A Habeas Corpus on Behalf of a Chimpanzee

Valdelane Azevedo Clayton[1]

This is a translation of a writ of habeas corpus filed on behalf of a chimpanzee called Suiça (Swiss) who was imprisoned in a unsuitable enclosure at the local municipal zoo in the Brazilian city of Salvador, a city located in northeast Brazil. It was an important case for animal rights in Brazil because of the legal issues involved, such as legal standing and legal personhood for non-human animals, as well as for the unusual legal remedy sought to bring the relief: the *Habeas Corpus* (latin: we command that you produce the body). Historically, the writ of habeas corpus has been an essential instrument for the safeguarding of individual freedom against arbitrary state action. Habeas corpus is a legal procedure by which a person can seek relief from unlawful detention of himself or of another person.

However, in the present case, can a chimpanzee be considered a person? The writ of habeas corpus was filed by public prosecutors Heron Santana and Luciano Santana from the northeastern Brazilian state of Bahia, and was submitted to the "9th Criminal Trial Court", on behalf of a chimpanzee called Suíça (scientific name: Pan Troglodytes) who was confined in an cage at the municipal zoo in the city of Salvador. The relief sought was for the Chimpanzee's release from solitary confinement, and her relocation to a primate sanctuary in the city of Sorocaba, located in the state of São Paulo. There she would be cared for by biologists and could interact with others of her species in a proper environment.

The respondent in this case was the director of the Biodiversity Agency which is a branch of the state Institute for the Environment and Water Resources, and was the main authority responsible for the zoo in Salvador City.

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In 9th Salvador Criminal Court,

Salvador, Bahia. Brazil

O9/19/2005

Petition for a Writ of Habeas Corpus

nº 833085-3/ 2005

Heron J. de Santana and Luciano R. Santana bring action under art. 5º, LXVIII, Brazil Constitution. And, art. 647, Code of Criminal Procedure. The Petitioners seek the Great Writ on Behalf of Suíça, Chimpanzee (scientific name Pan Troglodytes) who is a prisoner at the Zoo Getúlio Vargas, to relief from illegal and abusive act perpetrated by the director of the *government Secretariat for Biodiversity, Environment, and Water Resources.*

1. Statement of Facts

Accordingly with the attached official investigation, the petitioner, member of the chimpanzee species, is imprisoned at Salvador Zoo in a unsuitable enclosure (total area of 77.56 m2, height 4. 0 m, and confined area of 2.75 m), being hindered of her right of movement.

First, it is important to notice that chimpanzees resemble human beings more than any other living non - human animals, and are capable of experiencing and expressing emotions. And because chimpanzees are highly social creatures, if deprived of socialization, they exhibit stress symptoms similar to an emotionally starved or mentally ill individual, these symptoms can evidence themselves as self mutilation, dysfunctional sexual behavior, or symptoms of autism.

> According to Doctor Clea Lucia, veterinary at the Great Primates Sanctuary, "chimpanzees are social animals that are genetically wired for living in groups. They need to live with others of the same species to develop their instinct and

natural behavior. In their natural habitat, they can live in social groups up to 100 individuals. They communicate among each other through sounds, body language, and physical interactions. Chimpanzees take great interests and display great curiosity about each other. They often are aware of each other in a group, and know what each one of them are doing and with whom. The social interaction among chimpanzees seems to be an essential element for the development of a sense of self security, the maturity of social and emotional skills, especially through physical contact with each other".

The official inspection report established that Suiça's enclosure has water infiltration which had damaged its structure and was blocking her access to another larger area used for handling and care of the chimpanzee. The report also recommended the installation of vertical polls where Suíça could hang and exercise. This inspection report illustrated quite well how the enclosure was unacceptable; it didn't have an adequate physical structure to accommodate a chimpanzee. The lack of space, the bare cement floor, and the solitary confinement was causing great suffering to Suíça.

Thus, the zoo enclosure is not physically fit to house a chimpanzee. The current conditions of Suíça's enclosure are inherently cruel. Chimpanzees can't live cooped up in a bare cement cage because the inextricable peculiarity of the chimpanzees species.

To Pedro Ynterian, from Brazil Great Ape Project and founder of the Great Primates Sanctuary: "To us, who know chimpanzees well and know their suffering in living in places where they are constantly being observed, kept under control, and restricted in their freedom, without even a blanket to warm themselves in cold nights, we can conclude that chimpanzees shouldn't live in zoos."

2. Causes of Action

Historically, the Great Writ is one of the first legal remedies guaranteeing fundamental rights of personal liberty. The historical roots of the Habeas Corpus are uncertain, but it is usually recognized as the most enduring legacy of the Magna Carta, an English charter originally issued in 1215 by King John of England. Later, the essential

elements of the writ were recognized by the English Parliament in the Habeas Corpus Act of 1679.

In Brazil, Dom Pedro I[2] issued a decree which guaranteed individual freedom of movement. However, the denomination "Habeas Corpus" was only used afterward in the Criminal Code of 1830. Later, in 1891, the Habeas Corpus was elevated to a constitutional right. Since then, the great writ has been a constitutional guarantee in every subsequent Brazilian federal constitution. The current Brazilian Federal Constitution states[3]: "The writ of Habeas Corpus will be issued when somebody has their individual freedom of movement restrained or in imminence of being restrained by illegal imprisonment or abuse of authority."

In a society committed to the preservation of principles of liberty and equality, the law evolves from the way society thinks and behaves. Thus, when public attitudes change so does the law. Nevertheless, this change is often slow because the forces of conservatism are often stronger in the short term than those of reform.[4]

New ideas often emerge from a change in the moral fabric of a society. Indeed, the public attitudes towards animals have changed. Many people believe that animals have an intrinsic value. Although animals are different from humans, they should not be regarded or treated as things, or mere objects.

However, it is necessary to keep in mind that even the idea of moral equality among men was a long and arduous process that evolved slowly over time. And, the equality principle was just consolidated with the concept of written law as an obligatory and uniformly applied rule in an organized society. However, still today there are people who are unaware that all humans belong to the same species and believe that members of other cultures or tribes are from a diverse species.

Despite the current ideological and physiological obstacles, many jurists believe that the judiciary is a powerful catalyst in the social change process not only because its legitimate power to do so, but because of its duty to act when the legislators fail. The judiciary is the only governmental power capable of correcting a social injustice when

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[2] Brazil's first emperor
[3] Article 5, LXVIII.
[4] Clive Hollands. Animal Rights in Political Arena

other governmental powers are politically compromised or tied up in economical interests.

Legal Hermeneutic provides theories that create legal change mechanisms and adaptations, such as equity reasoning [5] and analogical inferences, enabling contradictory norms to co-exist validly in the same legal system. Thus, there's often a conflict between old legal rules and new supervenient situations which lack provision in the Law. For instance, the Brazilian Supreme Court, before the enactment of the Monetary Correction Act[6], authorized the application of monetary correction on damages awards ruled in torts lawsuits.

Furthermore, change in social morals can also render a norm obsolete. For example, the Brazilian Civil Code of 1916 permitted a husband to annul his marriage based on error or mistake of person [7] if the woman he took to be chaste turned out not to be. Consequently, with the change of how society perceived women rights, the substantive values underlying the law are not acceptable anymore. Thus, when the reason for a rule no longer exists, the rule should be changed because the basis for it no long exists[8].

Another important factor for change is conflict in the law which is a mutual incompatibility of two or more rules that can create contradictory and self-excluded judicial verdicts. This can happen in cases when old rules are validated by a new constitutional order or later become unconstitutional.

Even the institute of Habeas Corpus has gone through similar changes. The Brazilian Constitution of 1891, when established the Habeas Corpus, it didn't refer to the freedom of movement. Only with the launch of the Brazilian doctrine of Habeas Corpus, lead by Rui Barbosa[9], was freedom of movement understood as an individual

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[5] Equitable Jurisdiction

[6] Inflation was so chronic that in the late 1960s, the government instigated monetary correction, whereby fixed payments were indexed to past inflation. Thus, interest rates, pension payments, mortgage payments, and so forth, kept pace with rising prices.
http://www.nationsencyclopedia.com/Americas/Brazil-ECONOMY.html

[7] Marriage is a contract made in due form of law. So the parts must be willing to contract. There is no will when the person is mistaken in the party whom he intended to marry.
http://www.lectlaw.com/def2/m087.htm

[8] Kelch, Thomas G. "toward a Non-property Status for Animals". In: New York University Environmental Law Journal, n. 6. New York, 1998, p. 549

[9] Rui Barbosa was an important Brazilian writer, jurist, and politician. A defender of civil liberties

fundamental civil liberty. Later in 1926, another constitutional reform restricted the Habeas Corpus to protect only the freedom of movement. For this reason, lawyers had to improvise and employ writs of possession [10] to protect other rights until the enactment of the Writ of Mandamus Act[11] which is the proper judicial remedy to protect diverse liberties.

Also, with the introduction of the welfare state, the judiciary became an arena for confrontation and negotiation of interests. Consequently, judges became co- responsible of other governmental powers public policy[12].

Like ideas, jurisprudence also changes. Before the abolition of slavery, human slaves were registered in notary's offices as moveable goods (personal property). When slavery finally became social unacceptable, the law changed because when public way of thinking changes, the judiciary rarely goes against it.

Furthermore, shifts in legal culture occurs in diverse legal professions like judges, prosecutors, attorneys, legislators as well as in instructional levels especially regarding predominant philosophies in law schools.

Indeed, the concept of subjective rights has been an important theoretical instrument because it enables a person to contest legal situations which would restrict his/her liberties, allowing this person an advantageous position in face of others.

Hans Kelsen, for example, didn't consider an absurd idea that animals could be subject of rights because a legal relationship is not between a subject of a right and a subject of a legal obligation, but the legal relationship is between the legal obligation per se and its reflex right. For Kelsen, the definition of the law in a subjective sense refers to the right as the reflex of a legal obligation. To him, the legal relationship is between

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[10] the lacking of legislation to protect fundamental legal rights, Brazilian jurists used interditos possessórios like an equitable remedy in the form of a court order, whereby a party is required to do, or to refrain from doing, certain acts.

[11]Mandamus is a judicial remedy which is in the form of an order from a superior court to any government, subordinate court, corporation or public authority to do or forbear from doing some specific act which that body is obliged under law to do or refrain from doing

[12] Krell, Andreas J. Direitos Sociais e controle judicial no Brasil e na Alemanha. In Germany the Nazi regime was capable to provoke a change in ideologies of positivists like Gustav Radbruch who started thinking about the existence of "legal injustices" and rights beyond written legislation. The Brazilian experience with a dictatorial regime didn't provoke a similar rupture. Brazilian Jurists still are prisoners of an old formal conception of legal interpretation.

norms. For instance, the relationship is between a norm which oblige the debtor and a norm which give the creditor the faculty to demand the fulfillment of the obligation[13].

The Subjective Right (*facultas agendi*) is a prerogative, guaranteed by a legal system, to demand a certain behavior from somebody who is obligated by law or a legal act to perform that behavior. But, to the subjective right, there is a corresponding obligation. If the obligation isn't fulfilled, the legal subject can demand the State to forcibly enforce the right or award reparation. Beneficiaries of subjective rights have an advantage, the prerogative to demand in a court of law the fulfillment of their right.

To Técio Sampaio Ferraz Jr., the subjective right is not merely correlated to the legal obligation, but is a cluster of related rights. To illustrate, the right of property includes legal relations, obligation, liberty and no- rights, immunity and disabilities etc.

Finally, someone would ask, why using Habeas Corpus and not other legal remedy available in the Brazilian legal system? The Habeas Corpus is traditionally the adequate legal remedy to protect the freedom of movement (freedom of arrest). Thus, the purpose of this writ is not avoiding potential damage to the environment, or protecting society's diffused interests of safeguarding the fauna which the proper legal instrument would be the Public Civil Action. However, the goal of this writ is to enable the legitimate exercise of the freedom of movement.

2.1 Extension of Human Rights to Great Apes

In 1993, a group of scholars started publicly defending the extension of human rights to great apes, culminating with the launch of the Great Ape Project lead by Peter Sing and Paola Cavalieri. Also, the project was supported by accomplished primatologists, ethologists, and philosophers such as Jane Goodall, Richard Dawkins, and Edgar Morin.

The Project point of view is based in the modern evolutionary theory regarding genetic evolution and similarities between humans and great apes. Scientific evidence shows that humans and apes had a common ancestor about 5 or 6 million years ago when they split up; one branch led to chimpanzees and bonobos. And the other led to the

[13] Kelsen, Hans. Teoria Pura do Direito;1987,p.180

hominids, the erect bipedal primates that include humans and other species of the genera *Homo*, such as *Australopithecus*, *Ardipithecus*, and *Paranthropus*.[14]

Indeed, the common ancestor between humans, chimpanzees, and gorillas is more recent than the apes' ancestor with Asian primates (orangutans and gibbons). Hence, it is not possible that a biologic category which includes chimpanzees and gorillas, excludes the human specie[15].

In 1994, the biologists Charles Sibley and Jon Ahlquist applied a method from molecular biology to taxonomy, performing a study about DNA of humans and the DNA of chimpanzees, bonobos, gorillas, orangutans, two gibbons species, and seven macaques species. Their studies concluded that great primates are more closely related to humans than to macaques[16].

Moreover, gorillas broke away from our genetic family tree before humans split away from bonobos and chimpanzees. Thus, the chimpanzees' closest relative is not the gorilla but humans. According to Jared Diamond, the traditional taxonomy has enforced the mistaken anthropocentric view which established a fundamental dichotomy between the mighty men isolated on high, and the lowly apes all together in the abyss of bestiality[17]:

> "Now, future taxonomists may see things from the chimpanzees' perspective: a weak dichotomy between slightly higher apes (the three species of chimpanzees, including the "human chimpanzee") and slightly lower apes (gorillas, orangutans, gibbons). The traditional distinction between "apes" (defined as chimps, gorillas, etc) and humans misrepresents the facts."[18]

Animals are composed by molecules which might provide "clocks" by which to measure genetic distances and to date time of evolutionary separation. Silbley and

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[14] Wise, Steven. Rattling the Cage; Toward Legal Rights for Animals. Cambridge/Massachussett:Perseus Books, 2000. p. 242

[15] According to Richard Dawkins, like chimpanzees, gorillas and bonobos, men is also a African primate. DAWKINS, Richard. "Gaps in the Mind", in : CAVALIERI, Paola and SINGER, peter (Ed). The Great Ape Project. : Equality Beyond Humanity, New York: St. Martin's Press, 1993. P. 82-83.

[16] Singer, Peter. "Prefácio". In : Pedro Ynterian (Ed). Nossos Irmaos Esquecidos. Sao Paulo : Arujá : Terra Brasilis, 2004.

[17] Singer, Peter. Vida Ética. Trad. Alice Xavier. Rio de Janeiro : Ediouro, 2002. p. 111

[18] Jared Diamond. In The Third Chimpanzee. P. 94-95

Ahlquist turned to the DNA clock, and estimated men diverted from chimpanzees' evolutionary line approximately 6 to 8 millions years ago. Gorillas separated from chimpanzees about 9 millions years, and the chimpanzees separated from bonobos just 3 millions years ago. [19]

The genus *Homo* appeared about 2.5 millions years with the trinity *Homo Habilis*, *Homo Ergastere,* and *Homo Rudolfensis*. The first to appear was *Homo Erectus* about 1.8 millions, followed by *Homo Sapiens* and *Homo Heidelbergenis*, while *Homo Sapiens Sapiens* and *Homo Neandertals* appeared about one million years afterwards.

Like Richard Dawkins puts it. Imagine a kind of chain, involving lineal descendants. If you hold hand with you mother, and she holds the hand of her mother, and so on. We would arrive at our common ancestor with chimpanzees in fewer than 300 miles. And this is not a long time by the evolutionary standards. [20]

Furthermore, when the structural size of the brain becomes larger, members of the genus *Homo* develop complex abilities such as mathematics and the use of languages[21].

Thus, based on this evolutionary continuum argument, Singer and Cavalieri demand the extension of fundamental rights to the great apes: The right to life, liberty, physical integrity, the ending of all sorts of captivity in zoos, circus, and laboratories. They demand a legal capacity for great apes similar to those of children and mentally disabled individuals.

However, the majority of scientists still adopt the traditional Linnaean taxonomy which considers important the differences between species. In this view, men belong to the *family Hominidae*, *genus Homo*, *specie Homo Sapiens*. The anthropoids, for example chimpanzees, belong to the *family Pongidae*, *genus pan*, and *specie Pan Troglodytes*.

Since the end of the nineteen century, with the beginning of biology as a discipline based on the evolution theory, the classification system tries to reflect the evolution of species history, although sometimes in a circular and subjective manner, first deciding the similarities between species and then looking for anatomic evidence that proves those presumptions.

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[19] Idem.Ibidem,pg. 96

[20] DAWKINS, Richard. "Gaps in the Mind", In : CAVALIERI, Paola and SINGER, peter (ED). The Great Ape Project : Equality Beyond Humanity, New York: St. Martin's Press, 1993. p.85

[21] Idem. Ibidem p. 242

In the second half of the twenty century, a new taxonomy model appeared. The Cladistic taxonomy is the classification of species based on evolutionary ancestry, and it focuses on evolution rather than similarities between species. Cladistic taxonomy differs from other taxonomic systems because the inferences based on the evolutionary history of species come first rather than the classification per se. So, there is sufficient scientific evidence to affirm that men and great primates belong to the same *family* (*Hominidae*) and the same *genus* (*Homo*). Besides, the basic anatomic similarities, the hairless chest, molars teeth, the lack of a tail, reveal that it wasn't a long time ago when they had a common ancestor with humans.

The Smithsonian Institute, for instance, had adopted the new taxonomy. In the latest editions of Mammals Species of the World, members of the great apes family were place in the hominid family. Before, just humans belonged to that family. Thus, great apes are already being classified as *Homo troglodytes* (chimpanzee), *Homo Paniscus* (bonobos), *Homo Sapiens* (homens), and *Homo gorilla* (gorillas).[22]

The main question is: why we award legal personality to insolvent entities, corporations, and refuse to award this legal capacity to beings who share 99, 4 % of our DNA? Why do we allow chimpanzees, bonobos, and gorillas to be captives in circus, zoos, and at the same time we guarantee fundamental rights to humans capable of the most despicable crimes against humanity?

2.2 Chimpanzees as legal persons

Gary Francione argues that to face the ethical questions regarding non-human animals, it's necessary to extend the concept of legal personhood to them. If we examine legal doctrine, not all humans are (or were) considered as persons, and not all persons are human[23]. The expression "human being" is often used in a contradictory manner. Sometimes, it means the members of the Homo sapiens specie. Or, it can mean a possession of certain traits such as self-consciousness, self-control, sense of past and future, capacity to relate, to worry , to communicate with others, and curiosity . Clearly,

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[22] Burgierman, Denis Russo."Chimpanzés são humanos", In : Superinteressante, São Paulo : Abril, julho de 2003, p. 24.

[23] DAWKINS, Richard. "Gaps in the Mind", In : CAVALIERI, Paola and SINGER, peter (ED). The Great Ape Project : Equality Beyond Humanity, New York: St. Martin's Press, 1993. p.85

not all humans have these traits, for instance, this concept of person would exclude some mental disabled individuals.

The world *person* has the connotation of representation. The Latin world *persona* was a mask used by Greco-roman actors to impersonate their characters. For instance, in ancient Rome, a person was an individual who had certain attributes such as been born alive, have a human form, or fetal viability. Also, a person had a status of free citizen, concept which excluded women and animals who were considered things (*res*).

The relationship between the concept of person and human being is a product of Christian tradition which aspired to deconstruct the Roman distinction between citizens and slaves[24]. Moreover, it was Christians who brought to Roman's world the idea that humans were destined to a life after death. So, life began to be considered sacred, even the life of a fetus[25].

In legal doctrine, the humanization process was later consolidated by authors such as Francisco Juarez , Hugo Grócio, Cristian Wolf, among others[26]. John Locke defined person as all individuals who are capable to reason, to reflect, and to consider themselves as thinking beings in diverse places and time. For Kant, a person is a rational and self-aware being who is capable of acting diversely rather than just a spectator, and is able to make decisions and execute them deliberately pursuing his own interests.

According to Robert Mitchel, although apes might not be persons on the complete sense of the term, they have psychological capacities which make them worthy of our protection.[27] Laurence Tribe contends that arguments against extending legal personhood to animals are flawed because legal doctrine has already developed the concept of juridical person, a legal fiction which allows inanimate entities to act as legal persons. For a long time, jurists like Brinz and Bekker refuted the idea of juridical person because, for them, only a natural person could be legal subjects. And, they considered this legal construction unnecessary since the phenomena could be explained by the theory of rights without subjects. Bolze and Lhering, for example, argued that corporation associates are the legal subjects. Planiol and Barthelemy affirmed that juridical person

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[24] FERRAZ JR, Tércio Sampaio. Introdução ao Estudo do Direito. São Paulo : Atlas, 1990. p.148
[25] SINGER, Peter. Libertaçao Animal. Trad. Marly Wincller. Lugano. 2004 p.217
[26] Eduardo Rabnhorst. Ob. Cit., p. 58
[27] Mitchel, Robert W. "humans, nohumans and personhood." In: the Great Ape Project. Paola Cavalieri and Peter Singer (Ed) New York : St. Martins Press, 1994. p. 245

was just a collective property. However, the juridical person theory isn't an arbitrary creation but a concept recognized by law through a process called personification. It is a necessary legal rule which gives entities legal status, awarding them legal rights such as due process of law, legal standing, property ownership, and contracts.

Furthermore, the improvement of medicine and biosciences had raised many ethical questions regarding personhood, for instance, there are humans being that aren't necessarily considered persons like a brain-*dead* individual, an anencephalic *fetus,* or *a* fetus conceived in a rape in which case its abortion is permitted by the Brazilian penal code.

In fact, just recently, an individual would be considered dead when his vital signs had ceased. But, with development of organs transplant technology, organ donations had to be facilitated by the law, so the old concept of death was abandoned in favor of a new concept of cerebral death. And this new situation had consequences in the legal world; the law now differentiates biologic life from personal life of human beings.[28]

With the concept of cerebral death, the law also has to consider:

1) the concept of person is superior than the concept of vegetative life
2) although vegetative life has value, it doesn't have rights
3) The function of sensory-motor organ like the brain is a necessary condition for a living being to be considered a person.

Joseph Fletches maintains that personhood has the following attributes: minimal intelligence, self-awareness, self-control, notion of time (past and future), capacity to relate and worry about others, communicability, curiosity, mutability, balance between rationality and emotion, idiosyncrasies, and neocortical function.[29]

So, like Peter Sing asserts, we should reject doctrines which place the life of our species above the life of other species. Some members of other species are persons, some member of our species are not. There is enough scientific evidence to ascertain that apes, dolphins, whales, elephants, dogs, and pigs are intelligent, self –aware beings.[30]

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[28] H Tristram Engelhard Jr.: "Medicine and the Concept of Person". In what is a Person? Michael F Goodman (Ed). New Jersey : Humana, 1988, p. 170.
[29] FLETCHER, J. "Humaness": Essay in Biomedical Ethics. Prometheus, New York, 1979. p. 12-16
[30] SINGER, Peter. Ética Prática. Trad. Jefferson Luis Camargo. 2 Ed. São Paulo: Martin Fontes, 1998 p. 126-127.

The new Brazilian Civil Code almost adopted the same definition of legal personality from the previous Civil Code of 1916. However, the new civil code replaced the word "men" by the word "person". Thus, we can conclude that natural person and human being are two diverse concepts since there are human beings (brain dead individuals, anencephalic *fetus*, etc) that are not legally viewed as persons.

In Sum, if we consider the new evidence presented by scientists from the most renowned scientific research centers in the world, the current Brazilian law, it is necessary to acknowledge that chimpanzees must, using an extensive interpretation, be covered by the concept of natural person in order to guarantee their fundamental right to bodily freedom.

2.3. The Hermeneutics of Change of the Brazil Federal Constitution

The Brazilian Constitution says that it is the duty of all people to respect the fauna, expressly prohibiting any activity that might represent a risk to its ecological function, cause the extinction of species, or subject animals to cruelty. [31] So, if the constitution rules have full effectiveness, it is hard to deny that chimpanzees have at least a minimum protection under the law: not be subject to cruelty, or to activities which would endanger their ecological function or the preservation of species.

Laerte Levai argues that the constitutional rule disconnected Brazilian law from anthropocentric view in favor of biocentric ethics turning unconstitutional laws which regulate animal exploitation in circus, zoos, and laboratories.[32]

Indeed, Robert Garner asserts it doesn't make any sense to believe anti-cruelty legislation is concerned just with people because in many developed countries, the anti-cruelty statutes are to benefit animals themselves which are considered a special type of property. [33]

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[31] Brazilian Federal Constitutional, Art. 225 , VII. of Paragraph 1

[32] LAERTE Levai, in Direito dos Animais. P.128

[33] Robert Garner "the mistake is born by the incorrect assumption that because animals are property they are equivalent to unanimated objects.

In fact, with the political failure of legal positivism[34], a new legal hermeneutic theory, based in a post-positivist constitutionalism, points out to principles of law, attributing moral values an important role in the constitutional interpretation process. [35]

Ronald Dworkin criticizes positivism and utilitarianism theories because these theories excluded morality and philosophical principles from law theory. Dworkin argues that when positivism theory defended the absolute separation between law and morality, it disregarded a logical distinction between rules, directives, and principles; the interpretation of the law applying a reasoning of everything or anything should be abandoned by legal professionals. [36]

Nowadays, we know that it is impossible the absolute separation between law and morality because they are logically inseparable concepts, considering that law affects public morality, and in the same way, public morality strongly influences the process of creation and application of law.[37]

Law is not just a group of statutes, but there are sets of moral principles and political directives invoked by judges when resolving cases. So, the literal words of a legal rule can be disregarded if that rule is not aligned with a fundamental principle.[38]

Moreover, no statute can cover all possible cases. Often, judges need to apply moral principles which might not have been adopted by legislatures, but these principles are implicit parts of a legal system. Furthermore, there are values which guide, limits, and influence judicial decisions.

Further, rights are not just those inserted in a legal system. In addition to subjective rights like property rights, there are moral rights like the right of freedom. In a case of conflict, subjective rights should not always prevail because moral rights arguments might be so strong that sometimes they can compel judges to accept and apply them.

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[34] BARROSO, Luís Roberto. *Fundamentos Teóricos e Filosóficos do Novo Direito Constitucional Brasileiro.*p.40.

[35] Luís Roberto Barroso argues that this new hermeneutic theory can be applied in the Brazilian Legal System because we have a constitutional diffuse control mechanism that permits any judge to have constitutional jurisdiction .

[36] Dworkin, Ronald. *Levando os Direitos a sério.* São Paulo: Martins Fontes, 2002, p. XIV.

[37] ROLLIN, Bernard. *Animal Rights and Human morality*. 1992, p. 109.

[38] DWORKIN, Ronald. Ob. Cit. P. XIII

A new legal argument which is being developed by legal doctrine and jurisprudence would always rely on moral arguments because moral principles have an important role in the evolution of law.

To every subjective right corresponds a prerogative, to demand from somebody a duty. Correspondingly to that duty, there is a claim which is an ability to request legal protection from the State. Thus, a legal action is the way to exercise this legal right. Although judicial action is optional, it is compulsory when involves rights of incapable people. So, a claimant has the power to sue for the violation of a claim.

A person who is able to exercise his rights in a court of law is considered to be subject of legal rights. However, in atypical situations, incapable people can be represented by procedural substitutes. So, access to judicial courts is independent of a legal relationship. The judicial process is diverse from the legal relationship of substantive law.

So, one of the main obstacles to the extension of rights to apes is legal standing, under which they are not capable of demanding in court their constitutional right of not being treated cruelly. However, according to Alf Ross, the metaphysical idea that considers a subjective right as simple and indivisible, and it must be present in an individual is a fallacy which can bring disastrous consequences to practical legal questions, specially when there are atypical situations where subjects of substantive law do not coincide with subjects of procedural law[39].

Thus, to have legal standing, a claimant needs to fulfill some procedural prerequisites such as legal capacity, legal representation, legal jurisdiction of judicial court, an apt complaint, and service of process. The lack of these procedural requisites can impede the installment of procedural relationship or render a legal action null.

In typical legal situations, a right-holder has power to sue in a court of law to protect that right. However, in atypical cases, there are people who are incapable of making a claim either because they are physically incapable or because they lack legal standing. The reason is the capacity of being subject in a legal relationship differs from

[39] According to Alf Ross "the under aged individual is the beneficiary (subject of interests) the trustee is the subject of administration (subject of the judicial procedure). Despite that, the right belongs to the under age individual who is the beneficiary". In: *Direito e Justiça*. Trad. Edson Bini. São Paulo: Edipro, 2000. P. 213-214.

being capable to directly exercise rights. And, in atypical cases, the subject of a substantive right often can't exercise his rights directly but by being represented by guardians.

Moreover, legal capacity means the fully exercise of personality rights because only a legally competent person can directly exercise certain legal actions. This legal capacity can be a contractual capacity or legal liability. The former means the capacity to be part in a business transaction and the latter an individual is legal responsible for his actions. So, while legal capacity is the capacity of be the subject of rights, factual capacity is the capability some people have to fully exercise personally their rights and act within law limits without relying in somebody else to represent their rights. Thus, a capable individual can:

a) Perform legal action/facts;

b) Carry out *sticto sensu* legal acts

c) Have capacity to carry out commercial transactions

d) Commit illegal acts.

Moreover, Laurence Tribe argues that the atypical situations clearly demonstrate that the argument that animals can't be subjects of rights because they can't have obligations is inconsistent since children and deficient people already fit in this situation

In 1972, for example, the USA Supreme Court judged the case Sierra Club v. Morton which can be summarized like this. The environmental organization Sierra Club sued US Forest Service when it permitted development of Mineral King near Sequoia National Park, a national park in the southern Sierra Nevada, east of Visalia, California. The park is famous for its Giant Sequoia trees.[40]

California Court of Appeals reversed the decision of the District Court which granted a preliminary injunction, holding that the Sierra Club lacked standing, and had not shown irreparable injury. In this occasion, Christopher Stone wrote a law essay titled *Should Trees have Standing? Toward Legal Rights for Natural Objects.* The article was cited by Justice William O. Douglas in his dissent from the Supreme Court's decision in the Mineral King Valley case.

Stone's arguments relies on the historical expansion of legal protections to include children, women, slaves, and also corporations, foundations, and governments. Thus, there isn't a reason to refuse the extension of legal rights to plants and animals.

Contrary to expectations, there were 3 dissent opinions in Sierra *Club v. Morton.* The famous dissenting opinion by Douglas asserted that natural resources, like ships or corporations, ought to have standing to sue for their own protection.

3. Prayer for Relief

Wherefore, the petitioner hopes that in an act of strict JUSTICE, after considering the law, the judge will grant the writ of habeas corpus preliminarily[41] because the requisites for a preliminary order are fulfilled: *fumus boni iuris* (constitutive elements of illegal imprisonment are present) and *periculum in mora* (there is a substantial threat of irreparable damage or injury)

Thus, the present writ is the best possible legal instrument to expand the sense of natural person to include *Hominidae*. And, with an acknowledgement of the precautionary principle, we ask the judge to grant the writ of habeas corpus on behalf of the chimpanzee Suíça, ordering her transference to the Great Primates Sanctuary, the transportation to the sanctuary has already been arranged. In the sanctuary, Suíça will live in a group of 35 chimpanzees. She will enjoy opened spaces, a social life, and raising a family. We would guarantee the survival of an individual of a species that has a common ancestor with us.

We ask for the granting of the writ, awaiting Justice!

Salvador, Bahia. 09/12/2005

Heron José Santana
Luciano Rocha Santana

[41] Similar to a preliminary injunction, without a hearing