ANIMAL STANDING AND THE HABEAS CORPUS THEORY FOR THE GREAT APES

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Abstract: This paper aims to contribute to the ethical debate on the relationship between humans and animals and demonstrate that the Law con recognized the great apes as legal subjects with standing to claim the basic rights of freedom in a court. It initially analyses the moral grounding of speciesism which claims that animals lack spirituality and therefore puts the interests of mankind above those of other species. After, from Darwin's theory of evolution it analyses the case Suiça v Gavazza, concluding that this first case that recognized a great ape as a legal subject with standing in a court could contribute to help to save the great apes from violation of their basic rights

Keywords: Speciesism; legal subject; animal standing; case Suiça v Gavazza.

Summary: 1. Introduction - 2. The place of animals in the Brazilian legal system - 3. Non human person and the Great Apes project - 4. The case Suiça v. Gavazza and the animal standing in Brazil – 5. Conclusion.

1. INTRODUCTION

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ccording to many people the recent successes of the animal's right theory are remote, because the social conditions are unfavorable for it, since there is a public consensus that animals are human properties, an this idea finds strong support in the logic of political and economic liberalism and the liberal concept of justice.[1]

There is a tendency to transfer this demand from the philosophy of law to the legal dogmatics, even because the expression "animal right" is becoming more commonly used among jurists, and many of them understand that, besides a moral duty, people have the obligation to don't treat animals with cruelty.

This essay attempts to analyze the roots of the discrimination process against species, showing that the concept of soul – *anima* - has been changing throughout history to provide an ethical grounding that excludes animals from all and any moral consideration.

Furthermore, It analise the case Suiça v Gavazza proposing a change in the legal status of animals from legal object to legal subject and even confer them legal standing.

2. THE PLACE OF ANIMALS IN THE BRAZILIAN LEGAL SYSTEM

It has not been easy for Brazilian academics nor the judicial system to identify the legal status of animals. The question falls under two distinct legal spheres: public and private law. Public law regulates the relationships between man and wildlife, and in this sphere the latter is considered common goods. Private law regulates domestic or domesticated animals, and here animals are considered property.

Given that in the eyes of the law animals have always

[1] GARNER, Robert. Political Ideology And The Legal Status Of Animals. Animal Law Review (2002)

been considered to be property, thousands are captured and often killed on a daily basis in the animal trade, both legally and illegally.

The issue, however, is not as simple as it initially appears. When we seek to establish the legal status of a wild animal captured for human consumption - for example, a fish captured in Brazilian waters - we have to determine if this act transforms the fish into a private good of the person who caught it or if the State maintains its property rights. Is the fisherman granted a waiver to use and commercialize a public good because it is an animal?

According to the law, a *thing* is a relevant entity to the legal sphere, able to become an object of legal relationships. There were *things*, for example, in Roman law, that could not be considered private property (*res extra patrimonium)* and *things* that could not, if considered as a group, become objects of possession (*res extra commercium*).[2]

Things could be *res nullium* (nobody's thing) or *res derelictae* (abandoned thing), available to become part of someone's assets, although the thing had never belonged to another; in other words, while they were not appropriated they could be considered neither public nor private.[3]

Res nullium was a kind of public good, excluded from commerce (*res extra commercium),* and subdivided into *res communes* (seas, ports, estuaries, rivers), *res publicae* (lands, public slaves), and *res universitatis* (forums, streets, public squares).[4]

Gaio, however, before Justiniano, divided things in to *res extra patrimonium*, which could be *res divini juris* (divine things) or *res humani juris* (human things). Human things, in turn, could be *res communes,* such as water and air, not able to

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2 José Cretella Jr. Curso De Direito Romano.: O Direito Romano E O Direito Civil Brasileiro 151 (Rio De Janeiro: Forense 1999).

3 Orlando Gomes - Introdução Ao Direito Civil. 151 (Rio De Janeiro: Forense 1983).

4 Maria Sylvia Zanella Di Prieto - Direito Administrativo 432. (São Paulo 1998).

be private property, although appropriable in specific quantities, *res universitatis*, things belonging to cities, such as stadiums, theatres, and forums, or *res publicae*, things owned by the State for public use (*res public usui destinatae*), such as squares, streets, rivers and the things *in pecunia populi.*[5]

In the Roman-German tradition, but also strongly influenced by the Pandects through the Recife School of Law and the individualism and patrimonialism of the Exegese School, the Brazilian Civil Code, promulgated in 1917, classified wildlife as *res nullium*, i.e. things that are neither public nor private - not belonging to anybody.[6] However, they can be appropriated, such as in the case of animals caught through hunting and fishing.[7]

As such, hunting and fishing were considered as ways to obtain property rights. Ownership was acquired by the hunter or fisherman who caught the animals. After the war, however, liberalism was replaced by the paradigm of the welfare state. This promoted increased state intervention into the legislative realm under the pretext of protecting the weak and restricted - private autonomy without losing its original meaning.[8]

The growth of industrial society's complexity led to a series of special legislations, which among other things canceled certain general principles present in the Civil Code, from the removal of whole subjects from it and transforming them into autonomous legal branches, such as the newly created environmental law.

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5 José Cretella Jr. Curso De Direito Romano.: O Direito Romano E O Direito Civil Brasileiro 165-66 (Rio De Janeiro: Forense 1999).

6 Maria Helena Diniz, - Código Civil Anotado. 75 (Saraiva Ed., São Paulo 1995).

7 Orlando Gomes, - Introdução Ao Direito Civil: Obra Premiada Pelo Instituto Dos Advogados Da Bahia 182 (Rio De Janeiro: Forense 1983). According To The Former Brazilian Private Code Article. 593. It Can Be Appropriated: I – Wildlife, While Living In Its Habitat II – Domesticated Without Signal, If It Had Lost The Costume To Go Back Home, Except In The Case Of Article 596 (When The Owners Were Looking For It).

8 Paulo L. N. Lobo, - *Constitucionalização Do Direito Civil*, 141 Revista De Informação Legislativa - Brasília, January-March 99-109 (1999).

The Protection Wildlife Act n. 5.197/67, for example, modified the legal nature of wildlife, which became property of the state rather than being considered *res nullium*. This law forbids professional hunting, wildlife trafficking, and sale of products and tools used to hunt, pursue, destroy or capture animals. However, sport and scientific hunting is permitted through a state waiver, as is hunting to cull animal populations when they present a hazard to agriculture or public health, or when abandoned pets become feral or wild.

Under the idea of animals as property of the state, the law to protect wildlife has caused much controversy. Many scholars claim that the expression *State* refers to the Union, an interpretation which has predominated in the Brazilian Superior Court of Justice. The federal judges were intent to decide cases concerning crimes against wildlife.[9]

However, this precedent was not without controversy in the high courts. The situation was such in case 6.289-3 of São Paulo, decided on December 5, 1982, by the Supreme Court, which Judge Dacio Miranda expressed reservations regarding the precedent, claiming that wildlife did not belong to the Union, but to the State; in other words, to the Brazilian nation.

Therefore, the leading case was removed from the outcome of the jurisdiction conflict between a criminal court of the State of São Paulo and the Federal Court of Justice. Since then, questions regarding crimes against wildlife have been the subject of state courts.

9 Súmula 91 STJ Stated That: “The Role Of Federal Justice To Process And Judge The Crimes Practiced Against Fauna. “ In The Same Sentence, The Reporter Cites To Vladmir Passos De Freitas & Gilberto Passos De Freitas, Crimes Against Nature 52 (Reviewed Publishing Company Of The Courts Ed., São Paulo 2000): "As A General Rule, These Crimes Will Be The Ability Of State Justice. However, They Would Be Of Federal Attribution When The Crime Is Practiced Within 123 Miles Of The Brazilian Territorial Sea (Act 8,617, Of April 1, 1993), In The Pertinent Lakes And Rivers Of The Union (International Or That Divides States – CF, 20, Inc.II), Or In The Areas Of Conservation Importance To The Union (Example, In The National Park Of Iguaçu).

The Brazilian Fishing Code dictates that animals and vegetation found in waters belonging to the states or the Union are public goods, although the state can permit professional or commercial fishing, as well as sport or scientific fishing.[10]

In fact, legislation does not bring together the concept of environmental goods, for example, flora is a good of common interest, wildlife is property of the state and fish in public waters are public goods.

With the passing of the article 1 of the Act 9.4333/97, however, water has become a public good of economic value, all waters have become public goods, and surface water belongs to the Union when they cross more then one state or countries, as is the territorial sea, while the rest belong to the state-members. There are no longer private or municipal waters.[11]

In regards to domestic or domesticated animals, the new civil code treats animals as legal objects. According to article 82 they are considered movable property because they are susceptible of own movement or removal by force of others, without alteration of the substance or of the economic-social destination. [12]

Just articles 936 and 1.447 expresses the word animal. The first to A provides that the owner or keeper of the animal shall recover the damage caused by it, unless it proves that the fact occurred because of the victim's fault or by force majeure. The second one to inform that animals can be object of pledge.

In effect, according to the present Brazilian legal system, domestic and domesticated animals, including those destined for the food industry, are considered private goods, and can be

10 Act 221/67,Art.3º. All Animals And Vegetables In State-Owned Waters Are Of Public Domain.

11 Vladimir Passos Freitas, Água: Aspectos Jurídicos E Ambientais. 22 (2000).

12 BRAZIL. CIVIL CODE. Art. 82.(2002). On Http://Www.Planalto.Gov.Br/Ccivil_03/Leis/2002/L10406.Htm

freely bought and sold. The owner have the right to receive compensation for any damage caused by a third party or by the state itself

The legal concept of the environment can not be understood without taking into account the 1988 constitutional rules, which establish equal legal status for environmental goods, by defining the environment as a good of public use for people and essential for a healthy quality of life. This status, for many authors, breaks the traditional approach that goods of common use are public goods.

Following this understanding, an environmental good, even if located on private land, will be submitted to limitations that guarantee everyone's mediated fruition of the good, as regards for example scenic beauty, production of oxygen, refuge for wildlife, etc.[13]

Thus, the environment can be neither public nor private, but rather occupies an intermediate zone of diffuse interest and belongs to everybody, at the same time it being impossible to identify an owner and impossible to divide.[14]

This interpretation is not as simple as it seems, because public use goods have always been considered public goods. The Civil Code itself includes them among types of public goods.

In fact, although the Civil Code should not legislate on public law, it rules that the public goods are inalienable, and while having this status, can be used freely or otherwise, according to the will of the entity responsible for their administration.

It would have been better if the constitution drafters had

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13 Paulo De Bessa Antunes. Direito Ambiental 68 (2004). Celso Antonio Pacheco Fiorillo O Direito De Antena Em Face Do Direito Ambiental Brasileiro 117 (2000). Art. 225 Of The Constitution, When Establishing The Legal Existence Of A Thing That If Structure As Being Of Use Joint Of The People And Essential To The Healthy Quality Of Life, Configure A New Legal Reality, Disciplining Well That He Is Not Public Nor, Much Less, Particular.

14 Luis Paulo Sirvinskas, Manual De Direito Ambiental 27 (2002).

used the Forest Code[15] and defined environment as a "good of common interest of the people," or "good of diffused interest." These expressions would have more easily characterized it as a hybrid interest, of public soul and private body, transcendental to individual rights and extended to the public, i.e. "pluri-individual," public relevance, and cultural nature.[16]

Be this as it may, the definition of the legal nature of the environment is still legally controversial and, in these cases, as it deals with principles, it is necessary to construct a valid interpretation which would make its wording more flexible and with a view of reaching a new meaning that leads to fairness[17].

The 1988 Constitution, while guaranteeing property rights (article 5º, XXII), imposed an interventionist and collective dimension which required that the law be used for the social function of property principal. This was done to accommodate environmental conflicts with the use of the hermeneutic criterion of proportionality, through the balancing and weighing of rights and interests in conflict.[18]

It seems, therefore, that the expression *good of common use of the people* must be understood as a good of common interest to the public, and thus the environment belongs to the nation. The use of private property is controlled by social function of the property principle that restricts its use, without eliminating its legal status[19].

In short, goods of diffuse interest are those that, whether

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15 To Antonio Herman V. Benjamin. Desapropriação, Reserva Florestal Legal E Áreas De Preservação Permanente; See Also Max Limonad, 65 (1998). ("Without Being Proprietors, All The Inhabitants Of The Country - It Is What The Law Declares - Have Legitimate Interest In The Destination Of The National Forests, Private Or Public.")

16 M.S.Gianini *La Tutela Degli Interessi Collettivi Nei Procedimenti Amministrativi*, In Le Azioni A Tutela Di Interessi Collettivi (1976).

17 Andreas J. Krell, Direitos Sociais E Controle Judicial No Brasil E Na Alemanha: Os (Des) Caminhos De Um Direito Constitucional. 82 (2002).

18 Paulo L. N. Lobo *Constitucionalização Do Direito Civil*, *In* Revista De Informação Legislativa. N º 141. Brasília 106 (1999).

19 Ruy Carvalho Piva, Bens Ambientais 120 (2000).

public or private, satisfy at the same time the interest of the whole community, and must be protected by public prosecutors or other co-legitimated entities.

To return to the issue we set out to examine, to know if a fish, while wildlife, being legally fished stops being a public good, we can claim that public environmental goods remain goods of common use. Although they cannot be appropriated as a whole, they can be taken as parts with previous authorization from the State itself.

In fact, although they are not alienable, goods of common use of the people can be used or appropriated by private individuals, as long as it is authorized by the State. In the case of appropriation by authorized hunting and fishing, the environmental good is no longer public and becomes private.

It is worth highlighting that these modifications in the legal nature of wildlife have contributed little towards guaranteeing the physical and psychological integrity of these beings. If before they were considered things belonging to nobody, nonhuman animals now belong to everybody, which is essentially the same.

Additionally, as hunting and fishing is permitted, the Brazilian legal system does not guarantee even the right of life to these animals, which continue to be captured and killed, legally and illegally.[20] This makes a mockery of the constitutional rule which prohibits practices that put at risk the ecological function of animals, leading to their extinction or submitting them to cruelty as set forth in article 225, §1, VII.

Neither the government nor civil society has managed to implement the rules that prohibit illegal trading of wildlife. This

20 Jorge Batista Pontes, Animais Silvestres: Vida À Venda 175 (2003) ("The Traffic Of Wildlife And Its By-Products Are One Of The Biggest Illegal Businesses Of The Planet. Such Crimes, According To Non-Official Sources, Would Annually Put Into Motion Astronomical Amounts, That Would Be Behind, In The World Of The Crime Business, Only Of The Traffic Of Drugs And The One Of Weapons").

is partly due to failures on the part of the public services for environmental protection in the formulation, implementation and maintenance of public polices, in the financial resources of the Union, and state and local authorities.[21]

Among the reasons that contribute to the social inefficacity of environmental laws for the protection of fauna, is the fact that the central focus of its protection is not the animal itself, but the sensitivity of man.[22]

On the other hand, these laws state that the will to kill or mistreat animals is a crime, while slaughter, vivisection and the use of animals in public spectacles are supposedly exonerated from the law.

Despite the fact that the constitutional rules prohibit acts of cruelty against animals, most interpreters of the law see this as avoiding only unnecessary suffering. However, what this actually means is vague particularly if we put ourselves in the same position.

Finally, the implementation of these laws is deficient, either as a result of lack of resources or lack of political will,[23] and when cases of cruel practice are identified the penalties imposed are very low.

Thirty million animals die every year in scientific experiments and another twenty billion are submitted to degrading living conditions while they wait the moment of slaughter. Despite environmental rules, the sacred character of property rights always prevails over the interests of animals.

However, a movement for the defense of animal rights is beginning to emerge in Brazil, and it counts on the support of sectors of the academic, artistic and cultural world. It has started

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21 Andreas J. Krell, Direitos Sociais E O Controle Judicial No Brasil: Descaminhos De Um Direito Constitucional Comparado. Porto Alegre 31-32 (2002).
22 Thomas G. Kelch, Toward A Non-Property Status For Animals, 6. N.Y.U. Envtl. L.J 531. (1998).
23 *Ibid.*

to call for radical legislative change to grant freedom and equality of treatment to animals in the same way as granted to men. This movement is called animal abolitionism, given the similarities between the emancipation of slaves and animals.

If we take the Brazilian Constitution seriously, animals are already the legal subjects of fundamental rights, and can even have legal standing via legal representatives.

An important precedent was the decision published on October, 4, 2005 on the Habeas Corpus petition n. 833085-3, requested by me and a group of public prosecutors, Law professors and animal rights advocates in favor of a chimpanzee female named Suiça that lived in the city zoo in Salvador, Bahia. This was the first case that recognized a chimpanzee as a plaintiff, allowing a great ape to have standing in a court.[24]

3. NON HUMAN PERSON AND THE GREAT APE PROJECT

Even for positivists like Kelsen, most of the time the law imposes legal obligations without reciprocal rights, for example, when law prescribe a man's behavior towards animals, plants or objects, regardless of any reciprocity, such as not treating animals cruelly. Only when an individual is legally obliged to behave in a specific way towards others, he has a right to demand this behavior. Thus, animals are legal subjects, i.e., they are able to acquire and exercise their rights.[25]

The fact that animals are not able to complain in court has nothing to do with the legal relationship. A claim is completely different from the guarantee that an animal has the right

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24 See Suíça v Gavazza. Brazilaian Aninal Law Review. (2006). According To The Brazilian Federal Rules Of Criminal Procedure, Art. 654, Any Person Can Petition For A Writ Of Habeas Corpus, For Himself Or On Behalf Of Another Person; As Well As A Public Prosecutor.

25 Hans Kelsen, - Pure Theory Of Law (Max Knight Trans., 2d Ed., The Regents Of The University Of California 1967) (1934).

not to be mistreated. Even if reason were an exclusive attribute of man, would this be enough to deny basic rights to animals, such as life and freedom?

Or does this refusal demonstrate that man very rarely uses his reasoning, and through biological determinism acts instinctively, disdaining and destroying everything that does not belong to his social group, tribe, race, religion, nationality, family, social class, or simply the fans of his soccer team?

To affirm that animals feel no pain is another inconsistent argument. Simple observation reveals the gestures and expressions of animals in pain and how similar they are to ours. In fact, some research has been carried out with animals to understand exactly how pain functions and there is scientific proof that animals do feel pain. Even though it can differ in some aspects, it is very similar to pain in human beings.[26]

According to Thomas Kuhn, periods of crisis in science begin when a scientific paradigm (a structure that shapes concepts, the results and processes of scientific activity) accumulates a series of anomalies and difficulties that inhibit coherent solution. However, during a period of transition problems can be solved either by the old paradigm or by the new.[27]

Roman law came from the intellectual inheritance of the Greek world, where only a free man was considered a "person",[28] (i.e. legal subject). For the Romans a person and a man were diverse concepts. Only a man with certain attributes could

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26 Thomas G. Kelch, Toward A Non-Property Status For Animals, 6 N.Y.U. Envtl. L.J. 531 (1998).

27 Thomas Kuhn. The Structure Of Scientific Revolutions, 115 (1962). According To Steven Wise, In Rattling The Cage 72 (2000): "The Physicist Max Planck Complained That A New Scientific Truth Does Not Triumph By Convincing Its Opponents And Making Them See The Light, But Rather Because Its Opponents Eventually Die, And A New Generation Grows Up That Is Familiar With It." Darwin Despaired Of Convincing Even His Collegues Of The Truth Of Evolution By Natural Selection. In The Face Of Attacks Upon Core Beliefs, Knowledge Tends To Advance, In The Word Of The Economist Paul Samuelson "Funeral By Funeral".

28 José Cretella Jr. Curso De Direito Romano 87 (1999).

be a legal subject. Some of these attributes were from nature, for example, perfect birth (i.e. born alive, to have human form and fetal viability), while others from social status.

In Rome, the *status civile* was divided into *status libertatis*, free men or slaves, *status civitatis*, citizens and non-citizens and *status familiae,* completely capable (*pater familiae*), relatively capable (*sui juris*) or fully incapable (*alieni juris*). Thus, only free and fully capable citizens were considered persons, while women, children, slaves, the physically impaired, foreigners and animals were not considered persons.

According to Kelsen, the capacity to acquire rights and the capacity to exercise rights cannot be confused. Animals are legal subjects, with a legal title in a secondary legal relationship, as they do not possess the capacity to exercise their rights, in the same way as a child. Children do not have criminal liability, as their behavior is not deemed of sanction. Moreover, those who cannot exercise their rights themselves can acquire property rights, for example. Their legal representative assumes the duties in name of the legal subject he/she represents.[29]

For a long time the law has not only privileged human beings but also corporations. Companies as well as other entities resemble legal persons; however, this is through an artificial process of legal fiction and terminology. Furthermore, in Brazil there are legal subjects who do not have legal personhood, such as estates, societies without personality, cohabiting couples, etc.

In this sense an animal or a group of them, while without legal personhood can have standing and be represented by their guardian, by the state or organizations for the protection of animals.[30]

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29 Hans Kelsen. Pure Theory Of Law (Max Knight Trans., 2d Ed., The Regents Of The University Of California 1967) (1934).

30 Decree No. 24645 Of 10.7.34,"The Animals Will Be Represented In Court By Representatives Of The Public Ministry, Their Legal Surrogates And Members Of The Society Protection Of Animals" (Art. 1, Para. 3).

The big issue here is not whether animals have legal personhood or not, but rather if they can be legal subjects, and enjoy basic rights, such as life, freedom and physical and psychological integrity.

If we understand cruelty as the act of doing something bad just for fun, tormenting or damaging others through insensitive, inhumane, painful acts, all and any cruel practice to animals therefore offends rather than confirms the principle of human dignity.

We claim the extension of basic rights to animals, along the lines of the Universal Declaration of Animal Rights, which should be defended in the same way as human rights.

Philosophers such as Paola Cavalieri and Peter Singer, in 1993, launched The Great Ape Project, counting on the support of primatologists such as Jane Goodall and intellectuals such as Edgar Morin. They defend the immediate extension of human rights, such as the right to life, freedom and physical wellbeing for the great apes before they become extinct.

Why do we confer legal standing to children, people with special needs or leading a vegetative life, while not granting the same to beings that share up to 99.4% of genetic load with us, and are part of the same family, hominids, or the same infra-order, anthropoids.

Why do chimpanzees, bonobos, gorillas and orangutans face extinction while we grant basic rights to human beings capable of committing the most abominable crimes against humanity itself?

Why do we not respect the principles established in the Universal Declaration of Animal Rights, proclaimed by the International League for Animal Rights in 1978 and submitted to UNESCO and the UN?

Tom Regan, in his pioneering work, addressed many of these issues, and today many authors have begun to defend the possibility of obtaining legal standing for certain animals.

For this, however, it must be recognized that the great apes have similar intellectual capacities to those to whom we grant legal standings, such as children or people with special needs.[31]

It is on the basis of the utilitarian ideas of Jeremy Bentham that Singer suggests that the capacity to suffer is a vital characteristic capable of conferring to each being the right of equal consideration. It does not matter whether a being is capable or not of reasoning, if it can speak or not: what matters is whether it is susceptible to suffering. According to Singer, a stone, for example, does not have interests; therefore it is incapable of suffering. However, a blow with a stick given to a horse provides "the same amount of pain" as a blow to a child.[32]

For Tom Regan the notion that only human beings are worthy of moral status is mistaken, he defends an inherent value for all individuals that are "subjects of a life."[33]

Steven Wise has demonstrated that prejudice against non-human creatures is due to the fact they were considered of instrumental value, a kind of slavery that perceives them as property. While his defense of the inclusion of animals into the legal world has left him open to ridicule and marginalization in academia, he compares his position with that of Galileo, denouncing cultural and religious anachronisms which can discourage young judges from acting in accordance with correct principles in the same way that Galileo's contemporaries forced him to affirm that the earth continued to be the center of the universe, although his experiments had proven the contrary.[34]

David Favre argues that animals can have their interests protected in law, without modifying their legal nature. He uses the traditional common law division of property rights which separates legal title and equitable title, using the contractual

31 Sciences Et Avenir, Le Projet Grand Singe. 8 (1995) (Fr.).
32 Peter Singer, Practical Ethics 52 (1979).
33 Tom Regan, Defending Animal Rights 43 (2001).
34 Steven Wise, Rattling The Cage: Toward Legal Rights For Animals 73-77 (2000).

model of society trustee, where a person or institution agrees to manage a property and transfers legal title to it, while keeping the equitable title. Favre argues that all animals are retainers of their equitable title.[35]

For the author, in the same way that in the society trustee, the administrator (trustee) cannot consider the property as his own, and only deal and keep it in the best interest of the equitable owner, the society trustee has only the legal title of the property, acting more as a guardian, also able to represent the equitable title holder in court.[36]

In this way animals considered property can have their status changed through a private act, such as a declaration or a will, as occurred with the freedom of the slaves in Rome, or slaves in countries such as Brazil and the U.S.A.; or through a public act, i.e., a judgment or a change in law,[37] as occurred with the abolition of slavery in Brazil.

Many authors, however, refute the possibility of extending human rights to animals, using the argument that the real border that exists between man and some animals lies in the distinction between freedom and determinism.

For these authors, man is the only moral subject in the world; therefore only he is capable of exercising his free will, even if it goes against his instinct. In this way, as animals are not free, they cannot be held morally responsible for anything: they are always innocent.[38]

It does not seem, however, that such arguments are capable of justifying the non-concession of moral dignity to non-human animals. These arguments are based on the traditional Aristotelian ethics that hold that there are insurmountable barriers between humans and animals, in spite of evidence that the great

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35 David Favre, Equitable Self-Ownership For Animals, 50 Duke L.J. 473 (2000).
36 *Id.* At 496-502.
37 *Id.* At 492-93.
38 Eduardo Rabenhorst, Sujeito De Direito: Algumas Considerações Em Torno Do Direito Dos Animais. V.2, Nº3, Recife 119-130, (Jan-Mar. 1997).

apes are endowed with intelligence, moral sense and a social conscience.[39]

Are people with mental illnesses and children not innocent too? Are they not incapable of being conscience of their acts as well? However, nobody denies them the capacity to acquire and exert rights through their representatives.

Even among healthy adults, was it not Freud who pointed out that nobody is the master in his own house? As we know, only a small number of men, and at certain moments, act in accordance to reason.[40]

Prejudice against animals, i.e. specisism, is logically inconsistent as both we consider that only man is rational while no animal is, which is not true, and that reason is an instrument of freedom from prejudice, myths, and false opinions and misleading appearances.

In fact, reason can still be understood as the force that frees man of appetites he shares with animals, keeping them measured. Rationality, however, is the ability to perceive and use relationships (relationship rationality) and we all know that animals can perceive relationships and respond to them. Nevertheless, rationality conceived as auto-analysis, knowing about knowing, i.e. the capacity of speaking about what you say (deliberative rationality), with exception of some great apes, most animals lack.[41]

It is worth noting here that the thesis of the lack of standing has always been the legal mechanism used to exclude people

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39 Hervé Ratel, *La Planète Des Singes,* 647 Sciences Et Avenir. 50, 54 (Janvier 2001) (Fr.) ("We Are Nowadays In A Situation Such That Is Necessary To Reexamine The Famous "Proper Of The Man", That It Was Conceived From Our Ignorance In Relation The Primates, Affirmed Pascal Picq.") (Free Translation).

40 John Coezze, The Lives Of Animals, 23 (1999) ("Both Reason And Seven Decades Of Life Experience Tell Me That Reason Is Neither The Being Of The Universe Nor The Being Of God. On The Contrary, Reason Looks To Me Suspiciously Like The Being Of Human Thought; Worse Than That, Like The Being Of One Tendency In Human Thought.").

41 Nicola Abbagnano, Nicola. Dicionário De Filosofia. 792 (1982).

who were not desired in the scope of equality, such as black people, women, children, and in regards to animals has not been different.[42]

4. THE CASE SUIÇA V. GAVAZZA AND THE ANIMAL STANDING IN BRAZIL

Until the nineteenth century, for example, when civil process was not considered an autonomous discipline, the civilian or intrinsic standing theory was predominant. Clóvis Beviláqua was the main exponent of this theory in Brazil. For this theory, standing was just constitutive element of legal right, that is, It is just one way of manifestation of substantive right. [43]

The intrinsic theory, however, received a lot of critics until It was overcome by the concrete theory of standing or concrete right theory, developed by Adolf Wach, for whom the action is an autonomous and distinct substantive right, although it exists only If the author holds a substantive right. In this sense, some supporters of the concrete theory of standing, such as Wach and Chiovenda, says that judicial protection can only be satisfied when a concrete protection of the right occurs and the standing only exist if the judge decided favorably to the plaintiff, since all action is conditioned to the existence of a concrete will of law. [44]

The concrete standing theory, in turn, was overcome by the abstract standing theory , which has in Heinrich Degenkolb and Alexander Plótz their corifeus. They say that the right to action is just the right to provoke a movement of the State-judge.

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42 Sônia T Felipe. Por Uma Qustão De Pincípios. Alcance E Lmites Da Éica De Peter Singer Em Defesa Dos Animais, 27 (2003).

43 Alexandre Freitas Câmara. Lições De Direito Processual Civil. 116 (2011)

44 Luis G. Marinoni. *Novas Linhas Do Processo Civil.* 3. Ed. São Paulo: Malheiros 209 (1996)

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Brazilian law, however, has adopted the eclectic standing theory , a theory created by the Italian professor Enrico Tulio Liebman, according to whom the law has at the same time an abstract nature, for not conditioning the existence a substantive right , and concrete, for requiring a category linked to the merits of the case as a requirement for standing. [46] Action, therefore, is seen as an abstract right connected with a substantive interest, but at the same time, it is instrumented by certain constitutive requirements. [47]

In this conception, the standing is not just a concrete right to a favorable judgment, It is a right to a judgment on the merit too, since the presence or absence of the substantive right can only be recognized at the end of the procedure.

This issue is not peaceful, and many authors considering that standing refer to the merits of the case, I.e. this requirements are real procedural requirements of merit. [48]

In fact, despite being enshrined in art. 17 of CPC / 73, the theory of standing has promoting a lot of legal controversy, although it is dominant that they are connected with the procedural relationship, and not with substantive law, and that its analysis is independent of the existence or not of a substantial legal relationship.

According to Liebman, the conditions of standing would be between the procedural presuppositions and the merits of the case and would be established by procedural law, contrary to the merits of the case, which depends on substantive right. [49] In that conception, the conditions of standing are conceived as a real

45 Ibidem. 117-118.
46 Ibidem 119-120.
47 Ibidem 210.
48 Humberto Teodoro Júnior. Curso De Direito Processual Civil 52 (1992)
49 Humberto Teodoro Júnior. Curso De Direito Processual Civil 52 (1992)

procedural requirements which are not to be confused with substantive law. [50]

For Liebman, the first condition of the action would be the legal possibility of the request, which would consist of the author's obligation to demonstrate that his claim can be admitted in the abstract by the objective law. The classical example is the request for payment of gambling debt, which is considered an impossible request because it has an interest not protected by law. [51]

Although all actions are twofold, since they contain an immediate request to the State to provide judicial protection and a plea against the defendant in order to fulfill a duty, the legal possibility of the request refers to the immediate request, that is, the obligation Or not of the State to protect the right claimed by the author. [52]

What the judge must decide, in this case, is only if the request is susceptible of appreciation by the Judiciary, without considering its origin or dismissal. An heir, for example, can not ask the judge to promote the division of a living person's inheritance, since there is no law binding that duty on the holder of the estate.

Nevertheless, Liebman himself, in the third edition of his Manual of Civil Procedural Law, abandons the idea of the legal possibility of the request as a condition of the action, which, for him, is confused with the procedural interest itself. [53]

On the other hand, in view of the enormous demand of the social movements for the access to justice, there is an increasing tendency of the courts to ensure the universalization of the jurisdiction. [54]

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[50] Ibid.

[51] Ibid.

52 Ibid., 1992, P. 61.

53 Luis G. Marinoni. *Novas Linhas Do Processo Civil* 210 (1996)

54 Antonio Carlos Cintra Et Al. *Teoria Geral Do Processo.* 230 (1991)

The second condition of the action is the procedural interest, which, assuming that it is not appropriate to trigger the judicial apparatus without it being able to extract a useful result, requires the author to demonstrate that the judicial sentence is necessary to resolve that conflict and that the type of action chosen is appropriate to achieve the desired result.

In fact, the procedural interest occurs when the author demonstrates that he can suffer some damage if the action is not proposed, either because the subject of duty refuses to fulfill his obligation, or because the law requires that right should be exercised by prior declaration Judicial process, as in the cases of actions constituting civil proceedings or criminal tort proceedings. [55]

The adequacy, in turn, is the relationship between the right asserted by the plaintiff and the requested adjudication , which must be able to correct the alleged damage. There is no interest, for example, if the plaintiff files a class action to collect pecuniary claims for only one person or if the Public Prosecutor's Office files a criminal action without "just cause", to file a complaint without the appearance of a right. [56]

In short, the interest of acting – or the legitimate interest - is always a question of an instrumental or procedural order, for in action, alongside the primary interest of substantive right directed to a particular legal, material or intangible right, which is itself the object of action - there is a secondary interest in obtaining a jurisdictional provision of the State for the protection of the primary interest. [57]

The third condition of action is the legitimacy ad causam, which refers to legitimacy of the plaintiff to sues and It is nothing more than the abstract ability to prove to be the holder of the right. [58] Legitimacy refers to both the subject who - in theory -

55 Ibid
56 Ibid
57 Moacyr Amaral Santos, *Primeiras Linhas De Direito Processual Civil 166 (*1990)
58 “Orlando Gomes 123 (1983)

has the right or power to demand a judgment in court (active legitimacy), as for the subject who has the duty to fulfill the obligation (passive legitimacy).

Only an individual who can claim his or her rights in court is considered a legal subject , although, in atypical situations, he can only do so through representatives or procedural substitutes. Access to justice has nothing to do with the legal relationship, since the judicial process is completely different from the legal relationship of substantive law. [59]

The Code of Civil Procedure of 2015 (CPC / 15) extinguished, as a category, the conditions of the action, placing them as procedural presuppositions (relative to the admissibility judgment of the action) and as a matter of merit. Thus, the interest and the legitimacy came to be treated as procedural presuppositions, under the terms of art. 17 of CPC / 15, in such a way that, upon finding the initial action, the void of the interest or legitimacy, [60] the court will reject the initial petition, according to art. 330, II and III of CPC / 15. [61]

One of the main obstacles to animal rights has been the refusal of the courts to consider them capable of asserting their rights in court. For Alf Ross, this metaphysical idea that rights is a simple and undivided entity that has to exist in a subject is a fallacy that can have disastrous consequences for the treatment of practical legal issues, especially when we are faced with atypical situation, In which the subject of the law does not coincide with the subject of the proceedings. [62]He recalls that they are often left legacies for the benefit of animals and that, in such cases, there is no denying that the animal has a subjective right.

59 Hans Kelsen. Teoria Pura Do Direito. 141 -142 (1987)

[60] Fredie Didier, . Será O Fim Da Categoria “Condição Da Ação”? Um Elogio Ao Projeto Do Novo Cpc. 5 (2017) On: Http://Www.Frediedidier.Com.Br/Artigos/Condicoes-Da-Acao-E-O-Projeto-De-Novo-Cpc/.

[61] Brasil. Act 13.105, March, 16, 2015. Código De Processo Civil. On:: Http://Www.Planalto.Gov.Br/Ccivil_03/_Ato2015-2018/2015/Lei/L13105.Htm.

62 Alf Ross. Hacia Uma Ciencia Realista Del Derecho :Crítica Del Dualismo Em El Derecho 213-214 (2000)

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Indeed, in typical situations, when the holder of the substantive right exercises, in his own name, the right to litigate in court, we say that this legitimacy is ordinary, but when the law authorizes a third party to claim, in his own name, the right of others (Article 18 of CPC / 15), as is the case with Habeas Corpus, which allows anyone to go to court to demand that the judge assure the freedom of movement of another person (article 5, LXVIII, of the CF), we are before an extraordinary proceeding.
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On November 3, 2016, in Argentina, a new Habeas Corpus is recognized in favor of a chimpanzee: the Association of Officials and Advocates for the Rights of Animals of Argentina (AFADA), under the leadership of Professor Pablo Buompadre, filed a writ of Habeas Corpus on behalf of the chimpanzee Cecilia, who lived in a zoo in the city of Mendoza. Judge María Alejandra Mauricio then declared that the chimpanzee is a "nonhuman legal subject" and ordered her transferred to a Sanctuary of Great Primates located in Sorocaba / SP. [65]

It is that procedural law does not require the identity between the legal subject and the plaintiff and, in outliers, a person - physical or legal - may sue in the name of another person's interest, as in the case of procedural substitution (Article 18, CPC / 15). For example, the business manager acts on behalf of the managed, but the decision rendered judged both for the right holder and for the procedural substitute. [66]

The concept of legal subject is greater than the concepts of person and legal personality, since being a legal subject is just

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63 Ibid, 217 (2000)

[64] Brasil. Act 13.105, March, 16, 2015. *Código De Processo Civil.* On;: Http://Www.Planalto.Gov.Br/Ccivil_03/_Ato2015-2018/2015/Lei/L13105.Htm.

[65] Maria Alejandra Mauricio. Revista Brasileira De Direito Animal, V. 11, N. 23, 175-211 (2016). On: Https://Portalseer.Ufba.Br/Index.Php/Rbda/Article/View/20374/12959.

66 Greco Filho, Vicente. Direito Processual Civil Brasileiro. 85 (2009)

having the ability to acquire rights, even when the subject can not directly exercise those rights.

In any case, it is possible that in our current legal system an animal - or a group of them - may be admitted to court as a nonhuman legal entity, replaced by the prosecution, the protective societies or represented by its guardians, when domesticated animals or pets.

5. CONCLUSION

Twelve years ago I was in my public prosecutor's office and I received a report from the animal protection society called Happy Animal stating that the chimpanzee Suiça had lost his companion Geron and she was depressed in a zoo cage in the city of Salvador in Bahia State.

I was researching to complete my doctoral thesis and at that time I read the seminal collection organized by Peter Singer and Paola Cavalieri, *The Great Apes Project: Equity beyong humanity*, which collected articles by various intellectuals on the similarities between man and great apes .At that moment I had the idea of filed a habeas corpus in favor of chimpanzee Suiça.

Nevertheless, I did not take long to realize that I would suffer hostilities from my colleagues in the legal world. To reduce the impact of such hostilities and ridicule I have sought out some fellow at and university professors as well as students and protective societies.I was fortunate to have the support of sixteen friends who helped me by signing the Habeas Corpus petition.

When we entering with the Writ we had the good fortune to It have fallen into the hands of the judge Edmundo Lúcio Cruz, who received the writ, determining the citation of the director of the zoo, Telmo Gavazza, admitting for the first time in history that an animal would have standing to claim its right of freedom in a court.

Unfortunately the Swiss chimpanzee died on the same

day that the judge would decide the case, but the barrier was already broken, allowing other activists to make new attempts around the world.

That's right, for our happiness, On November 3, 2016, an Argentinian judge has released the chimpanzee Cecilia, realizing the dream that Suiça has wished: Be released from prison.

History, however, is constantly evolving, and I hope one day justice anywhere in the world will allow these our not so distant ancestors to have their basic rights recognized to save them from extinction.