THE LEGAL STATUS OF ANIMALS IN ROMAN TRADITION

Heron José de Santana Gordilho[*]

Cristóvão José dos Santos Júnior[**]

Abstract: This article utilizes the hermeneutic method, aiming to translate and interpret the correct meaning of the legal status of animals within Roman Law tradition, based on the *Corpus Iuris Ciulis Institutes*. And so, it is questioned the traditional and reductionist way of thinking that always identifies animals as things. At first, the article makes a brief historical summary of Roman Law in light of the time it was created. Afterwards, a translation proposition of the Institutes' parts that have any reference to animals, taken directly from a Latin version of German Romanist Paulus Krueger, where indicative traces that animals enjoyed a particular legal status within the *Institutes* are presented. Finally, this article notes in that document a difference in treatment among animals, which is based on their own animality and will, distinguished and classified according to different standards, such as nature and habits. Therefore, clues that disclose acknowledgment of animals' sentience and that these beings truly had rights derived from *ius naturale* are revealed.

Keywords: institutes, Justinian, animals, res, thing.

[*] Post-Doctorate by Pace University Law School, New York; Doctorate in Law by Federal University of Pernambuco; Professor of PPGD/UFBA and PPGD/UCSAL. Member of the *World Academy of Arts & Sciences* (WAAS). Justice Promoter in Salvador/BA.

[**] Master student in Literature and Culture by the Federal University of Bahia (UFBA). Researcher at the Núcleo Interdisciplinar de Pesquisa e Extensão em Direito Ambiental e Direito Animal (NIPEDA).

Summary: 1. Introduction. – 2. The political moment of the institution of *Corpus Iuris Ciuilis.* – 3. *Corpus Iuris Ciuilis* as source of the Justinian Romal Law – 4. Translating the legal status of animals in the *Institutiones* – 5. Animals in *Ius Naturale Liv. I, Tit. II.* – 6. Animal property acquisition through *Ius Naturale, Liv. II, Tit. I.* – 7. Freedom reacquisition by a wild animal – 8. Freedom acquisition by a domesticated animal – 9. Final considerations – 10. References

1. INTRODUCTION

This article will analyze the legal status of animals within the *Institutiones* of the *Corpus Iuris Ciuilis*, in order to find indications that Roman Law already considered that, in particular situations, animals already enjoyed a legal status that was different from the legal status of an object or that of a good with economic value.

For Gadamer, translation, like any human activity, happens via interpretation, and as such, this research will utilize the hermeneutic method, aiming to interpret the correct sense of the legal status of animals in Roman Law, based on the *Institutiones* of *Corpus Iuris Ciuilis*.

Although the original manuscripts of the *Institutes* of the 6th century have been lost, a version closest to the original Latin was used: the famous edition of German Romanist Paulus Krueger, presenting a translation proposal, for didactic purposes, effectively directed towards the legal understanding of the subject matter of this article.

Studies on this subject are rare, and although there are researches on the Justinian compilation, the legal world remains resentful of researches regarding the historical roots of the legal status of animals within Roman Law.

The first part of this article does not intend to re-write the

history of Roman Law, but make a small summary of Justinian Law, presenting the social and political conditions that influenced the elaboration of *Corpus Iuris Ciuilis.*

Then, this article will translate and interpret the *Institutes*, bringing to light evidences that have been ignored by the Law itself, especially the fact that in Rome, in specific circumstances, animals were considered subjects of rights.

Based on translations of original texts, this article will analyze the legal status of animals in *ius naturale*, and then the forms of acquisitions of animal property, the reacquisition of freedom by wild animals, and the acquisition of freedom by domesticated animals.

2. THE POLITICAL MOMENT OF THE INSTITUTION OF *CORPUS IURIS CIUILIS*

The study of Roman Law refers to the analysis of private law institutions, the denominated "internal history of Roman Law", also known as *historia iuris*[1] that is divided in: pre-classic period (753 B.C. – 130 B.C.); classic period (130 B.C. – 230 A.C.); post-classic period (230 A.C. – 530 A.C.); and the Justinian period (530 A.C. – 565 A.C.), to which counter-poses the "external history" or *antiquitates iuris*, which is a detailed study of jurisprudence, of political institutions and innumerable sources of Roman Law.

As we know, the Roman State adopted different forms of government such as Monarchy, the Republic, the Principality, and the Dominate. In this sense, it is important to note that the Justinian law, in its external dimension, is located in the Dominate period, whereas in its internal dimension, is in the post-classic period.[2]

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[1] CAMPELLO, M. N. (1929). *Direito Romano: Prelecções expendidas em aula, 1*, (2a ed.). Rio de Janeiro: Francisco Alves & Cia, p. 30.

[2] PEIXOTO, J. C. (1997). *Curso de Direito Romano.* (4a ed.). Rio de Janeiro: Renovar, p. 4.

In order to solve the administrative issues due to the huge extension of the Roman Empire, Diocletian decides to divide it in two: the Eastern Empire, and the Western Empire, each one ruled by one Augustus, with a Caesar as lieutenant, totaling the number to four rulers.[3]

After Diocletian, Constantine stands out during the Dominate,[4] by reunifying the Roman Empire and transferring the capital to Byzantium, which is then renamed Constantinople.[5] Constantine converts to Christianity and creates the Edict of Milan, authorizing Christian practices on Roman soil, one of the factors that will contribute with the humanization of Law, despite causing a crisis on slavery[6] and the decline of the Empire itself.[7]

It is important to highlight that in the Dominate, the Emperor is considered *dominus* and *Deus*[8] since at the same time he acts as the supreme ruler, he also holds powers of a religious order,[9] a phenomenon denominated *caesaropapism*.

With absolute power in the hands of the emperor, both the Magistrate and the Senate weaken, so that the Senates – both of Rome and of Constantinople – play the role of mere city councils, whereas the Magistracy becomes a kind of honorary consulate or urban praetor, without any jurisdiction, promoting only games for the public, or acting as Tribune of the Plebs.[10]

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[3] ALVES, J. C. (2016). *Direito romano*. (17a ed.). Rio de Janeiro: Forense, pp. 43-44.
[4] TELLEGEN-COUPERUS, O. (2003). *A Short History of Roman Law*. Taylor & Francis e-Library, pp. 117-118.
[5] PEIXOTO, J. C. (1997). *Curso de Direito Romano.* (4a ed.). Rio de Janeiro: Renovar, p. 108.
[6] MARTINS, A. C. (2011). *O direito romano e seu ressurgimento no final da idade média.* In: WOLKMER, A. C. (Org.). *Fundamentos de História do Direito*, (6a ed.). Belo Horizonte: Del Rey. p. 202.
[7] GIORDANI, M. C. (1991). *Iniciação ao Direito Romano.* (2a ed.). Rio de Janeiro: Lumen Juris, pp. 20-21.
[8] ALVES, J. C. (2016). *Direito romano.* (17a ed.). Rio de Janeiro: Forense. p. 44
[9] LOPES, J. R., QUEIROZ, R. M. & ACCA, T. S. (2013). *Curso de História do Direito.* (3a ed.). São Paulo: MÉTODO, p. 27.
[10] PEIXOTO, J. C. (1997). *Curso de Direito Romano.* (4a ed.). Rio de Janeiro: Renovar. p. 109.

As sources of law are the imperial constitutions, titled *leges*, which can be *leges generales* (general norms), rewritten (particular actions), or *sanctio pragmatica* (general law written on request of a high official), as well as customs, used to fill in the legal gaps.[11] In addition, the resulting norms from law sources of previous periods continue in force, as long as they haven't been revoked.[12]

It just so happens that this jurisprudential activity goes into crisis, since older norms become known more due to the work of classic jurists than by the direct analysis of the original sources. Hence, the Law within these classical works is then denominated *iura*, and so the sources of law become the *leges* and the *iura*.[13]

The *iura*, however, cause a lot of controversies, because many lawyers start to manipulate the facts and to misquote the citations of classical jurists, which allows for legal insecurity to spread through the tribunals. Seeking to limit the invocation of *iura*, the emperors Theodosius II and Valentinian III order the elaboration of the Law of Citations, according to which can only be accepted in court the writings of jurists Modestinus, Papinianus, Gaius, Ulpian, and Paulus.[14]

Nevertheless, after the classic period of Roman Law, marked by the splendor of innovative ideas and the legal dawning due to the activities of jurists, from the 3rd century onwards we can observe a time of decadence that culminates in a great crisis in the Roman Empire, followed by the "Fall of the Western Empire" in 476.[15]

This imperial decadence will not happen abruptly, as the

[11] ALVES, J. C. (2016). *Direito romano*. (17a ed.). Rio de Janeiro: Forense. p. 45.
[12] PEIXOTO, J. C. (1997). *Curso de Direito Romano.* (4a ed.). Rio de Janeiro: Renovar. p. 110
[13] SCHILLER, A. A. (1978). *Roman Law: Mechanisms of Development*. New York: Mouton. p. 395.
[14] ALVES, J. C. (2016). *Direito romano*. (17a ed.). Rio de Janeiro: Forense. p. 46.
[15] CRETELLA JÚNIOR, J. (1971). *Direito Romano Moderno: Complemento ao Curso.* Rio de Janeiro: Forense, p. 42.

word "fall" suggests, but in the continuous manner of a systemic, complex and prolonged crisis, and together with this political and economical crisis there will also be a great legal decline, due to the temporary removal of classical jurists, as well the excess of *leges* and the gradual process of language alteration, keeping in mind that the changes suffered in Latin create a normative Babel that makes the interpretation of Law very difficult.

The legal norms begin to proliferate in such a way that the Empire sees the emergence of innumerable doubts regarding the truly in force norms, leading to the vulgarization of Law and the increasing distance between legal norms and the effectively applied norms.[16]

To fight this problem, it was necessary the gathering of the normative collection of pre-Justinian compilations previous to the *Corpus Iuris Ciuilis*, such as the *leges* and the Gregorian, Hermogenianus and Theodosian Codes, for beyond the *leges* and the *iura*, there were the Roman Law of the Visigoths, the Roman Law of the Burgundians, and the *Edictum Theodorici*.[17]

In the attempt to overcome this jurisprudential decadence, the 5th century presents itself as a moment of re-emergence of legal studies on classic authors and the institutions of the Eastern Roman Empire, especially the school of Beirut, and it is this political moment that will allow the creation of *Corpus Iuris Ciuilis* in the first half of the 6th century, published between 529 and 534 A.C.

3. *CORPUS IURIS CIUILIS* AS SOURCE OF THE JUSTINIAN ROMAN LAW

With the death of emperor Justin I in 527 A.C., the throne is inherited by his adoptive son Upranda.[18] Originally from

[16] ALVES, J. C. (2016). *Direito romano*. (17a ed.). Rio de Janeiro: Forense. p. 47.
[17] CRETELLA JÚNIOR, J. (1971). *Direito Romano Moderno: Complemento ao Curso.* Rio de Janeiro: Forense, pp. 43-44.
[18] MEIRA, R. C. (1983). *Curso de Direito Romano.* São Paulo: Saraiva, p. 78.

Thracia and native of Tauresium,[19] he was born in 482 A.C., biological son of Sabbatius and Vigilantia. This uncultured man, of humble origins who never had visited Rome, changes his Slavic name to *Iustinianus*, and with a high concentration of power, begins a militaristic phase of expansion of Eastern Roman Empire, ruling for 39 years until his death in 565 A.C., at 83 years of age.[20]

Justinian re-establishes the Roman domain partially in the Italic peninsula, expels the Ostrogoths from Africa, as well as submitting the Vandals to his power. In Spain, he defeats the Visigoths, and with an iron hand imposes his will in an absolutist reign, legitimated by religion, in a way that everything that pleases the prince now has the force of law (*quod principi placuit, legis habet uigorem*).[21]

The Justinian empire is marked by an important cultural revival, with a great production of sculptures, paintings, mosaics, literary works and architectural monuments – like the San Vitale Basilica in Ravenna, and the Church of Santa Sofia, in Constantinople -, besides the edition of his most important legacy: the *Corpus Iurius Ciuilis*.[22]

The great legal work will be composed by five books: the *Institutes*, the *Digest*, two *Codes*, and *Novellae*,[23] although only in 1583 this compilation was baptized as *Corpus Iurius Ciuilis* by French Romanist Denis Godefroy,[24] an expression that was

[19] FRÓES, O. (2004). *Direito Romano: Essência da Cultura Jurídica.* São Paulo: Editora Jurídica Brasileira p. 56.
[20] CRETELLA JÚNIOR, J. (2007). *Curso de direito romano: O direito romano e o direito civil brasileiro no Novo Código Civil.* (30a ed.). Rio de Janeiro: Forense, p. 50.
[21] MEIRA, R. C. (1983). *Curso de Direito Romano.* São Paulo: Saraiva, p. 73.
[22] PEIXOTO, J. C. (1943). *Curso de Direito Romano, 1.* Rio de Janeiro: Editorial Peixoto, S.A., p. 119.
[23] CASTRO, F. L. (2007). *História do Direito Geral e do Brasil. (*5a ed.). Rio de Janeiro: Lumen Juris, p. 86.
[24] VÉRAS NETO, F. Q. (2011). *Direito Romano Clássico: Seus institutos jurídicos e seu legado.* In: WOLKMER, A. C. (Org.). *Fundamentos de História do Direito*, (6a ed.). Belo Horizonte: Del Rey. p. 139.

already used by glossers between 1100 and 1250 to designate Roman Law in general, in contrast to Canonic Law, known as *Corpus Iuris Canonici*.[25]

Many consider this work to be the great Roman legacy for Law, however its elaboration only happened after the fall of the Western Roman Empire in 476 A.C., and the deposition of emperor Romulus Augustulus by barbarian Odoacer, King of the Heruli.[26] Edited in Eastern Rome, the *Corpus Iurius Ciuilis* had the important role of rescuing and consolidating the legal foundations established by the Western Roman Empire.[27]

Justinian is heir to a bureaucratic system that is very complex and legislatively disorganized, so despite all the previous work done such as the pre-Justinian compilations, it was necessary a normative systematization of the laws in force at the time.[28]

In fact, in a context in which there are numerous sparse laws, creating doubt as to which of them are in force, the emperor nominates, in 528 A.C., a commission formed by ten members, among them Theophilus, a professor from the School of Constantinople.[29]

Justinian intends to compile the current imperial constitutions (*leges*), in order to ease the application of law, and merge the previous codes (Gregorian, Hermogenianus and Theodosian), excluding repetitions, contradictions and the application of revoked *leges*.[30]

After the dedication of the commission fronted by

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[25] CRETELLA JÚNIOR, J. (2004). *Curso de direito romano*. (29a ed.). Rio de Janeiro: Forense, p. 51.
[26] LUIZ, A. F. (1981). *Noções de Direito Romano*. [S.l.: s.n]. p. 37.
[27] ALVES, J. C. (2016). *Direito romano*. (17a ed.). Rio de Janeiro: Forense. p. 49.
[28] STEIN, P. (2004). *Roman Law in European History*. Cambridge University. p. 33.
[29] MARTINS, A. C. (2011). *O direito romano e seu ressurgimento no final da idade média.* In: WOLKMER, A. C. (Org.). *Fundamentos de História do Direito*, (6a ed.). Belo Horizonte: Del Rey. p. 209.
[30] MOUSOURAKIS, G. (2012). *Fundamentals of the Roman Private Law.* Heidelberg, p. 73.

Tribonian, the justice minister of Justinian, the *Nouus Iustinianus Codex* is born, which was solemnly promulgated on April 7th, 529 A.C.[31]

Nonetheless, although the *leges* were finally gathered,[32] the lack of systematization of the *iura* gave way to many legal controversies because of the divergence between the *iura* derived from the opinions of the classical jurists, bringing Justinian to elaborate the Fifty Constitutions with the objective of addressing these antinomies.[33]

In 530 A.C., however, when noticing that his *leges* weren't enough and that the *iura* needed to be systematized urgently in order to mitigate legal insecurity, the emperor nominates a new commission, composed by 16 members and leaded once more by Tribonian, to gather and unite the opinions of the old jurists. Hence, after the study of nearly two thousand books in just three years, appears, in 533 A.C.,[34] the *Digest* (*Digesta*) or *Pandects* (*Pandectae*).[35]

It just so happens that between the *Nouus Iustinianus Codex* and the *Digesta* there will be many controversies, since the previous commissions were more preoccupied in compiling the existing laws than in updating them.

Justinian, firm in his belief that his work is sublime and perfect, forbids any kind of commentary on his text and considers any criticism as perversions (*immo magis peruersiones*), allowing only the making of summaries (indexes) or literal translations of his text into Greek, so that whoever disobeys this order, or cites in court another work that is not the Codex, the Digest or the Institutes, will be considered a forger and will have

[31] RADDING, C. & CIARALLI, A. (2007). *The Corpus Iuris Ciuilis in the Middle Ages.* Boston, p. 35.
[32] CRETELLA JÚNIOR, J. (2004). *Curso de direito romano.* (29a ed.). Rio de Janeiro: Forense, p. 51.
[33] ALVES, J. C. (2016). *Direito romano*. (17a ed.). Rio de Janeiro: Forense. p. 49.
[34] MEIRA, R. C. (1983). *Curso de Direito Romano.* São Paulo: Saraiva, p. 80.
[35] CRETELLA JÚNIOR, J. (2004). *Curso de direito romano.* (29a ed.). Rio de Janeiro: Forense, p. 52.

his writings destroyed.[36]

Justinian nominates a new commission - this time composed of five members, and determines that an extensive update of the Codex is done, culminating in the promulgation of the new edition of the *Codex repetitae praelectionis*, in 534 A.C., which revokes the previous Code.[37]

The legal reality, however, continues to suffer changes, causing the need to promulgate new imperial constitutions.[38] Justinian himself, with the incessant search for a legal systematization, promises to create a different compilation of those new *leges* (*alia congregatio*), which never came to be during his ruling.

These imperial constitutions, after the death of Justinian, will be compiled into one single body and then translated to Greek and Latin,[39] and become known as *Nouellae Constitutiones*, or in its shortened form, *Nouellae* (Novels), divided in preface, chapter, and epilogue.[40]

After the creation of the Digest, Justinian chose three great jurists (his minister Tribonian; Dorotheus, professor in Beirut, and Theophilus, professor in Constantinople) to elaborate a teaching manual seeking the better comprehension of the *Pandects*. This commission use as reference the Institutes of Gaius, and making use of the *Res Cottidianae*, the Digest, and the Codex of 529, they create the *Institutes of Justinian*, which come into force on the same date as the *Pandects*, on December 30th of 533 A.C.[41]

It should be noted as well, that the Institutes are divided

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[36] PEIXOTO, J. C. (1943). *Curso de Direito Romano, 1*. Rio de Janeiro: Editorial Peixoto, S.A., p. 117.
[37] MEIRA, R. C. (1983). *Curso de Direito Romano*. São Paulo: Saraiva, p. 82.
[38] CRETELLA JÚNIOR, J. (2004). *Curso de direito romano*. (29a ed.). Rio de Janeiro: Forense, p. 53.
[39] MEIRA, R. C. (1983). *Curso de Direito Romano*. São Paulo: Saraiva, p. 82.
[40] PEIXOTO, J. C. (1943). *Curso de Direito Romano, 1*. Rio de Janeiro: Editorial Peixoto, S.A., p. 118.
[41] ALVES, J. C. (2016). *Direito romano*. (17a ed.). Rio de Janeiro: Forense. p. 49.

in four books, which themselves are subdivided in titles and paragraphs, in addition to a proem (*principium*),[42] and although they are aimed at education, they have the value of an autonomous law,[43] to the point of even being invoked in court.

Therefore, the Institutes are truly teaching manuals that seek the teaching of Roman Law, with emphasis on two of them: the *Gai Institutionum Commentarii Quattuor*, also known as the Institutes of Gaius, which were extremely relevant for the understanding of the legal Roman institutes of the Classic Period,[44] and the Institutes that compose the *Corpus Iuris Ciuilis* in the Post-classic Period.[45]

4. TRANSLATING THE LEGAL STATUS OF ANIMALS IN THE *INSTITUTIONES*

When one studies Roman Law, the use of Latin has a specialized and technical character, since the legal terms refer to issues very particular to Romans, which only made sense at that particular time and under those circumstances, not being there an exact equivalent between these terms in modern languages.

One can recall, for example, the Italian proverb *traduttore, traditore* (translator, traitor) – attributed to Vittorio Imbriani – to illustrate the impossibility of a faithful translation of the source text.

Many authors prefer not to translate certain Latin legal expressions or words, like *mos maiorum*, *fides*, *dignitas*, *honor*, *gloria*, *pietas*, *grauitas*, *parricidium* and *princeps*, and this happens more due to a terminological concern than any linguistic

[42] CRETELLA JÚNIOR, J. (2004). *Curso de direito romano.* (29a ed.). Rio de Janeiro: Forense, p. 53.
[43] PÔRTO, V. S. (1962). *Direito Romano: Comentários a textos do Livro I das Institutas de Justiniano*. (2a ed.). Rio de Janeiro: Livraria Freitas Bastos S.A, pp. 31-34.
[44] GIORDANI, M. C. (1992). *O Código Civil à Luz do Direito Romano*. Rio de Janeiro: Forense, p. 1.
[45] FRÓES, O. (2004). *Direito Romano: Essência da Cultura Jurídica.* São Paulo: Editora Jurídica Brasileira, p.59.

value or want for erudition.[46]

It is so that many translations from Latin to Portuguese become debatable, for centuries of linguistic separation influence not only on the orthographic alterations, but also semantic, syntactic and pragmatic alterations.

For example, although the expression "*pecunia non olet*" is commonly translated as "money doesn't smell", one cannot forget that the notion of *pecunia*, Latin word derived from *pecus* (cattle), is wider than the current notion of money.

Another example is the expression "*dura lex, sed lex*", commonly translated as "the law is harsh, but it is the law", though Roman "*lex*" is sometimes understood as imperial constitution, is not to be confused with the contemporary idea of "law".

In order to comprehend better the legal strength of the Institutes, it is necessary to go directly to its Latin version, instead of using as reference the modern translations for the vernacular, so it was chosen the edition of the first volume of *Corpus Iuris Ciuilis*, published by German Romanist Paulus Krueger, alongside Mommsen, Schoell and Kroll.[47]

In this volume were selected the passages that refer to animals, like the initial part of Title II of the First Book, which verses on general legal matters, as well as the three paragraphs of Title I of the Second Book, which verses about the types of *res*.

Created for the *cupidade legum iuuentati* (the youth that loves to read),[48] the Institutes are written in a simple and objective way,[49] with systematizations rich in concepts and

[46] PEREIRA, M. H. (1984). *Estudos de História da Cultura Clássica, 2*. Lisboa: Fundação Calouste Gulbenkian, pp. 320-345.
[47]IVSTINIANVS, F. P. (529-534). *Corpus Iuiris Ciuilis*. Retrieved from: https://bibdig.biblioteca.unesp.br/handle/10/6423 Accessed in: 13/03/2017.
[48] CORREIA, A., & SCIASCIA, G. (1949). *Manual de Direito Romano: e textos em correspondência com os artigos do código civil brasileiro*. São Paulo: Saraiva, p. 429.
[49] CRETELLA JÚNIOR, J. (2004). *Curso de direito romano*. (29a ed.). Rio de Janeiro: Forense, p. 52.

classifications, which make them interesting for a theoretical analysis on the legal status of animals, very different from the Digest, which presents sparse solutions for concrete problems.[50]

Furthermore, according to the criteria established by linguist Roman Jakobson,[51] an inter-lingual translation was chosen, denominated late Latin or low Latin, it is the language that was spoken after the fall of the Roman Empire.

Besides, some elucidative textual insertions were put between parentheses to explain certain occurrences and expressions, but also to make the reading more fluid, as there were innumerable Latin deletions. Additionally, the passages considered to be more important for the analysis were put in bold italics.

5. ANIMALS IN *IUS NATURALE LIV. I, TIT. II.*

For a better understanding of the research done, tables with the translated texts of the *Corpus Iuiris Ciuilis* will be presented, followed by commentaries, in order to comprehend the legal status of animals in Roman Law.

Initially, it is important to highlight that the Institutes present different concepts and general ideas that can be found throughout, in addition to the traditional trichotomy of Roman private law: *ius gentium*, *ius naturale* and *ius ciuile*.[52]

According to the doctrine, *ius gentium* (Law of People) is the one applicable to the relations between foreigners in Rome, and between Romans and foreigners, contrasting with *ius ciuile* (civil law), which is applied only among Romans and marked by the materialism and formality, contrary to *ius*

[50] PEIXOTO, J. C. (1997). *Curso de Direito Romano.* (4a ed.). Rio de Janeiro: Renovar. pp. 115, 120.
[51] JAKOBSON, R. (2003). *Linguística e Comunicação*. (I. Blikstein & J. P. Paes, Trad.). São Paulo: Cultrix. pp. 64-65.
[52] ANDREOTTI NETO, N. (1975). *Direito civil e romano*. (2a ed.). São Paulo: Riddel, p. 47.

gentium, which is more flexible and based on the principle of good faith (*fides*).[53]

The *ius naturale* (natural law), seen as an imposition of nature and not as an arbitrary creation of man, is based on principled norms such as "*suum cuique tribuere*" (give to each what is theirs), "*honeste uiuere*" (live honestly), and "*alterum non laedere*" (not hurt the other), securing, above all else, the right to life, to freedom and to property.[54]

Note that Roman jus-naturalism is influenced by Greek jus-naturalism, uses arguments of a philosophical-value order as a tool to justify the *status quo*, as well as explanations of a cosmological nature, like the one referred in the tragedy *Antigone* by Sophocles.[55]

Starting with Cicero, in the Republican period, the Roman jus-naturalism will be spread from *naturalis ratio* (natural reason), as an imposition of natural order that establishes legal precepts universally conceivable.

The Justinian law, still, will only develop in the final phase of Roman Law, since it is found in a context of paradigmatic transition for, if on one hand, it rescues the jus-naturalist influence of the classic period, on the other, it absorbs several elements from Christian axiology.[56]

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[53] GIORDANI, M. C. (1991). *Iniciação ao Direito Romano.* (2a ed.). Rio de Janeiro: Lumen Juris. p. 84.

[54] ANDREOTTI NETO, N. (1975). *Direito civil e romano*. (2a ed.). São Paulo: Riddel, pp. 271-272.

[55] CRETELLA JÚNIOR, J. (2004). *Curso de direito romano.* (29a ed.). Rio de Janeiro: Forense, p. 21.

[56] CORREIA, A., & SCIASCIA, G. (1949). *Manual de Direito Romano: e textos em correspondência com os artigos do código civil brasileiro*. São Paulo: Saraiva, p. 11.

LIBER PRIMUS *DE IURE NATURALI ET GENTIUM ET CIVILI* ***Ius naturale** est quod natura **omnia animalia** docuit. nam ius istud non humani generis proprium est, sed omnium animalium, quae in caelo, quae in terra, quae in mari nascuntur. hinc descendit maris atque feminae coniugatio, quam nos matrimonium appellamus, hinc liberorum procreatio et educatio: **videmus etenim cetera quoque animalia istius iuris peritia censeri.***	BOOK FIRST ON NATURAL LAW, OF THE PEOPLE AND CIVIL *Natural law* is that which nature taught *to all animals*. In truth, this law is not exclusive to humans, but also refers to all the animals born in the sky, earth and sea. From it comes the union between male and female, which we call marriage. From it comes procreation and education of the offspring. *We see, in reality, that other animals also qualify by the knowledge of such law.*

Table 1 – Animals in *IVS NATURALE, LIV. I, TIT. II*. Source: Authors (2017).

As it can be seen in the table above, animals are regulated by Natural Law, which is based on a theological guideline that emanates from divine providence itself, for Roman jus-naturalism[57] invokes a primordial and absolute Right, previous to other laws, timeless, firm, perennial, immutable and universal,[58] seeking the preservation of values such as goodness and justice.[59]

The Roman jus-naturalism adopts the principles of initial freedom and isonomy among all men, so that slavery would offend humanity's own nature (*dominio alieno contra naturam subicitur*).[60] The inclusion process of slaves comes more out of the necessity to conciliate between this legal institute and the Christian principle of equality.[61]

Effectively, the *ius naturale* is a complex of natural laws that impels animals and humans to similar practices, like feeding, procreation and care for offspring. As it is, the Justinian law approximates the animal to the human through the concept of

[57] MARQUES NETO, A. R. (2001). *A Ciência do Direito. Conceito, Objeto e Método.* (2a ed.). Rio de Janeiro: Renovar. pp. 133-136.
[58] MACHADO NETO, A. L. (1987). *Sociologia Jurídica.* (6a ed.). São Paulo: Saraiva. pp.186-187.
[59] BOBBIO, N. (2006). *O Positivismo Jurídico. Lições de Filosofia do Direito*. (M. Pugliesi, Trad.). São Paulo: Ícone, pp.17-18.
[60] Inst. I,3,2.
[61] JOHNSTON, D. (2004). *Roman Law in Context*. Cambridge University Press. pp. 51-52.

soul, a trait common to both, although animals are not considered gifted with reason or spirit,[62] since they act solely on instinct, always engaging in similar actions.[63]

Even with the approximation between humans and animals, for Romans, in face of their inability to act in a rational manner, animals are not considered subjects of rights and obligations, but merely things (*res*) and objects of rights.

The text highlights only the natural character of the legal foundations, revealing a strong influence from Stoic philosophy and its search for a life lived in harmony with nature.[64]

Some authors disagree with this claim, and consider that for Justinian law, animals, though considered *res*, possess rights of a natural order, made possible by the abundance of sources, even if divergent, and by the fact that Romans are pragmatic[65] and not theoretical.[66]

For some Roman jurists, Natural Law refers to all animals, rational and irrational, which is considered "surprising" and "shocking", reason why these authors refute the acknowledgement of any legal value to this concept.[67]

With this, it is important to highlight the words of Spencer Vampré, one of the biggest Brazilian Romanists at the start of the 20th century, for whom the text of the Institutes is clear and leaves no doubts, in the sense of considering animals as subjects of rights:

> The text clearly states that animals also have rights and that the natural law is common to men and animals. An absurd and

[62] GORDILHO, H. J. (2012). *Why animals are spiritual beings? Revista Brasileira de Direito Animal* – RBDA, *7*(10), 144.
[63] GIORDANI, M. C. (1991). *Iniciação ao Direito Romano.* (2a ed.). Rio de Janeiro: Lumen Juris, p.93.
[64] PÔRTO, V. S. (1962). *Direito Romano: Comentários a textos do Livro I das Institutas de Justiniano*. (2a ed.). Rio de Janeiro: Livraria Freitas Bastos S.A, pp. 28-29.
[65] MEIRA, R. C. (1983). *Curso de Direito Romano.* São Paulo: Saraiva, p. 49.
[66] CASTRO, F. L. (2007). *História do Direito Geral e do Brasil. (*5a ed.). Rio de Janeiro: Lumen Juris, p. 83.
[67] CRETELLA JÚNIOR, J. (1971). *Direito Romano Moderno: Complemento ao Curso.* Rio de Janeiro: Forense, p. 21.

> unsustainable doctrine when compared to modern law. Besides, there are no animals that are air-born. The interpreters seek to explain the concept of natural law saying that the text implies that there are certain rights that are derived from the animal nature of man, like procreation, legitimate defense, etc., and for that reason are called natural; but the text is clear and leaves no doubt. Fr.2 *de statu hominum* declares that all of law is constituted because of men. Romans did not see contradiction between this text and that of the Institutes, because they understood that natural law is not constituted, but preexistent to man.[68]

Also in accordance to this perspective, Marita Giménez-Candela acknowledges Roman Law's veneration towards nature. Hence, considers the existence of a universal respect towards animals.[69]

However, it just so happens that many interpreters of Roman Law adopt an anachronistic legal concept, transferring values of one period into the analysis of another, and it is curious that the doctrine pacifically accepts an opposition between the *ius naturale* and the *ius gentium* in the treatment of slaves, since men are free by natural law, previous to man-made laws, whereas slavery is admitted by the law of people, as it is instituted by man for his own interests.

All in all, for Romans there is a primeval law, naturally imposed, that can collide with the egotistical interests of a particular human community, without, however, losing its universal and timeless relevance.

It should be emphasized, however, that if for the most part the doctrine accepts the apparent contradiction in regards to slaves, it also strives to deny the acknowledgement by the Romans that animals have rights of a natural order.

The positivists – in an attempt to overcome jus-

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[68] VAMPRÉ, S. (1915). *Institutas do Imperador Justiniano.* São Paulo: Livraria Magalhães, p. 5.

[69] GIMÉNEZ-CANDELA, M. (2017). *La descosificación de los animales. Revista Eletrônica do Curso de Direito, 12* (1). UFSM, p. 299.

naturalism –[70] consider this interpretation absurd, and in the hurry to deny rights to animals they become victims of their own contradictions.

There is a certain similarity between the legal interpretation of the Institutes when it comes to the interests of animals and of slaves, and one of the distinctions made by Ulpian between *ius gentium* and *ius naturale* is that slavery would be exclusive to the law of people, an institution that is unrecognized by natural law, for freedom is a human essence.

The Digest affirms as well, that "by natural law, all men are born free"[71] (*cum iure naturali omnes liberi nascerentur*) – which demonstrates Christian influence –[72] so that slavery would be "contrary to nature" (*contra naturam*).[73]

The Pandects, by its turn, affirms that *ius gentium* differentiates itself from *ius naturale* because the former refers only to the behavior of humans, whereas the latter refers to all animals (regardless if they can reason or not).

For Romanist Vampré,[74] to consider animals as having rights is something astonishing in certain space-time circumstances, although Romans lived with contradictions between their private law norms, and the fact that they were submitted to a pastoral culture that allowed them a more diversified view regarding animals.[75]

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[70] MACHADO NETO, A. L. (1987). *Sociologia Jurídica.* (6a ed.). São Paulo: Saraiva, pp. 333-355.
[71] IVSTINIANVS, F. P. (2017). *Digesto ou Pandectas do Imperador Justiniano.* (M. C. Vasconcellos et al., Trad.). São Paulo: YK Editora. (Original work published in 533), p.63.
[72] MARTINS, A. C. (2011). *O direito romano e seu ressurgimento no final da idade média.* In: WOLKMER, A. C. (Org.). *Fundamentos de História do Direito*. (6a ed.). Belo Horizonte: Del Rey. p. 202.
[73] IVSTINIANVS, F. P. (2017). *Digesto ou Pandectas do Imperador Justiniano.* (M. C. Vasconcellos et al., Trad.). São Paulo: YK Editora. (Original work published in 533), p.78.
[74] VAMPRÉ, S. (1915). *Institutas do Imperador Justiniano.* São Paulo: Livraria Magalhães, p. 5.
[75] ANDREOTTI NETO, N. (1975). *Direito civil e romano*. (2a ed.). São Paulo:

Therefor, for Roman Law, in particular circumstances, animals are considered subjects of rights because of *ius naturale* – which is a Natural Law, immutable and previous to the laws of men -,[76] in other situations, however, they are considered *res* in accordance with *ius ciuile* (civil law), which is a Law created by human intelligence.

Regardless, for some scholars, Roman Natural Law, through Greek influence, derives itself from reason (*ratio naturalis*), and it would be common to all living beings, whilst others understand that Roman Natural Law is limited only to humans.[77]

6. ANIMAL PROPERTY ACQUISITION THROUGH *IUS NATURALE, LIV. II, TIT. I.*

LIBER SECVNDVS *DE **RERVM** DIVISIONE*	BOOK SECOND ON THE DIVISION *OF THINGS*
*§11 Singulorum autem hominum multis modis res fiunt: **quarundam enim rerum dominium nanciscimur iure naturali, quod, sicut diximus, appellatur ius gentium, quarundam iure civili**. commodius est itaque a vetustiore iure incipere. **palam est autem, vetustius esse naturale ius**, quod cum ipso genere humano rerum natura prodidit: civilia enim iura tunc coeperunt esse, cum et civitates condi et magistratus creari et leges scribi coeperunt.*	§11 In addition, things become property in various ways. *Certainly we acquire property of some things by natural law, which, as we mentioned, is known as law of people, (whereas) other things (we acquire) through civil law.* It is best to start by the oldest law. *It is manifestly older the natural law,* which created the nature of things, like humans themselves. Certainly, civil rights came into existence when cities started to be built, magistrates were nominated, and the laws written.

Table 2 – Animal property acquisition through *IVS NATVRALE, LIV. II, TIT. I.* Source: Authors (2017).

The Institutes refer to animals at the beginning of their second book, under the title "*De rerum divisione*" (On the division of things), establishing that animals are considered *res*.

The challenge is found in relation to the words *res* and

Riddel, pp. 44-45.

[76] MACHADO NETO, A. L. (1987). *Sociologia Jurídica.* (6a ed.). São Paulo: Saraiva, p. 218.

[77] LUIZ, A. F. (1981). *Noções de Direito Romano*. [S.l.: s.n], p.12.

persona, because although they are usually translated as "thing" and "person", it is necessary to keep in mind that, in the context of the 21st century, these vernacular forms do not exactly express the same meaning of *res* and *persona* of the 6th century, when Justinian ruled.

One should avoid a reductionist understanding, that merely identify animals as things simply because they are considered *res*, just because this word is currently translated as "thing".

This linguistic awareness is important, and is the basis for comprehending the legal status of animals, who must be recognized as not just "things", but as *res sui generis* as well.[78]

Legally, "thing" is whatever can come to be an object of subjective patrimonial right, as the Romans utilize both *pecunia* and *res*,[79] with the former designating things inserted in the patrimony of someone in particular, and the latter to designate things that are excluded from or outside someone's patrimony, such as in expressions *res nullius* (someone's object), and *res derelicta* (abandoned object).[80]

According to Andreotti Neto,[81] *res* means, broadly, the "patrimoniality" of things, whereas, in a strict sense, it represents the existence of something that can be subjected to a legal relationship.

In fact, Romans do not have a systematic issue when it comes to the classification of *res*, though it is possible to verify the existence of a series of differentiations, starting from the

[78] VÉRAS NETO, F. Q. (2011). *Direito Romano Clássico: Seus institutos jurídicos e seu legado.* In: WOLKMER, A. C. (Org.). *Fundamentos de História do Direito*, (6a ed.). Belo Horizonte: Del Rey. p. 132.
[79] CRETELLA JÚNIOR, J. (2004). *Curso de direito romano.* (29a ed.). Rio de Janeiro: Forense, p. 107.
[80] CORREIA, A., & SCIASCIA, G. (1949). *Manual de Direito Romano: e textos em correspondência com os artigos do código civil brasileiro*. São Paulo: Saraiva, p. 42.
[81] ANDREOTTI NETO, N. (1975). *Direito civil e romano*. (2a ed.). São Paulo: Riddel, p. 63.

analysis of legal and doctrinal texts.[82]

In Roman Law *res* can be classified, according to the patrimonial dimensions, in: corporeal/incorporeal; mobile/immobile; fungible/inflexible; simple; composed or collective; divisible/indivisible; main/accessory; fruitful/unfruitful; *in commercio* or *extra commercium*; and *mancipi* or *nec mancipi*.[83]

Corporeal things, for Romans, are those that can be perceived by the senses (*quae tangi possunt*), like slaves and animals, whilst incorporeal things are imperceptible (*quae tangi non possunt*), as exemplified by rights.[84]

Mobile things (*res mobiles*), are those that do not suffer alterations in form or substance when moved, for example, a slave or an animal, who can move on their own, while immobile things are the soil and whatever else that is added on it, like buildings and plantations.[85]

Fungible things are those that can be replaced by others of the same kind[86], quality and quantity (*res quae pondere numero mensura consistunt*), while inflexible ones, on the contrary, cannot be replaced by another, whether it is because of their singular nature, or by determination of both parties. The animal, by rule of thumb, is fungible, but when bought, its qualities are considered singular, i.e. a cow that produces more milk than others is to be considered as something inflexible.[87]

Simple thing is that which composes an organic whole,

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[82] GIORDANI, M. C. (1992). *O Código Civil à Luz do Direito Romano*. Rio de Janeiro: Forense, pp. 69-76.

[83] FRÓES, O. (2004). *Direito Romano: Essência da Cultura Jurídica.* São Paulo: Editora Jurídica Brasileira, p.143.

[84] CRETELLA JÚNIOR, J. (2004). *Curso de direito romano.* (29a ed.). Rio de Janeiro: Forense, pp. 110-111.

[85] SERAFINI, F. (1888). *Istituzioni di Diritto Romano, 1.* (4th ed.). Firenze: Giuseppe Pellas Editore. pp. 107-108.

[86] ANDREOTTI NETO, N. (1975). *Direito civil e romano*. (2a ed.). São Paulo: Riddel, p. 66.

[87] CORREIA, A., & SCIASCIA, G. (1949). *Manual de Direito Romano: e textos em correspondência com os artigos do código civil brasileiro*. São Paulo: Saraiva, pp. 42-43.

like an animal or a slave; composed thing is that which composes a mechanical whole, for example a ship; and collective things are those that integrate an ideal whole, such as a flock.[88]

Divisible things are those that can be fractioned and still keep its essence and its social and economic functions, such as a terrain; but when this division is impossible, they are then considered as indivisible things (*quae sine interitu diuidi non possunt*),[89] as it is the case of an animal or a slave.

The classification in main and accessory has a relative trait, because it only makes sense when something is considered in contrast to another, so that a main thing is that to which another dependent thing is united to, whereas the accessory thing is the dependent or subordinate thing, like domestic animals and slaves.[90] Accessory things are those destined to the cultivation of the immobile (*instrumenta fundi*), and even autonomous things can become accessories when they are at the service of the main thing, in a lasting and constant manner.[91]

Unfruitful things are those that do not bare fruit, whereas fruitful things are those that do bare fruit, i.e. animals, who can sometimes, provide wool and milk, as well as offspring.[92]

In commercio things are susceptible to being alienated or appropriated by an individual, such as animals and slaves, whereas *extra commercium* things are those outside commerce, i.e. sacred, religious or sanctified objects, as well as things that are common to all, like public squares.[93]

A fundamental classification in Roman Republic and at

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[88] ALVES, J. C. (2016). *Direito romano*. (17a ed.). Rio de Janeiro: Forense. p. 148.
[89] ANDREOTTI NETO, N. (1975). *Direito civil e romano*. (2a ed.). São Paulo: Riddel, p. 66.
[90] CRETELLA JÚNIOR, J. (1971). *Direito Romano Moderno: Complemento ao Curso.* Rio de Janeiro: Forense, p. 118.
[91] ALVES, J. C. (2016). *Direito romano*. (17a ed.). Rio de Janeiro: Forense. p. 149.
[92] ANDREOTTI NETO, N. (1975). *Direito civil e romano*. (2a ed.). São Paulo: Riddel. p. 67.
[93] ALVES, J. C. (2016). *Direito romano*. (17a ed.). Rio de Janeiro: Forense. pp. 150-151.

the beginning of the Principality is that which divides things in *res mancipi* and *res nec mancipi*,[94] where the former are the more precious to the Romans, and are known as *numerus clausus*, that is, *ager Romanus*, the *praedia italic*, the slaves, rustic building easements, houses and beasts of burden (bulls, horses, mules and donkeys), with the exception of camels and elephants.[95] All other things belong to the *res nec mancipi* group, particularly coins, provincial accommodations, goats and sheep.[96]

Whatever the case may be, it is possible to affirm that animals are considered to be corporeal, mobile, undividable, *in commercio*, as well as fungible, simple and fruitful *res*, particularly animals of burden and traction, which are considered by Romans as *res mancipi* (that which can be hold by hand)[97] due to their great importance for such an agricultural and pastoral people.

A very curious aspect is the fact that, according to the Institutes, in the process of property acquisition, the *ius naturale* identified itself with *ius gentium*, instead of *ius ciuile.*[98]

This is, in fact, a controversial matter among Romanists,[99] and one can see that the expression *ius gentium* (Law of People), which is based on *bona fides* and *aequitas*,[100] is used in Rome to designate the legal-normative complex that founds the relationships among foreigners, or among Romans and

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[94] CRETELLA JÚNIOR, J. (2004). *Curso de direito romano.* (29a ed.). Rio de Janeiro: Forense, p. 110.
[95] ALVES, J. C. (2016). *Direito romano*. (17a ed.). Rio de Janeiro: Forense. p. 153.
[96] COGLIOLO, P. (1889). *Diritto Privato Romano, 2*. Firenze: G. Barbèra, Editore, pp. 30-37.
[97] SAMPER, F. (2017). *Las instituciones de Gayo*. Santiago: Ediciones Universidad Católica de Chile, p.47.
[98] GIORDANI, M. C. (1992). *O Código Civil à Luz do Direito Romano*. Rio de Janeiro: Forense, p. 6.
[99] PÔRTO, V. S. (1962). *Direito Romano: Comentários a textos do Livro I das Institutas de Justiniano*. (2a ed.). Rio de Janeiro: Livraria Freitas Bastos S.A, p. 28.
[100] GIORDANI, M. C. (1991). *Iniciação ao Direito Romano.* (2a ed.). Rio de Janeiro: Lumen Juris, p.67.

foreigners, coated in less solemnity than *ius ciuile*, which regulates the legal relations between Roman citizens.

It just happens that, with time and the expansion of the Empire, the already-mentioned distinction between *ius gentium* and *ius ciuile* loses its meaning, since various tribes are integrated to the Empire, gaining Roman citizenship.[101]

Hence, the expression *ius gentium* gradually gains new layers of understanding and acquiring a doctrinal meaning[102] - adopted by Gaius and Cicero – attached to *naturalis ratio* (natural reasoning), taken more as universal right of all peoples, approximating it to *ius naturale*.[103]

With the Institutes, the comprehension of these differences becomes even more difficult, because if in some moments it becomes evident the tricotomic distinction of private law (*de iure naturale, et gentium et ciuili*), at other moments, natural law is similar to the law of the people (*iure gentium id est iure naturali*).[104]

Vicente Sobrinho Pôrto[105] exposes that there are registries in legal diplomas of Roman Law of at least three different meanings to *ius gentium*, which can refer to a group of norms and institutes applicable to the relations between foreigners and Romans or among foreigners in Rome, to a group of norms and institutes based on *naturalis ratio* and applicable to all tribes, or still to a group of norms and institutes applicable to the relations between States.

The Institutes consider that the process of acquisition of

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[101] PEIXOTO, J. C. (1997). *Curso de Direito Romano.* (4a ed.). Rio de Janeiro: Renovar, pp. 229-230.
[102] GIORDANI, M. C. (1992). *O Código Civil à Luz do Direito Romano*. Rio de Janeiro: Forense, p. 7.
[103] PÔRTO, V. S. (1962). *Direito Romano: Comentários a textos do Livro I das Institutas de Justiniano*. (2a ed.). Rio de Janeiro: Livraria Freitas Bastos S.A, p.33.
[104] GIORDANI, M. C. (1991). *Iniciação ao Direito Romano.* (2a ed.). Rio de Janeiro: Lumen Juris, p.89.
[105] PÔRTO, V. S. (1962). *Direito Romano: Comentários a textos do Livro I das Institutas de Justiniano*. (2a ed.). Rio de Janeiro: Livraria Freitas Bastos S.A, p.34.

animal property can be done through *ius naturale*, and from the basis of *naturalis ratio*[106], so it is important to observe how *ius naturale*, especially in its correlation with *ius gentium*, creates practical effects for Romans, by organizing even the acquisition of property, as it does not relate only to vague evaluative notions.

7. FREEDOM REACQUISITION BY A WILD ANIMAL

LIBER SECVNDVS *DE **RERUM** DIVISIONE*	BOOK SECOND ON THE DIVISION *OF THINGS*
*§12 Ferae igitur bestiae et volucres et pisces, id est omnia animalia quae in terra mari caelo nascuntur, simulatque ab aliquo capta fuerint, iure gentium statim illius esse incipiunt: quod enim ante nullius est id **naturali ratione** occupanti conceditur. nec interest, feras bestias et volucres utrum in suo fundo quisque capiat, an in alieno: plane qui in alienum fundum ingreditur venandi aut aucupandi gratia, potest a domino, si is providerit, prohiberi, ne ingrediatur. quidquid autem eorum ceperis, eo usque tuum esse intellegitur, donec tua custodia coercetur: **cum vero evaserit custodiam tuam et in naturalem libertatem se receperit, tuum esse desinit et rursus occupantis fit**. **naturalem autem libertatem recipere intellegitur, cum vel oculos tuos effugerit vel ita sit in conspectu tuo, ut difficilis sit eius persecutio.***	§12 Hence, wild animals, the birds and the fish, that is, all animals that are born on the earth, sea and sky, that are captured by someone, are immediately theirs, by law of the people, since that which belonged to no one, is given, *by natural reasoning*, to whom possess it. It matters not that someone captures wild animals and birds in your property or in another's property. Without doubt, he who enters into someone else's property with the intention of hunting or capturing birds, can be prohibited by the landowner, if he (the owner) sense that (the invader) would enter. But if you have captured any of them (the animals), it (the animal) is considered yours, while it remains under your custody. *But when it evades your custody and refuges in natural freedom, it stops being yours and once more belongs to who possess it. Furthermore, it is understood by "recovering natural freedom" when it has escaped from your watch or, being in your presence, it is difficult to retrieve.*

Table 3 – Reacquisition of freedom by a wild animal, LIV. II, TIT. I. Source: Authors (2017).

Initially, the first title of book I of the Institutes presents the different kinds of things, and from paragraph 12, begins to describe the ways of acquiring property through *ius gentium*. However, in the paragraph shown in Table 3, animals gain more notoriety, justified by the relevance given by the Romans to

[106] MEIRA, R. C. (1983). *Curso de Direito Romano*. São Paulo: Saraiva, p. 49.

these creatures, due to their pastoral culture.[107]

The legal status of animals is so unique to this culture that it varies according to the animal, since Romans, during the Republic and the beginning of the Principality, differentiate some animals in *res mancipi* and *res nec mancipi*,[108] with special attention to working and traction animals, who belong to the first group.

Another distinction to be considered refers to the nature of the animal, which can be wild or domestic, a distinction that constitutes an important criterion to determinate the acquisition or loss of property.

The classification of "wild animal" weakened the bond of property, contrary to the classification of "domestic animal",[109] which has a tendency to make the bond last. If the animal is considered wild, it becomes easier to lose property, as it happens when an animal escapes.[110]

Bees, for example, are considered naturally wild, and so being, hard to acquire, since it doesn't simply happens by them landing on the tree of someone's property.[111] Besides that, any person can become the owner of bees that land on the tree of a particular realty, with the owner of the realty, however, being

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[107] GASSEN, V. (2011). *A natureza histórica da instituição do direito de propriedade.* In: WOLKMER, A. C. (Org.). *Fundamentos de História do Direito*, (6a ed.). Belo Horizonte: Del Rey. pp. 178-179.

[108] FRÓES, O. (2004). *Direito Romano: Essência da Cultura Jurídica.* São Paulo: Editora Jurídica Brasileira, p.143.

[109] CRETELLA JÚNIOR, J. (1971). *Direito Romano Moderno: Complemento ao Curso.* Rio de Janeiro: Forense, p. 118.

[110] SAMPER, F. (2017). *Las instituciones de Gayo*. Santiago: Ediciones Universidad Católica de Chile, p.89: "But when is referred to animals that can be tamed are *res mancipi* is questioned how it should be interpreted, as they are not immediately tamed when they are born. The teachers from our school believed they became *res mancipi* the moment they were born. Nerva and Proculus, as well as other teachers from another school, believed the contrary: that only those who could be tamed were considered *res mancipi*, and if because of their excessive wildness they couldn't be tamed, then they began to be *res mancipi* the moment they reached the age to be tamed. Beasts that were *res nec mancipi* were, for example, bears, lions…" (Our translation)

[111] Inst. II, 1, 14.

able to deny access to his lands.[112]

With the exposed above, one can note that a wild animal without owner is considered *res nullius* (no-one's thing),[113] and can be appropriated by anyone who captures it, not mattering if it is done in a private property or some place where the access of the invader can be denied.

It is no coincidence that, in the previous paragraph, the Institutes employ, in regards to animals, an expression of *ius gentium*, for it considers their doctrinal concept attached to *naturalis ratio*.[114]

The insertion of the animal in a symmetric game of liberties, on one hand allows the acquisition of the animal property through its capture, but on the other hand, also recognizes the reacquisition of its freedom in the case it escapes, even if done under the vigilance of the owner or when its persecution is difficult.

In regards to the Digest considering that all humans are free through *ius naturale*, an escaped slave, differently to a wild animal, does not reacquire its freedom by escaping.

There is, then, the tacit acknowledgement that the correct place of animals is in nature, where they can enjoy a right to freedom, and this is one more reason by which it can be affirmed that animals possessed a legal status *sui generis* within the Institutes.[115]

8. FREEDOM ACQUISITION BY A DOMESTICATED ANIMAL

[112] VAMPRÉ, S. (1915). *Institutas do Imperador Justiniano.* São Paulo: Livraria Magalhães, pp. 61-62.
[113] CORREIA, A., & SCIASCIA, G. (1949). *Manual de Direito Romano: e textos em correspondência com os artigos do código civil brasileiro*. São Paulo: Saraiva, p. 42.
[114] MACHADO NETO, A. L. (1987). *Sociologia Jurídica.* (6a ed.). São Paulo: Saraiva, p. 230.
[115] ALVES, J. C. (2016). *Direito romano*. (17a ed.). Rio de Janeiro: Forense. p. 148.

LIBER SECVNDVS *DE **RERUM** DIVISIONE*	BOOK SECOND ON THE DIVISION *OF THINGS*
§15 Pavonum et columbarum fera natura est. ***nec ad rem pertinet, quod ex consuetudine avolare et revolare solent: nam et apes idem faciunt, quarum constat feram esse naturam****: cervos quoque ita quidam mansuetos habent, ut in silvas ire et redire soleant, quorum et ipsorum feram esse naturam nemo negat. in his autem animalibus, quae ex consuetudine abire et redire solent, talis regula comprobata est****, ut eo usque tua esse intellegantur, donec animum revertendi habeant: nam si revertendi animum habere desierint, etiam tua esse desinunt et fiunt occupantium. revertendi autem animum videntur desinere habere, cum revertendi consuetudinem deseruerint.***	§15 It is wild the nature of peacocks and pigeons. *Doesn't matter that they go and return flying, for in reality, the same do bees, whose nature is wild.* Similarly, some also have domesticated deers, who usually go to the forests and return, of which no one denies (however) of having a wild nature. But about these animals that have the habit of departing and returning, a rule was established: *it is understood to be yours while they have the will to return, for if they no longer have the will to return, they also stop being yours and submit to (new) possessors. In addition, it is considered that they stopped having the will to return when they have abandoned the habit to return.*

Tabel 4 – Acquisition of freedom by a domesticated animal, LIV. II, TIT. I. Source: Authors (2017).

It was already clarified the importance of classifying animals as either domestic or wild,[116] and so, one should question what would be the adopted criterion to know to which group the animal belonged to.

Romans classified animals[117] based on the nature of their coexistence with humans, beyond their mere comings and goings, and on the Institutes, which is why bees and deers are considered wild, despite having the habit of returning to the same place.[118]

Besides the division between wild and domestics,[119] animals can be classified in having or not the habit to return, where animals that do have such habit are generally but not necessarily considered as domesticated animals.

[116] CRETELLA JÚNIOR, J. (1971). *Direito Romano Moderno: Complemento ao Curso.* Rio de Janeiro: Forense, p. 118.
[117] ALVES, J. C. (2016). *Direito romano*. (17a ed.). Rio de Janeiro: Forense. p. 148.
[118] VAMPRÉ, S. (1915). *Institutas do Imperador Justiniano.* São Paulo: Livraria Magalhães. p. 62.
[119] CRETELLA JÚNIOR, J. (1971). *Direito Romano Moderno: Complemento ao Curso.* Rio de Janeiro: Forense, p. 118.

For the Institutes, animals that have this habit integrate an individual's patrimony while it maintains this *animus reuertendi* (will to return), highlighting the use of the word *animus* in relation to animals.

In Latin, the word means will, desire, mind, heart, soul, intention, consciousness, feeling, attention, memory, thought, imagination, and intent, among other meanings,[120] as Romans use expressions such as *animus domini, animus donandi, animus furandi, animus nouandi, animus possidendi,* and *animus societatis,* expressions that correspond to a notion of will or desire.[121]

The *animus reuertendi* should be objectively analyzed, through the observation of the external behavior of the animal, not through a psychological study. Nonetheless, in many other cases involving people, especially in regards to private property, one also does not dive into a subjective analysis of the soul element.[122]

Therefore, the adopted criterion to effectively declare loss of property is centered on the animal's volition, not on the owner's behavior, such as carelessness or negligence that might facilitate the animal's escape.

Aristotle defended the "great chain of life", according to which living beings would be differentiated in accordance to their mere ability to survive (plants), aptitude for awareness and sentience (animals), spirituality (humans) and the more elevated degrees (divinities).[123]

Another aspect that stems curiosity is that the owner can lose his right to property without another person acquiring it immediately in his stead, and without actually wanting it, a fact that

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[120] DICIONÁRIO Latim-português. (2001), p.63. (2a ed.). [S.l.] Porto Editora.
[121] PEIXOTO, J. C. (1997). *Curso de Direito Romano.* (4a ed.). Rio de Janeiro: Renovar.
[122] ALVES, J. C. (2016). *Direito romano*. (17a ed.). Rio de Janeiro: Forense. pp. 274-279.
[123] GORDILHO, H. J. (2012). *Why animals are spiritual beings? Revista Brasileira de Direito Animal* – RBDA, *7*(10), p. 152.

is considered as abandonment and the object becomes *res derelicta*.[124]

This happens when the wild animal reacquires its natural freedom (Table 3), or when the domesticated animal loses its *animus reuertendi* (Table 4),[125] the volition of animals being directly bound to certain legal effects, so that wild and domesticated animals have rights derived from *ius naturale*, which means that they possess *sui generis* legal status.

9. FINAL CONSIDERATIONS

Romans developed a very characteristic relationship with animals, who were considered important within their pastoral society, offering a specific treatment to these creatures.

To understand the legal status of animals within the Institutes it was necessary to revisit the history of Justinian law, and verify that Romans were practical men who had a huge theoretical difficulty in keeping the legal system in harmony and without contradictions.

To comprehend the legal status of animals in the Institutes of *Corpus Iuris Ciuilis*, this article used the Latin edition of German Romanist Paulus Krueger, and in accordance with many Romanists, demonstrated that animals possessed legal status *sui generis*, since they were legally differentiated from other things via *animus* and will.

Furthermore, it was observed that the division of Roman private law in *ius ciuile*, *ius gentium* and *ius naturele*, enabled contrasting interpretations, once it was found indicative traces that animals were holders of some rights derived from natural law, specifically the right to freedom.

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[124] PEIXOTO, J. C. (1997). *Curso de Direito Romano.* (4a ed.). Rio de Janeiro: Renovar. p. 370

[125] ALVES, J. C. (2016). *Direito romano*. (17a ed.). Rio de Janeiro: Forense. p. 328.

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