Wildlife and the Brazilian Abolitionist Movement

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Summary: 1. Introduction - 2. The roots of speciesism and the spiritual barriers among species - 3. The place of wildlife in the Brazilian legal system - 4. The Brazilian Abolitionist movement for Animal Liberation - 5. Conclusion

Abstract: This paper aims to contribute to the ethical debate on the relationship between humans and animals and demonstrate that the Brazilian Federal Constitution of 1988 has already elevated animals to the level of legal subjects, able to enjoy and exercise basic rights. 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, and departing from Darwin's theory of evolution show us the actual evidence of this ideology. After this, it analyses the change in the wildlife legal status, from nobody's thing (*res nulium*) to legal subject, as occurred in the case chimpanzee Swiss vs Salvador Zoo. This was the first case that recognised a chimpanzee as a plaintiff that achieved standing in a court of law through representatives The main focus of the study is to offer a legal interpretation to include wildlife on to the list of those entities without legal personhood who possess basic rights and standing to come before a court of law through representatives or legal substitutes.

Keywords; Wildlife, Animal abolitionism, Speciesism, legal subject, Standing.

1. Introduction

> There had been talk about building a society to protect animals. I have a profound respect for animals. I think they have souls, even rudimentary, and they conscientiously revolt against human injustice. I have seen a mule sigh after a severe beating from a driver who had filled his cart with load heavy enough for four horses and wanted the poor animal to pull it. **José do Patrocínio**[2]

The black slavery abolitionists were the first to break the absolute silence at the heart of the Brazilian nation. Even the Catholic

Church, which had played an important role in the process of the humanization of slavery, had long ignored the suffering of slaves in Brazil.

In the same way, millions of sentient animals, free born, are stolen, captured, mutilated, sold as products, exploited for forced labor or simply killed and eaten, without due process of law.

Although many of them are close to us in the evolutionary chain, few of us worry about their suffering. Do we have the right to treat other species in this way?

By comparing the treatment given to animals with that given to slaves, this paper attempts to demonstrate that animals are treated like slaves who were until recently considered items of property, without any moral or legal status.

Sooner or later, men will have to admit other species into their ethical community, at least those that manage to survive the genocide against them. This genocide takes the form of either the destruction of their natural habitat or simply their extermination.

Some authors have compared animal issues to the Nazi holocaust, inasmuch as animals are treated like the Jews in concentration camps, without any moral dignity or respect[3].

Over the course of history, slaves and animals have been submitted to similar violations. However, with the exception of some primitive peoples, man does not normally eat the meat of his prisoners. Like prisoners of war or slaves, animals are used to satisfy the desires of

the winners. Millions of them die daily as a result of wildlife trafficking, are killed for food, for materials for the fashion industry, religious sacrifices, cultural manifestations or scientific experiments. Other millions are tamed and used as pets or to guard property, for entertainment in zoos and circuses, or as forced labor.

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, we propose a change in the legal status of animals from legal object to legal subject and even confer them legal standing.

1. The roots of speciesism and the spiritual barriers among species

> There were no echoes that repeated their cries or moans. Everybody ignored the suffering that they felt; everybody thought he was incapable of thinking, and it was ridiculous to say that they could consider freedom. **Luis Anselmo da Fonseca**[4]

Speciesism is a term coined in 1970 by the psychologist Richard Ryder to make a parallel between our attitudes towards other species and racist attitudes. Both represent biased behavior or prejudice in favor of interests of the members of our own group against the interests of the members of others.

Although man and animals share birth, death, pain, pleasure, among other things, western tradition identifies huge differences between

them, mainly concerning body and soul, instinct and reasoning.

The idea of soul, according to Durkheim, came to primitive people through their dream experience which led to the idea of separating the body from the soul, the latter capable of leaving the body.

For primitive people, representations of the world while awake or sleeping had the same value. This duplicity was only possible if they accepted that the body has a soul, made out of subtle and ethereal material able to pass through pores of the body and go anywhere. Later, primitive man perceived that the dead often participated in their dreams thus giving rise to a third element: the spirit.

Disconnected from any embodied form and free in the space, a spirit – unlike the soul which spends most of the time inside the body – is immortal, and even after death continues, in particular the spirits of men who have special virtues (*mana*)[5].

The idea of linking each soul to its corresponding body (soul as an incarnated spirit) passed into the Greek tradition, and according to Aristotle the soul is conceived as the substance of the body, a vital principle of all living beings. Like sight is to the eyes, the soul is to the body[6].

Analyzing the faculties of the soul, Aristotle says that feeding is common to all living beings and sensitivity is common to animals, however, only the human soul has intellectual ability (*noûs*), and is able to think and communicate ideas through language. For Aristotle the

intellectual soul is the spirit itself, another kind of soul – separate from the body – which can be divided in two parts: the sensitive spirit (receptive) and effective spirit (active), the former functions as matter (potential) and the latter as form (act)[7].

Thus, animals are considered beings with their own life/soul (*anima*), but with no spirit. It is only through involuntary natural impulses that birds build nests and spiders webs. Only the human spirit is able to deliberate. The sensitive spirit is connected to the sensitive soul which transforms matter into thoughts, while the active spirit, unlike other faculties of the soul, is not linked to the body and is therefore immortal. However, thoughts are only born from feeling, and after death the spirit is no longer individual but collective. This refutes the theory of individual soul advocated by Plato.

In short, as well as the physical body (*soma*) and life (*anima*), rational man has a third element which supposedly sets him apart from other living beings: a spirit independent of body and able to learn, understand and make judgments or have opinions based on reasoning, consciousness, thoughts, will, and so on.

Consequently, as Aristotelian ethics are teleological, beings which occupy the lower rungs of the Great Chain of Beings are there to be used by animals which occupy the upper rungs. Therefore animals – like women, slaves and foreigners – are there to be used by rational man[8].

From this point of view rationality is considered to mark the

difference between men and other living beings, nearest genus; animal, and by specific difference, reasoning.

It is by the soul's intellectual function that men locate themselves in the Great Chain of Beings, putting animals below them and God above them. This distinction does not function only to differentiate men from animals – like a beak, wings and the ability to fly would distinguish birds from other living beings – but it also proves their proximity to God[9].

Stoics put moral problems before theoretical problems and with Aristotelian ethics both have had a great influence on western thought. For them, the ideal state is calm suppressing emotions and desires. Unlike animals who act out of instinct, man is guided by reason which enables him to be aware of the immutable rules of natural law. From this Stoic understanding of *logos* (speaking, ability to reason) comes the definition of man as a rational animal (*zoon logikon*) and animals as beings that can not speak (*aloga zoa*).

The Stoic and Aristotelian tradition gave Roman Law and Christianity the notion that non-human animals are not worthy of any moral consideration. These ideas passed into Common Law and Civil Law traditions and remain today.

In the 17th century the French philosopher Rene Descartes argued that animal have no soul or minds, they are unable to either think or feel pain. Descartes took the Aristotelian and Stoic traditions to the

extreme because animals were conceived as machines (*automata*). This understanding denies any spirituality to animals, considering them as *automata* and this, in turn, was used to justify the economic exploitation of natural resources (including animals) by the emerging industrial society.

This tradition only gave way in 1871, after the publication of The *Origin of Species*, in which Charles Darwin refuted the philosophical basis that supported the idea that only men, created in the image and likeness of God, had an intellectual soul (spirit) that legitimated their dominance over all other animals.

The Darwinian revolution proved that the only difference between man and animals was a matter of degree. Mankind does not occupy a privileged place in the order of creation. This evolutionary theory dismantled the foundations of Aristotelian tradition regarding the immutability of species based on the theory of substance which advocated that there is an ontological structure in the world[10].

Despite the fact that the modern anthropocentric tradition was rocked by Darwin's ideas, which proved that there is a continuum between man and other species, non-human animals remain excluded from our moral and legal consideration.

For a long time after the publication of *On the Revolutions of the Celestial Spheres* (1543), physicists and mathematicians continued to

operate inside the scientific Ptolemaic paradigm. However, with the work of Galileo and others, it finally gave way. Similarly, Darwin's ideas, while accepted in the natural sciences, have yet to be taken on board by the social sciences, legal scholars and philosophers.

There is an increasing body of scientific research nowadays into the mental faculties and genetic attributes of animals, further refuting theories that sustain there are significant differences between men and other animals.

The primatologist Bernard Thierry, for example, has demonstrated similarities among facial expressions of men and great apes; while the psychiatrist ethologist Boris Cyulnik, following the pioneer works of Konrad Lorenz, has demonstrated that affection helps to build the cognitive abilities of young mammals, demonstrated by the use of tools mostly.

In the 1970's, the American primatologist David Premack, using research carried out with chimpanzees, pigeons and chickens, studied animals' ability to associate colored plastic shapes to objects, and identified the skills of abstraction, so the old opposition instinct and intelligence might be transformed in a museum of curiosities too soon[11].

Many authors insist on distinguishing man and other species in the place occupied by them in the evolutionary ladder, by affirming that only mankind is able to reason, has linguistic skills, self-consciousness, autonomy, self determination, the skill to choose, capacity to practice

actions and assume moral obligations.

The theory of evolution has been used to justify the traditional sight of superiority of men related to non-human animals, inasmuch as the mechanism of evolution-surviving of the most apt make us conclude that killing animals for food and other purposes come from fulfilling our role in the evolutionary chain.

Thus, considering evolution as a progressive process of natural selection of species less able to others more able, only man, placed at the top of the Great Chain of Being, should have special legal and moral status.

If there were some truth in this theory, giving intrinsic value to humans as "the best" in nature, it would force us to also give special status to cockroaches, because, as many scientists have shown, cockroaches could also be considered the best as they are the only species able to survive a nuclear disaster. Being more or less evolved does not confer any special moral value to species. It is impossible to concede moral value to scientific facts although they can be used as factual evidence for ethical arguments[12].

In truth, what science has shown is that man is merely one more species in the evolutionary chain; there is no characteristic that distinguishes him from animals, because all differences are differences of

degree, and not of category[13].

This becomes clearer when we compare man to the great apes. Man and the great apes belong to the same order (primates) and the same suborder (antropóides). The traditional taxonomy classifies man in one family (*hominidae*), genus (*homo*) and species (*homo sapiens*), and the great apes in another (*pongidae*), genus (*pan*) and species - common chimpanzee (*pan troglodytes*) and bonobos (*pan paniscus*). However, with the advances of DNA mapping, a group of scientists have recently published in the American magazine *Proceedings of the National Academy of Sciences* reporting research revealing that man and such animals share 98.4% of their genetic code.

There is already sufficient scientific proof to affirm that men and great apes are in the same family (*hominidae*) and the same genus (*homo*), so they should be classified as *homo troglodytes* and *homo paniscus*, chimpanzees, and *homo gorilla*, gorillas.

Man has always sought to differentiate himself from animals and reinforce these differences through his religions and philosophies as a means of fleeing from his animal essence and domesticating his animal instincts[14].

However, man can not free himself completely from his primitive impulses such as sex, gluttony and power. According to Freud, they can be repressed or sublimed, through intoxication, displacement or illusions.

Furthermore, these sometimes lead people to commit perversions such as violence and cruelty against others, including animals[15].

Freud's great contribution was to perceive the paradox of man as a social being, i.e. we are libidinous, deceitful, and selfish, but we have to live in polite society with others, we have to cooperate, conciliate, and contain our instincts. This makes our mind a place where the conflict between animal impulses and social rules is played out[16].

In conclusion, with scientific discoveries in the area of psychology and biology, sooner or later there will have to be changes in the moral and legal realms of our societies. The way we treat animals today will shock future generations.

2. The place of wildlife in the Brazilian legal system

> And man's law is man's zoology. The anthropocentrism is so wrong in the former as well in the later. It's a surprise that this is still true today, and it needs to be opened way with a hammer's blow. **Tobias Barreto**[17]

It has not been easy for Brazilian academics nor the judicial system to identify the legal status of animals. It falls under two distinct legal spheres; public law regulating the relationships between men and wildlife, the latter considered common goods, and private law for domestic or domesticated animals, where animals are considered property.

Firstly, given that in the eyes of the law, animals have always

been considered as things that are property, thousands of them are captured and often killed on a daily basis in the legal or illegal animal trade.

The issue, however, is not as simple as it initially appears because when we need to establish the legal status of a wild animal captured to be used as food for men, 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 were not able to be private property (*res extra patrimonium)* and things that were not able, if considered in group, to become objects of possession (*res extra commercium*)[18].

Things could be *res nullium* (nobody's thing) or *res derelictae* (abandoned thing), able to become part of someone's assets, although they had not belonged to anybody before, in other words, while they were not appropriated they could be considered neither public nor private[19].

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)[20].

Gaio, however, before Justiniano, divided things in to *res extra patrimonium*, which could be *res divini juris* (divine things), *res humani juris* (human things).Human things, in turn, could be *res communes,* such as water and air, not able to be private property, although appropriable in specific quantities; *res universitatis*, things belonging to cities, such as stadiums, theatres, forums; and *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*[21].

In the Roman-German tradition, but also strongly influenced by the Pandects through the Recife School of Law and 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[22], although they can be appropriated, such as animals caught through hunting and fishing[23].

Thus, hunting and fishing were considered 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, which promoted increased state intervention into the legislative realm, that under the pretext of protecting the weak restricted private autonomy, without losing its original meaning[24].

The growth of industrial society's complexity led to a series of special legislations, which among another 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.

The law to protect wildlife (Act 5.197 of 1967), 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, 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 there is a hazard to agriculture or public health, or when abandoned pets become feral or wild.

As regards 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 supposed to decide on cases concerning crimes against wildlife[25]. However, this precedent was never without controversy in the high courts, such as in the case 6.289-3 of São Paulo, passed on 12.05.1982, by Supreme Court, when the judge Dacio Miranda expressed reservations regarding the precedent, claiming that wildlife did not belong to the Union, but to the state, in other words, the Brazilian nation.

Therefore, the leading case was canceled from the outcome of the jurisdiction conflict n. 29.508 between a criminal court of Sao Paulo

state vs. Federal Court of Justice, and since then they have been subject to state courts.

The Brazilian Fishing Code rules that animals and vegetation found in waters belonging to states and the Union are public goods, although the state can permit professional or commercial fishing, as well as sport or scientific fishing[26].

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[27].

As regard domestic or domesticated animals, the new civil code, although it does not deal directly with the issue, rules that animals used in industry or for the industrialization of meat and derivatives can be the object of commercial or industrial guarantee (Civil Code, article 1.447), and that the offspring of animals belong to beneficiaries, in other word, animals belong to the owner of the land. (Civil Code, article 1.387).

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 freely bought and sold, the owner having 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 a limitations that guarantee everybody mediated fruition of the good, as regards for example scenic beauty, production of oxygen, refuge for wildlife, etc[28].

Thus, the environment can be neither public nor private, occupying an intermediate zone of diffuse interest, belonging to everybody and to each one at the same time, impossible to identify an owner and impossible to divide[29].

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 used the Forest Code[30] and defined environment as a "good of common interest of the people", or "good of diffuse interest", expressions that would more easily characterize it as a hybrid interest, of public soul and private body, transcendental to individual rights and extend to the public, i.e. "pluri-individual", public relevance and cultural nature[31].

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 value interpretation which would make its wording more flexible and with a view of reaching a new meaning that leads to fairness[32].

The 1988 Constitution, while guaranteeing property rights (article 5°, XXII), imposed an interventionist and collective dimension which required that the law be used for the social function of property principal (article 5° XXIII). 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[33].

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[34].

In short, goods of diffuse interest are those that whether 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, and although they can not be appropriated as a whole, 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 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, they 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 to life of these animals which continue to be captured and killed, legally or illegally[35]. 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 (article 225, §1, VII).

Neither the government nor civil society has managed to implement the rules that prohibit illegal trading of wildlife. This is in partly due to failures on the part of the public services for environmental protection in the formulation, implementation and maintenance of public polices and in the financial resources of the Union, states and local authorities[36].

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[37]

On the other hand, these laws require the will to kill or mistreat animals 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[38], and when cases of

cruel practice are identified the penalties imposed are very small.

30 million animals die every year in scientific experiments and another 20 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.

Despite this, 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 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 in the Habeas Corpus n 833085-3/2005 requested by a group of legal scholars, public prosecutors and animal activists in favor of Swiss, a chimpanzee that lived in the city zoo in Salvador, Bahia. This was the first case that recognized a chimpanzee as a plaintiff and achieved standing in a court of law through representatives[39].

4. The Brazilian abolitionist movement

Blind people the ones that assume in the

abolitionism the last page of a locked up book, a negative form, the suppression of a loser evil, the epitaph of a century iniquity. In the rise, she's a sunrise's song, the motto no more mysterious of an age that begins, the measure of a giant's powers that unfastens. **Rui Barbosa**[40]

Many defend 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, 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 sub-order, anthropods.

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 principals 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[41].

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 an "equal amount of pain" as a blow to a child[42].

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 "subject of a life"[43].

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 proved the contrary[44].

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 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[45].

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 person for whom 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[46].

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 U.S.A.; or through a public act, i.e. a judgment or a change in law[47], as occurred with the abolition of the 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[48].

It does not seem, however, that such arguments are capable of justifying the non-concession of moral dignity to the non-human animals. These arguments are based on traditional Aristotelian ethics that hold that there are insurmountable barriers between man and animals, in spite of evidence that the great apes are endowed with intelligence, moral sense and a social conscience[49].

Are people with mental illnesses and children not innocent too? Are they not incapable of being conscience of their acts too? 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 master in his own house. As we know, only a small number of men and at certain moments acts in accordance to reason[50].

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 all we know that the 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[51].

It is worth noting here that the thesis of the lack of standing has always been the legal mechanism used to exclude people who were not desired in the scope of equality, such as blacks, women, children, and as regards animals has not been different[52].

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 subject, i.e. they are able to acquire and exercise their rights[53].

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 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 though 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[54].

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[55].

Roman law came from the intellectual inheritance of the Greek world, where only a free man was considered a "person"[56], i.e. legal subject. For the Romans a person and a man were diverse concepts. Only a man with certain attributes could be a legal subject. Some of these

attribute 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 can not 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 can not 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[57].

For a long time the law has not only privileged human beings. 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[58].

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.

5. Conclusion

> The greatness of a nation and its moral progress can be judged by the way its animals are treated. Vivisection is the blackest of all the black crimes that a man is at present committing against God and his fair creation. It ill becomes us to invoke in our daily prayers the blessings of God, the Compassionate, if we in turn will not practice elementary compassion towards our fellow creatures. ***Mahatma Gandhi***[59]

In conclusion, this article has attempted to identify the philosophical and scientific bases of speciesism that have been used to legitimate prejudices and cruel practices against animals. Many of these bases started to be undermined by Darwin's theory of evolution and recently by scientific research that has demonstrated that there no identifiable capacities separating animals from man.

On the other hand, it is wrong of those who oppose the abolitionist movement to imagine that it is against humanity. In fact, it attempts to extend the moral sphere to include animals rather than threaten man and thus exalting him.

If we understand cruelty as the act of doing something bad, 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 recognize moral dignity or legal status for members of our own species who lack intellectual attributes, such as children, companies or depersonalized entities. Why is it so difficult to raise this morality further and include at least beings in close evolutionary terms such as great *apes*?

As the case of Swiss vs Director of biodiversity, environmental and hydrological resource department from state of Bahia has demonstrated, this can occur, similar to slavery abolitionism, without a constitutional amendment, therefore when article 225, §1º, VII of the Federal Constitution of Brazil ruled that the government and society must protect all animals, "forbidden, in form of the legislation, practices that put in risk their environmental function, increase the extinction of species or submit them into cruelty", it mean that it must have an immediate effect.

Nothing prohibits us from taking a wild animal, unable to return

to its habitat, and protect it in sanctuaries or make it part of a family, as a subject not an object, as occurred with Brigidte, a monkey that lived for 19 years with the Zaniol family in Caxias do Sul, a town in the state of Rio Grande do Sul.[60]

Nevertheless, the abolitionist movement is growing in Brazil and as has occurred with most emancipation movements, activists have perceived the need to create a organized movement made up of politicians, scientists, artists, professionals, lawyers, prosecutors, judges and animal protections associations, so that the systematic defense of animal rights can be assured.

Furthermore we need to be aware that the issue is not only legal, but above all political and that legal scholars must supply the theoretical instruments to be used when circumstances are ready for abolition of animal slavery.

In fact, the social inefficacy of the principles and rules of article 225 of the Federal Constitution occurs because of the social obstacles that Lassalle called real factors of power, such as the animal exploitation industry and the psychological blocks put up by the speciesism ideology. It has soldier, until the moment, that the legal factors transform into real factors of power`.[61]

However, it will be always possible to demand of the Third Power the compatibility of the inferior norms with the constitutional rules, because the real factors of power have prompted significant changes, as

the current environmental crisis and the recent scientific discoveries have demonstrated.

The environmental crisis and factors such as global warming, water pollution by food processing industries, the increase in illnesses due to meat consumption, the number of people joining abolitionism and vegetarian movements has grown throughout the world. This is evidence that things are changing.

A sign of progress in Brazil has been the creation of the Animal Abolitionism Institute, during the 1st Brazilian and Latin American Vegetarian Congress at Latin America Memorial. It is an institute that joins the Brazilian Vegetarian Society in its efforts to abolish animal slavery. Furthermore, it will help those who do not have legal support nor the philosophical background to take a case to court to defend animals' interests.

The importance of this institute, the first in Brazil, is pragmatic and we will probably hear much talk of it in the future. It is important to say that it has among its founding members some of the biggest thinkers and exponents of this subject in Brazil, people such as Sônia Teresinha Felipe, Laerte Levai, Marly Winckler, Irvênia Prada, Edna Cardozo Dias, Luciano Rocha Santana among others.

At the same time the institute launched the Brazilian Animal Rights Review, a pioneering journal in Latin American. All of this was a very important step to abolish the last nonhuman slavery on Earth.

Even Peter Singer, who faithful to Jeremy's Bentham positivism refused to talk about animal rights, currently defends the extension of human rights to the great primates, argues that we already have enough evidence to affirm that we are of the same species.

I understand that the abolitionist movement is independent of the legislation under the Federal Constitution that grants corporate entity to the animals, because as well as occurs with condominiums, masses declared insolvent, inheritances in abeyance, unborn children, etc., nothing hinders that, having the Constitution recognized them the basic right of not beings treat to cruel form, nothing hinders that they are admitted in judgment in the condition of depersonalized legal citizens.

In these cases, they would be substituted by the Public Prosecution, or represented for the protective societies or its guards, which would be also authorized to use the available writs.

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[2] José do Patrocínio, A Notícia. 1905. Patrocínio was farmacist, journalist, writer and politician, and one of the most distinguished activist in the movement against the black slavery in Brazil.

[3] John M. Coetzze. The Lives of Animals. 1998, p. 70.

[4] Luís Anselmo da Fonseca. A escravidão, o clero e o abolicionismo. Recife, 1998.p.14. Luis Anselmo da Fonseca (born june 9, 1848 in Salvador, capital city of Bahia) He was professor of the first School of Medicine in Brazil, and in this work he talks about the indifference and omission of the church with the black slavery.

[5] Émile Durkheim. Elementary Forms of the Religious Life. 1912.

[6] MAYET, laurent. *Homo intellectus*. In Sciences et avenir, n.103. Paris, 1995.p.58

SCIENCES ET AVENIR. *Le projet grand singe*. Paris: Michel Friess, octobre, 1995. p. 8.

[7] Aristotles. De Anima. Lisboa, 2001.

[8] Irvênia Luiz de Santis Prada. A Alma dos Animais. Campos do Jordão, São Paulo: Mantiqueira,1997.p. 13. p.12 : " For some of these studious, called mechanist ones, the life would be a product of the functioning of the proper organism, that is, of its physical and chemical activities. For others, the vitalists, the life would be a different thing, to the part. In this case, they admit that the beings livings creature would have, beyond the physical body, the manifestation of the life, as being of another nature. In this case, the life would correspond to the expression *anima*, of the Latin." (our translations)

[9] Laurent Mayet. Homo intellectus. In *Sciences et avenir*, n.103. Paris, octubre. 1995.p.58.

[10] Nicola Abbagnano. Dicionário de Filosofia. São Paulo: Mestre Jou, 1982. p.373.

[11] Antonio Fisccheti and Laurent Mayet. *Le propre de l' animal*. In Sciences et avenir. Paris. Octubre.1995.p3

[12] Thomas G. Kelch Toward a non-property status for animals. 6. N.Y.U. ENVTL.L.J.531. 1998. .p.563: That humans and other animals share similar mental capacities was recognized by Darwin. He contended that the differences in respective mental capacities were a matter of degree, not kind. Darwin argued that some animals feel pleasure and pain, have most of the complex emotions that humans have, possess imagination and reason to some extent, and may even have memory and reflection on that memory. The mental processes of humans have evolved like all other properties of humans, and are thus just a continuation of the same sort of processes that exist in lower animals.

[13] Charles Darwin. The Origin of the Species. 1871. In the distant future I see open fields for far more important researches. Psychology will be based on a new foundation, that of the necessary acquirement of each mental power and capacity by gradation. Light will be thrown on the origin of man and his history.

[14] Denis Russo Burgierman. Chimpanzés são Humanos. In Superinteressante. July Edition 190. P.24. 2003. Other research points a lesser percentage, but that still thus they allow the same conclusion. According Peter Singer. Ethical Life. 2002 p.111: "During many years, the biologists, in its majority, had presumed that the human beings would have evolved as an isolated branch of the other great primates, who include the chimpanzees and gorilas. A time was about a sufficiently natural assumption, that, in many aspects, them if seems more between itself of what they are looked like we. More recent techniques of molecular biology in had allowed them to measure with sufficient exactness the degree of genetic difference that exists between different animals. Now, someone knows that we share 98.4% of our DNA with the chimpanzees."

[15] For Sigmund Freud. Civilization and its discontents. "If civilization requires such sacrifices, not only of sexuality but also of the aggressive tendencies in mankind, we can better understand why it should be so hard for men to feel happy in it. In actual fact primitive man was better off in this respect, for he knew nothing of any restrictions on his instincts. As a set-off against this, his prospects of enjoying his happiness for any length of time were very slight. Civilized man has exchanged some part of his chances of happiness for a measure of security. We will not forget, however, that in the primal family only the head of it enjoyed this instinctual freedom; the other members lived in slavish thraldom. The antithesis between a minority enjoying cultural advantages and a majority who are robbed of them was therefore most extreme in that primeval period of culture. With regard to the primitive human types living at the present time, careful investigation has revealed that their instinctual life is by no means to be envied on account of its freedom; it is subject to restrictions of a different kind but perhaps even more rigorous than is that of modern civilized man".

[16] Robert Wright. The Moral Animal - Why we are the way we are: The new science of evolutionary psychology, 1966.

[17] Tobias Barreto. Estudos de direito e política. Rio de Janeiro: Instituto Nacional do

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Livro, 1962. p. 13.

[18] José Cretella Jr. Curso de Direito Romano. Rio de Janeiro, 1999.p.151.

[19] Orlando Gomes. Introdução ao Direito Civil. Rio de Janeiro, 1983.p.182.

[20] Maria Sylvia Zanella di Prieto. Direito Administrativo. São Paulo, 1998. p. 432.

[21] José Cretella Jr. Curso de Direito Romano. Rio de Janeiro, 1999.p.165-166.

[22] Maria Helena Diniz. Código civil anotado. São Paulo, 1995.p.75.

[23] Orlando Gomes. Introdução ao Direito Civil. Rio de Janeiro, 1983. p.182. According to the old Private Code Article. 593. Things without owner and that can be appropriated *I – wildlife , while living in it 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 was loocking for it)*

[24] Paulo L. N. Lobo. Constitucionalização do Direito Civil. In Revista de Informação Legislativa. nº 141. Brasília, 1999.

[25] The Súmula 91 of the STJ made use: "It competes to Federal Justice processing and judging the crimes practiced against the fauna." In the sentence, the reporter cites Passos de Freitas, Vladimir and Passos de Freitas, Gilbert. Crimes against the nature, p.52. São Paulo: Ed. Reviewed Publishing company of the Courts, 2000: General rule, these crimes will be of the ability of state justice. However, they could be of the federal attribution when the crime will be practised in the 12 miles of the Brazilian territorial sea (Law 8,617, of 04.01.1993), in the pertaining lakes and rivers to the Union (international or that it divides, m states - CF, 20, inc.II) and in the units of conservation of the Union (to put example, National Park of the Iguaçu).

[26] Act 221/67, art. 3º. All animals and vegetables that are in dominial waters are of public domain.

[27] Vladimir Passos Freitas. Água: aspectos jurídicos e ambientais. Curitiba, 2000. p. 22.

[28] Paulo de Bessa Antunes. Direito Ambiental. Rio de Janeiro, 2004. p. 68. For FIORILLO, Celso Antonio Pacheco. The right of antenna in face of the Brazilian environmental law. São Paulo, 2000. P.117,: *... the* 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.

[29] Luis Paulo Sirvinskas. Manual de Direito Ambiental. São Paulo, 2002. p. 27.

[30] According to Antonio Herman V. Benjamin. Desapropriação, reserva florestal legal e áreas de preservação permanente. In *Temas de Direito Ambiental e Urbanístico*. São Paulo: Max Limonad.1998.p. 65: "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."

[31] M.S.Gianini La tutela degli interessi collettivi nei procedimenti amministrativi, in Le azioni a tutela di interessi collettivi, Padova, 1976.

[32] Andreas J. Krell. Direitos sociais e controle judicial no Brasil e na Alemanha: os (des) caminhos de um direito constitucional (comparado). Porto Alegre: Sergio Antonio Fabris, 2002. Ps. 82-83.

[33] Paulo L. N. Lobo Constitucionalização do Direito Civil. In Revista de Informação Legislativa. N º 141. Brasília: 1999. p.106.

[34] Ruy Carvalho Piva. Bens Ambientais. São Paulo, 2000. p. 120.

[35] Jorge Batista Pontes. Animais Silvestres: vida à venda. Brasília, 2003. P.175: "The traffic of wild life and its by-products are one of the biggest illegal businesses of the planet. Such crimes, according to sources not-officers, 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".

[36] Andreas J. Krell. Direitos sociais e o controle judicial no Brasil: descaminhos de um direito constitucional comparado. Porto Alegre. 2002.ps.31-32.

[37] Thomas G. Kelch Toward a non-property status for animals. 6. N.Y.U. ENVTL.L.J.531. 1998
[38] Id.
[39] See Suíça v. Director of biodiversity, environmental and hydrological resource department from state of Bahia.
[40] Rui Barbosa
[41] Sciences et avenir. Le projet grand singe. Paris,1995. P. 8.
[42] Peter Singer. Practical Ethics. Cambridge, 1979.
[43] Tom Regan Defending animal rights. Urbana and Chicago:University of Illinois Press, 2001.
[44] Steven Wise. Rattling the cage: toward legal rights for animals. Cambridge/Massachussett:Perseus Books, 2000.
[45] David Favre. Equitable self-ownership for animals. In Revista de Direito Ambiental, n° 29, Ano 8. São Paulo, 2003
[46] Id
[47] Id
[48] Eduardo Rabenhorst. Sujeito de direito: algumas considerações em torno do direito dos animais. Recife, v.2, n°3, p.119-130, jan-mar, 1997.
[49] Hervé Ratel. *La planète des singes.* In Sciences et anenir. N° 647, Paris, Janvier 20001.p.50. In this exactly article: p.54: "We are nowadays in a situation such that is necessary to reexamine famos it "proper of the man", that it was conceived from our ignorance in relation the primates, affirmed Pascal Picq." (Free Translation)
[50] John M. Coezze. *The Lives of Animals*. 2002. P. 10: "In truth, the reason doesn´t constitute nor the essence of the universe, nor the essence of God. In contrast, the reason, I think that it is, and of form doubtful, the essence of the human thought; or worse, the essence of only one trend of the human thought". (free translation)
[51] Nicola Abbagnano, Nicola. Dicionário de Filosofia. São Paulo, 1982. p.792.
[52] Sônia T Felipe. Por uma questão de princípios. Alcance e limites da ética de Peter Singer em defesa dos animais. Florianópolis, 2003. p. 27.
[53] Hans Kelsen. *Pure Law Theory*, 1934.
[54] Thomas G. Kelch, *Toward a non-property status for animals. 6. N.Y.U. ENVTL.L.J.531. 1998. p. 6.*
[55] Thomas Kuhn. The structure of scientific revolutions, 1962. According to Steven Wise, in: Rattling the cage. 2000, p.72: " 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 eventualy 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".
[56] José Cretella Jr. Curso de Direito Romano. Rio de Janeiro, 1999. p.87.
[57] Hans Kelsen. Pure Law Theory, 1934.
[58] Act 24.645/34 makes use: art. 3° The animals will be attended in judgment for the legal representatives of the Ministério Público, its substitutes and for the members of the protective societies of the animals.
[59] Mahatma Gandhi. *The Moral Basis of Vegetarianism*. Delhi/Bombay/Madras/Calcutta, India. 15th World Vegetarian Congress. 1957.
[60] Case Zaniol family v. Brazilian Institute of Environment , in 2005, the 4th Federal Court decide that Brigite, a monkey that was take by the Brazilian Institute of Environment must return to the Zaniol family that was grow up her for 19 years.
[61] Ferdinand Lassalle. *On constittional system.* Leipzig.1863.