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WHICH ANIMAL RIGHTS SHOULD BE RECOGNISED?

The paper considers the issue of the possibility to award the fundamental rights to sentient animals. Taking as a starting point contemporary animal protection laws, particularly the ones in which animals are treated as human's co beings, the latest scientific investigations, which prove irrefutably a sizeable genetic similarity between humans and animals, but also negligible differences in intelligence and capability to communicate between themselves, as well as the change of course in individual contemporary codifications towards disallowing treating animals as things, the author advocates argumentatively for recognising the fundamental rights of animals and thereby their legal personhood. According to the author's understanding, sentient animals should be awarded the fundamental rights corresponding to their interests, needs and species, such as: the right to life; the right to freedom; the right to not have pain, suffering and stress inflicted on them; the right to be cared after by humans; the right to acquire ownership rights; and the right to legal protection.

Key words: *Legal protection of animals. Animal behaviour. Animal fundamental rights.*

1. INTRODUCTORY NOTES

Contemporary law recognises people and legal persons as legal subjects. Presently, just as at the beginning of human civilisation, animals have no status of legal subjects.

However, in the last couple of decades, mostly thanks to the passing and application of the laws protecting the welfare of animals and particularly those progressive normative creations where an animal as a

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co-being of human beings is at the centre of attention,¹ then to the numerous researches that showed a great resemblance in the genetic material between human beings and animals (particularly chimpanzees, bonobo monkeys, and pigs),² animals' intelligence and their capacity for empathy and socialisation,³ as well as the change of the course of individual civil codifications in the direction where animals are not considered things,⁴ a legal dilemma occurs: are these natural creations legal subjects or objects? If they are subjects, then which rights are to be recognised to animals to protect them in the most efficient manner?

In this paper, we make an attempt to provide answers to the questions posed.

2. ANIMAL RIGHTS A BRIEF BACKGROUND

Fight for animal rights is not an achievement of the 21st century. As far back as 1964, at the request of the English Government, a Committee was formed, headed by Roger Brambell with a task to assess the real status and conditions in which domestic animals raised on farms live. The following year already, the mentioned Committee drew up and delivered a report (Report of the Technical Committee to Enquire into the Welfare of Animals kept under Intensive Livestock Husbandry Systems) to the Government, where the rights (freedoms) of an animal to "to turn round, groom itself, get up, lie down and stretch its limbs" are mentioned for the first time. A short while later, in 1979, the newly established Farm Animal Welfare Council, FAWC improved the concept of the five stated rights of those animals to: right to diet and water; right to life free from

¹ 1 See in particular: Austrian Law on the Protection of Animals ALPA, (Tier schutzgesetz, 2004, BGBl. I, Nr. 118/2004, including the amendments dated 4. 3. 2016, BGBl. I, Nr. 80/2013), para. 1 and the German Animal Welfare Act GAWA (Tier schutzgesetz, 1972, in its version published in 2006, BGBl. I S. 1206,1313, including the amendments dated 3. 12. 2015, BGBl. I S. 2178), para. 1.

² The data are retrieved from the following web page: http://www.b92.net/zivot/vesti.php?yyyy=2012&mm=06&dd=25&nav_id=621302, last visited 5 February 2016.

³ So, for instance, the results of the conducted research can be found with: V. Joveski, "Neobična životinjska inteligencija", 2013. Retrieved from http://znanost.geek.hr/clanak/neobicna_zivotinjska_inteligencija, last visited 22 February 2016; L. Medak, "Empatija kod životinja češća nego što se prije mislilo", 2016. Retrieved from http://znanost.geek.hr/clanak/empatija_kod_zivotinja_cesca_nego_sto_se_prije_mislilo/#ixzz40tTmSd6e, last visited 22 February 2016.

⁴ For instance, see the Austrian Civil Code (Allgemeines Bürgerliches Gesetzbuch, 1811, JGS Nr. 946/1811, including the amendments dated 30. 7. 2015, BGBl. I, Nr. 87/2015), para. 285a; the German Civil Code (Bürgerliches Gesetzbuch, 1896, BGB I S. 195, including the amendments dated 19. 2. 2016; L. I S. 254, 264), para. 90a and the Swiss Civil Code SCC (SR 210 Schweizerisches Zivilgesetzbuch, 1907, including the amendments 2009, AS 2009, 3577), para. 641a.

pain, injuries and diseases; right to appropriate shelter; right to express normal behaviour, including also social contacts with the animal's own kind, and the right to life free from fear and suffering.

Today the concept of five rights of animals on farms is widely accepted in practice for pets and animals kept in zoos.

The Universal Declaration of Animal Rights,⁵ as the Universal Declaration of Human Rights,⁶ acknowledges a broad range of the so-called natural rights to these beings, placing them practically in the position of legal subjects. Thus, this legal document proclaims: that the life of any animal deserves respect; that animals have the right to live and reproduce freely in their natural environment; the right to be cared for and protected by humans; the right to life free from pain, stress and suffering.⁷

The World Society for the Protection of Animals, the creator of the Universal Declaration on Animal Welfare,⁸ being aware of the fact that the use of the term "rights" of animals will not attract the support of states at international plane, opted for the term "welfare"⁹ of animals.

Although there are opinions¹⁰ in legal literature that essentially it is about the same rights that are directly (in the Universal Declaration of Animal Rights), or indirectly (in the Universal Declaration on Animal Welfare) acknowledged to animals, we cannot agree with it since the latter legal source puts the improvement of conditions for animals used by humans for various needs in the foreground, not the guaranteeing of the elementary rights of animals, such as the right to live and the right to freedom. The point where both Declarations coincide is the right of animals to be protected against maltreatment.¹¹

⁵ The text of the Universal Declaration of Animal Rights UDAR, can be found on the following web page: <http://www.declarationofar.org/>, last visited 6 March 2016.

⁶ The text of the Universal Declaration of Human Rights UDHR, can be found on the following web page: http://www.poverenik.rs/yu/pravni_okvir_pi/međunarodni_dokumenti_pi/146_univerzalna_deklaracija_o_ljudskim_pravima.html, last visited 1 March 2016.

⁷ See UDAR, art. 1 5.

⁸ The text of the Universal Declaration on Animal Welfare UDAW, can be found on the following web page: http://worldanimalprotection.ca/sites/default/files/ca_case_for_a_udaw_tcm22_8305.pdf, last visited 6 March 2016.

⁹ This term implies the provision of conditions, by man, in which an animal should satisfy its biological needs, free from fear, suffering, pain and stress. The biological, basic needs of animals are: need for food, water, adequate space for shelter, need for expressing normal patterns of behaviour and veterinary care. Such a determination of this term, say, is contained in the UDAW, art. 1.

¹⁰ See: M. Paunović, "Životinjska prava, Prilog proširenoj teoriji ljudskih prava", *Strani pravni život* 3/2005, 39.

¹¹ Cf. UDAW, art. 2, para. b and c, with UDAR, art. 3, para. 1.

Depending on whether the advocates for the protection of animals focus their attention to the prohibition of the use of animals, in all its aspects, or to the improvement of conditions in which animals live, for their further exploitation, animals are given higher or lower number of rights of various contents.

So, Francione believes that the basic right to be guaranteed to animals is the right not to be treated as objects of property rights.¹²

Paunović does not insist to a strict application of the previously mentioned law¹³ and he advocates for a bit wider range of animal rights, proposing the following to be acknowledged to animals: right to life; right to freedom, in accordance with the species they belong to; right to habitat adequate to animal species; right not to be harmed by man, and right to be cared for by man.¹⁴

Favre advocates for an improvement of conditions for animals and proposes the following rights to be acknowledged: Not to be put to prohibited uses; not to be harmed; to be cared for by man; to have living space; to be object of a “proper” ownership; to acquire property; to “enter into contracts”; to be legally protected.¹⁵ In this author’s opinion, this must not be a final list of rights to be acknowledged to animals anyhow.¹⁶

Visković approaches the rights of animals cautiously, pointing out that there are general and special rights. The former shall be valid for all animal species and all the individual ones within them, such as the case of the right of animals not to be inflicted pain, suffering and harm. The latter stated rights would only be intrinsic to specific species; for example, the right to life would only be “intended” to those animals that are not used as food for man. Some general rights, according to the understanding of this theoretician, would have various modalities, depending on the animal species they refer to, say, the right to freedom.¹⁷

¹² G. Francione, R. Garner, *The Animal Rights Debate, Abolition or Regulation?*, Columbia University Press, New York 2010, 1.

¹³ Paunović states several possible discrepancies from the right of animals not to be treated as objects. See in more detail: M. Paunović, 41.

¹⁴ *Ibid.*, 40 44.

¹⁵ D. Favre, “Living Property: A New Status for Animals within the Legal System”, *Marquette Law Review* 93/2010, 1062 1070.

¹⁶ *Ibid.*, 1062.

¹⁷ N. Visković, “Stradanja, zaštita i prava životinja (Prilog raspravi o ‘trećoj generaciji prava’)”, *Zbornik radova Pravnog fakulteta u Zagrebu* 39 (5 6)/1989, 820.

3. WHY SHOULD THE FUNDAMENTAL RIGHTS AND LEGAL SUBJECTIVITY BE RECOGNISED TO ANIMALS?

Although it may be closer to science fiction than to cruel reality that is mainly not benevolent to animals, particularly to those abandoned or used for satisfying various necessities of man, we dare to bring up a stand that the fundamental rights belonging to man should also be recognised to animals, and which are, as such, guaranteed by the Universal Declaration on Human Rights and the supreme legal acts (constitutions) of any state.¹⁸ Thereby, those rights must fit the interests of animals. The recognition of, say, the right to life or the right not to be inflicted pain, suffering or stress is something intrinsic to any animal species that feels. To the contrary, other animals, besides man, do not need, for example, electoral right, right to education or freedom of association.

Why is it necessary that the norm setters undertake this revolutionary step in legislative practice? In our opinion, this is the only way in which animals as our co-beings may enjoy a more complete legal protection, now as legal subjects. The mere fact that animals are legally guaranteed narrower or broader array of rights may be a specific type of barrier, first created in heads of people and then demonstrated in the real world to act contrary to what law guarantees and protects.¹⁹

There are more and more reasons for recognising the rights to animals. Here we shall implicate those that can be, with their volume and weight and each one individually taken, a sufficient justification for a different status of animals.

Respecting the basic postulate of Darwin's Theory Of Evolution, it entails that people are connected to other animal species through evolution,²⁰ that man is not God's creation, but they originate from animals and are at the same time the top evolutionary phase in the development of animals.²¹ Modern Zoology classifies human species in the superfamily Hominoidea – consisting of, besides people, great apes, too.²² Because of that evolutionary connectedness, the recognition of appropriate corps of the fundamental rights of animals follows as a logical conclusion.

¹⁸ See: The Constitution of the Republic of Serbia (*Official Gazette of the RS*, no. 98/2006), art.s 23 74.

¹⁹ Similar observation, see: N. Visković, 820.

²⁰ Darwin's Theory of Evolution, say, is processed in more details with: J. Stevanović, Z. Stanimirović, N. Đelić, *Zoologija*, Fakultet veterinarske medicine, Beograd 2013, 275.

²¹ On origins of man, see in detail: C. Darwin, *Čovekovo poreklo i spolno odabi ranje* (*The Descent of Man and Selection in Relation to Sex*), Matica srpska, Novi Sad 1977.

²² See: J. Stevanović, Z. Stanimirović, N. Đelić, 159.

If legal entities are recognised legal subjectivity,²³ which bear no much resemblance to physical persons, we do not see the reason why animals cannot enjoy legal protection as subjects with rights adequate to their needs, interest and species.

The long time ago confirmed scientific knowledge that numerous animals are, as people, sensitive beings, supports our claims, as they have, like people, in their organism: oxytocin, epinephrine, serotonin and testosterone, the substances that affect feelings and behaviour.²⁴ Hence, animals have interest not to suffer, not to be exposed to stress and pain.²⁵

Additionally, genetic similarity of animals to people would be confirmed with legal norms by acknowledging the fundamental rights of animals. Here, first of all, we bear in mind that genetic materials between chimpanzee and bonobo monkey is almost identical (98.7%), on one hand, and man, on the other hand.²⁶ In the last years, however, some scientific research have confirmed the similarity between genomes of pigs and man.²⁷

The similarity in regard to intelligence, the manner of communication and the complex rules of conduct in their community are in favour of the recognition of the elementary rights to animals. There are many examples from the animal world testifying in favour of the existence to intelligence with animals and, thereupon, the closeness to human species. Monkeys particularly stand out in that regard: chimpanzee, orangutans and bonobo monkey. Characteristically, they learn fast, have the best memory in animal world and possess a very developed sense for justice. Besides that, they can plan, set objectives themselves and fulfill them. Like people, these kinds of monkeys also live in communities, they can fight, but can also comfort each other. Maybe it seems a bit strange, because they are not primates; but crows also belong to the order of very intelligent animals. They have excellent memory and capability to recognise people. Besides, crows regularly use twigs, stones and well-shaped

²³ On legal entities as subjects in law, see in more detail: V. Vodinić, *Građansko pravo, Uvod u građansko pravo i opšti deo građanskog prava*, Pravni fakultet Univerziteta Union, Beograd 2014, 413-417.

²⁴ Emotional life of animals is particularly considered by: M. J. Moussaieff, S. McCarthy, *Kada slonovi plaču – Emocionalni život životinja (When Elephants Weep – The Emotional Lives of Animals)*, Algoritam, Zagreb 2004, 36.

²⁵ T. Regan, *Defending Animal Rights*, University of Illinois Press, United States of America 2001, 42; G. Francione, R. Garner, 7.

²⁶ The data are retrieved from the following web page: http://www.b92.net/zivot/vesti.php?yyyy=2012&mm=06&dd=25&nav_id=621302, last visited 5 February 2016.

²⁷ Some geneticists, such as for example prof. Eugene M. McCarthy, claim that man is actually a hybrid originating from a wild boar and a female chimpanzee. See the basic ideas of the conducted research titled: "Human Origins the Hybrid Hypothesis. Human Origins: Are we Hybrids?" Retrieved from: http://www.macroevolution.net/human_origins.html, last visited 5 February 2016.

wires to reach food. Even besides their genetic similarity to people, it is characteristic for pigs; they belong to the most intelligent species among domestic animals. They remember for a long period of time, they learn fast and respond when called by name, they are social and capable of expressing complex emotions.²⁸

Those, but also many other examples from animal world only confirm that differences among individual animals and people are only the matter of degree, not the species.²⁹ Intelligence, thus, is not something that separates people from other animals, but it is on the contrary their “brand”; therefore, the fundamental rights that belong to man should also be acknowledged to animals.

Omnipresent hunger in the world goes in favour of acknowledging the elementary rights to animals. Currently, over 864 million undernourished people are recorded within the international frameworks.³⁰ According to the assessment of competent experts,³¹ meat industry and their consumers are considered the main culprits for such a situation. Today 80% of the produced cereals in the developed world is used for raising animals on farms, and in the poor countries, instead to be used to feed population, they are mainly sold and transported to richer countries for livestock breeding.³² Thus, there is enough food in the world, but it is not rationally distributed.

By acknowledging the fundamental rights to animals, the health status of human population would significantly improve because staple food would be of plant origin. Numerous studies and multiyear researches showed that vegetarians, as well as vegans, in principle, are the healthier part of human population since they are less exposed to risks of cancer, cardiac diseases, diabetes, osteoporosis, Alzheimer’s disease, arthritis and meat poisoning because they normally have no obesity problem.³³ Besides, scholars confirmed in a number of research projects that vegetarians are more resistant, stronger, recover quicker after hard work comparing to meat eaters.³⁴

²⁸ The data are retrieved from the following web page: http://www.b92.net/zivot/vesti.php?yyyy=2012&mm=06&dd=25&nav_id=621302, last visited 5 February 2016. See also: V. Joveski.

²⁹ C. Darwin, 121 122.

³⁰ Food and Agriculture Organization of the United Nations, *Livestock’s long shadow environmental issues and options*, Rome 2006, 271. Retrieved from <http://www.fao.org/docrep/010/a0701e/a0701e00.htm>, last visited 29 February 2016.

³¹ For example: M. F. Lappé, *Diet for a Small Planet*, Ballantine Books, United States 1971.

³² Food and Agriculture Organization of the United Nations, 14 20.

³³ The data are retrieved from the following web page: <http://www.prijateljizivotinja.hr/index.hr.php?id=1734>, last visited 15 December 2015.

³⁴ The data are retrieved from the following web page: <http://www.prijateljizivotinja.hr/index.hr.php?id=227>, last visited 15 December 2015.

By acknowledging the fundamental rights to animals, the existing biosphere of the planet Earth would also be protected better. Grim statistics shows that livestock industry “participate” with 18 percent in greenhouse gas emissions, thus, much bigger share than the one of transportation (14%). Carbon dioxide, methane, nitrous oxide and ammonium produced by animals raised on farms are to be mainly blamed for this. Particularly dangerous, out of this range of detrimental gases is ammonium that is directly responsible for the occurrence of “acid rains”, which have detrimental effects on environment, particularly on forests, rivers, lakes, and soil quality.

Mass deforestation carried out for the sake of creating pasture and land for raising food for animals on farms surely contributes to the increased greenhouse gas emissions. Mass destruction of forests, for the needs of animal husbandry, further contributes to endangering and even destruction of numerous animal species, whereby it directly contributes to the decrease of biological diversity.³⁵ Not less significant contribution to ecological disaster is made by the waste that is product of animal husbandry, in total 13 billion tons per year.³⁶

More economic use of natural resources surely goes in favour of acknowledging the elementary rights to animals. It seems that data about spending averagely 990 litres of water for the production of one litre of milk is alarming enough, which is enormously more than spent for the production of cereals (for 1 kilo of wheat, 150 litres of water is spent) and out of the total consumption of water of human population, at the global level, 8% refers to animal husbandry.³⁷ Almost the same disbalance also exists in the use of fossil fuels. According to the calculation done, 11 times more energy is spent for the production of meat and other animal products than for the production of cereals. At the global level, 1/3 of the total consumption of fossil fuels is attributed to animal husbandry.³⁸

4. THE FUNDAMENTAL RIGHTS THAT SHOULD BE ACKNOWLEDGED TO ANIMALS

4.1. Animal right to life

The right to life as the highest value of man is guaranteed, as we have already said, by international and the highest legal acts of each state, too.

³⁵ Food and Agriculture Organization of the United Nations, 214 218.

³⁶ The data are retrieved from the following web page: http://www.prijateljizivotinja.hr/index.hr.php?id_1516, last visited 15 December 2015.

³⁷ Food and Agriculture Organization of the United Nations, 167 and 272.

³⁸ The data are retrieved from the following web page: http://www.prijateljizivotinja.hr/index.hr.php?id_1734, last visited 15 December 2015.

Does/should the same right belong to animals? At the current development degree of scientific thought and legislative practice, the answer may be undetermined at the very least. On one hand, when the UDHR guarantees this right, it does not limit itself to humans only, using the formulation “Everyone has the right to life...”³⁹ On the other hand, animals, even besides significant changes in treating them, are still closer to being treated as things, than to the recognition of their legal subjectivity.

Two streams, which exist in relation to the protection of animals, give a special seal to the complexity of the situation. Within the framework of the one, there are theoreticians (the so-called welfarists)⁴⁰ who deem animals are things; they do not propose abolition of their use, and they strongly support the reform and improvement of treating animals in the form of welfare.⁴¹ On the other side, there are abolitionists who advocate for the abolition of all aspects of exploitation of animals and recognition of their fundamental rights.^{42, 43} Between these diametrically opposed conceptions, Cochrane proposed the so-called free-range farms where animals are bred for milk, chicken for eggs, where animals would not be killed or exposed to suffering. Consequently, according to this author, such an aspect of the use of animals would not be, because they are not independent, opposed to their interest.⁴⁴

It is quite clear that on the basis of the presented starting ideas, the right to life of animals is not in the welfarists’ focus of attention, because in that case it would mean that people should not eat animals or use them for experiments, which are the two main aspects of using animals.

Advocates for the welfare of animals share common opinion that life of animals is morally less valued comparing to life of people, therefore, it is justified to use and kill them.⁴⁵

³⁹ See: UDHR, art. 3.

⁴⁰ From English term “animal welfare”.

⁴¹ In that direction, say, see: J. Bentham, *An Introduction to the Principles of Morals and Legislation*, Hafner Press, New York 1948; J. S. Mill, “Utilitarianism”, *Utilitarianism and Other Essays: J. S. Mill and Jeremy Bentham* (ed. A. Ryan), Penguin, Harmondsworth 1987; P. Singer, *Osobođenje životinja*, IBIS grafika, Zagreb 1998; R. Garner in: G. Francione, R. Garner.

⁴² This conception of legal protection of animals, for instance, is advocated for by: G. Francione, “Animals as Property”, *Animal Rights Law* 2/1996; T. Regan.

⁴³ Some authors, however, state their attitude that these two theoretical directions should not be so radically separated, which, finally, have protection of animals as their goal. So, Garner deems that standardisation of animal welfare can serve as a means for ending their exploitation or decreasing their use or suffering of animals. See: G. Francione, R. Garner, 9.

⁴⁴ A. Cochrane, “Ownership and Justice for Animals”, *Utilitas* 4/2009, 438.

⁴⁵ G. Francione, R. Garner, 125.

Welfarists justify the absence of interests of animals to go on living and be used as resources, since they cannot conceive of themselves existing in the future, as people can,⁴⁶ and are not aware of themselves, as well as the fact that emotional experiences of people far outweigh those of animals.⁴⁷ Besides, derecognition of this rights is justified by death not being harmful to animals, since they live in present and are not aware of what they are losing when their life is taken from them. Also, welfarists believe that killing animals, *per se*, is not a moral issue until they are treated and killed “in a humane way”.⁴⁸

On the contrary, abolitionists hold that animals, as sensitive beings, have an interest to live; that they are aware of their existence and affiliation to a specific species; that death is harm to them;⁴⁹ as well as that life offers them an opportunity to acquire precious experiences, which is obvious welfare for them.⁵⁰

According to abolitionists, the right to life of animals is directly linked to the rights of animals not to be treated as things and property of people.⁵¹ Until animals are treated as things, they will not be members of moral community, and the value of the interest of animals as things will be worth less than the interest of the owners of animals.⁵² Hence, the joint belief of theoreticians who fight for the fundamental rights of animals is that life of beings having feelings, as people, so animals too, have the same moral value, so it is equal for the purpose of not being treated like resources.⁵³

If biodiversity and life on the planet Earth are to be preserved, the right to life to animals that feel must be guaranteed, not only to the animals that are currently endangered.

The right to life must also be acknowledged to animals raised for feeding people or satisfying other people’s needs. Only exceptionally,

⁴⁶ P. Singer, *Practical Ethics*, Cambridge University Press, Cambridge 1993, 199.

⁴⁷ G. Francione, R. Garner, 15.

⁴⁸ J. Bentham, 310 311.

⁴⁹ G. Francione, R. Garner, 15.

⁵⁰ D. DeGrazia, *Prava životinja: kratak uvod*, TKD Šahinpašić, Sarajevo 2002, 59 64.

⁵¹ There are opinions in the theory that the abolition of possessions does not necessarily mean that animal will be recognised the right to life and other fundamental rights. It is also debatable whether the ownership right over animals a barrier to significant reforms on the welfare of animals, since that authorisation is a reflection and not the cause for the existence of the laws on the welfare of animals that are being applied. See: G. Francione, R. Garner, 130.

⁵² *Ibid.*, 22.

⁵³ *Ibid.*, 5.

killing animals for the sake of feeding people if no food of plant origin or other kind of food is available, may be permitted.

The right to life may only be, as well as with people, abolished to animals in strictly stipulated, limited cases: if an animal represents danger to life and health of people and other animals; if the animal is incurably ill, and therefore, it suffers great pain or suffers a lot, according to the assessment of competent experts in the area of veterinary science, and with the permission of owner, i.e. another person authorised for the protection of animals.⁵⁴

4.2. Animal right to freedom, according to the category it belongs to

Animal right to life gains in weight if related to the right to freedom. Animal right to freedom implies that the animal lives in its natural environment, where it can express and satisfy its physiological needs (to get up, lie down, move, mate, etc.).

In theory, there is no unique viewpoint on acknowledging this right to animals. Cochrane and Garner, say, deem that, since animals have no interest to be guaranteed the right to freedom (as well as the right to life), as they have no autonomy, this right should not be acknowledged to them.⁵⁵ Francione, for example, directly opposes this opinion, claiming that sentient animals have interest to be free (as well as to live) and to have the necessary level of autonomy, which enables them to live without being owned also.⁵⁶

The animal right to freedom must be viewed primarily through a prism of the category the animal belongs to. So, for wild animals (as for hunted animals, so for non-hunted ones also), freedom represents the condition for survival and a “shield” of possible suffering and stress, because of its loss or limitation. For tamed animals (as for economic animals, so for pets also), freedom has another form, because of multi-centennial dependence on man.⁵⁷ Full “liberation” (abandonment) of these categories of animals from man’s authority and their release in wilderness, without human care, regularly results in their fear, stress and suffering. Hence, it seems that the opinion expressed in literature that owning animals limits their freedom, but the lack of that freedom does not necessarily disturb their interests, which depends on the nature and type of those limitations.⁵⁸ So, owning wild animals does not essentially disturb their free-

⁵⁴ On other reasons, listed in the literature, why an animal may be deprived of life, see: M. Paunović, 41-42.

⁵⁵ A. Cochrane, 424-442; R. Garner in: G. Francione, R. Garner, 128.

⁵⁶ G. Francione in: *Ibid.*, 128.

⁵⁷ Classification of animals in the stated categories is taken from: N. Visković, 821-822.

⁵⁸ A. Cochrane, 436.

dom if they live in natural reserves, contrary to those kept in zoos. On the other hand, “being free in the wild might not be valuable to him simply for its own sake, but it might make his life more enjoyable”.⁵⁹ Keeping domestic animals in cages, boxes, etc. enables them regularly to function naturally, whereby their interest not to suffer is disturbed.⁶⁰ On the other hand, however, since domestic animals, like children, have no capacity frame, revise and pursue their own conceptions of the good, that lack of autonomy confirms that complete freedom is not their basic interest.⁶¹

Independently of whether we consider animal freedom is important to them or it is relevant only for the interest that animals have thereof, just as Cochrane believes that freedom is important for animals only when suffering is alleviated,⁶² this authorisation must be a basic element of the legal subjectivity of animals.

4.3. The right of animals not to be inflicted pain, suffering and harm

Where the advocates for the protection of animals agree is that a high number of animals belong to the group of sentient animals, which are capable of experiencing pain, suffering, fear and pleasure. This allegation is sufficiently illustrated by Bentham’s understanding,⁶³ that animals are not considered with whether people use or kill them for their own needs. Their concern is not to suffer, as the result of being used or killed by humans. Garner shares similar positions.⁶⁴

The right of animals not to be inflicted pain, suffering and harm is guaranteed by almost all laws protecting the welfare of animals.⁶⁵

What theoreticians has no unique viewpoint upon is that individual theoreticians advocate for the understanding that the majority of animals possess no mental capability that is expressed in an existence of the awareness of themselves,⁶⁶ whereas the others deem that animals are

⁵⁹ *Ibid.*

⁶⁰ Similar examples mentioned by: G. Francione, R. Garner, 128.

⁶¹ A. Cochrane, 436.

⁶² A. Cochrane, “Do animals have an interest in liberty?”, *Political Studies*, 3/2009, 660 679.

⁶³ J. Bentham, 310 311.

⁶⁴ R. Garner in: G. Francione, R. Garner, 128.

⁶⁵ See, for instance: ALPA, para. 5 para. 1, para. 2, point 1, 8, 9, 10, 11, and 13; GAWA, para. 1 and para. 2, para. 2; Swiss Law on Animal Welfare SLAW, (SR 455 Tierschutzgesetz, 2005, including the amendments dated 1. 5. 2014, art. 4, para. 2; Croatian Law on the Protection of Animals CLPA (*Official Gazette*, no. 135/2006, 37/2013, and 125/2013), art. 4, para. 1 and para. 2, point 1, 11, 12, 13 and 14 and Serbian Law on Animal Welfare SrLAW (*Official Gazette of the RS*, no. 41/2009), art. 6, para. 5 and art. 7, para. 1, point 4, 7, 12, 17 and 29.

⁶⁶ P. Singer, (1998), 16 17.

aware of their own existence; that they comprehend that they are beings of a specific species, and not of any other; that they certainly recognise that they suffer, and that they feel the need or desire for this experience to stop.⁶⁷ The opinion of welfarists that people have superior mental strength and, therefore, they experience pleasure and pain more intensively, follows as a “natural continuation” of those allegations.⁶⁸ Abolitionists categorically refuse such a thinking with the argumentation that if such a thing would be accepted as correct, that would mean that there is a difference in the degree of pleasure and pain between less intelligent and more intelligent people, as well as between more and less educated people.⁶⁹

Welfarists, since they consider the use of animals for satisfying various needs of humans acceptable, agree that they are treated for those purposes as much as possible humanely and no unnecessary pain is inflicted on them.⁷⁰

Abolitionists are against any use of animals by man, therefore, against any suffering generated as the product of such a use.⁷¹

If we read the texts of animal welfare laws thoroughly (independently of the state), and fathom their essence, it is obvious that they serve man and represent primarily a “legalisation and legitimisation of a bloody practice of abusing, torturing and killing animals, and not a legal speech on the welfare and protection of animals”.⁷² Hence, this right, which is indirectly proclaimed by the regulations on the protection of animals, is more an idea with no real cover.

4.4. The right of animals to be cared for by man

Survival of domestic as well as wild animals is directly linked to the duty of man to care for them.

The term “care for animals” implies an entire array of activities undertaken by man with an aim to alleviate life of animals and enable the satisfaction of their biological needs.

Man, according to this right, is obliged to provide to domestic animals appropriate food, adapted to their species, necessary quantity of water, adequate shelter that meets their basic needs: to be able to move, get up, communicate with other animals of own kind or other kind, to lie

⁶⁷ D. Griffin, *Animal Minds: Beyond Cognition to Consciousness*, University of Chicago Press, Chicago 2001, 274.

⁶⁸ G. Francione, R. Garner, 18.

⁶⁹ *Ibid.*, 18 19.

⁷⁰ J. Bentham, 310 311; *Ibid.*, 5 and 10.

⁷¹ T. Regan, 24; *Ibid.*, 24.

⁷² H. Jurić, “Veliki ciljevi i mali koraci”, *Zarez* 194 195/2006.

down, breathe clear air, have daylight and adequate temperature, needed care, in the event of illness or very old age, and veterinary aid.⁷³ In principle, the same goes for wild animals – pets, as well as for wild animals kept in zoos, animal shelter or wild animals breeding centre.⁷⁴

Care for wild animals in the wild primarily refers to conservation of their natural habitats and not undertaking any actions preventing them to perform their physiological functions (feeding, watering, reproduction); and when the circumstances require (e.g. due to major natural disasters), provision of needed food and care, too.⁷⁵

4.5. The right of animals to acquire property rights

In the series of challenging the rights to animals, a special place belongs to property rights. Argumentations mainly go in the direction that animals, since they have no interest to live, but only not to suffer, have no interest to acquire property, therefore, it should not be protected by law either.⁷⁶ Besides, it is claimed that animals do not recognise the concept of property law, therefore, they cannot make correct decisions on investment or use of money or other property.⁷⁷

That animals are not benevolently looked at as the holders of property rights in legislative practice either, is also testified by the solution contained in the Swiss Civil Code that stipulates that an animal cannot be specified as a testamentary heir, but if an animal receives a bequest by testamentary disposition, this is transformed through a legal conversion to an order to the heir or the legatee by which the animal must be cared for according to the rules on animal welfare.⁷⁸

The presented arguments in theory may equally be valid for children, even for many adults and persons capable for business (particularly the lateral explanation stated), but acquiring property rights in human population is not challenged in any way.⁷⁹ It seems that the presented stands are losing weight if one takes into consideration the animal potential to, thanks to their physical (e.g. participation in horse races) or intellectual efforts (e.g. creation of a work of art by elephants or chimpanzees),⁸⁰

⁷³ See: ALPA, para. 13 19; GAWA, para. 2, and para. 2a; SLAW, art. 6 and art. 7; CLPA, art. 36 42 and SrLAW, art. 6 and art. 20 21.

⁷⁴ See: ALPA, para 25 26 and SrLAW, art. 58 and 71.

⁷⁵ See: CLPA, art. 46 and art. 47 and Serbian Law on the Protection of Nature (*Official Gazette of the RS*, no. 36/2009, 88/2010, 91/2010, and 14/2016), art. 71 85.

⁷⁶ J. Bentham, 310 311.

⁷⁷ D. Favre, “Living Property: A New Status for Animals within the Legal System”, *Marquette Law Review* 93/2010, 1021 1071.

⁷⁸ See: SCC, Art. 482, para 4.

⁷⁹ Also: D. Favre, 1069.

⁸⁰ Examples stated with: *Ibid.*, 1068 1069.

enable their owner to acquire certain property (first of all, monetary awards). The fairness principle orders to take into consideration the efforts and engagement of the owner, but also the efforts of the animal, and to share the gain accordingly. Property acquired in that way would be used by the representatives of animals for the needs of the animals themselves exclusively.⁸¹

Also, we do not see the reason why an animal cannot be, by bequeath, specified for a heir, particularly if it, during its lifetime, was emotionally closer to the owner than the persons who he/she was in family or other legally recognised relations influential for constructing a legal inheritance order.⁸² The position of a heir in the legal trade is much safer than the position of the beneficiary of the order, which animals have today.

On the other hand, the limitation of the authorisation of animal's owner, in relation to the animal itself, by banning animals to be objects of specific rights (e.g. right of pledge, right of retention, object of enforcement,⁸³ or that, when dividing common acquired property, the animal falls to the participant of the division who can care for animals better⁸⁴), speaks in favour of a consistent respect of the principle of animal welfare.⁸⁵

4.6. The right of animals to legal protection

Within the framework of the proposed rights that would fall to animals, the right to legal protection would also make an inextricable whole that would enable animals to protect their vital interests with the intervention of state organs.

Since animals do not have legally relevant will and capacity for legal communication, their interests, primarily, should be protected by people who care for them. For those animals that no one cares for or does it sporadically, it is acceptable, as per the Austrian law,⁸⁶ to establish special and independent state organ – animal ombudsman for each county in the territory of the Republic of Serbia.

Animal ombudsman would be authorised to protect interests on animals that are not cared for, and on animals that are owned, unless the

⁸¹ *Ibid.*

⁸² Also M. Paunović, 21; F. Foster, "Should Pets Inherit?", *Florida Law Review* 4/2011, 844 852.

⁸³ See: Serbian Law on Enforcement and Security (*Official Gazette of the RS*, no. 106/2015), art. 218, para. 6.

⁸⁴ See: SCC, art. 651a.

⁸⁵ Also: V. Vodinelić, 426.

⁸⁶ Austrian LPA regulates the appointment of animal ombudsman for each province. See: para. 41, para. 1 therein.

owner instigated adequate legal mechanism for the protection of animals' interests. Animal ombudsman would have to, by the wording of law, have the position of a party to the procedure conducted for the protection of animals' interests.⁸⁷

5. CONCLUDING CONSIDERATIONS

Correlation of people with other animal species through evolution, irrefutable scientific evidence that numerous animal species (like people) are sensitive animals, genetically similar to people, that they have intelligence and capability to communicate are arguments that speaks in favour of acknowledging the elementary rights to animals. Additional incentive to the norm setter in guaranteeing basic rights to those natural creations may be the following: omnipresent hunger in the world, improvement of the healthcare status of human population and a more quality protection of the ecosystem on the planet Earth.

All the presented arguments exactly speak in favour of our assertion that animals should be acknowledged the basic rights that fit their interests, needs and species, and consequently, their legal subjectivity. In our opinion, the basic rights to be acknowledged to animals should include the following: right to life; right to freedom, adequate to the category they belong to; right not to be inflicted pain, suffering and harm; right to be cared for by man; right to acquire property rights and right to legal protection. Animals, thus, should be acknowledged the so-called limited or passive legal subjectivity, which excludes obligations, since they, like children or persons fully deprived of business competency, do not have such intellectual capacities to understand their essence, as well as they do not have an acquired sense on correct and incorrect behaviour.

Just as the acknowledgement of the fundamental rights to people by international documents and the supreme legal acts of each state does not represent any guarantees that they will be observed in practice, so the acknowledgement of the rights to animals will not represent any guarantee that animals will really protect their legal position. What is, however, certain (analogous to what happens in the area of human rights) is that acknowledgement of the rights to animals will create change in awareness of a large number of people, and consequently (sooner or later) changes in their behaviour in relation to animals, too.

⁸⁷ Analogous to what is contained in the ALPA, para. 41, para. 4.

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