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QUESTIONING ANIMALS' STATUS AS OBJECTS OF PROPERTY RIGHTS IN CROATIAN AND COMPARATIVE PROPERTY LAW***

Summary: *The proper coexistence of humans and other members of the living world is one of the essential preconditions for forming the rule of law. Through the influence of the biocentric concept, under the auspices of bioethical and animal-ethical thinking, the legal regulation of humans and animals develops within the framework of animal law as a relatively new branch of law. One of the central topics within the mentioned legal branch is the discussion of animals as objects of property (proprietary) rights and, potentially, as holders of certain legal rights. The above represents a significant challenge to property law and the theoretical foundations of civil law, given that the Croatian Ownership and Other Proprietary Rights Act does not explicitly mention the status of an animal, but the status of an animal as a thing derives from the Croatian property law doctrine. The paper analytically, historically and comparatively examines the current legal status of animals as objects of property rights. Historical insight refers to the development of the paradigmatic position of animals as things established in Roman private law. Analytical elaboration of current property law statutory provisions and reflection of property law doctrine are placed in the comparative legal context of the civil law provisions of those countries that have recognized animals as non-things or as sentient beings.*

Keywords: *animals, thing, property (rights), ownership, legal rights, legal personhood*

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1. INTRODUCTION

The proper coexistence of humans and other members of the living world is one of the essential preconditions for forming the rule of law. Animals, as one of the main factors of the natural and human environment, directly affect human life. In this regard, it is apparent that animals impact the entire economic, social, emotional, cultural and ecological functioning of humans and society in general. Through the influence of the biocentric concept, under the auspices of bioethical and animal-ethical thinking, which is largely present in domestic scientific writings as well, the legal regulation between humans and animals is developing within the framework of animal law, as a relatively new branch of law, but a branch within which numerous interesting legal discussions are held.[1]

One of the central topics within the mentioned legal branch is the discussion concerning animals as either objects of property (proprietary) rights or, potentially, as holders of legal (subjective) rights,[2] even entities with legal personhood.[3] The above represents a real challenge of property law and theoretical foundations of civil law, of which quite interesting jurisprudentially based debates are being held. Neither Ownership and other Proprietary Rights Act nor any other act regulating Croatian civil law explicitly mention animal status. In civil law doctrine, animals have been considered things since Roman law. However, today certain legislation, including those that greatly influence Croatian (e.g. German and Austrian), contain provisions in their civil codes that explicitly state that animals are not things.

The question arises as to whether the mentioned provisions have practical application and which are the exact legal consequences of those provisions. Consequently, the examination of this issue is transferred to the Croatian (civil) legal system to try to determine the position of Croatian property law doctrine on the said problem. Is there a need for legal regulation? Should similar provisions, as the ones in German and Austrian civil law, be implemented in Croatian civil law? What dilemmas and challenges lay in further attempts to answer these questions?

In this paper, the possibility of animals being considered objects of property rights (in the first place, the right of ownership), is mainly explored analytically. More precisely, concerning the aforementioned bioethical, animal-ethical and property law considerations about animals as non-things, the previous analysis refers to whether animals are still considered things or what is equated with things by law. In addition to the analytical method, the development of

1 See e.g. Gary L. Francione, *Animals, Property and the Law* (First published in 1995, Reprinted in 2007, Temple University Press, Philadelphia); Gary L. Francione and Anna Charlton, *Animals Rights: The Abolitionist Approach* (First ed, Exempla Press); David DeGrazia, *Taking Animals Seriously: Mental Life and Moral Status* (First ed, Cambridge University, 1996); Tom Regan, *Defending Animal Rights* (Reprint edition, University of Illinois Press, 2006); Hrvoje Jurić, 'Životinjska duša i životinjska prava, Pitanja i odgovori o filozofiji Hansa Jonasa' [2009] 6 (12), Arhe, 107–120; Dragan Jakovljević, 'Prava za životinje. K normativnom reguliranju suživota ljudi i životinja na pozadini paralelne primjene dvaju interpretativnih pristupa' [2013] 33 (1) Filozofska istraživanja, 167–182; Željko Kaluđerović, 'Bioetički pristupi životinjama' [2009] 18 (3–4) Socijalna ekologija, 311–322; Tomislav Nedić, 'Pravni sustav zaštite života, zdravlja i dobrobiti životinja – bioetički pristup u pravnom okviru' [2018] 27 (1) Socijalna ekologija, 71–94.

2 See e.g. Matthew Kramer, 'Do Animals and Dead People Have Legal Rights?' [2011] 14 (1) Canadian Journal of Law & Jurisprudence, 29–54.

3 See Visa A. J. Kurki and Tomasz Pietrzykowski (eds), *Legal Personhood: Animals, Artificial Intelligence and the Unborn* (Springer, Cham, Law and Philosophy Library, 119).

the mentioned problems is also approached historically and comparatively. First, the paradigmatic position of animals as things is considered in the historical context of Roman private law, where an attempt is made to see if the stated property law position is still present in Croatian law. After the analytical elaboration of the Croatian civil law doctrine and the statutory provisions of the Ownership and other Proprietary Rights Act,[4] comparatively Croatian property law provisions are tried to be placed in the context of the property (civil) law system of those countries that proposed animals as non-things or as sentient beings. Finally, a concluding consideration is imposed on the critical review of the current status of animals in Croatian property law and reaching for those solutions that categorically do not equate animals with (corporeal) things or the property itself.

2. ANIMALS IN ROMAN PRIVATE LAW

2.1 ROMAN PRIVATE LAW AND THE PARADIGMATIC POSITION OF ANIMALS AS LEGAL OBJECTS

The paradigmatic position of animals as things and property derives its foundation from Roman private law, which refers not only to statutory provisions but also to specific reflections of numerous prominent Roman jurists. Moreover, the status of animals as things has been present in civil law for almost two millennia, that is, until recently, when certain legislations (e.g., German and Austrian) contained provisions that explicitly state that animals are not considered things.

It is not unnoticed that animals played a big role in the daily life of the Romans. Their role in Rome was particularly pronounced because animals were not only used for food production, transportation or assistance in performing daily tasks. The use of animals was very present in different performances inside the Roman arenas.[5] Therefore, the mentioned animals had to be collected throughout the Empire, so in addition to ownership, the conditions of sale and transportation, as well as the issue of civil liability for damage caused by the animals, had to be established.[6] To establish the above, the issue of ownership of animals had to be preliminarily settled.

Although Roman jurists did not explicitly define what a thing or property would be,[7] many considerations clearly show how an animal was considered a legal object. Generally speaking, in Roman private law, a distinction was made between wild and domestic(ated) animals, es-

4 The Ownership and the Other Proprietary Rights Act (Official Gazette, No 91/1996, 68/1998, 137/1999, 22/2000, 73/2000, 129/2000, 114/2001, 79/2006, 141/2006, 146/2008, 38/2009, 153/2009, 143/2012, 152/2014, 81/2015, 94/2017) (HR).

5 In these circumstances, the welfare of the animals was not taken into account. Various data indicate that up to 150 leopards were allowed into the arenas, during the time of Augustus up to 3,500 animals were killed, and during the inauguration of the Colosseum by Titus, as many as 5,000 animals in one day. In: Reinhard Zimmermann, *The Law of Obligations, Roman Foundations of the Civilian Tradition* (First ed, Juta & Co, Ltd, Cape Town, Wetton, Johannesburg, 1900) 1105; George Jennison, *Animals for Show and Pleasure in Ancient Rome* (Manchester University Press, 1937) 42.

6 In this regard, the *actio de pauperie* was used in Rome for the aforementioned issues. More about the legal obligations aspects of the use of animals in Roman law in: Reinhard Zimmermann, note 5, 1096.

7 See Dragomir Stojčević, *Rimsko privatno pravo* (Fiftheenth ed, Savremena administracija, Belgrade, 1988) 137.

tablished by the Roman jurist Gaius.[8] Among the domestic animals, those animals on which things are loaded or harnessed had a particular position (Latin *animalia quae collo dorsove domantur*), because they were considered as *res mancipi*.[9] According to Ulpian (*Liber singularis regularum XIV, 1*), four-footed animals, such as oxen, horses, donkeys etc were considered as *res mancipi* (things that could only be legally transferred formally by *mancipatio)* and wild animals as *res nec mancipi* (things that could be transferred informally by traditio), for the reason that the Romans were much later acquainted with wild animals.[10]

2.2. THE TWELVE TABLES

In the first codification of Roman law, the status of an animal is nowhere mentioned, although it's nature could be interpreted concerning certain provisions of the Laws of the Twelve Tables. In the Law of Twelve Tables (XII, 1.) it is stated that there shall be introduced "levying of distress against a person who had bought an animal for sacrifice and was a defaulter by non-payment;"[11] Also, punishment is provided "against a person who was a defaulter by non-payment of fee for yoke-beast which anyone had hired out for the purpose of raising therefrom money to spend on a sacred banquet."[12] Although the legal position of animals is not explicitly mentioned, in these provisions relating to the punishment of invalid purchase and rental of animals for sacrificial purposes, it is possible to conclude that animals could not have a status that exceeds the contours of the concept of legal objects.

2.3. *THE DIGEST* OF JUSTINIAN

However, legal considerations about animals were primarily present in the second and much more significant codification of Roman private law, Justinian's *Corpus Iuris Civilis*, specifically in the *Digest* and *Institutes*. *Digest*, which consisted of substantial considerations of prominent Roman jurists, contained the most deliberations about animals' legal status that mainly was elaborated in *Book 41* concerning possession and ownership of property. The most significant are Gaius' considerations, where the most crucial distinction is made between domestic and wild animals, which is a very important condition in the ownership appropriation of an animal. The basic principle of Gaius is that everything that does not belong to anyone, based on natural reason and natural law, becomes the property of whoever acquires the

8 Compare Adolf Berger, *Encyclopedic Dictionary Of Roman Law* (First ed, The American Philosophical Society, Philadelphia, 1953) 362; Ante Romac, *Rječnik rimskog prava* (Sec ed, Informator, Zagreb, 1983) 30.

9 *Ibid.*

10 Ante Romac, Izvori rimskog prava (Informator, Zagreb, 1973) 199.

11 Thomas Ethelbert Page, Edward Capps and William Henry Denham Rouse (eds), *Remains of Old Latin, Lucilius, Twelve Tables* (Eric Herbert Warmington tr, The Loeb Classical Library No. 329, Harvard University Press, 1938) 507.

12 *Ibid.*

possession first (Sec. Gaius – D. 41, 1, 3).[13] Wild animals lived in natural freedom and were treated as *res nullius* (nobody's thing/property) so anyone could catch them and thus acquire ownership.

On the other hand, domesticated animals were considered to belong to the owner as long as they have a habit of returning home (*animus*[14] *revertendi*),[15] but as soon as they stop doing it, they become *res nullius*, so another person who catches them could acquire ownership of them (*Sec. Gaius* – D. 41, 1, 3, 2).[16] The next question is up to what point an animal can be considered wild. Gaius states that an animal is considered wild as long as a man can see it in his field of eye-vision (*Sec. Gaius* – D. 41, 1, 5).[17] Thus, Gaius considered bees (*Sec. Gaius* – D. 41, 1, 5, 2-4), stags, peacocks and pigeons (*Sec. Gaius* – D. 41, 1, 5, 5) to be wild animals, and chickens and geese (*Sec. Gaius* – D. 41, 1, 5, 6), for example, to be domestic.[18]

Pomponius (*Pomponius,* – D. 41, 3, 30, 2) and Ulpian (*Ulpianus* – D. 41, 1, 44) discuss the legal status of a flock of animals. Pomponius thus believes that, even though the flock is a particular unit, each animal has its title, so even if it gets lost in the flock of another owner, in that case, it does not belong to him by the usucaption rule.[19] Ulpian further elaborates on the rather interesting and controversial legal situation of wolves driving a hog out of a flock, which is then found wounded by another person, asking whether the wounded hog is then the property of the person who drove the wolves away and found it wounded.[20] Ulpianus states that "it is certainly preferable to say that what is seized by a wolf remains ours so long as it can be retrieved ",[21] so if another person appropriates it the owner can claim the animal back by *rei vindicatio*.[22]

13 "What presently belongs to no one becomes by natural reason the property of the first taker." Justinian, *The Digest of Justinian* (Alan Watson tr, Volume 4, University of Pennsylvania Press, Philadelphia) 1.

14 It is quite interesting to note how animals, which had the status of things/property, were considered to have *animus*, that is a term that denotes a legally relevant will or intention aimed at achieving certain legal effects, which was characteristic of human beings with full capacity of consciousness. More about *animus* in: Ante Romac, Rječnik rimskog prava (2nd ed, Informator, Zagreb, 1983) 30; Marko Petrak, *Traditio iuridica, Verba Iuris* (Vol. II, Novi informator, Zagreb, 2016) 34.

15 The above has also become a legal maxim: "*Animalia fera, si facta mansueta et ex consuetudine eunt et redeunt volant et revolanst, ut cervi, cygni, etc. eo usque nostra sunt et ita intelliguntur quamdiu habuerunt animum revertendi." See in*. Dragomir Stojčević and Ante Romac, *Dicta et Regulae Iuris*, (Sec ed, Savremena administracija, Belgrade, 1971) 40.

16 "Any of these things which we take, however, are regarded as ours for so long as they are governed by our control. But when they escape from our custody and return to their natural state of freedom, they cease to be ours and are again open to the fist taker... " A wounded animal is considered the property of the person who hunts it with the intention of appropriating it (*Sec. Gaius* – D. 41, 1, 5, 1). Justinian, note 13, 1.

17 "An animal is deemed to regain its natural state of liberty when it escapes our sight or, though still visible, is difficult of pursuit." Justinian, note 13, 1.

18 Justinian, note 13, 1–2.

19 "We must now look to the third case. A flock or herd is not usucapted in the same way as individual things nor yet as those which are constructed or put together. What, then, is the position? Although the essence of a flock is such that it subsists through the accretion of animals, there is no usucapion of the flock as such; just as there is possession of individual animals, so also is there usucapion of them. Hence, if a purchased beast be incorporated with a view to augmenting the flock, the ground of its possession is not changed so that if the rest of the flock belongs to me, I own this beast also. But the individual animals have their own grounds of acquisition, and so if any of the flock be stolen animals, they are still not usucapted." Justinian, note 13, 36.

20 *Ibid.* 11.

21 *Ibid.* 12.

22 "If, then, it does so remain, I am of opinion that even the action for theft will lie; for even if the farmer did not give chase with the intent to steal, though he may have had that intent, still, even assuming that he did not give chase with that intent, nevertheless, when he does not restore on request, he appears guilty of detaining and appropriating. Accordingly, I am of the view that he

2.4. *THE INSTITUTES* OF JUSTINIAN

Since it follows on from the *Digest*, animals are also mentioned in Justinian's *Institutes*. Justinian's natural law setting at the very beginning of the *Institutes* (*Iust. Inst. 1, 2*), which emanates from Ulpian's preliminary considerations in the *Digest*,[23] could be found quite intriguing. Namely, it is stated that "the law of nature is that which she has taught all animals"(Latin *animalia*, meaning all (animalistic) living beings); "a law not peculiar to the human race, but shared by all living creatures, whether denizens of the air, the dry land, or the sea."[24] According to mentioned setting, it could be concluded that all living beings are born equal and that animals must be granted the same moral status as human beings.[25] But that coherence is lost in the continuation of both *Digest* and *Institutes*, where the animal is also seen as a thing and property. In the rest of the text the *Institutes*, the legal basis and terms "by the natural law" or "by the natural law of ownership" is often mentioned, which authorizes human beings to dispose of animals (*Iust. Inst. 2, 1, 12* (also in *13-19*) and their fruits (*Iust. Inst. 2, 1, 37*) as their property.[26] All the considerations above from the *Digest* are also contained in the *Institutes*, so a person establishes ownership of an animal by occupation until the moment he keeps it in his possession, that is, until it disappears from his field of eye-vision.[27] Fruits were considered the property of the person who owned a particular animal.[28]

3. ANIMALS IN CROATIAN PROPERTY LAW

3.1 DEFINITION AND DETERMINATION OF A THING IN CROATIAN PROPERTY LAW

In (Croatian) civil law system, objects of civil law relations are considered as things, property, obligations and personality rights.[29] Even though there are certain criteria what is considered to be an object of private law relations,[30] Gavella states that the circle of potential

is liable to both the action for theft and that for production; and the pigs, when produced, can be reclaimed from him by a *vindicatio*." *Ibid.* 12.

23 *Ulpianus, Dig. 1, 1*: "*Jus naturale* is that which nature has taught to all animals; for it is not a law specific to mankind but is common to all animals-land animals, sea animals, and the birds as well... So we can see that the other animals, wild beasts included, are rightly understood to be acquainted with this law." *Ibid.* 1.

24 Justinian, *The Institutes of Justinian* (J. B. Moyle tr, 5th ed., Oxford, 1913) 4.

25 "... for this is a law by the knowledge of which we see even the lower animals are distinguished. " *The Institutes of Justinian,* note 24, 4; For example, it is also interesting that, on the basis of natural law, the unborn child of a female slave was not considered a fruit (*Iust. Inst. 2, 1, 37*), regardless of the fact that slaves also had the status of things in Roman law: "But the term does not include the offspring of a female slave, which consequently belongs to her master; for it seemed absurd to reckon human beings as fruits, when it is for their sake that all other fruits have been provided by nature." Justinian, note 24, 21.

26 *Ibid.* 19–21.

27 *Ibid.* 19.

28 *Ibid.* 21.

29 Petar Klarić, Martin Vedriš, *Građansko pravo* (Fourteenth ed, Narodne novine, Zagreb, 2014) 71.

30 According to Gavella, 1) if according to its characteristics it is appropriate to be in someone's private legal authority, 2) if it is not excluded from it by the norms of the legal order. In: Nikola Gavella, *Privatno pravo* (First ed, Narodne novine, Zagreb, 2019) 149.

objects of private law is expanding with new scientific discoveries and technological achievements, but is also narrowing with new regulations.[31] Therefore, it is impossible to enumerate everything that, considering its properties, could be the object of a private legal relationship.[32] Thus, in addition to the issue of animals as things, the thinghood of, for example, digital goods is increasingly being discussed.[33] Also, certain entities, such as artificial intelligence, are discussed in terms of the transition of their status from legal thinghood to legal personhood.[34]

A maiore, ad minus, objects of property rights are things and (incorporeal) entities that are equated with things by law. According to the Ownership and the Other Proprietary Rights Act "things within the meaning of this Act are bodily parts of nature, different from humans, which serve humans for use. Therefore, it is assumed that things are and everything else equated with them by law."[35] In contrast to the broader definition of a thing in the Austrian ABGB (*Allgemeines Bürgerliches Gesetzbuch*),[36] the Croatian property law legislative solution mainly relies upon the German BGB (*Bürgerliches Gesetzbuch*) legislative solution[37] and the so-called doctrine of the corporeality[38] of things.[39] However, on the trail of the Austrian legal solution, the objects of proprietary acts are not only things but also everything else that is equated with things by law, and in that situation, it is taken as legal fiction that these entities should be considered as things.[40] In this respect, Croatian legislation does not (entirely) follow the Austrian legal solution of dividing things into *res corporales* and *res incorporales*, because there are no incorporeal things, only certain incorporeal entities that are treated as things.[41]

31 *Ibid.*

32 *Ibid.*

33 See: Sjap van Erp, 'Ownership of Digital Assets' [2016] 5 (2) Journal of European Consumer and Market Law, 73; Sjap van Erp, 'Ownership of Digital Assets?' [2016], 5, (2) European Property Law Journal, 73–76; Michael Birnhack, Tal Morse, 'Digital Remains: Property or Privacy?' [2022] 30 (2) International Journal of Law & Information Technology, 280–301; Edina Harbinja, *Digital Death, Digital Assets and Post-Mortem privacy* (First ed, Edinburgh University Press, 2023) 16–51.

34 See e.g. Visa A.J. Kurki and Tomasz Pietrzykowski (eds), note 3; Karolina Ziemianin, 'Civil legal personality of artificial intelligence: Future or utopia?' [2021] 10 (2) Internet Policy Review, 1–22; Mik, Eliza, 'AI as a Legal Person?' in Jyh-An Lee, Reto Hilty, and Kung-Chung Liu (eds), *Artificial Intelligence and Intellectual Property* (Oxford, 2021, 419–440).

35 The Ownership and the Other Proprietary Rights Act, note 4, Art. 2, Par.2.

36 "Everything that is distinct from the person and serves for the use of people is called a thing in the legal sense." – *Allgemeines Bürgerliches Gesetzbuch* (ABGB), 1812, (A), Art. 285. <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001622> accessed 15 January 2023; The aforementioned definition stems from the Roman division between *res* and *personae* (*et actiones*; Gaius, -D., - 1,5,1; Gaius, *Inst*, 1, 2, 8;), but also division of things into *res corporales* and *res incorporales* (the Second Commentary of *The Institutes of Gaius* (Gaius, *Inst*, 2, 12), whereby only "those things can be possessed which are corporeal" (Paulus, - D. 41, 2, 3). Justinian, note 13, 15, 18; Gaius, The *Institutes of Gaius* (Francis De Zulueta tr, Volume 1, Oxford University Press, Oxford) 5, 67.

37 "Only corporeal objects are things as defined by law." – The German Civil Code, *Bürgerliches Gesetzbuch*, BGB, 1896, (D) Art. 90, <https://www.gesetze-im-internet.de/englisch_bgb/> accessed 16 January 2023.

38 Corporeality does not refer to the fact that the thing must have a certain form and that it can be physically felt with the sense of touch, in which case the Roman legal principle *res corporals eae sunt, quae sua natura tangi possunt* has been abandoned. Obren Stanković, *Stvar*, in *Enciklopedija imovinskog prava i prava udruženog rada* (Vol III, Novinsko-izdavačka ustanova, Službeni list SFRJ, Belgrade, 1978) 170–182.

39 Nikola Gavella, Tatjana Josipović, Igor Gliha, Vlado Belaj, Zlatan Stipković, *Stvarno pravo* (Sec ed, Vol.1, Narodne novine, Zagreb, 2007) 67; Marko Petrak, note 14, 285.

40 For example, ideal parts of things are treated as things, some legal rights can be objects of easement of usufruct, and also some can be objects of lien rights. Nikola Gavella, Tatjana Josipović, Igor Gliha, Vlado Belaj, Zlatan Stipković, note 39, 95.

41 So stated in: *ibid.* 67; however, in the Croatian civil law doctrine, a different point of view is taken than the above, i.e. that in Croatian property law, following the example of ABGB (Art. 285), there is also a division into *res corporales* and *res incorporales* which is established by the Ownership and the Other Proprietary Rights Act (Art.2, Par.2.). In: Petar Klarić, Martin Vedriš, note 29, 72.

For a thing to be considered as such, it must *a priori* have the capacity of mobility but also satisfy three essential criteria: that it is individually determined, that it is suitable for serving people[42] and that it is different from people.[43] In addition, the thing can be movable or immovable, and when determining whether the thing is movable or immovable, it is assumed that it is movable.[44]

3.2. ANIMALS AS OBJECTS OF PROPERTY RIGHTS

The paradigmatic position on animals as things and property has not changed throughout the history of (Croatian) property and civil law. Although Croatian sources of civil law throughout history did not explicitly mention the provision on the legal status of animals, the said status could undoubtedly be interpreted based on already existing provisions. Thus, on the one hand, in the (Austrian) *ABGB*, animals are mentioned within the warranty provisions, more precisely concerning material defects of things (§922–927). Basic Ownership Relations Act,[45] as the fundamental property act in the Socialist Republic of Croatia, did not mention animals at all but did not even define or determine what a thing would be. The definition and determination of what would be considered a thing was introduced by the Ownership and the Other Proprietary Rights Act.

Currently, there is no explicit provision about animal (property law) status in the Ownership and the Other Proprietary Rights Act. However, in Croatian property law, animals have still considered things and property and the aforementioned is conditioned not so much by the legal provisions themselves,[46] but mostly by the viewpoints of Croatian property law doctrine, but also case law practice.

Some countries have explicit provisions in their civil law legislation that animals are not things (e.g., Germany and Austria). However, in some countries, it is not explicitly stated that animals are not things, but they are considered sentient beings which should be treated as things only to the extent that this is compatible with their nature.[47] In most other countries (as well as in the Republic of Croatia) it is neither explicitly stated that animals are not things nor is it said that they are considered sentient beings. The Croatian property law legislation and doctrine are still based on the foundations established by Roman private law on the proprietary status of animals and the possibilities of acquiring the legal right of ownership over them.

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42 In addition to the fact that the thing must be materially determined and serve people for use, even earlier the civil law doctrine took the position that things must be in the control and power of people and thus, for example, wind, sunlight, free electricity cannot be considered things. In: Obren Stanković, note 38, 170–182.

43 Nikola Gavella, Tatjana Josipović, Igor Gliha, Vlado Belaj, Zlatan Stipković, note 39, 68.

44 The Ownership and the Other Proprietary Rights Act, note 4, Art. 2, Par. 7.

45 The Basic Ownership Relations Act, 6/1980, 36/1990, Official Gazette, No. 53/1991, 92/1994 (HR).

46 However, such qualification may indirectly result from certain other provisions of the Ownership and the Other Proprietary Rights Act in which animals are qualified as things. For example, in Art. 106 on access to someone else's real estate, it is stated that if "an animal, a swarm of bees, or a *thing* that was not connected to it so that it ceased to exist on its own land gets on someone else's real estate, the person whose *things* these are can, within an appropriate period, access someone else's land to take them back."

47 More about comparative regulation and solutions in the next subsection.

In our property law doctrine, animals are divided into domestic, wild and domesticated. Wild animals are those animals that live freely in nature[48] and are considered *res nullius*,[49] so the legal right of ownership of them is acquired through occupation.[50] However, in Croatian legislation, an important distinction is made between wild animals and game. Wild animals are under the jurisdiction of the Animal Protection Act and Nature Protection Act, while the Hunting Act[51] applies to game.[52] The provisions on *res nullius* also apply to the game, but under certain conditions i.e. the right to occupy the game and acquire ownership of the game is held by the holder of the right to hunt.[53] According to the Hunting Act, game is a good of interest to the Republic of Croatia and has special protection.[54]

Croatian case law, within the framework of tort law, considered whether animals should be regarded as dangerous things, taking the position that such categorization primarily refers to wild animals.[55] However, the Constitutional Court of the Republic of Croatia questioned the status of game as *res nullius*, arguing that game is a "natural event ", and that something that no one owns cannot be considered a "dangerous thing".[56] There is also the question of the status of those animals that are protected by legal regulations on nature protection. According to the Croatian property law doctrine, these animals could not be the subjects of property rights but would still be considered things,[57] as *res extra commercium*.[58]

48 According to the Nature Protection Act (Art.9, Par.1/4) "wild species are those species that did not arise under the influence of man as a result of artificial selection (selection and breeding for the purpose of obtaining breeds of domesticated animals and varieties of cultivated plants) or genetic modification of hereditary material using modern biotechnology techniques." The Nature Protection Act, Official Gazzette, No. 80/2013, 15/2018, 14/2019, 127/2019 (HR).

49 Accordning to the Ownership and the Other Proprietary Rights Act (Art.132, Par. 3), in doubt, it is considered that the thing does not belong to anyone; however, it is considered that a domesticated animal is nobody's if it is absent on its own for forty-two days, and that a swarm of bees whose owner has not been buzzing for two days is nobody's.

50 Nikola Gavella, Tatjana Josipović, Igor Gliha, Vlado Belaj, Zlatan Stipković, note 39, 509.

51 The Hunting Act, Official Gazette, No. 99/2018, 32/2019, 32/2020 (HR).

52 Special regulations also apply to fish. The Sea Fisheries Act (Official Gazzette, No. 62/2017, 130/2017, 14/2019) (HR) and the Freshwater Fisheries Act(Official Gazzette, No. 63/2019) (HR).

53 More in: Davorin Pichler, 'Novo stvarnopravno uređenje lovišta' [2019] 40 (1) Zbornik Pravnog fakulteta Sveučilišta u Rijeci, 481.–498.

54 The Hunting Act, note 51, Art. 3, Par.1.

55 The Supreme Court, Rev-1816/90 (5 December 1990) (HR) and The Supreme Court, Rev-2070/92 (16 December 1992) (HR).

56 "... the game is also considered in most EU member states as *'res nullius'*, that is, it has no owner while it is alive. Accordingly, we consider the classification of game as a dangerous thing doubtful at all, because not only is game a natural event, but it also has no owner while it is alive, and according to the Civil Obligations Act, the owner or the person who is entrusted to use it is responsible for damage caused by a dangerous thing"; The Constitutional Court of the Republic of Croatia, U-I/4249/2018 (18 June 2019) (HR); "Furthermore, it is logical that the ownership of live game is not defined, since the free-living game in the hunting grounds has no master, that is, it is a natural event. Unlike other natural resources such as forests or ores, the game moves continuously and in its movement also crosses state borders, then it is not possible to carry out an inventory of game." The Constitutional Court of the Republic of Croatia, *ibid.*

57 Therefore, in Croatian property law doctrine, it is stated that the fact of whether a thing is capable of being the subject of property rights should not be confused with the question of whether something is a thing or not. A thing is a thing even when it is not capable of being the subject of property rights. Nikola Gavella, Tatjana Josipović, Igor Gliha, Vlado Belaj, Zlatan Stipković, note 39, 66.

58 According to the Nature protection act (note 48, Art. 153, Par.2): "The following actions with strictly protected animals from nature in their natural range are prohibited:, all forms of intentional capture or killing, deliberate disturbance, especially during breeding, raising young, hibernation and migration, intentionally destroying or taking eggs and keeping them, even if they are empty, intentional destruction, damage or removal of their developmental forms, nests or brood, damaging or destroying their breeding or resting areas."

Domestic and domesticated animals can only be considered dangerous if they exhibit some hazardous properties.[59] Thus, the courts took the position that in tort law, the application of regulations on liability for compensation of damages based on the criteria of fault or the criterion of liability for a dangerous thing (domestic animal) will be considered, depending on the breed (species) of the domestic animal.[60]

Croatian property law doctrine assumes that domestic and domesticated animals are treated "more or less the same as not-living things."[61] It is interesting how the qualification mentioned above (the expression "more or less" is further elaborated by the fact that animals "are things in the sense of civil law, but that the Animal Protection Act specifically regulates the treatment of them (vertebrates)."[62] Additionally, Croatian property law doctrine refers precisely to the provisions of the Austrian and German civil legislation according to which animals are not considered things.[63] In this respect, the Croatian property law doctrine is unconsciously on the trail of what is increasingly discussed in legal theory, and that is the concept of things with (legal) rights.[64]

3.3 EMANATING CONSIDERATIONS AND QUESTIONS – ANIMALS IN COMPARATIVE (PROPERTY) LAW

Although from a strictly legal point of view, the definition of things contained in the Ownership and the Other Proprietary Rights Act could be subsumed under animals, certain bioethical and animal-ethical objections can be made to such thinking. Such a definition (from Article 2) does not necessarily require changes in itself, but specific changes regarding the mentioned issue in the complete legislation should certainly be considered. In comparative property law systems, the problem of animals as non-things is solved with precisely defined solutions. Civil law solutions on animal status can be viewed as three legislative solutions in other countries.

59 "The criterion for evaluating the degree of danger that an animal represents to the environment should be its usual behavior." The Supreme Court, Rev-845/83 (3 November 1983) (HR).

60 See The County Court in Varaždin, (Gž.198/03-2 10 February 2003) (HR).; Additionaly, the County Court in Varaždin (in another case) took an interesting stand on the issue of violation of personality rights. In the case where the defendant killed a cat owned by a juvenile plaintiff, who was present during the act, the court dismissed the juvenile plaintiff 's claim in the part concerning the non-material damage compensation for the loss of the pet with which he was extremely emotionally involved and for the shock and the stress of observing the scene. The Court took the position, commonly purported in Croatian legal theory and practice, that the animal is a thing and that "the law does not prescribe the possibility of compensation for non-material damage due to damage caused to someone's thing, which is the subject matter of the plaintiff's claim in this proceeding, but that such right is prescribed only in the case of death of persons, not the animals, even if they were pets". The County Court in Varaždin Gž-1113/12-2 (11 December 2013). More in: Davorin Pichler and Tomislav Nedić, 'The Most Important Civil Law Aspects of Relations Between Humans and Animals in Croatian Law', in: Saša Knežević and Maja Natić, (eds.), *Law and Multidisciplinarity*, (Collection of papers from the International Scientific Conference Held on 12–13 April 2019, Niš, Serbia, Faculty of Law, University of Niš, Niš, 2020) 71–81.

61 Nikola Gavella, Tatjana Josipović, Igor Gliha, Vlado Belaj, Zlatan Stipković, note 39, 510.

62 The Animal Protection Act, Official Gazette, No. 102/2017, 32/2019 (HR).

63 Nikola Gavella, Tatjana Josipović, Igor Gliha, Vlado Belaj, Zlatan Stipković, note 39, 510.

64 More on the mentioned issue in the next subchapter.

a) The first type of regulation refers to countries that explicitly state in their civil legislation that animals are not considered things. These countries are, for example, Austria, Germany, Switzerland, the Czech Republic, the Netherlands, Moldova and Québec (Canada).

However, in all those countries, the provisions relating to things apply to animals in compliance with the legal and regulatory provisions that protect them. German BGB (Art. 90a) states that "animals are not things. Special statutes protect them. They are governed by the provisions that apply to things, with the necessary modifications, except insofar as otherwise provided." Quite similarly, in the Austrian ABGB (Art. 285a) it is stated that "animals are not things; they are protected by special laws. The provisions applicable to things are only to be applied to animals insofar as there are no deviating regulations." Swiss Civil legislation[65] (Art. 641a) states that: "1- Animals are not objects, 2- Where no special provisions exist for animals, they are subject to the provisions governing objects." In the Dutch civil legislation[66] (Art. 3:2a) it is stated that "animals are not things. Provisions relating to things are applicable to animals, with due observance of the limitations, obligations and legal principles based on statutory rules and rules of unwritten law, as well as public order and public morality." The Civil Code of the Czech Republic[67] (Art. 494) also expresses that "a living animal has a special meaning and value as a living creature already gifted. A living animal is not a thing and the provisions on things apply to a live animal similarly only to the extent that it does not contradict its nature." Moldovan civil legislation[68] follows all of the above, so it is stated (Art. 287) that "(1) animals are not things. They are protected by special laws. (2) The provisions regarding animals shall apply, except in cases established by law." In the civil legislation of Québec,[69] it is explicitly stated (Art. 898.1) that animals are not things and that they are sentient beings: "Animals are not things. They are sentient beings and have biological needs. In addition to the provisions of special Acts which protect animals, the provisions of this Code and of any other Act concerning property nonetheless apply to animals."

b) The second type of regulation refers to countries where it is not explicitly stated that animals are not things, but they are considered sentient beings that should be treated as things, only to the extent compatible with their nature. These countries are, for example, Belgium, France, Spain, Colombia and the UK.

The Belgian Civil Code[70] (Article 3.38), states that "things, natural or artificial, corporeal or incorporeal, are distinguished from animals. Things and animals are different from people." In article 3.39, it is stated that "animals are sentient and have biological needs. The provisions

65 The Swiss Civil Code, SR/RS 210, *Schweizerisches Zivilgesetzbuch* (ZGB), (CH) <https://www.fedlex.admin.ch/ eli/ cc/24/233_245_233/en > acceseed 20 January 2023.

66 The Dutch Civil Code, 1992 (Burgerlijk Wetboek), (NL) <http://www.dutchcivillaw.com/civilcodegeneral.htm> acceseed 21 January 2023.

67 The Civil Code of the Czech Republic, Law 89/2012 (CZ) <https://is.muni.cz/el/1422/jaro2013/SOC 038/um/Civ il-Code_ EN.pdf> acceseed 21 January 2023.

68 The Civil Code of the Republic of Moldova, of June 6, 2002 No. 1107-XV, (MD) <https://cis-legislation.com/ doc ument. fwx?rgn=3244> acceseed 22 January 2023.

69 The Civil Code Of Québec, (CDN) <https://www.legisquebec.gouv.qc.ca/en/pdf/cs/CCQ-1991.pdf> acceseed 22 January 2023.

70 The Belgian Civil Code, 2007, (B) <http://www.ejustice.just.fgov.be/img_l/pdf/2020/02/04/2020A20347_F.pdf> acceseed 23 January 2023.

relating to tangible things apply to animals in compliance with the legal and regulatory provisions that protect them and public order." According to the French Civil Code[71] (Art. 515–14): "Animals are living beings gifted with sentience. Subject to the laws that protect the animals, they are subjected to the regime of goods." By amending the Civil Code from 2021,[72] Spain recognized the sensitivity status of animals (Art. 333 bis): "Animals are living beings endowed with sensitivity. Only the regime will be applicable of goods and of things to the extent that it is compatible with their nature and with the provisions for their protection." The Colombian Civil Code[73] recognizes the quality of sentient beings to animals in the provision (Art. 655) that "the treatment of animals is based on respect, solidarity, compassion, ethics, justice, care, prevention of suffering, eradication of captivity and abandonment, as well as any form of abuse, mistreatment, violence, and cruel treatment." Although it belongs to the common law legal circle and does not have a codification of civil law, the UK recognized animals as sentient beings by adopting the *Animal Welfare* (*Sentience*) *Act*[74] in 2022.

c) The third type of regulation refers to countries where it is neither explicitly stated that animals are not things nor that they are considered sentient beings. In these countries, legislation and case law show that animals are not treated as a common property.

Republic of Croatia, for example, belongs to the aforementioned group of countries, and the question could be asked whether it is necessary to change certain things in its civil legislation. However, taking into account all the mentioned provisions of the civil codes of other countries (especially the first, i.e. the mentioned a) category), the logical sequence dictates the question – if a certain entity is not a legal person, and is not considered as a thing (object), what is the legal status of the said entity?

In a situation where even the Croatian property law doctrine states that animals "are things in the sense of civil law, but that the Animal Protection Act specifically regulates the treatment of them (vertebrates)", the question arises whether things or, in this case, animals can have certain legal rights.[75] The thesis that animals can possess and exercise legal rights based on their interest protected within statutory regulations on animal protection is increasingly present in scientific debates.[76] The flexibility of the concept of legal personhood advocated by Kurki is based on elaborated claims about the separation of legal personhood and the entity's

71 The French Civil Code, (*Code Civil*) (F) <https://www.legifrance.gouv.fr/codes/textelc/LEGI TEXT000006070 721/> acceseed 23 January 2023.

72 The Spanish Civil Code, 2016, (E) <https://www.conceptosjuridicos.com/codigo-civil-articulo-333-bis/> acceseed 23 January 2023; Even the verdict of a Spanish court, which granted 'shared custody' over a dog to former partners who asked the judge to decide who the dog should go to, after the break, shows that the dog was not treated like any other commodity, See: Spain grants joint custody of dog in rare ruling, BBC News, <https://www.bbc.com/news/world-europe-59062132> acceseed 23 January 2023.

73 The Colombian Civil Code, (*Código civil*), Diario Oficial No. 49747 del 06 de enero de 2016. (CO) <https://www. alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=64468#2> acceseed 24 January 2023.

74 The Animal Welfare (Sentience) Act 2022, (UK) <https://www.legislation.gov.uk/ukpga/2022/22/enacted> acceseed 24 January 2023.

75 More about the same topic in: Visa A. J. Kurki, 'Animals, Slaves, and Corporations: Analyzing Legal Thinghood' [2017] 18 (5) German Law Journal, 1069–1090.

76 Visa A. J. Kurki, 'Why Things Can Hold Rights: Reconceptualizing the Legal Person', In: Visa A. J. Kurki and Tomasz Pietrzykowski (eds.), *Legal Personhood: Animals, Artificial Intelligence and the Unborn*, in note 3, 69–89.

ability to be the holder of rights (persons-as-right-holders view).[77] According to Kurki, "the sufficient condition for legal personality consists in being the holder of incidents of legal personality, such as fundamental rights, criminal law, legal standing, and so forth – even though there is no clear-cut threshold between persons and nonpersons."[78] The aforementioned concept makes it easier for lawyers to discuss animal rights topics without any need for justification or elaboration of animals as legal persons or legal subjects. Instead, Kurki suggests we should focus, in a particular case, on whether the animals "ought to hold the particular legal entitlements that are being claimed for them."[79] Therefore, legal personality could be extended to animals, but only passive incidents should apply.[80] In property law frames, Favre proposes a new, fourth (in addition to real property, personal property and intellectual property in the common law system) concept of property for animals.[81] The so-called *living property* includes the interests of animals (following the interest theory of legal rights) and in every (civil) legal relationship, the following criteria and rights should be taken into account in favor of the animal: "1. Not to be held for or put to prohibited uses.; 2. Not to be harmed; 3. To be cared for; 4. To have living space; 5. To be properly owned; 6. To own property; 7. To enter into contracts; 8. To file tort claims."[82]

However, it should be emphasized that the scientific debate about animals as holders of legal rights (or even potentially legal persons or legal subjects), or the concept of property and things with rights, is still ongoing. That is why, at the moment, Croatian legislation should not consider such a hybrid implementation of legal thinghood, but the primary consideration should be focused on their recognition as non-things, precisely as it is present in the already mentioned countries. Even in these legislations, it is evident that animals are treated as things in legal transactions, but with taking care of their well-being. Thus, in the comments of the civil codes in Austria and Germany, it is stated that the provisions relating to things still apply to animals in compliance with the legal and regulatory provisions that protect them.[83] The provision functions as a practical normative content because animals are legal objects, not legal subjects, that belong to property.[84] However, the great importance of the provisions above reflects the biocentric awareness of animals as non-other ("fellow-creatures"[85]) living beings,

77 "Legal nonpersons can hold rights, or – if one endorses the will theory – legal persons do not necessarily hold any rights." In*: Ibid.*

78 *Ibid.*

79 *Ibid.*

80 The aforementioned theory, as stated by Kurki, can be disputed and more difficult to apply within the Continental-European legal circle, precisely because the German term Rechtssubjekt is translated as "subject of rights", but it is also questionable whether the aforementioned equating personhood and rights concept is legally viable. In: *ibid.*

81 David Favre, Living Property: A New Status for Animals Within the Legal System [2010] 93 (3) Marquette Law Review, 1021–1070.

82 *Ibid.*; Favre points out that "the legal rights discussed above deal with the life conditions and the well-being of the animal. Legal rights 6, 7, and 8 acknowledge the new legal personality that comes with being the new category of property, living property." See also David Favre, 'Equitable self-ownership for animals' [2000] 50 (2) Duke Law Journal, 473–502

83 Burkhard Boemke and Bernhard Ulrici, *BGB Allgemeiner Teil* (Springer, Heidelberg, Dordrecht, London, New York, 2009) 437; Peter Bydlinski, *Bürgerliches Recht, Band I, Allgemeiner Teil* (4th ed, Springer, Wien, New York, 2007) 37; Helmut Koziol, Peter Bydlinski and Raimund Bollenberger (eds), *Kurzkommentar zum ABGB, Allgemeines bürgerliches Gesetzbuch, Ehegesetz, Konsumentenschutzgesetz, IPR-Gesetz, Rom I- und Rom II-VO* (Springer, Wien, New York, 2010) 268, 269; Peter Bydlinski, 'Das Tier, (k)eine Sache?' [1988] RdW Lexis Nexis 157.

84 *Ibid.*

85 "*Tiere sind ausweislich 'Mitgeschöpfe' der Menschen*". Burkhard Boemke and Bernhard Ulrici, *BGB Allgemeiner Teil*, in note 83, 437.

i.e., equal participants in the human environmental world. In any case, the mentioned provisions are the first step in further scientific discussions on the property law status of animals in general.

4. CONCLUSION – IS IT TIME TO RECONSIDER ANIMALS' STATUS AS OBJECTS OF PROPERTY RIGHTS IN CROATIAN PROPERTY LAW?

Animals have been considered things in law since Roman private law. The historical analysis presented in our work showed precisely how the stated position of the animal is still present in Croatian property law. Such status does not derive explicitly from the statutory provisions of property law, but mostly from understanding the Croatian property law doctrine. However, biocentric awareness based on thoughts within the framework of bioethics and animal ethics, led to the position of animals as non-other living beings and sentient beings that cannot be identified with things.

The comparative legal analysis showed precisely how the aforementioned biocentric awareness is visible in the statutory provisions of the civil codes of numerous states. In this regard, the regulation of animal status can be divided into three groups. The first consists of those countries whose civil codes expressly state that an animal is not a thing (e.g. Austria, Germany, Switzerland, Moldova, Quebec (Canada), the Czech Republic, the Netherlands). Other groups consist of states whose civil codes state that animals are sentient beings and that they should be treated following the preservation of their well-being (e.g., Spain, Colombia, France, Belgium, UK). Republic of Croatia belongs to the third group of countries where the Ownership and the Other Proprietary Rights Act neither states that an animal is a non-thing nor a sentient being.

Although in the first two groups of states, animals are still treated as things in legal transactions, a significant shift has been made in the biocentric awareness of animals as non-things in property law provisions. The first step for Croatian legislation would be the provision where animals are guaranteed a special status that protects their well-being, but does not reflect the position of an ordinary object in legal transactions. Further treatment of animals in civil law relations is still in the phase of numerous scientific discussions and, therefore, in the hands of scientific writings of numerous theorists in the field of property law, legal philosophy and animal ethics, specific arguments of which are also used in this paper. The provision on animals as non-things (as in Austrian or German legislation) in the Croatian Ownership and the Other Proprietary Rights Act would certainly not shake up the current treatment of animals as things in legal transactions. But it would significantly contribute to the *a priori* moral and legal position of animals as living beings and equal members of the human environment and nature.

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PROPITKIVANJE ŽIVOTINJSKOG STATUSA KAO OBJEKTA STVARNIH PRAVA U HRVATSKOM I KOMPARATIVNOM STVARNOM PRAVU

Sažetak

Pravilan suživot čovjeka i ostalih dionika živog svijeta jedan je od bitnih preduvjeta ozbiljenju ideje vladavine prava. Utjecajem biocentričkog koncepta pod okriljem bioetičkog i animalnoetičkog promišljanja, pravna regulacija čovjeka i životinje razvija se u okvirima prava životinja kao relativno nove pravne grane. Jedno od središnjih tema unutar navedene pravne grane predstavlja upravo rasprava o životinjama kao objektima stvarih prava, odnosno potencijalno i kao nositeljima određenih subjektivnih prava. Navedeno predstavlja velik izazov stvarnog prava i teorijskih osnova građanskog prava, s obzirom na to da hrvatski Zakon o vlasništvu i drugim stvarnim pravima izričito ne spominje status životinje, ali status životinje kao stvari proistječe iz hrvatske stvarnopravne doktrine. U radu se analitički, historijski i komparativno propituje trenutačni stvarnopravni status životinja kao objekata stvarnih prava. Historijski uvid odnosi se na razradbu paradigmatičke pozicije životinja kao stvari uspostavljene u rimskom privatnom pravu. Analitička razradba trenutačnih stvarnopravnih statutarnih odredbi i promišljanja stvarnopravne doktrine stavljaju se u komparativnopravni kontekst građanskopravnih odredbi onih država koje su prepoznale životinje kao ne-stvari ili kao osjećajna bića.

Ključne riječi: *životinje, stvar, vlasništvo, stvarna prava, imovina, subjektivna prava, pravna osobnost*

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