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SPECIAL APPEAL No. 1,797,175 - SP (ÿÿÿÿÿÿÿÿÿÿÿÿ-0)

REPORTER	: MINISTER OG FERNANDES
RECURRENT	: MARIA ANGELICA CALDAS ULIANA
LAWYERS	: ADELINA HEMMI DA SILVA - SP107502
	BARBARA APARECIDA DE JESUS - SP296261
	BRUNO HEMMI PEREIRA - SP337999
DEFENDANT	: FAZENDA DO ESTADO DE SÃO PAULO
ATTORNEY	: LAMAC JACKS AND OTHERS - SP057222

SUMMARY

ADMINISTRATIVE. ENVIRONMENTAL. SPECIAL RESOURCE. NOT CONFIGURED THE VIOLATION OF ART. 1.ÿÿÿÿCPC. NO OMISSION, OBSCURITY OR CONTRADICTION. JUDICIAL FINE FOR PROTECTORY EMBARGOS. INAPPLICABLE. INCIDENCE OF THE SUMMARY ÿÿÿSTJ. ADMINISTRATIVE FINE. RE-DISCUSSION OF PHATIC MATTERS. IMPOSSIBILITY. SUMMARY ÿÿSTJ. INVASION OF ADMINISTRATIVE MERIT. WILD ANIMAL TEMPORARY GUARD. VIOLATION OF THE ECOLOGICAL DIMENSION OF THE PRINCIPLE OF DIGNITY HUMAN

1. Originally, this is an ordinary action filed by the appellant with the aim of annulling the infraction notices issued by IBAMA and restoring custody of the seized wild animal.
2. There is no mention of omission in the judgment capable of revealing the infringement of art. 1022 of the CPC. The court a quo based its position on the alleged proof of good treatment and the alleged risk to the life of the wild animal. opposition to motions for clarification.

3. Pursuant to the Precedent ÿÿÿSTJ: "Declaration embargoes manifested with a clear purpose of pre-questioning do not have a delaying nature". The summary text harbors the appeal claim, since the opposing embargoes with the intention of pre-questioning are not postponed, therefore, the fine imposed is untenable.
4. In order to modify the conclusions of the Court of origin regarding the veterinary reports and other elements of conviction that led the Court a quo to recognize the situation of ill-treatment, it would be essential to reexamine the factual and evidentiary matter of the case, which is closed in a special appeal before the Precedent ÿÿSTJ: "The claim of simple re-examination of evidence does not give rise to a special appeal." precedents.
5. As far as the merits of fact are concerned, in relation to the guarding of wild animals, in spite of IBAMA's performance in adopting measures aimed at protecting Brazilian fauna, the principle of reasonableness must always be present in judicial decisions, since each case examined demands its own solution. Under these conditions, the reintegration of the bird to its natural habitat, as far as possible, can cause more harm than good, considering that the parrot in question, which already has the habits of a pet bird, has lived for about 23 years with the author. In addition, the constant uncertainty of the final destination of the animal clearly violates the dignity of the human person of the appellant, because, despite allowing a temporary coexistence, it imposes the end of the affective bond and the certainty of a separation that is not known when it may occur.
6. Special appeal partially provided.

JUDGMENT

Having seen, reported and discussed the case to which the aforementioned parties are parties, the Justices of the Second Panel of the Superior Court of Justice unanimously agree to partially grant the appeal, pursuant to the vote of Mr. Rapporteur Minister. Messrs. Ministers Mauro Campbell Marques, Assusete Magalhães, Francisco Falcão (President) and Herman Benjamin voted with Mr. Rapporteur Minister.

Brasilia, March 21, 2019 (Date of Judgment)

Minister Og Fernandes
Reporter

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REPORT

Mr. MINISTER OG FERNANDES: This is a special appeal filed by Maria Angélica Caldas Uliana, based on art. 105, III, items "a" and "c", of the Federal Constitution, against the judgment rendered by the Court of Justice of the State of São Paulo, as amended (e-STJ, pages 1032-1033):

ACTION FOR CANCELLATION OF FINES WITH REQUEST FOR WILD ANIMAL CUSTODY.
In the present case, two fines were imposed, one for having a specimen of wild fauna in captivity and the other for mistreatment.
Blue parrot. There was no correct indication, in AIA No. 294764, of the legal type that incriminates the conduct "to have in captivity".
Fine away. As for the mistreatment, it was attested by a veterinary report, and the fine was maintained accordingly. Provisional custody may be granted to the appellee, pursuant to IBAMA Resolution No. ÿÿÿÿÿÿÿÿ. It is impossible to allow the perpetuation of the unauthorized breeding of wild animals, under penalty of promoting the illicit trade in these animals. However, it is not reasonable to seize the bird by IBAMA until it proves the viability of the destination provided for by law and that it has the necessary apparatus to ensure the animal's well-being. PARTIAL GIVEN GRANT TO THE APPEAL.

The appellant party alleges, in addition to the praetorian agreement, that the disputed dispute violated the provisions of art. 1022 of the CPCÿÿÿÿÿ, as it failed to provide proof of good treatment and the patented risk to the life of the wild animal if the insurgent is removed. It requires the cognition of the violation of art. 1,026, § 2, of the CPC, in view of the alleged right of the party to obtain a judicial pronouncement. Furthermore, it considers that the embargoes had a pre-questioning character and there was no delaying intention.
Postulates the recognition of offense to the provision of art. 5 of the Law of Introduction to Brazilian Law (LINDB), as it did not authorize the permanence of the wild animal with the appellant, in view of the impossibility of promoting the illicit trade of these animals.
It argues, in short, that there is no legal provision that makes possible the "legalization" of keeping wild animals and the reinsertion of the animal in nature is unlikely. In this way, the judges a quo should have the sensitivity to adapt the command of the norm to the existing social needs at the time of the judgment.
It adds that the contested article vilified the provision of art. 8 of the CPCÿÿÿÿÿ. "This is because, when determining that the temporary custody has an expiration date, that is, when IBAMA proves that it is able to insert the animal in its habitat or deliver it to authorized breeders, the decision is generating expectation and anxiety that transcend the necessary emotional and physical stability to the appellant.
Not to mention the risk to life that Verdinho will suffer if he leaves the appellant" (e-STJ, page 221).
It asserts that the Court a quo also violated the aforementioned rule by maintaining the administrative sanction, given that the provision of services or the warning are sanctions that best suit the reality of the case.
In the end, it requests the granting of the appeal to overturn the judgment, determining the return of the case to the origin for a pronouncement on the omitted issues, as well as, in the case of an analysis of the merits of fact, that the disputed edge be reformed, giving total approval to the special appeal, granting custody and definitive possession of the parrot to the appellant and annulling the administrative and judicial fine.

Counterarguments presented to the e-STJ, pgs. 251-257.
Opinion of the Federal Public Ministry (e-STJ, pages 334-338) for the knowledge and provision of the special appeal. It's the report.

SPECIAL APPEAL No. 1,797,175 - SP (ÿÿÿÿÿÿÿÿÿÿÿÿ-0)

VOTE

Mr. MINISTER OG FERNANDES (Rapporteur): I record, initially, that the original judgment was published during the term of the CPCÿÿÿÿÿ, which is why the admissibility requirements of the noble appeal must follow the corresponding procedural system, under the terms of Administrative Statement no. . ÿÿSTJ, with the following content:

Appeals filed based on the CPCÿÿÿÿÿ (regarding decisions published on or after March 18, 2016) will be subject to the appeal admissibility requirements in the form of the new CPC.

I - Of the motions for clarification

The lack of express and direct mention of the provisions required by the party does not constitute a violation of the content of art. 1022 of the CPCÿÿÿÿÿ, since the judgment under appeal clearly substantiated the position regarding the alleged proof of good treatment and the

supposed risk to the life of the wild animal. In this way, the Court a quo granted the jurisdiction that was postulated to it. This is what can be deduced from the reading of the following excerpts from the ruling vote of the contested article (e-STJ, pages 157-158):

Although the plaintiff claims that she has always taken good care of the parrot and has attached a declaration from a veterinary doctor to that effect (pages 42 to 44), it is certain that this declaration is not capable of attesting to the situation of the parrot at the time of its apprehension, nor the hygiene conditions of its cage.[...] The measure is necessary to ensure the animal's well-being and does not allow the perpetuation of the irregular situation of unauthorized breeding of wild animals. It is true that irregular breeding must be repressed and fought, not least because it is this type of attitude that encourages the illicit trade in wild animals;

Therefore, there is no omission, obscurity or contradiction in the edge. The fact that the Court a quo decided the dispute in a manner contrary to that defended by the appellant, choosing grounds other than those proposed by it, does not constitute an omission or any other cause subject to examination by opposing a motion for clarification.

II - Judicial fine for delaying embargoes

In the present case, the appellant filed a motion for clarification with the aim of clarifying and pre-questioning the matter.
As can be seen from the following excerpt, the Court a quo considered the opposition to the embargoes to be delayed (e-STJ, page 188):

In this context, it is strictly necessary to recognize that the embargoes have a merely delaying nature. On these grounds, I then apply the fine of article 1026, § 2, of the CPCÿÿÿÿÿ, condemning the appellant to pay a fine of 2% of the updated value of the case.

Thus, knowing the embargoes, THEY ARE REJECTED, with the imposition of the fine of article 1026, § 2nd , of the Code of Procedure Civil.

It so happens that the repeated jurisprudence of this Superior Court establishes that the delaying character in the opposition of embargoes must be duly demonstrated in the sanctioning decision, with sound and specific reasoning, evidencing the delaying purpose.
In the species, the ratio decidendi of the contested decision changed the appellant's legal situation, however, there was no change in the factual situation - considering that the animal remained in the insurgent's provisional custody. Thus, it would be impossible to delay the factual result included in the sentence with the opposition of the clarifications.
Furthermore, under the terms of the Precedent ÿÿÿSTJ: "Declaration embargoes manifested with a clear purpose of pre-questioning do not have a delaying nature."
By the way:

CIVIL PROCEDURE. INSTRUMENT APPEAL. ABSENCE OF POWER OF ATTORNEY GRANTED TO THE ATTORNEY OF THE APPELLED PARTY. NO QUOTATION. UNNECESSITY. PRECEDENTS. IMPOSITION OF FINE FOR BAD-FAITH LITIGANCE IN REPEATED DECLARATION STATEMENT.

1. If the circumstance of the process points to the certainty of the absence of a power of attorney to the defendant's lawyer, as he has not yet been summoned, the requirement to attach the piece, which does not exist, or even a certificate from the notary that will attest to what has already been concluded for granted. precedents. 2. The application of the procedural fine provided for in art. 538, sole paragraph, of the CPC, if the motions for clarification are not clearly postponing, especially when intended to meet the requirement of pre-questioning, necessary for access to special instances, under the terms of Precedent 98 of this Court.

3. Special feature provided.
(REsp 1,258.ÿÿÿÿSP, Reporting Min. MAURO CAMPBELL MARQUES, SECOND PANEL, judged in ÿÿÿÿÿÿÿÿ, DJe ÿÿÿÿÿÿÿÿÿ)

In this way, the summary statement ÿÿÿSTJ supports the appeal, since the opposing embargoes with the intention of pre-questioning the opening of the exceptional path are not considered delaying, so that the fine imposed is untenable.

III – Fines for mistreatment of wild animals

The Court a quo asserts – based on the evidence in the case-file – that the conditions of the enclosure in which the wild animal was found were unsuitable for the bird's habitat. Check out the excerpt from the decision (e-STJ, page 157):

It appears that such conduct was really configured. This is because there is a veterinary report in the records attesting to the mistreatment (pages 89). Although the plaintiff claims that she has always taken good care of the parrot and has attached a declaration from a veterinary doctor to that effect (pages 42 to 44), it is certain that this declaration is not capable of attesting to the situation of the parrot at the time of its apprehension, nor the hygienic conditions of your cage.

It so happens that it is not appropriate, in this way, to inquire about the veterinary reports and other elements of conviction that led the Court a quo to recognize the situation of mistreatment in the face of the obstacle contained in the Precedent ÿÿSTJ.

at the point:

ADMINISTRATIVE. ENVIRONMENTAL FINE. REVIEW OF THE PENALTY AMOUNT. RE-DISCUSSION OF PHATIC MATTERS. IMPOSSIBILITY. SUMMARY ÿÿSTJ.

1. Originally, this is an ordinary action filed by Marcone da Conceição de Souza in order to obtain the annulment of the Notices of Infraction 720168-D, issued by Ibama.
2. The Court of First Instance dismissed the request made by the plaintiff to annul the administrative fine, considering the inexistence of exorbitant fine imposed in the amount close to the minimum BRL 880.00 (eight hundred and eighty reais) provided for in the governing legislation , as provided for in art. 126 of Decree 6.ÿÿÿÿÿÿÿÿ cÿc arts. 91 and 92 of the normative instruction ÿÿÿÿÿÿÿ - IBAMA.
3. The Court of origin partially granted the Plaintiff's Appeal to determine the reduction of the fine to the minimum amount, R$ 200.00 (two hundred reais), as provided for in art. 91 of Decree 6.ÿÿÿÿÿÿÿÿ, due to the following arguments: "Taking into account the appellant's financial situation, the fact that he is a person with low education, in addition to the hypothesis of being an autonomous professional, with no fixed income. .." (page 118, e-STJ).
4. In this context, the measurement of the quantum applied as a fine to the defendant, as well as its increase, as intended by IBAMA, gives rise, considering the specific circumstances of the case, to an incursion into the factual and evidentiary aspects of the case, which is an obstacle in Precedent 7 of the STJ.
5. Special Feature Not Known.
(REsp 1,773.ÿÿÿÿPB, Rel. Min. HERMAN BENJAMIN, SECOND CLASS, judged in ÿÿÿÿÿÿÿÿÿÿ, DJe ÿÿÿÿÿÿÿÿÿÿ)

It is worth noting the peculiarity of the present case. The court a quo granted the appellant the provisional custody of the wild animal, despite recognizing the unsanitary nature of the cage and sanctioning the insurgent as a result of this reality. In turn, the Court of origin evidenced the lack of essential care for the animal during the period in which the bird was in the possession of IBAMA. Check out the following excerpt (e-STJ, page 157):

With regard to the custody of the animal, it should continue, on a provisional basis, with the appellee, in accordance with Resolution No. ÿÿÿÿÿÿÿÿ, notably by the certificate on pages 67 who reported the lack of necessary care for the parrot while it was under the care of IBAMA. This provisional custody will cease when IBAMA proves, in the same administrative procedure that regularizes such custody, the viability of the destination of the animal in accordance with § 1 of art. 25, of Law no. 9. ÿÿÿÿÿÿ and demonstrate that the animal will be immediately taken to a suitable place, with daily care.

Indeed, it remains to analyze the assertiveness of the decision-maker in the face of the peculiar situation presented in the case file.

IV - From the ecological perspective of the principle of human dignity and the recognition of non-human animals as subjects of law

In a special appeal, the party considers that, by determining the removal of the wild animal from living with the appellant, the disputed edge violated the provision of arts. 8 of the Civil Procedure Codeÿÿÿÿÿ and 5 of the Introduction to Brazilian Law Law (LINDB), given that the coexistence dates back more than 23 years and that the judgment established a provisional guard that induces expectation and anxiety, destabilizing the appellant's emotional and physical It considers that the removal of wild animals after a long period of domestication also implies a violation of the rights of the animal itself.
At this point, it should be noted that the ecological approach of Brazilian legislation is justified due to the importance that quality, balance, and environmental safety have for the enjoyment, protection and promotion of fundamental rights (liberal, social, ecological) , as examples life, physical integrity, property, health, education, housing, food, which places environmental protection, in itself, as one of the edifying values of our Rule of Law constituted in art. 225 of the Basic Law of 1988.
The ecological bias comes as a consequence of the degradation perpetrated by human action in the natural environment, since the negative effects of such practices result, in most cases, in direct or even indirect violation of fundamental rights.
Based on several examples of environmental degradation, the ecological crisis motivated the mobilization of various sectors and social groups in defense of Nature, which led to the emergence of new values and practices within the community.
Regarding the issue, Sérgio Tavolaro (2001) points out, in his work entitled "The environmentalist movement and modernity: sociability, risk and morality", São Paulo, AnnablumeÿFapesp, that civil society started to be characterized as a third arena of power, in order to stand up to the State and the Market.
Thus, in the face of the ecological crisis, it is necessary to rethink the Kantian concept of dignity, in order to adapt it to contemporary existential confrontations, as well as in order to bring it closer to the new moral and cultural configurations driven by ecological values.

In this context, one should reflect on the Kantian, anthropocentric and individualist concept of human dignity, that is, to also affect non-human animals, as well as all forms of life in general, in the light of the biocentric legal-philosophical matrix (or ecocentric), capable of recognizing the web of life that permeates the relationship between human beings and nature.
Inserted in this thought is that the discussion is urgent, especially in relation to non-human animals, the concept of dignity must be reformulated, aiming at the recognition of an end in itself, that is, of an intrinsic value conferred on non-human sensitive beings. human beings, who would have recognized the moral status and share with the human being the same moral community,

as proposed by Arne Naess in a Deep Ecology (Naess, Arne. Ecology, community and lifestyle: outline of na ecosophy Translated and edited by David Rothenberg. Cambridge University Press. 1989).

In other words, one can also speak of limitations on the fundamental rights of human beings based on the recognition of non-human interests.

It is observed that these rights are constitutionally legitimized, as is easily identified in the protection granted to fauna and flora through the constitutional prohibition of "practices that jeopardize the ecological function, cause the extinction of species or subject animals to cruelty (art. 225, § 1, VII, of the Federal Constitution).

Faced with these concerns, it is necessary to rethink the individualistic and anthropocentric Kantian conception of dignity and advance towards an ecological understanding of the dignity of the person and of life in general, considering the premise that the modern philosophical matrix for the conception of dignity (of the human person) is essentially rooted in Kantian thought.

Kant's central thought puts forward the idea that the human being cannot be seen as a simple means (object) for the satisfaction of any other's will, but must always be taken as an end in itself (subject) in any relationship, in the face of of the State or towards other individuals.

However, it is necessary that we can confront ourselves with new ecological values that feed contemporary social relations and that demand a new ethical conception, it is essential to establish a rediscovery of the true ethics of respect for life.

Thus, any ban on the practice of "reification" should not, in principle, be limited to human life only, but rather have its spectrum expanded to include other forms of life as well. It is always necessary to uphold the dignity of life itself in general, even more so at a time when the recognition of the protection of the environment is elevated to the level of fundamental ethical and legal value. This circumstance indicates that it is no longer just human life at stake, but the preservation of all natural resources, including all forms of life on the planet, although it can be argued that such protection of life in general is to make life viable. and, above all, human life with dignity.

The very idea of non-cruel treatment of animals must seek its foundation no longer in human dignity or human compassion, but in the very dignity inherent in the existence of non-human animals. It takes care of a moral duty.

As an example, see the Swiss Constitution (1992), which recognizes the "dignity of the creature" (art. 24), which must be respected especially in the context of legislation on genetic engineering. (Saladin, Peter. Die Wurder der Kreatur. Apud. Bosselmann, Klaus. Human Rights and the environment: the search for common ground. Journal of Environmental Law, no. 23. São Paulo: Ed. RT, Jul. set 2001.p.41.).

Constitutionalism in Switzerland supports a new profile for the treatment of the environmental issue based on the "principle of human respect for the non-human" (interspecies justice).

Translating a perception of ecological justice, with a focus on respect and duties that humans must observe when interacting with the natural environment and non-human forms of life.

The German fundamental law has express references – “natural bases of life” instead of “human life” (art. 20 of the 1994 constitutional reform) –, a step beyond pure anthropocentrism. See transcript of article 20:

Within the framework of the constitutional order, the State protects the natural bases of life and animals, also taking into account its responsibility towards future generations, through the legislative power, and according to law and law, through the executive and judiciary.

Latin American countries have been pioneers in a type of constitutionalism that values "ecological awareness, uniting the ancient Panchamama concept of the Andean peoples, which represents the Earth as the holder of rights, as it is the maximum expression of life and of all beings (human or not) and contemporary Andean theory, which considers Gaia (Earth) as a living being that regulates itself through the harmonious coexistence of its beings (Boff, Leonardo. ecological constitutionalism in Latin America 2003. Available at http:ÿÿ cartamaior.com .br. Access in ÿÿÿÿÿÿÿÿÿ).

Two important milestones of this innovation in the way of thinking about environmental protection are the current Constitutions of Ecuador and Bolivi

In the Federal Constitution of Ecuador (2008) this new trend is already observed in its preamble:

Celebrating a la naturaleza, la Pacha Mama, de la que somos parte y que es vital para nuestra existencia [...], appealing to the wisdom of all the cultures that enrich us as a society, as heirs of the social struggles of liberation in the face of all forms of domination and colonialism, and with a deep commitment to the present and the future, we decided to build a new form of civic coexistence, in diversity and harmony with nature, to achieve good living, sumak kawsay [...]. (Ecuador.

Constitution of the Republic of Ecuador.2008. available at: http:ÿÿwww.stf.jus.brÿrepositorio)

In the Political Constitution of the Republican State of Bolivia (2009), the same pattern is observed, since in its preamble the concern for nature as a whole is also expressed:

Fulfilling the mandate of our pueblos, with the fortress of our Pachamamma and thanks to Dios, we refound Bolivia"...
(Bolivia. Political Constitution of the Plurinational State of Bolivia . 2009. Available at . http:ÿÿ www; harmonywithnatureun.org.)

This view of nature as an expression of life in its entirety makes it possible for Constitutional Law and other areas of law to recognize the environment and non-human animals as beings of their own worth, deserving, therefore, respect and care, so that the legal system to grant them the ownership of rights and dignity.

In fact, what we must rethink and discuss is that these non-human living beings are no longer just means for the human species to guarantee its own dignity and survival.

In line with this understanding, Morato Leite, José Rubens; Ayala, Patryck de Araujo. Environmental Damage: from the individual to the off-patrimonial collective (theory and practice) 3rd Edition. Sao Paulo: Ed. RT, 2010, p. 77-78.), based on the Cunhal Sendin doctrine, works with the concept of broad or moderate anthropocentrism, aiming to protect the environment regardless of its direct utility or benefits to man when considering the preservation of the functional capacity of natural heritage with ethical ideals of collaboration and human-nature interaction (SARLET, Ingo Wolfgang, Environmental Constitutional Law, ED. Revista dos Tribunais, 5th edition, 103., 2017).

It is worth noting, in the context of ethical declarations, the Universal Declaration of Animal Rights (1978). The featured document was intended to compile in its text measures to protect the rights of non-human animals, in order to reach the global scope, with Brazil among its signatories.

The aforementioned declaration postulates among its ideals that non-human animals are creatures worthy of the right to life and protection. The human being must promote measures that avoid mistreatment, the extinction of species, the lack of alternative methods to laboratory texts and the use of animals as entertainment by man, and especially measures that use education to encourage respect for others. living beings for the next generations.

At the national level, Brazil has some laws on the protection of animal rights. In this sense, there are the following normative diplomas: a) Environmental Crimes Law (Law n. 9.ÿÿÿÿÿÿÿÿ), which criminalizes acts of cruelty to animals; b) Law no. 7.ÿÿÿÿÿÿÿÿ, which governs the functioning of zoos; 3) Law no. 7.ÿÿÿÿÿÿÿÿ, on the protection of marine cetaceans; 4) Law no. 11.ÿÿÿÿÿÿÿÿ, which regulates scientific activities involving animals; 5) Law. no. 10.ÿÿÿÿÿÿÿÿ, which deals with hygiene and care standards for animals in rodeos and the like, in addition to a series of state and municipal laws on rules for the treatment and protection of non-human animals.

However, despite the existence of a significant list of legislation aimed at the protection and care of animals, it is important to remember that, even with the intention of protecting other species, most of these laws still carry an anthropocentric and not biocentric heritage. .

In this sense, despite the aforementioned complex of laws aimed at the protection of other living beings, we are still in the process of building an ecological awareness.

Strictly speaking, what has been happening is the condemnation of certain intolerable acts of violence so that human beings themselves see their moral standards met. Non-human animals are spared the cruelty considered harmful to the preservation of man's fundamental goods, and therefore, this prevents them from being caged, exhibited, hunted, killed, subjected to experiments and used as a means of entertainment (FRANCIONE, Gary L. Reflections). on Animals, Property, and Law and, THUNDER, Rain Without. Law and Contemporary problems. v. 70, no. 1. 2007).

In the provisions of the Civil Code of 2002, there is a clear division between the legal regime given to people and that stipulated to non-human animals, which are objectified as goods.

According to Caio Mário da Silva Pereira, for the current Civil Code "the legal regime of people are the subjects of law who have legal personality, that is, the human being. based on the fundamental rights of the personality, it does not do so with other living beings" (Pereira, Caio Maio da Silva. Civil Law Institutions, 25th edition, Rio de Janeiro. Ed. Forense, 2012, pg. 181).

To Carlos Roberto Goncalves:

At the same time that there are assets, not susceptible to appropriation, such,as life, honor, and dignity, there are legal assets, which are part of the regime of real rights, subject to the domain and possession of man for economic and social purposes (Gonçalves , Carlos Roberto. Brazilian Civil Law, p.12. vl. 5, Law of Things. 7th Ed. São Paulo, Ed. Saraiva., 2012)

Furthermore, for Civil Law, everything that objectively exists, except the human being, falls into the category of things, which is the genus of which the concept of goods is a species.

Denoting this dichotomy of treatment between subjects and objects of law, the non-human animal is still treated in our Civil Code as a "thing", having its definition given by its art. 82, as well as mobile category.

Let's look at some articles of the Civil Code: in art. 445, § 2, in the provisions on redhibitory defects, mentions the aforementioned device the sale of "defective animals", as if these were objects with hidden defects; the arts 936, 1,297 and 1,313 reinforce the idea of the human being as the owner of the animal, and not as a guardian or tutor; already the arts. 1442, V, 1444, 1446 and 1447, when ruling on agricultural pledge, leave the clear understanding that animals, in addition to being among the goods susceptible to pledge, would still be fungible goods, since they can be replaced by others of the same quality in case of death (LOURENÇO, Daniel Braga. Animal Rights Foundations and New Perspectives. Porto Alegre: Sergio Antonio Fabris Editor, 1.ed., 2008, pg. 56-57).

After analyzing these provisions, the objectification suffered by non-human animals becomes evident, even making evident an incongruity between the legal text of civilist content and that expressed in the current Magna Carta. The Federal Constitution places other living beings as fundamental goods to be protected, while the Brazilian Civil Code still has provisions that associate other animals with objects of commercial value.

This objectification ends up making it difficult to change the paradigm in relation to non-human beings, so that they go from being inferior creatures to having fundamental rights of protection.

Within the national legal system, there are some cases of habeas corpus filed to try to guarantee the freedom of great primates. At the Bahia Court of Justice, HC 833085-ÿÿÿÿÿÿ was filed, judged on September 28, 2005, which intended to grant freedom to a chimpanzee. The measure wanted freedom for the monkey named Switzerland, which was in the Salvador Zoo, on the grounds that the animal would be conditioned alone in a cage with problems of infiltration and infrastructure, which caused its suffering and loneliness.

In the request for an injunction, it was claimed that the chimpanzee be transferred to the Santuário dos Grandes Primatas do GAP, city of Sorocaba, in São Paulo, the request for an injunction was rejected, however the court was favorable to the claim, eventually granting th

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required freedom. However, before the magistrate could execute his assent, Switzerland was found dead in her cage.
In the wake of this decision, the Court of Justice of Rio de Janeiro, in HC 002637-70.2010.8.19.0000-TJ-RJ, analyzed the possibility of granting freedom to the chimpanzee Jimmy, caged in the Niterói Zoo, in Rio de Janeiro. The demand valued, in an injunction, for the primate's freedom, on the grounds that it would be confined in a small cage, but structured for its needs and that the animal would be suffering for the long time exposed to loneliness, since the members of their species need the company of their peers to develop in a healthy and dignified way.
The process was extinguished without a decision on the merits, it was decided that it was unfounded, on the grounds that, even touched by Jimmy's situation, the HC is a measure that is up to the human being:

[...] because in the constitutional text it is expressed that it is up to someone, that is, a human person, and not to any living being, and it is not the role of the magistrate to innovate the interpretation of the law, but to follow the express will of the legislator. (http:ÿÿwww4.tjrj.jus.brÿejudÿ ConsultaProcesso.aspx?N=201005900611)

In Comparative Law, it is worth mentioning an important decision rendered in foreign territory, by the Argentine Constitutional Court, in habeas corpus, for the release of an orangutan named Sandra.
The measure filed by the President of the Association of Employees and Lawyers for the Rights of Animals (AFADA) Pablo Bompadre, achieved its objective, which was to transfer the orangutan Sandra from the Buenos Aires Zoo, where she lived, to an ecological protection area in Brazil, because the primate was in a state of solitude and confinement (MACEDO, Roberto F.
Orangutan receives habeas corpus in Argentina. Available at: https:ÿÿferreiramacedo.jusbrasil.com.brÿnoticiasÿÿÿÿÿÿÿÿÿÿÿorangutan receives-habeas-corpus-na-argentina).
In the sentence of the aforementioned HC, quite innovative for Environmental Law, the Argentine magistrates considered animals as subjects of rights, opting for a more dynamic interpretation of the laws:

[...] that, based on a dynamic and non-static legal interpretation, menester recognized the animal and the character of the subject of rights, put the non-human subjects (animals) as holders of rights by which they impose their protection. corresponding scope of competence.

The decision set a precedent in Argentina where another HC was granted in November 2016, in Criminal Action 72.ÿÿÿÿÿÿ, in favor of Chimpanzee Cecília, who also suffered from loneliness in her confinement at the Zoo in the city of Mendonça.
Recently, through a lawsuit filed by several civil society entities, the Colombian Constitutional Court handed down judgment T-622 of 2016, in which it recognized Rio Atrato as a subject of rights and imposed sanctions on the public power due to the omission regarding the acts of degradation caused by a company against the river, its basin and tributaries, located in the city of Chocó.
It is verified, according to the preamble of the sentence, that the lawsuit was triggered in a region known as Chocó
Biogeographic, one of the richest territories in Colombia in terms of natural, ethnic and cultural diversity, where it is also home to four regions of humid and tropical ecosystems, in which 90% of the territory is considered a special conservation zone, housing several national parks.
The Atrato River, according to the ruling, is the largest in Colombia and also the third most navigable in the country. In addition to its relevant natural features already highlighted, the Atrato River basin is also rich in gold and wood and is considered one of the most fertile regions for agriculture (Colombian Amazon).
Also in accordance with the ruling, the reasons that led to the filing of the judicial measure were diverse, including: a) stop the intensive and large-scale use of various methods of mineral extraction and illegal forest exploitation; b) curb contamination associated with illegal mining activities in the Atrato River basin, mercury spills, and other mining-related toxic substances. (Republic of Colombia – Constitutional Court. Judgment – Tÿÿÿÿÿÿ. Available at: http;ÿÿ www.corteconstituional.gov.coÿrelatoriaÿÿÿÿÿÿT-622-16.htm)

The most important factor in this reflection is based on a re-dimensioning of the human being with nature from a biocentric approach and not just anthropocentric law, "which translates a profound unity between nature and the non-human animal and the human species. " (The legal recognition of Rio Atrato as a subject of rights: reflections on the paradigm shift in the relationship between human beings and nature. Journals of Studies and Research on the Americas, v. 12, n. 1, 20018, pg. 221 -239).
In the reasoning defended by Oliveira (2016), nature is not something separate from the human species and other beings of the planetary collectivity, as well as human beings, are nature itself in its universality and diversity (OLIVEIRA, Vanessa Hasson de. Nature's Rights. Rio de Janeiro: Lumen Juris, 2016, p. 115) It is
necessary to rethink a new rationality distinct from the logic hegemonically traced and reproduced in the ordinary instances that appreciate demands like the one that is the object of discussion in this Superior Court, so that the State and Society can be encouraged to think in a radically different way from the legal standards set.
Furthermore, having this reflection as a starting point, it is not difficult to reach the conclusion that the relationship that must be established between human beings and nature is much more an interrelation marked by interdependence, than a relationship of domination of being. human over other beings of the planetary collectivity.
Therefore, it is necessary to reflect on the internal field of infra-constitutional legislation, in an attempt to point out ways to mature the discussion about the recognition of the dignity of non-human animals, and, consequently, the recognition of rights and the change in the way people interact with each other and with other living beings.

V - Guarding the wild animal

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Finally, in the normative subsumption, the appellant is right regarding the violation of the provisions of arts. 8 of the Civil Procedure Codeÿÿÿÿÿ and 5 of the Introduction to Brazilian Law Law (LINDB). In this regard, I highlight respectively the aforementioned normative text:

CPC: [...] Art. 8. When applying the legal system, the judge will meet social purposes and the requirements of the common good, protecting and promoting the dignity of the human person and observing proportionality, reasonableness, legality, publicity and efficiency.

LINDB: [...] Art. 5. In applying the law, the judge will attend to the social ends to which it is directed and to the demands of the common good.

There is clearly a normative command that encourages the judge to carry out an axiological analysis of the norm used as a ratio decidendi.

In this case, the Court a quo stated (e-STJ, pages 157-158):

With regard to the custody of the animal, it should continue, on a provisional basis, with the appellee, in accordance with Resolution No. ÿÿÿÿÿÿÿÿ, notably by the certificate on pages 67 who reported the lack of necessary care for the parrot while it was under the care of IBAMA. This provisional custody will cease when IBAMA proves, in the same administrative procedure that regularizes such custody, the viability of the destination of the animal in accordance with §1 of art. 25, of Law no. 9. ÿÿÿÿÿÿ and demonstrate that the animal will be immediately taken to a suitable place, with daily care. The measure is necessary to ensure the welfare of the animal and does not allow the perpetuation of the irregular situation of unauthorized breeding of wild animals.

Observe the text of the normative diploma referred to in the aforementioned excerpt: Law n. 9.ÿÿÿÿÿÿÿÿ: [...]Art. 25.[...] §1st The animals will be released in their habitat as a priority or, if this measure is unfeasible or not recommended for health reasons, delivered to zoos, foundations or similar entities, for custody and care under the responsibility of qualified technicians. .

It is known that the protection of fauna has a constitutional shelter (art. 225, caput and § 1, VII, CFÿÿÿÿÿ) and that the Public Power must adopt measures to prevent it from being harmed, especially by curbing the trafficking of animals wildlife, and therefore Ibama's performance in adopting measures aimed at protecting Brazilian fauna is commendable.
However, the principle of reasonableness must always be present in judicial decisions, since each case examined demands its own solution.

In the event, although there are serious indications that the possession of the parrot in question, in fact, was irregular, since the appellee did not demonstrate the existence of a license, authorization or invoice for the purchase of the animal that could justify its possession, true is that the referred bird was already in contact with the family for a long period of time.
Furthermore, the aforementioned conditions of ill-treatment recorded in the area being fought (cage hygiene conditions) must be compared with the "lack of necessary care for the parrot while it was under the custody of IBAMA" (e-STJ, page 157).
In this aspect, the court order issued by the Court a quo established provisional custody for the appellant even in the face of the measured "mistreatment". Thus, the Court of origin recognized two facts: a) the mistreatment found was not harmful to the bird's health, possibly resulting from mere ignorance regarding the necessary care; b) under current conditions, keeping the bird with Ibama poses a greater risk to the life of the wild animal than keeping the bird with the appellant.
Indeed, the court established provisional custody and determined that IBAMA develop conditions to enable the custody of the animal. It so happens that the decision caused a nebulous instability, because, at the same time that it allowed the continuity of the affective bond between the appellant and the wild bird, it conditioned the end of this relationship to an uncertain and unpredictable condition.
Under these conditions, the reintegration of the bird to its natural habitat, as far as possible, can cause more harm than good, considering that the parrot in question, which already has the habits of a pet bird, has lived for about 23 years with the author.

In addition, the constant uncertainty of the animal's final destination clearly violates the insurgent's human dignity, as it allows for a temporary coexistence, but imposes the end of the affective bond and the certainty of a separation that is not known when it will be possible.
to occur.

In another point, it also violates the ecological dimension of human dignity, as the multiple changes in the environment perpetuate the animal's stress, putting in doubt the feasibility of a readaptation to a new environment.
Indeed, all these aspects make it impossible for the bird to be separated from the applicant and from the house where it lives. However, some measures must be observed to ensure the animal's well-being: a) semiannual visit by a veterinarian specialized in wild animals, documented by documents, to carry out an educational training with the applicant, teaching the necessary and appropriate care for the bird ; b) annual inspection of the conditions of the enclosure and the animal, with the issuance of an opinion, whose observations must be implemented in totum, under penalty of loss of custody – the technical visit must be carried out by the local IBAMA.
In view of the foregoing, I partially grant the special appeal to amend the contested judgment, ruling out the judicial fine provided for in art. 1.026, § 2, of the CPC and determining the definitive custody of the parrot for the appellant and the observance of the conditions transcribed in the previous paragraph. It's like voting.

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JUDGMENT CERTIFICATE
SECOND CLASS

Registration Number: ÿÿÿÿÿÿÿÿÿÿÿÿ-0 ELECTRONIC PROCESS REsp 1,797,175 ÿ SP

Origin Numbers: 00022442820148260642 22442820148260642

AGENDA: ÿÿÿÿÿÿÿÿÿÿ JUDGED: ÿÿÿÿÿÿÿÿÿÿ

Reporter
Excellency Mr. Minister OG FERNANDES

Chairperson of the Session
Excellency Mr. Minister FRANCISCO FALCÃO

Deputy Attorney General of the Republic
Excellency Mr. Dr. MÁRIO JOSÉ GISI

Secretary
Lovely. VALÉRIA ALVIM DUSI

NOTICE

RECURRENT	: MARIA ANGELICA CALDAS ULIANA
LAWYERS	: ADELINA HEMMI DA SILVA - SP107502
	BARBARA APARECIDA DE JESUS - SP296261
	BRUNO HEMMI PEREIRA - SP337999
DEFENDANT	: FAZENDA DO ESTADO DE SÃO PAULO
ATTORNEY	: LAMAC JACKS AND OTHERS - SP057222

SUBJECT: ADMINISTRATIVE LAW AND OTHER PUBLIC LAW MATTERS - Environment - Fauna

CERTIFICATE

I certify that the distinguished SECOND CLASS, when considering the above-mentioned process at the session held on this date, uttered the following decision:

"The Panel, unanimously, partially granted the appeal, pursuant to the vote of the Minister-Rapporteur."
Messrs. Ministers Mauro Campbell Marques, Assuete Magalhães, Francisco Falcão (President) and Herman Benjamin voted with the Mr. Rapporteur Minister.