THE JURIDICAL REGIME OF ANIMALS ACCORDING TO THE NEW ROMANIAN CIVIL CODE

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Abstract

In the perspective of comparative law, relatively recent changes in legislation have imposed the rule according to which „animals are not things". This delimiting of animal beings from things points out the actual importance given by the human society to the respect shown to the animal beings' sensitivity and to the affective bond the human being might develop for the animal.

The Romanian Civil Code of 2011 did not maintain the disposition formerly stated by art. 473 of the 1864 Civil Code, literally: „animals are movable assets by their own nature".

Should that be a simple legislative lacuna or a new view upon this matter?

Key words

legal status of animals; assets; animal protection; obligations of animal owner.

1. Comparative law: Austria, Germany and Switzerland. Recent legislative changes in the comparative law have imposed in private law the rule according to which "animals are not objects".

In Austrian law, article 285 a of ABGB (Allgemeines Bürgerliches Gesetzbuch) entered into force on 1 July 1988 expressly states that "animals are not objects; they are protected by special laws", and legal provisions regarding objects "do not apply to animals unless there is a contradictory provision" – "Tiere sind keine Sachen; sie warden durch besondere Gesetze geschützt. Die für Sachen geltenden Vorschriften sind auf Tiere nur soweit anwendbar, als keine abweichenden Regelungen bestehen".

In German law, article 90 a of BGB (Bürgerliches Gesetzbuch) entered into force on 1 September 1990 contain identical provisions: "Animals are not objects. Special laws protect them. The provisions related to objects are applicable, unless otherwise provided by law" – "Tiere sind keine Sachen. Sie warden durch besondere Gesetze geschützt. Auf sie sind die für Sachen geltenden Vorschriften entsprechend anzuwenden, soweit nicht etwas anderes bestimmt Vorschriften entsprechend anzuwenden, soweit nicht etwas anderes bestimmt ist".

In Switzerland, two unsuccessful parliamentary initiatives demanded at the beginning of the 90s that animals or at least some of them should not be considered as simple objects, but they must benefit of a special status. Later in 2000, two people initiatives were launched on the same subject: the initiative "For a better legal status for animals" of 17 August 2000 and the initiative "Animals are not objects" of 16 November 2000. They argued for the introduction in the Federal Constitution of a new article 79a that redefines the status of animals in Swiss law. It was considered that the qualification of animals in real rights field must be associated with the idea that animals are living beings endowed with sensitivity, aspect that must be taken into consideration by law.

On 25 April 2001, the Federal Council proposed the Chambers to recommend the rejection of the two initiatives. Although it agreed with the fundamental objectives of both initiatives, it still considered that these objectives had to be accomplished through legal reform, without the need of a new constitutional provision regarding this subject.

The final text of the legal reforms that followed was adopted on 4 October 2002 and entered into force on 1 April 2003. We will present only three changes brought into the Swiss Civil Code regarding this subject.

Firstly, article 482 par. 4 states that if an animal receives a bequest by testamentary disposition, this disposition is deemed to be a burden by which the animal must be cared for according to its needs.

From the report of the specialized commission of 25 January 2002, we notice that the new paragraph avoids mentioning the animal as heir or legatee because giving the animal civil rights "would be truly against our legal system". In essence, the new provision allows the final wishes regarding animals, expressed by the testator, to be taken into consideration, without giving them civil rights. The reason for introducing this new stipulation is the fact that sometimes the person writing a will "designates" an animal as heir or legatee. Such a clause could be considered invalid on the grounds that the animal that has no civil rights cannot be an heir or a legatee. The new stipulations establish the interpretation that must be given to a will clause designating an animal as heir or legatee: a task (burden) imposed to the heirs or legatees to take care of the animal in an adequate way.

Secondly, after article 641, with marginal title "A. Nature of ownership", article 641 a ("II. Animals") was introduced, which states in the first paragraphs that "Animals are not objects". In the second paragraph, it stipulates, "Where no special stipulations exist for animals, they are subject to the stipulations governing objects".

According to the Swiss commission, this provision admits the fact that the animal is a living being capable of perception and feeling. In the report there is further comment: "This provision has essentially a declaratory nature because it does not create a new legal category for

the animal. The Swiss legal system is consequently founded on the distinction between "persons – subjects of law, with their rights and obligations – and objects: the animal will be forever assimilated to a thing and will not benefit from civil rights". The reserve introduced through the expression "unless otherwise provided by law" is a direct reference to the legislation related to animal protection. Obviously, from a legal perspective, we infer that these provisions limit or indicate the rights of animal owners.

Finally, the new article 651 a, with the marginal title "c. Animals living in a domestic environment", describes the situation of "animals living in a domestic environment and which are not kept for patrimonial or gain purposes, in case of a litigation". Based on criteria regarding animal protection, the judge assigns the ownership right to the party, which represents the best solution for the animal (par. 1). The judge may force the party who gains the animal to pay the other party an equitable compensation and he may fix its amount at his own discretion (par.2). The judge will take the necessary measures, especially regarding the temporary placement of the animal (par.3).

2. Environmental Law versus Civil Law. Romanian doctrine's answers. Established on the grounds of the Romanian civil code of 1864, the concept of Romanian private law regarding animals is clear. The animal is a movable asset in its nature (art. 473) or an immovable asset by its destination (art. 468 par. 2), when it is associated with agricultural exploitation.

Object of ownership right, the animal can be acquired and transferred from one patrimony to another because it is part of the civil circuit (it is part of "trading"). On the other hand, wild animals, fish and living aquatic resources from natural fisheries are objects without owner.

This situation is criticized in the environmental law doctrine, being considered as "an old concept that denies any right to the animal, since it is assimilated with an object" (Mircea Duțu, 2010:329). There has been claimed "the recognition of the quality of subject of law of the animal as a living being". The argument is given by the fact that between an animal and a human there is no difference in nature, only one of the degree of complexity of the organization and manifestation of the living matter. The new status of animals could be expressed by the recognition and the guarantee of firm protection measures, including several rights. The purpose would be the elimination of acts of cruelty and wrong, useless treatments inflicted on animals and granting the dignity of coexistence with the animal world.

It must be mentioned that the Romanian press presents information about animals that have been given "cruel or bad treatments", accompanied sometimes by shocking pictures. For example, the situation of wild horses in the Danube Delta has been greatly publicized in the spring of 2010. In this kind of situation, people who are fond of animals had every reason to be revolted. Their simple

questions exceed the zone of sensitivity towards animals and reach the zone of legal responsibility. The public, upset by the cruelty of the "animal owners" demanded punishments for the guilty persons. What resolution should law provide?

The debate regarding the "legal personality" of animals is not new in Romanian law. At the beginning of the 20th century, the Romanian diplomat and civil law professor, Nicolae Titulescu, clarified this subject in front of his students: "Every man is a person. Only man can be a person". It is correct that "animals have a sensitivity that makes us have certain obligations towards them". Regarding the opinion that "an animal is half a person, capable of exercising half a right", he mentioned: "because we cannot impose legal obligations to the animal, it cannot be considered a person" (Nicolae Titulescu, 2004:127).

At present, the private law doctrine remains firm and affirms that "only a human being is a person", subject of law, and rejects the tendency to give animals legal personality. It is agreed that animals need to be protected, especially against acts of cruelty, but the notion of "animal rights" cannot be accepted. In reality, these are "human obligations" towards the environment in which human beings live or towards animals. The fact that there are limits to the humans' right over the animals does not mean that they acquire the quality of subjects of law. The animal remains an object of law and it is considered from a legal point of view as "an asset" whenever it belongs to a person.

3. Animal protection. A. Obligations of animal owners. The problem of animal protection is analysed in the Romanian environmental law in the field of "fauna and biodiversity protection". In this field, the Law no. 205/2004 on animal protection stipulates clear obligations for "animal owners".

The law stipulates as a principle the obligation "to have a kind attitude towards animals, to ensure the elementary conditions necessary for the purpose the animals are raised, not to abandon or to banish them". The abandonment refers to "leaving an animal which belongs to a person, on the public domain, without food, shelter and medical assistance".

Animal owners have the obligation to ensure for them: 1) an adequate shelter; 2) food and water in sufficient amounts; 3) the possibility to get enough free movement; 4) care and attention; 5) medical assistance.

It is forbidden for animal owners to inflict on animals "bad and cruel treatments". The two notions are defined by law and sanctioned. A list of actions is given as examples: 1) the intentional killing of animals; 2) shooting domestic or captive animals; 3) organization of fights between or with animals; 4) separating cubs from their mother before the minimum age of 8 weeks.

The law expressly forbids “dog, cat or other animal euthanasia, except animals with incurable diseases found by veterinary physicians”.

The law distinguishes four categories of animals and it stipulates a special legal regime for each of them. The first includes “animals of economic interest”, meaning the animals raised for obtaining different products of animal origin, like food, wool, leather and fur, including animals meant to be used for economic purposes. The second category concerns “pets”, meaning “any animal owned by a human being or meant to be owned by a human being, especially around the house for leisure or company”. The third category regards “wild animals”, meaning all animals except the domestic animals and pets. Finally, the fourth category regards “animals used for experimental or other scientific purposes”.

The number of animals, except wild animals, owned by the natural or legal person, is not restricted, provided that they respect health, protection and welfare regulations.

B. Legal liability of animal owners. In case of failure to fulfil the obligations imposed by law, animal owners can be held responsible, under contraventional or penal law. The law expressly states the actions that constitute contraventions or crimes. There is a national authority that has competence in the animal protection area (National Sanitary Veterinary and Food Safety Authority)

The contraventions in this area are punishable by fine. In case of repletion of certain actions that constitute contraventions, by the owner of the animals, besides the contraventional fine, the seizure of animals will be enforced. In this situation, the animals will be placed in shelters that function under the competence of local authorities, for the purpose of adoption or patrimonial benefits.

In this matter, crimes are punishable by imprisonment (from 1 month to 1 year) or by a penal fine and seizure of animals. Also, the criminal court might order against the owner the interdiction to hold other animals for 5 years.

4. Regulations from the New Romanian Civil Code (NCC). The new Civil Code entered into force on 1 October 2011 and contains some provisions regarding animals. The environmental law professionals’ first observation should concern the fact that there is no express provision anymore which considers “the animals as movable assets by their nature”, as provided by Civil Code of 1864 in article 473. Before concluding with regard to the legal consequences of such a situation, we will briefly present the provisions of the new civil code that are relevant for this subject.

Firstly, in the field of “the fruits of the asset”, article 548 (2) NCC defines “the natural fruit of an asset” as being “the direct and periodical products of an asset, obtained without human intervention”.

The law gives an example: “the animals' production and breeding”. In the C.C. of 1864, art. 503 contained similar dispositions.

Also, article 576 NCC regulates the “natural accession over animals”. There are mentioned the conditions under which “domestic animals which have been lost or strayed on someone else’s land come to belong to this latter”. Similar provisions existed in article 503 of CC 1864.

In the matter of the usufruct law, article 736 NCC regulates the situation when the object of this right would be an group of domestic animals (a flock). The usufructuary's obligations under the circumstance that the flock had entirely perished, or only a part of it had, are precise. At first, "if the flock given into usufruct should entirely perish, due to causes for which the usufructuary might not be held liable, the latter would have to return the skins only or their pecuniary value". On the other hand: "if the flock should not entirely perish, the usufructuary would be obliged to replace the perished animals through breeding ones". In the C.C. from 1864 art. 556 contained similar dispositions.

On the other hand, article 941 NCC regulates “the acquirement of a asset through occupation”. In this field, “things without owner are abandoned movable assets, as well as assets that, by nature, do not have an owner, like wild animals, fish and living aquatic resources from natural fisheries, wood berries, wild eatable mushrooms, medicinal or aromatic plants and so forth.”

In the field of the civil liability for the damage caused by the animal, article 1375 NCC stipulates the following rule: “The owner of an animal, or the person using it, is liable, independently of any guilt, for the damage caused by the animal, even if it has escaped from his watch”. In this matter, “the animal watch” is held by the owner or the person who, by virtue of a legal provision or a contract or even only in fact, exercises independently the control and the surveillance of the animal and uses it for personal purposes (art. 1377 NCC).

In the field of “goods that can be leased” (lease granting contract), article 1836 NCC stipulates the next rule: “there can be leased any agricultural assets”. The law gives as an example: “animals meant to be agriculturally exploited”. The lessee has the obligation to insure the animals against a risk of death caused by natural disasters (art. 1.840 NCC).

In the matter of “the contract goods transportation”, article 1991 NCC stipulates the causes that exonerate the carrier from liability. The carrier is not held liable for the damage caused, due to the “inherent danger of living animals’ transportation”.

In the field of “hotel deposit”, article 2127 NCC provides the conditions to engage the liability of the person who offers the public services of accommodation for the goods brought in the hotel. As a matter of principle, the hotel keeper is liable for the damage caused

through stealing, destruction or damage caused to the goods introduced by the client into the hotel. The law excludes the application of special provisions of this section to "pets". For this type of animals, the hotel keeper cannot be held liable unless he expressly undertakes such an obligation.

Finally, in the field of the "movable assets mortgage contract", article 2389 NCC contains provisions related to "the object of mortgage contract". Among other things, "groups of animals" can be mortgaged.

5. Conclusions. Private law traditionally distinguished between "subjects" and "objects" of the law. According to Justinian, the entire law that we use refers either to persons, or to goods or actions - Omne autem ius quo utimur vel ad personas vel ad res vel ad actiones". Firstly, the subjects are the persons, natural or legal, which are holders of subjective rights, resulted from the legal system. On the other hand, the objects of rights are the goods that persons can own as a consequence of a subjective right.

During a period in which, in comparative law, some national laws have provided the rule according to which "animals are not objects", the Romanian Civil Code of 2011 gives up only the express stipulation stating that "animals are movable assets by their nature". In the doctrine dialogue, between environmental law and civil law, the legislature offers indirectly a valid argument to the first.

The Romanian legislature avoids giving an answer to the question: "animals, are they or are they not objects"? Silence can be an answer. But, in order to understand the legal consequences of not giving an answer to this problem we have to take into account all the relevant provisions of the new code. We immediately notice that in the classic fields of civil law, the new regulation practically keeps the solutions of the 1864 Civil Code. But, let us not hastily say Nihil novi sub sole.

Firstly, the silence of the legislature is not an affirmative answer for those who affirm "legal personality" for animals. The new regulation does not introduce in the Romanian law a new fundamental category – the animals – that would be distinguishable from the "subjects" and "objects" of law. It keeps animals in the area of the patrimony, in the category of assets.

On the other hand, the silence of the legislature can be an answer for those who affirm the animal protection. The ownership right must be exercised "under the limits established by law", as expressly provided in article 555 NCC (art. 480 CC 1864). In this matter, for the "animal owners", the limits of exercising their rights over the animals are established by the special law regarding the protection of animals.

"Animals are a huge majority without electoral right and with no right to speak whatsoever, which cannot survive without our help" (Gerald Durrell). The Romanian legislature knows this truth. Romania ratified the European Convention for the pet protection, signed in Strasbourg on 23 June 2003 (Law no. 60/2004). In 2004, a special law on animal

protection was adopted. And examples of this kind can go on. The New Romanian Civil Code keeps the distinction made between persons – goods, and in the category of goods it recognizes a special legal regime to animals and an adequate protection for them.

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