

CAPABILITY APPROACH THEORY AND THE DIGNITY OF NONHUMAN ANIMALS: ESTABLISHING A NEW ETHICAL PARADIGM IN ANIMAL LAW

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RESUMO: A ideia de que os animais não foram feitos para sofrer tem uma longa tradição na história da humanidade, porém, a ideia de que eles têm direitos, é uma abordagem nova e controvertida frente aos interesses das pessoas. Entre os pressupostos contemporâneos, destaca-se a versão proposta por Martha Nussbaum da Capability Approach, consiste numa abordagem normativa mais ampla em termos de justiça mínima extensiva a todos os seres vivos. A interpretação do conceito propõe uma melhor compreensão de base teórica mais favorável à proteção animal em países como Brasil. A perspectiva sugere uma clara alternativa frente as visões contratualistas e utilitaristas tradicionais. Desta forma, influenciado por princípios de autonomia, igualdade e respeito aos seres humanos, Nussbaum nos dá um amplo espectro teórico que nos estimula às discussões sobre a necessidade de remodelar o conhecimento atual sobre a dignidade animal no Brasil.

PALAVRAS-CHAVE: direito animal, racionalidade, capacidades.

ABSTRACT: The idea that animals are not be made to suffer has a long tradition in human history, but the idea that animals have actual rights conflict with the interests of people is fairly new and controversial. Among the contemporary perspectives, the Martha

Nussbaum's version of the Capability Approach gives us a broader normative approach in grounds of minimum justice extensive to all living beings. The interpretation of Nussbaum's proposal gives a better understanding to an adequate theoretical baseline more favorable to animal protection in countries like Brazil. The perspective gives a clear alternative against traditional contractualists and utilitarian views. Thus, influenced by principles of autonomy, equality and respect, Nussbaum gives us a wide theoretical range that stimulate discussions on the necessity of remodeling current knowledge of animal dignity in Brazil.

KEYWORDS: animal rights, rationality, capacities.

SUMMARY: 1. Introduction – 2. Dignity in Kant – 3. Beyond Rationality: Nussbaum's Capability Approach – 4. Final Considerations – 5. Reference Notes

1. INTRODUCTION

During the course of human existence, one can verify that, the majority of human acts have been preventing a dignified treatment towards non-human animals. All human societies have been using the qualities of the other species in the animal kingdom, based on the assumptions that man is superior to other species. Therefore, the relationship between man and animals is characterized by subjugation and domination of the animals.

As a result, the impairment caused to non-human species can be understood from a broader perspective, which denotes that, human welfares¹ has averted any possibility of animals ever be thought as active members of our society. In other words, human society has been failing to acknowledge non-human animals as active members of society, entitled to some of the same rights as human's beings, such as shelter, security, food and health.

Therefore, animals are considered as beings whose lives are complementary to human existence, even though they

participate actively in wide number of human activities such as; agriculture, product testing, scientific and medical research, entertainment, feeding, textile industry. Animals have always seen as mere objects, as opposed to sentient, *special beings*. There are seen as secondary in the system of legal rights and human social relations. Sharing Steven Wise's perspective, Richard Epstein states that:

Under traditional conceptions of law, animals were typically regarded as objects of rights vested in their human owners but as not as the holders of rights against human beings².

As one can see, by sustaining this discourse, humans have been able to subdue and systematically define the fate of other species. For at least one century, animals were not considered a matter of discussion, especially when related to entitlement of legal consideration. Only recently, has the suffering of animals been taken into consideration. However, the progress has been very slow in recognizing animals their legal status in societies worldwide.

According to Ryder³ (1970), discrimination based on one's species is morally reprehensible as any kind of prejudice. Species membership has always been used to justify the unequal treatment of which non-human animals are subjected to and it is clear that animals are placed in disadvantageous position when compared to humans. In other words, animal's interests, life condition, food, shelter and health depend on human values, human functions, and human rights. In the current social arrangements, non-human animals are not being able to bring forth a discussion regarding to their dignity. They are constantly wronged, and disfavored, while their true needs are forgotten.

In Brazil, the dismantling of traditional institutions brought on by the new social arrangements by

Postmodernity, frustrated the expectations of building a more equitable treatment towards animals. In spite of contrary efforts, we can that testify more and more every day to a gradual process of *apathy*⁴ and abandonment in society towards important animal related issues.

The emergence of unbridled actions related to contemporary consumer society, whose savage profit and the dissemination of an ideology strictly based on economic rationality, generated immeasurable effects and consequences towards the creation of animal's legal rights. In addition, the continuous omission of government, and civil society, in not granting due protection to animal causes, characterizes the risk of *dismissing animals' priorities*. By tolerating crimes of cruelty, genocide and other forms of abuse practiced against animals, human society contributes heavily to this element of environmental crisis⁵. The ecological risks⁶ of the modern era are caused mostly by human action. Man creates a reality in which the damage towards nature and other species become life.

In Brazil, due to the work of ONG's, volunteers and the cooperation (although precarious) of some institutional forces favorable to the cause, animal issues have gradually earned political relevance. Therefore, society in general, has been gradually understanding that animals are "fit" to extended certain rights and protection also extended to humans. In this context, Animal Law is a work in progress, among academics, activists, judiciary and lawmakers it became a growing field of interest. Where, under a new and revised theoretical framework, based in the works of authors like Francione (1995); Wolfe (2003); Steiner (2010)⁷; it's becoming even stronger.

In the same direction, Marta Nussbaum's Capability Approach (2002) is a prominently philosophical theory. It's main purpose to give new foundations to social

arrangements responsible for designing the current terms on animal's dignity. Nussbaum emphasizes that her approach is directed to the provision of basic issues of dignity, seeking the establishment of minimum standards of justice toward animals. She understands, that a sort of permanent state of rivalry has been instituted between humans towards the other species in the animal kingdom. Thus, animals are considered *others*⁸. Taking into consideration these facts, it is clear that the established poles of power announces a great asymmetry between animals and humans. As a consequence, animals can never be brought forth to detain any rights. This context made it impossible to ever reach a satisfactory point of animal protection within contemporary society.

Nussbaum centers the basis of her discussion on misconceptions presented by predecessor philosophers such as, Kant. She understands that the narrow views presented by Kant, for example, in terms of morality and dignity, are not in tune with the reality of non-human animals, thus not contributing with the development of an adequate theoretical view regarded to animal rights.

We believe that by defining basic theoretical of Nussbaum's version of the Capability Approach we can make an effort to direct legislators, law operators, and Brazilian society as whole, to seek satisfactory legal ground in animal right. We hope that our discussion will contribute to grant a social status to the animals consistent with their essence.

In the first part of my work I will seek to establish the current premises on animal dignity according to the theories on the subject derived from the Kantian point of view. I will after outline the main objectives related to Capability Approach Theory, emphasizing its positive aspects in the defense of an adequate theorization of animal's dignity.

Thus, I hope to contribute to the development of new directions to animal studies related to Brazilian context, seeking gradually to establish standards of justice and minimum levels worthy treatment of nonhuman animals.

2. DIGNITY IN KANT

Nussbaum's criticism is based on Kantian premises of dignity. Dignity in Kant has an immeasurable value and to it nothing compares. To Kant, dignity is a quality inherent to humans as beings of this world and to the extent in which they, accordingly, and autonomously, practice their sense of rationality. In doing so, human beings build distinctive personalities in their social bulge, each an individual manifestation and absolutely irreplaceable. Kant believes that the dignity is totally inseparable from rationality and for this reason that only human beings are dignified beings.

In his work, *Introduction to the Metaphysics of Morals* (1785), Kant elucidates that when an individual questions his actions, motivations, and other rational based thoughts he exercises his divine human gift. To Kant, all morally good premises are derived from a universal commune of ideas transcendently instituted. In the words of Kant:

“The reason relates for each maximum will conceived as universal legislator with all other wills and all actions to ourselves, and this not because of any other practical motive or any future advantage, but because of the dignity idea a rational being who does not obey no other law than that which he simultaneously gives. In the kingdom of ends everything has a price, a dignity. When something has, a price can be put on it as any other equivalent; but when a thing is above all price, and therefore does not allow equivalent, then has her dignity. What relates to the slopes and generated needs?”⁹

In general, dignity to Kant can only be exerted by the instrumentality of human reason, therefore instituted accordingly to humans, for humans. The price of dignity lies on the fact that individuals must act themselves in a dignified manner, to be afterwards considered worthy of dignity. Nussbaum understands that Kantian notion of dignity is problematic since it excludes upfront a large number of humans, for example, people with some sort of disabilities (NUSSBAUM, 2003). In this scenario animals, are not even considered worthy of dignified treatment under such standards.

According to Anderson (1998), as an alternative to the Kantian notion of dignity, Nussbaum evocates in favor of a different type, in which the respect for other living beings is based on the simple fact of their existence, the respect for the “animal” body that they possess, is considered:

[...] as a contrast with Kantian dignity, Nussbaum argues that individual humans possess a form of dignity that attaches to their animal bodies, distinct from the one they claim in virtue of their rationality. (...) This shows that the animals dignity of human is essentially tied to their human species membership, conceived hierarchically in relation to nonhuman animals and independently of the capacities of the individual whose dignity is at stake. There is no way to place animals on equal footing in this system of meanings.”¹⁰

According to Leukman¹¹, the first theoretical conceptions of dignity in the Western society were derived from Stoic foundations and philosophical medieval Christianity (LEUKMAN, 2011, p.05). This concept was extremely important to Humanist trends and the foundation of Modern European societies. The notion of the word dignity and its importance to Western societies lies in the fact that it reinforced the superiority of men over animals.

Taking into consideration this long historical tradition

of the term dignity, Nussbaum defends that the non-human beings have the right to a dignified existence, and for that, humans should at least include them in the social agenda as active beings entitled to adequate protection. She some basic prerogatives necessary to the formation of a minimum scope of rights inside society, to have adequate opportunity to nutrition and physical activities, be spared from pain, fear, misery, cruelty and degrading treatment; to have the liberty to accordingly to the characteristics of its species; have the opportunity to interact with other members of its species, as well as other species; to have the opportunity to appreciate light, air, and a healthy environment. The idea of animal dignity is expressed through the following quotation:

“Animals, then, have their own type of dignity. As for humans, it is related to the type of functioning’s that they are capable of and the flourishing that they can derive from these functioning’s. Dignity functioning’s and flourishing exists in animals as much as in humans. But since dignity is not only related to functioning and flourishing, but also to respect and rights/entitlements, this means that animals now also deserve respect and get rights to a set of capabilities” [“XIV” p. 301].

In these terms, dignity is not a right, nor a status, it is something that is owned by every living thing in this Earth. I believe that Nussbaum understands the term dignity as an inherent natural condition that all living beings have towards one another, of mutual respect and empathy. No living being should have to “fill certain requirements” in order to “entitled to be considered worthy” of dignity. It is something naturally owned by all living beings. I also understand that maybe the greatest obstacles, to humans, is to recognize the sense of duty in the moral sense towards other living beings. By incorporating the concept of animal dignity, it is easier to exercise others such as compassion. Together, these values enable us to maintain a relationship with them based on respect.

In Nussbaum's perspective, non-human animals are thought as members of our social environment. In this case, she refers to animals as members that are able to receive specific protection and that can be partners with humans in society. This idea becomes clear in Nussbaum thought in such terms:

“When I say that the mistreatment of animals is unjust, I mean to say not only that is wrong to treat them in the that way, but also that they have the right, a moral entitlement, not to be treated in that way. It is unfair to them. I believe that thinking of animals as active beings who have a good and who are entitled to pursue it naturally leads us to see important damages done to them is unjust¹²”.

Taking into consideration Nussbaum perspective, human's denial of a dignified existence to animals must be understood as a problem of justice, far away from the evolutionary standards reached in the contemporary humane society. With all the technological and social evolution, there are no obvious motives that the basic mechanisms of justice cannot be extended to other species in the animal's kingdom. By rejecting Kantian perspective on animals, Nussbaum establishes a new foundation in animal rights:

“Kant's vision on animals is not very promising. He argues that all duties with animals are merely imposed indirectly by mankind. It rests on a fragile empirical claim about the issue. Not recognizing that other beings who have self-awareness and ability of moral reciprocity. in more general terms, cannot see that such a being can have dignity and intrinsic value.” [XIV, p.300]

In general, Nussbaum's perspective provides a valuable contribution to Animal Studies. It is clear that she believes that the conceptual construction of dignity in Kant precludes any possibility of equal treatment to non-human animals in society. According to this view, only humanity and rationality are worthy of respect and

admiration. The rest of nature is just accessories to human satisfaction. Considering Kant inadequate for “animal interests”, Nussbaum not only moves away from Kant’s perspective but also rejects the basis of dignity according to human rationality. This broad perspective opens the way for the establishment of a more inclusive type justice that recognizes the dignity of both nonhuman and human animals on equal terms. That is, the morally instituted transcendent values that guide the approach in the case of human beings should guide all forms of life.

3. BEYOND RATIONALITY, NUSSBAUM’S CAPABILITY APPROACH

Discussions on animal’s rights are issues inserted in a broader context related to the relationship between animals and men. It is accepted that nature is a higher living organism, a vast and complex body of which humans are a part of. However, man has been considered the ultimate creation. Conceived as the first rational being, man has the power to change and creates his own environment, and for this reason he is responsible for the impacts caused.

Nussbaum, argues that every living creatures has a different form of life with different purposes, and motivations. They are complex life forms that are incapable of being deciphered by the human eye. The lives of non-human animals have different means of satisfaction and fulfillment.

Traditionally, the term dignity, is assigned to the highest levels of honor and respect (universally designed), but unfortunately it has not been extended to animals. When dealing with animal’s dignity, humans in general, tend to relativize the acceptance of unmistakable features

eventually failing to recognizing certain animal's rights. According to Nussbaum, features that are perfectly compatible with an animal's noble existence¹³, does not coincide to human priorities:

"The fact that humans act in ways that deny animals a dignified existence appears to be an issue of justice, and an urgent one, although we shall have to say more to those who would deny this claim. There is no obvious reason why the notions of basic justice, entitlement, and law cannot be extended across the species barrier."¹⁴

One of the most important features on Nussbaum's statement, as one can notice, is that she recognizes the denial of dignity to animals as a problem of justice, "an urgent one". In fact, such premise presupposes the idea that all creatures were created equal and that law must incorporate this plea, urgently. In other words, Nussbaum attributes to law the basic task of reinforcing the moral status granted by Philosophy¹⁵.

Nussbaum's Capabilities Approach is presented as a philosophical theory human rights destined to all governments, countries, as minimum requirements of respect and dignity to non-human animals. The Capability Approach is an alternative to other perspectives that identify a society as just when persons have rights to certain resources, or when utility is maximized (CLAASSEN, 2014, p.2). In this thread of thought, Nussbaum says:

"We need a counter-theory to challenge these entrenched but misguided theories, if we want to move policy choice in the right direction"¹⁶.

Nussbaum uses her theory to draw some basic political principles that will guide the law and public order in dealing with animals. She draws the legislator's attention exclusively to the term *Capabilities*, or *Capacities*. She understands that all living beings should have the opportunity to flourish, to obtain fulfillment in life,

provided it does no harm to others. Living beings, individually should be supported by their government on having basic right entitlement and protection, as Nussbaum puts it:

“Given a widely-shared understanding of the task of government (namely, that government has the job of making people able to pursue a dignified and minimally flourishing life), it follows that a decent political order must secure to all citizens at least a threshold level of these ten central capacities.¹⁷”

Observing this thread of thought one can implicitly recognize that the State must be able to provide, a dignified way to life to all individuals. This manner life must be in tune with the Capabilities. Through the capabilities, Nussbaum’s gives a strong theoretical foundation that will guide society in establishing a universal parameter of animal rights all over the world.

According to Claassen, the *principle of capability* has a broad scope of use. Its theoretical baseline permits the application in a large number of contexts, to be used by a large number of professionals, such as lawyers, government officials, researchers, academic, animal rights activist, and so on. (CLAASSEN, 2014, p.3),

Interpreting Nussbaum, perspective, Claassen states that “she maintains that dignity gets its importance by being related to a set of other notions” (CLAASSEN, 2014, p.3).

Nussbaum makes uses of three basic notions, first, as dignity is related to *respect*. Based on the intention to carry through the necessity of a mutual respect between all living beings as basis for human interaction; Equality, is based on the sense that we all are equal, so therefore we must be treated as equals, and finally through the notion of *agency*, she basis unto the premise, “what are

living beings capable to do given adequate opportunity to flourish" (NUSSBAUM, 2011, p. 30).

Summing up, Nussbaum (2002) divides the Capability Approach basically in three (3) points of *actions*:

a) as a set of rights attached to all living beings, including animals;

b) as a general intuitive framework to her support Capability's list;

c) as an argument to justify the operational functions in concrete everyday cases.

In this context, Arias (2013) also focusing these core ideas on Nussbaum's theory sees the importance of *value* as unrestrained term applicable to every living being. Each has its own *value*, its goal, a purpose, each special in its own special way. In his perspective, human society should set the guaranties for providing each being with adequate tools to flourish in this world. In the words of Arias:

"The proposed approach takes each person as bearer of value and as an end in itself, endorsing the Kantian maxim that human beings should always be treated as ends and never as means. Thus, placed in the center of the scene to each individual, pursuing the goal of each is in conditions to live a dignified human life, that is, that each person is above the minimum level in each one of the areas covered by the listed capacities.^{18''}

Another contribution to Nussbaum's thought is derived from an interpretation of the Aristotelian notion of fulfillment. According to Monad:

Nussbaum's wholesome approach to the characteristic flourishing of animals is informed by a neo-Aristotelian

appreciation and curiosity towards the biological functioning of animals. She credits Aristotle for his writings on nature and his contribution that “each creature has its own characteristic form of life and an internal organization suited to attaining that form of life under appropriate conditions”¹⁹.

As we can see, Aristotle arguments played an important role on Nussbaum’s Capability Approach. The appreciation of all living creatures can be considered as a standpoint to her whole frame work. Monad (2016) states that, the Aristotelian Notion, within each creature rests innate capability wishing to thrive. In this sense, the principle of fulfillment has a similar connotation as the word dignity.

And, importantly, the Aristotelian argument insists that “there are waste and tragedy when a living creature with the innate or “basic” capability for some functions that are evaluated as important and good never gets the opportunity to perform those functions” (NUSSBAUM 2006, p.347). Thus, the approach holds that “an ethical concern that the functions of life not be impeded, that the dignity of living organisms not be violated” NUSSBAUM (2006, p.348). This is exactly what Nussbaum’s capabilities approach is intended to accomplish: “It wants to see each thing flourish as the sort of thing it is”²⁰.

Potentiality, is another fundamental word retaken from Aristotle concepts. In this case, the potential that each being has, to exercise and fulfill a certain aspect essential to its’ life. (MONAD, 2016; NUSSBAUM 2002) An ethical concern extended to all beings. Nussbaum states that a lot of contexts must be analyzed so that *flourishing* can play out and be applicable, she writes:

“Insofar as a highly general idea of human flourishing and its possibilities does figure in the approach, it is not a single idea of flourishing, as in Aristotle’s on normative theory, but rather an idea of a space for diverse possibilities of flourishing. The claim that is made by the use of this single list, then, is not that there is a single type of flourishing for the human being, but, rather, that

these capabilities can be agreed by reasonable citizens to be important prerequisites of reasonable conceptions of human flourishing, in connection with the political conception of the person as a political animal, both needy and dignified; and thus these are good bases for an idea of basic political entitlements in a just society”²¹.

In general, one can understand that *capacity* is an ability, an opportunity, to exercise or not, a certain choice for oneself. Capacities are freedoms to achieve something, parameters guide individuals to achieve certain goals. Nussbaum’s premise relies heavily on the idea of equality and justice, and that “all the controversy over metaphysical issues divert to the fact that animals should be entitled to right”. (NUSSBAUM, 2006, p.310). The political principles, as well as the values, uphold in human society, should be impartial and have equal amount of respect for living beings.

“All human beings must recognize and respect the rights of others to live a life compatible with human dignity”²². (*ibid id*, p.310).

By reconstructing the theoretical basis of dignity, Nussbaum argues that all living creatures should have dignity, even if a different one, a type that complies to each animal’s complexities and life. “Human Dignity” as she comments, is the highest moral standard found in contemporary society, founding its positive ethical parameter in the highest virtues known to man. Thus, she gives access to a richer and broader perspective that is favorable to animals and humans as well. It’s an understanding that is truly in compliance to social justice and morality. She states that her perspective goes beyond contractualist and utilitarian views as well in the following terms:

“I believe that the capabilities approach is well placed, intuitively, and made to go beyond both points of contractualist and utilitarian view. It goes beyond the

contractarian point of view, because it develops the idea that all living things must have the right to flourish. and goes beyond utilitarianism, because it takes into question not only the pleasure and pain²³ [...]”.

Her punctual distinction reveals her claims to go beyond contractualist and utilitarian views. In other words, the concept of capability seeks *what's is morally correct to all beings*, not just to human. Even though she is set on highly intuitive notion, that fact of the matter is that she is pointed to a correct understanding of *good*, of *what should be*, for all living beings, and isn't that the essence of it all? Nussbaum's perspective is also practical and lies foundation for political militancy, by stating that, one should hold these matters in joint discussions viewing future concrete actions:

“What should happen is that the debate should be held, and each must have arguments that attempt to show that kind of freedom involved in the dignity idea. We understand that It cannot be done by a vague intuitive appeal, based on the ideas of dignity alone, but discussing the relationship to the putative law and other existing rights in a comprehensive process”²⁴.

Nussbaum also believes that freedom is not an absolute concept. It is first necessary to view the context in which is applied to after have an adequate discussion to “what's is freedom” in each specific case, what is the dynamic to which is should apply? How should we comprehend it in each case? As Claassen explains, “in Nussbaum version, the capability approach, whether a functioning is valuable is not decided by the person herself, but by an ethical procedure of evaluation, in which dignity comes to play a role.” (CLAASSEN, 2014, p.3) According to Nussbaum (2002) Capabilities are “doings” and “beings”, then like eating, riding a bicycle, walking, and etc. Nussbaum's version of the Capability Approach is based on a “ethical procedure of evaluation”, in which its main objective is to

design an understanding of dignity intrinsically related to a number to *respect* and *equality*. According to Claassen,

“Nussbaum uses this conceptual apparatus in philosophical theorizing about justice to say that society is just to the extent that every citizen has constitutionally guaranteed entitlements to a list of basic capabilities”²⁵.

The basic stretch of the theory is the establishment of a minimal rights parameter extensive to all human beings structured on a sense of social justice inserted directly in the constitution²⁶, the first step to reaching this parameter is through the evolution of the *capabilities* in society. Nussbaum’s theory can be used to strengthen a practical constitutional formalization of animal rights, effectively subduing societal expectations that fight for animal issues. I believe that rethinking the concrete nature of the *capacities*²⁷ gives more ground to expand our perspective to all living creatures.

Critics such as Monad (2016) argue that Nussbaum’s capabilities approach heightens awareness of the pluralism inherent in society. She writes that her list “enumerates capabilities, but not how they are supposed to function, although the focus of her approach is attached to liberty, freedom, autonomy (MONAD, 2016, p.3). In this perspective, Nussbaum’s Capability approach does not hold all living beings in one parameter of an “ideal life”. Instead, she enumerates capabilities that are deemed necessary in exercising freedom and having the chance to flourish.

Nussbaum’s approach also considers that all living beings are an “end in themselves”, all of them should be entitled to rights, multiplicity of other values exercised through the capabilities, as well as free will and freedom. Through this understanding, she lists a number of capabilities that are essential for that each member of a

society “reach a minimum level” of dignity.

There is much debate about whether the list of core capabilities is revisable, subject to change. Nussbaum believes that her list has a mutable character being susceptible to subsequent changes, to become more and to favorable animal cause. The central capacities applied to animals in this theory are the following;

1. Life - beings should be able to live up to the end of a life, with normal length, and fully protected against premature death;

2. Health Corporal- beings should be able to have a good life that includes reproductive health, nutrition and shelter, but not limited to these;

3. Physical integrity - beings should be able to change locations freely, but also to have sovereignty over their own bodies, which includes being protected from aggressions of any kind. (Ex, sexual assault, child abuse, domestic violence and the opportunity for sexual satisfaction);

4. Emotions - beings should be able to have connections with things outside of themselves; To love, to have grief, be angry, all justifiable;

5. Practical Reason - beings should have the ability to form design in itself, and on the right. To choose how they prefer to live their lives;

6. Membership

6.1 beings should be able to live with and show concern for others, empathy and the ability of justice and friendship. Institutions help develop and secure forms of affiliates;

6.2 beings should be able to have self-respect and not be humiliated by others, or to be treated with dignity and equal value. This implies (at least) protections against discrimination of any kind.

7. Other species - beings should be able to take care and live with other animals, plants and the environment in general;

8. Entertainment - able to play and enjoy recreational activities;

9. Control over one's environment: to be able to transition freely in one's own environment.

Underlining these concepts, Nussbaum highlights the importance the Capabilities when establishing a core foundation to life and reciprocity among all living beings. Her framework allows us to take animals into consideration as essential elements in society. She sets a new standard to human rights, that are upheld by all governments globally.

We believe that she triumphs to focuses attention on the capacities in "intuitive way", in which in her view, give the needed flexibility to adequately mold themselves in each government reality, its dynamic. And by doing so, by rethinking dignity and its meanings, she consequently sets a minimum parameter of the construction of animal rights in terms of constitutional value. Nussbaum explicit the necessity for "the gradual formation of an interdependent world in which all species will enjoy cooperative and mutually supportive relations" (2006, 400), "the supplanting of the natural by the just" (2006, p.400).

As an animal activist, I agree with her with regarding the necessity to form and “interdependent world” through collective force, collective change, in human consciousness, in human ways. The capacities are thought to be as means for a living being to fulfill his aspiration in life, it is an intuitive notion that strikes the basic core of social justice. Nussbaum consciously sets a universal a comprehensive idea of *common good*, redefining what should be considered dignity. Nussbaum is able to put highlight that all lives matter, and because of it, they should all have means to flourish.

Rethinking animal rights in terms of basic entitlement, so intrinsically tied to the notion of dignity of living beings, allows society a chance to change its perspective regarding animal rights, elevating it to a higher parameter, a humane parameter. Their lives, their existence, have same the same importance as any other life in this universe.

4. FINAL CONSIDERATIONS

As I demonstrated, Nussbaum raises an important discussion with regard to animals’ rights. Her perspective stands against the traditional anthropocentric conceptual bias that dictates animal’s rights and dignity.

Her arguments are punctual and go beyond contractualist and utilitarian views, they are based on ethics and universal values related to the lives of all beings. In other words, they stand for *what’s is morally correct for all beings, humans and non-humans*. According to Nussbaum’s perspective, non-human animals are thought as members of our social environment. Non-humans have the right to a dignified existence, and for that, be included in our social agenda.

Her theory is an important milestone in the attempt to establish an effective protection of non-human animals. I understand that to effectiveness in the protection of animals has to be done through the consolidation of these rights in constitutional spheres, and also by enforcing legislation to ensure the conceptual advancement on the issue, moving human societies closer to an ideal state of protection towards animals.

Brazilian modern constitution still carries retrogressive conceptions related to the role that other species in the animal kingdom play in the social world. In fact, regarding animals, what we see constantly, is the failure of the State in solving these subject-matters, as well as the inefficiency of legal devices created within this purpose. Human society fails in ensuring the non-humans are ensured adequate protection.

In Brazil, there is much to achieve in terms animal rights. Legal society still did not awake to rethink these values, its terms of protection and dignity towards animal. There is still a lot to be done, and unfortunately discussions did not reach satisfactory parameters related to these issues. But new horizons are ahead with the forthcoming of a lot civil associations and ONG's fighting for animal rights.

In February 2007, the parliament of the Balearic Islands, an autonomous province of Spain, became the first legislative body to grant legal rights to all members of the *Hominidae* family. In 2014, an Argentinian association of lawyers for animal rights named AFADA impetrated a "Great Writ" habeas corpus in favor of a chimpanzee named Cecilia²⁸. The Argentinian Court, ruled that Cecilia was subject of rights, considered her to be a "non-human person" fit to receive protection an adequate means of preserve her cognitive abilities.

In 2015, Nonhuman Rights Project (NHRP), impetrated an habeas corpus in on behalf of two chimpanzees, Hercules and Leo²⁹, who were being used for biomedical experimentation at Stony Brook University on Long Island, New York. The Manhattan Supreme Court decided that the chimpanzees were legal subject of rights.

In Brazil (2008) we can mention the case of “Jimmy”³⁰ where a habeas corpus was *impetrated* by the district attorney Heron Santana to protect a chimpanzee in a zoo, in Salvador-BA, that lived-in degrading condition. Actions like these are fit to show us that new horizons are coming and are bringing better deal to all nonhuman animals in Brazil, and worldwide.

7. REFERENCE NOTES

(ENDNOTES)

- 1 In my paper, Human Welfare is considered as the actions, policies, and/or rules that should be evaluated on the basis of their consequences towards human life. WEBSTER, John. *Animal Welfare: Limping Towards Eden. A practical approach to redressing the problem of our dominions over the animals.* London: Blackwell Publishing, 2005.
- 2 EPSTEIN, R. *Animals as Objects, or Subjects, of Rights, in Animal Rights: Current Debates and New Directions*, Martha Nussbaum & Cass R. Sunstein eds. (Oxford University Press, 2002) (also published as a University of Chicago John M Olin Law & Economics working paper.
- 3 RYDER, Richard. *Experiments on Animals*, in Stanley and Roslind Godlovitch and John Harris. *Animals, Men and Morals.* Grove Press, Inc. 1971.
- 4 Lipovetsky understands that in this postmodern culture there is certain ideological apathy provoked by the mass in-

formation and dispersion of consciousness. Where the mass indifference reigns, a dominating feeling of stagnation, private autonomy is always present and collectiveness are disappearing. An era where innovation is trivialized with the perspective of a future no longer assimilated to human progress, but the necessity of obtaining ultimate satisfaction. See Lipovetsky, G. *La era del vacío*, España, Editorial Anagrama, 2000.

- 5 Cunha & Rangel (2016) shows that we should look at the current environmental crisis as part of a larger conjecture, where political, historic, and social elements serve to understand the disastrous consequences brought about by human action against the environment. In this perspective, the predatory action of the capitalist model serves to situate the unsustainable exploitation of nature on a global scale. Cunha & Rangel (2016) state that: "The environmental crisis, which frontally questions the economic and technological rationalities, is another reflection of the politics of capital, adopted in Postmodernity, in the economic, social, and political conjunctures." See, CUNHA, B. and RANGEL, A. *A Crise contida em outras Crises: Perspectivas Historias e Politocos Sociais da Crise Ambiental atual*. In: *A Crise Ambiental/ Belinda Pereira da Cunha (Org.) – Appris, 1 ed. Curitiba, 2016.*
- 6 Ulrich Beck identifies these problems in the confinement of a Risk Society, in which the ecological crisis is a central to social analysis of the contemporary period. He argues that environmental risks had become the predominant product, not just an unpleasant, undesired effect of an industrial, modern, society. BECK, Ulrich. *Risk society*. London: Sage Publications, 1992. The risk generated by humans, or manufactured, can be also be due to ignorance and illogical laws., for example the horrific Genocide practiced against stray animals in Romania, which during a period of 2004 – 2009 has killed over 10 million stray dogs. Romanian Court, in a Lower House of the Romanian Parliament voted GEO 155/2001 to legitimize this 'catch and kill' policy for all homeless animals. Acts like this one are of irrepressible damage, unmeasurable consequences, to na-

ture and life. Seen in: <http://www.occupyforanimals.net/romania---on-the-greatest-animal-genocide-in-europe-an-history-government-initiated-anarchy-violations-of-human-rights-and-children-rights.html>, access: 04, set.2016.

⁷ See FRANCIONE, G. *Animals. Property and the Law*. Temple University, 1995 Philadelphia; WOLFE, C. *Animal Rites: American Culture, the Discourse of Species, and Posthumanist Theory*. University of Chicago Press, 2003. STEINER, G. *Anthropocentrism and its discontents: the Moral Status of Animals in the History of Western Philosophy*. University of Pittsburg, 2010.

⁸ According to Bauman, *otherness* is the representation of a different group within any given company in which there is a majority. He believes that the existence of the *other* is fundamental to how companies establish their identity categories. He argues that identities are configured as dichotomies, such as women and men, primitive and modern, humanity and animal, man and beast. BAUMAN, Z. *Modernity and Ambivalence*. Ithaca, N.Y.: Cornell University Press. 1998.

⁹ KANT, Immanuel. *Fundamentação da Metafísica e dos Costumes*. Trad. Paulo Quintela. Ed 70 –Lisboa- Portugal, 2007.

¹⁰ ANDERSON, E. *Animal Rights and the Value of the Non-human Animals*. In: NUSSBAUM, M. C.; SUNSTEIN, C. R. *Animal Rights: Current debates and New Directions*, Chicago Press, 2006.

¹¹ LEUKMAN, Mary. *Dignified Animals: How “Non-Kantian” is Nussbaum’s Conception of Dignity?* Thesis, Georgia State University, 2011. http://scholarworks.gsu.edu/philosophy_theses/89, Access: 12 of set. 2016.

¹² _____. *Beyond Compassion and Dignity: Justice for the Nonhuman Animals*. In: NUSSBAUM, M. C.; SUNSTEIN, C. R. *Animal Rights: Current debates and New Directions*, Chicago Press, 2006.

¹³ According to Benedito Nunes etymologically, the word

dignity comes from the Latin *dignus* – which denotes that, one deserves respect and honor, that he has an important existence. Throughout the middle ages, it was always used to referred to people, never animals. Christianity appropriated itself of its meaning and utilized it to ground their belief system throughout the ages. St. Thomas Aquino’s thought the dignity as inherent to a species; existing in man in *actus* and only in man as an individual. Kant reorganized the Christian concept, separating the world into two social concepts: a market linked to the price of things and the other, a subjective value on morality. NUNES, Benedito. *Filosofia e memória*. In: NUNES, Benedito. *Ensaio filosóficos*. Organização de Victor Sales Pinheiro. São Paulo: Editora WMF, 2010a. p. 20-25.

- 14 NUSSBAUM, M. *Capabilities and Disabilities: Justice for Mentally Disabled Citizens*, Philosophical Topics. Chicago, 2002.
- 15 Sharing the same perspective as Nussbaum, Steiner understands that these “arguments have their root in Aristotle, and particular in the thoughts of the Stoics, Saint Augustine, Saint Thomas Aquinas, Descartes, and Kant, these philosophers’ view about animals are linked by an underlining logic: all and only human beings are worthy of moral consideration, because all and only humans are rational and endowed with language. Only such beings are capable of genuine self-determination and moral responsibility, and moral beings in the most complete and authentic sense.” STEINER, Gary. *Anthropocentrism and its discontents: the Moral Status of Animals in the History of Western Philosophy*. University of Pittsburg, 2010, p.3
- 16 *Ibid.*, p. 305
- 17 *Ibid.*, p. 318
- 18 ARIAS, Anabella Di Tullio. *Hacia una justicia sin frontera? El enfoque de las capacidades de Martha Nussbaum y los limites de la justicia*. *Revista Internacional de Filosofia*, n.58, p.54 2013.
- 19 MONAD, M. *Nussbaum’s Capabilities Approach and Non-*

human Animals: The Ecological Implications. CLA journal 4, p.218 -238. P.3 2016

- 20 Ibid. p.5 2016
- 21 NUSSBAUM, Martha C. *Beyond Compassion and Dignity: Justice for the Nonhuman Animals.* In: NUSSBAUM, M. C.; SUNSTEIN, C. R. *Animal Rights: Current debates and New Directions*, Chicago Press, 2006. (p. 313)
- 22 Ibid, p. 310
- 23 Ibid. p. 305
- 24 Ibid. p. 315
- 25 CLAASSEN, R. *Human Dignity in the Capability Approach.* Published in: Marcus Düwell, Jens Braarvig, Roger Brownsword, Dietmar Mieth (eds.). *The Cambridge Handbook of Human Dignity* Cambridge: Cambridge University Press, 240-249, p.2, 2014.
- 26 Referring to Brazilian context, I believe that animal right should reach a higher parameter in society. For example, the protection of nature and all its species could hold a status as *Clausulas Petreas*. *Clausulas Petreas* are the form in which the Brazilian Federal Constitution solidifies the ideas and values of the Sovereign Nation of Brazilian. Another way animals can be contemplated, is that their rights can inserted in chapter I, articles 5, in the section of "*Rights and Duties, Individual and Colective*". This title is responsible for what's legally understood within society as Human Rights, or rights applied to humans, that guarantees the rights that each citizen has. These rights are instruments in objectifying the possibility of a providing a dignified, free and equal life to all individual. The rights and guarantees are disposed into terms of individual, civil, political, social, economic, cultural, diffuse and collective rights. This way, we believe that positioning animal rights in the same level of importance could me a milestone a conceding them their real status in society.

27 As it is expressed in this article, in Brazil, there is a conceptual difference in the utilization of the term capacity. In general the term capacity designates an ability to exercise certain rights entitled at birth, or exercise them for a certain period in life. (See Sílvia de Salvo Venoza. *Direito Civil: Parte Geral*. 5. ed. São Paulo: Atlas, 2005). In the Brazilian legal system term capacity, is divided into two concepts. The first, refers to *Natural Capacity* acquired when a person is born. This right is extinguished only by death. Every human being is entitled to Natural Capacity. In civil society, each individual has their own set of rights guaranteed. The protection to those rights is an attribute given only through natural capacity to all human beings. There exists, independently if the person is able to exercise it or not. *Capacity of Fact*, or Civil Capacity, is the ability to act, to experience, or to have power over something or someone. In the civil society, this capacity is only attained by a limited number of individuals. In order to exercise this right one must fulfill certain traits. Civil Capacity is related to the idea that not all individuals are able to exercise their rights and guide their actions inside civil society. Civil Capacity is also the legal restriction imposed on an individual to exercise certain acts of civil life. To exemplify, the Brazilian Civil Code states in its third article that: The following cases are absolutely incapable of exercising the acts of civil life, and need to be represented in the following terms: I - those under the age of sixteen, II - those who, due to illness or mental deficiency, do not have the necessary discernment for the practice of these acts; III - those who, even for a transitory cause, cannot express their will. Therefore, the basic meaning of capacity in our paper, is related to Nussbaum's theory, extended to the animals. In other words, we agree with Nussbaum's perspective, expressed through the following statement: the animals should be rewarded personality of human rights, protected before their birth by the legal order, and therefore be entitled with natural capacity. Each animal must be protected by an adequate parameter in consonance to a dignified treatment given to each species individually. To make a parallel with Brazilian situation, I believe that the term Capacity enlisted by Nussbaum's approach should guide law operators in

Brazil to expand their conceptual knowledge of judicial personality when attending cases related to non-human animals. Nussbaum perspective is ideal to Brazilian cases, since it serves to ground a firm ideological stand with a positive ethical perspective to animal protection.

- 28 <http://www.projetogap.org.br/wp-content/uploads/2016/11/329931683-habeas-corporus-cecilia.pdf>
- 29 <http://www.nonhumanrightsproject.org/2015/04/20/judge-recognizes-two-chimpanzees-as-legal-persons-grants-them-writ-of-habeas-corporus/> and http://www.huffpostbrasil.com/entry/chimpanzee-personhood_n_7107490
- 30 <http://www.proanima.org.br/noticias/pedido-habeas-corporus-para-chimpanze-que-vive-sozinho-em-zoologico/> accessed in 04 Set. 2016