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SENTIENT BEINGS PROTECTED BY LAW

Analysis of Recent Changes in Colombian Animal Welfare Legislation

by Carlos Contreras¹

Abstract

The article analyses a recent reform of Colombian animal welfare legislation. In December 2015, Bill number 172 was passed in the parliament and on January 6, 2016 approved by the president as Law 1774. The Law reformed National Animal Protection Statute; the Colombian Civil Code; the Criminal Code and the Criminal Procedure Code.

The new law recognizes animals as sentient beings and introduces new penalties for animal abuse. The new sanctions include prison sentences and fines and are the most stringent in all of Latin America for the crimes of abuse and abandonment. The law, fully coherent with the Colombian legal framework, represents a turning point for Animal Law in Latin America.

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1. Introduction

On December 2, 2015, the most important advance with regards to the legal protection of animals in the country (and one of the most important in Latin America) occurred in the Senate of the Republic of Colombia. On this date, the Colombian Congress approved Bill number 172 which sought to reform the National Animal Protection Statute (Law 84 of 1989); the Colombian Civil Code; the Criminal Code and the Criminal Procedure Code. The Bill was approved as a Law of the Republic², on January 6, 2016³ by the President of Colombia, Juan Manuel Santos. In this article, I examine this Law that recognizes animals as sentient beings and penalizes animal abuse in Colombia. Legal sanctions include prison sentences and fines and are the most stringent in all of Latin America for the crimes of abuse and abandonment. The drafting of the bill, led by the Chamber Representative Juan Carlos Losada, included the participation of jurists and experts in the topic, who in turn involved associations that have been working to protect animals in Colombia. I also had the honor of participating in the process of drafting the Law, exchanging opinions, knowledge and experiences, in a very enriching debate which culminated with the consolidation of a text that is fully coherent with the Colombian legal framework, and which represents a turning point in Animal Law Latin America.

In the Explanation of the Motivations for the bill, the authors note that although the National Animal Protection Statute from 1989 stipulated that animals throughout the national territory would have “special protection against suffering and pain, caused directly or indirectly by humankind”⁴, its enforcement framework has been essentially inapplicable over the years. The 1989 Statute stipulated that the violation of the statute's regulations would be punished with arrests (a different penalty from prison time, lasting no longer than 72 hours) and fines as well as with the confiscation of the animals involved, when appropriate. However, since 1995, with the passage of Law 118, a limit was imposed on the maximum amount for fines imposed due to violations contained in the National Animal Protection Statute from 1989 and the possibility of arrest was removed: “*violations currently punishable by arrest will be*

² Law 1774, of January 6, 2016 which modifies the Civil Code, Law 84 of 1989, the Criminal Code, the Criminal Procedure Code and dictates other provisions. Available at:

<http://es.presidencia.gov.co/normativa/normativa/LEY%201774%20DEL%206%20DE%20ENERO%20DE%202016.pdf>

³ Law against Animal Abuse approved in Colombia. Available at: <http://www.derechoanimal.info/esp/page/4382/aprobada-en-colombia-la-ley-contra-el-maltrato-animal>

⁴ Law 84 of 1989, Official Diary 39120, of December 27, 1989.

punished with a fine of up to five (5) legally minimum monthly salaries'⁵. That is to say, by eliminating the possibility of arrest with the approval of Law 28 of 1995, the only punishment which remained valid for animal abuse and cruelty was a fine. These fines also ended up becoming ridiculous. According to the explanation of motivations⁶, the fines imposed for animal abuse varied between five thousand (5,000) and fifty thousand (50,000) Colombian pesos. This translates to between 1.38 and 13 Euros at today's value (November 2016).

Another of the arguments outlined in the Bill's Explanation of Motivations, in addition to the different advances on the topic at the international level, referenced the possible relationship existing between animal abuse and violence against people; the same link was made by the speaker at the time in the Law from 1989.⁷ Undoubtedly, this is a very convincing argument for most members of the society.

2. Animals as sentient beings. Modification to the Colombian civil code of 1887

Animals as movable goods, as non-things, as sentient beings

Article 1, which contains the Law's purpose, establishes the following:

Article 1: Animals as sentient beings are not things, they will receive special protection against suffering and pain, in particular, suffering and pain caused directly or indirectly by humans; this Law classifies some behaviors related with animal abuse as punishable and establishes a police and legal enforcement procedure.⁸

With regards to animals, the Colombian Civil Code of 1887 (COLCC) referred to animals in the framework of three institutions of Private Law, in particular: 1. the classification of goods; 2. *occupatio*,

⁵ Law 228 of 1995, which determines the applicable framework for special violations and dictates other provisions. Available at: <http://www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=5243>

⁶ Speaker's report, second debate of Bill 172, 2015, Senate, 087, 2014, Chamber, available at: http://www.imprenta.gov.co/gacetap/gaceta.mostrar_documento?p_tipo=27&p_numero=172&p_consec=43266

⁷ In this respect, we recommend the book *The Link Between Animal Abuse and Human Violence* (Sussex 2009) edited by Andrew Linzey, in which different authors examine in detail the relationship between animal abuse and violence toward minors and within the family. The book analyzes psychological studies and medical research on this topic, presenting a very interesting ethical discussion.

⁸ Article 1 of Bill 172, approved by the Congress of the Republic of Colombia. Available at: http://servoaspr.imprenta.gov.co/gacetap/gaceta.nivel_3

as a way of acquiring ownership of animals which do not belong to anyone; and 3. in crimes and torts, to regulate the damages that animals may cause to third parties. Regarding the first of these, article 655 of the Colombian Civil Code of 1887 included animals within the classification of movable goods. This provision was taken from article 567 of the Chilean Civil Code by Andrés Bello, which maintained the tradition of European Codes with regards to the classification of goods, and the origin of which we can find in the configuration of property in Roman Law.⁹

Article 567 of the Civil Code by Andrés Bello, which had enormous influence in Latin America, defined animals as movable goods:

Article 567. [1] Movable goods are those which can be transported from one place to another, either when they are capable of moving themselves, such as animals (which are known as self-moving), or whether they are only moved by an external force, such as inanimate things. [2] Excepting those which are movable goods by nature but are deemed immovable goods due to their use, in accordance with article 570.¹⁰

As such, article 2 of the new Law (1774 of 2016) although maintaining the original drafting of the cited article of the COLCC¹¹, adds the following paragraph: “Let animals be recognized as having the quality of sentient beings.”

We have to differentiate between two issues here. The first is the new legal category of animals in the Colombian Civil Code and the other, the applicable legal system. I maintain that with the modification that the new Law makes to the Colombian Civil Code, animals now belong to the legal category of sentient beings, which have the category of movable goods or in some cases of immovable goods due to fate applied to them.¹² The fact that Law 1774 recognizes all animals (without exception) as sentient

⁹ GIMÉNEZ-CANDELA, *An Overview of Spanish Animal Law*, in, *Animales y Derecho* (Valencia 2015) 222

¹⁰ GUZMÁN BRITO, A., *Código Civil Chileno. Estudio preliminar y notas* (Cizur Menor 2006) 20

¹¹ COLOMBIAN CIVIL CODE, *Article 655. Movable Goods. Movable goods are those which can be transported from one place to another, either when they are capable of moving themselves, such as animals (which are known as self-moving), or whether they are only moved by an external force, such as inanimate things. Excepting those which are movable goods by nature but are deemed immovable goods due to their use, according to article 658.* Available at: http://www.secretariasenado.gov.co/senado/basedoc/codigo_civil.html

¹² Sometimes movable things and Animals can be considered as immovable things by the disposition of the Law. In this sense, in the Colombian Civil Code, there are things immovable by their nature, others by their destination, and others by the object to which they are applied. Things which the owner of a tract of land has placed upon it for its service and improvement, are immovable by destination, according to Article 658. Thus, animals are immovable by destination when

beings, means that we must differentiate them from the other goods and this situation must be taken into account by the legal framework in its entirety. It is not coherent to consider animals as movable goods and at the same time as sentient beings.

Law is dynamic and the legal concept of “thing” is defined according to the practical needs that each civilization has had. Regarding animals, today most members of society reject animal abuse and consider animals “as beings which must be respected and whose life and protection are extremely important, just like the care for the environment.”¹³

The fact that animals are no longer considered by the Law as things does not mean that they automatically become subjects with rights or “persons”. But animals’ becoming persons is not impossible. Why not? According to the *Royal Spanish Dictionary*, the concept of “person” derives from the Latin *persōna*, meaning ‘actor’s mask’, or ‘theater actor; it does not have to be a static legal concept, nor must it remain linked solely to the human condition.

As such, Colombia has become the first Latin American country to recognize animals as sentient beings as expressed in its Civil Code. Colombia thus joins what the Teresa Giménez-Candela has called the “The New French Revolution”¹⁴ referring to the issuance of Law 2015-177 of February 16, 2015 in France which modified the legal statute of animals in the country’s Civil Code, recognizing their nature as living and sensitive beings. Specifically, since then, the French Civil Code establishes in article 515-14 that “Animals are living being imbued with sensitivity. Subject to the Laws that protect them, animals are subjected to the property regime.”¹⁵ The previous means that animals are living beings imbued with sensitivity, subjected to the Laws which protect them, and also, when applicable, to the legal framework of movable goods. The previous formula was also used to modify the framework of the immovable goods by fate (article 524 of the Civil Code) as it establishes that for animals which serve and benefit a farm,

they have been placed by the owner for the service and improvement of a tract of land. For Example: Cattle intended for cultivation, and Pigeons for a pigeon house.

¹³ GIMÉNEZ-CANDELA, *A cara descubierta a favor de los animales: Francia, el “Code Civil” y la Constitución*. Available at: <http://www.derechoanimal.info/esp/page/2937/a-cara-descubierta-en-favor-de-los-animales-francia-el-code-civil-y-la-constitucion>

¹⁴ GIMÉNEZ-CANDELA, *Una nueva Revolución Francesa: La modernización del Code Civil* (2015) Available at: <http://www.derechoanimal.info/esp/page/3718/una-nueva-revolucion-francesa-la-modernizacion-del-code-civil>

¹⁵ *Civil Code*, Art. 515-14. Available at: <https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070721>

the legal framework of immovable goods by fate will be applied, as opposed to what was established by the Napoleonic Code, which directly considered animals as immovable by fate.

This amendment to the French Civil Code, which signified the culmination of several years of reflection and parliamentary debates with the support of the *30 Millions d'Amis* Foundation, is extremely important, as it "positions animals as living beings -- which cannot be equated with inert things -- differentiated from owned things and human beings, whose capacity for sentience allows them to enjoy an autonomous legal status, more in agreement with what science has been affirming: that animals are 'sentient beings'."¹⁶

We consider that the legal technique used to modify the Civil Code was more precise from a theoretical point of view, given that it is not the same to continue considering animals as movable goods and at the same time as sentient beings (in the Colombian case), as it is to consider animals as sentient beings which have the legal framework of movable goods applied to them.

The modification of the Civil Code, in turn, followed the path set by the Treaty of Lisbon in its Article 13 which recognized for the first time in a programmatic legal text¹⁷ that animals are "*Sentient Beings*", leaving behind the legal consideration of animals as owned things.¹⁸ The Treaty of Lisbon, the French Civil Code, and now the Colombian Civil Code are going one step further than the steps taken by Austria, Germany, Switzerland, Catalonia and the Czech Republic, when they established a negative definition of animals as "not things" in their respective legal frameworks. These changes occurred (as in Colombia) as a consequence of the growing societal demand for Laws to provide better protection for animals. This is an "adaptation to social reality" demanded by a global society that is ever more sensitive to the animal issue.¹⁹ We can recall that the first to make this negative definition of animals as not things was the Austrian Civil Code, thanks to Law 179 of March 10, 1988, which led to an immediate effect in Germany²⁰, given that through the Law approved on August 20, 1990, the German Parliament made a

¹⁶ GIMÉNEZ-CANDELA, *Una nueva Revolución Francesa: La modernización del Code Civil* (2015) Available at: <http://www.derechoanimal.info/esp/page/3718/una-nueva-revolucion-francesa-la-modernizacion-del-code-civil>

¹⁷ GIMÉNEZ-CANDELA, *A la búsqueda de un régimen jurídico animal* (2012) Available at: <http://www.derechoanimal.info/esp/page/2081/a-la-busqueda-de-un-regimen-juridico-animal>

¹⁸ Consolidated version of the Treaty on European Union, Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0001:01:EN:HTML>

¹⁹ GIMÉNEZ-CANDELA, *An Overview of Spanish Animal Law*, in, *Animales y Derecho* (Valencia 2015) 226.

²⁰ GIMÉNEZ-CANDELA, *An Overview of Spanish Animal Law*, in, *Animales y Derecho* (Valencia 2015) 227.

similar reform in its BGB²¹. The Austrian and German Legislatures were followed by the Swiss Legislature, through the Law of October 4, 2002²² and the Catalan case in 2006²³, in its Civil Code.²⁴

However, I do not consider the definition of animals as "non-things" to be fully satisfactory. In the words of Prof. Giménez-Candela, "[this classification] can be classified as a superficial one, in the first place because it adopted a negative formula: an animal is not a thing, which leads to a non-definition and makes extracting all the consequences from such a formula impossible".²⁵ That is, the theoretical and practical effects of a negative definition of animals as "not things" are practically non-existent, as opposed to a positive definition, such as the definition adopted in France and with regard to Article 2 of Colombian Law 1774 of 2016. That article defines animals as sentient beings and also defines the legal consequences of such a definition in the subsequent article.

Animal welfare in legislation

Article 3²⁶ of Law 1774 related to the principles of the regulation includes the well-known 5 freedoms as minimal animal welfare standards to be taken into account in the use that we as human make of animals.²⁷

²¹ German Civil Code. Official English translation. Available at: http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0265

²² Inserted by No I of the Federal Act of 4 Oct. 2002 (Article of Basic Principles: Animals), in force since 1 April 2003 (AS 2003 463 466; BB1 2002 4164 5806). Available at: <http://www.admin.ch/ch/e/rs/210/a641a.html>

²³ Law 5/2006, of May 10, of the fifth book of the Civil Code of Catalonia, related to real rights. DOGC 4640 of May 24, 2006. Art. 511-1.

²⁴ Regarding the history and legal analysis of the advances of the Legal Statute of animals in European Civil Codes, the following is essential: GIMÉNEZ-CANDELA, *Estatuto Jurídico de los Animales: Aspectos Comparados*, in *El Derecho de los Animales* (Madrid 2015) 149 -180; GIMÉNEZ-CANDELA, *An Overview of Spanish Animal Law*, in *Animales y Derecho, Animals and the Law* (Valencia 2015).

²⁵ GIMÉNEZ-CANDELA, *An Overview of Spanish Animal Law*, in, *Animales y Derecho* (Valencia 2015) 228.

²⁶ Bill 172, Article 3. "Principles. a) Animal protection. The treatment of animals is based on respect, solidarity, compassion, ethics, justice, care, prevention from suffering, eradication of captivity and abandonment, as well as any form of abuse, mistreatment, violence and cruel treatment; b) Animal welfare. In the care of animals, the person responsible or bearer of the animals shall ensure at a minimum: 1 That they do not suffer from hunger or thirst; 2. That they do not suffer undue physical suffering or pain; 3. That illnesses due to negligence or lack of care do not occur; 4. That they are not subjected to conditions of fear or stress; 5. That they can express their own natural behavior."

²⁷ Farm Animal Welfare Council. *Farm Animal Welfare in Great Britain: Past, Present and Future*. (October 2009) 2. "Five freedoms: Freedom from hunger and thirst, by ready access to water and a diet to maintain health and vigour. Freedom from discomfort, by providing an appropriate environment. Freedom from pain, injury and disease, by prevention or rapid diagnosis and treatment. Freedom to express normal behaviour, by providing sufficient space, proper facilities and appropriate company

The philosophical origins of this animal welfare policy necessarily lead us to utilitarianism, a philosophical current created by Jeremy Bentham in the 18th century which is based on the premise that pain is something that must be avoided, and pleasure should be maximized. In his 1789 work *An Introduction to the Principles of Morals and Legislation*”²⁸ Bentham reflects on his vision about the moral principles that legislation must take into account. Opposing all type of discrimination, and being coherent with his proposal that the most important part of the principle of utility was to prevent pain and to ensure pleasure, Bentham advocated for the moral consideration of animals, centering his attention on what was truly important: can they suffer? If the answer is affirmative, then the consequences that may occur with human actions on a sentient being must also be taken into account. In this way, in Volume II, Chapter 18 of this work, alluding to the lack of protection that slaves had in the French Antilles within the *Code noir* by *Louis XIV*, he stated his famous phrase: “The question is not, Can they reason? nor, Can they talk? but, Can they suffer?”²⁹

In this sense, Law 1774 follows the same reasoning as Bentham, since as we saw, in its first two articles, the Law recognizes animals' capacity for sentience in order to establish certain boundaries which limit pain, or to ensure welfare, and criminal consequences for those who abuse and cause cruelty to animals.

Lastly, on this point, we should note that in spite of the fact that our Civil Codes have changed from considering animal as movable goods to considering them as sentient beings which have the legal framework of movable goods and immovable goods by fate applied to them, this is still, in the first place, a theoretical advance. Some may claim that the change does not produce any immediate effect concerning the lives and protection of animals. However, I consider that in spite of being a theoretical issue, we must progress coherently in our legal systems toward a system of regulations which takes animals and their capacity to experience pain into account.

of the animal’s own kind. Freedom from fear and distress, by ensuring conditions and treatment, which avoid mental suffering.” Available at: <https://www.gov.uk/government/publications/fawc-report-on-farm-animal-welfare-in-great-britain-past-present-and-future>

²⁸BENTHAM, J., *An Introduction to the Principles of Morals and Legislation*. Available at: <http://www.econlib.org/library/Bentham/bnthPML.html>

²⁹ BENTHAM, J., *An introduction to the Principles of Morals and Legislation II* (London 1823) 235.

3. The crime of animal abuse in the Colombian criminal code

Protected legal goods

Traditionally, in dealing with animal issues, the law has classified them from an anthropocentric point of view. We know that the first legal framework which included animals as owned things was Roman Law³⁰ and that the *Napoleonic Code* of 1804 (which constituted the model for codifying the Law throughout the 19th and 20th centuries)³¹ brought together the civil institutions from the Roman traditions, dividing the Law into *personae*, *res* and *actiones*. According to this trifurcation, only persons are able to have rights, specifically rights over things.

Among its fundamental principles Criminal Law has the principles of subsidiarity and *ultima ratio*. Therefore, Criminal Law only deals with legal interests which need special protection, as required by society. These legal interest have traditionally been anthropocentric, including interests such as life, liberty, physical and moral integrity, and economic wealth. In this sense, Article 1 of the Colombian Criminal Code stipulates that “Criminal Law has at its core the respect for human dignity.”³²

Now, article 5 of Law 1774 to the Criminal Code has a new title, XI-A, known as: “ON CRIMES AGAINST ANIMALS. Crimes against the life, physical and emotional integrity of animals.”

Undoubtedly, the fact that the behaviors classified as the crime of animal abuse are going to be found in the Colombian Criminal Code, within a singular title, with the aforementioned name, has some truly important, if not historic, consequences. At first glance, this means that the legal interests to be protected by the Colombian Criminal Code in its Title XI-A shall be the life and the physical and emotional integrity of animals. From our point of view, as of now it is more than appropriate to employ legal argumentation which sustains that animals are considered as legal subjects by the Colombian legal framework, now that Colombian Criminal Law opened its doors to expressly include the life and physical and emotional integrity of animals (beings which had previously been considered by the Law as things) within the legal goods considered most important for Colombian society. Title XI-A of the Colombian

³⁰ In a civilization like Rome, where animals constituted an essential element of the economy, it was necessary to include animals within the legal system to regulate the creation of property rights over them.

³¹ CARONI, P., *Saggi sulla storia della codificazione* (Milan 1998) 1-98.

³² Law 599 of 2000, which issues the Criminal Code, Available at: <http://www.alcaldiabogota.gov.co/sisjur/normas/Normal.jsp?i=6388>.

Criminal Code does not protect collective or individual human interests, but rather it protects the animal's interest in not being abused. As such, we go from a conception of the animal as an instrument to satisfy human interests to a being considered as an end in its own right, protected by the Law.

Type of abuse

Article 339A of the Colombian Criminal Code, which classifies animal abuse, was drafted by the Law 1774 of 2016 in the following manner:

Article 339A. Anyone who, by any means or procedure abuses a domestic, tame, wild or exotic vertebrate animal, causing death or injuries to the animal which severely affect its health or physical integrity, shall incur prison time ranging from twelve (12) to thirty six (36) months, and a special disqualification of one (1) to three (3) years from exercising any profession, trade, business or ownership related with animals and a fine ranging from five (5) to sixty (60) legally minimum monthly salaries.

The first aspect to note is that not only domestic or companion animals are included, but the Law also includes *wild vertebrates* which are found in Colombian territory, as opposed to criminal provisions in other countries such as Spain, which only punish the abuse of domestic or domesticated animals.³³ It is coherent to include all animals within the sphere of application, as it would not make sense to discriminate between punishing dog abuse, while letting the abuse of a primate go unpunished. That is to say, we are clearly speaking of vertebrate animals, of sentient animals in accordance with what is established in article 1 and 2 of Law 1774. In other words, the new Colombian Law recognizes animals as sentient beings, making the respective modification in its Civil Code, to later protect animals (all vertebrate animals) in its criminal code.

On the other hand, acts of abuse which do not have a material result, i.e. which do not lead to the death or serious damages to the animal, shall not be considered a crime. If abuse occurs which leads to death or to serious harm to the health or physical integrity of an animal, this will therefore be sufficient for the

³³ Organic Law 1/2015, of March 30, which modifies Organic Law 10/1995, of November 23, of the Criminal Code. Available at: <http://www.derechoanimal.info/bbdd/Documentos/1630.pdf>

act of abuse to enter within the criminal classification. In other words, abuse which does not lead to the consequences described above will not be deemed to have criminal relevance. It is interesting to observe that the two results (death and serious harm in the health and physical integrity) are considered equivalent with regards to the punishment. On the other hand, in other legal frameworks, such as in Spain, the result of death is an aggravating actor for abuse which includes a stronger punishment.³⁴

The emotional abuse of animals is left out. However it is also certain that this is usually accompanied by physical abuse which, by action or negligence, causes physical injuries or death, thus being deemed a crime.³⁵

The latter occurs in accordance with the principle of *ultima ratio*, according to which Criminal Law must only be concerned with the most serious behaviors when the administrative framework is not sufficient. However, Law 1774 does not leave out other acts of abuse as it modifies article 10 of the National Animal Protection Statute of 1989. The Law establishes that although harmful and cruel acts against animals which do not cause the animal's death or injuries that seriously affect the animal's health or physical integrity are not considered crimes, the Law does establish punishments with a fine of five (5) to fifty (50) currently valid minimum monthly salaries.

Additionally, we can positively highlight that the legislature preferred to leave out a term traditionally used in these cases, which by including it could bring problems of applicability in criminal Law, which is "unjustifiable abuse". Lastly, we highlight that the appropriate punishment of disqualification from owning animals is included for anyone sentenced for abuse.

³⁴ Organic Law 1/2015, of March 30, which modifies Organic Law 10/1995, of November 23, of the Criminal Code. Single article. One hundred eighty one. Article 337 is modified, which has been drafted in the following manner: "1. Anyone who by any means or procedure unjustifiably abuses a) a domestic or domesticated animal, b) an animal which is commonly domesticated, c) an animal which temporarily or permanently lives under human control, or d) any animal which does not live in a wild state, causing injuries to the animal which seriously affect its health or submitting it to sexual exploitation, shall be punished with the sentence ranging from three months and one day to a year in prison and a special disqualification ranging from one year and a day to three years from exercising any profession, trade or business related with animals and from the ownership of animals. (...) 3. If this has caused the death of the animal, a sentence of six to eighteen months of prison and a special disqualification ranging from two to four years from exercising any profession, trade or business related with animals and from owning animals shall be imposed." Available at: <http://www.derechoanimal.info/bbdd/Documentos/1630.pdf>

³⁵ GARCÍA SOLÉ, M., *El delito de maltrato a los animales. El maltrato legislativo a su protección*. In *Revista de Bioética y Derecho*, 18 (2010) 39. Available at: <http://www.bioeticayderecho.ub.es>

Sub-type of abuse aggravating factors

Article 339A studied in the previous section shall have punitive aggravating circumstances. The punishments established in the previous article will be increased by one half to three quarters, if the behavior is committed

With excessive cruelty;

b) When one or various of the cited behaviors are perpetrated on a public thoroughfare or in a public place;

c) When employing those deemed legally incompetent or underage minors or in the presence of these individuals;

d) When sexual acts are committed with the animals;

e) When one of the crimes established in the previous articles are committed by a public servant or someone who exercises public functions.

Paragraph a) classifies excessive cruelty as an aggravated type of abuse which allows the punishment to be increased. That is, in carrying out the abuse, the perpetrator has acted maliciously and directly, seeking to increase the animal's suffering in an unnecessary and unjustified manner. Excessive cruelty is a behavior similar to acting with malice (in addition to special cruelty).

The aggravating factors established in paragraphs b, c, and e, for their part, do not protect the animals' interests, but rather protect society's collective interests. It is understood that the punishment must be increased if the abuse is carried out by a public servant or by a person who exercises public functions (paragraph e); in public (paragraph b), or by involving minors or persons deemed legally incompetent from prosecution or in their presence (paragraph c) as these groups deserve special protection by the State, with the legislature understanding that underage minors would be more vulnerable to the impact or damage that could occur in witnessing animal abuse.

Zoophilia is classified as a subtype of aggravated crime, in the case that it leads to death or to serious harm to the health or physical integrity of the animal (section c). In other words, zoophilia is an

aggravating factor of abuse, but it is not a crime *per se*. What is against the Law and what is punished with greater severity, is abuse which occurs with the presence of acts of zoophilia.

4. Exceptions

Shows with animals

Law 1774 does not prohibit certain shows with animals which involve abuse, such as bullfights or *corralejás*. In fact, paragraph 3 of article 5 establishes explicitly that those who carry out the behaviors described in article 7 of the National Animal Protection Statute will not be guilty of the crimes established in the Law.

The National Animal Protection Statute of 1989 (ENPA), in its article 7, established that certain activities constitute exceptions to this framework for general animal protection and against animal abuse (article 6 of ENPA); that is, article 7 allows certain activities which involve animal abuse to be performed:

Article 7. The *rejoneo*, *coleo*, bullfights, *novilladas*, *corralejás*, *becerradas* and *tientas*³⁶, as well as cockfights and the procedures used in these shows are exempt from the provisions expressed in section 1, in paragraphs a), d), e), f) and g).³⁷

In this way, bullfights, *novilladas*, *corralejás*, *becerradas* and *tientas* as well as cockfights and the procedures used in this shows, in spite of being harmful and cruel to animals, when carried out in accordance with the Law, shall not be included within the criminal type of abuse. These activities continue to be exceptions to the legal framework for animal protection in Colombia in spite of the fact that these same Laws (the ENPA and Law 1774) consider that these activities involve animal abuse.

Here the Law has some incongruences: it protects some animals, while at the same time allowing for other cruel practices. The Colombian Council of State (CEC, The Highest Court for the Administrative Jurisdiction) in a verdict from 2013, considered circus activities such as bull fighting to be unconstitutional and illegal because the animal is subject to cruelty and humiliation.³⁸ In this case, the

³⁶ *Novillada* is another commonly used term for bull fight. *Rejoneo*, *coleo*, *corralejás*, *becerradas* and *tientas* are all festivals involving bulls where abuse occurs, though the bull does not necessarily die.

³⁷ ENPA., Art. 7

³⁸ *Sentencia del Consejo de Estado Colombiano de 26 de noviembre de 2013.*

Court considered that animals have dignity, self-worth, a vital purpose and reason for existence. This ruling is in agreement with the decree from the same institution, in the sentence from May 23, 2012, where the court stated that “dignity means that animals cannot be equated with a thing or object” and that therefore “each legal institution must take this condition into account, that they are ends in themselves and therefore can be holders of legal rights”. However, in spite of the previous statement, the ruling declared that animals can be used by human beings “to guarantee or improve human welfare”.

However, the Council of State does not have the jurisdiction to rule over the constitutionality of a Law, as this pertains to the Constitutional Court, which in Sentence number C-666 of 2010 ruled for the constitutionality of bullfights. That is, the Constitutional Court declared that the exception to the prohibition of animal abuse contained in the 1989 statute was constitutional, in spite of recognizing that the animals suffer, that they are sentient, and that the State cannot be indifferent to this condition. This position has been highly criticized, because it is incoherent and incongruent.

I agree with the verdict of the Council of State from 2013, in the sense that prohibiting some spectacles with animals while allowing others is inconsistent, given that animal suffering occurs in all these spectacles, which is the reason that led the legislature to prohibit these types of behavior. This inconsistency is usually justified by the defenders of economic interests or due to considering the behaviors as tradition and culture. Some even insinuate that the bull does not suffer in the ring. Concerning this, we must simply note that for us there is no justification, from an ethical point of view, to maintain spectacles which involve animal suffering and torture; even more so if we take into account that these spectacles are not important or essential for the life of Colombians, as the majority of society neither participates nor is interested in them, thus putting its status as a Colombian tradition into doubt. We highlight that in the Sentence of the Council of State from 2013, the Institution rejects that spectacles with animals can be integrated into humanity’s cultural heritage with the following critical phrase: “because by guaranteeing this perspective there would be no different between Van Gogh’s *Starry Night* and the bullfighting season in the plaza”. This sentence precedes a paragraph with very important affirmations concerning the position of the CEC regarding the spectacles with animals, which we consider it to be essential to cite below:

Humanity must experience a paradigmatic change in how it view animals, in a way that today slavery, racism, gladiators in the Roman Colosseum, etc. are no longer

permitted, but we should also not permit animals – sentient beings with highly developed nervous systems, similar in many ways to humans -- to be subjected to spectacles where humans satisfy their most primary needs, and where they return to that state of nature that Hobbes described in his *Leviathan*, by seeing and enjoying the suffering and sacrifice of these animals which are capable of experiencing pleasure, suffering and loyalty.

The CEC, by opposing any activity involving cruel acts to animals, concludes that a paradigmatic shift must occur, similar to what happened toward slavery and racism, with humanity needing to adopt a global viewpoint on the issue. We can thus affirm that the CEC equates speciesism, the discrimination against other animal species, with racism and slavery. We must highlight that the previous statement unnecessarily leaves out sexism, which has also long been a form of discrimination.

However, this decision was made by the drafters of Law 1774 as part of a strategy not to create obstacles to the initiative during the different debates. Shows with animals, and bullfights in particular, are a topic where very important political and economic interests converge. Prohibiting these shows must thus necessarily involve close cooperation with the civil society, so that society demonstrates that it rejects these activities. This seemed likely to occur on July 28, 2015 in the city of Bogotá when the City Council approved the District Mayor's desire to hold a popular referendum to ask the citizens of Bogotá if they wished to prohibit bullfights. However, the Fifth Section of the Council of the State issued an Appeal Ruling on September 23, 2015, in which it considered that “resorting to the mechanism of a referendum for a majority decision is not appropriate to determine if the cited show may or may not be performed in the building available for this purpose: the Plaza de Toros de Santamaría”.³⁹ Consequently, the only means possible to prohibit these shows will be through the legislature. We are not in agreement with this position from the Council of the State, and we have previously explained our reasons in an article published on the *Derecho Animal* website⁴⁰.

Concerning this point, it is interesting to remember the words of the author of the Animal Protection

³⁹ COUNCIL OF THE COLOMBIAN STATE, LITIGIOUS-ADMINISTRATIVE HALL, FIFTH SECTION, September 23, 2015. Filing number: 11001-03-15-000-2015-02257-00.

⁴⁰ CONTRERAS CARLOS, *Consulta popular sobre la celebración de corridas de toros en Bogotá (Colombia). Comentario sobre la constitucionalidad de la consulta.* (August 2015) Available at: <http://www.derechoanimal.info/images/pdf/celebracion-de-corridas-de-toros-en-Bogota.pdf>

Statute of 1989 to justify the exclusion of bullfights from the general protection system:

Neither this bill, nor the version of the bill presented to Congress last year contain prohibitions for certain shows with animals such as bullfights and cockfights. The bill should have these prohibitions. The philosophy which inspires the bill and the rationale which sustains it should lead to prohibition. But certain concessions had to be made for national barbarism, to not create obstacles to the initiative, which appeared imminent when a pressured reading produced the false news that these bloody festivals would be prohibited.⁴¹

Production Animals

All practices related to the breeding and transport of production animals are excluded from the criminal type of animal abuse in the framework of current regulations.

Specifically, paragraph 1 of article 5 establishes that:

Good animal handling practices, in the framework of the current regulations, which have the goal of caring for, reproducing, breeding, training, and maintaining animals, as well as the farming and processing practices related with food production, and entertainment activities for legally accepted competitions shall be exempt from the criminal provisions in the approved Law.

The previous paragraph was added to the Bill due to the concern by a group of Parliament members that the practices concerning animal production destined for human consumption and animal competitions would be included within the classification of abuse. Production animals were excluded due to the ignorance of some sectors of society which equate animal protection with vegetarianism or veganism. That is, they believe that when speaking of Animal Law and the criminalization of animal abuse, vegetarianism is being decreed, prohibiting the breeding of animal for human purposes.

⁴¹ CABRERA CAICEDO, J.E., “*Proyecto de Ley 231 DE 1987: Estatuto Nacional de Protección de los Animales. Exposición de motivos*”, in *Anales del Congreso* 142 (Bogotá 1987) 9-11.

We can highlight that these actions will only be excluded when they are performed “*in the framework of current standards*”. These standards must necessarily include Law 1774 that we are discussing here, which includes the following principles:

Article 3. Principles. a) **Animal protection.** The treatment of animals is based on respect, solidarity, compassion, ethics, justice, care, prevention from suffering, eradication of captivity and abandonment, as well as any form of abuse, mistreatment, violence and cruel treatment; b) **Animal welfare.** In caring for animals, the person responsible or the owner of an animal shall ensure at a minimum: 1. That the animals do not suffer from hunger or thirst; 2. That the animals do not suffer undue physical suffering or pain; 3. That illnesses due to negligence or lack of care do not occur; 4. That the animals are not subjected to conditions of fear or stress; 5. That the animals can express their own natural behavior;

Furthermore, paragraph 2 of article 5 establishes the last exception to the criminal category of abuse for those who perform actions aimed at controlling public health outbreaks, or the transmission of zoonotic diseases. In any case, this refers to the people authorized by the Law and by the corresponding authorities to perform this activity.

5. Modifications to the ENPA

Article 6 and the subsequent articles of the Law establish administrative and procedural provisions, among which we can highlight the provision which enables the National Police and the competent police enforcement authorities to preventively confiscate any animal in a vulnerable situation, that is, when there is evidence or knowledge of behaviors which constitute animal abuse. The previous, as a modification to the ENPA, includes a new article to the statute (46A)⁴².

We can also note that the Law establishes that the money collected from fines due to violations of the ENPA will be dedicated exclusively to creating, publicizing and monitoring animal protection, citizen

⁴² ENPA, Article 46A. "Preventive material confiscation. Preventive Retention. When there is knowledge or evidence of behaviors which constitute animal abuse or which violate an animal's physical welfare, the National Police and competent police authorities shall immediately and preventively confiscate any animal without requiring any prior judicial or administrative order. Every report must be dealt with in a maximum of the following twenty four (24) hours"

awareness and educational campaigns and also to creating animal protection funds, thus actively connecting with animalist organizations and animal defense groups as well as anyone working toward this goal.

Lastly, article 10 of the new Animal Protection Law in Colombia establishes that the Ministry of the Environment in coordination with the competent entities may carry out educational campaigns to change animal handling practices and seek to establish the most appropriate animal welfare practices. Educating the citizenry thus has great importance in the goal of advancing and progressing toward more appropriate and respectful treatment for animals.

6. Conclusion

Law 1774 of 2016 has 10 articles which seek to make the principal goal of the 1989 National Animal Protection Statute (ENPA) – the prohibition and punishment of animal abuse - more effective⁴³. As of now, the Colombian society, judges and police forces will have secure, practical legal tools to guarantee special protection for animals against abuse, cruelty and pain.

In addition to defining animal abuse as punishable by Law and establishing certain aggravated sub-types of abuse, Law 1774 modifies the Colombian Civil Code of 1887 by declaring animals as sentient beings; establishes certain objectives and goals which will regulate the Colombian legal framework with regards to animals; and establishes police and judicial enforcement procedures.

I believe that the culture of reporting must continue to grow among the citizenry for Law 1774 to be applicable and effective. Furthermore, appropriate training is necessary for the different Law enforcement agents and officers investigating its infractions and crimes. The fact that animal abuse is now a crime in Colombia leads us to identify many of the points concerning animals which the legal

⁴³ Law 84 of 1989, which adopted the National Animal Protection Statute and created some sanctions and regulates issues regarding procedure and jurisdiction. Available at: <http://www.alcaldiabogota.gov.co/sisjur/normas/Normal.jsp?i=8242>

framework must still regulate more rigorously, such as: The breeding, transport and sacrifice of production animals; Animals in zoos; Hunting wild animals; Shows with animals, etc. The consolidation of Animal Law as a branch within the Law is an unstoppable phenomenon and it already has a place and is a reality in many Law Faculties around the world⁴⁴. Animal Law has a prominent position in the Autonomous University of Barcelona, with its Master in Animal Law and Society.⁴⁵ In the words of Steven Wise, “once you have a class at Harvard, and once you have a few books published, people take you seriously”⁴⁶

⁴⁴The first class of Animal Law in a Law Faculty was offered in Harvard Law School in 1990. See: FAVRE, D., *The Gathering Momentum*, in *J. Animal L.* 1, 9-14 (2005)

⁴⁵More information about the Master in Animal Law and Society:
<http://www.derechoanimal.info/esp/page/1667/presentacion>

⁴⁶ KOOKLAN, P., *As attitudes have evolved during the past 20 years, animal law practice and education have steadily increased, and they continue to gain ground*, in *Student Lawyer* 36, No. 6 (2008) Available at: <http://aldf.org/press-room/saldf-news/animal-law-gaining-ground-in-the-united-states/>

ANIMALS IN CHINA – LAW AND SOCIETY

Book Review

by Shih-Yun Wu¹

The book *Animals in China - Law and Society*, written by Professor Deborah Cao², was published in August 2015 by Palgrave Macmillan as part of its Animal Ethics Series. The book is composed of eight chapters, written in English. In addition to the comprehensive introduction of the traditional role of animals and their legal status under the Chinese philosophical discourses and ancient legal regimes, it covers all the key areas of controversial animal issues in China in recent years, including wildlife, companion animals, fur animals, lab animals and other working animals, and it is the first comprehensive research monograph on the subject.

Nowadays animal welfare has become one of the most significant international issues. As the largest global trading country, China is not only known as the largest world factory of manufactured goods but also the world factory of manufactured animal cruelty on a new phenomenon of globalized institutional animal cruelty. So far China has virtually no law protecting animals from cruelty and mistreatment. Despite the fact that China has enacted its *Wildlife Protection Law (the WPL)* since 1988 and has several administrative laws and regulations regarding animal health and disease, specific animal raising and management and laboratory animal welfare, most of these rules are neither on the basis of the purpose of animal protection and humane treatment nor well implemented, and some of them even lack enforcement mechanism.

More significantly, the deficiencies and problems of the legislations further result in much worse and severer animal cruelty issues and phenomena in China, for example, the legalization of wildlife exploitation and animal abuse under *the WPL*. Such legalization not only promote the development of animal cruelty-based businesses such as tiger and bear farming but also provide a black market for those illegal trading, selling and buying of wildlife products in China. Professor Deborah Cao provides a

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comprehensive and detailed introduction of these relevant regulatory regimes, animals involved, the social and cultural context and more importantly, the economic factor behind these controversial animal issues. These issues are not only related to the facts of extreme animal cruelty in either individual cases or institutional systems, but also associated with other serious crimes and social problems concerning animals, such as the problems of stolen owned animals and worsening food safety resulting from the consumption of dog and cat meat. This provides an overall and practical picture of animal-related problems, difficulties and challenges in China. These bases of information and understanding are fundamental and necessary in helping the country to further improve the social situation and the treatment of animals.

Notably, Professor Deborah Cao specifically introduces the increasing development of public condemnation of animal cruelty and animal rescue events in China. She holds a relatively positive perspective on the future development of emerging animal protection movement in the country, since as long as the developmental direction of animal protection is neither political nor controversial, it can be allowed to develop in the current politically sensitive environment created by the Chinese government. However, as the central issues of animal protection and cruelty mainly involve enormous conflicts of interest between the development of economy and the humane treatment of animals, they can hardly be largely improved without open political lobby and further legislation. It is essential to note that the necessary and fundamental factor of developing any animal protection movement and promoting legislation in any country lies in the irreplaceable influence of domestic animal protection groups for their persistent and long-term legislative and political lobbying and advocacy.³ So far China's lawmaking is a completely exclusive national privilege without any political liberalization and open policymaking space for society.⁴ For example, nowadays the formation and operation of environmental or any other grass root groups remain highly restrictive, in that their activity and advocacy are both under the nation's overall control and supervision.⁵ This is also the reason why the amendment of *Wildlife Protection Law* (*the WPL*) hardly moves further forward even if the obvious inabilities and severe deficiencies of the law

³ Mike Radford, *Animal Welfare Law in Britain: Regulation and Responsibility*, OUP Oxford (2006) at 167-192; Elaine L. Hughes & Christiane Meyer, "Animal Welfare Law in Canada and Europe", 6 *Animal L.* 23 (2000).

⁴ Peter J. Li, "Enforcing Wildlife Protection in China-The Legislative and Political Solutions", *China Information*, vol. 21 no. 1 71-107(2007)

⁵ *Id.*

have been widely noticed and resulted in massive controversy and criticism either in national or international level. As Professor Li states, “Chinese activists, particularly those who are versed in the politics of contemporary China, are extremely cautious not to get involved in controversies that could cause government reprisal and lead to a reversal of what has already been accomplished.”⁶

Along with an increasing public awareness of animal protection among Chinese citizens, the attitude towards animals has been gradually changing in the country, especially in the minds of the younger generation, and several domestic animal protections groups have also been subsequently established in the last few years.⁷The scope of animal protection issues, however is still fairly restricted and mainly focuses on very limited animal species such as dogs and cats and their rescue events,⁸ for example, to rescue dogs and cats being in dangerous situations or being transported for human consumption and to take care of homeless animals. I would say it is a development of animal charity instead of that of emerging social movements. Since these concerns and efforts cannot be expanded in terms of their scope and influence and, more importantly, further result in comprehensive animal protection issues rising up the political and legal agenda, the development would merely be limited within an individual event, and the best example is the drafting of the general and specific animal protection laws and the failures of their further enactments in 2004 and 2009.⁹

In 2004 the Beijing municipal government released its draft laboratory animal welfare law but withdrew it from consideration soon afterwards because of the concern of the difficulties of enforcing the law from opposing officials and scholars; they generally believed that the draft was completely impractical and premature even though the scope of protection of the law merely covered the welfare of experimental animals.¹⁰In June 2009, 36,000 dogs were brutally killed by the Hanzhong government after the outbreak of rabies; the massive, cruel slaughter attracted the attention of international society and aroused immense controversies and criticisms.¹¹In response to the outbreak over the past two months, the Chinese central

⁶ *Id.*

⁷ Jiaqi Lu, Kathryn Bayne, Jianfei Wang, “Current status of animal welfare and animal rights in China”, *Altern Lab Anim.*,41(5):351-7, (2013).

⁸ Pages 150-167.

⁹ Li, *Supra* note 4; Joan Schaffner, *An Introduction to Animals and the Law*, Basingstoke, England: Palgrave Macmillan (2011) at 2.

¹⁰ *Id.*

¹¹ *Id.*

government released a comprehensive animal protection draft law which was entitled the *Animal Protection Law of the People's Republic of China (the APL)* for stipulating various minimum standards of animal welfare for companion, farm, laboratory, wild and entertainment animals and preventing them from deliberate cruelty.¹² Yet, later in March 2010, the draft law was revised and its name was changed to the *Prevention of Cruelty to Animals Law of the People's Republic of China (the PCL)* as the proposed version.¹³ The new version of the draft law puts the main emphasis on the prohibition of animal cruelty and excludes the majority of the provisions regarding the minimum standard requirement of animal welfare because of the political pressure and resistance.¹⁴ However, none of these draft laws has been further developed and promoted and the impossibility of their enactment has also been determined since, as mentioned, without continuous and long-term domestic legislative and political lobbying and advocacy for more comprehensive issues of animal protection by local pressure groups, the possibility of further improving the animal treatment in the country seems to be less promising and unlikely. Thus, the major challenge of developing its social movement and promoting relevant legislation for protecting animals in China remains a political difficulty; it can only be really overcome with the political will of the Chinese government and the approval of political lobbying and advocacy on this specific issue. Notwithstanding that such a developmental condition in China seems to be fairly unlikely in the near future, the gradual and invisible influence of domestic animal protection groups exerted on society is still irreplaceable and indispensable. However, the essential step of achieving this for the domestic animal protection groups should be to further expand the scope of issues which they merely focuses on the concern for dogs and cats to more critical and comprehensive issues, for example, to highlight the issues of general animal cruelty and the concept of “unnecessary suffering” through education and other acceptable advocacies such as support from celebrities. Although several specific animal cruelty issues have, to a certain extent, successfully attracted the attention of society and have achieved certain improvements under the efforts of some international animal protection groups, such as the campaign against moon bear farming arranged by the *Animal Asia* which enables China to sign an international agreement of closing certain bear farms,¹⁵ the role and influence of the domestic animal protection groups

¹² Schaffner, *Supra* note 9, at 3; Amanda Whitfort, “Evaluating China’s Draft Animal Protection Law”, *Sydney Law Review* Vol. 34:347(2012)

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Bruce A. Wagman & Matthew Liebman, *A Worldview of Animal Law*, Carolina Academic Press (2011) at 31.

still cannot be replaced. This is why they should catch up with the trend of promoting various broader and deeper issues for protecting animals without any delay. This is also the very and necessary step for the country to actually initiate its emerging animal protection movement.

Overall, *Animals in China – Law and Society* is not only the first but also the very significant publication on animal protection issues either in national or international context in terms of new phenomenon of globalized institutional animal cruelty. I strongly recommend the book for anyone concerned about the suffering of animals and their treatment either in China or any other country with poor animal protection and slow development, since understanding is the very first step of improvement.