

# Is It Useful to Have an Animal Protection in the Constitution?

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A new question arises today in the field of animal law as a growing number of countries have decided to open their constitution to animals. This question deals with the effectiveness of the considered provisions and more precisely the usefulness of inscribing an animal protection in the fundamental law of the country.

*Keywords:* Animal law, Constitution, animal welfare

## Scope of Application

To answer this question, this study will focus on national constitutions which contain general norms of animal protection. So defined, the scope of application leads to the exclusion from the study of three types of norms.

Firstly, the non-national constitutional provisions, like the new Constitution of the autonomous city of Mexico, which recognizes an obligation of decent treatment of animal<sup>1</sup>; the Constitution of the canton of Genova, which bans the practice of hunting<sup>2</sup>; or the Constitution of the state of Florida, which forbids a method of animal husbandry known as gestation crates<sup>3</sup>.

Secondly, excluded from the study, the national Constitutions only evoke animals but do not protect them for themselves. Concretely, Constitutions mention an animal as the national symbol of the country (like in Nepal<sup>4</sup>), as an object of agricultural activity (like the Iranian Constitution, which refers to animal husbandry<sup>5</sup>), as a matter or a subject in the distribution of competences between the parliament and the government, or

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<sup>1</sup> Constitution of the autonomous city of Mexico (2017), art. 13.B: "This Constitution recognizes animals as sentient beings who must therefore be treated with dignity. In the City of Mexico, every person has an ethical duty and a legal obligation to respect the life and integrity of animals. Animals, by their nature, are subjects of moral consideration. Their protection is a common responsibility" (pt. 1). The point 2 provides that "City authorities will ensure the protection, welfare, and dignified and respectful treatment of animals and foster a culture of responsible care and mentoring. They will also carry out actions for the care of abandoned animals". The point 3 mandates secondary laws to determine penalties for animal abuse and guidelines for wildlife protection and humane farm animal practices.

<sup>2</sup> Genova Constitution, art. 162 (since 1974): "Hunting of mammals and birds is forbidden in all its forms in all parts of the canton of Genova".

<sup>3</sup> Constitution of the state of Florida, art. 10, section 21, a. (since 2002): "It shall be unlawful for any person to confine a pig during pregnancy in an enclosure, or to tether a pig during pregnancy, on a farm in such a way that she is prevented from turning around freely".

<sup>4</sup> Constitution of Nepal (2015), art. 9.3: "The cow is the national animal and the Lophophorus is the national bird of Nepal".

<sup>5</sup> Iranian Constitution (1979), art. 44: "The private sector consists of those activities concerned with agriculture, animal husbandry, industry, trade, and services that supplement the economic activities of the state and cooperative sectors". Along the same line, the afghan constitution (2004) provides that the state encourages the development of animal husbandry: "The state shall design and implement within its financial resources effective programs for development of agriculture and animal husbandry, improving the economic, social and living conditions of farmers, herders, settlement and living conditions of nomads. The state adopts necessary measures for housing and distribution of public estates to deserving citizens in accordance within its financial resources and the law" (art. 14).

between the central power and the local authorities (like in Switzerland<sup>6</sup> and Germany<sup>7</sup>), being specified that those norms of competences are just competences rules and not material rules, that is to say, they do not recognize or institute an obligation to protect animals. They only attribute a competence to an authority, but do not require this authority to protect animals. On this point, the German administrative court has judged that article 74 does not give a constitutional basis to the protection of animals<sup>8</sup>.

Thirdly, excluded from the study the norms focus on one specific aspect of animal protection, like article 48 of the Indian Constitution, which provides a legal basis to the state's legislation prohibiting the slaughter of cows<sup>9</sup>.

In view of the above, the discussion will deal with the constitutional rules which protect animals for themselves, therefore in a biocentric protection, centered on animals' interests.

### Seven Countries

Seven countries have constitutionally enshrined a general obligation of animal protection.

India, which recognizes since 1976 a duty of compassion to animals<sup>10</sup>.

Brazil: The Constitution of 1988 establishes a prohibition of cruelty to animals<sup>11</sup>.

Switzerland: Since 1992, the Constitution recognizes an obligation to take into account the dignity of living creatures<sup>12</sup>.

Germany: The Constitution has been modified in 2002 to add in article 20a that the state shall protect animals<sup>13</sup>.

Luxembourg: Since 2007, the Constitution provides that the state promotes the protection and the welfare of animals<sup>14</sup>.

Austria: A constitutional law of 2013 recognizes, as in Germany, a state goal of animal protection<sup>15</sup>.

Last country, Egypt: The new Constitution of 2014 provides that "The state (...) commits to (...) the prevention of cruelty to animals"<sup>16</sup>.

<sup>6</sup> Switzerland Constitution (1999), art. 80.1: "1 The Confederation shall legislate on the protection of animals".

<sup>7</sup> German Constitution (1949), art. 74: "Concurrent legislative power shall extend to the following matters: (...) 20. the law on food products including animals used in their production, the law on alcohol and tobacco, essential commodities and feedstuffs as well as protective measures in connection with the marketing of agricultural and forest seeds and seedlings, the protection of plants against diseases and pests, as well as the protection of animals".

<sup>8</sup> BVerwG (Federal administrative Court), 18th June 1997 6 C 5.96.

<sup>9</sup> Indian Constitution (1950), art. 48: "The State shall endeavor to organize agriculture and animal husbandry on modern and scientific lines and shall, in particular, take steps for preserving and improving the breeds, and prohibiting the slaughter, of cows and calves and other milch and draught cattle".

<sup>10</sup> Indian Constitution, art. 51A (since 1976): "It shall be the duty of every citizens of India (...) (g) (...) to have compassion for living creatures".

<sup>11</sup> Constitution of Brazil (1988), art. 225.1: "In order to ensure the effectiveness of this right [right to an ecologically balanced environment], it is incumbent upon the Government to (...) protect the fauna and the flora, with prohibition, in the manner prescribed by law, of all practices which (...) subject animals to cruelty".

<sup>12</sup> Constitution of Switzerland (1999), art. 120.2: "The Confederation (...) shall take account of the dignity of living creatures (...)". This provision was first introduced in the former Constitution in 1992 (art. 24 *novies*).

<sup>13</sup> German constitution, art. 20a (since 2002): "The state shall protect (...) animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order".

<sup>14</sup> Constitution of Luxembourg, art. 11 bis: "It [the state] promotes the protection and the welfare of animals".

<sup>15</sup> Austria, Constitutional law on sustainability and animal welfare, No. 111/2013 (2013), § 2: "The Republic of Austria (...) is committed to animal protection".

<sup>16</sup> Egyptian Constitution (2014), art. 45: "The state also commits to (...) the prevention of cruelty to animals".

### The Phrasing

Regarding their phrasing, the considered provisions are written in two different ways:

- In the form of a ban, as it is the case in Brazil;
- In the form of an objective in the other countries, that is to say a guideline of the state, a norm that is not self-executing and, as a result, cannot, as such, be directly invoked against public authorities.

What are the effects or interests of these norms?

### Effects

Two situations have to be distinguished.

#### First Situation

When the norm is written in the form of a ban, it allows the annulment of a law or a regulation violating it. This situation only concerns Brazil: On the ground of article 225 of the Constitution, the judge can overturn a law or a regulation which allows an activity or a spectacle which constitutes an act of cruelty to animals.

The first decision was related to *Fara do boi* (the “feast of ox”, a traditional feast during which beefs are literally tortured by villagers). In 1997, the federal supreme tribunal declared unconstitutional a law of the state of Santa Catarina which allowed the feast<sup>17</sup>.

A second decision dealt with cockfighting. In 2001, a law of the state of Rio de Janeiro allowing cockfighting was suspended for violation of article 225 of the Constitution<sup>18</sup>.

The third decision was about *Vaquejada* (which is a kind of rodeo). In 2016, a law of a northern state of Brazil was declared unconstitutional for allowing this practice<sup>19</sup>.

#### Second Situation

When the norm is written in the form of an objective, it can produce four different effects.

**First effect.** It gives the individual a right to conscientious objection, a right not to participate in activities using animals in a way he/she disapproves of, or finds unacceptable.

Let us recall the mechanism of conscientious objection (which is not recognized in all legal orders). This mechanism allows an individual to refuse to be associated with an action he disapproves (for example, for a pacifist citizen, to be obliged to accomplish a military service; or for a nurse or a doctor, to practice an abortion if he/she found it morally condemnable).

Generally speaking, conscientious objection is legitimate only if the considered value is consensual.

In the domain of animals, the existence of a constitutional norm of protection gives a justification and a basis to this objection. It founds a right of objection.

It was the case, for example, in India. In 1997, the High court of Delhi recognized this right to schoolchildren and students, after a schoolchildren of the secondary degree took legal action against the official scholarship program, which made the dissection of animals compulsory. The court acknowledged the right to refuse to practice dissections<sup>20</sup>.

<sup>17</sup> STF RE, 3 June 1997, No. 153.531-8, DJU 13 October 1998.

<sup>18</sup> STF, 26 May 2011, ADI 1856 RJ.

<sup>19</sup> STF, 6 Oct. 2016, ADI, No. 4983.

<sup>20</sup> Delhi High Court, 19 May, 1997, Sarika Sancheti vs. Central Board of Secondary Education (CBSE), AIR 1997 Delhi, writ Petition, No. 139/96.

**Second effect.** The constitutional norm of protection represents an obligation (or incitement) for public authorities to ensure the enforcement of the law.

This effect concerns principally administrative authorities, when an act of cruelty or mistreatment prohibited by law is committed and that the competent authorities remain passive. In India, on the ground of article 51-A of the Constitution, a judge can order these authorities to take specific measures, for example, to take steps to prevent *Jallikatu* (a Bullock-cart race)<sup>21</sup> or to ban all types of animal fights which are prohibited by law, “including bull fights” which were illegally organized in the state of Goa<sup>22</sup>.

This effect concerns, in a more indirect way, criminal authorities. When the Constitution protects animals, public prosecutors and criminal courts are invited to take into account this societal choice (the choice to make of the animal a higher political and legal value)<sup>23</sup>. It implies more frequent criminal prosecutions and more severe convictions.

**Third effect.** It is up to judicial courts to read the legal provisions in the light of the state’s goal of animal protection. In other words, when a text is open to several interpretations, the constitutional protection of animals represents a reference or a parameter which encourages courts to retain the most animal-friendly interpretation, which integrates biocentric considerations<sup>24</sup>.

**Fourth and main effect of a constitutional goal of animal protection.** It gives a basis to the limitations of fundamental rights which are necessary to improve animal protection.

Indeed, fundamental rights often have to be limited in order to implement animal protection (especially the property right of the owner, the right to livelihood and the entrepreneurial freedom). On this matter, constitutional norms of protection are useful to legally justify the necessary limitations.

For example, the constitutional protection can justify a limitation of:

- Sexual freedom, by a law prohibiting sexual relationships with animals<sup>25</sup>;
- Economic freedom, by a decision banning the training and exhibition of some animals<sup>26</sup>;
- Or professional freedom, by an administrative decision refusing the use of an electric collar for dog training<sup>27</sup>.

## Appreciation

What is to be thought of those effects?

At first glance, they seem not very important. Nevertheless, the constitutional norms of protection are not useless, for two reasons.

Firstly, they produce some effects which were previously mentioned.

Secondly, if these norms had no interests, individuals, organizations, and companies using animals (for their activities or their hobbies) would not try to inscribe their vision of the world—their vision of the animals

<sup>21</sup> Supreme Court of India, 7 May 2014, *Animal Welfare Board of India Vs. A. Nagaraja & Ors*, No. 5388 of 2014 [Jallikatu].

<sup>22</sup> Bombay High Court, 20 December 1996, *People for Animals vs. State of Goa*, AIR 1996 Bombay, 1997 (4) BomCR 271.

<sup>23</sup> This invitation is clearly expressed in the German Constitution. Its article 20a provides that “the state shall protect (...) animals by legislation and (...) by executive and judicial action”. Judicial power is expressly involved in the implementation of this state goal. It has a constitutional mission to protect the animal.

<sup>24</sup> See, for example, Indian Supreme Court, 7<sup>th</sup> May 2014, *Animal Welfare Board of India vs. A. Nagaraja & Ors*, n° 5388 of 2014 & ors: § 66 : “Rights and freedoms guaranteed to the animals under Sections 3 and 11 have to be read along with Articles 51-1(g) and (h) of the Constitution, which is the magna carta of animals rights”.

<sup>25</sup> BVerfG (Constitutional Court of Germany), 8 December 2015, *Mrs S. et Mr F.*, 1 BvR 1864/14.

<sup>26</sup> Supreme Court of India, 1st May 2001, *N.R. Nair vs. U.O.I.* AIR 2001 SC 2337, 2001 (4) SCALE 20, (2001) 6 SCC 84.

<sup>27</sup> BVerwG, 3 C 14.05, 23 February 2006.

—in the Constitution.

They would not have inserted in the Austrian constitutional law related to the protection of animals that animals can be used as food<sup>28</sup> and in research<sup>29</sup>.

If the constitutional norms of protection did not have any effects, people using animals would not have obtained a revision of the Brazilian constitution, in a record period of six months, to overturn the decision on *Vaquejada* by a rewriting of article 225, stipulating that this provision does not apply to sports activities like rodeos<sup>30</sup>.

If the Constitution had no stakes or interests, hunters would not have enshrined in more than 20 states of the United States a constitutional right to fish and to hunt<sup>31</sup>.

### A Major Issue

The presence in the Constitution, for those *using* animals and those caring for them, is the major issue of the 21st century, or at least one of its major issues.

The constitutional issue is fundamental. It allows to engrave a vision of the world in the marble of the Constitution, therefore in a perennial manner.

It is important that it is decisive to be in the Constitution.

### Two Ways

There are two ways of achieving this.

First is through interpretation. It is possible to recognize a constitutional obligation of animal protection based on the right to environment. It has been done in Costa Rica<sup>32</sup> and Colombia<sup>33</sup>: Their Supreme courts have decided that the right to environment protects not only the fauna, that is to say, wild animals, but also domestic animals.

The second way would be to revise the Constitution, by adding a specific article dealing with animal protection. Three proposals can be submitted.

A radical one: “It is forbidden to kill animals or to affect their welfare”.

An intermediate proposal: “It is forbidden to kill animals or to affect their welfare, except in cases expressly provided by law” (possibly with limited reasons allowing those exceptions, like public safety and public health).

A more realistic proposal: “As the animals are live and sentient beings, their life and welfare shall be respected”.

### Conclusion

In conclusion, three general lessons can be inferred from this study.

<sup>28</sup> Constitutional law on sustainability and animal welfare, § 5: “The Republic of Austria (...) is committed to ensuring that the population is supplied with quality foodstuffs of animal and plant origin also from domestic production as well as to the sustainable production of raw materials in Austria with a view to safeguarding the security of supplies”.

<sup>29</sup> § 6: “The Republic of Austria (...) acknowledges the importance of basic research and applied research”.

<sup>30</sup> Brazil, art. 225 C (amendment from 6 June 2017): “The sportive practices that use animals are not considered as cruel if they represent cultural traditions (...)”.

<sup>31</sup> <http://www.ncsl.org/research/environment-and-natural-resources/state-constitutional-right-to-hunt-and-fish.aspx>.

<sup>32</sup> SC Costa Rica, sala 4, 21 September 2016, res. No. 2016-13553.

<sup>33</sup> SC Columbia, sentences No. C-666-10 (30 August 2010), C-083-14 (12 February 2014) and C-095-16 (25 February 2016).

Firstly, the constitutional norms of animal protection present a diversity that appears at several levels, especially their phrasing, nature and scope of application.

Secondly, the constitutional norms of animal protection are authentic legal norms and not declaration of intents. Most importantly, they represent effective rules—able to produce concrete effects within the legal system.

Thirdly, the recognition of animal protection at the constitutional level is a new phenomenon in our history. With the increasing consideration given to animals, this phenomenon is expected to expand, as shown the recent proposals of constitutional revision in Belgium<sup>34</sup> and South Korea<sup>35</sup>.

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<sup>34</sup><https://www.senate.be/www/webdriver?MItabObj=pdf&MIcolObj=pdf&MInamObj=pdfid&MItypeObj=application/pdf&MIvalObj=100663747>.

<sup>35</sup>[http://www.hsi.org/news/press\\_releases/2018/04/korea-constitution-animals-041718.html](http://www.hsi.org/news/press_releases/2018/04/korea-constitution-animals-041718.html).  
<https://www1.president.go.kr/Amendment>.