ONE STEP FORWARD, TWO STEPS BACK: THE SEARCH FOR 'RIGHTS' IN THE ECUADOR ANIMAL RIGHTS BILL

UN PASO ADELANTE, DOS ATRÁS: LA BÚSQUEDA DE 'DERECHOS' EN EL PROYECTO DE LEY SOBRE DERECHOS DE LOS ANIMALES EN ECUADOR

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Received: May 2024
Accepted: May 2024

ABSTRACT

The Ecuadorian Constitutional Court ruled in the *Estrellita* case (2022) that animals, as elements of nature, are subjects of rights, and ordered what became the Bill Organic Animal Law (Bill LOA), due for debate in the Ecuadorian National Assembly in August 2024. This is the world's first bill that seeks to legislatively recognise animal rights. Therefore, Ecuador's actions in this realm will serve as a catalyst for global discourse, prompting reflection and reaction in legal frameworks world over. However, our critical analysis of the Bill LOA reveals that the text is noble in its objectives, but deficient in its articulation. Its content often ends up being a manifestation of the practices it pledged to disrupt: speciesism, anthropocentrism, and the instrumentalisation of animals. This article proposes that the National Assembly pause and reflect, treating the Bill LOA as an agent of change, rather than the immediate mechanism to achieve it. It further identifies where the text turned against its own ideals, and key questions that need to be resolved before passing a law that forever undoes the reification of animals.

KEYWORDS

Animal rights; animal welfare; rights of nature; Ecuador; Estrellita.

RESUMEN

La Corte Constitucional de Ecuador dictaminó en el caso *Estrellita* (2022) que los animales, como elementos de la naturaleza, son sujetos de derechos y ordenó la elaboración de un nuevo proyecto de ley sobre derechos de los animales. Esto resultó en el Proyecto de Ley Orgánica de

los Animales (Proyecto LOA), cuyo debate está previsto en la Asamblea Nacional de Ecuador en agosto de 2024. Este proyecto es el primero en el mundo que busca reconocer legislativamente los derechos de todos los animales, por lo que las acciones de Ecuador servirán como catalizador más allá de sus fronteras. Sin embargo, nuestro análisis del Proyecto LOA revela que el texto es noble en sus objetivos pero deficiente en su articulación. Su contenido a menudo acaba siendo una manifestación de las prácticas que se comprometió a corregir, incluido el especismo y el antropocentrismo. Este artículo identifica las cuestiones clave que deben resolverse antes de aprobar una ley que deshaga la cosificación de los animales y propone que la Asamblea Nacional ecuatoriana trate el Proyecto LOA como un agente de cambio, más que como el mecanismo inmediato para lograrlo.

PALABRAS CLAVE

Derechos de los animales; bienestarismo animal; derechos de la naturaleza; Ecuador; Estrellita.

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INTRODUCTION

The West has inherited its foundational legal principles from Roman Law, according to which the world is divided into persons (a category that is limited to humans) and things (a category that includes all non-humans). This binary division led to an anthropocentric worldview and a set of rules that enables human dominion over 'everything' else. The category of natural persons has been the exclusive province of humans, whereas the fictitious category of legal persons has been awarded to objects that humans have invented for their own purposes (e.g. companies, foundations).

In 2008, Ecuador started to break away from this paradigm. It became the first (and so far, only) country in the world to codify the rights of nature in its constitution.[1] This recognition is intricately linked to *Sumak Kawsay*, a pre-colonial principle of living in harmony with nature, which stands in opposition to "Western concepts of exclusivity, categorization, competition, subjectification, etc."[2] Embracing it symbolises a shift from a primarily profit-driven lifestyle towards a non-instrumental view of nature.

1 CONSTITUCIÓN DE LA REPÚBLICA DE ECUADOR (Decreto Legislativo, Registro Oficial 449 de 20-oct.-2008) art. 71. *Sumak Kawsay* can be found in the preamble and articles 14, 250, 275, 387.

2 WALDMÜLLER, JOHANNES M., Buen Vivir, Sumak Kawsay, 'Good Living': An Introduction and Overview, in Alternautas 1/1 (2014) 17-28.

The Constitutional Court of Ecuador ('Constitutional Court') initially developed the content of the rights of nature in relation to mangroves, rivers, and forests.[3] In 2022, it issued a decision concerning a monkey named *Estrellita* where it declared that non-human animals ('animals') were part of nature and thus, subjects of rights.[4] In the *Estrellita* decision, the Constitutional Court ordered the Ombudsman's Office to prepare a draft law on animal rights within six months, and instructed the National Assembly to debate and approve it within two years after its publication.[5] The resulting draft law, *Ley Orgánica para la Promoción, Protección y Defensa de los Derechos de los Animales no Humanos* ('Organic Law for the Promotion, Protection, and Defence of the Rights of Non-Human Animals'),[6] commonly referred to as the Bill *Ley Orgánica Animal* (LOA), was released in August 2022 and is meant to be debated at the National Assembly in August 2024.

The stakes are high because, with this order, the *Estrellita* decision set in motion a potential paradigm shift of enormous proportions that will reverberate beyond Ecuador. A law recognising the rights of all animals could entail an epistemic change, a U-turn from 'modern' legal frameworks. While some countries have judicially recognised animal rights,[7] no legislature has extended rights-based legal entitlements to the whole of the Animal Kingdom.

Ecuador's pioneering role in the fledgling movement of nonhuman rights means that, when it makes such decisions, its actions reverberate beyond its national borders.[8] The forthcoming debate in the National Assembly and its outcome will thus dictate the immediate future of animals in Ecuador, and further serve as a yardstick for actions and discussions in other jurisdictions.

Is Ecuador about to overturn 4,000 years of human history with regard to animals? This is what the title of the Bill LOA seems to promise: 'Organic Law for the Promotion,

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3 Respectively, see CORTE CONSTITUCIONAL DEL ECUADOR (8 September 2021), Sentence No. 22-18-IN/21; CORTE CONSTITUCIONAL DEL ECUADOR (10 November 2021), Sentence No. 1149-19-JP/21; CORTE CONSTITUCIONAL DEL ECUADOR (15 December 2021), Sentence No. 1185-20-JP/21.

4 CORTE CONSTITUCIONAL DEL ECUADOR (27 January 2022), Sentence No 253-20-JH/22 [hereafter '*Estrellita*'] paras. 82-83.

5 Ibid., para. 183.

6 The official text of the Bill LOA can be found in the ASAMBLEA NACIONAL DE ECUADOR, Memorando Nro. AN-PR-2022-0465-M. "Difusión del Proyecto de Ley Orgánica para la Promoción, Protección y Defensa de los Animales No Humanos" (Quito, 31 August 2022) [hereafter 'Bill LOA'].

7 For a systematic overview, see SHANKER, A., BERNET KEMPERS, E. The Emergence of a Transjudicial Animal Rights Discourse and Its Potential for International Animal Rights Protection, in Global Journal of Animal Law 10/2 (2022) 1-53.

8 See, e.g, INTER-AMERICAN COURT OF HUMAN RIGHTS, Advisory Opinion OC-23/17 of November 15, 2017, requested by the Republic of Colombia: The Environment and Human Rights (15 November 2017) para. 62.

Protection, and Defence of the Rights of Non-Human Animals'. However, despite the significant change that it is expected to trigger, to the authors' best knowledge, there is no commentary available on the Bill LOA, perhaps because its text is only available in Spanish.

This article fills this gap by offering, in both Spanish and English, a critical examination of the Bill LOA as well as recommendations on the ways to move forward while overcoming its shortfalls. In essence, we argue that the *Estrellita* case set a minimum standard for animal rights that the Bill LOA has generally failed to uphold. The current Bill LOA is noble in its ideals but deficient in how it articulates them. This is because, while it proclaims to promote, protect, and defend animal rights, its provisions often end up being a manifestation of the practices the Bill vowed to disrupt: speciesism, anthropocentrism, and the instrumentalisation of animals.

The text of the Bill exists in an inescapable and palpable plane of internal contradiction. On the one hand, it proclaims to defend the rights of animals but, on the other hand, their treatment is prescribed according to their human uses, thus perpetuating the anthropocentric welfarist model. For instance, the first pages of the Bill LOA recount that Ecuador stands at a fork in the road where it aims to depart from the legal system that excludes animals from the sphere of morality and legitimises their exploitation and discrimination, in favour of recognising animals as legal subjects with inherent value and dignity (para. 1). However, the reform to the Ecuadorian Civil Code it proposes on the last page states that animals, other than wildlife, can continue to be valuated and traded (second amending and repealing provision). Therefore, regrettably, the Bill LOA uses the guise of 'rights' to describe everyday exploitative practices which results in animals having a 'right' to death. This is not only perplexing, but also counterproductive for the animal rights movement.

If the Bill LOA were adopted by the Ecuadorian National Assembly in its current form, what initially looked like an opportunity for deep transformation, would achieve the opposite: entrenching the *status quo*. This is because the Bill LOA is yet another example of "utilitarianism for animals, Kantianism for people".[9] Moreover, cloaking as 'rights' what in effect are welfare protections risks giving the impression of having achieved a summit when the initiative of recognising animal rights has barely left the base camp.

We contend that the timeline given to the drafters of the Bill LOA to, essentially, change the course of history in what concerns the treatment of animals, worked against the cause. We understand that when faced with such a task under such time pressure, the drafters were likely caught in a dilemma: either *defy* reality and prepare a law that genuinely recognised the rights of all animals, or *define* reality and propose a law that

9 NOZICK, R. Anarchy, State, and Utopia (New York City 1974) 39.

did not break away with the current paradigm. In the final outcome, the Bill largely gravitated towards the latter.

We argue that, at this decisive moment and given the repercussions that passing this law would have domestically and internationally, the Ecuadorian legislature should pause and reflect. The short-term goal of this article is to facilitate such space for pause and reflection, and offer alternative courses of action to the Ecuadorian National Assembly. Long-term, this article aims to transport the debate beyond the parliamentary setting and provides a commentary of this unique case-study that helps identify where the text turned against its own ideals, and the list of questions that would need to be resolved before drafting a law that aims to forever disrupt the objectification of animals. We do so by (1) providing an overview of the main schools of thought concerning animal law; (2) discussing the parameters of the *Estrellita* judgment and those of the Bill LOA; and (3) critically analysing the content of the Bill against these factors. Moreover, (4) we devise a practical way for the National Assembly to comply with the Constitutional Court order without undercutting the animal rights law movement. The gist of our recommendations is to treat the Bill LOA as an agent of change, rather than as the immediate mechanism to achieve it. At this fork in the road, due consideration must be given to foundational issues, some of which are identified in this article, concerning the standard of fairness that should govern the rapport between humans and animals, its limits, and its exceptions. What Ecuador does next will one day be seen as a milestone in the history of global animal law, for better or for worse.

1. THE DIFFERENT SCHOOLS OF THOUGHT OF THE ANIMAL LAW MOVEMENT

The animal law debate, which gained prominence in the second half of the 20th Century,[10] is not monolithic in what it proposes.[11] To the contrary, "the animal ethics debate is, more often than not, couched in terms of two extremes":[12] (1) welfarism, the dominant current requiring the dignified treatment of animals aimed at reducing their suffering while they are used for human purposes; and (2) abolitionism, advocating for the total liberation of animals from their categorisation as 'things' and thus an end to their use and exploitation for human purposes. There remain irreconcilable differences between the two:

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10 CALLEY, D.S. Human Duties, Animal Suffering, and Animal Rights: A Legal Reevaluation, in The Palgrave Handbook of Practical Animal Ethics (London 2018) 395-418.

11 When describing the different schools of thought, we use the structure followed in FASEL, R.N., BUTLER, S. Animal Rights Law (Oxford 2023) 34-53.

12 GARNER, R. A Theory of Justice for Animals: Animal Rights in a Nonideal World (Oxford 2013) 163.

> The term 'animal rights' is used to denote a legal paradigm in which animals' fundamental rights […] are recognized and protected, abolishing animals' status as legal things. This means that they are regarded as subjects of fundamental legal rights, rather than mere objects of property rights. Under such a paradigm, the exploitation of animals by humans is strictly prohibited […] [W]elfarism only aims to improve the treatment of animals by humans, while still allowing for their exploitation. Welfarism, in other words, does not attempt to dismantle the legal presuppositions that make animal exploitation possible and permissible.[13]

Raffael Fasel describes fundamental rights as those that "protect their holder's vital interests, such as their interest in having their bodily integrity protected",[14] in contrast to welfare/thin 'rights' that only seek to protect their holders against the bleakest forms of mistreatment. Albeit, rather paradoxically, the notion of 'welfare rights' (i.e., welfare-based protections) can be found in the literature every now and then, we take 'rights' to mean 'fundamental rights'. As explained later, this is also clearly the meaning that the Constitutional Court and the drafters of the Bill LOA intended.

Although welfarism and abolitionism project different realities, both coincide in breaking with the Cartesian premise.

1.1. The Cartesian premise

Cartesian thought, which has prevailed in the West until the last century, justifies the absolute reification of animals. Descartes regarded animals as complex machines without the capacity for thought, consciousness, or sentience.[15] Although philosophers still debate whether Descartes really held that animals were truly incapable of feeling,[16] on a practical level, the debate is futile because any acceptance of the Cartesian premise suggests that "since pain, suffering and misery in all levels of existence below man are nothing more than idle anthropomorphic projections, there is no moral case to answer",[17] giving humans a "licence to treat animals as insensitive objects, including by

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13 Op. cit. SHANKER, BERNET KEMPERS 3 [citations omitted].

14 FASEL, R.N. More Equal Than Others: Humans and the Rights of Other Animals (Oxford 2024) 3.

15 See e.g. HATFIELD, G., René Descartes (winter 2023), in: https://plato.stanford.edu/entries/descartes/#:~:text=Ren%C3%A9%20Descartes%20(1596%E2%80%931650),second%2C%20and%20a%20metaphysician%20third.; HATFIELD, G. Animal, in The Cambridge Descartes Lexicon (Cambridge 2015).

16 HARRISON, P. Descartes on Animals, in The Philosophical Quarterly 42/167 (1992) 219-227; COTTINGHAM, J. A Brute to the Brutes? Descartes' Treatment of Animals, in Philosophy 53/206 (1978) 551-559; NEWMAN, L. Unmasking Descartes' Case for the Bête Machine Doctrine, in Canadian Journal of Philosophy 31/3 (2001) 389-425.

17 LINZEY, A. Christianity and the rights of animals (London 1987) 63.

dissecting and experimenting on living animals".[18] Although his legacy is essential in the history of animal treatment, in reality, the Cartesian view was simply an enunciation of the objectification of animals that had been central to all Western schools of thought, steeped in the Judo-Christian belief that animals were simply a "gift from the creator for the use of man".[19] Descartes just added another brick in favour of the reification of animals that had been practised for millennia.

As Thomas Kelch recounts, the exploitative relationship that humans have established with respect to animals has remained virtually unchanged for 4,000 years.[20] Roman law sealed a vision anchored in a dichotomy where the world was divided into two categories: people and things. Although the Roman Empire fell, the binary format of its legal system has persisted and, through colonisation, has reached places beyond that empire's imagination, including Latin America.

Today, there are two types of countries according to the level of reification exercised on animals: 21% of them, including some large ones such as China, merely include animals in the category of things, without making any distinction between animals and inanimate objects; the remaining 79% mention animals specifically to dedicate to them some kind of protection, either at a basic level such as prohibitions against cruelty, or regulations aimed at increasing their welfare while they are being handled for human ends.[21] Within this 79%, a small group of countries have proclaimed that animals are not things, but sentient beings.[22] However, this has not allowed animals to transcend their 'object' status. For example, the Austrian Civil Code (amended in 2004), which pioneered such recognition, says:

> Animals are not things; they are protected by special laws. The laws that apply to things are applicable to animals only to the extent that there are no regulations that deviate from them.[23]

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18 Op. cit. FASEL, BUTLER, 36.

19 BLACKSTONE, W. Commentaries on the Laws of England, Book II (1765-1769), Book II (Oxford 1769) 3.

20 KELCH, T.G. A Short History of (Mostly) Western Animal Law: Part I, in Animal Law 19/1 (2012) 24.

21 Op. cit. FASEL, BUTLER, 14 (statistics updated in 2021).

22 ALLGEMEINES BÜRGERLICHES GESETZBUCH (ABGB), amended 2004. StF: JGS Nr. 946/1811 (amended 2004), art. 285; CÓDIGO CIVIL DE CATALUÑA, Ley 5/2006, de 10 de mayo, del libro quinto del Código Civil de Cataluña, «BOE» núm. 148, de 22 de junio de 2006 relativo a los derechos reales, art. 511-1(3); SCHWEIZERISCHES ZIVILGESETZBUCH/CODE CIVIL SUISSE/CODICE CIVILE SVIZZERO/CUDESCH CIVIL SVIZZER, datiert 1907, Stand 2024, art. 641(a); CODE CIVIL 1804 (amended 2016), art. 515-14; ZÁKON č. 89/2012 Sb. Zákon občanský zákoník, s. 494; BURGERLIJK WETBOEK, Book 3, Title 1, s. 1, art. 2a; BÜRGERLICHES GESETZBUCH (BGB) 1896, published 2002, amended 2023. BGBl. I p. 42, 2909; 2003 I p. 738, art. 90; UK ANIMAL WELFARE (SENTIENCE) ACT 2022; CONSOLIDATED VERSION OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION, art. 13.

23 Op. cit. ABGB, art. 285.

This means that beyond the extent to which animals are beneficiaries of welfare or any other protection, their status and treatment are still governed by the default legal framework for property. Therefore, the difference in describing them as a 'non-thing' remains, in great measure, ineffable and symbolic.

Despite the exponential growth in regulations regarding the treatment of animals and the recognition of animal sentience in some legal systems, in quantitative terms, any real change in the treatment of animals has been to their detriment.[24] For example, the shift from traditional animal husbandry to intensive farming confines approximately 450 billion animals in Dantesque conditions, while between 126-150 million animals are used in experimentation.[25] Moreover, the number of animals used in food is on the rise, given the expansion of intensive farming in Asia, Africa, and Latin America.[26] In other words, the number of animals raised and killed at any given time for consumption is 56 times higher than the world's human population.

In contrast to Cartesian thinking, welfarism and abolitionism agree on the starting basic point, namely that animals deserve moral consideration. However, they diverge on almost everything else.

1.2. Welfarism

Welfarism can be traced back to the late-18th Century philosopher Jeremy Bentham who, writing on the legal treatment of animals, coined his well-known phrase, "The question is not, Can they *reason*?, nor, Can they *talk*? But, Can they *suffer*? Why should the law refuse its protection to any sensitive being?"[27] Welfarism is built around three central tenets, which we explore in turn: (1) animals are worthy of moral consideration by virtue of their sentience; (2) animals are things or objects subject to appropriation and enjoyment; and (3) animals should be treated in accordance with the principle of avoiding any 'unnecessary suffering'.

Firstly, animal sentience is increasingly irrefutable. The landmark Cambridge Declaration on Consciousness of 2012, drafted by a leading international group of neuroscientists, states:

> subcortical neural networks aroused during affective states in humans are also critically important for generating emotional behaviours in animals. Artificial arousal of the same

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24 Op. cit. KELCH, 25.

25 PETERS, A. Animals in International Law, in The Pocket Books of The Hague Academy of International Law, vol. 45 (Boston 2021) 25.

26 Ibid.

27 BENTHAM, J. An Introduction to the Principles of Morals and Legislation, vol. II, new edn, corrected by the author (London 1823) 236 [emphasis in the original].

> brain regions generates corresponding behaviour and feeling states in both humans and non-human animals.[28]

Based on evolutionary theory, this observation is logical because, as Helen Proctor explains, "[f]eeling pain [...] would be a selective advantage for animals, as it would help to facilitate meaningful learning and thought processes beneficial for survival."[29]

Secondly, in line with the Cartesian school of thought, welfarists perpetuate the reification of animals and their human use because their life is regarded as less important. The basis for this is the belief that animals are incapable of foreseeing the future and understanding their own existence, so must be indifferent to whether they are alive or not; just as a table is indifferent to being or not being a table. Bentham believed that to put an animal to death, however prematurely, was not objectionable because it would be more benevolent than the end that would await them in the natural course of their life.[30]

Thirdly, the characteristic principle of the welfare school is the principle of avoiding 'unnecessary suffering', i.e., opposition to acts of cruelty that cause unjustified torment. The principle underpinning the unnecessary suffering test has, according to Mike Radford,[31] sought to underpin UK animal protection law since, at least, 1849 and lies behind the famous 'five freedoms' adopted in the UK in 1979[32] as a reaction to intensive animal husbandry practices. In their current form, these are: "(a) need for a suitable environment; (b) need for a suitable diet; (c) need to be able to exhibit normal behaviour patterns; (d) need to be housed with, or apart, from other animals; (e) need to be protected from pain, suffering, injury and disease."[33] While originally anticipated only to form the basis of the regulation of farming practices, the five freedoms have however evolved in their scope to become a general set of principles by which the welfare of animals is enshrined in law, and have expanded in their application to jurisdictions beyond the UK.

However, given the perceived superiority of humans and the automatic prioritisation of their interests, the threshold of what constitutes 'unnecessary' suffering according to the lens of classical welfarism is quite low.[34] For example, the egg industry gives rise to the legality of practices such as the mass shredding of live male chicks because they

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28 THE CAMBRIDGE DECLARATION ON CONSCIOUSNESS, in Proceedings of the Francis Crick Memorial Conference, Churchill College, Cambridge University (7 July 2012) 1.

29 PROCTOR, H. Animal Sentience: Where Are We and Where Are We Heading?, in Animals 2 (2012) 633.

30 Op. cit. BENTHAM, 1823; FASEL, BUTLER, 37.

31 RADFORD, M. Animal Welfare Law in Britain: Regulation and Responsibility (Oxford 2001) 241-242.

32 THE FARM ANIMAL WELFARE COUNCIL (FAWC), Annual Reviews, in Journal of Animal Welfare Law (2010) 1-5.

33 ANIMAL WELFARE ACT 2006, s. 9(2).

34 FRANCIONE, G.L. Animals, Property, and the Law (Philadelphia 1995) 135; DECKHA, M. Animals as Legal Beings: Contesting Anthropocentric Legal Orders (Buffalo 2021).

are useless for egg-laying.[35] Since the shredding happens in a matter of seconds, it is considered a quick and humane form of death. As Gary Francione put it:

> [V]irtually any use of animals is deemed 'necessary' irrespective of the trivial nature of the human interest involved or the serious nature of the animal interest that will be 'sacrificed'. […] Once an activity is regarded as legitimate, animal killing or suffering that occurs as part of the activity is acceptable, and the balancing supposedly required by anticruelty statutes has been implicitly predetermined and the animal loses.[36]

Using animals for human purposes such as consumption, research, entertainment, cargo and transport, dangerous and/or strenuous work, etc., thus becomes absolutely reasonable, and any 'necessary' suffering they may endure in the process is considered justifiable.[37]

1.3. Abolitionism

Abolitionism sits at the opposite extreme. It demands a life for animals that aspires to something more than the mere absence of pain. Abolitionism is based on the outright rejection of animals being classified as objects or things. Another of its central concepts is 'speciesism', a term coined by Richard D. Ryder in 1970 that refers to the systematic discrimination of animals on the grounds that they belong to a species other than human.[38]

Tom Regan, a pioneering author in the abolitionist movement, contributed the thesis that animals should have rights because they have inherent dignity and are subjects of life. He also introduced the slogan of 'empty' cages, as opposed to 'larger' cages,[39] the latter being the view preferred by welfarists. Francione, another key proponent of abolitionism, argues that welfarism has had the effect of creating an image of legitimacy in the increasingly massive and intense exploitation of animals. He also identifies the reification of animals as the source of all their oppression and advocates for extending to them legal personhood,[40] in contrast with theorists, such as David Favre, who attempt to reconcile some form of property status of animals with rights-holding.[41]

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35 EC REGULATION 1099/2009 on the protection of animals at the time of killing.

36 Op. cit. FRANCIONE (1995) 129, 135.

37 Op. cit. FASEL, BUTLER, 36-37.

38 The expression was mainstreamed into animal studies by Peter Singer, see SINGER, P., Animal Liberation: A New Ethics for Our Treatment of Animals (New York 1975) 21, 271; SINGER, P. Speciesism and moral status, in Metaphilosophy 40 (2009) 567-581.

39 REGAN, T. Empty Cages: Facing the Challenge of Animal Rights (Lanham 2004) 61; REGAN, T., The Case for Animal Rights (Berkeley & Los Angeles 1983).

40 FRANCIONE, G.L. Rain Without Thunder: The Ideology of the Animal Rights Movement (Philadelphia 1996), *passim*.

41 FAVRE, D. Living Property: A New Status for Animals within the Legal System, in Marquette Law Review 93/3 (2010) 1021-1072; see also, STUCKI, S. Towards a Theory of Legal Animal Rights:

The 2019 Toulon Declaration, the legal counterpart of the 2012 Cambridge Declaration, endorses abolitionist precepts:

> Animals must be universally considered as persons and not things.
>
> It is urgent to put a definitive end to the reign of reification.
>
> Current knowledge requires a new legal perspective with respect to animals. Consequently, animals must be recognised as persons in the legal sense of the term.
>
> Thus, beyond the obligations imposed on human beings, animals shall be granted their own rights, enabling their interests to be taken into account.[42]

Although there are a variety of theories to justify that animals, or at least some of them, should or even do have legal rights, one common theme is the concept of abolitionism. From Steven Wise's 'one species at a time' approach,[43] to Alasdair Cochrane's sentience-based rights theory,[44] to the more recent proposal, by Fasel, according to which each species is entitled to a distinct set of rights,[45] the *a priori* principle is that animals have rights, irrespective of the scope of these rights, or their detailed content, or their theoretical basis, including the right to be free from human use. Thus, the animal rights agenda is essentially abolitionist.

1.4. New Welfarism

There is a more recent and moderate sub-current of abolitionism that has been described as the "new welfarism",[46] or "animal protectionism".[47] This theory is proposed as a kind of "crisis management"[48] of the differences between welfarism and abolitionism, which claims to sit between ideals and reality.[49]

As put by Ankita Shanker and Giuseppe Martinico, new welfarists' "strategies might be welfarist, but their goals are abolitionist":[50]

Simple and Fundamental Rights, in Oxford Journal of Legal Studies 40/3 (2020) 544-552.

42 THE TOULON DECLARATION, proclaimed on March 29, 2019, 2.

43 WISE, S.M. Animal Rights, One Step at a Time, in Animal Rights: Current Debates and New Directions (New York 2004) 19-50.

44 COCHRANE A. From human rights to sentient rights, in Critical Review of International Social and Political Philosophy 16/5 (2013) 655-675.

45 Op. cit. FASEL, R.N.

46 Op. cit. FRANCIONE (1996) 399.

47 FRANCIONE, G.L., GARNER, R. The Animal Rights Debate: Abolition or Regulation? Critical Perspectives on Animals: Theory, Culture, Science, and Law (New York 2010) 103-175; op. cit. FASEL, BUTLER, 44-48.

48 TAYLOR, N. Whither rights? Animal rights and the rise of new welfarism, in Animal Issues 3/1 (1999) 27.

49 Op. cit. GARNER (2013) 88-92.

50 SHANKER, A., MARTINICO, G. "Abolitionism, Welfarism, Instrumentalism: Legal Approaches to Animal Protection", manuscript in preparation.

> Whereas traditional welfarists see animal welfare as an end in itself in the form of regulation of animal exploitation, new welfarists recognise that welfare reforms are limited in scope, and see them as a means for eventually abolishing or at least significantly reducing animal exploitation. In other words, while the former pursue ideals in a puristic way, the latter pursue those same ideals while remaining cognizant of social realities.[51]

New welfarism does not share the belief of classical welfarism that animals are indifferent to their death. Robert Garner, a leading proponent of this school, says that the death of a sentient being is objectionable because it denies the being the "future possibility of pleasurable experiences".[52]

An example of the interactions, and occasional blurred boundaries, between welfarism and new welfarism is to be found within the European Union's regime on the use of animals in scientific procedures,[53] which aspires to the 3Rs—replacement, reduction, and refinement.[54] Replacement calls for employing non-sentient alternatives whenever possible; reduction for minimising the number of animals used in testing; and refinement for improving their welfare by avoiding unnecessary suffering.[55] Replacement, therefore, aims to end the exploitation of animals for research in the long run but, reflecting the pragmatic view that until society reaches that point, minimum welfare standards must be strictly applied. However, cognisant of *new* welfarism's view that *if* animals are to be used for human benefit, Member States should "ensure refinement of breeding, accommodation and care, and of methods used in procedures, eliminating or reducing to the minimum any possible pain, suffering, distress or lasting harm to the animals."[56]

1.5. Anthropocentric and Ecocentric Instrumentalism

The field of animal law has had a complicated relationship with the rights of humans and, now, also with those of nature. One of the most obvious intersections between the interests of humans and those of animals is found in the anthropocentric reasoning behind both the moral and legal protections afforded to animals. From St. Thomas Aquinas to Immanuel Kant,[57] and beyond, there has always been a school of thought to suggest that while a prohibition of cruelty to animals might be a noble aim, the

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51 Ibid.; see also op. cit. FRANCIONE and GARNER, 48.

52 Op. cit. FRANCIONE, GARNER, 117.

53 DIRECTIVE 2010/63/EU of the European Parliament and of the Council of 22 September 2010 on the protection of animals used for scientific purposes, see e.g. preamble (10).

54 RUSSELL W.M.S., BURCH R.L. The principles of Humane Experimental Technique (London 1959).

55 FLECKNELL, P. Replacement, reduction and refinement, in National Library of Medicine 19/2 (2002), *passim*.

56 Op. cit. DIRECTIVE 2010/63/UE, article 4(3).

57 KANT, I. Duties Toward Animals and Spirits, in Lectures on Ethics (New York (1963 (1780)).

protection of animals would always be an indirect means by which humans or their humanity were protected. For instance, St. Thomas Aquinas, whilst acknowledging that "passages of Holy Scripture seem to forbid us to be cruel to brute animals" explained that "this is either to remove a man's thoughts from being cruel to other men […], or because injury to an animal leads to the temporal hurt of man".[58] Later, Kant would make a similar point, claiming that "he who is cruel to animals becomes hard also in his dealings with men".[59]

In law, there are numerous examples of this anthropocentric reasoning justifying *prima facie* animal protection laws[60] but, perhaps, the most overt example is the ill-fated Pulteney Bill of 1800 to prohibit the practice of bull-baiting on the streets of England. Whilst this prohibition might seem a natural and justified step towards the protection of sentient creatures from the barbarism involved in pitching bulls against a pack of furious fighting dogs,[61] this was not the purpose of the Bill. As William Pulteney himself declared to Parliament:

> The practice of bull-baiting hath of late much increased in several parts of the Kingdom, and particularly in places where large manufactories are carried on, to the great encouragement of idleness, rioting and drunkenness, and to the great corruption of the morals of the common people.[62]

Clearly then, for Pulteney—who could never be described as a progressive animal protectionist—the only real justifications for banning bull-baiting were based entirely on the Thomist/Kantian tradition of protecting humans from their own brute condition. However, as noted in the South African case of *NSPCA v MoJCD* (2016) "the rationale behind protecting animal welfare has shifted from merely safeguarding the moral status of humans to placing intrinsic value on animals as individuals."[63]

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58 Cited in LINZEY, A., CLARKE, P.B. Animal Rights: A Historical Anthology (New York 2005) 10.

59 Ibid., 127.

60 The latest example is the ruling by the Grand Chamber of the European Court of Human Rights, which has upheld a Belgian ban on slaughter of animals without prior stunning. The ban was challenged by Muslim and Jewish organisations relying on article 9 of the European Convention of Human Rights (freedom of religion). The right to manifest one's religion or beliefs has limitations grounded on, among others, the protection of public order, health or morals. The Court "considered that the protection of animal welfare could be linked to the concept of 'public morals' one of the legitimate aims under paragraph 2 of Article 9" and thus rejected the challenge to the Belgian's decree. EUROPEAN COURT OF HUMAN RIGHTS. Executief van de Moslims van België and Others v. Belgium – 16760/22, 16849/22, 16850/22 et al. Judgment 13.2.2024 [Section II]. Legal Summary (February 2024).

61 COLLINS, T., MARTIN, J., VAMPLEW, W. (eds.). The Encyclopaedia of Traditional British Rural Sports (Abingdon 2005) 51-53.

62 HOUSE OF COMMONS PAPERS 127, UK PARLIAMENTARY PAPERS, A Bill for the Preventing the Practice of Bull Baiting (24 September 1799-29 July 1800).

63 SOUTH AFRICA CONSTITUTIONAL COURT, National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development and Another (CCT1/16) [2016] ZACC

In contrast to human rights, the rights of nature are a more recent phenomenon that has become a legislative reality in, besides Ecuador, Bolivia,[64] New Zealand,[65] Panama,[66] Spain,[67] and Uganda,[68] among others. The question then arises as to whether the rights of nature and those of animals are antagonistic or allied movements.

From a theoretical point of view, these two currents pursue different objectives: the rights of nature generally advocate for the integrity of its elements and the balance of ecosystems, while the rights of animals focus on their inherent value as individuals.[69] Some authors, however, do not conceive their relationship as necessarily antagonistic. Kristen Stilt states, "[I]f nature has rights, and if nature includes animals, then rights-based claims could be made on behalf of animals using existing rights of nature doctrine and strategy".[70] Similarly, Eva Bernet Kempers observes "Rights of nature *can* include the rights of animals" but is also "carefully optimistic about a possible alliance between the two."[71]

Rights of nature seeks the ecological balance of the whole, not the individual existence of its components for their own intrinsic value. The separate elements that comprise nature are relevant insofar as they fulfil an ecological function. However, if a plant or animal is considered invasive or environmentally harmful in any way, it is a right of nature to reduce or eliminate the threat. Protecting animals as elements of nature necessarily involves a degree of instrumentalisation of the animal, who is protected only as a means to safeguard nature.[72] In other words, the rights of nature might permit, but certainly do not guarantee, animal rights.

46; 2017 (1) SACR 284 (CC); 2017 (4) BCLR 517 (CC) (8 December 2016) para. 57.

64 LA LEY MARCO DE LA MADRE TIERRA Y DESARROLLO INTEGRAL PARA VIVIR BIEN, Ley n. 300 (15 October 2012).

65 See TE UREWERA ACT 2014 No 51 (as at 28 October 2021); TE AWA TUPUA (WHANGANUI RIVER CLAIMS SETTLEMENT) ACT 2017 No 7 (as at 17 February 2024).

66 LEY N° 287 QUE RECONOCE LOS DERECHOS DE LA NATURALEZA Y LAS OBLIGACIONES DEL ESTADO RELACIONADAS CON ESTOS DERECHOS, Gaceta Oficial Digital, jueves 24 de febrero de 2022.

67 LEY 4/2021, DE 16 DE SEPTIEMBRE, POR LA QUE SE MODIFICA LA LEY 3/2020, DE 27 DE JULIO, DE RECUPERACIÓN Y PROTECCIÓN DEL MAR MENOR, «BOE» núm. 308, de 24 de diciembre de 2021, páginas 161917 a 161919.

68 THE NATIONAL ENVIRONMENT ACT, The Uganda Gazette No. 10, Volume CXII, dated 7th March, 2019.

69 BERNET KEMPERS, E. Do rights of nature include animal rights? (4 May 2023) in: https://blogs.helsinki.fi/animallawblogseries/2023/05/04/do-rights-of-nature-include-animal-rights/.

70 STILT, K. Rights of Nature, Rights of Animals, in Harvard Law Review 134 (2021) 279.

71 Op. cit. BERNET KEMPERS.

72 SHANKER, A., NURSE, A. "Instrumental Animal Protection and Its Implications for the Status of Animals", manuscript in preparation; Op cit. SHANKER, MARTINICO.

Saskia Stucki has compared animal welfare laws to international humanitarian law—a special regime that applies in armed conflict in order to offer minimal protections.[73] From our perspective, the eco- or bio-centric principles underlying the rights of nature can, in certain circumstances, be likened to what international humanitarian law does for humans: creating a situation where there is potential for suspending fundamental rights, including the right to life. Likewise, if nature is ecologically balanced, i.e., in a state of peace, animals can enjoy their rights. If, on the other hand, nature is in conflict because its ecosystem is endangered, the animals' right to life and physical integrity may be disregarded.

For example, imagine that Australia recognised both the rights of nature and the individual right to life of wild animals. In that context, a koala's right to exist in its native habitat would go hand in hand with the right of nature. Moreover, as koalas have been an endangered species in parts of Australia since 2022,[74] rights of nature would add a further dimension to their protection: koalas would be safeguarded both as individuals and as part of a vulnerable group. However, this is not necessarily the case for all animals. For instance, camels were introduced to Australia in the 19th Century as vehicles suitable for exploring its core areas,[75] but their adaptation was so successful that they reproduced in large numbers and are now considered a pest. From the ecosystemic logic of the rights of nature, not only should the right to life of these camels not matter, but there should be an obligation to cull them, as indeed is happening.[76]

In the UK, the concept of 'alien invasive species' represents a similar tension between the rights of nature and the rights of the individual animals who live within nature. Such species—whether plants or animals—have been noted to be "one of the top threats to global biodiversity"[77] and, so as to provide a response to this threat, the UK has enacted legislation. The eradication of invasive species under the UK's Wildlife and Countryside Act 1951 should be proportionate and necessary (i.e., with no alternative means), conducted "in accordance with legal requirements on animal welfare" and in such as manner as "to ensure that pain, distress or suffering to the animal is avoided

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73 STUCKI, S. Animal Warfare Law and the Need for an Animal Law of Peace: A Comparative Reconstruction, in The American Journal of Comparative Law 71/1 (2023) 189–233.

74 AUSTRALIAN GOVERNMENT – DEPARTMENT OF CLIMATE CHANGE, ENERGY, THE ENVIRONMENT AND WATER. Species Profile and Threats Database: EPBC Act List of Threatened Fauna.

75 CROWLEY, S.L. Camels Out of Place and Time: The Dromedary (Camelus dromedarius) in Australia, in Anthrozoös, 27/2 (2014) 191-203.

76 LUCAS, J. Feral camel 'plague' forces pastoralists to shoot thousands and call for urgent cull (23/1/2019), in: https://www.abc.net.au/news/rural/2019-01-24/feral-camels-cause-chaos-as-pastoralists-shoot-thousands/10737400.

77 CORNWELL, L. Invasive species: A global problem we can tackle together (8/9/2023) in: https://aphascience.blog.gov.uk/2023/09/08/tackling-invasive-species/.

or minimised".[78] Yet, the fundamental tension remains: the lives of dozens of species of wild-living mammals, reptiles, fish, and insects are routinely and legitimately taken in the name of environmental protection and diversity in the UK. After all, the UK's Wildlife and Countryside Act 1951 expressly lists 77 species of animals as being the potential subjects of Species Control Operations.[79]

This shows that the rights of nature are only compatible with themselves. Individual animal rights can be tolerated within the framework so long as they do not contradict its precepts. Therefore, the eco- or bio-centric logic of nature's rights will always act as a sword of Damocles over animal rights.

Another problem with a rights-of-nature/animal rights symbiosis is that 'nature', properly defined, can only assist free-living (wild) animals and not those billions of animals who have never so much as walked through a forest, climbed a tree, or lived in any environment even remotely resembling natural. These animals, kept in factory farms and research institutions, could no more be considered part of any ecosystem or nature than a microchip or a component for a motor car. The danger, therefore, is that the already tiered system of animal rights becomes further segregated along the lines of free-living and captive animals.

2. *ESTRELLITA* AND THE BILL LOA

The 'Draft Organic Law for the Promotion, Protection and Defence of the Rights of Non-human Animals', the Bill LOA, is part of the pioneering recognition of the rights of nature that Ecuador incorporated into its Constitution in 2008, according to which:

> Nature, or Pacha Mama, where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes.
>
> All persons, communities, peoples and nations can call upon public authorities to enforce the rights of nature. To enforce and interpret these rights, the principles set forth in the Constitution shall be observed, as appropriate.
>
> The State shall give incentives to natural persons and legal entities and to communities to protect nature and to promote respect for all the elements comprising an ecosystem.[80]

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78 CODE OF PRACTICE FOR SPECIES CONTROL PROVISIONS IN WALES, Welsh Ministers, May 2017, para. 35; SPECIES CONTROL PROVISIONS CODE OF PRACTICE FOR ENGLAND, DEFRA, 2017, paras. 31-32.

79 WILDLIFE AND COUNTRYSIDE ACT 1981 c. 69, Sched. 9.

80 Op. cit. CONSTITUCIÓN DE ECUADOR, art. 71.

The Constitution refers to nature and the elements of the ecosystem as subjects of rights, but it does not identify what these elements would be. The Constitutional Court has thus developed the content of the right to nature in relation to mangroves,[81] forests,[82] rivers,[83] and ultimately, non-human animals in the landmark case of *Estrellita*.[84]

2.1. The *Estrellita* ruling

Estrellita was a monkey belonging to an endangered species who had been raised in a human home for 18 years. Authorities confiscated Estrellita and placed her in quarantine. Estrellita's 'owner', who perceived herself as her mother, filed a *habeas corpus* petition for Estrellita's release and return to her human home.[85] Sadly, Estrellita perished during her stay in quarantine. However, the Constitutional Court decided to select the case strategically to determine whether the rights of nature encompassed animals. This is one of the first cases in the world to deal with animal rights in a systematic way,[86] that is, beyond the need to resolve the situation of the specific animal in the dispute.

There were three central contributions of the Court's decision in *Estrellita* that deserve special mention. First, the Court stated that the Ecuadorian Constitution goes beyond classical anthropocentrism to accommodate socio-biocentrism. It referred to the move towards a paradigm of modern law in favour of Ecuador's millenary, plural, and intercultural tradition.[87] Second, the Court's decision emphasised that animals are entitled to rights, stressing the importance of safeguarding them not just for ecological reasons, but foremost for their individuality and inherent worth.[88] This indicates that ecocentrism is not the only governing principle, and zoocentric protections based on the animal's inherent worth are to be accounted for too. Third, the Court declared that animals were part of the ecosystem, and that animal rights constitute a specific dimension of the rights of nature.[89] It stated that, in general, the content of such rights are to be analysed using "the interspecies principle and the principle of ecological interpretation".[90]

The interspecies principle proposes that the protection of animals should be based on the characteristics, processes, and life cycles of the species to which they belong.[91]

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81 Op. cit. Sentence No. 22-18-IN/21.
82 Op. cit. Sentence No. 1149-19-JP/21.
83 Op. cit. Sentence No. 1185-20-JP/21.
84 Op. cit. Sentence No 253-20-JH/22, *Estrellita* case.
85 *Estrellita* case, para. 38.
86 See generally op. cit. SHANKER, BERNET KEMPERS.
87 Ibid., para. 56.
88 Ibid., paras. 71-79.
89 Ibid., paras. 73, 82-83, 91.
90 Ibid., para. 97.
91 Ibid., paras. 89, 98-103.

For example, a migratory bird needs different treatment from native, sedentary wildlife. The principle of ecological interpretation requires respect for the interactions that exist between the different species as well as between the different individuals that make up each species.[92] Consequently, the rights to life and physical integrity of animals have to be understood in a relative way, depending on, e.g., their position in the food chain.[93] The Constitutional Court pointed out that humans, as omnivores, are predators and therefore cannot be prohibited from having the right to feed on other animals.[94]

At the end of the decision, the Constitutional Court ordered legislative action. It first required the Ministry of Environment to adapt its regulations, which involved specifying the minimum conditions that needed to be met by keepers and caretakers of animals in accordance with those set forth by the judgment.[95] Then, it ordered the Ecuadorian National Assembly to debate and approve a new law on animal *rights*, building on the principles developed in the Court's judgment. As an intermediate step, the Constitutional Court directed the Ombudsman's Office to draft a bill to this end within six months of the issuance of the judgment.[96]

Pursuant to the latter instruction, the Ombudsman's Office, in its capacity as the national institution for human rights and nature, and in collaboration with civil society organisations, submitted the Bill LOA on 19 August 2022.[97] Its text, only available in Spanish, is meant to be debated by the Ecuadorian General Assembly, in principle, in August 2024.

The forthcoming debate and expected act on animal rights will not only be of relevance for Ecuador, but also a point of reference for jurisdictions that are looking to extend rights to the non-human. This is because Ecuador has been a trendsetter in the ever-growing movement of the rights of nature so, every time Ecuador adopts or interprets legislation in this regard, to some degree, it does so for the rest of the world too. For example, in 2010, the UN Secretary-General submitted his first report on the topic of 'Harmony with Nature' addressing "how sustainable development approaches and initiatives have allowed communities gradually to reconnect with the Earth".[98] The report noted Ecuador as the, then only, example of recognition of rights of nature in the world and explained the content of this concept.[99] In 2017, the Inter-American Court

92 Ibid., para. 104.
93 Ibid., paras. 100-102.
94 Ibid., para. 103.
95 Ibid., para. 182.
96 Ibid., para. 183.
97 Op. cit. Bill LOA.
98 UNITED NATIONS, First Report of the Secretary-General 'Harmony with Nature' A/65/314 (19 August 2010) 1.
99 Ibid., para. 72.

of Human Rights issued an advisory opinion concerning the environment and human rights. Therein it made the novel statement that "the right to a healthy environment, unlike other rights, protects the components of the environment, such as forests, rivers and seas, as legal interests in themselves, even in the absence of the certainty or evidence of a risk to individuals".[100] To support this assertion, the Inter-American Court of Human Rights referred, *inter alia*, to both the Constitution of Ecuador and the rulings of its Constitutional Court concerning rights of nature. In March 2024, a Peruvian Court recognised the legal personhood of the River *Marañón*, relying partly on said reasoning of the Inter-American Court of Human Rights.[101] In short, the pioneering development of rights of nature in Ecuador has attracted international attention and contributed to a cascade of concomitant recognitions of nature's legal interests.[102]

The Ecuadorian Bill marks the initiation of a groundbreaking discourse on the attribution of rights to all animals within a national legal framework, which makes it imperative to scrutinise its content to grasp its underlying principles, its breadth of impact, as well as its limitations in effecting change.

The proposal submitted by the Ombudsman's Office is for an 'organic law'. In the Ecuadorian legal system, organic laws are hierarchically superior that regulate, *inter alia*, constitutional rights and guarantees, and require an absolute majority to be approved. Ordinary laws, by contrast, cannot "amend or prevail over an organic law."[103] This means that, if an organic law were to recognise the rights of animals, the rest of the Ecuadorian legal framework would have to fall in line.

It is worth noting that the official title of the Bill LOA is 'Draft Organic Law for the Promotion, Protection and Defence of the *Rights* of Non-human Animals' (emphasis added), but when the President of the National Assembly forwarded the Bill to the members of the National Assembly, his communication had removed the reference to 'rights' from the title. Instead, the communication says 'Draft Organic Law for the Promotion, Protection and Defence of Non-human Animals' (*Proyecto de Ley Orgánica*

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100 Op. cit. INTER-AMERICAN COURT OF HUMAN RIGHTS*,* para. 62.

101 CORTE SUPERIOR DE JUSTICIA DE LORETO *Sentencia frente la Acción de Amparo contra Petroperú* et al., 00010-2022-0-1901-JM-CI-01 (14 March 2024) paras. 24-25.

102 For a map of the rights of nature phenomenon, see PUTZER, A., LAMBOY, T., JEURISSEN, R., KIM, E. Putting the rights of nature on the map. A quantitative analysis of rights of nature initiatives across the world, in Journal of Maps 18/1 (2022) 89-96. Since Ecuador recognised rights of nature, other jurisdictions have followed. In addition to the legislative examples cited above in notes 64-68, there have also been judicial decisions granting rights to nature. For example, CORTE CONSTITUCIONAL DE COLOMBIA *Sala Sexta de Revisión*, T-622/16 (10 November 2016) granting legal personhood to the River Atrato; in India, HIGH COURT OF UTTARAKHAND AT NANITAL. *Mohd Salim v. State of Uttarakhand & others*, 2017 SCCOnLine Utt 367 (20 March 2017).

103 Op. cit. CONSTITUCIÓN DE ECUADOR, art. 133.

para la Promoción, Protección y Defensa de los Animales No Humanos).[104] By accident or by design, this decaffeinated title foreshadows the true content of the Bill LOA, which is indeed more inclined to the protection of animals under the welfare umbrella than to the recognition of animal rights proper.

The Bill LOA consists of an explanatory memorandum, a preamble, and 80 articles divided into three titles: (I) general provisions; (II) obligations, prohibitions, and infringements; and (III) the creation of a National System for the Promotion, Protection and Defence of the Rights of Non-human Animals. At the end of the Bill, there are general, transitional, reformatory, and final articles situating the Bill in the wider normative framework of Ecuador.

2.2. The Bill LOA's own understanding of animal rights: an abolitionist stance

In the field of welfare, there is a wealth of legislation in a plurality of countries. What they all have in common is that they are *not* "framed in the language of rights and do not codify any explicit animal rights".[105] Some degree of welfare protection already exists in Ecuador. Its Organic Environmental Code, in force since 2018, applies to both wild and urban—including domestic—fauna and stipulates that the "keeping of animals entails the responsibility to look after their welfare".[106] Similarly, the Ecuadorian Penal Code criminalises a number of acts against urban wildlife, such as killing, organised fighting between dogs or other species, and zoophilia.[107] It further provides a special procedural guarantee whereby any person can file a complaint on behalf of animals.[108] It follows that welfare rules already existed in Ecuador and were not labelled 'rights'. Therefore, when the explanatory memorandum of the Bill LOA claims to initiate a break with the systematic discrimination against animals by "recognising non-human animals as subjects of rights" (p. 1), it implies that its drafters understood that the welfare and anti-cruelty provisions already in force in Ecuador did not make the cut.

The abolitionist inspiration of the concept of rights is clear in the operative part of the Bill LOA. It lists 23 governing principles of law among which are "equality and non-discrimination", according to which all animals are equal before the law "and may

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104 ASAMBLEA NACIONAL DE ECUADOR, Memorando Nro. AN-PR-2022-0465-M. "Difusión del Proyecto de Ley Orgánica para la Promoción, Protección y Defensa de los Animales No Humanos" (Quito, 31 August 2022).

105 Op. cit. STUCKI (2020) 544.

106 CÓDIGO ORGÁNICO DEL AMBIENTE, Registro Oficial Suplemento 983 de 12 Abril 2017, arts. 139-141. Specific welfare standards can be found in article 145, and penalties for infractions in article 319.

107 CÓDIGO ORGÁNICO INTEGRAL PENAL, Registro Oficial Suplemento 392 de 17 Febrero 2021, articles 249-250, see also ECHEVERRÍA, H. La Reforma Penal Ecuatoriana Sobre Protección Animal. Protección Animal Ecuador (undated).

108 Ibid., Art. 647(5).

not be discriminated against by any individual or collective distinction, temporarily or permanently" (art. 4(a)); and the principle of "dignity". Dignity is defined as a permanent value denoting the "intrinsic worth of each animal", which is recognised "as an end in itself and never as a means" (art. 4(m)). Among the aims, the Bill LOA includes the promotion of animal rights, safeguarding animal welfare (art. 3(a)); eradication of human-animal violence (art. 3(d)); and the elimination of "all kinds of speciesism" (art. 3(g) and (i)). This terminology clearly sets a tone of animals as subjects of law in line with the Constitutional Court's holding that "while all humans are subjects of law, not all subjects of law are humans".[109] Furthermore, according to the Bill, animals hold rights that are "universal, inherent, inalienable, non-transferable and interdependent" (art. 9).

The key provision of the Bill LOA is article 12 concerning the "rights of non-human animals". Among them, article 12 unequivocally proclaims that animals have the right to life (para. a); to physical and moral integrity (para. c); to formal and material equality (para. a); to respect their dignity without discrimination (para. e); to freedom from exploitation (para. j), to life in an environment free from violence (para. l); and to a dignified death when necessary (para. m). Effectively recognising these rights of animals would be an unprecedented revolution. So far, while a number of countries have established animal welfare protections, they are all anchored in the notion that humans exercise continuing dominion over the animal's life. No country in the world has concretely recognised the right of animals to simply exist, and though a few have made judicial declarations to that effect, these have so far had no practical effect.[110] Recognising the right of animals to life would entail a change of unfathomable proportions in the lives of humans. This is because human routine—nutrition, clothing, the use of cosmetic and medicinal products, among others—is heavily forged in animal exploitation, including death. It would entail the end of several industries, most notably meat, as well as the start or expansion of others such as alternative protein. In other words, recognising the animal right to life would require an epistemic adjustment of having to consider animals as equals in terms of respect for their existence, as well as a profound systemic change in the way society carries its usual business.

The Bill LOA aims to eliminate "all forms of discrimination and domination" as an indispensable step for the full enjoyment of rights" and identifies the need to modify socio-cultural patterns of discriminatory behaviour towards animals (p. 1). This is why, further on, in the operative part, some practices are banned. These include hunting, except in cases where it is carried out by Indigenous peoples and nationalities for subsistence purposes (art. 30(aa)) or, implicitly, for population control (art. 41); sacrifices of

109 *Estrellita* case, para. 81.

110 See generally op. cit. SHANKER, BERNET KEMPERS.

"animals for religious practices, beliefs or convictions" (art. 35(y)); "using nonhuman animals for entertainment and exhibition" for cultural or religious reasons (art. 49(j)); leaving companion animals unattended in vehicles in "conditions detrimental to their welfare or life" (art. 32(e)); or not offering leases for housing purposes on the basis of the existence of a pet animal (art. 32(k)).

Beyond these safeguards, to the extent that they are accepted as being such, the rest of the Bill LOA is highly contradictory. The epistemic and systemic change that was announced in the explanatory memorandum, the governing principles, the purposes of the law and, above all, in the groundbreaking list of animal rights in article 12, does not occur at practically any level when one looks further into this Bill.

3. CRITICAL ANALYSIS OF THE BILL LOA

3.1. The Bill LOA is irremediably anthropocentric and ecocentric

The demise of the abolitionist promise of the Bill starts in article 13. The internal inconsistency between principle and provision becomes impossible to ignore as animals are categorised depending on the human use to which they are put. How can animals not be a means to an end if their use is still permitted by humans, and their legal status and identity are defined by this utility?

Under article 13's criteria, there are two broad groups of animals: those who have a human use (paras. a-d), and those who do not (paras. e-h): animals are those (a) "for companionship"; (b) "for work or trade"; (c) "for experimentation"; (d) "for consumption and industry"; (e) "wild fauna"; (f) "exotic wildlife"; (g) "marine, aquatic, and semi-aquatic fauna"; and (h) "synanthropic or liminal" animals. This classification reveals that the Bill LOA understands that the existence of the animal world revolves around the type and degree of human dominance, and far from representing a novel and uncharted turn into 'animal rights' or an example of living in harmony with nature (*Sumak Kawsay*), it mirrors contemporary welfarist legislation.

This anthropocentric catalogue is the key source of the problems of the Bill because, contrary to its own governing principles, it systematically subjects animals to human dominion. For instance, under UK animal welfare laws, a rabbit will, potentially, be subjected to at least four different legal regimes and protections depending on how that rabbit is classified by humans. If the rabbit is considered a 'companion animal', he will fall within the protection of the Animal Welfare Act 2006 and be subjected to its specific unnecessary suffering formulations.[111] If that same rabbit is classified as a

[111] ANIMAL WELFARE ACT 2006, ss. 4, 9

subject of scientific experimentation, the welfare provisions of the Animals Scientific Procedures Act 1986 apply.[112] Although both Acts mandate certain welfare provisions, the living conditions under which that same rabbit could be kept are markedly different: the conditions in which the rabbit, if governed by the Animals (Scientific Procedures) Act, may be kept would be entirely inappropriate, and therefore unlawful, if that same rabbit were a companion animal governed by the Animal Welfare Act. Similarly, the conditions to which the rabbit would be subjected if designated as a 'farmed animal' would be governed by The Welfare of Farmed Animals (England) Regulations 2007, with further differing protections.[113] Finally, if the rabbit were free-living (or wild), they will be protected by the Wildlife and Countryside Act 1981's restriction and controls over snaring or trapping, or the Hunting Act's (very limited) prohibitions on hunting with hounds.[114]

The path of breaking with the exploitation and discrimination of animals announced by the Bill LOA opened up a range of different methods to categorise them: as vertebrates and invertebrates; by terrestrial, aquatic, or aerial environment; by degree of proven sentience; by species; by habitat, etc. All of them are plausible and defensible with their pros and cons. Only one classification method was clearly untenable: one based on the instrumental use of animals by humans. This choice, far from breaking the socio-cultural patterns of exploitation, perpetuates them. In fact, there is a parallel animal law proposal in Ecuador, the Project Organic Law for Animal Welfare, (*Proyecto de Ley Orgánica de Bienestar Animal*) which contains a similar classification,[115] with the difference that such categories actually do make sense in a welfarist bill, like in the UK example above.

The Bill LOA affirms that "[t]he rights of nonhuman animals are part of the rights of nature" including "species that have been domesticated by humans and maintain a direct relationship with humans" (art. 8). However, this is clearly not the case because animals who have been artificially separated from nature by humans for their own ends are deprived of many fundamental protections. Indeed, as discussed below, the Bill LOA enables these animals to continue to exist in an unnaturally forced cycle of breeding, feeding, and slaughter. As such, this can mean one of two things: either this anthropocentric classification of animals implies that, according to the Bill LOA, not all animals are part of nature; or, being recognised as a component of nature does not ensure the subsequent protection of rights and may result in a superficial declaration.

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112 ANIMALS SCIENTIFIC PROCEDURES ACT 1986, s. 14.

113 WELFARE OF FARMED ANIMALS (ENGLAND) REGULATIONS 2007.

114 WILDLIFE AND COUNTRYSIDE ACT 1981, ss. 1, 11; sched. 1(4), respectively.

115 ASAMBLEA NACIONAL, REPÚBLICA DEL ECUADOR, Proyecto de Ley Orgánica de Bienestar Animal (Asambleístas Elina Narváez y Esteban Torres / 428825) 18-12-2022: 2021-2023-782 (17 November 2022), art. 4.

This problematic, anthropocentric classification of the Animal Kingdom also produces a direct contradiction between the Bill LOA and the parameters of the *Estrellita* ruling: the rights assigned to each category exclusively mirror a life cycle subjected to human domination and instrumentalisation, as opposed to a set of rights aligned with their inherent value, dignity, and specific needs.[116] This classification also contravenes *Estrellita*'s expected departure from pure anthropocentrism, the desire to protect animals primarily for their individual value and, above all, from the interspecies principle and the principle of ecological interpretation.[117]

The interspecies principle claims that the protection of animals should be based on the characteristics, processes, and life cycles of the species to which they belong. However, the Bill LOA regulates animals in such a way that they do not exist in and of themselves, nor are they defined by their intrinsic qualities, but by external patterns based on the fate that humans bestow on them. The principle of ecological interpretation requires that interactions between species be respected, but the Bill LOA describes animals exclusively on the basis of their utility to humans. Consequently, there exists a distinct absence of interaction, favouring instead a top-down approach towards animals. Furthermore, this classification overlooks the network of connections among species *inter se*, emphasising and giving voice solely to the perspective of *homo sapiens sapiens*.

The Bill LOA is also deeply ecocentric as it maintains the subordination of animals to nature (art. 8). Only wild animals who, at any time, contribute positively to nature, have the right to full respect for their existence (art. 18(a)). If, however, they become harmful to the habitat, the Bill LOA foresees culling practices to ensure the "integrity of ecosystems" (art. 45). While an instrumentalist approach such as this might provide a short-term strategic advantage in protecting animal interests, as argued by Shanker and Angus Nurse, it ultimately provides a shaky foundation for animal rights as such and may be detrimental to animals in the long run.[118] This is because, under an instrumental paradigm, animals remain objectified as a means to an end; their inherent value and interests can be overlooked; their protections, or lack thereof, are commensurate with their contribution to the ecosystem; they can easily be reversed; and their interests can never be fairly balanced.[119]

It is noteworthy that the Bill LOA not only transgresses the fundamental parameters of the *Estrellita* case, but also internally contravenes its own precepts. This is because its operative part proclaimed that animals should be recognised as "an end in themselves and *never* as a means" (art. 4(m), emphasis added) and adhered to the principle of

116 As mandated by the Bill LOA, arts. 4, 9, 12; and the *Estrellita* case, para. 98.
117 *Estrellita* case, paras. 56, 71-79, 97 and 100-102, respectively.
118 Op. cit. SHANKER, NURSE.
119 Ibid.

interspecies and ecological interpretation (art. 4(f);(g)). These principles are untenable insofar as the Bill LOA creates regimes for animals for consumption (art. 17) and experimentation (art. 16) that are premised on their use as a means for food and research.

3.2. The Bill LOA is effectively speciesist

The Bill LOA expressly speaks out against speciesism (art. 3(g)(i)), that is, the discrimination of other beings because of their species membership.[120] However, the classification of animals depending on their human use ends up discriminating on the basis of species adscription, both in a human-animal context, and in animal-animal contexts.

Even though the Bill LOA rarely identifies animals by reference to their species, its human-based classification has the equivalent effect. Animals for consumption and industry (art. 13(d)) is an alternative way of designating species such as *bos taurus* (cattle), *ovis aries* (domestic sheep) or *gallus gallus domesticus* (chicken). Similarly, experimental animals (art. 13(c)) will generally include *mus musculus* (house mouse) or *pan troglodytes* (chimpanzee), among others; while companion animals (art. 13(a)) will be mostly *canis lupus familiaris* (dogs) and *felis catus* (cats). This remains generally true even though there will be some overlap in categories within the same species, some of which are put to multiple human uses. Thus, considering that animals intended for companionship, consumption, labour, and experimentation would commonly correspond to, respectively, cats/dogs, cattle/birds, dogs/horses and rodents, the Bill becomes a testament to the speciesism it vows to eradicate.

The Bill LOA creates a hierarchy where humans sit at the apex and dictate how the lower strata must live. This ensures that human interests automatically prevail over animal interests, with no room being carved out for balancing in most cases. Humans remain free to exploit animals for their various purposes as a matter of routine and depending on their anthropocentric value, certain species are more 'privileged' than others, entrenching inter-species hierarchies even among non-humans. This is because, based on the classification by human use in article 13, the Bill LOA focuses on elaborating a complex and extensive regime of rights, obligations, prohibitions, and penalties specific to each type of animal with stark differences between them. For example, article 12(a) stated that animals shall have the right "[t]o life and existence", but the ascription of the animal to a specific category is what determines what is permitted or prohibited, and thus their prospects of life and death.

The only groups of animals for whom, in principle, the right to life exists, are three. The first includes animals intended for companionship, who have the recognised right

120 Op. cit. SINGER (1995) 6.

to have their life cycle respected (art. 14(a)), to not be abandoned (art. 14(b)), and to not be exploited for commercial purposes (art. 14(c)). However, it should be noted that there are exceptions as euthanasia is provided for if they are abandoned, unclaimed, and in overcrowded shelters (art. 45(f)), if they are afflicted with incurable diseases or the animal suffers permanently (art. 45(a) and (b), *bis*), or if they have caused harm to other humans and/or animals "and it is determined that the owner is unfit to take responsibility for it" (art. 45(c)). This is a huge caveat considering that, only in the municipality of Ibarra in Ecuador, "[t]he estimated population of stray canines is 65,000, while that of stray felines is 14,000."[121] The second group refers to animals intended for work or trade, who have the recognised right to be cared for by a designated guardian once their activities have ceased (art. 15(c)), and must not be sent to a slaughterhouse (art. 33(i)). The last is terrestrial wildlife, who enjoy "full respect for their existence" (art. 18(a)),[122] save for the eventual need of population control, i.e., culling (art. 41), and human predatory behaviour practised by Indigenous groups for subsistence purposes (art. 18(f)). However, hunting by everyone else is banned (art. 38(a)).

The right to life does not exist, even in principle, for any other animal. On the contrary, many of them are bred intensively precisely to bring about their premature death. This is the case of animals for consumption, both terrestrial and some of those belonging to marine, aquatic, and semi-aquatic fauna. The Bill LOA grants such animals the 'right' to be killed, albeit respecting welfare protocols (arts. 17(b); 30(c)). Animals destined for experimentation do not have an intrinsic right to life either. Once used, laboratory facility personnel must decide whether they can be kept alive or whether they should be euthanised (art. 27(j)). Finally, synanthropic animals, i.e., species that live in urban areas without being domesticated, such as rats and mice, have no right to live; the Bill LOA only regulates the manner in which they should not be killed (e.g. by means that unnecessarily increase or prolong their suffering, such as by glue traps, art. 39).

Therefore, the fate and rights awaiting a cat under the Bill LOA are very different from those awaiting a monkey, a cow, or a common mouse, precisely because they each belong to a different species. The cat and the monkey are, in principle, allowed to live their full vital cycle; whereas the cow has the 'right' to be slaughtered and eaten, and the common mouse the 'right' to be annihilated with a single blow. This enforcement is a frontal violation of the Bill's own renunciation of speciesism and patterns of behaviour that legitimise violence and domination and discrimination (art. 3(c);(g);(i)). In short, the

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121 ANDRADE, E. Estrategias para fortalecer el capital social y su importancia en la solución del conflicto ser humano-fauna urbana en la ciudad de Ibarra, Ecuador, in Derecho Animal 13/1 (2022) 35 (trans. the authors).

122 These entitlements are not extended to marine, aquatic, and semi-aquatic wildlife who can, on the contrary, be harvested and killed (art. 30(b) and (c)).

Bill LOA not only maintains hierarchies among animals, it *promotes* them, entrenching speciesism.

3.3. The Bill LOA is essentially welfarist

Despite the rights-based approach of the Constitutional Court, and despite its espoused-abolitionist spirit, what the Bill LOA actually protects for most animals is their welfare, albeit under the guise of rights. Its failure to recognise this distinction forms the crux of our concerns because, quite apart from the immediate effect on the prospects of protecting animal rights in Ecuador, its interpretation of 'rights' will set a precedent for the legal understanding of the term throughout the world. It is therefore imperative for this distinction between rights under abolitionism and protections under welfarism to be clearly understood and expressed.

As seen, the categories into which animals are placed is *defined* around the types of exploitation they face—to be worked, to be traded in, to be experimented upon, or to be used to produce things for consumption (art. 13). No attempt is made to prohibit the exploitation, or to even treat it as an exception to a general rule that prohibits exploitation. Animals destined for consumption are transactional commodities. The Bill LOA turns a blind eye to factory farming and, instead, enables its operation providing safeguards regulating *how* that exploitation is to be carried out (arts. 17 and 26). For example, the Bill LOA bans, among others, their permanent confinement, their mutilation without anaesthesia, administering growth-inducing antibiotics, and anti-welfare handling practices (art. 17). It expressly refers to these welfare standards as 'rights', but it is not as explicit in disclosing that being an animal destined for consumption comes with the concomitant obligation to perish (e.g., arts. 17(a); 26(d)-(k); 35(c)). If animals destined for consumption are not fit for this human purpose (e.g., male chicks in the egg-laying industry), the Bill LOA does not spare them from death. In its place, it says that animals have a 'right' to not be discarded through cruel methods, such as grinding, asphyxiation, or crushing (art. 17(f)).

It is true that the Constitutional Court assented to human's omnivore nature in *Estrellita* and declared that, pursuant to the ecological principle, such biological interactions between species must be respected, including predatory behaviour in the trophic chain.[123] In other words, *Estrellita* is, by no means, a call to a vegan lifestyle. Except for Indigenous groups, what the judgment did not specify, however, are the circumstances under which, and the manner in which, humans can exercise this right to feed on other animals. Is it an unfettered and unlimited entitlement? Or are there prescribed exceptions to the right to life of animals in the form of derogations?

123 *Estrellita* case, paras. 99, 102.

For instance, in pro-animal-rights decisions, Indian courts have adopted a policy of derogation based on human necessity, which requires a fair balancing of human and animal rights in cases of conflict.[124] The Bill LOA is not even consistent with a policy of derogation and, instead, beyond symbolic recognition, it does not protect even the most fundamental of rights of animals, such as that to life, and then allows for exceptions in finite circumstances. Rather, it assumes that animals can be used, tested, slaughtered, or eaten for reasons connected to human convenience. So instead of, e.g., protecting the animal's right to life and then allowing a derogation based on human necessity, the Bill LOA fails to uphold a genuine animal right to life at all, precluding any consideration of necessity or balancing. As a result, this Bill makes killing animals the norm rather than the exception.

Moreover, there is a bright thick line between predatory and exploitative practices that the Bill LOA does not draw or discuss. Its text conflates predation and exploitation because the need to mass produce meat or meat-derived products is left unquestioned. Against this background, in a glaring contradiction, the Bill LOA forbids hunting for commercial purposes (art. 31(aa)) where, at least, there is a fairer rapport between wild animals and hunters; but does not ban intensive factory farming or any other commercial reproduction, breeding, and slaughter of non-wild animals whose entire existence is tied to what the Bill LOA itself refers to as a "chain of production" (art. 17(a)).

Likewise, the Bill LOA accepts the existence of animal experimentation under the framework of the 3Rs. It calls for "using and developing alternative experimentation techniques" (art. 16(b)) that, with time, should replace animal experimentation. However, for the time being, the Bill regulates the conditions in which such experiments must be carried out. Just like any other welfare law, the Bill does not purport to eliminate all animal harm when animals are being used in experiments and, instead, adopts the welfarist hymn of 'unnecessary suffering' (art. 27(d)).

The prospects of instrumentalisation vary depending on whether the animal is destined for consumption or experimentation. In what concerns animals in experiments, replacement is the long-term goal. However, despite the availability of substitute products in the food, clothing, etc., industries, the Bill LOA does not extend the 'replacement' logic to animals subject to consumption. As such, unlike animals in experimentation, the prospects of the future generations of cows, pigs, sheep, chickens, and the like are to be instrumentalised *ad infinitum*.

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[124] HIMACHAL PRADESH HIGH COURT AT SHIMLA. Ramesh Sharma vs. State of Himachal Pradesh 2013 (3) ShimLC 1386 (26 September 2014) para. 55; SUPREME COURT OF INDIA. Animal Welfare Board of India vs A. *Nagaraja and Ors* (2014) 7 SCC 547 (7 May 2014) paras. 31, 59-60.

4. RECOMMENDATIONS

The Bill LOA is commendable for its ideals and intentions but falls short in its execution. It has fundamental internal inconsistencies, departs from some of the guidelines in *Estrellita* and, overall, it recognises only *some* of the rights of *some* of the animals it covers. Besides, as it stands, the Bill LOA may become counterproductive because it could, inadvertently, legitimise the systematic exploitation and slaughter of animals under the guise of rights.

Recognising animal rights would mean a break from the way of life of most of the world's populations; if we accept this premise, we must accept the inherent conflict between their status as autonomous rights-holders and the fundamental tenet of human existence found in nearly every culture throughout history that humans have dominion over animals.

This reflects the immense challenge assigned to the Bill LOA, particularly made more complex in the absence of precedents to guide the drafters. This challenge is further compounded by the expectations and pressures that the Bill faces: it is poised to be the first law recognising the rights of animals and thus, it should receive a commensurable degree of attention nationally and internationally. It has also been drafted under judicial orders, rather than at the initiative of the legislator, which means that it must comply with pre-established parameters and a deadline.

We do not think that the defects of the Bill LOA can be surmounted simply by redrafting or amending its content. We rather think that the task entrusted to the Ombudsman and the Ecuadorian National Assembly is bigger than what a single bill and related parliamentary debate can achieve. Legal change in this regard must balance aspirations with realities. Recognising and protecting the rights of animals requires a systemic overhaul that would disrupt established norms and social conventions across various levels and, as such, cannot be accomplished all at once through a law. The change needed for animal rights to materialise is multifaceted and needs a shift in moral perception, cultural frameworks, economic models, and diet traditions, among others. In short, recognising and protecting the fundamental rights of animals requires imagining a different world.[125] Therefore, we submit that the Bill LOA should be approached as the means to initiate a path of transformation, rather than the immediate mechanism to attain it.

At the practical level, given the immediate need to comply with the *Estrellita* judgment requiring the debate and passing of a law on animal rights, we deem that the members of the Ecuadorian National Assembly have three alternative courses of action: (1) restrict the scope of the law to terrestrial wildlife; (2) recognise the genuine rights of all animals; or, our preference, (3) restrict the scope of the law to terrestrial wildlife for

[125] We thank one of the peer reviewers for their remarks in this regard.

the time being, and task the National System for the Promotion, Protection and Defence of the Rights of Non-human Animals ('National System') with formulating proposals to extend rights recognition to the remaining animals within a deadline.

4.1. A restriction in scope

The first option is to limit the ambit of the law to terrestrial wildlife,[126] and to enact the welfarist provisions aimed at other animals in a separate piece of legislation.[127]

To the extent that derogation is permitted from the right to life of wild animals, albeit policy-based, it is still in exceptional circumstances that form a credible basis for a necessity argument. As animal rights protections strengthen and alternatives to their exploitation grow, the ambit of necessity will reduce, until, one day, it may not exist at all in practice.

This strategy has the overall advantage of providing a text that is coherent with its own espoused tenets. This is because focusing only on terrestrial wildlife would remove the need for article 13 of the Bill LOA that classifies animals according to their human use. The main drawback of this option of restricting the law to terrestrial wildlife is that it complies with *Estrellita* only in part because the Constitutional Court ordered drafting and approving a law on the rights of, presumably, all animals.[128] At the same time, this could create an incentive for the Constitutional Court to strategically select a case concerning a non-wild animal and provide more and clearer parameters for their treatment within a framework of rights.

All in all, this first option is still better than the current situation because the text of the Bill LOA, albeit it encompasses all animals, fails to recognise actual rights. Furthermore, the current Bill LOA has a potential negative consequence of broader proportions of corrupting the meaning of rights, and thwarting the quest of the animal rights movement in the process.

4.2. Going all-out

The second option involves enacting a law that confers actual rights of the ilk listed in article 12 of the Bill LOA to all animals.

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126 Though companion and work animals also appear to enjoy genuine rights under the Bill LOA's provisions, we exclude them from the scope of our recommendations on what to retain in order to avoid the need for anthropocentric categorisations at all.

127 We recall that a Bill on animal welfare is also before the Ecuadorian National Assembly, see op. cit. Proyecto de Ley Orgánica de Bienestar Animal (Asambleístas Elina Narváez y Esteban Torres / 428825).

128 *Estrellita* case, para. 183.

This alternative would comply with the *Estrellita* order, but would defy reality. Extending, for example, the right to life, dignity, and non-discrimination to cows, chickens, and pigs would effectively ban animal farming. This would be a radical and premature departure from daily habits that are the result of more than four millennia of history, which cannot be overturned overnight. Banning farming and meat consumption would disrupt business networks heavily reliant on animal products, resulting in significant repercussions for the national economy that no state is currently equipped to handle. Additionally, it would pose challenges to importation and trade policies, and likely foster the emergence of an underground meat market, operating beyond welfare and food security oversight. This could in turn lead to an increase in animal suffering as well as to the spread of human and animal diseases. A blanket ban on the production and consumption of animal-derived products could also be argued to infringe on the human rights to, e.g., food and culture.[129] Plant-based sources of nutrition might, at least in theory, not be available in all regions and to all peoples, and diet can form an integral part of culture.

Moreover, as noted above, the *Estrellita* judgment did not want to go as far as putting an absolute stop to animal-derived food because it acknowledged humans' omnivore nature as well as the historical domestication and consumption of animals.[130] Yet, the Constitutional Court spoke about the legitimacy of these practices in the context of ensuring "survival",[131] whereas the current Bill LOA fails to address the thick line between ensuring the intake of necessary nutrients where, e.g., no plant-based alternative is accessible, and the extensive and unrelenting exploitation of animals by species and by choice.

In short, this second option may defy reality but, nonetheless, is as unacceptable as the scenario envisaged by the current Bill LOA that just *defines* reality. The obligation to draft and approve a law according to the *Estrellita* judgment must therefore rest somewhere in between these two extremes.

4.3. The half-way house

Our recommendation is to restrict the scope of the Bill LOA to terrestrial wildlife for the time being, and continue undertaking efforts to extend rights protection to the remaining animals, within a deadline. Alongside this, the welfarist protections under

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129 UN GENERAL ASSEMBLY, International Covenant on Economic, Social and Cultural Rights, United Nations, Treaty Series, vol. 993, p. 3 (16 December 1966), articles 11(1), 15(1)(a); see also UNITED NATIONS COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, General Comment n. 12: The right to adequate food (art. 11), E/C.12/1999/5 (12 May 1999).

130 *Estrellita* case, paras. 106-110.

131 Ibid., para. 108.

the Bill LOA for other animals should be enacted under a separate legislation,[132] as an interim measure, while the rights protections are being composed.

We think that the key to solving the current conundrum can be found within the same Bill LOA and it revolves around understanding its function as an agent of change. The first paragraph of the Bill LOA states that Ecuador "now *begins* a journey of change" (p. 1, emphasis added) with the paradigm of the legitimisation, exploitation and systematic discrimination of animals. Indeed, we contend that articulating and operationalising a goal as ambitious as disrupting the deeply entrenched subject-object rapport between humans and animals requires a process, not a result. It demands fostering an environment conducive to discussion, research, proposals, and trials, rather than imposing a fresh set of regulations.

One innovative aspect of the Bill LOA is that it foresees the creation of a 'National System for the Promotion, Protection, and Defence of the Rights of Non-Human Animals' (art. 56). This organism is to be tasked, *inter alia*, with "developing and issuing public policy on the promotion, protection, and defence of the rights of non-human animals" (art. 59(a)).

We believe that the Bill LOA should take advantage of this institution to create a space to reflect and perfect the aspects that are currently problematic in the text. This would mean that the operative part of the Bill LOA would limit its remit to terrestrial wildlife for the reasons explained in the first option, and task the National System with creating a Commission to explore how to recognise rights to the rest of animals. We emphasise using the word *how*, and not *if*, to reflect the intent of article 9 of recognising "universal, inherent, inalienable, non-transferable and interdependent" animal rights. The Commission should present a series of proposals for consideration within a deadline. This way, the Bill LOA would not disregard the Constitutional Court order: it would protect the actual rights to some animals, respecting the *Estrellita* parameters, and create the necessary mechanism to develop rights protections for all others.

This alternative would also ensure that the Bill does not commit the mistake of rushing a result and understanding its purpose as a self-contained effort. Protecting the rights of animals would have deep repercussions for the economy, trade and culture, to name a few, meaning that its approval would reverberate across several layers of public policy and the regulatory framework. Therefore, the Commission would need to foresee and study the impact of the Bill across these areas, consult experts, and make legislative proposals that have taken into consideration all such implications. Here, we suggest a number of guiding questions that should be considered by the Commission and, in general, by any legislative initiatives aiming to recognise and protect the rights of animals.

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[132] See notes 115 and 127 above.

- Which, if any, non-instrumentalist and non-speciesist classification of animals should govern the law?
- In which circumstances does derogating from animal rights become 'necessary for survival', and what should be the legal test to identify them?
- Are animal farming, animal experimentation, etc. practices compatible with the goal of breaking with practices of animal systematic exploitation and discrimination?
- Is there any account of animal farming, production of animal-derived products, animal experimentation, etc. practices that is compatible with the rights of animals?
- What implications would banning or reducing the production of animal-derived products, animal experimentation, etc. have for international trade policies? Would the import of animal-derived, animal-tested, etc. products be banned?
- What is the current State investment on research and production of alternatives to animal products, animal experimentation, etc?
- Could a policy of necessity serve as a basis for derogating from respecting animal rights, and if so, under what circumstances?
- How would public spending and revenue-generation (including but not limited to taxation and subsidies) need to be re-allocated by the State to facilitate a move towards full recognition and protection of animal rights?
- What, if any, is the principled reason to ban hunting but allow farming animals?
- What phase-out period would be reasonable for ending animal exploitation in each industry?
- Which interim measures can be adopted during this phase-out period?
- Which enforcement and punitive measures would need to be adopted to fully protect animal rights?

Investigations into these questions are not only a prerequisite to taking animal rights seriously, but also a prerequisite to operationalising animal rights effectively. Any institution, in Ecuador or outside it, that seeks to recognise and protect animal rights should bear these in mind when taking steps in this direction.

5. CONCLUSION

The Constitutional Court in *Estrellita* promised a paradigm shift, a turning back from 'modern' legal frameworks that have been inherited from the West. It seems to lend a hand to epistemic justice when it proclaims adopting millenary concepts as guiding

principles, such as the *Sumak Kawsay*. The Bill LOA begins its journey with this promise but, as its content takes shape, it reproduces welfare protections that have been spearheaded by the West and that are premised on the categorisation and objectification of animals. Thus, there is very little turning back from the colonial worldview, and a significant concession to the *status quo* where animals remain mostly a means to human ends.

However, if nothing else, the Bill LOA represents an attempt to introduce the notion of animal rights—as a concept—into the statute books. Given Ecuador's position at the vanguard of the rights of nonhumans, that can be a positive step at the abstract level and one that other states may wish to emulate. The problem, however, is that beyond the rhetoric, the substance of the proposed law offers very little more than the current model of welfarism incorporated into the laws of most states already, with the inherent problems of speciesism, hierarchical structures, and closed list welfare requirements.

The Bill LOA ends before 'rights' can even begin, thereby also missing the mark of *Estrellita*. So, while lofty in its ideals, the Bill fails to deliver. While it might be a step forward for animal welfare, it could be a step back because it risks conflating the notion of rights with welfare protection, thus diluting the term's significance.

We therefore suggest treating the Bill LOA as a first, not final, step in the move towards the recognition and protection of animal rights because passing it as it is would generate a problem, not a solution.[133] We propose confining the scope of the law for the time being to those animals whose rights it is ready to recognise (of wildlife), and protect the rest through distinct *interim* welfare regulations. This, of course, will only be the first step, as our proposal is for further research into operationalising the rights of all other animals, but in a manner that is consistent with social facts and other constraints.

We have identified some key questions that ought to be addressed with the goal of finding the answers that will make the vision of the Constitutional Court and the drafters of the Bill LOA a reality within and, hopefully, also beyond, Ecuador. We submit that lessons can be learnt from the Ecuadorian case to smoothen transitions in other legal systems seeking to follow in such post-humanist era-defining footsteps.

Breaking away from the human-centred legal system rooted in the subjugation of animals would require questions, answers, and actions that radically reimagine our relationship with the non-human.[134] Although far-fetched, that seems the only plausible way to confront our current reality and unmask it as merely one "historical alternative"[135] among many that, just as it had a beginning, it can have an end. As Alberto Acosta, former President of the Constituent Assembly of Ecuador, eloquently

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133 We thank one of the peer reviewers for helping us articulate this thought.

134 Idem.

135 Historical alternatives is a recurring concept in MARCUSE, H. One-Dimensional Man (Boston 1964) 14.

put it when discussing *Sumak Kawsay*: "Only by imagining other worlds, will this one be changed."[136]

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