

Republic of Colombia
Supreme Court
Civil Cassation Chamber

LUIS ARMANDO TOLOSA VILLABONA
Reporting Judge

AHC4806-2017
ESTABLISHMENT N° 17001-22-13-000-2017-00468-02

Bogotá, D.C., July 26, 2017.

The rebuttal of the ordinance issued on July 13th, 2017, by the Civil Family Tribunal of the Superior Court of the Judicial District of Manizales, in the context of the writ of *habeas corpus* filed by Luis Domingo Gómez Maldonado, who acts on behalf of the spectacled bear “Chucho”, is considered.

1. BACKGROUND INFORMATION

1. The petitioner holds, specifically, that the animal was sent to the Barranquilla City Zoo after remaining for 18 years in the Río Blanco Reserve of the city of Manizales, being thus “[...] condemned to permanent captivity, a state of affairs that the legislator has vowed to eradicate as the principle of animal protection expressed in section (a) of article 3 of Law 1774 of 2016 [...]”

He also maintains that “[...] the prevailing juridical system does not include a proper, suitable mechanism allowing for the implementation of the immediate and urgent measures required in order to protect the rights that animals possess in virtue of their being sentient entities, a mechanism that would permit their removal from centers of captivity if they have lived in a natural reserve for the greater part of their life.”

He concludes by arguing that there is a precedent of a captive “chimpanzee” in Argentina granted a writ of *habeas corpus* by a judge of that Republic, a judge who also ruled that the primate should be moved to the “Great Apes Reserve of Brazil.”

3. He requests that the Autonomous Regional Corporation of Caldas be enjoined to “permanently transfer Chucho the bear to the La Planada Natural Reserve, located in the state of Nariño”.

1.1 FIRST INSTANCE DECISION

The Court refused the protection requested because the Constitutional Court has declared that:

“(…) Since fundamental rights are not included in the safeguard of nonhuman animals, it is not possible to resort to writs for the protection of constitutional rights to secure immediate and special constitutional protection on their behalf. The same applies to the figure of *habeas corpus* (...): [given that this figure] is considered as a fundamental right in itself, and that animals are not acknowledged as subjects of rights, it would be folly to try to protect animals via *habeas corpus* (...)” (pp. 130-144).

1.2 REBUTTAL

The rebuttal was put forward by the petitioner, who appealed to arguments similar to those outlined in the initial document (pp.168-171).

2. EXAMINATION

“The legislator should forbid everything that may serve as an incitement to cruelty. The barbarous gladiatorial shows, introduced at Rome in the later days of the republic, doubtless contributed to inspire the Romans with the ferocity they were ever wont to display in the conduct of their civil wars. A people accustomed at their games, and in pursuit of pleasure, to set human life at naught will hardly respect it when blinded by the fury of their passions. For the like reason it is proper to forbid every kind cruelty practised towards animals, whether by way of amusement (...). Cock-fights, bull-baiting, (...) necessarily imply either a certain want of reflection or a lack of humanity, since they entail on sensitive beings the most lively suffering, ending too often in the most painful and lingering death of which we can form any conception. (...) But why should the law refuse its protection to any single sensitive being?”¹

2.1 Luis Domingo Gómez Maldonado, by means of this writ of *habeas corpus*, intends to end the captivity in which the Barranquilla City Zoo holds the spectacled bear “Chucho”, because the animal lived “free” in the Río Blanco Reserve of the city of Manizales before its confinement.

¹ BENTHAM, Jeremy (1748-1832). *An Introduction on the Principles of Morals and Legislation*. 1789. Principles of Penal Law. Chap. XVI. In this text, Bentham suggests an acknowledgment of the equality between human and nonhuman animals that forbids cruelty against animals on the basis of our common capacity to suffer. In the same vein, Peter Singer is well known for having popularized, in *Animal Liberation* (Harper Collins, New York, 2002), the use of the term ‘Speciecism’. Singer is an important precursor of the contemporary movements for nonhuman animal rights or in favor of the interests of nonhuman animals. STONE, Ch., in *Should Trees Have Standing? Toward Legal Rights for Natural Objects* analyzes similar problems arising in North American trends, and defends the right to act judicially on behalf of trees. See also FERRATER MORA, J. and MOSTERÍN, J., *Animales y ciudadanos*. Fundación Purina. Talasa, Madrid; LARA, Francisco, “Hacia una teoría moral de los derechos de los animales”, *Revista de la Facultad de Derecho de la Universidad de Granada*, 16, 1998, pp. 89-108; PELAYO, A., “Sobre los derechos de os animales”, *Anuario de Filosofía del Derecho*, Tome VIII, 19990, pp. 543-556; MUÑOZ MACHADO, S. *et al.*, *Los animales y el derecho*. Civitas, 1st edition, Madrid, 1999.

2.2 Article 30 of the 1991 Constitution, regulated by Law 1095 of the year 2006, defines *habeas corpus* as a right and an action that protects a person's freedom against unlawful or unconstitutional confinements, or against unlawful extensions of lawful confinements.

This prerogative has been acknowledged by many international instruments, such as the Universal Declaration of Human Rights, the International Agreement on Civil and Political Rights, the American Convention on Human Rights and the American Declaration of Human Rights and Duties.

Furthermore, according to canon 85 of the Political Chart, the 2nd section of article 1 of Law 1095 of 2006, numeral 2 of rule 27 of the American Convention on Human Rights, and the 4th precept of Law 137 of 1994 (statutory law about states of emergency), the above mentioned right "cannot be suspended or restricted even in states of emergency or abnormality."

Habeas corpus has experienced a growing evolution. According to German jurist Robert Alexy:

"The Magna Carta of 1215 has experienced, particularly in the Anglo-Saxon part of the world, a persistent effectiveness, although it is true that it did not yet contain fundamental rights founded on human rights, but permanent liberties. In XVIIth century revolutionary England, in the 1628 Petition of Rights, in the 1679 Laws of Habeas Corpus and in the 1689 Bill of Rights outstanding steps were taken in the positive classification of the freedom rights of the English citizen. The influence of these first steps in institutionalization, together with that of the modern doctrine of natural rational right, made possible, on June 12th, 1776, the first complete positive classification of fundamental rights with constitutional force, when the declaration of rights of the State of Virginia was made. However, it was only until 1791 that a catalog of fundamental rights was introduced at a federal level in the Constitution of the United States, in the guise of ten constitutional amendments. Two years before, on August 26th, 1789, the Declaration of the Rights of Man and of the Citizen was proclaimed in France. This is how the more important highpoints in the institutionalization of the liberal fundamental liberties were reached."²

2.3 Moreover, several judicial mechanisms different from writs of *habeas corpus* or actions for protection exist, such as popular actions and other administrative procedures, that befit the protection of animal rights and their welfare as an important part of the environment in which humans lead their lives.

Concerning this topic, the Constitutional Court asserts:

"(...) From the existence of a constitutional mandate to protect animal welfare it does not follow that there are any fundamental rights to which animals are entitled, nor any enforceability via an action of protection ["tutela"], because in this case we are dealing with a non-individual, fuzzy interest. However, from the existence of such a mandate, it follows a series of obligations that pertain to human beings, such as looking after the welfare of animals and avoiding mistreating them, in addition to caring for their integrity and for their life. Animals can be protected by means of several judicial mechanisms, like popular actions to request the protection of the environment or petition actions to demand the fulfillment of the administration's duty to safeguard animal welfare in concrete administrative actions. Also, there are criminal and civil sanctions that can be sought to

² ALEXY, Robert, 2003. "Tres escritos sobre los derechos fundamentales y la teoría de los principios". Externado University of Colombia. Bogotá, pp. 32-33.

punish those who harm animals in those situations where real and concrete acts of mistreatment are carried out that fall out of the boundaries of the constitutional duty of animal protection (...)" (Emphasis added)³

2.4 Yet many normative, doctrinaire and jurisprudential arguments have been propounded to substantiate the claim that animals are “sentient beings”, to show that they are entities apt to be granted some fundamental prerogatives and that they are worthy of the State’s immediate protection. These arguments are a consequence of a criterion that has consolidated worldwide, according to which the construction of an “ecocentric-anthropic” conception, within the framework of a national and international ecological public order, is something to be accomplished in order to preserve the universe and guarantee the survival of the human species and its environment.

2.4.1 Until now, from an anthropological, sociological, juridical, political and philosophical standpoint, and since human beings became predominant over all other living creatures, as well as due to the triumph of capitalism over feudalism, humankind’s central role in the universe has been spurred by an unwholesome individualism. This is the reason why the theme of anthropocentrism is being addressed in many coteries: the idea that human beings are merciless discoverers and colonizers, and thinking, dominant subjects. In this context, the relationship between men and nature is tackled from the perspective of efficiency and utility, and in this relationship, men, who eventually prevailed in the course of evolution, occupy the central position as conquerors and, because of this, they have a legitimate right to utilize and exploit their environment as they please.

This conception is the result of the variety of rationalism espoused by Descartes⁴, the Enlightenment, the Empiricist tradition and, in general, by all philosophical, ethical and political schools that praise and promote individualism and that emerged with capitalism. Thus, “*I am myself*”, “*je pans dans je sui*” [sic]⁵, or “*I conquer the colonies*”, “*I enslave*”, etc.; an ideology strengthened by natural law schools, as well as by the great influence of Kantianism⁶, which posits that human persons possess dignity because of their being free and having reason.

Accordingly humans, taking themselves as the measure of all things, became immoderate and irresponsible. For instance, humans destroy millions of hectares of forests on a daily basis, as if the world belonged exclusively to them, ignoring that it is they who belong to nature, to the Earth and to the universe; overlooking that their environment is also a holder of intrinsic values worth protecting.

³ Constitutional Court. Sentence T-095 of 2016.

⁴ *Discourse on the Method*.

⁵ The correct wording of this Cartesian dictum is “*je pense donc je suis*” [translator’s note].

⁶ *Critique of Pure Reason. Critique of Practical Reason. Critique of Judgment. Foundations of the Metaphysics of Morals. Perpetual Peace*.

Thinkers such as Georg Wilhelm Friedrich Hegel⁷, in accordance with the reasoning of Aristotle, Aquinas and the aforementioned precursors of Rationalism, defended the property rights that human beings have over everything, including living beings.

However, there are also a considerable number of intellectuals that advocate for animal rights from an array of viewpoints: moralistic, empathic, utilitarian and axiological. These include thinkers such as David Hume, Arthur Schopenhauer (1844), Jeremy Bentham (1863), and, more recently, Peter Singer (199) and Tom Regan, who developed a theory of value. In this group, we can also find some of the theses of Eugenio Zaffaroni's *The Pachamama and the Human Being* (2012), as well as the work of Henry Salta, the English writer who penned *The Rights of Animals* (1999), Jorge Riechmann, the author of *All the Animals are Brothers – Essays on the place of animals in industrialized societies* (2003), and the Spanish writer Martha Tafalla, who wrote "The Rights of Animals" (2004).⁸

2.4.2 From a merely anthropocentric conception to an ecocentric-anthropic one

We are not yet aware of the shift that must be made to an ecocentric-anthropic worldview—not to a radical and senseless ecocentrism that despises anything human or to a form of nature fanaticism, but to an ecological-anthropic conception in which human beings are the main wardens of the universe and the environment, and which promotes a universal and biotic citizenship.

We are all part of a reconstructive and resilient juridical natural community⁹, and we are citizens that are subjects of proactive rights and members of an organized society that evolves among plants, animals and abiotic agents. We must understand that nature and the universe are the places where, in general, human beings pursue their vital projects, where they live and participate, and that, as sentient beings, humans develop their creative and critical capacities to steer towards the reconstruction of a world in which they purport to preserve their own existence, as well as the of nature and all other species, in a context of justice and solidarity.

The objective is to reconsider the world outside of any form of regionalism, colonialism, Eurocentrism or Americanism, and to assume from the outset that the construction of a worldwide ecocentric-anthropic ecological public order, where we all participate with an explicit ethical and environmentalist vocation that springs from a sense of individual, collective and inter-generational responsibility, is necessary.

⁷ *Phenomenology of the Spirit. Elements of the Philosophy of Right. The Dialectic of the Master and the Servant. Philosophy of Nature.*

⁸ Here it is necessary to mention the American philosopher Martha Nussbaum and her book *Frontiers of Justice*, where she develops a defense of animal rights and criticizes bio-centric utilitarianism, drawing on Rawls (1993) who also agrees that animals have rights because of the several capacities they deploy. Rawls believes that "inter-species justice norms" are in order.

⁹ In this line of thought we can find scholars such as Aldo, Leopold, Naess, Devall, Sessions, Moore and Leimbacher, Stone. Leopold supports an ethics for individual and social relationships in the chapter entitled "Land Ethic" of his book *Almanac* (New York, 1966, p. 240). Meyer Abich suggests that a natural juridical community should prevail between nature and sentient beings, because our belonging to the natural world grounds a common existence between us, animals and plants.

The ethical and juridical reformulation that underlies this new juridical conception is founded on a sense of respect and responsibility that supersedes the individual and personal level, and that encourages us to see, think and act out of the understanding of the other, of the Earth and of nature, if we are to value human survival—not out of a meaningless universality of human rights transcending time and space.

Contemporary man cannot preserve nature; it can, however, shift the way it understands the conceptual opposition: human beings as sole subjects vs. nature, an ideal object source of utility, of interested satisfaction, of efficacy, transformed by human behavior and work, and hence visible to the Law as long as it is submitted to an indiscriminate utilization. Steps must be taken to actively construct, within our families, schools and academia, a conception of the *nature-subject* couplet that allows us to interpret and theorize about the universe in a novel way and to implement a novel social form of relationship with nature, one that truly respects it and makes it resilient, so that we may be able to preserve it as a natural habitat for survival, instead of barbarically destroying it.

2.4.3 Nonhuman sentient subjects of rights

Human beings are animals that give birth, are born, breathe and die; this is a natural reality. Therefore, the new analysis of human rationality, self-consciousness and development must start from our not ignoring that we are living, animal beings.

Consequently, if we want to survive, present circumstances compel us to point out that human beings are not the sole holders of rights, since legal entities, in virtue of a legal fiction, are also holders of rights. Hence, other sentient beings, including nature itself, can authoritatively claim such a condition, in virtue of their possessing it due to their very essence. If fictitious legal entities are subjects of rights, for what reason should those who are alive or are “sentient beings” not be so?

Moreover, our current legal framework deems as subjects of rights the immense category of legal persons: commercial societies, associations, public collectives, entities that are acknowledged with a juridical personhood and procedural safeguards in virtue of their being inanimate realities. So what precludes us from acknowledging the other truly living sentient “*animated*” realities with a juridical personhood, going beyond the traditional conception of nature as an object that humans have a duty to preserve?

2.4.4 Are animals and other sentient beings things?

From a traditional and classical perspective, animals have been considered things, goods over which we exercise our property rights; their capacity to feel or suffer has been ignored, and thus they have been submitted to the assaults of the conquering and arbitrary man. This notion is being teared down by biology, genetics, by the new philosophy and in general by all the sciences

of life. If men destroy their environment, can they still be the center of nature, and nature their quintessential object of activity?

Undeniably, the other sentient beings are also subjects of rights. The point is not to grant them rights in every respect analogous to those that human beings enjoy, and therefore think that bulls, parrots, dogs or trees, etc., will have their own courts, their own fairs and festivities, their own Olympic Games or colleges; nor that the other elements of nature must bear the same prerogatives or guarantees that human beings possess, but rather those which correspond to, or are fitting to or suit their species, rank and group. The point is to include within the chain of life a universal morality, a public ecological global order and, in virtue of the interdependency and interaction that prevail between humans and nature, conferring to animals the safeguard they deserve against the irrational efforts of contemporary mankind to destroy our habitat.

The Colombian Civil Code (before the amendment introduced via Law 1774 of 2016), Second Book, Chapter I, Rules 655, 658, 659, classified animals as movable goods, immovable goods or personal property. It is noteworthy that such rules were enacted on May 26 of 1873, that is, more than 150 years before. This state of affairs captures the extent to which the Law had become out of date and fossilized with respect to the social changes that have risen around the topic of animal welfare in recent times.

The categorization of animals as “*things*” brought about nefarious theoretical and practical consequences throughout history, because it entailed a degrading treatment of these creatures and of nature. In prehistoric times, even the slaves were treated as objects.

Fortunately, the amendment introduced by Article 2, Law 1774 of 2016 to Rule 655 of the Civil Code grants “*the quality of sentient beings to animals*”.

After the constitutionality of the abovementioned Rule was contested, the Constitutional Court claimed, in sentence C-467 of 2016, that:

“(…) since it has already been settled by constitutional jurisprudence that from the Constitution it is derived that, in virtue of their being sentient beings, animals must be protected, and hence that all forms of animal mistreatment are banned, the provisions under review evolve in a different domain that does not affect such an appraisal. For that purpose, the Corporation pointed out that the challenged provisions contain a distinction between movable and immovable assets, and that such a distinction includes animals, insofar as it is possible to have real rights over them and to conduct legal transactions with them. For the Court, assigning animals to the category of legal assets is a consequence of a vital necessity that, beyond any doubt, includes animals as objects of several forms of legal negotiation, and this in no way affects the regulations contained in other provisions for developing the duty of animal protection. The Court appended that it was important to have in mind that in virtue of Law 1774 of 2016, the Colombian legislation had incorporated the idea that animals have two complementary, and not contrary, conditions. Thus, they are partly sentient beings, and partly subject to be classified as legal assets, as livestock or fixtures in immovable (…).”

“(…) Animals are categorized as “sentient beings” precisely because their classification as goods is insufficient in the present context, and because we intend to limit thereby the allotments of property. This classification presupposes a limitation derived from the ecological function of animals that interdicts their abandonment, the unjustified infliction of pain on them and the display of cruel behaviors against them. This is how all administrative and criminal measures taken in favor of their

protection are explained. These measures answer to the capacity of sentience of animals and to the way human dignity must be expressed (...)."¹⁰

2.4.5 Nonhuman sentient subjects and our duties

All we have said demonstrates that, regarding nature, we must reconsider what a holder of rights is; we must relax the principle that holds that such a thing is reciprocally bound to comply with a set of duties; and we must accept from now on that **nonhuman sentient subjects are subjects of rights despite not being reciprocally constrained by duties**. Animals are right-holders that are free of duties, entities that cannot be burdened by obligations because they are sentient subjects of rights of whom we, precisely, are guardians, representatives and informal agents in charge of their care. To deem that animals cannot be subjects of rights because they are not encumbered with reciprocal duties is tantamount to instantiating a completely selfish and reductionist individualistic or collectivistic form of self-anthropocentrism that forces us to consider as equals beings that are totally different from us, but that constitute an essential and unique part of the biotic chain.

We are not trying to modify a juridical stance out of an exclusive biological or moralistic standpoint, nor out of a petty and trivial sentimental criterion that stems from the consideration of animal suffering, but from a different and creative philosophic-juridical frame; from a radical existential individual and collective commitment to the life of women and men, of future generations, of the species, a commitment to the preservation of nature and to fighting against the predators of our universe; against those who, day after day, destroy it mercilessly on behalf of the of greedy and technocratic appetites; against those who, day after day, poison and drain rivers, lakes, swamps, wetlands, who sweep away moors and birds, ecosystems and insects; against those who sink their tools, weapons, machinery, backhoes, injectors, etc., into the earth and put an end to entire species in an uncontrolled manner, thereby compromising the future of humanity.¹¹

In this devastating context, sustainable development as a global strategy “(...) *is the last attempt to articulate modernity and capitalism. It implies the re-signification of nature in terms of environment, the re-categorization of the Earth as capital under the perspective of science, the re-interpretation of poverty as the effect of environmental destruction, and the development of new models of administration and planning contracts where the State plays the role of arbitrator between nature and the people* (...)”.¹²

2.4.5.1 If animals are subjects of rights, what prerogatives are they entitled to?

¹⁰ Constitutional Court. Press release N° 37, August 31, 2016.

¹¹ A dramatic literary tableau of such a grave phenomenon is undertaken by Saramago. See: SARAMAGO, José, *En sus palabras*. Bogotá: Alfaguara, 2010, p. 508.

¹² ESCOBAR Arturo. *Encountering Development: The Making and Unmaking of the Third World*. New Jersey: Princeton University Press, 1995, p. 205.

Article 3 of Law 1774 of 2016 lays down that the minimal animal welfare standards are the following: “i) *The animal should not suffer from hunger or thirst; ii) The animal should not suffer from unjustified physical discomfort or pain; iii) The animal should not develop an illness because of negligence or disregard; iv) The animal should not be exposed to fearful or stressful conditions; v) The animal should be able to behave naturally.*”

Law 174 of 2016 also penalizes acts of cruelty towards animals such as “i) *Injuring or hurting an animal because of a blow, burn, cut, stab, or by using a firearm; ii) Causing needless death or inflicting severe injuries to an animal guided by heinous or petty motives; iii) Causing an inevitable or necessary death to an animal employing methods that cause suffering or that lengthen its agony. Articles 17 and 18 of the fifth Chapter of Law 1774 of 2016 describe what is meant by inevitable or necessary death through methods that cause suffering; iv) Setting up animal fights for public or private exhibition; v) Setting up public or private exhibitions that display acts of mistreatment, torture or death of trained or untrained animals; vi) Employing live animals to train, test or increase the aggressiveness or the skill of other animals; vii) Depriving a captive or a confined domestic or wild animal of air, light, food, movement, space and shelter in a way that results in the animal’s being seriously harmed or dead; viii) Leaving poisonous or harmful substances in places that can be reached by animals not intended to be combatted; ix) Burying a living animal: x) Confining animals in such conditions as to cause them asphyxia; xi) Drowning an animal.”*

2.4.5.2 The normative protection

A [normative protection of animals] in Colombia has begun to take shape, since Article 655 of the Civil Code was modified, as mandated by Law 1774 of 2016, and, as a result, the legal status of animals was distinguished from that which pertains to movable goods, by assigning them the quality of sentience, which sets them apart from things.

Animals are non-human sentient subjects of rights enjoying certain prerogatives on account of their being protected fauna, and of the biodiversity and natural balance between the species. This is especially the case for wild animals. Therefore, animals are objects worth preserving and protecting from ailment, mistreatment and unjustified cruelty. The Natural Resources Code in Colombian Law deepened this line of thought.

From a constitutional standpoint, animals are protected in virtue of their being an essential element of our natural resources, as mandated by Articles 8, 79 and 95 num. 10, which state that all persons have the duty to “*protect the cultural and natural resources of the country and to take the necessary measures for preserving a healthy environment*”. In this sense, a dynamic between human and nonhuman sentient beings must prevail that guarantees the integrity of animals and of nature as parts of the natural context, the context where every holder of rights exists and evolves.

We human beings must morph duties and responsibilities, reverence for nature, inclusive rationality and respect for life into one supreme value.

Since the enactment of Article 4 of Law 84 of 1989¹³, the obligation has been acknowledged for every person to “*respect animals, abstain from harming or injuring them, and report all known acts of cruelty against animals*”.

Once this norm was enacted, the legislator sought to protect animals from suffering and pain directly or indirectly caused by human beings. Among the legislator’s objectives were: i) to promote the health and welfare of animals by guaranteeing them hygienic, healthy and adequate living conditions; ii) to root out any form of animal abuse and other forms of animal cruelty; iii) to implement educational programs in the State’s communication channels and other public and private education institutions; and iv) to foster effective measures for preserving wild fauna.¹⁴

Article 7 of Law 84 of 1989 was declared constitutional by the Constitutional Court. According to this article, persons who engage in behaviors considered cruel towards animals in the context of entertainment and cultural events are exempted from punishment, “*as long as it is understood that animals must, in any case, be specially protected against suffering and pain during the course of these activities.*”¹⁵

As has been said, Law 1774 of 2016 recently amended Article 655 of the Civil Code to recognize the “*quality of sentient beings*” as applying to animals and to introduce several crimes against these beings into the judicial regulation of the country, with the aim of protecting their life and their physical and emotional integrity.

When expounding the constitutionality of Law 1774 of 2016, the abovementioned Institution asserted, among its reasons:

“(…) The concern for preserving the elements of nature—forests, atmosphere, rivers, mountains, ecosystems, etc.—is an imperative that hangs over the State and the community not because of the role these elements play in human survival, but mainly because of their being identifiable living holders of rights. Only as the result of a profound respect towards nature and its inhabitants, and of the abandonment of any conception that weighs them in strict utilitarian or interested terms, can we relate to them in fair and equitable terms, (…).”¹⁶

Therefore, the Colombian State, through the various branches of political power, has willed to provide the legal and juridical tools that ensure that animals be protected against the unrestrained actions that humans sometimes carry out against them.

In the international arena, European countries such as Switzerland and Germany have introduced norms within their juridical regulation intended to protect animals. These countries have

¹³ Whereby the National Statute for the Protection of Animals is adopted, some contraventions created, and everything that deals with its implementation and jurisdiction is regulated.

¹⁴ Article 2, Law 84 of 1989.

¹⁵ Constitutional Court, Sentence C-666 of 2010.

¹⁶ Constitutional Court, Sentence C-041 of 2017.

understood that it is a human duty to secure the life and welfare of those beings that are not a member of our species.¹⁷

In Latin America, constitutions such as Ecuador's proclaim that, since nature is the place where life is created¹⁸, it has the right that its "*existence, continuance, vital cycles, structure, functions and evolutionary processes*" be respected. Ecuador's constitution also burdens the State with the obligation to advance the "respect of all the elements that make up an ecosystem" among natural and juridical persons.¹⁹

As previously stated, the constitutional jurisprudence has pondered the right that any person has to live and to freely evolve in an environment that is healthy and in harmony with nature. This pondering is bound to produce a set of measures that protect animals, for animals are useful for the burgeoning of people's lives.

In this sense, the highest Court of that jurisdiction states:

"(...) It is plain that the concept of 'environment' envisioned by the Constitution of 1991 is a complex one, that involves all different elements that together shape the context in which human beings lead their life and that includes the flora and fauna located in Colombian territory. The Court also states that the elements that constitute the concept of environment might be protected per se and not simply because of their usefulness or indispensability for the progress of human life. Indeed, the conception of the environment as a transversal element in the constitutional system reveals an empathic interpretation of nature, of society and of the way of life that society pursues, that transcends a bare utilitarian idea to assume a respectful and caring stance rooted in ontological conceptions. (...)

"(...) the protection of the environment superseded those conceptions that considered the environment as an input to human development, as something that it was necessary to preserve simply because not doing so would hamper our progress. The environment is considered as the essential milieu for the burgeoning of human life, and thus it was realized that its safeguard is founded on the concept of harmony with nature, that the human actions relating to the environment ought to satisfy a moral code, and that this follows from the fact that we humans must act in accordance to our dignity. This conception is opposed to a view that warrants or that is indifferent to the neglect of the environment, and recedes from an anthropocentric conception that assumes that the other members of the environment are absolutely and unlimitedly available for human beings."

*"(...) The essence and meaning of the concept of environment that stem from the international instruments and that is attuned with the Constitution of 1991 limits the discretion that juridical operators enjoy when determining (i) the elements that constitute the environment and (ii) **the protection that must be granted to these elements by the legal system** (...)." (Emphasis in the original.)²⁰*

2.4.5.3 The **freedom of** animals

¹⁷ Article 80 of the Federal Constitution of the Helvetic Confederation, enacted on April 18th, 1999, establishes the necessity of implementing laws for the protection of animals. In a similar fashion, Article 20 of the German Constitution institute states: "Mindful also of its responsibility toward future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order."

¹⁸ Article 70 of the Political Constitution of Ecuador.

¹⁹ *Idem*.

²⁰ Constitutional Court. Sentence C-666 of 2010.

Animals must be without discomfort, hunger or thirst, free to undertake their natural behaviors; thus, for example, herbivorous animals spend most of their life in foraging zones, and carnivorous ones in the search of prey; some of them are gregarious, and some others solitary. In particular, they must be free from fear or anguish, and captivity causes them to be frightened, negatively stimulated, stressed, etc. They also need to remain free from maladies and from any form of overcrowding and metabolic anomalies.

Here it is necessary to remember the important proclamation of the International League of Animal Rights of 1977, subsequently approved by the United Nations, that reads as follows:

“(...) Universal Declaration of Animal Rights:

*“Considering that all living beings possess natural rights (...) and that the contempt for, and even the simple ignorance of these natural rights cause serious damage to nature and lead man to commit crimes against animals (...) it is hereby declared: **Article 1** All animals are born equal and they have the same rights to existence. **Article 2** a) Every animal has the right to be respected. b) Man, like the animal species, cannot assume the right to exterminate other animals or to exploit them, thereby violating this right. He should use his conscience for the service of the animals. c) Every animal has the right to consideration, good treatment and the protection of man. **Article 3** a) No animal should be submitted to bad treatment or cruel actions. b) If the death of an animal is necessary, this should be sudden and without fear or pain. **Article 4** a) All animals belonging to a wild species have the right to live free in their natural environment, and have the right to reproduce. b) Each deprivation of freedom, even for educational purposes, is in opposition to this right. **Article 5** a) Every animal that usually lives in a domestic environment must live and grow to a rhythm natural to his species. b) Any change to this rhythm and conditions dictated by man for mercantile purpose, is a contradiction of this law. **Article 6** a) All animals selected by man, as companions must have a life corresponding to their natural longevity. b) To abandon an animal is a cruel and degrading action. **Article 7** Working animals must only work for a limited period and must not be worked to exhaustion. They must have adequate food and rest. **Article 8** a) Experiments on animals that cause physical and mental pain, are incompatible with animal rights, even if it is for medical, scientific, commercial or any other kind of experiment. b) A substitute technique must be investigated and developed. **Article 9** In the eventuality of an animal bred for food, it must be fed, managed, transported and killed without it being in fear or pain. **Article 10** a) No animal should be used for entertainment. b) Animal exhibitions and shows that use animals are incompatible with an animal's dignity. **Article 11** Every action that causes the unnecessary death of an animal, is cruel which is a crime against life. **Article 12** a) Every action that causes the death of a lot of wild animals is genocide, that is a crime against the species. b) Pollution and destruction leads to the extinction of the species. **Article 13** a) Dead animals must be treated with respect. b) Violent scenes, where animals are the victims, must be forbidden at the cinema and on TV, unless they are for the demonstration of animal rights. **Article 14** a) Protection and safeguarding associations must be represented at government level. b) Animal rights must be defended by law as are human rights (...).”*

In its World Charter for Nature (1982), the UN sustains that any form of life is unique and deserves to be respected.

The European Parliament issued in 1988 a Resolution that rejects the ruthless exploitation of the environment. There exists an array of universal proclamations in the very same vein.

All this means that advocating for the protection of all sentient beings, including nonhuman animals, and for the preservation of worldwide fauna as a part of the environment is

constitutionally and conventionally valid, since they are a part of the national and global ecological public order, and all forms of animal captivity and mistreatment must be rejected.

Nevertheless, the protection of nonhuman animal rights is not similar to the protection that must be granted to human rights, since their causes, contents and purposes differ. Our orthodox criteria must be revised in order to understand that, insofar as they are a part of nature, nonhuman sentient beings contribute to the ecological balance that enables the survival of mankind. The concept of ecological constitution is, of course, necessarily the source of the possibility of acknowledging the rights of nonhuman sentient beings.

Therefore, all nonhuman animals held captive must be provided with the veterinary, zoo-technical, biological, bio-technical and dietary assistance to ensure their incremental re-adaptation to a natural habitat.

For this Court, it is necessary to soften the boundaries between mankind and nature, humans and nonhumans, between culture and nature²¹ and between all subjects of rights. Not doing so is tantamount to upholding and being complicit of the merciless destruction of our natural habitat.

This attribution of rights cannot be conceived as a novelty in our worldview, but as the proportional, horizontal and broad development and extension of the juridical principles that human persons enjoy to other sentient beings. This extension does not undermine the agro-industrial advancements that ensure the vital sustainability of humankind, nor the acquisition of essential medical progresses, the pursuit of bio-technological achievements attained in ethical and responsible ways, nor the rational use of natural resources required to meet the alimentary needs of human beings. It all amounts to recognizing and assigning rights and legal identity to nonhuman animals, so that we might put an end in an epistemological, ethical, political, cultural and juridical way to the irrational destruction of our planet and of nature that shamefully and tragically afflicts the present generation.

In an ethical and ontological sense, rights cannot be an exclusive endowment of human beings. However, the point of recognizing the legal status of nonhuman animals is not that of restricting human rights, nor promoting paltry, opportunistic, chauvinistic or uncompromising ends that could hinder scientific research benefiting human beings or that could impede the satisfaction of vital needs of men and women suffering from hunger and permanent needs. Also, the purpose of such a recognition is not defending an acrimonious and recalcitrant political partisan propaganda, nor promoting bare animal welfare movements or a senseless vegetarianism.

The unpostponable juridical, ethical and political purpose we target is the creation of a deep awareness of the necessity of protecting the vital environment for the survival of mankind, as well as of bluntly fighting the irrationality that prevails in our relationship with nature. Ours is an effort to sensitize the public to the environment, to design national and global public and institutional policies that discourage all forms of discrimination and destruction of the ecosystem and of the future of humanity.

²¹ Ingold, Tim. 2011. *Being Alive: Essays on Movement, Knowledge and Perception*. Routledgr: London. LAtour, Bruno. 1994. *Jamais fomos modernos: ensaio de antropología simétrica*. Sao Paulo: Editora 34.

2.4.5.4 The admissibility of the writ of *habeas corpus* as a way of protecting a sentient being and a national symbol

Since nonhuman animals are sentient beings capable of suffering, they must be holders of rights, and the law protects them. Therefore, nonhuman animals are entitled to freedom, to live a natural life, to prosper with the least possible pain and to lead a life with the standards that suit their status and condition, but essentially in a responsibly preserved habitat in the biotic chain.

The context expounded in the former sections demonstrates the existence of a copious doctrine that abounds with norms and international instruments, as well as with jurisprudential precedents, and of a robust philosophical framework that openly acknowledges nonhuman animals and other subjects as “*nonhuman sentient beings*” that are holders of rights and are entitled to the protection of the Constitutional State if they are ever threatened or harmed.

In conclusion, even though a writ of *habeas corpus* is a constitutional tool designed to safeguard the *supra-legal* guarantee of freedom of human persons, it is not ill-suited to protect nonhuman animals that are “*sentient beings*” and that, as such, are subjects of rights. Consequently, nonhuman animals can legitimately demand, through the intermediation of any citizen, that their physical integrity be protected, that they be the recipients of care and upkeep and that they be reinserted into their natural habitat once an analysis adjusted to each circumstance is concluded.

2.5 Concrete case

The precedents recounted by the plaintiff, and the rejoinders provided by the defendant, allow to infer that the Andean spectacled bear, or *Tremarctos ornatus*, named “*Chucho*”, was confined in the Barranquilla City Zoo, managed by the Zoological and Botanical Foundation of that city, because the environmental authorities “*could not guarantee his health and welfare*” in the place he inhabited before, *i.e.*, in the Río Blanco Natural Reserve.

The aforementioned animal belongs to a vulnerable and endangered mammal species, as established by Ruling 192 of February 10, 2014, issued by the Environment and Sustainable Development Department, in accordance with the Convention on the International Trade of Endangered Species of Sylvan Fauna, enacted in Colombia by means of Law 71 of 1981.

The *Tremarctos ornatus* is of vital ecological importance since it “*disperses seeds and transforms woods by tearing down bushes and branches to feed*”, thereby facilitating the renewal mechanisms of the forest.²² Such a species, sole native to South America, constitutes the “*remaining of the 13 short faced [varieties] that appeared in the world 2.5 million years ago*”.²³

²² Primer of the National Program for the Preservation in Colombia of the Andean Bear *Tremarctos ornatus* (published by the official webpage of the Department of the Environment and Sustainable Development: http://www.minambient.gov.co/images/BosquesBiodiversidadServiciosEcosistemicos/pdf/Programas-para-la-gestion-de-fauna-y-flora/472_cartilla_osos2.pdf)

²³ *Idem.*

The Andes range is the natural habitat of the spectacled bear, in particular the section that goes from Venezuela to Bolivia, in altitudes that vary “*from 250 to 4750 meters above sea level, occupying a diversity of habitats that include moors*”. And concerning its morphology, “*it possesses claws particularly adapted for climbing trees and seeking food*”.²⁴

The protection of the Andean bear and its environment is important not only because it promotes the preservation of the Andean region, but also because it is related to the preservation of water resources.

To meet their water requirements, the great cities of the Andes range presently rely on the “*conservation of the natural areas that constitute the natural habitat of the Tremarctos ornatus*”. Bogotá D.C.’s aqueduct, for example, “*is run mainly with water that comes from the Chingaza National Natural Park, a zone [where] it is still possible to find the Andean bear*” (Pérez-Torres & Correa Q., 1995).²⁵

“*Chucho*” dwelled in the Río Blanco Natural Reserve (near Manizales) in circumstances like those described above for more than 22 years.²⁶ He and “*Clarita*”, a second cub that arrived at the reserve along with “*Chucho*”, had been moved from the La Planada Natural Reserve (Nariño) in the context of a program that sought to “*repopulate the Andean bear*”. “*Chucho*” and “*Clarita*” were both born and raised in captivity.

According to the Autonomous Regional Corporation of Caldas—Corpocaldas—, both bears were transferred to the reserve because of the “*good environmental conditions*” it enjoyed, which supported the flourishing and reproduction of the bears. They were looked after by the Public Company of Water Distribution of Manizales—ESP—, L.C., as part of their management of the “*preservation of natural resources*”.

Nevertheless, the reproductive purposes were thwarted for genetic reasons, for the female was the “*sister of Chucho*”. After she passed away from a cervical cancer, “*approximately 9 years ago*”, the other specimen continued to live alone in the reserve.

Corpocaldas has also acknowledged that the Río Blanco Natural Reserve is the “*natural habitat*” of “*Chucho*”, despite being held captive inside a limited territory, “*an area of about half a block (sic) enclosed by a mesh, barbed wire and an electric fence*”. He gets his medical attention and his food from the ESP, whose work is monitored by Corpocaldas and has been assisted uninterruptedly by an interdisciplinary group of veterinarians, biologists and keepers.

Apparently, what really prompted the transfer of “*Chucho*”, as indicated by those who were summoned, was the behavioral changes he had gone through “*9 years ago*” after the decease of

²⁴ *Idem.*

²⁵ *Idem.*

²⁶ The Río Blanco Forest Reserve is found in the municipality of Manizales. It has an area of 4900 hectares that range from 2300 to 3800 meters above sea level, possesses highland forest and moor ecosystems, is the main source of the Manizales aqueduct and home of the white-tailed deer, the coati, the bush dog and other species of sylvan fauna. (Source: official webpage of Corpocaldas, http://www.corpocaldas.gov.co/dynamic_page.aspx?p=576)

his companion; the solitude he had to endure made him “*depressive, more sedentary and passive*”, to the point of becoming overweight and thus risking sudden death.

“*Chucho*” was sent to the Barranquilla City Zoo, managed by the Botanical and Zoological Foundation of Barranquilla, after running away from his home and coming back. According to Corpocaldas, “*Chucho*” would receive better attention there, and he would also be able to interact with another female bear of his species, so that his mood could improve.

Yet, this court house has not received any scientific data or explanation that would justify the relocation of the animal from Manizales (the place where the Río Blanco Natural Reserve is located) to Barranquilla. Moreover, the conditions under which “*Chucho*” the bear is to be confined have not been disclosed, and it has not been specified whether it is convenient for him to be in captivity or semi-captivity once his particular morphology, age, height, weight and confinement or surveilled freedom habits, etc., are taken into account.

Also, the roadmap or protocol for the bear’s “*liberation and/or relocation of native sylvan fauna seized and/or preventively apprehended or returned*”, as mandated by Resolution 2064 of 2010, issued by the Department of the Environment and Sustainable Development, has not been presented or submitted, if it exists. This roadmap is required for any environmental authority to decide the fate of a non-domestic or non-tamable animal.

This roadmap was important for assessing in precise terms the preservation strategy of “*Chucho*” the bear, *i.e.*, the feasibility of his reproduction or of his *in situ* or *ex situ* confinement, therefore meeting the technical and biological standards outlined by the abovementioned Department in the “*National Program for the Preservation of the Andean Bear in Colombia*”.

Furthermore, nothing has been said about the need of determining whether the apparently sharp difference in altitude between those two cities, the one located in the Andean central range, the other in the mouth of the Magdalena River in the Caribbean, could undermine the health and conditions of the bear. It is worth noting that the habitats that better suit his species are “**the Andean woods, located between 1000 and 2700 meters above sea level** (Rodríguez, 1991, Peyton, 1999), **and the moors, that range between 3200 and 4200 meters above sea level**” (Del Llano, 1990, as quoted by Posada et al., 1997) (emphasis added).²⁷

2.5 In virtue of the reasons that have been expounded, this Office deems it pertinent to grant the protection requested via *habeas corpus*.

Consequently, the Botanical and Zoological Foundation of Barranquilla, the Autonomous Regional Corporation of Caldas, the Public Company of Water Distribution of Manizales, L.C., the Special Administrative Unit of the National Natural Parks System and the Department of the Environment and Sustainable Development, will be summoned to arrange and complete, in a maximum of 30 days from the day this ordinance is enforced, the transfer of “*Chucho*” the bear,

²⁷ Primer of the National Program for the Preservation in Colombia of the Andean Bear *Tremarctos ornatus* (published by the official webpage of the Department of the Environment and Sustainable Development: http://www.minambient.gov.co/images/BosquesBiodiversidadServiciosEcosistemicos/pdf/Programas-para-la-gestion-de-fauna-y-flora/472_cartilla_osos2.pdf

presently held captive at the Barranquilla City Zoo, to an area that better suits his habitat, and preferably to the Río Blanco Natural Reserve, where he has been at home for the past 18 years, in full and decent semi-captivity conditions, as is required by the relevant laws.

3. DECISION

In view of what has been stated, The Supreme Court of Justice, in Civil Cassation Chamber, imparting justice in name of the Republic and by the law's authority,

SETTLES:

FIRST: WITHDRAWING the ordinance issued on the date and place mentioned above, and granting the protection requested via *habeas corpus* by Luis Domingo Gómez Maldonado, representing the spectacled bear whose name is "*Chucho*".

Consequently, the Botanical and Zoological Foundation of Barranquilla, the Autonomous Regional Corporation of Caldas, the Public Company of Water Distribution of Manizales, L.C., the Special Administrative Unit of the National Natural Parks System and the Department of the Environment and Sustainable Development, will be summoned to arrange and complete, in a maximum of 30 days from the day this ordinance is enforced, the transfer of "*Chucho*" the bear, presently held captive at the Barranquilla City Zoo, to an area that better suits his habitat, and preferably to the Río Blanco Natural Reserve, where he has been at home for the past 18 years, in full and decent semi-captivity conditions, as is required by the relevant laws.

SECOND: Let what has been decided be known to all parties as prescribed by the law, and let the proceedings return. The first-degree judge will oversee the execution of this decision.

PUBLISH AND FULFILL

LUS ARMANDO TOLOSA VILLABONA
Magistrate