

THE RECENT DEVELOPMENT OF PORUGUESE LAW IN THE FIELD OF ANIMAL RIGHTS

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I. THE PRESENT LEGAL OUTLOOK²

To put it mildly, Portugal is not at the forefront of the international struggle for the implementation of animal rights, and only timidly has the Portuguese legislation on animal welfare shown some progress in that direction in the last few years. Portuguese associations for animal welfare are too small, too financially strapped and too dispersed and uncoordinated to perform a sustained role in championing the cause. Their cultural and social visibility is minuscule – and surely disproportionate to the political, legal and judicial victories that, in spite of everything, the generosity and courage of a few activists³ have obtained on an individual basis. Worst of all, some traditions of violence on animals have a long history in Portugal, e.g. bullfights, and seem especially well suited to resist legal changes and to erect political barriers in the foreseeable future.

Nevertheless, there are reasons for hope that this bleak outlook will improve. The rural-urban migration over the last century has resulted in the predominance of an urban culture that is becoming more and more sensitive to issues of animal welfare (a sensitivity not immune to the “herding effects” of trends and fads, e.g. the ban on furs in the fashion industry). The growing power of the media, with its consistent denunciations of the more shocking episodes of abuse of non-human animals, both domestically and internationally, has conferred visibility to these issues and put the pressure on politicians to terminate at least the more extreme forms of exploitation and violence. The spectacular progress of Portuguese environmental law over the last 20 years has had some spillover effects on animal rights (bringing with it, among other benefits, the perception that the whole legal system can be changed swiftly, in tune with the progress in its underlying values). Judges and academics are progressively willing to admit that this is a serious issue, that it must be dealt with the utmost seriousness and must be given some priority in the reform of the Portuguese legal system (one can sense that the time is ripe for the

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² See generally ANTÓNIO PEREIRA DA COSTA, *DOS ANIMAIS: O DIREITO E OS DIREITOS* (1998); ANTÓNIO MENEZES CORDEIRO, *TRATADO DE DIREITO PORTUGUÊS: I-PARTE GERAL TOMO II-COISAS* (2000); FERNANDO ARAÚJO, *A HORA DOS DIREITOS DOS ANIMAIS* (2003).

³ Miguel Moutinho, Artur Mendes, to name just two of the most active and outspoken.

introduction of specialized courses at the undergraduate level in the curricula of Law and Philosophy degrees). There are growing numbers of politicians willing to discuss publicly the issues of animal welfare (responding to the sensitivity of their urban constituencies). The obligations stemming from Portuguese integration in the European Union (EU) involve the more or less automatic reception, into the national legal system, of the latest European regulations in these areas. Finally, the examples coming from more advanced systems, mainly from the United States, Australia, New Zealand and some European Countries, set powerful standards and provide the more backward systems with ready-made and sometimes fully tested solutions.

The focal point of the Portuguese legal system on animal welfare is *Protecção aos Animais*, Lei n.º 92/95 de 12 de Setembro (hereinafter “Law of 1995”) – to which we will pay more attention later. Mainly the initiative of the best-known Portuguese defender of animal rights, António Maria Pereira, a lawyer who was at the time a Member of Parliament, the Law of 1995 was the subject of strong political maneuvering, and its final version is heavily truncated, mainly in what concerns the direct prohibition of the more flagrant forms of abuse of animal health and welfare; powerful lobbies whose strength remains intact to this day – of hunters, bullfighters, pigeon shooters, breeders – opposed any form of substantive prohibition at that general level, taking advantage of the fact that such an initiative had no specific backing from the EU.

The Law of 1995 was preceded by: (1) The main Portuguese environmental law of 1987;⁴ and (2) laws about the protection of wild species.⁵ The Law of 1995 was followed by: (1) laws about hunting;⁶ laws about pets;⁷ and (2) laws about bullfighting.⁸

II. THE INFLUENCE OF EUROPEAN REGULATION

The aforementioned laws are all directly influenced and inspired by EU regulations, and it is quite clear that the main thrust for Portuguese legislation in these (and other) domains results from the obligations of Portugal as Member Country. Many other Portuguese laws are simple transpositions of European Conventions and EU regulations, such as:⁹ (1) laws on the protection of animals in slaughterhouses and breeding grounds;¹⁰ (2) laws on the transportation of animals;¹¹ (3) laws on the protection of wildlife habitats;¹² (4) laws on the use of animals for

⁴ Lei de Bases do Ambiente, Lei n.º 11/87 de 7 de Abril.

⁵ Estabelece Medidas de Protecção de Animais Selvagens, Necrófagos e Predadores, Decreto-Lei n.º 204/90 de 20 de Junho; Protecção das Aves, Decreto-Lei n.º 75/91 de 14 de Fevereiro.

⁶ Lei de Bases Gerais da Caça, Lei n.º 173/99 de 21 de Setembro; Regime Jurídico Gestão Sust. Recursos Cinegéticos Decreto-Lei n.º 227-B/2000 de 15 de Setembro.

⁷ Animais de Companhia e Animais Pot. Perigosos, Decreto-Lei n.º 276/2001 de 17 de Outubro; Decretos-Leis n.ºs 312/2003, 313/2003, 314/2003, 315/2003 de 17 de Dezembro.

⁸ Touros de Morte, Lei n.º 12-B/2000 de 8 de Julho; Lei n.º 19/2002 de 31 de Julho.

⁹ The enumeration is incomplete, and it intentionally omits lower-level regulation.

¹⁰ Protecção de Animais nos Locais de Criação, Decreto n.º 5/82 de 20 de Janeiro; Decreto-Lei n.º 270/93 de 4 de Agosto; Decreto-Lei n.º 113/94 de 2 de Maio; Protecção dos Animais no Abate e ou Occisão, Decreto-Lei n.º 28/96 de 2 de Abril; Protecção dos Animais nas Explorações Pecuárias, Decreto-Lei n.º 64/2000 de 22 de Abril.

¹¹ Decreto-Lei n.º 130/90 de 18 de Abril; Protecção dos Animais Durante o Transporte, Decreto-Lei n.º 153/94 de 28 de Maio; Decreto-Lei n.º 245/96 de 20 de Dezembro; Normas de Protecção dos Animais em Transporte, Decreto-Lei n.º 294/98 de 18 de Setembro; Identificação, Registo e Circulação de Animais, Decreto-Lei n.º 338/99 de 24 de Agosto.

experimentation and laboratory uses;¹³ (5) laws on the protection of poultry in aviaries;¹⁴ and (6) laws about pets.¹⁵

However, it should be noted that the proliferation of international conventions and EU regulations, far from being an unequivocal benefit, increases “regulatory noise” which decreases compliance and the efficiency of enforcement and monitoring, and is no real substitute, in cultural and social terms, for a more fundamental and visible consecration of animal rights – be it on a wide-ranging statute that supersedes the Law of 1995, be it by incorporating a reference to animal rights on the main pillars of the Portuguese legal system, the Constitution and the Civil Code.

Moreover, EU regulations have a serious problem concerning compliance on the national level: the content and accuracy of information of the common citizen about current EU Directives and Resolutions is very low, and quite often bureaucrats fare no better. Worse still, structural or hierarchical relations amongst EU and national legal systems are quite equivocal and contingent on political considerations – as is to be expected from an unfinished process, such being the case with the European integration, although that does not account for all the subtleties and complexities that have emerged along the way at the level of EU regulations.

In spite of all this, those regulations have proven to be a powerful ally to the cause of animal rights in Portugal, as we have noted. It is easy to imagine that, without the pressure of EU regulations, too much would remain to be done, to this date, in terms of the minimum legal rights of non-human animals. The need to keep up to date with EU norms has often helped decisively in cutting the Gordian knot of internal interests and the entangled mesh of endless discussions over the cultural and sociopolitical legitimacy of violent and abusive rural traditions.

That does not mean, on the other hand, that EU regulation is immune to capture by special interest groups, mainly in what concerns cost controls in the meat industry, the use of animals in scientific research and the persistence of traditional privileges of hunters' associations – activities that have in common their apparent utilitarian justification and the near-invisibility, for urban dwellers, of the suffering they cause on non-human animals. Moreover, the transnational nature of EU lobbying and jockeying for special interests makes it more difficult to detect and prevent regulatory capture than would otherwise be the case in pure national terms (one of a few factors that have, over the years, visibly impaired the full development of democratic checks and balances at the EU level).

¹² Conservação da Vida Selvagem, Decreto-Lei n° 316/89, de 22 de Setembro.

¹³ Animais para Fins Experimentais e Científicos, Decreto-Lei n° 129/92 de 6 de Julho; Decreto-Lei n° 197/96 de 16 de Outubro.

¹⁴ Galinhas Poedeiras Criadas em Bateria, Decreto-Lei n° 406/89 de 16 de Novembro.

¹⁵ Protecção de Animais de Companhia, Decreto n° 13/93 de 13 de Abril; Animais de Companhia e Animais Potencialmente Perigosos, Decreto-Lei n° 276/2001 de 17 de Outubro.

III. PROGRESS AND SETBACKS IN THE POLITICAL AND JUDICIAL ARENAS

Portugal is, therefore, far from achieving a reasonable level of legal protection of animal welfare, either at the statutory level or, more pragmatically, in what concerns enforcement and compliance with those laws already in place: the prevailing feeling is that, in spite of a growing conscience and sympathy towards the moral need for improvement of animal welfare standards, fines are not severe enough and are ineffective as deterrents, and impunity is still dominant, and will so remain in the near future – mainly due to widespread attitudes of leniency, indulgence or outright indifference to all but the most extreme cases of animal abuse.

The fast improvement of environmental law, while enacting a wide protection to animal species, mainly to endangered wildlife, hasn't brought with it any particular legal protection for individual animals, for example by imposing criminal liability for cruelty crimes against them. Instead, domestic animals and captured stray animals (including wildlife not in the public domain) are still qualified, by the Portuguese Civil Code, as mere things, mere personal property – a proposition with many corollaries, e.g. the impossibility of legally preventing and repressing abuse perpetrated by the owner of animals against his own property, or the added difficulty of imposing to proprietors duties toward what is formally taken to be their own property (if property includes, in typical Roman Law/civil law fashion, the *ius abutendi*, the right to destroy, why shouldn't it include, *a fortiori*, the right to maltreat, neglect, or abandon?).

A revision of the Portuguese Civil Code and the Portuguese Constitution is clearly in order – if not to radically change the legal status of non-human animals or to solemnly recognize their fundamental interest in the safeguard of their welfare and in the minimization of suffering, at least to block the powers of owners of animals in everything that may amount to acts of serious mistreatment, neglect and cruelty.

The Law of 1995¹⁶ was intended as a landmark in the evolution of domestic legal protection of animal rights – recognizing not only the fundamental interests of non-human animals as juridical trumps against further social, economic or political manipulations, banning the more gross and gratuitous forms of exploitation, of scientific experimentation (limiting recourse to vivisection to strict necessity) and consumption (imposing humane standards in industrial slaughter), but also affirming the right of individual animals to have their welfare interests represented in court, granting a legal standing to Animal Advocacy Associations to sue the perpetrators on behalf of the injured animals and recover damages inflicted to them.

Instead, as we indicated earlier, the final text of the Law of 1995 was heavily truncated vis-à-vis the central intentions stated in earlier drafts – to the point that it now appears fragmentary and incoherent in too many places. Lobbies representing bullfighting, the meat industry, hunting, pigeon shooting, some of them representative of powerful regional constituencies, managed to mangle the parliamentary debate of the fundamental issues beyond the limits of recognition and reasonableness. Courageously, Mr. António Maria Pereira withstood multiple attempts at denigration and scorn, but in the end his political support was so dangerously narrow that he had to make wide concessions in successive drafts.

As a result, the Law of 1995 is confined to more or less innocuous proclamations of basic principles, which in general do not add much to what already resulted from the mere application

¹⁶ Protecção aos Animais, Lei n.º 92/95 de 12 de Setembro.

of diverse domestic and international norms, and of EU regulations. The first Article of the Law imposes negative duties (n° 1), especially the duty to abstain from inflicting *unjustified* violence on non-human animals,¹⁷ afterwards specified in an enumeration of prohibitions (n° 3), and then a very weak positive duty,¹⁸ the duty to help wounded, imperiled or sick animals (n° 2).

Apart from Article 10, the remaining Articles of the Law of 1995 restrict themselves to procedural and bureaucratic aspects: licensing of the commerce of companion animals (Article 2), licensing circuses and bullfights (Article 3), handling of stray animals (Article 5), neutering of pets (Article 6) and access of pets to public transport (Article 7). The true extent of the limitations imposed on the final version becomes apparent when we consider Article 9, which states that "*sanctions for the infringement of this law will be object of a special law,*" a special law that never materialized (and was never even considered – a revealing symptom of the political hypocrisy surrounding this whole matter).

In spite of everything, the Law of 1995 has become a cornerstone of the judicial leverage of animal welfare and animal rights advocacy – much, it must be said, to the dismay of its opponents, who lament the fact of having overlooked a point in the law that, according to them, amounts to a loophole. In fact, granting not only a legal standing to Animal Advocacy Associations to sue the perpetrators on behalf of the injured animals, but also affirming the legitimacy of those Associations "*to require to all authorities and courts the adoption of preventive and urgent measures that are necessary and adequate to avoid ongoing or imminent violations*" (Article 10), the Law of 1995 opened up a whole new field of possibilities, mainly the path to judicial activism in affirming animal rights.

Portuguese Animal Advocacy Associations immediately explored that possibility, and soon after they began to require, both from the Courts and from administrative authorities and the police, that effective measures be taken to put an end to everything that could be broadly interpreted as a violation of the prohibitions enumerated in Article 1, 3 of the Law of 1995. These include: (1) subjecting animals to overexertion or to fights (Article 1, 3, (a) and (f)); (2) using any kind of painful, perforating or mutilating tool on an animal (Article 1, 3, (b)); (3) trading in weakened, sick, wounded or aged animals, or denying them a humane treatment or euthanasia (Article 1, 3, (c) and Article 4); (4) the intentional abandoning of domestic animals (Article 1, 3, (d) and Article 8); and (5) inflicting pain or suffering in animals outside of the strict necessity of scientific experimentation (i.e. in activities such as training, contests and exhibitions, advertising, education).

Outstanding in those first judicial struggles, and ever since, was Paulo Azeredo Perdigão, a lawyer from Lisbon. Under his initiative, coordinated with the leaders of Portuguese activism, many Portuguese judges have, over the years, issued court injunctions prohibiting the worst violations of animal welfare – sometimes courageously confronting both groups upholding violent traditions still popular, and the passivity and complacency of the Government, the local authorities and the police. Those judges that have tried to enforce the Law of 1995 against prevailing barbarism have suffered heavy political pressure – but judicial independence has prevented most Portuguese courts from backing down in their jurisprudential activism. Unfortunately, this has meant that many of those same court injunctions haven't been properly enforced by the central and local administration, and namely by the police, and that too many

¹⁷ With the subtle anthropocentric implication that there may be an unspecified margin of justified violence, not even subject, eventually, to the usual rules of conflict of rights.

¹⁸ A weak duty, in the sense that, as we shall see, it is patently unenforceable.

prohibited activities have not only been perpetrated but have remained unpunished. Worse still, when it could be expected that the lack of criminal sanctions and the inadequacy of civil damages would be at least replaced *ad hoc* by the sanctions for disobedience or contempt of court, there ensued a political-doctrinal clash that, on the part of the Government and local authorities, tried to justify their hypocritical disregard for the implementation of the (already truncated and minimal) Law of 1995.

On one hand, they gave in to pressure of groups rooting for a local tradition (in Barrancos, a little village near the Spanish border) that consistently violated the old Portuguese prohibition of the slaughter of bulls in the arena, during bullfights¹⁹ – trying in that way to avoid the embarrassment and the media frenzy around its inability in dealing with consistent disrespect for the law and contempt for successive court injunctions – changing the law and allowing, although exceptionally, the slaughter of bulls during bullfight.²⁰ On the other hand, even eminent scholars who should have known better came to the help of the Government with the bizarre, and certainly untenable, opinion that there's no such thing as contempt of court on the part of authorities (even when it consists on the open refusal to carry out court orders), because such a notion would violate the constitutional separation of powers – an argument that, if taken seriously, would prevent the enforcement of court injunctions by the police, and would collapse the whole legal and judicial system into a kind of toothless platonism, in the midst of a Hobbesian state of nature, a state of general anomy.

Progress has been reached, nevertheless, and there's no reason to despair: the uncompromising attitudes of many judges seem especially helpful, and it is to be hoped that the steady, albeit slow, progress of moral standards of the urban populations, in compass with the evolution of legal standards at the European and international levels, will someday tip the balance definitely and unequivocally in favor of the general promotion of animal welfare – and force politicians to leave their abject attitude of hypocritical complacency, if not of schizophrenic ambiguity, towards such fundamental values, such defining beacons of our cultural progress. And let it be said, finally, that the fact that things are no better in a multitude of other countries is meager consolation for Portuguese activists and sympathizers, and certainly cannot constitute any kind of justification.

¹⁹ Touros de Morte, Decreto n° 15 355 de 14 de April (1928).

²⁰ The latter (Lei n° 19/2002 de 31 de Julho) also revised the Article 3 of the Law of 1995: with the most unfortunate consequence that nowadays the only general Portuguese law on animal rights includes a provision (Article 3, 4) that expressly allows the slaughter of bulls in the arena!

IV. MAIN POINTS OF CONTENTION

A. Transportation and Slaughter in the Meat Industry

In spite of an abundance of norms – more than enough, in fact, if they were all applied and obeyed – mainly of EU origin, news of abuse and inhuman treatment of animals in the meat industry still reach the mass media with alarming frequency, sometimes causing a big, but temporary, commotion. The usual invisibility and routine character of what goes on in the meat industry, added to its economic relevance, makes it difficult to generate a public awareness of the main issues that may arise, and make it all the more difficult to raise public support to regulations intended to improve the standards of compliance and monitoring in the meat industry. This means that the problem here lies in the restricted efficacy of State action in enforcing the rules that are already in place – be it because of leniency or of regulatory capture by the industry, a kind of impasse that typically can only be overcome by public awareness of the need for stricter supervision and accountability.

B. Bullfights

Portuguese politics is still a hostage of the bullfighting tradition and the bullfighting industry, although things are not so serious as they are in Spain. As we saw, embarrassments with enforcing the law and maintaining public order, even at the restricted level of a minuscule village whose alleged traditions ran counter to the legal prohibition, forced the Government to make concessions to the bullfighting lobby, who for long has pressured for the introduction of the “Spanish bullfighting” with the slaughtering of the bulls in the arena.

It can be said that the aforementioned episode was by far the most disheartening defeat of the whole evolution toward implementation of a Portuguese legal system of protection of animal welfare. But on the other hand, the Portuguese bullfighting circuit is quickly losing social, cultural and political weight. There are still powerful local constituencies in the South of Portugal (who still claim the right to promote all over Portugal the full Spanish *corrida*, with *picadores* and *matadores*), but they are narrowing quite fast, at least in demographic terms; we can even say that, a bit surprisingly, economic support for the bullfighting business comes increasingly nowadays from tourist attendance.

Despite the setback in the *Barrancos* case, in which neither the law nor court injunctions were efficient, precedents have not been set and the example is not bound to spread – in large part because there's sufficient awareness in international public opinion about this particular topic, making it possible to raise an international outcry at short notice, something that Portuguese politicians profoundly dread. As for bullfighting itself, its abolition seems beyond the horizon, mainly because of tourist interest and of spillovers from the international leverage of the Spanish bullfighting industry.

C. Circuses and Zoos

Portuguese Animal Advocacy Associations have been very active in monitoring animal abuse and inhuman conditions in circuses and private zoos. There are no powerful lobbies in these areas, so we can conclude that problems simply stem from a lack of proper regulation and administrative monitoring; additionally, it can be expected that opportunities for abuse of animals in circuses and zoos can be diminished through an appropriate education of children (making them more sensitive to the suffering that may be involved in the treatment of animals as toys or as anthropomorphic cartoon characters).

*D. Pigeon shooting*²¹

In a famous court ruling in 2000 – and also a major setback in the progress of Animal Advocacy – the Portuguese Supreme Court found that pigeon shooting was no violation of the Law of 1995, even though it had been proved that unnecessary suffering was inflicted on pigeons, not only in the sense that pigeons were shot at “for sport” (i.e. for the thrill of shooters), but also in the sense that, for aiming purposes, pigeons could be replaced by plastic targets.²² Again, it is to be lamented that eminent legal scholars assisted with their authority toward this patently abrogating judicial interpretation of the law.

If an opportunity arrives for revising the Law of 1995, the specific interdiction of pigeon shooting is high on the agenda of the Portuguese Animal Advocacy Associations; moreover, the incredibly stretched interpretation of the Supreme Court in 2000 had the unexpected consequence of convincing many people, quite a few politicians included, of the need of legal reform in this matter. Still, there remains a small but active and vociferous lobby in Parliament, so there lays ahead a vigorous political struggle.

D. Dog Fights and Dangerous Pets

The raising of dangerous pets and the organizing of dog fights are recent social developments in Portugal, and are closely connected with marginal activities – ghettos of immigrants and organized gangs – although there are worrying developments in the mainstream of urban fads. The implementation of very recent legislation about pets,²³ added to the fact that these phenomena are very much confined socially and have no roots in Portuguese traditions, make them easy targets for prevention and repression, and it can be said that in this area we have a satisfactory level of law enforcement.

Still, the pet industries, and especially the dog breeders who try to take advantage of the current fashion for attack dogs, try to organize politically, in order to oppose what they allege to

²¹ Jorge Bacelar Gouveia, *A Prática de Tiro aos Pombos, a Nova Lei de Protecção dos Animais e a Constituição Portuguesa*, 2000 REVISTA JURÍDICA DO URBANISMO E AMBIENTE 13 (2000).

²² Acórdão de 13-12-2000 Proc. N.º 3282/00 Supremo Tribunal de Justiça.

²³ Decretos-Leis n.ºs 312/2003, 313/2003, 314/2003, 315/2003 de 17 de Dezembro.

be an infringement on their economic freedom, what they describe as a menace to simple laws of supply and demand.

(1) Some Possibilities of Improvement: Civil Code Reform, Constitutional Revision

One should not overlook the cultural impact of legal reform in these matters. Scattered, casuistic or piecemeal legal improvements may do the job and they certainly have their pragmatic advantages (mainly as steps of social engineering causing the least political resistance), but they do not have the cultural/ideological impact that may be needed to accelerate that moral revolution without which all legal improvements in animal welfare and animal rights may turn out to be merely contingent and reversible. That's the main reason why there has been such an insistence, at least in European countries of civil law tradition, and Portugal among them, in the need to dignify the founding principles of the Protection of Animals by means of their inclusion in the basic laws of the land, the Constitution and the Civil Code. Of the two, the Constitution has proven to be the most changeable: it has been subject to several revisions since its approval in 1976, whereas the Civil Code of 1966 has been subjected to only one major (and even then, partial) revision.

There has been a hope that, following the example set by the recent revision of the German Constitution, the next revision of the Portuguese Constitution will eventually allow for the explicit recognition of animal rights – on generic terms, namely the right to protection on the part of the Portuguese Republic, based on the recognition of the intrinsic worth of animals as sentient individuals, capable both of a significant existence and of suffering. That is, a formal recognition that animals are not things, mere inert and fungible commodities that can be put entirely at the mercy of human interests, and that there are *fundamental* limits beyond which individual non-human animals cannot be taken to be mere *means* to human *ends*.

Fundamental protection obviously does not mean that animal rights are put precisely on a par with human rights, or that they cannot be sacrificed in case of a serious clash with human interests. In my view, animals do not have a fundamental right to life, although they certainly should have, in all occasions, a right to non-suffering. In case of need, e.g. in case of hunger, it seems unequivocally justifiable to slaughter animals, provided suffering is minimized; and the same could be said in situations where the killing of animals is the only available means of avoiding destruction or predation, or of preserving human health or human lives. Instead, fundamental protection simply means that Portuguese citizens explicitly recognize not only the need for effective respect of the interests of non-humans as the fulfillment of an ethical imperative, a standard of the progress toward higher levels of civilization and humanity; but recognize also the need of laying the foundations of such an effective protection on the Constitution itself, on the grounds over which can be erected the whole legal system of protection of animal interests.

As for the Civil Code, a revision is in the works, but it is to be expected that it will take quite a while before it's over. In what concerns the status of animals, the evolution should point to a definition of non-human animals as a *tertium genus* between humans and things²⁴, following the steps of recent revisions of some civil codes in Europe, paramount among them the German Civil Code, the *Bürgerliches Gesetzbuch* (BGB), which now states in its § 90a that "Animals are

²⁴ As in the new version of Article 524 of the FRENCH CODE CIVIL.

not things. Special laws protect them. In the absence of rules to the contrary, the rules applicable to things are also applicable to animals."²⁵ As corollaries, limitations should be introduced to the exercise of property rights by the owner of animals, subjecting that exercise to the rules of animal protection;²⁶ the limitation of liability should not apply to nuisance caused to animals,²⁷ seizure should not extend to domestic animals,²⁸ bequests to animals should be allowed as duties of care toward their non-human beneficiaries,²⁹ among others.

What seems crucial is the fact that the incorporation in the Civil Code of rules about animal rights and animal welfare would certainly have wide-ranging consequences, not only directly influencing other areas of private and public law (think of the impact on rules of legal standing, or the impact on penal rules), but also surely allowing those issues a much more prominent place in the University *curricula*, in the education of the coming generations of jurists, judges, lawyers, bureaucrats, politicians – in what would amount to a crucial step in the direction of a true moral revolution, a profound and long-lasting (and less contingent) improvement on the legal status of non-human animals.

V. CONCLUSION: IS THERE A KUZNETS CURVE FOR ANIMAL WELFARE, OR MUST WE KEEP ON STRUGGLING FOR A MORAL REVOLUTION?

Last year when I published my book on animal rights,³⁰ I wondered, quite skeptically, if it would make any difference in the progress of that field, either in the context of the University or in the context of Portuguese society at large. Not intending to be neither naïve nor defeatist, I came up with a somewhat ambiguous answer: on the one hand, no, it will *cause* no changes, but on the other hand, the book is in itself a symptom of a cultural context that has already evolved somewhat, it is *caused* by a previous change that allows Portuguese academics to openly debate, with the utmost seriousness, these new issues and challenges to legal theory. In other words, a long road lies ahead, but we already have come a long way – the mere fact that the issue has been subject to a book-length study, whatever may be the merits of that study, can be used as evidence to that.

A. *The Relationship Between Cultural/Economic Progress and Animal Welfare*

Let me therefore conclude with two positive notes. First, I think it is possible to observe a relationship between cultural and economic progress, on one hand, and animal welfare, on the other. Contrary to the radical litany that sees fundamental evil in some (if not most) aspects of human progress, I try to be an optimist, upholding that not only the worst moments of generalized abuse on non-human animals may be over in the majority of developed countries (let

²⁵ "Tiere sind keine Sachen. Sie werden durch besondere Gesetze geschützt. Auf sie sind die für Sachen geltenden Vorschriften entsprechend anzuwenden, soweit nicht etwas anderes bestimmt ist," a rule almost identical to the § 285a of the Austrian Allgemeines Bürgerliches Gesetzbuch (ABGB).

²⁶ Following the example set by the § 903 of the BGB.

²⁷ Following, in this case, the lead of the § 251 of the BGB.

²⁸ As in the §§ 765a and 881c of the German Zivilprozessordnung and the § 250 of the Austrian Executionsordnung.

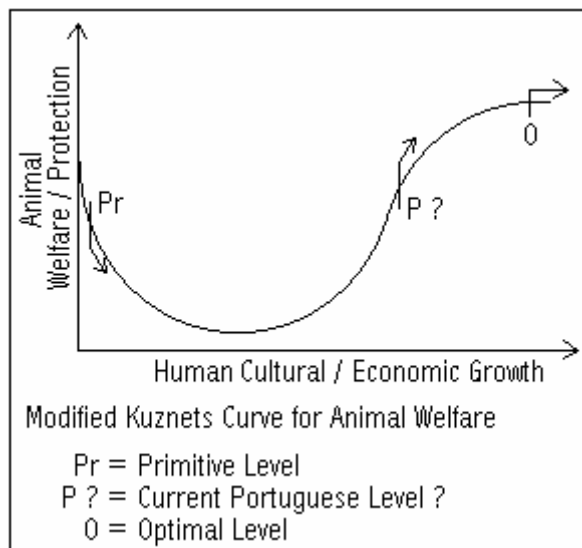
²⁹ As in the 2002 version of the Article 482, 4 of the Swiss ZBG.

³⁰ ARAÚJO, *supra* note 2.

us think of the pervasive exploitation of animal effort in farms, or the massive use of animals in the battlefields, or the “tragedy of the commons” in fisheries and in big game hunting, all not so long ago)³¹, but also that non-human animals are sharing, and can continue to share in the future, the benefits of human progress (think of scientific developments applied to the protection of species, and the use of scientific therapies to improve the welfare both of domestic and wild animals).

I'm a firm believer that the “Environmental Kuznets Curve,” that has for quite a while demonstrated the relationship between economic growth and successive periods of environmental degradation and improvement – showing that the initial efforts at economic growth tend to sacrifice environmental quality, but in the end growth itself gives us the means to improve environmental standards, sometimes beyond their starting levels at “zero growth” – can be extrapolated to the field of animal welfare, meaning that the sacrifice of animal welfare may have been, historically, an inevitable byproduct of socio-economic progress, that things had to get worse before they began improving again, something I suggested earlier when I mentioned an urban culture that is becoming more and more sensitive to issues of animal welfare, more willing to connect human fulfillment with the realization that non-human welfare is being satisfactorily preserved.

Let me present a modified form of an “Environmental Kuznets Curve,” a mere rhetorical-metaphorical device, I must admit, just to show where I think we can locate the uphill struggle that the Portuguese legal system still faces, without disregarding all that has been achieved in the meantime (with and without EU and international help).



Does this mean that I'm willing to adopt a mechanist-determinist view on the legal evolution of animal protection, willing, i.e., to admit a more than merely metaphorical nature to the “Environmental Kuznets Curve”?³² Certainly not: I insist, I'm no subscriber of a fatalistic

³¹ I'm aware that I may be overlooking the invisible suffering in the *eternal Treblinka* of the meat industry, but the improvement of awareness even in those fields leaves us room for hope.

³² See Simon Kuznets, *Economic Growth and Income Inequality*, 49 AM. ECON. REV. 1-28 (1955). See also James Andreoni & Arik Levinson, *The Simple Analytics of the Environmental Kuznets Curve*, 80.2 J. PUB. ECON. 269-286 (2001); Alain Bousquet & Pascal Favard, *Hétérogénéité des Agents et la Relation Pollution-Revenu*, 52.6 REVUE ÉCONOMIQUE, 1185-1203 (2001); Susmita Dasgupta et al., *Confronting the Environmental Kuznets Curve*, 16.1 J.

Philosophy of History. Simple common sense says the future is at our mercy, and personally I feel as distant of radical activism as of a contemplative conformism that would wait things to happen for themselves, according to some kind of superhuman logic.

B. Scholars as Guardians of Social Hope

Finally, I also think scholars are the guardians of social hope. Even in the midst of the worst difficulties and the bleakest outlooks, society expects that scholars will be the last members of society to despair of the possibility of improving human experience and coexistence through the progress of ideas and of cultural habits. Let this testimony of an academic from a far country, a country that has a long way to go in the improvement of legal protection of animal welfare, be, in spite of everything, a proclamation of hope – the unashamedly anthropocentric hope that the betterment of human condition is at hand, that a moral revolution is close by, in the ironic meditation and self-redescription of the animals we are, through the solidarity we may feel for fellow non-human creatures.

In my book, I resorted quite often to the bright thoughts of my favorite philosopher, Richard Rorty. And so it seems fitting that I end this paper with two passages from *Contingency, Irony and Solidarity*:

*Simply by being human we do not have a common bond. For all we share with all other humans is the same thing we share with all other animals – the ability to feel pain.*³³

*The self-doubt seems to me the characteristic mark of the first epoch in human history in which large numbers of people have become able to separate the question ‘Do you believe and desire what we believe and desire?’ from the question ‘Are you suffering?’*³⁴

ECON. PERSP 158ff. (2002); SANDER M. DE BRUYN, ECONOMIC GROWTH AND THE ENVIRONMENT: AN EMPIRICAL ANALYSIS (2000); Gene M. Grossman & Alan B. Krueger, *Economic Growth and the Environment*, 110.2 Q.J. ECON. 353-377(1995); Nico Heerink et al., *Income Inequality and the Environment: Aggregation Bias in Environmental Kuznets Curves*, 38.3 ECOLOGICAL ECON. 359-367(2001); John A. List & Craig A. Gallet, *The Environmental Kuznets Curve: Does One Size Fit All?*, 31 ECOLOGICAL ECON. 409-423 (1999); Thomas M. Selden & Daqing Song, *Environmental Quality and Development: Is There a Kuznets Curve for Air Pollution Emissions?*, 27.2 J. ENVTL. ECON. & MGMT. 147-162 (1994); Mariano Torras & James K. Boyce, *Income, Inequality, and Pollution: A Reassessment of the Environmental Kuznets Curve*, 25 ECOLOGICAL ECON. 147-160 (1998); MICHAEL P. VOGEL, ENVIRONMENTAL KUZNETS CURVES: A STUDY ON THE ECONOMIC THEORY AND POLITICAL ECONOMY OF ENVIRONMENTAL QUALITY IMPROVEMENTS IN THE COURSE OF ECONOMIC GROWTH (1999).

³³ RICHARD RORTY, *CONTINGENCY, IRONY, AND SOLIDARITY* 177 (1999).

³⁴ *Id.* at 198.