

CAN EXPERIMENTS ON ANIMALS CONSTITUTE A CRIMINAL OFFENCE OF CRUELTY TO ANIMALS?

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Abstract - The criminal offence “killing and torturing animals” under Article 269 of the Criminal Code says that it can be committed only “contrary to regulations”. The regulations governing the treatment of experimental animals are the Animal Welfare Law from 2009 and the Law on the Ratification of the European Convention for the Protection of Vertebrate Animals used for experimental and other scientific purposes amended by the Protocol of amendment to the European Convention for the Protection of Vertebrate Animals used for experimental and other scientific purposes from 2010. The first one imposes numerous obligations and introduces numerous prohibitions in the treatment of experimental animals, which at first sight make the possibilities of committing this criminal offence greater. The other law does not contain most of the prohibitions and restrictions that are included in the Animal Welfare Law. Thanks to a legal rule which says that a later law regulating the same subject replaces the former one (*lex posterior derogate legi priori*) and the aforementioned unconstitutionality of many provisions of the Animal Welfare Law, researchers and teachers in Serbia are not in particular danger of criminal prosecution.

Key words: murder; torture; animal; welfare; science; experiment; criminal offence; interest.

INTRODUCTION

The criminal offence “killing and torturing animals” may exist only when committed by “breaking the rules”. This means that prior to determining the existence of a criminal offence, one must determine which regulations govern the treatment of animals.

Scientific experiments, as a type of treatment of animals, are regulated by two “regulations”: the Animal Welfare Law from 2009 (hereinafter referred to as the “Law”) and the Law on the Ratification of the European Convention for the Protection of Vertebrate Animals used for experimental and other scientific purposes amended by the Protocol of amendment to the European Convention for the Protection of Vertebrate Animals used for experimental and other

scientific purposes from 2010 (hereinafter referred to as the Convention of the Council of Europe). The subject of this paper will be the Law only because it introduces numerous restrictions and prohibitions to scientific experiments on animals, which raise the question posted in the title of the paper. The Convention is not a subject of interest of this work because it regulates the relationship of humans and animals in a way that the animal’s interest certainly cannot be superior to the improvement which human society can gain from scientific research.

MEANING AND PURPOSE OF THE ANIMAL WELFARE LAW

For questioning the purpose, i.e. objective of this Law, the important parts are Part II – Explanation

of the Law titled “The reasons for the adoption of the Law” and Part V whose point 1 is titled “Which problem is solved by the Law?”. A key purpose and meaning of the Law in Part II Explanation is a thesis on the alleged existence of some “unique rules on the protection of animals” within the legislation of the EU Member States, as well as a classical rumor that something like this is “required” from Serbia in the “process of EU accession”. The first statement is more false than true and presents a harsh simplification of things. The second statement from the Part II Explanation, where Serbia is allegedly asked to adopt this law in the “process of EU accession” is not true.

From the point of law, one statement from point 1 of part V, Explanations, called “Which problem is solved by the Law?” is particularly problematic. According to this statement the purpose of the Law is “In accordance with the principles and recommendations of the First resolution on the protection of animals, it is necessary that the Republic of Serbia begins the process of improving animal welfare, i.e. to uniquely regulate an area of the protection of life and welfare of animals by defining the rights of animals to live in accordance with the biological characteristics of the species within the Law and the Constitution of Republic of Serbia...”. One kind of replacement of thesis, utterly unacceptable from the perspective of the legal system is present here. An explanation of the Law underlays “The first resolution on the protection of animals”, which is supposedly a measure and a criterion for the Republic of Serbia in order “to define the rights of animals to live”. As stated in the explanation, an uninformed reader might think that this is an official resolution (political act) of a supra-national (European) or state (Serbian) authority, for example, some parliament, government, committee, council, board, etc. A check can determine that it is the Act of an ordinary non-governmental organization.

PARTICULAR LEGISLATIVE LAW TECHNIQUE AS A TOOL FOR THE IMPLEMENTATION OF A LEGAL CATEGORY “INTERESTS OF ANIMALS”

The rights and freedoms of animals do not exist. The

theory on which the objective of the Law is based, which is trying to impose something like this, is simply not true. The reason is simple: every living creature that wants to be the subject of rights must be able to be a holder of obligations. Therefore, the rights and freedoms of some present an obligation for all others. An animal is not capable of being a holder of obligations, so it cannot be the holder of rights. Therefore, the legislator tried something else.

Animals are living creatures and as such, they have some of the same needs as a man. For example, the need to satisfy hunger, thirst and sex drive. Like people, animals do not want to be sick or in pain, etc. If the rights and freedoms of animals can not be introduced as a new category in the legal system, is it possible to recognize the needs of animals as a matter of their interest and introduce an obligation for people and the state not to violate them, which is undoubtedly according to the literal interpretation of the Law title and Article 1 that describes the purpose of the act. The Legislator in the case of this Law tried to do this; to create and introduce into a legal system a completely new legal category – the interests of animals – and to introduce this category into the legal system of the Republic of Serbia, which makes the Legislator a kind of a quasi-writer of the Constitution. The technique used, stating the specific interests of animals and determining their content, is not positive, but negative. The Legislator lists a number of duties and responsibilities of the holders of rights towards animals, which can be explained.

The rights and freedoms of people related to an obligation or prohibition imposed by this Law are already prescribed by the Constitution or undoubtedly arise from other rights and freedoms, and there is no need to prescribe them. However, the interests of animals were never prescribed by the Constitution and the Law sets them out. The way it creates a new legal category (animal interests) is precisely this imposition of obligations and prohibitions on the legal entities and natural persons in dealing with animals. The legislator uses this negative mechanism of introducing the category of animal interests into the legal

system because it is aware that by a positive approach of listing the interests of animals, it would have to determine them by their name, to prescribe the content of these interests and more importantly, the legislator would have to determine the relationship of this new legal category with the current constitutional legal categories within the system, and those are the rights and freedoms of people and state authority competence. By acting like this, the legislator would be in a middle of a problem. It would be obvious that there is no basis for this new legal category in the Constitution, which is in this paper called interests of animals.

IS THERE A CONSTITUTIONAL BASIS OF THE ANIMAL WELFARE LAW?

The legislator tried to find a basis for the enactment of this Law in the Constitution and it formally succeeded. As a basis for enactment of the act, an Explanation refers to Article 97 of the Constitution. This article of the Constitution is entitled "Authority of the Republic of Serbia" and in point 9, paragraph 1, among other things it says that the Republic of Serbia regulates and provides a "...system of protection and improvement of the environment; protection and improvement of flora and fauna...". Strictly speaking, the Republic of Serbia has jurisdiction over the legal regulation of protection of animal life and the legislator uses this possibility. However, this article of the Constitution does not explain how the legislator does that, and certainly does not give the legislator the possibility to limit the human rights and freedoms specified by the Constitution. If the creator of the Constitution wanted to limit existing human rights and freedoms specified by the Constitution by an animal protection act, it should have emphasized this in the continuation of Article 97, i.e. it should have set down the basis for the limitations. However, the creator of the Constitution did not do this. The legislator was left free to prescribe the way of protecting animals, without the authority to restrict existing human rights and freedoms specified by the Constitution. The final answer to the question whether there is a constitutional basis for the Law would be as follows: formally – yes, essentially – no. From the

standpoint of form, in the Constitution there is a basis for the enactment of a law on the protection of animals, but from the standpoint of essence, i.e. substance, there is no basis to enact such a law. The purpose of animal protection cannot limit the human rights and freedoms guaranteed by the Constitution, two of which are important for carrying out scientific experiments on animals: the freedom of scientific creativity and the right to education.

INTERESTS OF ANIMALS AND FREEDOM OF SCIENTIFIC CREATIVITY UNDER ARTICLE 73 OF THE CONSTITUTION

Freedom of scientific creativity is defined in article 73 of the Constitution of the Republic of Serbia as follows: "scientific creativity is free" and "moral and material rights are guaranteed to the authors of scientific works". At the end, the Constitution states that "the Republic of Serbia assists and encourages the development of science". The Animal Welfare Law introduces many limitations to this freedom without basis in the Constitution. Thus, Article 38 introduces eight cases where experiments on animals can be performed. Although relatively widely set and explicitly mentioning scientific researches, they present some kind of limitation because all other cases are not allowed. This is followed by Article 42, which contains a list of five types of banned experiments on animals, joined by paragraph 1 Article 41 according to which an experiment cannot be conducted if there is "an alternative method for conducting the experiment that achieves the same goal", and paragraph 3 according to which "a method that causes animals the least pain, suffering, fear or stress must be used". The limitation of the freedom of scientific creativity under Article 36 and paragraph 2 of Article 35 of the Law under which animal experiments can be conducted "only by a professional trained in animal welfare" should also be classified here and people who conduct experiments have to determine the persons responsible for animal welfare protection that are once again "trained in the welfare of experimental animals".

None of these restrictions of the freedom of scientific creativity introduced by the Animal Welfare

Law have basis in the Constitution. Restrictions are not explicitly stated within the Freedom itself or deriving from it (freedom of scientific creativity is, by itself, limited by scientific method), nor do they arise from some other freedom or right to which the freedom of scientific creativity balances (the freedoms and rights of ones are the obligations of others, and *vice versa*). Out of all these restrictions, especially problematic is the one from point 5 of paragraph 1 Article 42, according to which an experiment on animals cannot be conducted in the case of “displaying biological and medical rules or facts that have already been confirmed”. This restriction undermines inevitable crucial part scientific truth and infringes on the whole purpose and meaning of science. **How will science progress if critical tests of its results are not going to be performed?!** The law in this provision prohibits any repetition of “confirmed” scientific results. Even Albert Einstein’s Theory of Relativity, no matter how great it was and repeatedly confirmed, still undergoes scientific challenges and confirmations by those who are putting it to test with a mechanism of scientific criticism. How will anyone be called a scientist, applying a scientific method, if they are exempted from scientific criticism? It is far more important that this provision of the Animal Welfare Law undermines the whole purpose of science by taking a key scientific mechanism – scientific criticism – that infringes on the Constitution of the Republic of Serbia.

ANIMAL INTERESTS AND THE RIGHT TO EDUCATION UNDER ARTICLE 71 OF THE CONSTITUTION

Article 71 of the Constitution, which briefly states “everyone has the right to education”, regulates the right to education. Article 44 of the Animal Welfare Law almost completely undermines the entire field of education in which animals are used, mostly affecting biology, veterinary science and farming as sciences. Thus, paragraph 1 of this article prohibits all “experiments on animals for educational purposes” if they cause pain, injury, stress and pain. In primary and secondary schools, paragraph 2 allows experimentation only by observing animals and the

rule in paragraph 1 is being applied at universities. According to paragraph 4, studies of dead animals at all levels of education are possible only if the animals were not killed for the purpose of study. Such restrictions on education will prevent the acquisition of the most basic knowledge about animals and the living world in general. What will children in primary and secondary schools learn about animals more than they have already learned just by watching dogs or cats in the park? What will biology students learn if they cannot kill an animal and dissect it? How will the veterinary student learn about the anatomy of a dog, cat, pig, sheep, horse or goat if he has to wait for these animals to die of natural causes at a farm and then be brought to the faculty so a student could dissect it? How long will veterinary medicine studies last? When it comes to the education of doctors, the appliance of this rule is quite understandable. A “human life is inviolable” according to Article 24 of the Constitution of the Republic of Serbia. For this reason, every student of medicine will have to wait for a man to die and will only then be able to gain some applied knowledge about human anatomy. This is the way to balance two constitutional values, the right to life and the right to education. No killing or injuring people for the purpose of the right to education. The introduction of the same rules for animals indicates that the animal’s life is just as valuable that of a human. This would be unreasonable even if there were a basis in the Constitution, but there is no basis in the Constitution and therefore the constitutionality of this rule is questionable.

After all, the Law itself allows some forms of animal killings, such as slaughter for human consumption. What is the difference between the slaughter of animals for food and killing for scientific experiments and education? Does this mean that the legislator took the stand that the human need for food exceeds his/her need for knowledge? This would appear to be the case, although it is completely wrong. If humans had put their need for food in front of their need for knowledge, they would never have domesticated animals. In societies before civilization, humans were perfectly capable to fulfill their

need for food by hunting and collecting and had no need to learn how to domesticate animals and plants; it was the need to make progress by gaining new knowledge. Humans wanted an easier, better, safer and a more certain life. This need led humans to the development of different forms of knowledge, in this case, the knowledge of animal domestication. In modern times, this knowledge has developed into a science – farming – and other sciences that follow, such as veterinary medicine or biology. How would people be able to learn to domesticate the wild boar into a pig or a wolf into a dog if they did not gain knowledge? That knowledge has had a price in the form of animal life, and it still does today. It is certain that wolves and wild boar have resisted domestication as a horse still does. If such an understanding led a human forward in the sense of civilization, why should the progress of civilization stop by prohibiting the killing and harming animals while conducting scientific experiments or teaching? Has the Serbian legislator decided that we have come to the end of scientific knowledge about animals? After all, this progress is also in the interest of animals. If people had not learned to domesticate animals and if they had continued to feed themselves by hunting and collecting, the demographic pressure would quickly lead to the destruction of all animal and plant populations. The domestication of animals applies less pressure on natural populations of animals, allowing them to be preserved.

CONCLUSION

Scientific experiments on animals that are comprehensively regulated by the Animal Welfare Law from 2009 could hardly be identified as a criminal offence of “killing and torturing animals” from Article 269 of the Criminal Code. A criminal offence is caused by behavior that breaches the “regulations”, and the aforementioned Law is certainly such a “regulation” and it is full of various prohibitions, restrictions or obligations imposed on scientists and students while dealing with experimental animals. However, its provisions are essential for performing scientific experiments on animals, which are as it turns out in significant contrast to the Constitution of the Re-

public of Serbia. The freedom of scientific work and the right to education defined by the Constitution of the Republic of Serbia do not have limitations deriving from the Law because it is an act of a lower legal force. In order to restrict scientific experiments on animals, the provisions of any law would have to have a basis in the Constitution. That basis can be specified explicitly and may also derive from the relationship that is created by balancing the freedom of scientific work and the right to education with other freedoms and rights regulated by the Constitution, which is not the case here.

This does not mean that all provisions of the Animal Welfare Law relating to animal tests are unconstitutional, for instance, those relating to the Register of animal experiments. However, these are all provisions that are not related to scientific experimental procedure, and violation of these provisions cannot lead to the “killing, harming or torturing animals”, which are all a criminal offense.

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