



Mini Review

An analysis of wild animals with respect to French Ethics and Law

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Before discussing the crux of the matter, it is important to understand what “wild” signifies and the characteristics that define a wild animal.

As contrasted to domesticated animals, a wild animal can be defined as an animal living freely in his natural habitat, independently of Man. These animals are only exposed to variations in the biological equilibrium, to the imperatives of their genetic program and live in a habitat that gives them the possibility of expressing it themselves.

However, this definition is very narrow as there exist a number of species of wild animals that don't live freely in their natural habitat. These animals are constrained by Man, who by creating a relationship of dependence, controls them and in turn becomes responsible for their sustenance. In such a situation, their habitat is no more their natural habitat but than which has been imposed on them by Man; such animals are said to be “held in captivity” or even “tamed”.

In short, when talking about law and ethics related to wild animals, there are two things to be taken into account: wild animals that live in the wild and wild animals that live held in captivity by Man.

French law prides itself, and rightly so, on its ability to deal with a particular subject by combining various elements such as precision in its definition and consistency in its various provisions while taking into account scientific, economic and ethical data. It has, however, established two totally different legal regimes, both with regard to its provisions and to the spirit that prevailed in elaborating them. There exists one regime applicable to the free wild animal and another to the wild animal held in captivity. At first sight, the fundamental aspect, the guiding principle of man's attention to the animal, seems to be ethical: it entails the recognition and the consideration of the capacity of an animal to feel pain, suffering and anxiety. Nonetheless, what must be denounced is the ethical divergence that entails in recognizing this capacity for some wild animals, particularly those that are held captive by man, and in refusing it to others, those who live freely. This results firstly in a formal ethical discrimination between the two states of life of the wild animal, that of freedom and of captivity and secondly, in a dispersal of legislative texts that are incoherent, incomplete, illogical and imprecise.

Indeed, these legal regimes are completely different if they concern captive wild animals or free wild animals. On the one hand, the regulations aim to preserve the « sentience » of the individual animal considered to the domestic animal, either directly through captivity standards, or indirectly by punishing the perpetrators of acts that affect this « sentience ». On the other hand, the regulations only concern the preservation of wild animals' species, as the strength of their populations, without any consideration specific to the individual animal.

Detailed examination of wild animals held in captivity

Wild animals "held in captivity" or even "tamed" are those held by zoos, circuses and by individuals as exotic pets, as well as those raised for their flesh (ostrich, bison, deer, fish), their fur (mink) or their skin (crocodile), or even for restocking of game animals like rabbit, pheasant and fish (trout). They benefit from the same "protective" provisions as those applicable to "domestic" animals (such as livestock or pets) who have been subjected to genetic, morphological and physiological modifications by Man in order to improve the conditions of his existence in particular with regard to food and physical effort. These "protective" provisions are detailed in the Rural Code, the Penal Code, the Environment Code and the Civil Code since the introduction of an amendment in 2015 [1]. However, it must be noted that animals held in captivity and those that are tamed and have the status of "domestic animals", must be distinguished before the law because Man has not exerted by selection a genetic modification of "domestication" on those held in captivity.

The Article L.214-1 of the rural code explicitly states that the animal is a "sentient being", but it limits this status to animals which have an "owner", who must set the animal "in compatible conditions with the biological imperatives of his species". However, the Code does not specify the animal, domestic or wild held in captivity. The reason for the animal to be considered in the Article L.214-1 is related to the fact that it is "owned". Moreover, the use of the restrictive term "biological imperatives" by the legislator is regrettable. The interpretation of this term is generally limited to needs related to food and comfort, thus excluding behavioral needs, which are nevertheless an essential factor of biological imperatives for an animal. This loophole in the legislation has played an important role in contributing to the multiplication of zoos or circuses and similar establishments (such as aquarium and delphinarium) and to the development of the trend of exotic pets, condemning animals to conditions of ownership contrary to the ethological imperatives of their species.

The Penal Code does not explicitly mention "sentiency", but it recognizes it implicitly by establishing a gradation of the attacks that may be made on an animal, and by punishing the perpetrator on the grounds of clumsiness, inattention, negligence (Article R.653-1), intentional illtreatment (Article R.654-1), acts of cruelty or serious abuse (Article 521-1), murder of an animal without necessity (article R.655-1).

As for the Civil Code, since its origin, it has considered the animal only in reference to its state of "appropriable property", while taking into account the value of how useful it can be to man. Hence, it is evident that there was a serious inconsistency between the various Codes, the Civil Code that ignored the notion of « sentiency » of the animal, while this was explicitly stated in the Rural Code, and implicitly in the Penal Code.

Since the beginning of the 80s, and for several years after the need to complete the Civil Code has been expressed. The repeated requests of groups' specialized topics related to the animal's right and law and the ethical conduct of Man towards the animal, culminated, for the first time, with the Law n °99-5 introduced on January 6th, 1999. This law established a regime that distinguished the 'animal' from the status of 'thing' or of 'bodies' in the Civil Code, without changing the status of the animal as a personal estate or real estate. Thereafter, many requests to include the aspect of "sensitivity" (or sentiency) of the animal were presented to the government and politicians. It was Mr. Dominique Perben, the then Attorney General, who was the first person to have answered to these requested. He entrusted Suzanne Antoine, Magistrate, with the mission to submit a report on a new legal regime for the animal. The report that was finally submitted to the Minister in May 2005 [2]. Out of the two proposals in the report the first one was related to removing animals from the regulation related to properties by changing the title of Book II of the Code to "Animals, Property, and Different Property Changes". The other proposition was to give the animal the status of

a "protected property", because of the special rules it benefits from. These modifications were not revolutionary, and much less could have been the more ambitious one of opening in the Civil Code a third book devoted to the animal. Nevertheless, Antoine's report immediately came up against fierce pressure and opposition, almost of principle, including those of lawyers committed to keeping the order of the current texts, and especially those of the circles involved in intensive breeding (professionals and unions) who wanted to see it as a threat, an additional constraint, while the constraints and rules are already brought by the regulations in force, resulting from the European texts. In June 2011, Senator Roland Poinvillain tabled a bill [3] "recognizing the animal's character as alive and sentient in the Civil Code", which took the position Antoine to distinguish the animal from other property. The said bill was not adopted by the Senate Law Commission. Finally, it is an amendment [1], carried by the law of February 16, 2015, which took into account the recommendations of the Antoine report, however without mentioning the latter.

The notion of the « sentience » of an animal has been introduced in a new article 515-14 of the Civil Code: "Animals are living beings endowed with « sentience ». Without prejudice that the laws that protect animals fall under the property regulation". This provision, known as the "Glavany Amendment" (named after the Member of Parliament, a former minister who introduced the law to be voted by other members of the Parliament) was inspired by the Antoine report [2] of May 10, 2005. Even though this was a symbolic step forward according those in favor of defending rights for animals, its impact is questionable. It was said at that time that the law had "finally" recognized the « sensitivity » or sentience » of animals, nevertheless this step consisted simply of a harmonization of the different codes as the "sentience" of the animal was already recognized since 1976 in the article L214-1 of the Rural and Fishing Code. In addition to this, there has been no change in the legal regime of animals, as animals were still subject to the "property regulation". It must notice that the French word « sensibilité », which is used in these french laws, means at once « sensibility », « sensitivity », « sensoriality », or « sentience », according to context.

There is a contradiction related to the fact that although animals are protected by certain laws, they share the same status as ordinary goods or that of objects of commerce. The Civil Code is not the only text to present this contradiction: for example there is neither a definition of what the "animal sensitivity » is nor that of "a sentient animal » in the legislative or regulatory. The rural code mentions the "sentient being" without defining it, the civil code mentions animals as "living beings endowed with sentience" and the Penal code punishes the attacks on their « sentience ». However, none of these actually define any the above terms. It should also be noted that all these texts are incompatible with the Amsterdam Treaty of 2 October 1997 and Lisbon of 13 December 2008 which advocate respect for the welfare of animals as sentient beings.

It is time to integrate in the Civil Code, a definition of the animal that takes into account the scientific knowledge on animal sensitivities. Such a definition could be a common point of reference for all texts, a kind of guiding principle whose present lack has led to inaccuracies, shortcomings, and even inconsistencies in the texts, making them conflicting sometimes. It is not sufficient to state that the senses of animals must be respected, or that the animals must be considered as sentient beings, without explicitly defining these terms. As the term "sentience" is nothing other than the ability to feel the pain and / or to experience other emotions, we must ask ourselves why a unequivocal definition based objective and scientific criteria it is not specified in legal texts. This definition could remain open to modification subject to advancements of our knowledge and comprehension of this field. This would make it possible to know which animals are called "sentient beings" or "endowed with sentience", and finally why they should benefit from protective measures. This definition could be: Any animal belonging to a zoological class or superclass in which at least one species

is scientifically presumed to be able to feel the pain and / or to experience other emotions must be the subject of legal and regulatory provisions intended to respect this particular sensitivity [4].

Finally, in its chapter on "Establishments holding non-domestic animals" for public-exhibition (eg. zoos, circuses and similar establishments), the Code of Environment enacts rules regarding the opening of new establishments, the safety of visitors, and the certification of competencies of individuals responsible for the animals. Various ministerial orders (August 21, 1978, October 25, 1995, March 30, 1999, August 10, 2004) complete these regular provisions, in particular concerning rules related to the size of cages, spaces of detention and specific species of animals that can be held kept. The most recent order (March 18, 2011), devoted to "wild animals in traveling shows", is a voluminous text that only ratifies the previous rules concerning the status of circuses without adding anything significant to the current situation. It does add certain obligations however these do not improve or change the living conditions of animals, as the respect of these obligations is neither verifiable nor checked. Furthermore, it does not include any restrictive measure that, at end prohibits the use of trained animals and wild animals' exhibition in circuses.

According to the texts, wild animals "kept in captivity", in circuses, zoos and aquariums, seem to be protected from attacks on them and are able to lead their life "in conditions compatible with the biological imperatives of their species". The reality, however, is quite different. Not only are they not free from coercion and even violence, especially during their training periods to prepare for shows, but they are also victims of the constant stress that comes from the deprivation of liberty and the impossibility to express their natural behavior. The standards prescribed for the size of detention spaces are measured in square meters or cubic meters, while natural areas are measured in square kilometers or cubic kilometers especially for marine mammals and large fish. The regulations do not take into consideration the state of well-being of animals in which Man has a certain responsibility with regard to domesticated animals as well as animals held in captivity. This wellbeing, as defined by the World Organization for Animal Health, takes into account the following factors : "good health, adequate comfort, good nutritional status, safety, possibility of expression of natural behavior, absence of suffering such as pain, fear or distress" [5]. Zoos, circuses, aquariums and other establishments are far from setting their animals in these conditions.

Under the guise of "protection" against attacks on their sentience, and that of a desire to ensure a life satisfying the "biological needs" of animals, the current regulations governing the living conditions of wild animals in captivity are incomplete, inconsistent, imprecise and somewhat hypocritical. These regulations are limited to covering the areas related to the treatment of an animal such as care, rearing conditions and well-treatment, but are flawed since there is an absence of any reference to the welfare of animals. Welfare is a notion that refers to the state of the animal. The complete welfare of an animal can only be attained if the animal can fully express behaviors specific to its species. The National Agency for Food Safety, Environment and Labor (ANSES, Agence Nationale de sécurité sanitaire de l'alimentation, de l'environnement et du travail) refers to the above in its definition of animal welfare published in 2018: "the positive mental and physical state linked to the satisfaction of its physiological and behavioral needs, as well as its expectations. This state varies according to the perception of the situation by the animal". According to ANSES, the quality of life has a temporal dimension taking into account the satisfaction of the animal throughout his life by integrating its past, his vision of the future but also the conditions related to its death [6]. The deprivation of liberty and the of behavioral expressions (social relations, exploration of the environment) are both scientific and moral lapses with regard to animals, whose species has been shaped over the millennia by process of Evolution, which have fitted them to their specific natural environment.

In conclusion, currently in France, the legislation applicable to the "wild animals kept in captivity or tamed" as well as "domestic animals", remains imprecise, misunderstood and incomplete. They evoke the animal being sentient and the sentiency of the animal, even dictating rules on this subject, however without stating which animal or what the word "sentiency" consists of. Moreover, the credibility of these "protective" provisions is seriously altered, because they fail to mention the importance of the behavioral needs of animals dictated by their genetic program, the expression of which is prevented due to detention and captivity, at the cost of permanent animal discomfort. It is abominable when you think about this lack of ethical consciousness with regards to the subject.

The case of wild animals: living without an owner and in complete freedom?

Contrary to individual wild animal held in captivity, an individual free wild animal has no place in French law. It has no individuality, and only exists as a member of a wildlife species. This fauna is taken into account by the Environmental Code in various ways (preservation, hunting, fishing, destruction). Nonetheless, this Code makes no reference to an animal's own individual nature. The absence of any reference to any "sentiency" of wild animals living in a state of freedom is a particularly shocking aspect of the law, which consists in ignoring or even denying the right of a wild animal to be "sentient", whereas it is granted to an animal of the same species, held in captivity. While animals held in captivity are recognized by the Criminal Code as having the right to not be killed without necessity, the right to not be subjected to ill-treatment or acts of cruelty. These rules do not exist for wild animals. The most demonstrative example is that of the pheasant, or any other game animal raised by Man. These animals are protected as such, but lose their nature and status of being sentient as soon as they are released; the notion of "sentiency" has a certain meaning on one side, and another meaning on the other. This is scientific absurdity and ethical misinterpretation. Moreover, this absurdity was reinforced by a judgment of the Paris Court of Appeal on 13 May 1971, which stated that when the pheasant is released, it loses its status as a domestic animal to become a free game animal in the wild [7].

Hence, it is only the wild animal "species" and not individual wild animals that are a subject of specific texts, which take into account aspects such as the fauna surrounding them, their diversity and their numbers. The wild animal living in a state of freedom is hence considered as a thing, possibly protected as a work of artistic patrimony. This state of affairs represents a shocking feature of the law, and also a failure of the ethical duty to respect animal life.

On the basis of the criteria of human predation or even destruction of wildlife species, combined with the imperative need to preserve endangered species, the texts result in a classification of species into categories. These categories range from allowing Man to take the lives of these animals to granting them the right to survive. Wild animals living in a state of freedom are a legal subject only if the species to which they belong is included in one of these regulatory categories. The law is only interested in them subject to certain conditions such as the size of their population, their management as they can sometimes be considered as a part of "heritage" [8,9] and finally in terms of appropriation by Man.

Many species are classified as "protected" because of the size of their populations, which has declined by factors such as human population growth, increasing agricultural land use and pesticide use, excessive urbanization, industrialization, pollution, illicit trading of living animals or animal products, overhunting, overfishing, which threaten the survival of the species. In France, almost all bird species, reptiles and amphibians, about twenty fish species, sixty insect species, fifty molluscs and some crustaceans are classified as "protected" species. The animals protected must not be captured, injured or killed. It can be considered that the right of species not to disappear due to errors committed by humans is a fundamental right of these animals [8]. This right

is taken into account in international conventions, agreements or treaties relating to the the protection of natural areas and endangered species (Bern, Rio, Ramsar, Bonn, Canberra, Geneva Conventions, etc.) and to trade in wildlife (Washington Convention CITES). The lists of protected species are specified by ministerial orders responsible for environment and agriculture, which set rules for the preservation of species for all protected wild animals, or for a particular group of animals. These orders apply are applicable either to the entire national territory or to an overseas department, and a particular biotope, particularly a marine biotope.

Twenty-three species of mammals, sixty-seven species of birds, and most species of fish are classified in categories as "game" or "recreational and leisure fishing" respectively. It is therefore tolerated to hunt or fish them on certain dates, with the means and under the conditions (eg sizes, catch) laid down in the Environment Code and specified by specific ministerial decrees of the Minister in charge of the Environment and/or the Minister in charge of Agriculture and Fisheries, or by prefectural orders. Fish, crustaceans and molluscs used in "professional fishing" (in rivers but especially at sea) are covered by international, european and national laws. In France these species are covered by the Rural and Maritime Fisheries Code, or by ministerial decrees of the Ministry of Agriculture, which regulate the periods of fishing, equipment used and quotas for fish size and catch. It should be noted that in 2014, more than 400,000 tonnes of wild fish and 80,000 tonnes of crustaceans and molluscs were fished through professional fishing activities in France [10].

Finally, there are animals "likely to cause nuisances", formerly called "pests" for which we mostly talk about destruction, and not hunting. It is the Law for the Reconquest of Biodiversity, Nature and Landscapes of 8 August 2016 that changed the name of the so-called harmful species [11]. This name is derived from the damage they are known to cause to crops or game animals, or even from threats to public or animal health. While we welcome the disappearance of the harmful nature of these species, evidently strictly and arbitrarily dictated by the concern to protect human activities, it is unlikely that this change of name will change the animals that are listed. The list of species that fall into this category with the authorized "destruction" methods is established by a ministerial decree. This list is adopted after consultation with the National Council for Hunting and Wildlife (CNCFS Conseil National de la Chasse et de la Faune Sauvage), where hunters are represented in the majority, while there is limited or no representation by nature conservation organizations.

But in no case, whether the wild animal is hunted, fished, or destroyed, do the texts make the slightest reference or even the slightest allusion to the notion of "sentience". Fishing fish, hunting game and pests are, according to the texts, presupposed insensitive to any pain or fear, or anguish, since they are "things". Lead pellets that break the wings or puncture the guts consider animals as being only targets, fish are considered as only catches, and those that come from industrial fishing suffer prolonged agony due to asphyxia, crushing in nets, as well as ripping and amputations. However, these processes are totally prohibited for any other domestic or captive wild vertebrate.

In addition to these categories of animal "management" (preservation, hunting, fishing, destruction), animals are also used for experiments in research on topics such as environmental pollution, epizootics, zoonoses (diseases common to humans and animals), or, for protected species, on their biology, migration, genetics, etc. Such research requires derogations from the prohibitions on their capture and handling; the rules in force in the field of experimentation on live animals then apply to them.

But there are other free wild animals, which do not belong to any of the lists described above [8]. Not only are they relegated to the status of "property without an owner" (art. 713 of the Civil Code) and considered as "things that belong to no one and whose use is common to all" (art. 714). What is even worse is that they have

no legal existence. A dozen small mammals, a few other vertebrates and countless invertebrates are then considered as "nothing". This fact is completely unacceptable from an ethical point of view. Moreover, it is shocking because animals are not "things", and they do not have to be "owned by someone" to exist. Deprived of being recognized as "sentient", they can be wounded, captured, mistreated, mistreated, put to death, with complete impunity. They can also be the subject of experimentation, without any precaution or rule. This is the case for all invertebrates, considered as an alternative experimental model to vertebrates' animals, with the only one exception of cephalopods, who's scientifically recognized "sentiency" has motivated the protection granted by the European Directive of 20 September 2010 on the protection of animals used for scientific purposes [12]. However, there is also a need to reserve the same protection for decapod crustaceans and embryos of oviparous species (reptiles and birds) that have "neurosensory development that equips them with the ability to feel pain, suffering and anxiety" [13]. A request was thus brought before the competent authorities: the Director General of Food of the Ministry of Agriculture replied that it was not France's responsibility to extend the scope of the Directive alone and no reply from the Ministry of Research was received. No amendments are currently being considered, even though Article 58 of the above-mentioned Directive 2010/63/EU provides for a thematic review "with particular attention [...] to technological developments and new knowledge and animal welfare » [12]. Noting of this situation is all the more distressing while considering the fact that a principle of non-regression of environmental law has been enshrined in the 2016 Biodiversity Act, according to which "environmental protection, ensured by legislative and regulatory provisions relating to the environment, can only be the subject of constant improvement, taking into account the scientific and technical knowledge of the time" [11]. Thus, many other molluscs, insects, crustaceans or worms will continue to undergo experiments or even dissections without anesthesia until they are no more prejudged « insensitive ».

A real gap has been created between the protection of the individual tamed or captive wild animal and the preservation of a group of a certain animal species living in a state of freedom. The recognition of "sentiency" of wild animals living in a state of freedom in the law, requires an evolution or rather a revolution in Man's attitude towards nature. The slightest reform in this law can result in fierce reactions. We can see that through the following examples: the amendment of Book II of the Civil Code to explicitly mention in a detailed manner "animal sensitivity" met with fierce opposition from agricultural groups while the project to mention it in the Environmental Code triggered vindictive opposition from hunting groups. These reactions had rather important impacts finally leading to the rejection of a bill advocating the above, proposed by Senator Roland Pavinelli [14]. The rejection of this Bill once again symbolizes the denial of the genetic relation shared by the human and animal species [15]. The position of hunters on this matter has not changed much since the Hunting Gazette declared the animal "closer to the plant than to man" [16].

The law for the recon quest of biodiversity, nature and landscapes of 8 August 2016 proposes a new definition of biodiversity in article 110-1 of the Environment Code. In this definition the notion of "animal species" is replaced by that of "living beings". This change can be seen as a way of refocusing "environmental law on individuals, "the beings" who compose the living" [17]. Would we be dealing with the emergence of a bio-centered vision of the environment? This can also be seen by the modification of the principle of prevention in article L110-1 II para. 2 of the Environmental Code, which was replaced by the principle of "preventive action and correction", thus moving from a passive to an active attitude. It is no longer a question of trying to reduce biodiversity damage by banning it, but it must be "positively compensated and therefore repaired". The legislator also specifies in a paragraph that this principle "must aim to achieve a goal of no net loss of biodiversity, or even to achieve a gain in biodiversity".

The regulation currently granted to wild animals are no longer consistent with contemporary scientific knowledge, unacceptable in ethical terms, and therefore aren't justified in legal terms. There is an urgent ethical need to develop this right in the legal regime; the simplest being that of integrating a definition of the animal based on its ability to feel pain, to experience suffering, fear and distress. The recognition of animals as living and sentient beings must concern domestic and wild animals, which are included in a universal definition that must be solemnly enshrined in the Civil Code and the Environmental Code. This would restore the unity of the animal world. This would also make it possible to establish a kind of mobile index within the wild animal world, whose immense diversity extends from the most archaic invertebrates to primates. This index could be used to distinguish zoological classes whose science believes that that animals belonging to this classes are capable of experiencing pain and/or other emotions, and other classes to which this sentience cannot be attributed owing the current state of knowledge, which could possibly change in the future, and prove the reality of such a biological ability in those invertebrate classes.

It would be appropriate to devise a principle of "presumption of sentience": an animal would then be claimed to be sentient and have senses as long as science has not proved that the characteristics of its species make it unfit to feel pain [18]. From an ethical point of view, the result would undoubtedly lead to increased animal protection and faster progress in research.

Today we are faced with the need of a profound reform, which the legislator will necessarily have to consider sooner or later. A definition of the sentient animal, new and scientifically sound is the basic premise of any ambitious reform of the animal legal regime, driven by modern concepts related to life, science and ethics.

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