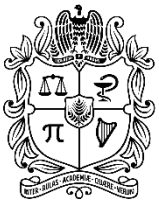

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Practical reason, criminal law and non-human animals. On the legitimacy of the criminalization of animal abuse

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To my parents Jorge and Maribel, without whose support none of this would be possible. To my sister and my niece, Paola and María, whom I thank for being part of my life. To Iris, for her unmatched support and affection. To Susy, Azabache, Violeta and Caramelo, for accompanying each of my days.

Monkey killing, monkey killing monkey over
Pieces of the ground
Silly monkeys
Give them thumbs, they make a club
To beat their brothers down
How they've survived so misguided is a mystery
Repugnant is a creature who would squander the ability
To lift an eye to heaven, conscious of his fleeting time here

Tool, (Song: Right in Two; Album: 10,000 Days).

Resumen

Razón práctica, derecho penal y animales no humanos. Sobre la legitimidad de la criminalización del maltrato animal

Este trabajo ofrece una respuesta parcial a la siguiente pregunta: ¿es legítima la criminalización de conductas que causan daño a animales no humanos? La respuesta parcial es que, si solo razones morales pueden justificar acciones y decisiones, entonces solo ese tipo de razones pueden dar cuenta de la justificación de la legitimidad de la criminalización y el castigo del maltrato animal en un sistema jurídico. La argumentación para llegar a esta respuesta consta de dos partes. En la primera, se estudian dos cuestiones. Por un lado, la semántica y la ontología detrás de las categorías utilizadas para formular la pregunta. Y, por otro lado, la ontología y la semántica de las categorías utilizadas en torno a esa pregunta en sistemas jurídicos como el colombiano. Para ello, se siguen tres pasos argumentativos. (1) Se defiende una concepción histórica de los taxones biológicos. (2) Se examinan las nociones de bienestar animal, sintiencia y maltrato. Y (3) se examina el estatus constitucional de los animales no humanos y del maltrato animal en el marco de las decisiones de la Corte Constitucional de Colombia. A partir de esto, en la primera parte, se argumenta a favor de dos afirmaciones. Por un lado, la imposibilidad de sostener desde una posición esencialista la distinción radical entre los seres humanos como únicos seres con dignidad y los animales no humanos como cosas y como seres sintientes. Y, por otro lado, la imposibilidad de fundamentar racionalmente el deber constitucional de protección animal en la noción de dignidad humana. En la segunda parte, se clarifican tres categorías, a saber, “norma jurídica”, “legitimidad” y “razón práctica”. Considerando esto, se sostiene que, si bien no existe una relación conceptual necesaria, sí existe una relación justificatoria necesaria entre el derecho y la moral. En consecuencia, la justificación o legitimidad de normas jurídicas como aquellas a través de las cuales se criminaliza una conducta se encuentra exclusivamente en razones morales.

Palabras clave: Animales no humanos, sintiencia, dignidad humana, razón práctica, legitimidad o justificación de normas jurídicas y razones morales.

Abstract

Practical reason, criminal law, and non-human animals. On the legitimacy of the criminalization of animal abuse.

This work offers a partial answer to the following question: is the criminalization of behaviors that cause harm to non-human animals legitimate? The partial answer is that, if only moral reasons can justify actions and decisions, then only those types of reasons can account for the justification of the legitimacy of the criminalization and punishment of animal abuse in a legal system. The argument to arrive at this answer consists of two parts. In the first, it is studied two issues. On the one hand, the semantics and ontology behind the categories used to formulate the question. And, on the other hand, the ontology and semantics of the categories used around that question in legal systems such as the Colombian one. To do this, three argumentative steps are followed. (1) A historical conception of biological taxa is defended. (2) Notions of animal welfare, sentience and abuse are examined. And (3) the constitutional status of non-human animals and animal abuse is examined within the framework of the decisions of the Constitutional Court of Colombia. From this, in the first part, it is argued in favor of two statements. On the one hand, the impossibility of sustaining from an essentialist position the radical distinction between human beings as the only beings with dignity and non-human animals as things and as sentient beings. And, on the other hand, the impossibility of rationally grounding the constitutional duty of animal protection on the notion of human dignity. In the second part, three categories are clarified, namely, “legal norm”, “legitimacy” and “practical reason”. Considering this, it is argued that, although there is no necessary conceptual relationship, there is a necessary justificatory relationship between law and morality. As a consequence of that, the justification or legitimacy of legal norms such as those through which a behavior is criminalized is found exclusively on moral reasons.

Keywords: Non-human animals, sentience, human dignity, practical reason, legitimacy or justification of legal norms and moral reasons.

Content

Introduction

Homo Sapiens have used non-human animals for millions of years. In fact, from the beginning of the evolution of our species to the present day, humans have hunted, harmed, and killed non-human animals to obtain energy to live (Kalof, 2007). Likewise, and for thousands of years, humans have shared their daily lives with non-human animals such as dogs, cats, horses, eagles, cows, etc. This has been possible through their domestication, for other purposes such as, for example, companionship, agriculture, hunting, wars, experimentation, entertainment, etc. (Kalof, 2007).

On the other hand, as social animals, human beings have lived in groups that were constituted at the beginning of our evolution by hundreds of individuals and today by millions of them. Since average human beings can develop self-awareness, moral agency, and autonomy in adulthood (Rottschaefer, 1998; DeGrazia and Millum, 2021), cooperation between interested members of those groups has been made possible through the development of normative systems.

These systems attempt to regulate their behaviors and subsequently create complex systems of social institutions, such as states, to promote their wellbeing and interests and protect them from harms.[1] Although others can be mentioned, such as religion[2], human beings have mainly developed two normative systems to cooperate: morality and law.[3]

[1]For authors of the sociobiological movement, morality and law are adaptations of groups to cooperate. These adaptations have evolved by natural selection, because a group with them has a better chance of surviving and reproducing than those groups of individuals that do not have them. In this regard, see Green (2014) and Haidt (2019). See also: Carnelutti (2018), for another account for the birth of law in our societies.

[2]In Muslim and Jewish cultures there is no clear difference between law and religion. In the case of Muslim culture, law and Islam are intertwined in Sharia law; while, in Jewish culture, Judaism and law are inextricably linked in the Talmud. In the Middle Ages and even before the Enlightenment, law in the Christian world was strongly influenced by the Bible and Christian thought.

[3]For Héctor Neri-Castañeda, a normative system is a system of rules that establishes the moral and/or legal correctness of the way in which a rational agent should or should not behave. In fact, Castañeda states: "Many philosophers have been concerned with the foundations of morality, and many others with the foundations of law. In this book we sharpen and generalize the problem to include the general foundations of all normative systems. In general terms, a normative system is a certain set of rules, or norms, or judgments, or declarations, that formulate permissions, licenses, rights, obligations,

For many centuries and with some exceptions[4], the relationships between non-human animals and our normative systems have been dominated by reasoning based on two assumptions. According to the first, members of *Homo Sapiens* are the only beings that can have certain unique characteristics. Those characteristics are reason, rationality, autonomy, moral agency, wellbeing and interests, that other beings, such as non-human animals, do not have and could never have (Descartes, 2009).[5]

According to the second assumption, morality and law have been developed to promote and protect from harm those beings called "persons", who have those types of characteristics mentioned. Therefore, it is stated that those beings with agency and moral autonomy have legal and moral obligations only exclusively towards "persons" (Kant, 1999).[6]

Now, if these assumptions are true, then our normative systems should only promote the wellbeing and autonomy of beings that may have these characteristics, that is, only individuals that belong to the species *Homo Sapiens*. This reasoning implies that, that non-human animals do not have characteristics such as reason, rationality, autonomy, moral agency, wellbeing, and interests and are not "persons" but "things". Then, it is argued that they are not beings with respect to which individuals with moral agency and autonomy have legal and moral obligations (Kant, 1999). For that reason, the conclusion of these ideas is that neither law nor morality should protect non-human animals from harm.

Despite some exclusions[7], our legal systems, for a long time until the last three or four decades of the 20th century, did not criminalize animal abuse, because it was considered that non-human animals not only were not "persons", but they could not be harmed. These ideas have implied that criminal law and, consequently, criminalization and criminal punishment should be exercised only on those behaviors that harm human beings (Beccaria, 2007 and Carrara, 1971).

However, this traditional way of thinking has been challenged by three ideas. First, there are non-human animals that may have wellbeing and interests and, as a result, may suffer harm (DeGrazia and Millum, 2021). Second, there are individuals who belong to the *Homo Sapiens* species and who do not meet all the characteristics required to be a "person" in a legal system like the

requirements, duties, commands, prohibitions, interdictions or some type of correctness or incorrectness of some course of action – or, alternatively, a certain set of do's and don'ts and dos and don'ts" (1975, p. 1). See also: Carnelutti (2018).

[4] The most prominent exception is Porphyry (Cochrane, 2010). For this ancient Greek thinker, non-human animals are beings that can be harmed.

[5] In turn, this way of thinking is common in antiquity and middles ages. See: (Cochrane, 2010).

[6] From a different account of Kantian ethics about non-human animals, see Korsgaard, C. (2018).

[7] One of such exceptions is paradoxically found in some laws protecting non-human animals enacted during the Nazi regime in Germany (Molina, 2018, pp. 113-140).

Colombian one. Third, the only requirement to be protected from harm by law and morality is the capacity for wellbeing (DeGrazia, 1996). If that is correct, it is pointed out that individuals with moral agency and autonomy have moral and legal obligations toward those non-human animals who have wellbeing. The conclusion of this reasoning is that law and morality should also protect non-human animals from harm.

Since the last four decades of the last century, and without totally rejecting traditional thinking, this argument has created different perspectives on the relationships between non-human animals and our normative systems (Hurd, 2019). These perspectives have materialized in at least two ideas. Some non-human animals are more than "things." They have capacities such as sentience and wellbeing that must be considered by law and morality and, consequently, they can be harmed.

In law, these ideas have been promoted through the enactment of laws with two main features (Chiesa, 2008). On the one hand, they recognize that some non-human animals are sentient beings. And, on the other hand, they criminalize some behaviors of individuals with moral agency and autonomy that harm certain taxa of non-human animals. (Hurd, 2019; Chiesa, 2008).

However, for some thinkers and for some people, even though our current legal systems today have these types of laws, they are not enough, because they do not criminalize behaviors of human beings that harm millions of non-human animals (Francione, 2009). For them, these behaviors, related for example to activities such as agriculture, experimentation, entertainment and culture, constitute the main source of harm against non-human animals in our societies.

Within the framework of these ideas, some defenders of the animal movement insist, firstly, that some non-human animals not only have wellbeing and interests, but also have moral rights that must be recognized by law (Francione, 2009 and Regan, 2004). Secondly, they maintain that the non-criminalization of a multitude of behaviors that harm them implies the violation of their rights and unfair treatment that in some cases justify civil disobedience [8]. This means that for them there are cases in which, faced with unfair treatment and animal abuse permitted by law, a legal system should be disobeyed for moral reasons, to protect non-human animals from harm and violations of their rights caused by others human beings[9].

[8]See: Thoreau (2008, pp. 29-57) and Greenawalt (1991, pp. 176-181).

[9] In common law there is a great debate about the constitutionality of what has been called "ag-gag laws" These types of laws restrict the freedom of expression of animal rights defenders by prohibiting and even in some cases criminalizing some conduct, such as the recording of behaviors and activities that seriously harm non-human animals in agroindustries (industrial animals complex). For some lawyers, these laws are unconstitutional because it is not possible to offer a constitutional justification for restricting the freedom of expression of animal rights activists in this way. Watch: Video of Cambridge Center for Animal Rights Law. (Chanel). (2020): https://www.youtube.com/watch?v=f0DchEupyb8.

In the face of civil disobedience, defenders of the animal rights movement can be punished by a legal system, if their acts of civil disobedience are criminalized. To illustrate this point, it can be mentioned that in the United States a federal law was enacted in 2006, called the *Animal Enterprise Terrorism Act* (AETA), which criminalizes and punishes conduct by individuals that, with the purpose of damaging or interfering with the operations of an animal company, "damages or causes the loss of any real or personal property" or places a person with a reasonable expectation of injury.[10]

This panorama shows the perplexities and difficulties that non-human animals have generated in our normative systems and opens several questions. In this work, the following question will be partially answered: is the criminalization of behaviors that cause harm to non-human animals legitimate? The answer to that question is that, if only moral reasons can justify actions and decisions, then only those types of reasons can explain the justification of the legitimacy of the criminalization and punishment of animal abuse in a legal system.

To elaborate the answer to that question, in the first chapter it is argued in two statements. On the one hand, the first is that taxa such as *Animalia* and *Homo Sapiens* are historical entities; and, on the other hand, the second is that the necessary and sufficient condition to have wellbeing is to be sentient. In the second chapter, the constitutional status of non-human animals and the criminalization of animal abuse within the Colombian legal system is studied.

In the third chapter, three categories are clarified, namely, "legal norm", "legitimacy" and "practical reason". In the last chapter, the thesis that is defended is that law and criminal law can

[10]Animal Enterprise Terrorism Act (AETA) says: "'§ 43. Force, violence and threats involving animal enterprises "(a) OFFENSE.—Whoever travels in interstate or foreign commerce, or uses or causes to be used the mail or any facility of interstate or foreign commerce—"(1) for the purpose of damaging or interfering with the operations of an animal enterprise; and "(2) in connection with such purpose: "(A) intentionally damages or causes the loss of any real or personal property (including animals or records) used by an animal enterprise, or any real or personal property of a person . or entity that has a connection, relationship or transactions with an animal business; "(B) intentionally places a person in reasonable fear of death or serious bodily injury to that person, to a member of that person's immediate family (as defined in section 115), or to a spouse or intimate partner of that person. person for a course of conduct involving threats, acts of vandalism, property damage, criminal trespass, harassment or intimidation; or "(C) conspires or attempts to do so; will be sanctioned according to the provisions of section b). "(b) PENALTIES.—The punishment for a violation of section (a) or an attempt or conspiracy to violate subsection (a) shall be: "(1) a fine under this title or imprisonment of not more than 1 year , or both, if the crime does not place another person in reasonable fear of serious bodily injury or death and— "(A) the crime does not result in economic damage or bodily injury; or "(B) the crime results in economic damage not exceeding $10,000; "(2) a fine under this title or imprisonment for not more than 5 years, or both, if no bodily injury results and— "(A) the offense results in economic damage exceeding $10,000 but not exceeding $100,000; or "(B) the crime places another person in reasonable fear of serious bodily injury or death; "(3) a fine under this title or imprisonment for not more than 10 years, or both, if— "(A) the offense results in economic damage exceeding $100,000; or "(B) the offense results in substantial bodily injury to another person; "(4) a fine under this title or imprisonment for not more than 20 years, or both, if— "(A) the offense results in serious bodily injury to another person; or "(B) the crime results in economic damages exceeding $1,000,000; and "(5) imprisonment for life or for any period of years, fine under this title, or both, if the offense results in the death of another person."

only be normatively justified for moral reasons. This implies that the law does not provide by itself normative reasons to justify decisions and actions. This entails that the normativity of law relies exclusively on morality.

1. Chapter 1: non-human animals, consciousness and animal abuse

This chapter argues, on the one hand, that taxa such as *Animalia* and *Homo Sapiens* are historical entities; and, on the other hand, that the necessary and sufficient condition to have wellbeing is to be sentient. The first idea is defended by rejecting the thesis of essentialism and non-essentialism to explain the nature of taxa such as *Animalia* and *Homo Sapiens*. The second idea is supported by arguing that only phenomenal consciousness can explain the subjective point of view required to have wellbeing. Considering the above, the objective of this chapter is to clarify the semantics and ontology behind the categories used to formulate the problem that this essay addresses.

1.1. The ontological nature of the taxa *Animalia* and *Homo Sapiens*. A historical approach

Thinkers in the philosophy of biology have defended one of three approaches to the classification of biological individuals[11] and taxa[12], namely, the essentialist, the non-essentialist or the historical. This implies that, according to the classification approach adopted, there are at least three theories about the ontological nature of biological taxa such as *Homo Sapiens* and *Animalia*.

If the approach of essentialist classification is accepted, from authors such as Plato, Aristotle and Linnaeus, it is proposed that biological taxa such as *Homo Sapiens* and *Animalia* are natural classes. In that sense, these are categories that are not created by human beings but are categories

[11]Within the framework of the more general and abstract notion of "individual", the notion of "biological individual" will be used synonymously with the notion of "biological organism". See: Mayr (1982, pp. 51-59), Curtis (1999, p. 30), Biggs (2012, pp. 6-10) and Wilson and Barker 2019).

[12] In general terms, the expression "taxon" refers to populations of biological individuals that can be categorized into any of the taxonomic categories to classify biological individuals and populations of those individuals. In biology, a hierarchical system of taxonomic categories has been established, where the lower categories are covered by the higher ones. Such a system begins with the category "species" and ends with the category "domain." So, for example, homo sapiens is a taxon that is classified in the taxonomic category species, and, in turn, the taxon Animalia is classified in the taxonomic category kingdom. Both the Animalia taxon and the Homo sapiens taxon are grouped into a single taxon called Eukarya, which is located in the Domain taxonomic category. See: Mayr, (1982); Curtis (1999).

that are really in nature and must be "discovered". According to this theory, a natural kind has an essence or nature that never changes. That essence is a necessary property or set of properties that all and only members of a certain natural class must have (Ereshefsky, 2004, pp. 16-24). Therefore, the correct definition of a category that refers to a natural kind is one that expresses its essence.

Within the framework of the philosophy of science, the paradigmatic cases of natural kinds are the elements of the periodic table. The members of an element in that table are recognized by a common atomic structure, that is, the number of protons found in the nucleus of each atom of that element. This common atomic structure is believed to be the essence of each element as a natural kind and is shared by all and only its members (Garvey, 2007, pp. 127-128). Consequently, if *Homo Sapiens* and *Animalia* are natural kinds, the members who belong to them possess a necessary property or a set of properties that never change.

But what is the nature or essence of *Homo Sapiens* and *Animalia*? The best theory of this type of essentialism is found in the philosophy and biology of Aristotle. In *Metaphysics*[13] and similarly to Plato, Aristotle developed an ontology in which there are types of inanimate things and living beings with specific essences that are instantiated in exemplars of those types. This nature consists of the ability of a type to achieve defined ends, which in the case of biological organisms consists of achieving a certain type of life. With this idea, Aristotle postulated a method of classification in which a genus is dichotomously divided into species. And, for him, the essence of "a species is a combination of its genus and the differences that distinguish it from the other species of that genus" (Ereshefsky, 2004, p.20).

Aristotle established only two kinds of living beings: animals and plants. While the essence of plants is simply life itself, the essence of animals is sensation and self-movement. The human being is a species within the animal genus whose nature is to achieve a life dominated by rationality. For this reason, Aristotle stated that animals and human beings are types that exist in nature and have an essence. However, the specific essence of the human being is to be a rational animal and the correct definition of that category is only one that, therefore, expresses the genus to which it belongs and the trait that characterizes it (Ereshefsky, 2004, pp. 18-20).

The above understanding would not be challenged until Darwin. Before him, natural history and philosophy assumed without discussion that the human being is a natural type with an immutable

[13] See: Aristotle, 2016.

essence that, for some thinkers, such as Plotinus or Thomas Aquinas, was given to him by God and by which he can be differentiated from anything else in nature (Lovejoy, 2001).

Within the framework of a non-essentialist classification approach in which only individuals exist and there are no natural types or classes with immutable essences, it is pointed out that taxa such as Homo S*apiens* or *Animalia* do not exist in nature. They are nothing more than categories created to improve our communication and achieve a better theoretical understanding of the individuals to whom those words refer (Ereshefsky, 2004, pp. 24-28). So, the definition of *Homo Sapiens* or *Animalia* is not determined by a non-existent essence that all and only members of a natural class must share. That definition depends on the rules of use and the theoretical purposes of biology that determine the meaning of those linguistic expressions.

The theoretical assumptions about these ideas are the rejection of metaphysical monism and classificatory monism and, consequently, the acceptance of metaphysical pluralism or metaphysical agnosticism and some form of classificatory pluralism[14]. For this point of view, there is more than one way in which reality is divided or it is impossible to know how reality is divided, and it can be classified in different ways (Ereshefsky, 2004).

The consequence of this is that taxa such as *Animalia* and *Homo Sapiens* are not natural classes but rather categories for classifying biological individuals by selecting some similarities and characteristics between them. For the strictest classificatory pluralism, the reasons for classifying organisms into a taxon such as *Animalia* and *Homo Sapiens* are simply arbitrary. For the less strict classificatory pluralism, organisms can be classified in different ways, but only within the framework of our best biological theories (Ereshefsky, 2004).

On the other hand, since Darwin, the historical approach claimed that biological taxa are historical entities. These entities are those whose members are biological individuals that are connected by causal relationships in a specific space and time and are always subject to small and gradual changes in their traits (Odenbaugh and Griffiths, 2020, pp. 4-5). Therefore, the correct way to identify and classify members of taxa should not rest on similarities or essential properties, but on those causal relationships (Ereshefsky, 2004, pp. 28-38).

This conception is based on two theories: the theory of evolution by natural selection and the theory of common ancestry. This means that organisms belonging to *Animalia* and *Homo Sapiens*

[14]For a contemporary defense of essentialism about biological natural kinds, see Laporte (2004) and Putnam (1975).

are connected by causal relationships in a given space and time and are subject to small and gradual changes in their traits. This is the outcome of the fact that they have derived from ancestral taxa on which natural selection has selected the organisms better fitted to survive and reproduce (Biggs *et al.*, 2012, p. 495 and Ghiselin 1997, pp. 37-50).

Therefore, some biological individuals are classified as *Homo sapiens* or *Animalia* due to the fact that they descend from a more recent common ancestor than other populations of organisms. For *Homo Sapiens*, research has shown that their common ancestor could be an organism belonging to the genus *Homo*, while, for members of the category *Animalia,* their common ancestor is believed to be an ancestral *protist*. The theories developed by Darwin lack a piece that was only elaborated when the synthetic theory of evolution integrated the theories of common ancestry and evolution by natural selection with Mendelian genetics (Ereshefsky, 2004, pp. 109-112).

The synthetic theory of evolution, accepting Mendelian genetics, asserts that taxa such as *Animalia* and *Homo Sapiens* not only descend from a common ancestor and can vary in their traits due to natural selection, but can also transmit those traits through reproduction to other generations (Ereshefsky, 2004, pp. 109-112). The inheritance of these traits is only possible if the different generations of a taxon such as *Animalia* and *Homo Sapiens* are connected by causal relationships. If these theories are true, it must be concluded that *Animalia* and *Homo Sapiens* are historical entities, insofar as their members are connected by causal relationships that allow them to transmit their traits to other generations.

That conclusion indicates that, if members of taxa such as *Animalia* and *Homo Sapiens* undergo changes in their traits, they cannot be natural classes with necessary properties that all and only their members have as in the case of the elements in the periodic table. The reason behind this is natural selection. In this context, organisms can have or develop the same traits that other organisms possess. In turn, organisms may not only lose the trait or traits that make up their essence, but also become extinct forever like most dinosaur species (Ereshefsky, 2004, pp. 95-102). Therefore, accepting the conception of taxa as historical entities means rejecting essentialism (Mayr, 1982, pp. 45-47; Sober, 1994, pp. 201-232).

Despite lacking essences, if taxa such as *Animalia* and *Homo Sapiens* are historical entities, they are not only categories to group individuals by their similarities. Instead, they are groups of organisms that are similar, because of sharing a specific common ancestor more recent than those of other taxa. If taxa such as *Animalia* and *Homo Sapiens* were considered only as categories to identify

individuals by their similarities, then there would be two inadmissible consequences, in the framework of our biological theories.

On the one hand, in those groups of organisms in which sexual dimorphism has evolved, as is the case of *Homo Sapiens*, the two sexes of a species would be considered two different groups of organisms. As a matter of fact, as Ereshefsky has stated, that is why "evolution can make the males of one species more similar to the males of another species than they are with respect to their females" (2004, p. 105). And, on the other hand, in those groups of organisms with various stages of development in which they exhibit different traits, one of those organisms could be identified and classified into several taxa in those various stages of its life (Ereshefsky, 2004, p. 104).

In short, the only way to avoid these consequences of accepting a non-essentialist approach is to recognize that taxa such as *Animalia* and *Homo Sapiens* make up groups of individuals that share a specific, more recent common ancestor. This common ancestor is the reason behind the similarities found among the members of a taxon. Thus, the historical conception of taxa excludes the non-essentialist approach. Based on what has been argued so far, it must be established that, in the remainder of this work, *Animalia* and *Homo Sapiens* are considered historical entities, groups of organisms with a common ancestor. Therefore, organisms that are classified as human beings or *Homo Sapiens* have neither an essence nor a nature.

1.2. Consciousness and animal abuse

It is useful to begin with a general characterization of wellbeing. In the field of philosophy and value theory, at least four types of values are distinguished, and, in addition, wellbeing is defined as a prudential value (Crisp, 2021, pp. 1-3)[15]. This type of value is related to what is intrinsically and not instrumentally good for an individual. Intrinsically good means that something is ultimately or in itself good. On the contrary, instrumentally good means that something is good as a means to something else. So, the capacity for wellbeing is the capacity to have a life that can go well or badly on its own.

The approach defended in this work is the following: the capacity to have certain mental states, known as "feelings", that is, the capacity to be sentient, is the necessary and sufficient condition to

[15] In value theory, it is distinguished among four types of values: moral value, perfectionist value, aesthetic value and prudential value. Moral value is related with what is morally correct. Perfectionist value is what is good for a type of things. Aesthetic value is linked with the concept of what is beautiful. And prudential value is related with what is good for an individual. (Crisp, 2021)

have the capacity for wellbeing.[16] If this is so, then it must be asked what it means to be sentient and why sentience is the necessary and sufficient condition for having wellbeing and interests.

Since the purpose of this work is different from that of deepening the study of consciousness and mental states, a general characterization of the aforementioned notions is sufficient for expository clarity. According to Searle (1985), consciousness is related to those mental and subjective states, events or processes of an individual, either during their waking life or during their dreams with a lower level of intensity. On the other hand, DeGrazia defines, first, a mental state as an event or process of an individual that involves information processing and can be potentially conscious and, second, feelings as a set of mental states "as sensations or emotional states that are typically pleasant or unpleasant (DeGrazia, 1996, pp. 97-102).

However, different levels of mental and conscious states can be found in various individuals and taxa. To illustrate this and fin line with the available evidence, the consciousness and mental states of an octopus are not the same as the consciousness of an average adult human, although they can share many similarities, such as having some types of feelings. For this reason, it has been proposed that consciousness and mental states can be found on a spectrum and continuum, ranging from the least sophisticated to the most sophisticated.

Following DeGrazia (1996), six levels of consciousness and mental states can be distinguished in order of sophistication:

(A) *Access consciousness*: it may be doubted whether it is a proper type of consciousness. It is the ability of an organism to respond to a stimulus and process information, without being able to experience and feel that information and stimulus as mental states. This type of consciousness constitutes a capacity, known as *nociception*. This capacity is the first step to feeling pain and is "the detection of potentially damaging stimuli for tissues by specialized neural organs, *nociceptors*, which fire nerve impulses along the axons" (DeGrazia, 1996, p. 99).

(B) *Sentience or phenomenal consciousness*[17]: an individual can experience reality through his or her ability to feel or have certain mental states known as feelings. These states can be pleasant such as pleasure, enjoyment and happiness or unpleasant ones such as pain, fear, anxiety, anguish

[16]Cochrane (2007, pp. 33-40). For his part, Nagel has defined a conscious experience as "a state such that there is something that is like being in it" (1974, pp. 435-450).
[17] Peter Godfrey -Smith defends the thesis that, in nature, sentience can be found to different degrees in the different taxa within the Kingdom Animalia. See: Harvard Philosophy Department (Chanel), (2023a) and (2023b).

and suffering. For DeGrazia (2007, pp. 129-165), there are good reasons to believe that the capacity to have feelings implies an individual's capacity to have desires and beliefs.

Also, DeGrazia claims that non-human animals have desires and beliefs. For him, there is evidence (for example, in complex processes such as learning) that shows that they can develop, in some sense, general categories to grasp reality. Nonetheless, there is a common agreement that they cannot do it with the same complexity normally attributed to an average adult human being (DeGrazia, 2007, pp. 130-142).

(C) *Higher-order thinking:* This is the ability of an individual to have higher-order mental states and thoughts about first-order or lower-order mental states constituted, for instance, by feelings, desires, and beliefs. In other words, consciousness is understood as the ability of an individual to reflect on his or her thoughts and mental states (Carruthers, 1992).

(D) *Self-consciousness*: it has been characterized in various ways, but, as DeGrazia states, in self-consciousness different types and degrees of self-awareness of an individual can be found (DeGrazia,1996, pp. 130-142). These types and degrees are theses. Firstly, bodily, psychic and social self-awareness. These types are the ability of an individual to recognize his or her own body, mental states and social position within a group as opposed to the rest of the environment and other individuals.

Secondly, the sense of time by virtue of memory and anticipation. By this sense, an individual can have the capacity to have mental states as representations of the past and the future that can be conscious. Thirdly, agency as the capacity to perform intentional actions, which, in the theory of action, are nothing more than behaviors carried out for reasons, which consist of appropriately related desires and beliefs. For some authors, agency presupposes self-awareness, because the former implies that an individual has the capacity to conceive of himself as the same individual who desires X and will satisfy its desire in the future (DeGrazia,1996).

(E) *Moral agency*: is the ability of an individual, first, to deliberate and act on the basis of moral reasons and, second, to justify his or her decisions and behavior with moral reasoning, that is, an argument that expresses moral reasons (Rottschaefer, 1998). The latter implies that moral agency,

at the level of moral justification, requires language, which is an act of communication with two elements, namely, semantics and syntax[18].

(F) *Autonomy and the concept of person*[19]: it is the conjunction of freedom of action with freedom of will. The first is the ability of an individual to act in accordance with his or her desires and beliefs and without external restrictions (Frankfurt, 2006). The second, the capacity of an individual by which he can reflect, change or reaffirm his first-order desires, beliefs and reasons to act for other higher second-order preferences, desires, values, beliefs or desires (Frankfurt, 2006, pp. 25-46). According to this, an autonomous being is one with the capacity to perform actions through which he exercises his freedom of will. In other words, an autonomous being is one that performs autonomous actions. Therefore, autonomy is related to an individual's ability to critically reflect on what type of life and conception of the good they want to lead (Cochrane, 2007).

This characterization of consciousness and mental states makes it evident that higher and more complex levels are related to lower or less complex mental phenomena on that spectrum and continuum.

After describing what it means to be sentient, it is possible to address from a better position the next question: why sentience is the necessary and sufficient condition for having wellbeing and interests. Before doing so, however, the notions of necessary and sufficient conditions must be clarified. What means that phenomenal consciousness is the necessary and sufficient condition to have wellbeing and interests is two things. The first is that without phenomenal consciousness there is no wellbeing. The second is that there is nothing else beyond sentience that can give rise to conceiving that an individual has the capacity to lead a life that can go well or badly on its own (Cochrane, 2007).

From the point of view of Cochrane (2007, pp. 33-40), the ability of an individual to have a life that can go well or badly is impossible without the existence of an irreducible and subjective point of view that requires a certain level of consciousness and mental states. Then, if the emergence of this subjective point of view is found, initially, in that characterization of phenomenal consciousness, it can be stated that sentience is the necessary condition to have wellbeing and

[18]For the purposes of the present exposition of the argument, the idea of "communication" can be understood as the successful and deliberate transmission of information from one individual to another.
[19] The notion of "person" will be used synonymously with the expression "subject of rights."

interests. As a result of this, if an entity does not have phenomenal consciousness, then it cannot have wellbeing and interests.

In addition to what has been mentioned, it is also important to analyze other theories about the sufficient and necessary conditions for wellbeing. For some points of view, called environmental ethics (Cochrane, 2007), biological life is the necessary and sufficient condition for wellbeing. However, there is a current possibility of thinking and of developing an artificial life and intelligence -a robot, for example- with phenomenal consciousness and even with more sophisticated levels of consciousness.

Hence, it could be stated that a robot without biological life but with that level of consciousness could have wellbeing. This denies the fact that without biological life an individual cannot have the capacity to have a life that goes well or badly by itself[20]. In Cochrane's perspective, this is why biological life is not necessary to attribute the capacity for wellbeing to an individual (Cochrane, 2007, pp. 32-33).

Environmental ethics has also claimed that all living beings have wellbeing. From this perspective, it is identified, in a similar way to Aristotle, the wellbeing of an individual with the full development of the biological ends or functions of the type to which it belongs (Cochrane, 2007). However, such an identification cannot be made, because the prudential value cannot be reduced to a perfectionist value. In fact, what is good for a species of entity, such as the biological purposes or functions of a species, can be classified as a perfectionist value. But those functions cannot be classified as a prudential value such as wellbeing, which consists of what is good for the life of the individual by itself.

That is why, although individual living beings can have certain purposes or biological functions and respond to stimuli, some of them cannot have wellbeing and interests. The reason behind this is that they lack a subjective and individual point of view that allows them to conceive what is good or bad for them. This involves the absence of the capacity for experiencing what can harm or benefit them. And, as a result of that, this absence implies the inability to have a life in which things go well or badly for them (Cochrane, 2007). Given this, it can be concluded that phenomenal consciousness is a necessary condition for wellbeing. In conclusion, due to the fact of lacking this level of consciousness, not all living beings have the capacity for wellbeing.

[20]For some authors such as John Searle, it is impossible for a robot with these characteristics to be developed in the future (cf. Cochrane, 2007, pp. 32-33).

Some authors such as Carruthers who have proposed "higher-order theories of consciousness". He argues that to have wellbeing, not only is phenomenal consciousness necessary, but also other more sophisticated types of consciousness, such as higher-order thoughts, self-awareness or autonomy[21]. To reject these ideas, it must be remembered that this work postulates the idea that consciousness and mental states can be found on a spectrum and continuum. This spectrum claimed that lower levels do not require higher ones (DeGrazia, 1997).

That implies that phenomenal consciousness does not require a higher level of thought consciousness. That is why the vast majority of an individual's subjective and irreducible mental states such as feelings were factually felt and experienced by that individual, even though they may never have been subject to further reflection by higher order thoughts. Consequently, a "higher level of thought consciousness" such as higher order thoughts, self-awareness and/or autonomy are not the necessary condition for having wellbeing and interests. In summary, it can be established that the necessary and sufficient condition to have the capacity for wellbeing is phenomenal consciousness.

After defending this thesis, the following question must be answered: what entities have phenomenal consciousness? In the first section of this chapter, it has been argued that all taxa such as *Homo Sapiens* and *Animalia* are historical entities constituted of populations of individuals that are causally related by reproduction. As a consequence of that, these populations share many similarities by descending from the same common ancestor and not by participating of the same essence. It was also stated that new taxa (species and higher taxa) are the result of gradual and small changes in ancestral taxa. Those changes are explained by natural selection through which biological individuals are selected with those adaptations that make them better fitted to survive and reproduce.

Thus, if in many of the individuals of a taxon, traits such as consciousness and mental states are found along with certain behaviors and neurophysiological structures such as more or less complex nervous systems, it is possible to infer that almost all members of that taxon have those traits. This does not involve ignoring that there is a possibility that some members of a taxa do not have those traits for various reasons such as mutations, stages of its development and so on. The explanation of this is that taxa are populations of individuals and natural selection causes the individuals of a taxon to be subject to change over time. For this reason, and as Cochrane has explain (2007, pp. 40-47), the features and capacities, such as the phenomenal consciousness of each

[21]In this regard, see: DeGrazia (1997, pp.112-115) and Carruthers (1992).

individual member that is classified in a certain taxon, must be established and judged case by case, considering the best available evidence.

So, phenomenal consciousness implies a subjective and irreducible point of view that is shaped by certain subjective mental states of an individual called feelings. This means that is impossible to have direct access to those subjective mental states. Then, the evidence about them can only be inferred indirectly for three types of reasons, namely, behavior, neurophysiology and evolutionary history.

These three types of reasons are used to argue by analogy. Indeed, it is argued that some behaviors, some neurophysiological structures such as nervous systems, and a certain natural history are correlated with the existence of phenomenal consciousness in human beings. Considering that premise, it is concluded that it is very likely that if other entities have those or similar behaviors, neurophysiological structures, and natural histories, then they can be considered sentient beings (DeGrazia, 1997, pp. 75-96).

Although there are possible exceptions, research has shown that the majority of individuals that belong to the taxa *Vertebrate* and *Cephalopod* have the behaviors, neurophysiology and evolutionary history that are correlated with the existence of sentience in humans. Instead of that the majority of individuals that do not belong to those taxa lack those behaviors, neurophysiology and evolutionary history (Cochrane, 2007, pp. 41-47). If that is right, then there is not enough evidence to attribute phenomenal consciousness to these latter individuals. Hence, it can be stated that due to lack of sentience they cannot have wellbeing, even if they can respond to stimuli and may have certain biological functions.

In fact, those individuals that do not belong to the *Vertebrate* taxa and the *Cephalopod* invertebrate class also do not show behaviors that are correlated with sentience. They lack behaviors such as avoidance, inhibition, adaptation, learning, calling and asking for help, limiting the use of injured or overloaded body parts, motor tension and autonomous hyperactivity. For that reason, they do not deploy the behaviors correlated in humans with the experience of unpleasant emotional mental states. They also do not possess neurophysiological structures, such as brains and nervous systems, associated in human beings with the ability to have phenomenal consciousness (DeGrazia, 1997, pp. 97-128).

Furthermore, bearing in mind the theory of evolution by natural selection and the theory of common ancestry, it is possible and highly likely to infer that these individuals that do not belong to the taxa *Vertebrate* and *Cephalopods* do not have traits such as consciousness and mental states. The explanation of this is that their common ancestor does not have the behaviors and neurophysiological structures such as more or less complex nervous systems associated in humans with sentience.

Though, it must be remembered that taxa are populations of individuals and natural selection causes the individuals of a taxon to be subject to change over time. Therefore, there is always a possibility that some members of those taxa may have those traits such as mental states for various reasons, such as mutations, for example. To sum up, according to the available evidence, individuals that do not belong to the *Vertebrate* taxa and the invertebrate class *Cephalopods* do not have phenomenal consciousness.

In contrast to that, research has shown that most individuals belonging to the *Vertebrate* taxa and the invertebrate class *Cephalopods* have behaviors, neurophysiology, and evolutionary history that are correlated with the existence of phenomenal consciousness in humans. Indeed, those individuals that belong to these taxa exhibit behaviors such as avoidance, inhibition, adaptation, learning, calling and asking for help, limiting the use of injured or overloaded body parts, motor tension and autonomic hyperactivity. Moreover, they have similar or almost similar neurophysiological structures as brains and nervous systems associated in human beings with the capacity for phenomenal consciousness (Cochrane, 2007, pp. 41-47).

To illustrate this point, the Roslin Institute in Edinburgh found evidence in trout of both *nociception* and pain, because individual trout, when faced with a possible harmful stimulus, modify their behaviors (Cochrane, 2007, p. 44). This means that trout can experience unpleasant emotional states such as pain and, as result, are sentient. Then, if trout share a common ancestor the rest of the individuals of classes within that subphylum *Vertebrates*, then it is very likely that the rest of the individuals of classes such as amphibians, reptiles, birds, and mammals are also sentient. In summary, in line with the available evidence, individuals that belong to the taxa *Vertebrate* and *Cephalopods* have phenomenal consciousness and consequently have wellbeing.

Nevertheless, to judge whether or not an individual has certain capacities such as phenomenal consciousness and wellbeing is necessary to consider the stages of development to which almost every individual can be subjected. This is important, because an individual throughout its different stages of development may have different capabilities. This can be stated for the majority of

individuals, due to processes such as mutations or other types of events. Thus, there is always the possibility that an individual may stop developing in the way it is supposed in accordance with the taxa to which it belongs.

In agreement with the available evidence, humans, like most other living beings, have different capacities during the various stages of their development (Cochrane, 2007, p. 42). A human fetus becomes phenomenally conscious around twenty-five weeks, when the neurophysiology necessary to have certain mental states has already developed.[22] Before that time, the human fetus lacks phenomenal consciousness and wellbeing. However, as a general rule, over the years, an average human being will tend to have other capacities corresponding to more sophisticated conscious states as they grow older.

In fact, it is evident that human beings, as they age, develop sophisticated levels of consciousness. On that account, an average adult human being without severe disabilities or illnesses can be considered a being with self-awareness, moral agency, and autonomy. Because these types of changes in individuals can be found in all species, DeGrazia (1997) and other authors[23] put forward two statements. Some species of non-human animals can have individuals with levels of consciousness more sophisticated than mere phenomenal consciousness. –such as, for example, self-awareness, higher-order thinking and even moral agency–. In turn, non-human animals, in the early stages of their development, as is the case with the human fetus, lack phenomenal consciousness [24].

Until now it has been claimed three statements. Firstly. phenomenal consciousness is the necessary and sufficient condition for wellbeing. Secondly, following the available evidence, phenomenal consciousness can be found in living individuals that belong to the taxa *Vertebrate* and *Cephalopods*. And, thirdly, phenomenal consciousness can be found in any entity that has artificial life with the capacity to have feelings, if it is considered that biological life does not matter. In agreement with the aforementioned, it can be stated that only individuals of those taxa and entities with that type of artificial life have wellbeing and interests.

Furthermore, using the same available evidence, there is good reason to believe that the capacity to have feelings implies an individual's capacity to have desires and beliefs. What this means is that, if an individual is sentient, they can also be attributed the ability to have beliefs and desires

[22] This is the scientific argument of the Colombia constitutional Court for declaring the permissibility of abortion. See: Constitutional Court of Colombia. C-055/2022
[23] Cochrane, (2007)
[24] DeGrazia (1997), pp. 166-211.

to some extent. This indicates that if the harm is the setback of the interests or the decrease in the wellbeing of an individual[25] and only if individuals or entities with wellbeing can be harmed, then animal abuse should be defined as (Gullone, 2012, pp. 11-13; Beirne, 2009; and Tiplaidy, 2013, pp. 3-8) [26]:

> A behavior or several behaviors carried out by one or more individuals that are moral and autonomous agents[27]and that harm one or more non-human animals[28] with phenomenal consciousness and with wellbeing. Those non-human animals correspond to most of the biological organisms that are grouped within the *Vertebrate* taxa and the class of invertebrates *Cephalopods*.
>
> Additionally, the conduct may be in the form of acts of commission or omission. This conduct may be carried out in two modalities. Either intentionally when one or more humans actively and deliberately harm one or more non-human animals. Or with negligence [29], when one or more moral agents do not act appropriately towards one or more non-human animals for which they are responsible. However, those behaviors that cause some type of harm to non-human animals are not classified as cases of animal abuse, if there is a reasonable expectation that they can increase the current general psychological and physical wellbeing of a non-human animal.

[25] Feinberg, J. (1987) and DeGrazia, D. and Millum, J. (2021).
[26] See also: Munro, R. and Munro, H. (2008), Merck, M. (Ed.) (2013).
[27] As it has been argued, these notions cannot be used as synonyms with the notion of Homo Sapiens, because the fact that are members of that taxon that are not moral and autonomous agents.
[28] Beirne, P, O'Donnel, I, and Janseen, J. (2018).
[29] Arluke, A. (2017) and Nurse, A. (2017).

2. Chapter 2: Constitutional Court and non-human animals

Two major periods can be distinguished about the decisions made by the Court on non-human animals. In the first period (1991-2010) and under the conception of non-human animals only as things or as renewable natural resources, the suffering caused in some cultural and scientific activities by human beings was not considered a constitutional reason to restrict or prohibit those behaviors[30]. In the second period (2010-2022), it is recognized that all non-human animals are sentient beings and components of the environment.

For the Court, considering the ecological constitution and the principle, value and right of the environment, this implies that human beings must behave with dignity and respect to all non-human animals. Based on human dignity and the ecological constitution, the Court establishes the constitutional duty of animal protection and the constitutional prohibition of animal abuse. Additionally, it is established only four exceptions to that duty, to wit, religious freedom, the eating habits of human beings, medical research and experimentation and cultural expressions.

In the second period, in spite of the fact of the recognition as sentient beings, non-human animals are not considered subjects of rights. Hence, since they are not persons with fundamental rights, their interests cannot be protected by the constitutional action of tutela or *habeas corpus*. For the Court, those interests can only be protected indirectly by the popular action or compliance action. These are constitutional actions to guarantee the collective rights and interests of people.

And, finally, in this period, it is also established that only the legislator, within the framework of the democratic principle, is the only authority with police power to prohibit or restrict those activities, such as bullfighting. Consequently, unless the Congress prohibits them, those activities are allowed within the Colombian constitutional order, although they can cause serious harm to non-human animals with welfare.

[30]See the following sentences: Constitutional Court of Colombia. C-1192-2005 and T-760-2007.

This overview is offered with the objective of examining the ontology and semantics of the categories used around the problem that this essay addresses in legal systems such as the Colombian one. Based on the previous examination and the arguments offered in the first chapter it is argued in favor of two statements. On the one hand, the impossibility of sustaining, from an essentialist position, the radical distinction between human beings as the only beings with dignity and non-human animals as things and as sentient beings. And, on the other hand, the impossibility of rationally basing the constitutional duty of animal protection on the notion of human dignity.

2.1 On the constitutional status of non-human animals: sentient beings and the duty of animal protection

With the decision C-666-2010, the Court studied the constitutionality of article 7 of Law 84 of 1989, In this article, the legislator excluded from the scope of conduct that harms non-human animals and that can be administratively sanctioned in accordance with article 6 of that law, several activities classified as cultural traditions. Despite being clear cases of animal abuse, the cultural traditions excluded from administrative sanctions are “rejoneo”, “coleo”, “corridas de toros”, “novilladas”, “corralejas”, “becerradas”, “tientas” y “riñas de gallos”. In this sentence, it is asserted that there is a constitutional duty of animal protection that entails moral and legal obligations of the human beings and the State with respect to all sentient beings.

The Court argues that the justification of this constitutional duty is found in two constitutional values, namely, the environment[31]and human dignity. In this perspective, the environment is conceived not as a set of natural resources that are useful only for the development and wellbeing of human beings -Decree 2811-1974-, but as the framework of existence of all sentient beings. In that sense, these approaches constitute the opening door to overcoming the conception of domestic animals as chattels and wild animals as renewable natural resources. They recognized that there are some sentient beings that can be harmed by human beings. Additionally, they claimed that sentience is a characteristic that must be considered in the evaluation of practices and institutions, based on the values and principles that govern the Colombian constitutional order.

[31]See: Constitutional Court of Colombia. Sentence T-411-1992.

Besides, it is worth mentioning that at this point the Court assumes, without demonstrating and examining the current scientific evidence, that all non-human animals are sentient.[32] This statement is claimed even though this evidence only allows us to affirm that only the majority of biological organisms that are classified within the taxa *Vertebrates* and *Cephalopods* have the capacity for wellbeing and, therefore, the capacity to experience pleasant and unpleasant mental states.

On the other hand, and by recognizing every human being as a person, the Court asserted that human dignity is an attribute of the person. In this sentence, a person or subject of rights is identified as rational and moral being with rights over the environment and the ultimate and sole purpose of the State[33]. This statement implies the beginning of the new paradigm on non-human animals in the constitutional order in which they are treated not only as chattels, but as beings with phenomenal consciousness that can be harmed.

Nonetheless, non-human animals, not being conceived as persons, lack moral and legal rights. Them, they can be subject to property rights by people, whilst all human beings are considered worthy beings and, consequently, potentially subjects of rights[34]. For the Court, human dignity entails moral and legal duties and obligations such as the principle of solidarity[35]. This principle declares that all human beings as the only worthy beings must protect from harm and promote the wellbeing of all non-human animals as sentient beings without dignity or rights.

As a result of these moral and legal duties, important consequences and modifications occur for various traditional legal institutions such as property within the legal system. In the case of property, the Court postulated that the constitutional duty of animal protection is a component of the ecological function of that legal institution. This duty implies a general restriction of the property rights of a person by virtue of which he cannot harm the sentient beings that it possesses[36]. As will be seen later, this assumption is found in the rest of the decisions on non-human animals taken by the Court since the sentence C-666-2010.

[32]Constitutional Court of Colombia. Sentence C-666-2010. For example, this ruling says: "In this sense the Court highlights that the protected concept as part of the environment is fauna , this being " the group of animals of a country or region " ; The protection derived from the Constitution overcomes the anachronistic vision of animals as animated things, to recognize the importance that they have within the environment in which people live, not simply as sources of resources useful to man, but as sentient beings. that are part of the context in which the life of the main subjects of the legal system develops: human beings."
[33]Constitutional Court of Colombia. Sentence C-666-2010.
[34]Constitutional Court of Colombia. Sentence C-666-2010.
[35]See: articles 1 and 95 of the 1991 Constitution.
[36]Constitutional Court of Colombia. Sentence T-760-2007.

Nonetheless, it should be mentioned that the identification of every biological individual classified as a human being as a person cannot be supported for two reasons. Firstly, not all human beings, as in the case of some adult human beings with severe disabilities or illnesses, can be considered moral or rational agents. And secondly, within the framework of the theories of evolution by natural selection and the theory of common ancestry, there is no human essence or nature. Indeed, there is not a trait such as moral agency or rationality which all and only biological individuals that belong to the species taxon *Homo Sapiens* must have.

As explained above, the reason behind the impossibility of affirming the existence of a human nature conceived in that way is based on the idea that taxa are historical entities and not natural kinds. As a result of that, it is impossible due to different biological processes such as, for example, mutations, that all individuals that belong to a specific taxon share a trait by which they can be differentiated from other taxa.

Without considering this, to conclude the abstract constitutional review of that article, the Court states that the constitutional duty of animal protection may come into conflict in certain and specific circumstances with other constitutional purposes and goods. In these cases, under the idea that this duty must be taken in consideration when applying and interpreting the law, all authorities must seek to harmonize the different components of the constitutional system under criteria of proportionality and reasonableness. This indicates two things when this constitutional duty is interpreted and applied. Not only can some restrictions be imposed on other constitutional values, principles and rights, but it can also be restricted without suppressing it for promoting other legitimate constitutional purposes[37].

Considering this, the decision establishes four exceptions to the constitutional duty of animal protection. These exceptions established the constitutional admissibility of activities that constitute clear cases of animal abuse. The exceptions are religious freedom, the eating habits of human beings, medical research and experimentation and, finally, cultural expressions. Those cultural expressions are those such as the activities contemplated in article 7 of Law 84-1989 that cannot be administratively sanctioned as animal abuse in accordance with article 6 of said law, although they may cause harm to non-human animals.[38]

[37]Constitutional Court of Colombia. Sentence C-666-2010.
[38]Constitutional Court of Colombia. Sentence C-666-2010.

Nevertheless, for the Court, instead of assuming an absolute suppression of the duty of animal protection, those exceptions must be regulated to guarantee as far as possible that duty. Without forgetting that they are based on legitimate constitutional purposes and ends that must be protected, those activities are allowed, inasmuch as the production of harm to sentient beings is eliminated and, at least, progressively reduced[39].

After the sentence C-666-2010, the Court issued several decisions on the topic, such as C-889-2012, T-296-2013, C-283-2014, T-436-2014 and T-095-2016. Those decisions are about two main issues. On the one hand, the constitutional status of non-human animals and the scope of the constitutional duty of animal protection and the prohibition of animal abuse. And, on the other hand, the constitutional justification for the authorization or prohibition of cultural expressions and entertainment activities that can be considered cases of animal abuse. Among those cultural expressions and entertainment activities are found bullfighting, circuses, hunting and sport fishing that can involve in most circumstances clear cases of serious harms to sentient beings.

In accordance with these ideas, in the sentences C-889-2012 and C-283-2014, an attempt is made to take an intermediate position between sentences C-1192-2005 and C-666-2010. Certainly, it is recognized that all non-human animals are sentient beings but not subjects of rights. Nevertheless, it is instituted that the Congress, in exercise of the democratic principle, is the only authority that can decide whether a cultural expression in which the constitutional duty of animal protection may be violated, can be restricted and totally prohibited within the Colombian legal system.

After the sentences that have been studied so far, the Court issued several decisions, such as C-467-2016, C-041-2017, T-121-2017, SU-056-2018, C-045-2019 and C-148-2022, which try to specify the scope of the constitutional duty of animal protection. Without a doubt, as in the case of sentences T-296-2013 and C-283-2014, these sentences recognized that all non-human animals are sentient beings that must be protected by law against the harm that human beings may cause them.

This protection is provided even if they are not subjects of rights and consequently lack fundamental rights. This is also independent of the fact that they may be harmed by human beings when carrying out activities based on constitutional values, rights or principles. However, it is reiterated that those activities in which sentient beings are harmed are legally allowed until the legislator decides whether such activities should be restricted or totally forbidden. Likewise, this

[39]Constitutional Court of Colombia. Sentence C-666-2010.

means that the legislator is the only authority that can decide if these activities as bullfighting must be administratively or criminally sanctioned.

In the sentence C-467-2016, a citizen filed a lawsuit within the framework of the public action of unconstitutionality against several articles (655 and 658) of the Civil Code of 1887, before the modifications introduced by Law 1174-2016. The citizen maintained that in these articles the categorization of non-human animals as things over which people can have property rights implies two issues. That is, this categorization ignores the constitutional recognition of them as sentient beings who have rights and deserve dignified treatment and violate the constitutional prohibition of animal abuse[40].

Despite these arguments, the Court decided to declare the constitutionality of the articles in question, noting that this legal qualification as well as its symbolic, legal and material effects do not imply any violation of the wellbeing of non-human animals or any kind of harm to them. The argument for this thesis is that these categorizations are nothing more than the specification of the current meaning of those expressions. The Court defends the idea that those categorizations capture the current use of them in a linguistic community without implying in any way an ontological or metaphysical commitment about what such expressions refer to.[41]

In this decision, it is argued that there is no contradiction between the following two statements on the legal status of non-human animals within the Colombian constitutional system. On the one hand, the statement that they are sentient beings without rights with respect to which there is a constitutional duty of protection and a prohibition of harming them. And, on the other hand, the statement that they are natural renewable resources or things, over which people as exclusive subjects of rights can have property rights. Nonetheless, as things, the possessor or owner of a non-human domestic animal can dispose of it in any commercial and civil transactions, which do not contravene the constitutional duty of animal protection[42].

In the sentence C-041-2017, the Court developed the abstract constitutional review on some articles of Law 1174-2016. In this case, there are two charges raised in the lawsuits by some citizens. Firstly, the possible violation of the principle of legality. They argued that there is an indeterminacy and vagueness of the expression “seriously undermine”, contemplated for the classification and

[40]Constitutional Court of Colombia. Sentence C-467-2016.
[41]Constitutional Court of Colombia. Sentence C-467-2016.
[42]Constitutional Court of Colombia. Sentence C-467-2016.

punishment of animal abuse. And, secondly, the alleged failure to comply with the constitutional duties of environmental protection and animal protection. For the plaintiffs, the failure is found on the unjustified exclusion from sanction of some cultural and entertainment activities that in most cases clearly constitute animal abuse[43].

By carrying out the constitutional review, the constitutional framework for interpretation and application of crimes against vertebrate non-human animals of said law is established. The decision taken in this ruling is to declare the constitutionality of that classification and the aforementioned expressions as a requirement for the configuration of those crimes. In this sentence, it is also declared the conditional unconstitutionality deferred to two years for the prohibition, classification and sanction of those activities. The activities that the Court refers to are those in which non-human vertebrate animals are commonly harmed but were excluded from the scope of those crimes in the 3rd paragraph of art. 5 of Law 1174-2016, which refers precisely to article 7 of Law 84 of 1989 [44].

To reach that decision, the Court argues that this expression does not imply a violation of the principle of legality. This principle requires that the classification of a conduct as a crime by the democratically elected legislator must lack insurmountable vagueness or indeterminacy and must be as far as possible clear, precise and univocal. In this regard, it is pointed out that the crime against vertebrate non-human animals is an open criminal type that complies with the judgment of strict legality. In fact, that crime requires the factual configuration of what is referred to by the expression "seriously undermine" which undoubtedly has a certain degree of vagueness and indeterminacy[45].

According to said ruling, an open criminal type is constitutional if and only if it is possible to overcome the indeterminacy of the description of the crime under two conditions. The first is when it is possible that by means of an average diligent hermeneutical activity, a recipient of the crime can establish the meaning of the words used in that description. In this case this activity allows the recipient to clearly establish which behaviors fall within or outside the scope of application of the crime. The second is when there are specialized references recognized by the constitutional review that specify the meaning of that classification and that have been communicated to the recipients of the crime[46].

[43]Constitutional Court of Colombia. Sentence C-041-2017.
[44]The article says: “They are excepted from the provisions of section 1. And in literals a), d), e), f) and g) of the previous article, rejoneo”, “coleo”, “corridas de toros”, “novilladas”, “corralejas”, “becerradas”, “tientas” y “riñas de gallos”. and the procedures used in these shows.”
[45]Constitutional Court of Colombia. Sentence C-041-2017.
[46]Constitutional Court of Colombia. Sentence C-041-2017.

Considering this, it is alleged that those open criminal types, such as the crime of animal abuse contemplated in Law 1174 of 2016, that meet these conditions do not violate the principle of legality established by article 29 of the 1991 Constitution. The Court argues that the indeterminacy of the description of that crime, since it is not absolute, can be overcome. This indeterminacy can be overcome in two cases.

First, when it is possible to determine the meaning of the expression "seriously undermines" throughout an average diligent hermeneutical activity of the possible active subjects of that crime.[47] On this basis, that activity implies the possibility of determining that the meaning of that expression includes within its semantic scope of application, not the reference to superficial injuries, but to deep injuries. For the Court, these injuries involve an intervention on the integrity and health with a significant impact on the vital functions of vertebrate non-human animals included in the classification of that crime.

And second, when there are specialized references. The Court points out two of them for this crime. On the one hand, the behaviors indicated as clear cases of animal abuse by article 6 of Law 84-1989. And, on the other hand, the rulings of the Constitutional Court and the Supreme Court that have tried to specify the meaning of this type of expressions in other types of crimes. Taking this into account, the Constitutional Court asserted that the protected goods by the crime of animal abuse are the life and physical and emotional integrity of all sentient beings[48].

Nevertheless, if these are the legal goods protected by the Colombian criminal law according to the literal wording of the formulation of the crime of animal abuse, the scope of application of the classification and punishment of harm to non-human animals does not include all sentient beings. In fact, the wording of the crime includes simply non-human animals classified within the subphylum-taxon *Vertebrates.* This signifies that wording excludes other types of non-human animals such as the majority of individuals of the taxon *Cephalopods*. This exclusion is established although there is sufficient scientific evidence to assert that *Cephalopods* are also sentient beings and have the capacity for wellbeing.

Beneath these arguments, it can be argued that there is no constitutional reason for that exclusion, taking into consideration the constitutional duty to protect all sentient beings. Undoubtedly, it would be unconstitutional to exclude *Cephalopods* from the scope of beings that can

[47]See: Constitutional Court of Colombia. S ruling C-148-2005.
[48]Constitutional Court of Colombia. Sentence C-041-2017.

be harmed according with the current classification of the crime of animal abuse, in the Colombian legal system.

After deciding the constitutionality of the expression "seriously undermine", the Court examines the second accusation. This accusation is about the constitutionality and the possible violation of the constitutional duty of animal protection. The argument of this accusation claimed that is unconstitutional the exclusion from the classification and sanction of the crime of some activities and cultural expressions, which cause serious harms against sentient beings.

In this case, the charge is put forward against those activities contemplated by the 3rd paragraph of art. 5 of Law 1174-2016, which refers precisely to article 7 of Law 84-1989. From the point of view of the Court, it is argued that this paragraph should be declared unconstitutional, because there is a violation of the principle of legality and, consequently, of the constitutional duty of animal protection.[49]

By virtue of the *ratio decidendi* of the sentence C-666-2010, this decision reiterates that in the constitutional order there is a duty of animal protection stemmed from two constitutional goods. The first is the environment which includes natural renewable resources such as fauna. The second is human dignity. This last constitutional good imposes legal and moral obligations on human beings as the only worthy beings. This last condition entails that they must behave with dignity with respect to other sentient beings. Under these considerations, the Court in that decision declared the conditional constitutionality of article 7 of Law 84 of 1989[50].

In this decision, the Court interpreted that the *ratio decidendi* of the sentence C-666-2010 implies the exclusion from the administrative sanctions established in Law 84-1989 of certain cultural expressions and entertainment activities that involves harms to non-human animals. That exclusion is based on the fulfilment of the following five conditions. Firstly, unless the legislator enacts a law that prohibits or criminalizes them, they are permitted under two states of affairs. On the one hand, non-human animals must be protected from pain and suffering. And, on the other hand, the harm caused to non-human animals in the future must be moderated or even eliminated so as to harmonize the practice of those activities with the constitutional duty of animal protection.

[49]Constitutional Court of Colombia. Sentence C-041-2017.
[50]Constitutional Court of Colombia. Sentence C-041-2017.

Secondly, the practice of those activities should be carried out only in those municipalities or cities in which they are regular, periodic and uninterrupted traditions. Thirdly, the practice of said activities must only be carried out in the periods of time in which they have been habitually practiced in those municipalities or cities. Fourthly, only those practices can be excluded from compliance with the constitutional duty of animal protection. And, finally, the prohibition directed at Public Administrations to allocate the public budget to the construction of structures in which those activities are exclusively carried out[51].

For the Court, the legislator's normative reference to article 7 of Law 84 of 1989, through the 3rd paragraph of art. 5 of Law 1174 of 2016, violates the principle of legality, the principle of typicality, the constitutional precedent and the constitutional *res judicata* established by the sentence C-666-2010. The reason for this conclusion is that this normative reference is indeterminate. For the court, it does not fulfill the requirement that the classification of a crime by the legislator must be as far as possible clear, precise and univocal. In this context, it was argued that the wording of that crime did not consider the conditions established by the sentence C-666-2010 for the exclusion of the administrative sanctions of those cultural activities contemplated in article 7 of Law 84-1989.[52]

Faced with this omission by the legislator, the Court held that the principle of legality had been violated. The reason for that transgression is that the indeterminacy of the classification of the crime and its exceptions is insurmountable. For the Court, that indeterminacy impedes two things. On the one hand, the possibility of the possible active subjects of the crime to determine what behaviors are within or outside the exception of said article for the criminalization of animal abuse in the Law 1174-2016.

And on the other hand, the protection of non-human vertebrate animals against the harm, pain and suffering commonly caused in the practice of those cultural expressions and entertainment activities. In that sense, the Court argued that the indeterminacy of this normative reference necessarily also implies a violation of the constitutional duty of animal protection. As a result of that, the paragraph was declared unconstitutional in the second paragraph of this decision[53].

Nonetheless, the unconstitutionality of this normative reference and, consequently, the classification and sanction of the exceptions contemplated in paragraph 3 of art. 5 of Law 1174-2016

[51]Constitutional Court of Colombia. Sentence C-041-2017.
[52]Constitutional Court of Colombia. Sentence C-041-2017.
[53]Constitutional Court of Colombia. Sentence C-041-2017.

were deferred to two years. During that time, the court establishes that the legislator had the obligation to enact a new legislation that should eliminate or modify as far as possible those cultural traditions and entertainment activities to fulfill the provisions of that decision.[54]

Nevertheless, with Auto 547-2018, the Court declared the nullity of that paragraph of sentence C-041-2017. The main argument of that decision is that it was not taken into consideration the formal *res judicata,* that had been established in sentences C-666-2010, reiterated by sentence C-289-2012. In this case, the Court asserts that it was unknown the rule that points out that only the Congress has the power to prohibit the cultural expressions and entertainment activities referred to in article 7 of the Law 84-1989.

In this constitutionality review, the violation of the formal *res judicata* is the result of re-examining the same legal provision that has already been declared constitutional for the same charges in a previous decision of the Court. From the point of view of the Court, the 3rd paragraph of art. 5 of Law 1174-2016 is the same legal provision as article 7 of Law 84-1989. In turn,the Court points out that in sentence C-666-2010, the conditional constitutionality of the last legal provision had already been decided. For that reason, it is concluded that the formal *res judicata* had been already configured on the article 7 of Law 84-1989.

And, consequently, under the conditions and parameters of the sentence C-666-2010, it is claimed that the permissibility of the cultural expressions established in that article had been already established. But that permissibility is conditioned to decisions of the democratically elected Congress. Acorrding with that, only the Congress, in the framework of the public debate, can decide whether these activities and cultural expressions should be modified or prohibited. Equally, the Congress is recognized as the only public power that can criminalized and punished those activities and expressions within the Colombian constitutional system.

Taking this Auto into account, the Court abandoned the path taken in the sentence C-041-2017 and took another course. This path implies that the constitutional duty of animal protection does not involve the prohibition of those cultural expressions. For the Court, it involves only that this duty must be harmonized with them, insofar as they are practiced by some groups and despite that those activities give rise to serious harms to non-human animals. Nevertheless, it is asserted the possibility of prohibition of those cultural expressions must respect the democratic principle. This

[54]Constitutional Court of Colombia. Sentence C-041-2017.

means that the Court cannot prohibit them, unless the democratically elected Congress decides trough the public debate whether those cultural expressions should or not be prohibited.

Finally, in the sentences C-045-2019 and C-148-2022, the Court developed the constitutional review on two legal provisions. On the one hand, the articles of the Decree 2811-1974 through which hunting and sport fishing are defined as recreational activities. And, on the other hand, the articles of Law 84-1989 that establish that hunting and sport fishing are exceptions to the prohibition of hunting or fishing non-human wild animals within the national territory. As exceptions, those activities are excluded from the administrative sanctions provided for animal abuse in said law.

In those decisions, the Court addressed the legal problem of whether sport hunting and sport fishing either should be prohibited and administratively sanctioned or should be allowed. The discussion is focused on the question of whether those activities are admissible exceptions to the constitutional prohibition of animal abuse by being based on one of the four exceptions to that duty. The Court took the first option. For the Court, hunting and sport fishing are undoubtedly types of animal abuse in which non-human wild animals are captured, after, in most cases, killing, mutilating or capturing them alive.

For that reason, the Court argued that the unjustified death of a living being or a non-human animal by a human being is an extreme act of cruelty. For the Court, those activities presuppose that non-human animals are exclusively conceived, not as living beings but simply as renewable natural resources useful for human beings. Besides, they involve an act of annihilation of a living being by which its existence is eliminated.

In the case of sport fishing, it was also affirmed that the constitutional duty to protect the environment is violated, by breaching the precautionary principle. According to this principle, in front of a reasonable risk of an inadmissible constitutionally environmental harm, appropriate measures must be taken to avoid the production of that potential harm. Following that, it is argued that by applying that principle the majority of individuals classified within the label “fish” deserve protection by the constitutional order.

The Court gave two reasons for this statement. Although there is no precise data on the environmental harm of sport fishing in Colombia, there is enough scientific evidence to determine that the majority of individuals classified within that label are sentient beings. As a consequence of that, they have wellbeing and can be harmed by human beings in the practice of sport fishing.

Furthermore, the Court reasoned that hunting and sport fishing are not based on any of those four admissible constitutional exceptions to the constitutional duty of animal protection. They are not expressions of religious freedom. They are not intended to produce food for the eating habits of human beings. They are not intended to carry out any type of medical or scientific experimentation. And, finally, they are not deeply rooted cultural manifestations.

Given that hunting and sport fishing are not based on such exceptions, the Court argues that it is not necessary to apply the criteria of reasonableness or proportionality to these cases. The reasoning behind this statement is that there is not a possible collision between constitutional principles. This means that there is not a problem about which principle should prevail. As a result of that, it is no necessary to seek a way to harmonize as much as possible the duty of animal protection with its exceptions recognized within the constitutional order.

In both sentences, the Court's decisions establish the unconstitutionality deferred to one year of the exclusion of hunting and sport fishing from the administrative sanctions of the Law 84-1989. For the Court, those activities are clear cases of animal abuse in which non-human animals as sentient beings are harmed. Moreover, they are also inadmissible exceptions to the constitutional duty of animal protection and the constitutional prohibition of animal abuse.

2.1.1. Chucho's case

In the exercise of the constitutional review, the Supreme Court issued three decisions, and the Constitutional Court issued a decision -SU016-2020- to decide the Chucho bear case. In this case, the plaintiffs filed a lawsuit promoting a constitutional action of *habeas corpus.* This action was promoted so as to protect the fundamental right to freedom of a bear known as Chucho, which was in captivity in a zoo in Barranquilla.

Finally, the Constitutional Court issued a decision after selecting Chucho's case to examine the constitutionality of the decisions made in the respective instances. In those previous instances, the possibility of granting the constitutional action of *habeas corpus* to non-human animals was denied. In said rulings, it was decided that the fundamental rights to due process and defense of the plaintiffs had been violated and that they should be protected. Consequently, the first instance sentence STL12651-2017 and the second instance decision STP16597-2017 were confirmed, by

which the sentence AHC4806-2017 was revoked. In this last decision, the constitutional action of *habeas corpus* had been granted to Chucho to protect his fundamental right to freedom.

As in the instances and following the constitutional precedent on non-human animals, the Court to support the decision argues that non-human animals are sentient beings with respect to which human beings have a constitutional duty of protection[55]. However, the court points out that it should not be overlooked that they are not rights holders or persons with fundamental rights.

Since *habeas corpus* is a fundamental right of persons, this constitutional action could not be used to grant an alleged fundamental right to freedom of non-human animals like the Chucho bear. The conclusion is inevitable in accordance with this reasoning, the constitutional action of *habeas corpus* can proceed only for the protection of the fundamental right to freedom of natural persons. For the Court, this last category can only be attributed to human beings as the only beings with dignity[56].

2.2. Essentialism and human dignity

It can be concluded that within the Colombian legal system it is assumed that moral agency and autonomy can be attributed to all and only individuals who belong to the species *Homo Sapiens*. Nonetheless, this assumption is not true, in the framework of the theory of evolution by natural selection and the theory of common ancestry. The falsehood of it is found in the fact that there is no essence such as moral agency or autonomy that is possessed by all and only individuals of that species.

This means that it is possible to find individuals belonging to the species *Homo Sapiens* who are not moral agents and are not autonomous beings. Likewise. it cannot be excluded the possibility that individuals of other species can be considered moral and autonomous agents[57]. This is a consequence of conceiving that taxa are historical entities – populations of causally related biological individuals – and not natural kinds with essences.

[55]Constitutional Court of Colombia. Sentence SU-016-2020. The Constitutional Court points out that the level of protection of a species of non-human wild animals by the constitutional order depends on two factors, namely, the ecosystemic relevance of the functions of that species for the environment and the vulnerability to extinction. of that species.
[56]Constitutional Court of Colombia. Sentence SU-016-2020.
[57]For example, other species of the genus Homo such as Homo neanderthalensis, probably according to current scientific evidence, could be considered moral and autonomous agents.

In opposition to what is defended by the Court in the decision C-467-2016, this last consideration mean that the distinction between human beings as subjects of rights and the rest of the animals as things, is supported on a metaphysical and classificatory monism. Under these ideas, it is postulated that all human beings are the only autonomous and moral agents, meanwhile all non-human animals lack these features. As shown before, that kind of monism supports an essentialist approach on the nature of biological taxa that is false. So, this distinction is nothing more than another example of essentialism within traditional legal thought.[58]

Therefore, unlike the arguments of sentence C-467-2016, the qualification of beings either as subjects of rights or as things that can be sentient is not merely the specification of the meaning of those words in a linguistic community. That is why far away from the determination of the use's rules of those expressions, these classifications depend on metaphysical theories about the composition of reality and the nature of living beings that go beyond their common use.

This means that these classifications are not theoretically neutral categorizations. And, besides, what is problematic about those classifications is that they are the theoretical mechanism to determine the scope of application of our normative theories. As matter of fact, they determine the set of beings to which our normative theories about what is morally good and just are applied. Following that, they determine in turn the permissibility, prohibition and even criminalization within our normative systems of behaviors that cause harm to non-human animals.

Notwithstanding, this does not mean that it cannot be stated that, by sharing a common ancestor with certain similar characteristics, most individuals classified as *Homo Sapiens* can be considered moral and autonomous agents. But this fact does not exclude the possibility that individual classified in that taxon do not have those features. If that reasoning is correct, there are two consequences. Individuals of the taxon *Homo Sapiens* who are not moral and autonomous beings could not be considered rights holders, meanwhile those individuals of other taxa who have the capacity to perform moral and autonomous actions should certainly be categorized as persons.

Accordingly, if moral agency and autonomy are the relevant characteristics for attributing to a being a moral status or the quality of a person, it could be established the following conclusion. The membership of a biological individual to a taxon such as *Homo Sapiens* does not necessarily imply the attribution of moral status or the quality of a person to the members of that taxon. The

[58] See: Bulygin, E. (1961) and Ross, A. (1976).

argument behind that is the fact that an individual can belong to that taxon without having moral status or the quality of a person, because that individual is not a moral and autonomous agent.

For clarity, the argument under attack can be specified by considering three universal propositions in a syllogism. First, all and only human beings are moral and autonomous agents. Secondly, all and only moral and autonomous agents are rights holders or persons. And finally, all and only human beings are persons or rights holders. The argument can also be formulated this way. First, all and only human beings are moral and autonomous agents. Second, all and only moral and autonomous agents are beings with dignity. Then, all and only human beings are beings with dignity.

In line with what has been argued up to this point, the conclusions of those arguments are false, because the first premises are false. That is a criticism of the presumed necessary connection between a biological individual's membership in a given species and his or her moral and legal status in our normative systems. In turn, the falsehood of these premises means that the source by which dignity is attributed to a being does not rest on the belonging of that being to the species *Homo Sapiens.* And, as a result of this, it is not possible to speak of "human dignity", as if it were an exclusively human attribute. In fact, the main argument for this is the inexistence of a human nature, that is, a necessary property that must have all and only the members of that taxon.

Hence, if something like “human dignity” cannot be supported, then it cannot be the justification of the constitutional duty of protection of the environment and of protection of the non-human animals. But if “human dignity” cannot be the justification of those duties as the Constitutional Court has argued, then that gives rise to two main questions. First, what is the justification of the constitutional duty of animal protection and of the constitutional prohibition of animal abuse? And, therefore, what is the justification of the criminalization and punishment of those behaviors that harm those non-human animals that are sentient beings and have wellbeing?

Answering these questions involves examining the second premise of those arguments. This encompasses to examine the arguments against and in favor of the thesis that only moral and autonomous agents are either holders of rights or are beings with dignity. This thesis is problematic. In our current legal systems, there are many examples of the recognition of, to illustrate, rivers or forests as subjects of rights[59]. However, undoubtedly, they are not moral and autonomous agents. One of the visible consequences of this landscape is that not only do our legal systems lack a

[59]In Ruling T-622-2016 of the Constitutional Court, the Atrato River is recognized as a subject of rights. On the other hand, in the ruling STC 4360-2018, the Supreme Court recognizes the Amazon rainforest as a subject of rights.

consistent conception of legal personhood, but there are also many questions about the nature of moral and autonomous agency as a theoretical foundation for a theory of legal personhood.

According to these arguments, it can be concluded that speciesism is false. Indeed, the legal and moral status of an individual is not derived from the species to which it belongs. Instead of that, the legal and moral status of an individual is assigned in virtue of the characteristics such as sentience or autonomy of each individual. Thus, it is false that an individual is a subject of rights or a moral and autonomous agent because he belongs to the species *Homo Sapiens*. This will also imply the next conclusion for our, normative reasoning. Without other additional consideration, there is no moral reason to give more weight to the interests of a species such as *Homo Sapiens* over the interests of other species whose individuals can be considered beings with phenomenal consciousness (Singer, 1990).

The above is a conclusion that many people may not be willing to support, because it rejects the moral relevance of classifying an individual as a human being. In turn, it is rejected the idea of considering that the membership of an individual to the *Homo Sapiens* taxon is what is required to grant him a moral and legal status as person. The basis for this conclusion depends on the answer to several questions. The most important of them is this: what role must play biological characteristics such as biological life, sentience, moral and autonomous agency in our normative theories about what is morally good or not and what is just or not.

Furthermore, except for decision C-148-2022, by which sport fishing was prohibited, it should also be noted that there is no theoretical clarification of the "sentience" category by the Court. The lack of this clarification seems to mean that in the Colombian legal system sentience is attributed to all non-human animals. Despite that, the criminalization and punishment of animal abuse only cover the harm caused to the individuals classified within the subphylum *Vertebrata*.

This entails the exclusion from the criminal punishment of those harms to other non-human animals that are not classified in that subphylum. This seems to imply that in the Colombian legal system the punishment of behaviors that cause harms to this subphylum is based on other reasons that are not specified and that go beyond the sentience of some non-human animals.

In fact, the current scope of the criminalization and punishment of animal abuse excludes from their sanctions established in the article 339A other taxa such as *Cephalopods*. This exclusion is made, because they are not individuals classified as members of the taxon *Vertebrata*, despite of

being sentient beings. As argued in the second section, *Cephalopods*, which include octopuses, are undoubtedly a taxon whose members are phenomenally conscious.

In addition to that, there is wide research that has shown that they have behaviors, the neurophysiology and an evolutionary history that are correlated with the existence of phenomenal consciousness in Humans. As well as those biological individuals that belong to the *Vertebrata*, *Cephalopods* are sentient beings with the capacity to feel pleasure and pain. For that reason, moral agents can harm them and impair the wellbeing of the individuals of that class.

This reasoning can mean that there would not be a constitutional justification for excluding *Cephalopods* from the scope of beings protected by the crime of animal abuse. Moreover, if it is accepted, beyond the current scientific evidence, that all non-human animals are sentient beings, according to Law 1174-2016 and the decision C-666-2010, it is possible to conclude that the harms against them must be punished by the crime of animal abuse. Indeed, there would not be a constitutional reason for excluding the rest of non-human animals that are not classified within the taxon *Vertebrata* from the protection provided by the crime of animal abuse.

Finally, this raises the question of whether all non-human animals have the capacity to be phenomenally conscious, as it seems to be claimed by the Court. Nonetheless, as was shown in the first sections and according to current evidence, not all non-human animals are sentient beings. That is why there is not enough scientific evidence to establish whether insects and other taxa within the kingdom *Animalia* are beings with phenomenal consciousness.

3. Chapter 3: Practical reason. How to establish the legitimacy of the criminalization and punishment of animal abuse?

After rejecting the idea that the legitimacy or justification of the criminalization of animal abuse rest on the idea of "human dignity", this chapter deals with analyzing the normative elements to respond to the problem initially formulated. This problem is if it is possible to justify or legitimize the criminalization of behaviors that harm phenomenally conscious beings. This is a question that requires determining the reasons for justifying the deontic status of a behavior in a normative system.

Put differently, if the classification of animal abuse is understood as a legal institution that is made up of a set of principles and rules that are addressed to citizens and judges, then the question that arises is why they must obey those rules and principles. This last question entails an answer to the question of how that legal institution can be justified. As a matter of fact, this implies to look for the normative reasons of the normative subjects for behaving according with those principles and rules. These normative subjects are mainly two, citizens and judges as moral and autonomous agents. Citizens who have the capacity to be guided by those principles and rules. Judges who must interpret and apply them to particular cases.

To develop the above, this chapter examines the notion of justification or legitimacy of legal norms. This exam will focus on three notions: legal norms, legitimacy and practical reason. The conclusion of that analysis is the following. The methodologies and theories based on the claim of a morally neutral conceptual analysis of criminal law in the tradition of *civil law* are insufficient to justify the legal institutions through which is prohibited, criminalized and punished a behavior (Nino, 1989a).

Thus, the insufficiency of those methodologies and theories within the *civil law* tradition requires the assistance of a normative approach provided by the philosophy of criminal law based on more general theories. Those theories are principally two. Normative ethics about what is morally

good or bad. And political philosophy about what is fair or not for determining the legitimacy or not of a legal institution (Nino, 1980).

The approach that is defended and developed in this work is the consequence of conceiving that there is a necessary justificatory connection, although non-conceptual, between law and morality. This necessary justificatory connection is defended on the frame of the internal point of view of our normative systems, where legal norms are conceived as reasons for actions of an agent (Alexy, 2004; Dworkin, 1977).[60]

This implies that the justification of a legal institution such as the criminalization and punishment of animal abuse can only be based on moral reasons. That is to say, moral rules, principles and values, that can be rationally established by a critical morality. Since the establishment of the justification of that institution is based on moral reasons, the morally neutral conceptual analysis in the *civil law* tradition regarding criminal law cannot be by itself an adequate methodological approach to study that justification (Nino. 1989a).

Before developing these questions, it is worth pointing out that the last two chapters of this essay can be classified as a work of practical philosophy or philosophy of practical reason. This branch of philosophy has as one of its components the philosophy of criminal law, political philosophy and normative ethics. Broadly speaking, the philosophy of practical reason is the philosophical study of the ability of some biological individuals, primarily those belonging to the species taxon *Homo Sapiens*, to determine upon reflection what one or some of them should do (Audi, 1991; Redondo, 1999). In other words, the philosophy of practical reason is, after assuming or arguing in favor of its existence, the study of the practical use of reason (Audi, 1991). The main representations of this use are our normative systems, that is, morality, politics in the normative sense and law (Castañeda,1975).

Following the distinctions established by Joseph Raz (1975), practical philosophy has two main branches, to wit, a substantive one and a formal one. The first deals with the arguments offered to determine the values that those beings with practical reason should seek through action. As a result, it also deals with the reasons for acting that should guide their actions and the rules they should follow. The second branch of practical philosophy deals with the conceptual and logical

[60]See: Nino, C. (1989b) and Nino, C. (1994).

analysis of the concepts that articulate the substantive branch of practical reason. This involves the analysis of concepts such as “value”, “reasons for acting” and “norm”.

The substantive and formal study of practical reason supposes, and, in turn, leads to, some ontological and epistemological questions about the existence of practical reason and its limits. As stated at the beginning of the first chapter, one of the main questions addressed regarding wellbeing was what requirements an individual must meet to attribute it prudential value. The answer to this question presupposes the study of the ontological arguments against and in favor of the nature of consciousness and subjective experience as the sufficient and necessary condition to determine if an individual has wellbeing[61].

Likewise, within the framework of this last division —that is, the formal and evaluative dimensions—, practical philosophy can be divided between theory of value, normative theory and theory of responsibility, each of which has an evaluative and a formal part (Raz, 1975). As explained in the first chapter, the theory of value is concerned with determining what is good or valuable and with the comparative analysis between those things that are good in one of its senses, that is, moral, prudential, aesthetic or perfectionist.

Taking as a necessary background a certain theory of value, normative theory deals with the establishment of the entities that must achieve or realize those values and the way in which they must pursue what is valuable. This last task involves determining the requirements that compliance with these values imposes on the behavior of individuals. These requirements are expressed through concepts such as “reason for acting”, “should”, “norms”, “duties” and “rights”. Furthermore, finally, based on a theory of value and a normative theory, the theory of responsibility studies the required conditions and the normative consequences of compliance or non with the requirements established by the normative theory (Raz, 1975).

The divisions that have been formulated so far can be projected into the areas of practical philosophy related to each of those areas of the praxis of those individuals with practical reason, namely, morality, law and politics (Nino, 1980; Raz, 1975). Being part of the philosophy of law, the philosophy of criminal law is part of the philosophy of practical reason. For this reason, the philosophy of criminal law has, in turn, two components: one formal and another normative. Hence, the formal part deals with the logical analysis and conceptual clarification of the categories with which we refer to the various institutions of criminal law. This entails the clarification of the concepts

[61] Nino, C. (1984).

used by the substantive and procedural criminal law, such as criminal sanction, criminalization, criminal responsibility and so on.

On the other hand, the normative part deals with the evaluation and correction of the reasons that justify the practices around these institutions in our daily lives. Just as described about practical philosophy in general, the philosophy of criminal law must study criminal law as one of the normative and institutionalized systems to regulate the behavior of those beings with practical reason. Ergo, this branch of philosophy must study the values, the requirements to achieve those values and the conditions and consequences of the responsibility of those who fail or comply with the required behaviors in accordance with the pursued values (Nino, 1980).

In the tradition of *civil law*, the study of criminal law, from criminal-legal dogmatics within the framework of the "theory of crime", has focused exclusively and mainly on the conceptual analysis of criminal responsibility. As will be seen later, this approach has obscured and confused the evaluative study of criminal law as a normative enterprise about values and reasons for action that justify the requirements that criminal law imposes on moral agents (Nino, 1989a, 1989b). If there is a necessary justificatory connection between morality and law, then the legal norms that construct criminal law must be justified on reasons for action that are moral norms.

Those norms are moral reasons that, being universal and autonomous, must be obeyed, by all moral or autonomous agents, regardless of whether an authority has enacted them or not (Alexy, 2004; Dworkin, 1977).[62] Following these ideas, the conclusion is obvious. The justification of the criminalization of animal abuse depends on the possibility or not of asserting moral reasons to criminalize and punish by the State those behaviors that harm phenomenally conscious beings.

3.1 Practical reason and philosophy of law. On the justification of legal institutions and legal norms.

It seems obvious that before trying to answer the question about the justification of a set of legal norms, such as those that constitute the institution in criminal law of the criminalization and punishment of animal abuse, a general characterization of what a legal norm is must be given. Two ideas will be studied on this question. The first is about the conception of a legal norm as a logical-

[62]See: Nino, C. (1989b) and Nino, C. (1994).

linguistic structure (Bobbio, 2002). The second deals with the relationship between legal norms and practical reasons (Redondo, 1999). In legal philosophy, the concept of legal norm has been the subject, like the concept of legal system, of several controversies. For these reasons, legal philosophers have developed different conceptions of this notion (Nino, 2010).

For authors such as Ross and Austin, a legal norm is a prescription, that is, a linguistic act whose function is to influence the behavior of others (Austin, 1954; Nino, 1994). For Hart, a legal norm is a social practice (Hart, 2012). Furthermore, finally, for authors like Kelsen, a legal norm is a deontic proposition or the illocutionary aspect of those linguistic acts or the internal aspect of those social practices (Kelsen, 2011). This deontic proposition is a normative judgment and the meaning of prescriptions that establish the deontic qualification of a behavior (Alchourrón and Bulygin 1975; 1979).

According to its logical-linguistic structure, a legal norm is a type of norm. And a norm is a clear case of the prescriptive function of language. In that function, a proposition is used, not to describe the world or to express a feeling but to influence the behavior of an individual or a group of them (Nino, 2010). This implies a first distinction, namely, that a norm is a proposition which, in turn, is the meaning of a set of symbols that grammatically constitute a sentence. The consequence of this is that a legal norm can be expressed by different sentences and a sentence can express different legal norms.

As several authors have pointed out (Nino, 2010), for long-time legal philosophers were concerned with finding a definition of legal norm that would characterize the broader notion of legal system. The goal of that definition was to make possible the differentiation between law and other types of normative systems, such as morality.

Yet, that intellectual enterprise has been futile for two reasons. Firstly, because a legal system is constituted by something more than legal rules, understood as prescriptive propositions, as is the case of legal definitions (Nino, 2010). Indeed, legal definitions are not rules but the specification of the meaning of a word in a legal norm. Secondly, because it seems that there is no property such as, to illustrate, coercion, as Kelsen stated, that only and all legal norms have, and other types of norms do not have.

On that account, there are legal norms that do not imply coercion, such as change or adjudication norms. And, in turn, there are norms that are not legal but that, nevertheless, entail

coercion (Nino, 2010). Faced with these difficulties in defining this notion, a different path has been proposed, in which, instead of defining the concept of legal system in terms of legal norms, the latter notion is characterized in terms of the former.

Before defining the notion of legal norm, the general notion of norm will be characterized. Considering this, following Von Wright, there are at least six different meanings for the word "norm" (Von Wright, 1963). These senses can be divided into three primaries and three secondaries. The first three are defining norms, technical norms and prescriptive norms and the secondary three are ideal norms, customs and moral norms.

As Nino and Bobbio have indicated, modern legal systems are constituted by norms that can be identified with the six senses of the word "norm" that Von Wright distinguished (Nino, 2010; Von Wright, 1963)[63]. Notwithstanding, although there is a general consensus that most legal norms are prescriptive norms, some legal norms are not prescriptive norms, and the category of prescription includes norms that are not legal norms. The characterizations of the six senses of the word "norm" are the following (Von Wright, 1963):

- *Defining norms:* are those norms that define an activity.

- *Technical norms:* are those that establish the means required to achieve a specific end.

- *Prescriptive norms* (Nino, 2010): are those norms that are promulgated by a normative authority with the objective or will that the recipient of the norm, who is the normative subject, behaves in accordance with the promulgated norm. To give rise to the effectiveness of the promulgated norm, the normative authority establishes a sanction.

  This sanction is the threat of harm to the normative subject, when he does not behave in accordance with that norm. From the perspective of Kelsen and Hart, a legal sanction is, in general terms, a coercive act by which someone is deprived of a good such as their life, their freedom, their property, etc. That coercive act is carried out by another person authorized by law and because of a conduct (Hart, 2008; Kelsen, 2011).

[63]See: Bobbio, N. (2002).

Clearly, even if there are other types of norms such as adjudication norms, the norms that make up the legal institution by which animal abuse is criminalized and punished in the Colombian legal system, as well as in other Western legal systems, are mainly prescriptive norms. According to Hart's terminology, these prescriptive norms are primary rules that prescribe a behavior. On the one hand, those norms prescribe to legal authorities such as judges, established by rules of adjudication, the imposition of legal consequences such as criminal punishment. And, on the other hand, those norms prescribe to moral and autonomous agents the behavior they should follow (Hart, 2008).

In effect, these norms are established and promulgated by a normative authority such as a congress. This authority enacts those norms with the objective that the normative subjects behave in certain ways. Those normative subjects may be a criminal judge, a prosecutor or whoever may be a moral and autonomous agent under a specific legal system. These rules impose on the criminal judge the obligation to sanction anyone who, after due process, is declared criminally responsible for harming one or more non-human animals. These regulations impose the obligation on the prosecutor to prosecute whoever has probably committed the crime of animal abuse. Failure to comply with those obligations by a criminal judge or prosecutor may have legal consequences that may include administrative and criminal sanctions such as imprisonment.

And, finally, these legal norms impose on a moral and autonomous agent who can be morally and criminally responsible a prohibition and an obligation. On the one hand, the prohibition of not seriously harming non-human animals. And, on the other hand, the obligation to protect the wellbeing of non-human animals, as is the case of the Colombian legal system. However, in most Western legal systems, for moral and autonomous agents, those norms, such as in the case of article 339 of the Colombian penal code, establish permissions to harm non-human animals.

Those permissions are conditioned to the development of certain activities in specific circumstances, as was ruled in sentence C-666/2010. Finally, for those who may be criminally responsible, failure to comply with this prohibition has a sanction as a legal consequence. This sanction is imposed only when there is no legal norm that establishes in a legal system a permission to harm non-human animals as sentient beings. This sanction may include the payment of fines, the inability to practice certain professions and/or imprisonment for a certain period.

As will be studied later, from the internal point of view of a normative practice such as law or morality, someone to whom is imposed the general prohibition of not harming non-human animals can behave for moral or prudential reasons (Nino, 1989b; 1994). In the second case, he just wants to

avoid the penalty. In the first case, he considers harming a non-human animal is *prima facie* morally wrong. On the contrary, a legal authority such as a criminal judge or a prosecutor as moral and autonomous agents can only justify their decisions to punish or prosecute someone not on prudential reasons, but on moral reasons. The reason for that last statement is that decisions or actions that harm the interest of others cannot be justified for reasons that are based on their own interests (Nino, 1994).

From the internal point of view, when a criminal judge punishes someone after being declared criminally responsible for the crime of animal abuse, he, as a moral and autonomous agent to justify his decision, must categorically accept the norms that criminalize those behaviors (Nino, 1989b; 1994). What that means is that the criminal judge considers that he must obey those rules and uses them as a guide to judge the behavior of others, because those rules are justified or constitute moral reasons for decisions and actions.

If that is true, then, the justification of the legal norms that are used in their legal reasoning by criminal judges to criminalize and punish the conduct of someone who harms a non-human animal can only be based on a particular type of normative reasons. These reasons are moral reasons, namely, norms whose justification is independent of the authority that promulgates them and that must necessarily be obeyed by a moral agent.

The consequence of this panorama is that the legal reasoning of judges is nothing more than a kind of moral reasoning (Alexy, 2004; Nino, 1989b). From the external point of view, what matters is not whether the obligation of judges to obey the law is really justified or not. What matters is the fact that they have followed a practice constituted by a criterion by which they consider that they must obey a legal system and must apply certain rules in their decisions to solve particular cases (Nino, 1994). In this case, unlike the judge, a social theorist must not accept the norms he studies or describes. Now, the other meanings of the word "norm" can be considered (Von Wright, 1963):

- *Ideal norms:* are those norms that establish those properties, virtues or qualities of a class in order to determine what it is to be a good member of that class.

- *Customs:* are those norms that are established because of a regularity in the behavior of a group of individuals. Those norms can be used as guides either to govern one's own behavior or to judge the behavior of another individual. This assumes that there is awareness that regularity is shared by the community. Therefore, a community can impose social sanctions

when individuals in the community do not behave in accordance with the custom (Nino, 2010).

- *Moral rules:* Following Nino (2010; Von Wright, 1963), these norms have been characterized in different ways depending on the normative ethics that are assumed. From a theological point of view, a moral norm is a prescriptive norm whose normative authority is God.

  From a consequentialist perspective, a moral norm is a technical norm that establishes the means to achieve an end that can be either the happiness of the individual (eudemonism[64]) or the general wellbeing (utilitarianism). And for a deontological ethics, moral norms are autonomous norms, namely, norms that a rational being as a normative authority and normative subject can give to himself.

After examining these meanings of the word "norm", the notion of legal norm can be defined. By criticizing Austin and Kelsen's legal norm theory, Hart showed that, although primary rules can be reduced to that theory, there are other types of legal norms called secondary rules. These rules cannot be explained in terms of norms that impose legal sanctions, because not all norms impose the execution of coercive acts by an authority (Hart, 2012).

The consequence of this criticism for legal theory and legal philosophy is that a legal norm cannot be characterized or differentiated from other types of norms by its content or structure. Considering this, legal philosophers have asserted that the best way to define a legal norm is as a norm that belongs to a specific legal system that is effective (Nino, 2010). This last idea implies that a legal system cannot be characterized as a system of legal norms that share an essential property by which they differ from other types of norms, such as moral norms.

So, to define a legal norm must be determined three issues. The concept of legal system. The requirements to determine the conditions to affirm that a norm, whether derived or non-derived (Nino, 2010), belongs to a legal system. And the criteria to distinguish a legal system from others (conditions for the individuation of a legal system). Therefore, it can be stated that the primary or secondary norms that are part of the institution by which animal abuse is criminalized and punished are legal norms only if they belong to an effective legal system (Bobbio, 2002). That is, a legal system whose rules are generally followed and applied by its normative subjects. Thus, if the

[64] Aristotle, (1999).

Colombian legal system is effective and if these norms belong to the Colombian legal system, then it can be stated that these norms are legal norms (Nino, 2010; Bobbio, 2002) [65].

Unlike descriptive propositions, which can be true or false, norms cannot be classified as true or false. For authors like Kelsen, legal norms are not judgments of being, but judgments of ought to be. Since Hume, a logical abyss has been postulated between ought to be and is, so it is fallacious to deduce norms from solely descriptive propositions about how the world is (the naturalistic fallacy). This abyss entails that propositions that describe facts are not operational reasons to justify decisions and actions (Hume, 1740; Redondo, 1999).

This imposes a restriction on practical reasoning whose objective is to seek the justification of a decision or an action. Besides, this kind of reasoning includes the moral and the legal reasoning. That restriction is the following. If it is impossible to deduce normative judgments from only descriptive propositions, then one of the principles of the practical reasoning is that it must always have a proposition that refers to values, interests or desires (Nino, 2010; 1989b and 1994). Excluding the possibility of predicating the truth, it can be established that there are four properties that can be attributed to both legal norms and legal systems:

Legal validity. A norm is valid in a descriptive sense when it belongs to an effective legal system. There is general agreement that the membership of a derived norm in a legal system can be easily explained in terms of relative validity. For Kelsen, this last notion of validity entails that a norm is valid if that norm derives its validity from a valid norm that authorized the promulgation of the first norm. This notion of relative validity faces an inevitable problem.

This problem is that, if the validity of a norm is derived from another valid norm, that implies a regression *ad infinitum.* This regression impedes explaining the validity of norms not derived from a legal system, that is, those norms whose validity does not depend on the validity of another norm (Nino, 2010). To overcome this problem, legal philosophers have formulated at least five theories to determine the criteria for belonging of non-derived norms to a legal system and for individualizing a legal system. These theories will be briefly mentioned.

Firstly, the territory criterion, by which it is claimed that a norm belongs to a legal system when it is applied in one territory and another norm belongs to another legal system when it is applied in another territory (Nino, 1994). Secondly, the criterion of the origin of the norms in a specific

[65]See: Kelsen, H. (2011).

normative authority, a legislator with sovereignty (Austin, 1954). Thirdly, the criterion of the basic norm (*Grundnorm)* of Kelsen. For this author, two legal systems are different if their basic norms are different. Thus, two non-derived norms belong to the same legal system if they are based on the same basic norm. It is worth saying that this Kelsenian notion refers to a non-positive norm. This norm is presupposed as an epistemological hypothesis. That hypothesis establishes the legitimacy of the original normative authority of a legal system to prescribe effective norms to its normative subjects (Kelsen, 2011).

Fourth, the criterion of the recognition rule, by Hart. For this author, two norms belong to the same legal system if their application is prescribed by the same rule of recognition. On the other hand, two legal systems are different if the application of all their norms is prescribed by a different rule of recognition. Hart uses the notion of a rule of recognition to overcome the problems of the basic norm. The rule of recognition is a positive norm that consists of a social practice that cannot be valid. Instead of that, that rule provides a criterion independent of the norm's content to establish the legal validity of the norms of a particular legal system (Hart, 2012).

Fifth, the criterion is based on the recognition of the primary organs. These organs are those that apply general rules to particular cases and that decide whether or not the coercive power of the State should be used in accordance with what is legally established (Nino, 2010; 1989b and 1994). According to this criterion, two norms belong to the same legal system if they are recognized by the same set of primary organs. Similarly, two legal systems are different if all their rules are recognized by a different set of primary organs. The obvious problem with this criterion is that it is circular, because the primary organs can decide the application of coercive acts based on only norms that grant them the authority to do so.

This implies that the notion of primary organs can only be characterized by referring to the legal norms whose legal validity is to be determined by this criterion. Another problem with that criterion is that it does not provide a condition for recognizing what makes one set of primary organs of a legal system different from others. For Nino (Nino, 2010), one way to overcome these criticisms of this criterion is to establish a criterion to distinguish the set of primary organs of a legal system from others. The criterion proposed by Nino is that the primary organs of a legal system are those that, when deciding the application of coercion, rely factually on the same monopoly of force. Stated another way, this monopoly is understood as the same coercive apparatus (Nino, 2010; 1989b and 1994).

Furthermore, the concept of legal validity is ambiguous and has been permeated by the dispute between the three main theories of law, namely, legal positivism, natural law and legal realism. For this reason, in their theories, legal philosophers have characterized legal validity in different ways. For some authors, two general concepts of legal validity can be distinguished, one normative and the other descriptive. The normative concept is identified with the notion of justifiability, which will be explained later. The descriptive concept is a characterization of legal validity that does not take into account the justifiability of a legal norm or a legal system (Alexy, 2004; Nino, 2010, 1989b and 1994). In place of that, this descriptive notion is merely defined in terms of the belonging of a norm to a legal system.

If the notion of existence of a legal system or of a legal norm depend on the notion of legal validity, then that notion of existence will be normative or not according to the definition of legal validity that is presupposed. Likewise, a normative conception of legal validity necessarily implies a definition of law in the terms of the theory of natural law, while a descriptive characterization of that notion implies a definition of the concept of legal system by factual properties as has been postulated, either by legal positivism or by legal realism (Nino, 2010).

However, as will be shown in the next chapter, the contrast between natural law and legal positivism on the concept of law is a pseudo-problem based on an essentialist conception of language. If the essentialist approach to the concept of law is rejected, it can be stated that the concept of law can be defined in different ways according to certain theoretical purposes or with the purpose of improving communication about law in a linguistic community (Nino, 1994).

Finally, to show the ambiguity of this notion, Nino has identified at least six senses of legal validity. These notions will be mentioned briefly. Legal validity as a criterion for the existence of a legal norm or a legal system; or as the justifiability of a legal norm or a legal system; or as the existence of a legal norm in a legal system that prescribes the obligation to apply and obey a norm; or as the authorization to dictate a rule by other legal rules of a legal system; or as the belonging of a norm to a legal system; or, finally, as the effectiveness of a norm and a normative system (Nino, 2010).

Existence [66]: a legal norm exists when it is a valid norm, that is, when it belongs to a legal system. On the other hand, a legal system exists when it is effective. Unlike Kelsen, as Alchourrón and Bulygin have argued, while a norm can be a prescriptive proposition that is neither true nor false,

[66]See: Alchourrón, E and Bulygin, E. (1979).

a normative proposition is a proposition that describes the existence of a legal norm, that is, a norm that belongs to a specific legal system.

Consequently, a normative proposition can be true or false (Alchourrón and Bulygin, 1975). If the conditions for the existence of a norm rest on the notion of legal validity, these conditions change with respect to the concept of legal validity that is used. If a descriptive concept of legal validity is presupposed, then the justifiability of a legal norm is not required for its existence. Otherwise, if a normative concept is assumed, then the existence of a legal norm depends on its justifiability. (Nino, 1994).

Effectiveness: a legal norm is effective when it is generally followed and applied by the normative subjects to whom it is addressed (Nino, 2010). In similar fashion, a legal system is effective when it is a legal system whose rules are generally obeyed by its normative subjects and applied by the legal authorities that have the power to order the execution of coercion acts by a State (Nino, 2010).

Justifiability or legitimacy: a legal norm is justified when that norm constitutes a reason to justify a decision or action. If only moral reasons provide such justification, then one can defend the thesis that a legal norm is justified only if it is also a normative reason and, more specifically, a moral reason for an act. For Nino, the justifiability of a legal norm implies saying that what that norm declares as obligatory, prohibited or permitted is actually obligatory, prohibited or permitted within the framework of a normative ethics (Nino, 2010 and 1994).

For Alchourrón and Bulygin (1975, pp. 234-237), the normative justification of the normative sciences that include ethics and the science of law is a type of rational explanation. This kind of explanation answers the question about the reason of why an intentional agent should perform or not a certain behavior (Alchourrón and Bulygin 1975, pp. 234-237). This last question is an inquiry into the reasons for the normative status of a certain behavior in a normative system. This normative status is no other thing that the deontic qualification (permitted, obligatory or prohibited) of a certain behavior in a normative system (Alchourrón and Bulygin 1975, pp. 234-237). For these authors, a normative justification in a normative system implies showing that the deontic qualification of a behavior can be derived from that normative system[67].

[67]For Alchourrón and Bulygin (1975), a legal system is a type of normative system, and a normative system is a type of deductive system. A deductive system is a system that consists of a set of statements that contain all their logical

In contrast to the normative justification that normative sciences attempt to establish, the nature of the rational explanation sought by formal and empirical sciences is different. In the case of formal sciences such as mathematics or logic, the rational explanation is established through a demonstration. This kind of explanation is a procedure by which a theorem is inferred from the axioms and other theorems of a deductive system following certain rules (Alchourrón and Bulygin 1975, pp. 234-237). In the case of empirical science such as physics, rational explanation takes the form of a causal explanation, through which it is established that a phenomenon can be explained by showing that a phenomenon is a particular case of a general law (Alchourrón and Bulygin 1975, pp. 234-237).

Furthermore, empirical sciences, which attempt to provide a rational explanation of behavior, do not look for the reasons for the deontic qualification of a behavior, but rather the reasons why an agent did something. So, rational explanation is a causal explanation of behavior, that is, of the facts and motives that causally determine the behavior of an agent (Alchourrón and Bulygin 1975, pp. 234-237). Under these ideas, investigating the justifiability of the criminalization and punishment of animal abuse is a task of the normative sciences, whether ethics or the science of law. Nonetheless, if legal norms can only be justified when that norm is derived from moral reasons, then ethics is the discipline that will be used to determine the justifiability of those legal norms.

According to Bobbio, this property of legal norms and legal systems is justice, understood as the correspondence of a legal norm or a legal system with those values, principles and interests that are the purposes of that legal system (Bobbio, 2002) For the purposes of this work, the notion of justifiability or legitimacy will be used interchangeably. Following this, it can be stated that the question that this work answers involves establishing if the legal norms by which animal abuse is criminalized in legal systems constitute reasons to justify a decision or an action.

Therefore, this essay will focus on the justifiability of prescriptive legal norms by which animal abuse is criminalized and punished in legal systems. If the legal validity and effectiveness of a legal norm are logically independent of its justifiability, this essay will not explicitly address the question of the legal validity and effectiveness of the criminalization and punishment of animal abuse.

consequences and a normative system is a deductive system that is constituted by a set of statements that includes as one of its logical consequences at least one norm. For these authors, a norm is a statement that links a case with a normative solution, that is, with the deontic qualification of a behavior by a normative system.

Nevertheless, a distinction can be made between justifiability and legitimacy. The first notion applies to a legal norm or a legal system when they are justified within the framework of an ideal morality. On the contrary, the notion of legitimacy applies to a legal norm or a legal system when the authority that promulgates the norms of a legal system is legitimized. In the frame of political philosophy, this notion of legitimacy implies that what a legal authority prescribes must be obeyed by the normative subjects and must be applied by the primary organs (Nino, 1994).

In this context, the legitimacy of a legal norm or a legal system is related to the ways in which political philosophy has traditionally tried to establish the obligation of a political community and their citizens of obeying what the State and its legal system prescribe. Conversely, the justification of a legal norm is more linked to theories about what is morally incorrect or correct (Nino, 1994).

It can be mentioned that, when talking about legitimacy and justification, what can be considered as the bridge between both categories is a theory of value, that is, a theory about what is good. If there is such a distinction between justifiability and legitimacy, then it is possible *prima facie* to say that a legal system or legal norm is justified, but not legitimate. This last issue is related to what Nino (1989b) called "the apparent paradox of the moral irrelevance of government and law" (Roca, 2002). This paradox entails that what authority prescribes does not play any role in the practical reason of moral agents.

3.2. Legal rules and practical reasons.

After defining the notion of legitimacy in terms of the notion of reasons to act or practical reasons, we will proceed to clarify this last notion. In the introduction to this chapter, a general characterization of practical philosophy was given. This characterization indicates that this branch of philosophy deals with the practical use of reason and that this use is fundamentally concerned with the relationship between reason and action.

For some authors such as Cristina Redondo (1999), the notion of practical reason can usually be understood in three senses: first, as a human faculty; second; as reasons to justify, explain and motivate actions; and, finally, as premises of arguments. In this last sense, reasons for acting are conceived as linguistic expressions that fulfill the function of supporting the conclusion of an argument. In this context, arguments dealing with actions are practical arguments related to values, desires, intentions, and courses of conduct (Nino, 1989b). These arguments have been studied as part

of the field that has been called practical reasoning. This type of reasoning seeks to establish the correctness of those arguments that support praxis. In the rest of this section, we will focus on the other two senses.

In the first sense, practical reason is considered a human capacity that allows human beings to reflect on what should be done (Wallace, 2020; Audi, 1991). As argued in the first chapter; by sharing a common ancestor, human beings share many traits, among which is the capacity for practical reason. However, due to natural selection, it is impossible to claim that all members of that taxon can have that ability, because it is always possible that some members of the *Homo Sapiens* taxon do not have it.

If that is right, then it is better not to assign the capacity for practical reasons as an essential property of human beings, because taxa are historical entities and not natural kinds. Having specified this, it can be said that, probably since Aristotle, the characterization of practical reason as a faculty has been provided in comparison and contrast with the other function of reason, namely, theoretical reason (Wallace, 2020).

For several philosophers, theoretical reason has traditionally been conceived as a formal capacity with a cognitive function. This function is related predominantly to questions of causal explanation in the empirical sciences (both the natural and social sciences) and demonstration in the formal sciences (logic and mathematics). This formal capacity is expressed in the ability to connect abstract entities with cognitive content, called "propositions", following certain rules (Redondo, 1999). With this ability, it is carried out a cognitive function that merely provides *a priori* knowledge, which is achieved only through demonstrations and without the help provided by the evidence obtained through experience. With the help of empirical evidence, theoretical reason can achieve an *a posteriori* knowledge that establishes causal explanations about what happens (Redondo, 1999).

This has been the traditional image of reason portrayed by hegemonic Western cultural thought since the Enlightenment. Yet, it is worth noting that a normative conception of theoretical reason has recently been defended. In this context, theoretical reason is a faculty whose primary task is to regulate beliefs. This type of reason answers the question of what should be believed (Wallace, 2020). The answer to this question implies that theoretical reason is interpreted as a faculty to construct a system of norms about beliefs. This system determines the reasons for believing in the truth of propositions that are part of our knowledge. The most radical view on reason as a faculty is

the skeptical one, which absolutely questions the existence of reason in the sense described above (Redondo, 1999).

On the other hand, if its existence is presupposed and argued for, practical reason is the ability to determine through deliberation about action an answer to the normative question of what one ought to do. As demonstrated previously, and according to Alchourrón and Bulygin, this capacity is portrayed through a specific type of rational explanation, that is, normative justification (Alchourrón, and Bulygin, 1975). This type of rational explanation is developed through practical reasoning expressed in arguments with mainly deontic propositions, which belong to the directive function of language or practical discourse. Through practical reasoning, intentional agents individually and collectively can evaluate and weigh reasons to establish the deontic qualification of intentional actions. Given that, much of the discussion about the nature and scope of practical reason has focused on theorizing the meaning of practical discourse in metaethics, that is, the meaning of normative concepts and normative judgments (Nino, 2010).

For some thinkers who defend a naturalistic perspective, normative and moral judgments lack cognitive meaning and, therefore, do not express propositions and do not provide knowledge about the world. For them, these judgments, from an expressivist perspective, refer to the feelings and attitudes of the speaker and seek to produce certain emotional stimuli in the recipient. Accordingly, practical discourse can be reduced to the type of language used to express feelings (Nino, 2010; Wallace, 2020 and Redondo, 1999). From that perspective, normative judgments and concepts have emotive meaning, but they do not have cognitive meaning. The conclusion drawn from these arguments is that there cannot be a substantive practical function of theoretical reason that determines the normative justification of an action beyond the preferences and attitudes of a particular agent (Wallace, 2020).

In opposition to this, other authors deny the reduction of practical discourse to emotional discourse. For them, the function of normative judgments and concepts is to express norms that may or not refer to normative facts. Under this idea, it is stated that, from a realist position, if there are normative facts, then norms have a cognitive meaning. Therefore, this signifies that theoretical reason has a practical function through which normative knowledge is provided about what an agent must do (Wallace, 2020; Redondo, 1999). Rejecting naturalism and realism, authors such as Kant and Nino defend a constructivist theory of normative judgments. This theory claimed that practical reason is understood as those normative standards that govern the behavior of rational and moral agents (Nino, 1984 and 1989b; and Kant, 1999).

In the second sense, a practical reason is a reason to justify, explain, and motivate actions. As Redondo mentions, there are at least two problems related to the notion of practical reasons or reasons to act. The first deals with the concept of that notion and the second on the ontology of practical reasons (Redondo,1999). Following the literature on the subject, a general characterization can be provided of these types of reasons that are linked to practical reason, practical reasoning and, consequently, action. However, these characterizations are intertwined with the ontological conception of the reasons for action and the possibility of practical reason as a faculty.

Those characterizations face three issues, among others. The possibility of practical reason as a faculty to achieve knowledge about what an agent should do; the possibility of practical reason as a faculty to motivate the intentional actions of an agent; and the possibility of practical reason as a faculty to provide binding rules or normative reasons for the correct behavior of an intentional agent (Wallace, 2020; Redondo, 1999).

As noted above, for authors such as Kant, practical reason can not only achieve knowledge about what a moral agent should do but is also sufficient to motivate the action of a moral agent. Oppositely, for authors such as Hume, practical reason cannot achieve that knowledge and is insufficient to motivate an agent's actions (Kant, 1999; Hume, 1740). Considering that and avoiding those deep discussions, these three types of reasons can be conceptualized as follows (Redondo, 1999):

Explanatory reasons (Wallace, 2020 and Redondo, 1999): these are those considerations about why an agent did something. In that sense, they are reasons that explain someone's action and therefore provide a rational explanation of the course of action taken by an agent. Regarding the ontological problem, for some authors who defend a psychological conception of practical reasons, explanatory reasons are mental states[68], that is, beliefs and desires, that causally explain an intentional action. From an externalist and anti-psychological perspective, both explanatory and normative reasons are certain types of facts, that is, external entities that are independent of the agent's mind (Raz, 1975).

Motivating reasons (Wallace, 2020 and Redondo, 1999): these are those considerations based on which an agent acts and for him they constitute the reasons in favor of behaving in a certain way. This reason is part of the premise of the practical reasoning through which an agent decides whether

[68]Or facts about mental states.

he should act or not. As in the case of explanatory reasons, there are two broad positions about the ontology of motivating reasons. One says that they are mental states; the other claims that they are facts.

Normative or justifying reasons: [69] these are those considerations that count in favor of the correctness or incorrectness of the actions of an intentional agent. In this case, a normative reason provides a normative justification for an agent's behavior and thus answers the question of why an agent should act in a certain way. As mentioned above, a normative justification involves the determination of the deontic qualification of a behavior in a normative system. For some authors, this implies that normative reasons are rules or principles that not only prescribe agents to carry out a certain action, but also make them correct or incorrect (Nino, 1989b and 1994). Despite this characterization, there is much debate about the ontology of normative reasons and the type of norms or principles that constitute justificatory reasons.

Regarding ontology, there are two positions. For authors such as Joseph Raz (1975), normative reasons can be considered facts in the broad sense, to the extent that they are mind-independent, while for other authors they are not facts. Likewise, for authors such as Cristina Redondo (1999), normative reasons can be legal, prudential or moral reasons. On the contrary, for other authors, such as Nino and perhaps Kant, only moral reasons are normative reasons, that is, reasons that, because they are universal and autonomous, provide the justification of an intentional action (Nino, 1984; 1989b; and Kant, 1999). In the latter case, the thesis that only moral reasons are justificatory reasons is essentially linked to the thesis that there is a necessary justificatory connection between law and morality, insofar as legal norms are justified only if they are well-founded in moral norms.

For Raz (1975), legal norms are a special type of reasons called "exclusionary reasons", while, for Nino, legal norms are not reasons in themselves, unless they are founded on moral reasons (1989b; 1994). Whether or not the justification of a legal norm is based exclusively on moral reasons depends on the possibility of arguing in favor of the thesis that only moral reasons and no other types of reasons constitute justificatory reasons. If that thesis is correct, then the criminalization and punishment of animal abuse must be based on moral reasons. If it is not correct, then that criminalization may rest on other types of normative reasons, namely, prudential or legal reasons. It must be added that this debate presupposes the existence of this type of reasons.

[69] Redondo, C. (1999); and Nino, C. (1989b) and (1994).

For skeptics, the debate is meaningless, because there are no normative reasons. The debate on the existence of normative reasons and moral reasons is beyond the scope of this work. Consequently, the existence of normative reasons and moral reasons will be assumed and, assuming that, the question that arises is if moral reasons are the only source of justification of legal norms. If that is the conclusion, then the intellectual enterprise of justifying legal norms must be based on an appropriate methodological approach to determine the moral reasons that justify legal norms and, therefore, that justify the criminalization and punishment of animal abuse.

Under these ideas, the determination of these moral reasons grounds the deontic qualification of intentional actions governed by the principles and rules of the criminalization of behaviors that harm non-human animals. This entails the possibility of justifying three obligations. The obligation to criminalize animal abuse by legislators. The obligation to attribute responsibility and to punish for the commission of animal abuse by judges. And, finally, the prohibition of harming non-human animals and the obligation and duty of citizens to promote their wellbeing.

As analyzed in the previous chapter, the Colombian Constitutional Court attempts to outline a justification of the duty to protect sentient beings and the prohibition of animal abuse through an essentialist conception of the human being. This essentialist conception attributes an essential property to all the individuals that are classified as *Homo Sapiens.* For the Constitutional Court, this essential property is dignity, based on the ideas of autonomy and moral agency

This essential property is considered by the Constitutional Court as an intrinsic value that underlies the entire Colombian legal system. However, as established in the first chapter, there is no essential property that all members of a taxon have, and therefore, it cannot be determined that all human beings have an essential property or nature. As a result, there is no such thing as “human dignity” as an essential property. If this is correct, then the justification for the criminalization of animal abuse must be sought elsewhere.

Given that moral reasons are norms and principles with certain characteristics, the traditional conception of criminal-legal dogmatics as a conceptual enterprise to deduce normative conclusions is erroneous. The reason behind this is that a simple analysis of the categories of the concept of crime cannot offer, without falling in the naturalistic fallacy, a clear image of the assumptions and the possibility of substantiating moral principles (Nino, 1980 and 1994). In this regard, it should be noted that the theory of the legal good (*Rechtsgutstheorie)* is an attempt to establish the justification of legal norms by postulating a concept (Nino, 1989a).

Nonetheless, how can the postulation of a concept answer a normative question about the justificatory reasons that compel a moral agent to criminalize and punish another agent for harming a non-human animal? If we accept the naturalistic fallacy, then the only way to establish the justification of these legal norms is to show the moral reasons that give the right for a moral agent recognized as a legislator or judge by a political community to criminalize and punish animal abuse. It seems obvious that addressing these types of normative reasons inevitably implies linking that research with ethics and political philosophy (Nino, 1980).

From this point of view, only the normative part of the philosophy of criminal law within the framework of practical philosophy can provide a better understanding of the possibility or not of determining the moral reasons that justify the legal institutions that are part of criminal law. This implies the possibility of determining the moral values that make morally correct the promulgation of legal norms that govern the behavior of the different normative agents in a normative system such as the law (Nino, 1984 and 1989b).

Therefore, this intellectual enterprise presupposes the existence of moral or ethical values. In conclusion, the possibility of providing a justification for criminalizing and punishing a behavior depends on the possibility of arguing for a certain type of theory of value. Only after determining that theory of value, it is possible to institute a normative theory and, because of it, a theory of responsibility. On the other hand, criminal dogmatics, with the claim of being a neutral and non-normative conceptual analysis of the notion of crime, merely provides a conceptual theory of criminal responsibility. Nevertheless, that theory does not clarify the possibility of giving a rational justification of the values and norms that support the adjudication of criminal responsibility (Nino, 1980) .

4. Chapter 4: Practical reasons and justification of legal norms.

One of the oldest discussions in legal theory and legal philosophy deals with the relationship between law and morality. The traditional opposition between natural law and legal positivism is mainly a divergence in the nature of that relationship. The objective of this chapter, framed in the general exposition of the topic of this work, is to answer two questions about the relationship between law and morality. First, is there a necessary conceptual relationship between law and morality? And second, is there a necessary justificatory connection between law and morality?

To address the questions, the central thesis is that, although legal phenomena can be identified and described using descriptive concepts and propositions, legal discourse and practice can only be justified within the framework of a broader practical discourse, i.e. the moral. That is why the moral discourse and practice developed collectively in Western thought and society since the Enlightenment are the only source of normative reasons. These reasons are not other than moral reasons, which are deontic judgments with specific characteristics. Only those judgments can justify, conclusively, the legal discourse and practice. This means that law alone cannot provide normative reasons and, therefore, cannot by itself justify its own legal rules and the actions and decisions that those legal rules declare as obligatory.

4.1 Is there a necessary conceptual connection between law and morality?

The classic discussion on the definition of the concept of law must be understood as a debate that presupposes a thesis about the relationship between language and reality. In the philosophical debate, there are two main theses on this question. For essentialism, there is a necessary connection between language and reality; while for non-essentialism there is no such necessary connection (Nino, 2010 and 1994). Obviously, as seen in the first chapters, these theses have grades depending on the ontological assumptions that are defended. An essentialist thesis can be claimed about some

concepts such as, for example, those that belong to the conceptual framework of natural sciences such as chemistry or physics (Putnam, 1975).

However, despite making this statement, an essentialist thesis on concepts that refer to social phenomena, such as law, can be rejected. Indeed, some authors have defended that those concepts of natural sciences such as physics and chemistry are correct only if they capture the essential properties of the kind of object to which they refer (LaPorte, 2004). The essentialist thesis presupposes a precise ontological image of reality. In that case, reality is divided into natural classes with their respective essences (Nino, 1994). In the first chapters, an essentialist conception of the biological categories used to refer to taxa such as *Animalia* or *Homo Sapiens* was rejected. On the contrary, non-essentialism rejects the ontological image of reality defended by essentialism.

What does the debate between essentialism and non-essentialism imply for the definition of the concept of law? Taking this into account, this implies that there are two general positions on the concept of law, behind the controversy between legal positivism and natural law over the role of morality in defining and identifying a legal system. These positions are one essentialist and the anotther non-essentialist (Nino, 2010). According to the first, the correct or true concept of law must capture the essential properties of a legal system. Thus, the definition of a legal system must establish the properties that all and only legal systems have, but no other types of normative systems, such as morality.

On the contrary, as explained in the first chapter, according to the second position, there is no correct or incorrect definition of the concept of law (Nino, 1994). Because language is governed by conventions that determine the use of linguistic expressions, the meaning of the words “law” or “legal system” are not determined by the essences of the object to which those words refer. Instead of that, that meaning is determined by the rules that a linguistic community establishes to apply those words to particular cases or to classify certain phenomena (Nino, 2010).

In this case, different concepts of law can be postulated and the preference for one or the other depends mainly on the pragmatic interests of the speaker (Nino, 1994). The speaker's limits are only restricted to the possibility of communicating with others. However, if he decides to use the word “legal system” in any way, no one could forbid him to do so and the only risk he would face would be the inability to communicate with others (Nino, 2010). In fact, the definition, and therefore the rules of use of the expressions “legal system” or “law”, may be subject to stipulations or

specifications to achieve a certain theoretical goal or better communication between the members of a linguistic community.

Therefore, if an essentialist position on the concept of law is accepted, then it must have the capacity to capture in the definition of that concept, the essential properties that all and only legal systems must have (Nino, 1994). Nonetheless, as in the case of biological categories and the notion of animal abuse, the question that immediately arises is how these essential properties can be established. The opposite situation occurs if a non-essentialist approach to the concept of law is accepted, since its use would be a matter of preference with some limits, certainly.

As mentioned above, natural law theory in all its versions, whether theological or rationalist, presupposes an essentialist position on the concept of law. For this theory, the essential property of law is justice or another normative property and other legal concepts such as legal validity must be defined in normative terms (Nino, 1994 and 2010)[70]. As Nino (2010) clarifies, the theory of Natural Law has two main theses. Firstly, a legal system is a normative system that is just and that follows a set of values, norms and moral principles. And, secondly, there is a set of moral principles and values that determine what is just and morally correct.

The first thesis implies that there is only one correct concept and definition of law, because only those normative systems to which it is possible to predicate a normative property such as justice can be identified as such (Kelsen, 2011 and Alexy, 2004). If a normative system is not just, then it is not a legal system. As Saint Augustine states, only justice can differentiate between a legal system and the orders of a criminal organization (Nino, 1994 and 2010). For the theory of natural law, the conclusion is clear. If morality is understood as the set of values and principles that define what is just and morally correct, then there is a necessary conceptual relationship between law and morality (Alexy, 2004; Dworkin, 1977).

The assumptions of natural law theory are obvious. There are natural kinds with essences, there is a necessary relationship between language and reality and the correct definition of a concept must capture the essences of natural kinds. As a result, if the concept of law refers to a natural kind, the essence of which is the normative property of justice, then the true or correct concept of that notion is the one that captures that essence. (Nino, 1994 and 2010).

[70]See also: Kelsen, H. (2011) and Alexy, R. (2004).

From this point of view, the theory of natural law establishes perhaps a more important thesis. Namely, if a legal system must be just, then a legal system must be obeyed and, because of this, there is a moral obligation for moral agents to obey a legal system (Nino, 2010). For some authors (Redondo, 1999), this thesis implies that law, due to its necessary conceptual connection with morality, must necessarily provide normative reasons to justify actions and decisions. This implies that there is not only a necessary conceptual relationship, but also a necessary justificatory connection between law and morality.

However, the ontological and metaphysical assumptions of natural law are certainly problematic: as elements of the periodic table, is law a natural kind? Is justice the essential property of law? and, finally, can it be rationally established that justice is an essential property of law? The answers of natural law to these questions are weak (Nino, 1994 and 2010). While essentialism must postulate the existence of natural classes and their essences to explain the meaning of a linguistic expression, natural law must accept the existence of a natural class with an essence to which the expression "legal system" refers (Nino, 1994). This suggests that both natural law theory and essentialism postulate the existence of two types of entities to explain the meaning of a linguistic expression such as "law". On the one hand, the natural kind "legal system" and its essence, and, on the other hand, the individual and particular cases that are members of that natural class.

If the principle known as Occam's razor is accepted, it must be considered the following. If one must choose between two theories that explain the same phenomenon, one must choose the one that implies the postulation and acceptance of the smallest number of types of entities. Therefore, if a theory is found that explains the meaning of the word "law" that postulates only the existence of particular legal systems, without accepting the existence of a natural kind, this theory should be preferred to the theory of natural law (Nino, 1994 and 2010). Furthermore, if despite this the existence of that entity is accepted, then it is still difficult to think about the way in which knowledge of the essence of that natural kind can be achieved.

According to the essentialist position, the method of achieving that knowledge, as in the case of natural kinds like triangles, is a kind of rational, not empirical, intuition. However, although this type of intuition can be defended to a certain extent for some concepts whose definitions express *a priori* analytical judgments, it seems doubtful that this type of intuition can be extended to concepts such as law whose definitions are not those types of judgments[71].

[71] Putnam, H. (1975).

As Nino (2010) indicates, it is difficult to accept the existence of such an intuition to reach the essence of a natural kind that is not subjected to any empirical evidence. Instead of accepting, the possibility of determining the meaning of a word through the empirical determination of the rules of its use. In this context, a linguistic community establishes the conventions to apply that expression and classify phenomena for various purposes.

On the other hand, legal positivism rejects the first thesis of the theory of natural law. From this point of view, law does not have an essential property like justice or another normative property. Due to this, the definition of the concept of law can be established without referring to these properties and can be given in terms of factual properties, such as coercion or others. The rejection of this thesis has been raised by legal positivists through two arguments (Nino, 1994 and 2010).

For authors like Kelsen (2011) and Ross (Cf. Nino, 2010), the first thesis of the theory of natural law must be rejected because the second thesis of that theory is false. These thinkers deny the existence of universal moral principles and values. According to these authors, and due to the lack of universal moral principles and values, moral and normative judgments and concepts lack cognitive content and, therefore, cannot be subjected to rational scrutiny (Kelsen, 2011).

For these reasons, if a science must be based on concepts and judgments with cognitive meaning, then the definition of the concept of law that can help articulate a science of law must be formulated in terms of factual properties. For them, only that kind of definition can give rise to descriptive concepts and judgments about a legal system (Kelsen, 2011; Nino, 1994). This foundation of legal positivism means that, from a skeptical position about practical reason, there are no normative or moral reasons. If that is true, then it makes no sense to ask about the normative justification for the criminalization and punishment of animal abuse.

That is why, if the justification of legal norms is based on moral reasons and if there are no moral reasons, then it is not possible to provide a normative justification of the deontic qualification of those behaviors that unjustifiably harm non-human animals with phenomenal consciousness. In this way, a legal system does not give reasons to justify actions and decisions. Under these ideas, neither a necessary conceptual connection nor a necessary justifying connection between law and morality can be affirmed (Redondo, 1999). Nonetheless, if the existence of moral reasons is accepted, then this position cannot be sustained, because there are moral principles and values that govern the way in which moral agents should behave.

For other authors, such as Hart and Nino, the first thesis of the theory of natural law must be rejected, because there is no necessary relationship between language and reality. Consequently, an essentialist perspective on the concept of right cannot be adopted (Hart, 2012). In line with these authors, law is not a natural kind with an essence. Therefore, the definition of the concept of law should not capture a necessary property such as justice that natural law thinkers have claimed that all and only legal systems must have (Nino, 1994).

From this point of view, the meaning of words like "law" and "legal system" are governed by the rules that determine their use in a linguistic community. These rules can change over time, in different societies, in different contexts, etc. (Nino, 2010). Historically, it is undeniable that both conceptions of law have influenced the rules and meanings that have been associated with the use of that linguistic expression.

For this reason and for this type of legal positivism, which has been called methodological or conceptual, there is no necessary conceptual connection between law and morality (Hart, 2012). For Nino (1994), this implies that different concepts of law can be formulated and none of them is true or correct. Different definitions and concepts of law can be formulated even using normative notions such as justice.

Despite the rejection of the apparent essentialist perspective on the concept of law, Hart (2012) proposes that, with three aims in mind, the definition of the concept of law and the identification and classification of a legal system must be expressed in terms of descriptive notions. These aims are the following: improving our communication, achieving certain theoretical purposes and avoiding ambiguity and vagueness. These notions refer to factual properties that can be found in the majority of cases to which the word "law" is applied and without mentioning normative properties or ideas such as justice or morality (Nino, 2010, pp. 37-44).

Nevertheless, this conception of a legal system does not imply that a moral agent has a moral obligation to obey the law. In fact, the identification and classification of a normative system as a legal system through the use or not of normative notions does not solve the question of if a legal system or a legal norm should be obeyed by a moral agent (Nino, 1994). This last issue is a genuine disagreement about facts or attitudes and not a merely linguistic disagreement about the meaning and definition of a linguistic expression.

As Nino (2010) suggests, these latter ideas can be found in the main thinkers who has been consider as legal positivists. But what has distinguished positivist thinkers, such as Bentham, Austin,

Kelsen and Hart, are the similar factual properties that a system of norms must have to be identified and classified as a legal system. For Austin (1954), Bentham (1780) and Kelsen (2011), a legal system is a system of rules that is composed of a set of rules whose main component is coercion.

However, for Hart (2012, pp. 99-102), characterizing legal systems as systems that have rules that imply coercion by an authority or sovereign is not enough. Instead, his conceptual positivism asserts that the similar factual properties with which a system of norms can be identified and classified as a legal system rest on the combination of two types of rules: primary and secondary rules (Hart, 2012, pp. 99-113).

While primary rules establish legal duties or obligations of individuals, secondary rules are classified in three types. Rules of adjudication that are those that determine who and how the primary rules should be applied. Rules of change that are those that determine who can create, modify or revoked the rules of a legal system and how can do it so. And, finally, the rule of recognition that determines if a rule exists and belongs to a particular legal system (Hart, 2012, pp. 99-113).

In proposing this descriptive concept of law, Hart articulates a distinction between two points views on law: one internal and another external. The first point of view is that of the participant within legal practice and discourse. From this point of view, law and legal norms are conceived as standards for intentional agents to guide their behaviors and judge the correctness of the intentional actions of others (Hart, 2012 and Nino, 1994).

The second point of view is that of the observer for whom law and legal norms are nothing more than facts with certain normative propositional content that may or not cause certain behaviors in their normative subjects (Hart, 2012 and Nino, 1994). One of the most interesting questions that arises from this distinction is on the relationship between these points views on law. For some authors, such as Nino and perhaps Dworkin, there is a logical primacy of the internal point of view over the external (Nino, 1994 and 1989b; and Dworkin, 1977).

As Nino (1994) correctly states, if a non-essentialist point of view on the concept of law is defended, it is not possible to affirm that there is a conclusive reason to prefer the definition of law and the conditions for its identification provided by positivism or the natural law. If methodological legal positivism defends that only a concept of law that is defined in descriptive and factual terms is correct, then this type of positivism can be subjected to the same criticisms that are raised against the essentialist conception of law defended by natural law.

Considering this, depending on the context and the discourse, different concepts and definitions of law can be formulated according to the pragmatic interest of the speaker in a specific context (Nino, 1994 and 1989b; and Dworkin, R. 1977). If that is correct, then the concept of right defended by Hart, as well as the concept of that notion defended by Saint Augustine, are some of the ways, among others, in which the concept of law can be defined. This different concepts capture different aspects and the different points of view on the complex phenomena that constitute legal discourse and practice in our societies. Normative definitions of law, such as those given by Finnis (1980) or Dworkin (1977), presuppose the existence of at least one standard that is not legal. Al in all, that standard establishes the duty to recognize certain deontic propositions that determine the deontic qualification of a behavior.

Following these ideas, Nino (1994) points out that the descriptive and normative concept of law and legal validity formulated by legal positivism or natural law can capture in a different way the points of view on law that Hart distinguished. The descriptive concepts of law and legal validity consider the external point of view of law as a set of facts of a certain type that can be described by an observer such as a social scientist who is not involved in a legal practice.

On the other hand, normative concepts of law consider the internal point of view by which law and legal norms are deontic propositions enacted by an authority. In this context, the objective of that authority is that intentional and moral agents such as lawyers, judges and legislators take those propositions as part of its practical reasoning. As it has been claimed, those propositions *prima face* establish the possible existence of a normative justification of an intentional action in a legal system (Nino, 1994 and 2010).

The consequence of these arguments is that there is no genuine disagreement about facts or attitudes about the law, but simply a linguistic disagreement about the meaning of the word “law”. This last disagreement can be solved by specifying when that concept is used in one sense or another in a specific context (Copi, I. and Cohen, C. 2010). Under these considerations, if the concept of law does not refer to a natural kind, then there is no problem in defining the concept of law using or not normative notions such as justice.

This conclusion can be extended to other important notions of legal theory and legal philosophy such as legal validity. Normative or descriptive definitions can be given for these notions and these definitions play a different role depending on the context and discourse in which they are used (Nino, 1994 and 2010). Furthermore, if one accepts Occam's razor, there seems to be good

reason to prefer conceptual legal positivism to natural law theory to explain the meaning of words like “law,” “legal system,” and “legal validity.”

That is why the theory of natural law postulates the existence of two types of entities, namely, the natural class “law” and the individual members who belong to that class. Instead, conceptual legal positivism only postulates the existence of one entity, i.e., individual legal systems. Thus, they are classified under the word “law” using different criteria to apply that word to those specific cases. Furthermore, there are good examples in the social sciences that show that a descriptive understanding of a social practice can be achieved, even if its participants use normative concepts, establish intrinsic values and rules of behavior.

In fact, for example, Durkheim (1965) proposes a descriptive conception of religion as “a unified system of beliefs and practices relating to sacred things”. For him, that characterization does not imply a value judgment about the normative justification of that social practice (Durkheim, 1965 and 2005). In this framework, it is possible to describe a religion as a social practice. From this perspective, that description includes some intentional states with certain normative propositional content of the intentional agents who participate in that practice. Nonetheless, the description does not entail a commitment or acceptance of that normative content on the part of whoever describes that social practice.

This implies that an atheist can achieve an incredible knowledge about Christianity, without accepting the value judgments that this religion and its participants accept. Still, without the description of that propositional content, the description of that religion would be totally incomplete. The argument behind that is that it would be unable to capture the content of those intentional states. Without capturing it, it would not be understood the value judgments by which a community determines what has or not intrinsic value. And, as a result of that, it would not be clarified the ways in which the individuals in that social group must behave around the things they consider sacred.

Despite the rejection of the first thesis of natural law theory, conceptual legal positivism does not necessarily imply the rejection of the second thesis of natural law theory. In fact, some authors within the framework of this approach consider that there are general and universal moral principles and values that determine what is just and what is morally correct or not (Nino, 1984, 1989b and 1994). This means that this type of legal positivism is compatible with the possibility of affirming a justificatory (necessary) connection between law and morality.

Indeed, authors such as Hart (1963 and 2008), Bentham (1780), Raz (1975) and Nino (1984, 1989b and 1994) defend the possibility of arguing in favor of certain normative and evaluative theories. For some authors such as Nino, despite the lack of a necessary conceptual relationship between law and morality, there is a necessary justificatory connection between them. This last thesis entails the statement that only moral discourse and practice based on moral reasons can justify actions and decisions and, therefore, legal discourse and practice. If that is true, then only morality and not law can provide normative reasons.

For other authors such as Redondo (1999), not only moral reasons but also legal norms can justify actions and decisions. If that is true, then both morality and law can provide normative reasons. And, therefore, in that case, a necessary justificatory connection between law and morality could not be claimed. Nevertheless, the thesis that law is a normative system that provides by itself and without relation to morality reasons to justify actions and decisions implies accepting ideological positivism (Bobbio, 2004).

For this type of positivism, the simple fact that an authority, which is recognized by a group of people or who manages a monopoly for the use of coercion in a territory, prescribes a normative judgment provides normative reasons to justify actions. So it is argued that this fact establishes a moral obligation of obeying that prescription (Bobbio, 2004 and Nino, 2010).

This thesis presupposes one of two things. First, deontic judgments can be derived from these facts as linguistic acts such as prescriptions. Second, if the naturalistic fallacy is to be avoided, there is only one moral principle that affirms that it is morally obligatory to obey what an authority prescribes if those conditions are met (Nino, 2010). The first presupposition implies that normative propositions can be derived from descriptive propositions. The second involves a hidden natural law theory through which it is affirmed that there is a single moral principle. For now, it is enough this discussion about the concept of law. The last debate will be developed in the next section about the answer of the second question formulated for this chapter.

4.2 The normativity of legal systems and criminal law. Is there a necessary justificatory relationship between law and morality?

After the discussion of the first question, the second question can be addressed, that is: is there a necessary justificatory connection between law and morality? Regarding the first question, it was stated that, if essentialism about the concept of law and moral skepticism about moral reasons are rejected, then a weak methodological legal positivism must be accepted through which the existence

of a necessary conceptual connection between law and morality is rejected. This implies accepting the possibility of postulating a plurality of concepts and definitions of the word "law" among which descriptive or normative definitions of that linguistic expression can be formulated.

However, as explained, the discussion on the definition of the concept of law is not a genuine disagreement but only a linguistic disagreement on the definition of a concept (Copi and Cohen, 2010).[72] These types of linguistic disagreements do not solve disagreements about attitudes and facts. That is why a definition alone could not establish whether there is a moral obligation to obey the law or whether the law is a source of normative reasons for intentional agents (Copi and Cohen, 2010).

For that reason, establishing a meaning for the term "law" does not solve the main issues that legal philosophers have argued against and for. That is, whether or not there is a necessary justificatory connection between law and morality, and if the answer is negative if a legal system provides normative reasons to justify actions and decisions. These issues can be called under the following name used in philosophy of law: the problem of the normativity of law (Redondo, 1999).[73] Nevertheless, if the existence of normative reasons is accepted, then there are two broad positions on these issues. Firstly, defended by authors such as Alexy (2004) and Nino (1989b and 1994), there is a necessary justificatory connection between law and morality. Secondly, law as a normative system provides by itself normative reasons to justify actions and decisions (Redondo, 1999).

The rest of this chapter argues in favor of the first thesis. If this thesis is true and there are moral reasons, then the conclusion is clear. Only moral reasons can justify the criminalization and punishment of behaviors such as animal abuse by a legal system. This position indicates the rejection of skepticism and relativism about practical and moral reason. As part of a larger project, this conclusion would be the first step towards a complete answer to the question posed at the beginning of the work. In this context, with the theoretical background that has been argued, the question that must be answered is the following. Are there moral reasons to normatively justify the criminalization and punishment of behaviors that harm the wellbeing of non-human animals with phenomenal consciousness?

To confront these problems, we must begin by discussing the logic and structure of the justificatory legal discourse and reasoning. These discussions will focus on those who, as citizens, judges, prosecutors, and legislators, participate in the legal practice and discourse related to a specific

[72] See also: Nino, C. (1994).
[73] See also: Roca (2002)

legal system. The content of the premises and the conclusion of this reasoning include, among others, normative and descriptive judgments that are the propositional content of intentional states. Those states include beliefs, desires and intentions of those who participate in the legal practice (Nino, 1989b). Likewise, these normative and descriptive judgments are the meaning that is established through the interpretation of prescriptions, texts, behaviors, attitudes and social practices. These facts can be described as a legal system for those who, like a social scientist, do not participate in that social practice (Nino, 1994).

However, like other types of practical reasoning, legal reasoning concludes with a normative judgment that determines what the intentional agent should do. That is, a normative judgment that establishes the deontic qualification of a behavior (Nino, 1989b). In the case of a criminal judge, the conclusion of his reasoning is a normative judgment such as, for example: “I must punish X, who is criminally responsible for crime Y.”

In fact, if the criminalization and punishment of animal abuse is considered, the conclusion of a criminal judge's legal reasoning would be something like “I must punish X, who is criminally responsible for harming a sentient non-human animal.” For the criminal judge, this conclusion implies a duty by which a certain decision and action that involves the punishment of someone for harming a non-human animal is mandatory. The question that arises is what is the source of that duty or, in other words, what is the normative justification of that obligation.

In the case of a citizen, the normative judgment that is the conclusion of his reasoning about the law can be formulated as “I should do X” or “I should not do Z” with respect to the legal system in relation to which that normative subject participates. If we consider the reasoning that a citizen may have regarding a legal system that establishes the criminalization and punishment of animal abuse, then “X” and “Y” can be exchanged respectively for “I must protect the wellbeing of non-human animals” or “I must not harm non-human animals.” In both cases, the conclusions entail duties by which certain behaviors are mandatory or prohibited, according to a certain legal system (Alchourrón and Bulygin, 1975). Similarly, as in the case of the judge, the question that arises is: what is the normative justification for that obligation and prohibition?

Finally, the case of a legislator or someone who formulates general prescriptions with the objective of governing the behavior of some normative subjects can be considered. The meaning of these general prescriptions can be seen in a sense as the conclusion of a practical argument. That argument establishes the deontic qualification of a general class referring to a set of individual

actions. For instance, that deontic qualification would be something like “someone who does not pay his taxes should be fined”. In the case of our topic, that normative judgment formulated by the legislator's prescription is "whoever is criminally responsible for seriously harming a non-human animal must be criminally punished”.

These prescriptions are aimed primarily at judges who must consider this general prescription to apply and solve particular cases in accordance with the adjudication rules of a legal system. Furthermore, this prescription is indirectly addressed to citizens in a given legal system to determine what they should do or not do. For these reasons, if those normative subjects accept the norms that belong to a legal system, then they use them to guide their actions and decisions and to criticize the actions and decisions of others.

What that means is that those prescriptions and their propositional content are somehow intertwined with the conclusion of practical reasoning of the judge and the citizen in relation to the particular legal system in which they participate (Nino, 1989b and 1994). However, the question that arises is where the legislator's power comes from to impose on the judge and citizens those duties and powers that imply the permission, prohibition or obligation of certain actions or decisions.

Under these ideas, the legal reasoning of a judge or a citizen in relation to a legal system can be reconstructed by adding a premise to support the normative judgments that constitute the conclusion of that reasoning (Nino, 1994). These premises are the following. In the case of the judge, the legislator or authority that has the monopoly of coercion in a territory that can dictate general prescriptions prescribes that "whoever is criminally responsible for harming a non-human animal must be criminally punished." And, in the case of the citizen, the legislator who can dictate general prescriptions prescribes that “it is prohibited to harm non-human animals.” The content of these premises are descriptive propositions that establish that a legislator has enacted a prescription, that is, a linguistic act whose content is a normative judgment.

Taking into account the above, the legal reasoning of a citizen would be:

- Premise whose content is a descriptive proposition: the legislator who can dictate general prescriptions prescribes that “it is prohibited to harm non-human animals.”

- Conclusion whose content is a normative judgment: I should not do Y. I should not harm non-human animals

In the case of the criminal judge, the legal reasoning would be:

- Premise whose content is a descriptive proposition: the legislator or authority that has the monopoly of coercion in a territory and that can dictate general prescriptions prescribes that "whoever is criminally responsible for harming a non-human animal must be punished."

- Conclusion whose content is a normative judgment: I must punish X. I must punish X for seriously and unjustifiably harming a sentient non-human animal."

As Nino points out, these reconstructions of the reasoning of judges and citizens open the door to at least two possibilities. First of all, if it is accepted that "ought" can be derived from "is", then the conclusion of that reasoning can be obtained by adding an additional premise whose content is a descriptive proposition that can be formulated in different ways such as:

- If a legislator or legal authority prescribes X, then X is obligatory (and just).

- If God prescribes X, then X is obligatory.

- If a theocratic authority who is God's representation on earth prescribes X, then X is obligatory.

It is interesting to note that, for example, Antigone decided that she must ultimately obey what the Greek gods prescribed rather than what the legal authority of her city prescribed (Castañeda, 1975). Despite this, this premise implies that from the simple fact of the prescription of a divine or human legislator, a duty of a citizen or a judge can be derived to carry out or not a certain action or decision in relation to a legal system (Nino, 1994).

As Nino (1989b and 1994) suggests, a legal anthropologist and other legal theorists might be tempted to describe that judges in a legal system obey legal rules on the basis of the fact that some legal or divine authority prescribes those legal rules. These considerations can lead to formulating a descriptive concept of law as those norms that are prescribed by a legislator and that are applied by judges to solve particular cases. But can a fact and a premise whose content is a descriptive proposition about that fact normatively justify a deontic judgment?

Behind these arguments, it seems that the two questions about the origin of the duties and powers that a legal system imposes on judges and citizens can be answered. The answer is simple. The source of these duties and powers is based on the fact that these normative judgments are

prescribed by a legislator (Nino, 1994). The answers to these questions can be completed by adding that the linguistic act of prescribing a normative judgment is authorized by another legal norm that has legal validity in the descriptive sense (Kelsen, 2011). This may imply that the mere fact that a legal authority prescribes a set of legal rules makes a legal system to become a system that provides normative reasons to justify actions and decisions.

According to this, it can be stated that there is no necessary justificatory connection between law and morality, because a legal system can itself provide normative reasons to justify the actions and decisions of those who participate in a specific legal practice and discourse (Redondo, 1999). Despite this and as noted above, if the legal validity of a norm rested exclusively on another legal norm that authorizes its promulgation, it would fall into a regression *ad infinitum* (Nino, 1994) . The solution to this problem requires determining a rule or set of rules that are not valid because their promulgation is authorized by another legal rule. This means that the norms in which as a last resort they account for the legal validity of legal norms are not legal norms (Dworkin, 1977 and Alexy, 2004).[74]

But can a fact and a premise whose content is a descriptive proposition about that fact normatively justify a deontic judgment? Since Hume, the inclusion of this last premise in the legal reasoning of citizens and judges in relation to the legal norms of a legal system implies falling into the naturalistic fallacy. This fallacy declares that it cannot be derived a normative judgment through the exclusive use of descriptive propositions as premises (Hume, 1740 and Nino, 1994)[75]. This implies that one of the principles of practical reasoning is that if the conclusion of an argument is a normative judgment that establishes the deontic qualification of an action, then that argument is required to have at least one premise that is also a normative judgment (Hume, 1740). Following these arguments, that answer to this question is negative.

In this scenario, it must be argued that the first premise of that argument does not imply that a normative judgment can be derived from the fact that an authority prescribes a norm. Instead of that and for avoiding that fallacy, is must claimed that this first premise is a principle that is another normative judgment that determines that what an authority prescribes is just and must be obeyed (Nino, 2010). This position, as has already been said, is called ideological positivism (Bobbio, 2004).

[74] See also: Nino, C. (1994) and (1989b).
[75] See also: Audi, R. (1991).

As Nino, Ross and Bobbio propose, this position is a hidden version of a theory of natural law, This hidden version postulates the existence of a moral principle that must be accepted by intentional agents independently of the authority that prescribes it (Bobbio, 2004).[76] If that is correct, then this version of legal positivism implies that law alone does not provide normative reasons. Therefore, this position entails that there is a necessary justificatory relationship between law and morality. The question that arises with this ideological positivism is whether or not the existence of a single moral principle can be supported. However, as it will show later, the practical reason of moral agents takes into account more moral principles.

Furthermore, the structure of the practical reasoning of judges and citizens seems in some cases to be independent of whether an authority with the power to determine the use of a state's monopoly of coercion prescribes a deontic judgment (Nino, 1994 and 1998b). Indeed, for example, a citizen under a specific legal system may decide to act in accordance with a standard of conduct that states that he should do X. This can be the case, even if there is a deontic judgment prescribed by a legal authority that determine that he must not do X. To illustrate, Thoreau (2008) discussed the fact of whether he had the obligation to pay the tax for the war of United States against Mexico. Despite the prescription of a legal authority that determines the normative criterion that an American citizen had to pay that tax, Thoreau decided that he did not have to pay that tax, because it was unjust.

For Thoreau, the prescription of a legal authority is not necessarily obligatory if the normative judgment that is prescribed is unjust. For this reason, Thoreau (2008) affirmed the existence of a moral right. This right implies that a moral agent has the faculty to disobey the prescriptions of a legal authority whose content is a normative judgment that is unjust. Regardless of the added punishment by the American legal system for failure to comply with that normative judgment, Thoreau's practical reasoning was that the morally correct action was not to pay the tax. The reason for that conclusion is that he accepted the validity of a normative judgment, regardless of the circumstances of its formulation and the positive or negative consequences of its acceptance. Thoreau's practical reasoning can be reconstructed as follows:

- If a legal norm is just, then that norm is mandatory and valid.

- Legal rule X is unfair and invalid.

[76] See also: Nino, C. (1994) and (2010).

- Then I must not obey legal rule X.

In the same way, someone may consider that it is not only permissible but also mandatory to record and report animal abuse of non-human animals in the industrial food production system. This may be considered by someone, despite rules such as those of ag-gag laws that prohibit, for example, recording the process of food production by killing and harming non-human animals. In this case, the citizen considers that those legal rules are unfair and cannot guide their behavior (Greenwalt, 1991). This legal rule is not binding, even though it is prescribed by a legal authority. In this case, the practical reasoning of, for instance, an animal rights defender may be as follows:

- If a legal norm is just, then that norm is mandatory and valid.
- The legal rules found in the laws known as "*ag-gag laws*" are unjust and invalid.
- So I don't have to obey those legal rules.

Likewise, a judge may consider that, despite the unconstitutionality of a certain legal norm, that legal norm must be used and applied to solve a particular case. It may also be the case that the judge, in order to solve a case that does not have a legal norm that establishes the solution of a case, must use and apply rules and norms that are not legal norms. That is to say, legal norms that do not comply with the descriptive notion of legal validity as the belonging of a legal norm to a particular legal system (Dworkin, 1977). This last case will be the case of a legal lacuna in a legal system (Alchourrón, and Bulygin, 1975).

But it can also be considered an axiological lacuna in a legal system. In this case, the judge decides that another norm that is not legal must be applied to solve a case. The decision of the judge to solve the case is taken, in spite of the fact that there is a legal norm that establishes the deontic qualification of a behavior in a legal system in relation to that particular case (Nino, 1994). This is because the particular case has a relevant property for which the case must be solved in accordance with that norm. In this case the judge cannot take into consideration the prescription of the legal authority, due to the fact that this prescription does not consider that property. And, consequently, it cannot give a just solution to the case. (Nino, 2010).

In these cases, the normative judgment of the conclusion of a judge's reasoning has norms that are not legal, Hence, those norms do not meet the conditions of being norms that are dictated in accordance with another legal norm in a specific legal system that fulfill the three conditions of the

descriptive notion of legal validity. Those conditions are that the norm establishes who has the power to prescribe the other norm, what procedure its promulgation must follow and the content it must have (Nino, 1994).

The conclusion that can be reached by such reasoning is that, from the perspective of the participants in legal practice and discourse in relation to a particular legal system, they use a normative concept of law and a normative definition of legal validity (Nino, 1994).[77] From this point of view, a legal system is not defined as the set of rules that, because they are prescribed by a normative authority, are used by judges or citizens in their legal reasoning but rather it is defined as the set of rules that must be recognized by them. (Nino, 1994). In the same way, the notion of legal validity that is presupposed by the participants of a legal system is not a descriptive notion of legal validity but a normative one.

As Nino, Dworkin and Alexy have shown, the difficulties with the descriptive meaning of legal validity proposed by legal positivists, such as Kelsen, are the following. This concept is unable to capture the fact that participants in legal discourse do not consider a norm valid because a norm is prescribed by an authority, but because there are reasons that justify the validity of that norm (Nino, 1994).[78]

Kelsen's solution is the formulation of the basic norm (Kelsen, 2011). However, this implies the hypothetical acceptance of a purely normative judgment that cannot be used to justify an action or decision. In this context, the basic norm cannot provide a justification for the normative judgments that constitute the conclusion of the legal reasoning of those, as judges or citizens, who participate in the legal practice and discourse (Nino, 1994).

In fact, this normative definition of legal validity implies that a legal norm is valid only if that norm is based on norms and principles that are not accepted because a human or divine authority prescribes them (Nino, 1994)[79]. As in the case of a religion, if that is correct, a legal anthropologist or a legal theorist in describing a specific legal system must not only consider facts such as prescriptions, actions, social practices, desires and beliefs. Instead, a legal theorist must in turn consider in describing a legal system, the normative propositional content of those facts and their logical relationships (Nino, 1994 and 1989b). If the last reasoning is true, this implies that, without

[77] See also: Dworkin, R. (1977) and Alexy, R. (2004).
[78] See also: Dworkin, R. (1977) and Alexy, R. (2004).
[79]See also: Dworkin, R. (1977) and Alexy, R. (2004).

the internal point of view of the participants of a legal system, the description from the external point of view of the social practice around legal discourse is not possible (Nino, 1994 and 1989b).

As a result, the internal point of view of the participants in legal discourse involves the consideration in their practical reasoning of norms that are not legal. If that is right, then a complete external-point-of-view account of law by a social scientist must take into account that the participants presuppose norms that are not legal to determine what they should do (Durkheim, 1965). As in the case of religion, the description of the facts and their normative content that constitute a legal system does not imply the acceptance, for example, by a social scientist, of the normative judgments accepted by the participants in the legal practice and discourse (Nino, 1994 and Hart, 2012).

The social scientist, both the legal anthropologist and the atheist, can describe without any commitment the normative judgments that form part of the legal reasoning of the participants as legislators, judges and citizens. If these ideas are considered, the Colombian system can be described as a legal system by which a sacred thing is presupposed, that is, human dignity, which is a symbol developed by a social group and which represents an intrinsic value.[80]

The legal anthropologist can describe that social practice that includes intentional social states about sacred things, without any commitment or value judgment about the possibility of accepting or not the existence of that value (Lerner, 1937). However, as established above, it was concluded that the idea of human dignity cannot be sustained, because it rests on an essentialist conception of biological taxa that is false.

As Nino (1989b and 1994) points out, this indicates that there is a logical priority of the internal point of view over the external point of view on the law. Therefore, since the internal point of view presupposes the reference to norms that are not legal, there is a necessary justificatory connection between law and a broader justificatory practical discourse. This discourse entails that a norm when constitutes a moral reason is binding for an intentional agent regardless of whether or not that norm has been prescribed by a divine or human authority.

This necessarily implies that a legal system and legal rules do not necessarily provide normative reasons to justify actions or decisions. This means that the law is not necessarily normative, that is, what a legal authority prescribes is not necessarily obligatory for its normative

[80] This is argued in the case of the United States. For some sociologists, there is a civil religion in the United States. That civil religion has three sacred symbols: the constitution, the flag and the Supreme Court. Those symbols define the collective identity of the United States. See: Lerner, M. (1937), Gómez-Albarello, J. (2023a and 2023b).

subjects (Nino, 1994 and 1989b)[81]. A legal system may or may not be normative. Furthermore, the normativity of law, namely, the obligation to obey the law and its legal norms, depends on another broader justificatory practical discourse. That last practical discourse is, ultimately, the source by which it is established if a norm is obligatory for an intentional agent. If this is correct, then legal reasoning is essentially linked to that more general practical reasoning. This last thesis can be formulated as the thesis of the unity of practical reasoning (Nino, 1989b).[82]

According to Nino, the reconstruction of the legal reasoning of judges and citizens in relation to legal norms within the framework of their participation in a legal system implies the following conclusion. The normative judgments that are conclusions of their reasoning can only be supported as a last resort by norms and principles that are not legal (Nino, 1994 and 1989b). Broadly speaking, this means that judges and citizens obey most of the legal norms of a legal system by one reason. This reason is that they accept those norms as standards by which they can guide their conduct and criticize the conduct of others regardless of the fact that some legal or divine authority prescribes them (Nino, 1994).[83]

But what kind of norms and principles are those through which other normative judgments can be derived? The answer is simple normative judgments that have certain content and toward which intentional agents have certain attitudes. These normative judgments are called by Nino (1994) “pure normative judgments”. Considering this, it is necessary to explain the characteristics of this type of judgments. Moreover, one can subsequently consider the way in which the legal reasoning of the participants should be reconstructed, if those judgments are required in that reasoning of the participants in the legal practice and discourse.

Following Nino, a pure normative judgment is a normative judgment that is accepted under two conditions. In this case, the judgment is accepted independently of the positive or negative consequences that may arise from its acceptance and independently of the circumstances related to its formulation. (Nino, 1994 and 1989b). This acceptance of a pure normative judgment can be subject to two types of propositional attitudes: hypothetical or categorical (Nino, 1994).[84]

When a judgment is accepted categorically, the agent assumes a commitment to the truth of that judgment, while when an agent hypothetically accepts that judgment, there is no such

[81] See also: Dworkin, R. (1977) and Alexy, R. (2004).
[82] See also: Roca (2002)
[83] See also: Dworkin, R. (1977) and Alexy, R. (2004).
[84] See also: Kant, I. (1999) and Redondo, C. (1999).

commitment (Nino, 1994). On the contrary, a normative judgment is not pure when the act of accepting that normative judgment is conditioned by factual circumstances that could not justify it on their own and, therefore, requires a new normative judgment to justify it (Nino, 1994).[85] Under those conditions, only that new normative judgment that is required to justify the first normative judgment conditioned to factual circumstances is what makes it a practical reason for the intentional agent who accepts it.

According to Nino, the acceptance of a descriptive proposition or the hypothetical acceptance of a normative judgment is pragmatically compatible with any action or decision. Instead of that, the categorical acceptance of a pure normative judgment is pragmatically incompatible with the action and decision opposed to the action and decision that the agent wants to justify (Nino, 1994 and 1989b). These purely normative judgments can be of two types: prudential judgments and moral judgments. While a prudential judgment is based on prudential reasons, a moral judgment is based on moral reasons (Nino, 1994 and 1989b).[86]

The relevance of the prescription in the practical reasoning of agents depends not only on the interpretation through which a meaning is determined for that linguistic act, but also on the acceptance by an agent of a purely normative judgment (Nino, 1994). In that sense, a prudential reason is a reason on why an action is obligatory by virtue of the subjective interests of exclusively a particular normative subject or intentional agent. These types of reasons are more general principles by virtue of which normative judgments about the interests of an individual's wellbeing can be derived (Nino, 1994 and 1989b). In this case and in relation to prudential reasons, the practical reasoning of a citizen in relation to a prescription that expresses a legal norm can be reconstructed as follows:

- An agent should do what promotes his wellbeing (prudential value)
- I am interested in avoiding the pain related to punishment.
- It is prudentially obligatory to do what legislator x prescribes (to avoid punishment).
- The legislator prescribes X. The prescription can be "whoever that seriously harms a sentient non-human animal must be criminally punished"

[85] See also: Kant, I. (1999) and Redondo, C. (1999).
[86] See also: Redondo, C. (1999).

- I must not do X. I must not seriously harm sentient non-human animals.

In this case, to decide what to do, the agent only takes into account his subjective interests. These reasons and prudential judgments cannot provide normative reasons to justify decisions and actions that impose duties on others and that harm the interests of others. That is why they become normative judgments conditioned to factual circumstances that cannot justify, without accepting another normative judgment, a decision or an action (Nino, 1994 and 1989b). In this case, prudential reasons become mere facts such as the prescription that a thief formulates towards his victim by which it is established that, if the victim does not give him the money, the thief will kill him.

On that account, prudential reasons could not justify the linguistic act through which a legislator prescribes a normative judgment. In turn, they could not justify the decision and act of a criminal judge to punish someone for violating criminal laws such as those that establish the criminalization of animal abuse. If prudential reasons and judgments cannot justify those acts and decisions, then those acts and decisions can only be justified by reasons and judgments that meet the requirements of moral reasons and judgments.

However, what is a moral reason? A moral reason is a reason that is obligatory based on the interests of all individuals with wellbeing (Nino, 1994). Likewise, moral reasons are more general principles by virtue of which moral judgments can be derived about the interests of all phenomenally conscious beings (Nino, 1989b)[87] The literature on the subject has defined at least four characteristics of moral judgments, namely (Nino, 1994) [88]:

- Generality: the judgment does not identify the situation with proper names and defined descriptions (Kant, 1999).

- Autonomy: the intentional agent accepts the judgment for reasons independent of the positive or negative consequences that may arise from the acceptance of that normative judgment and the circumstances related to the formulation of said judgment (Kant,1999).

- Universality: The judgment must apply to all situations that do not differ in some relevant property.

[87] See also: Redondo, C. (1999).
[88] See also: Kant, I. (1999) and Redondo, C. (1999).

- Impartiality: the judgment is formulated taking into consideration the interests of all beings with wellbeing that can be harmed by the behavior that is taken.

Keeping this in mind and in relation to moral reasons, the legal reasoning of a judge or a citizen can be reconstructed in this way:

- If a legislator is democratically elected [89], an agent must do what that authority prescribes.
- It is morally obligatory to obey the democratically elected legislator.
- The democratically elected legislator prescribes X.
- I must do X.

The moral judgment that is considered by the intentional agent in that reasoning can be modified by another normative judgment that is not prescribed by a democratically elected legislator and that grounds the normative judgment that is the conclusion of that reasoning. That would imply that law and legal norms play no role in the practical reasoning of intentional agents (Roca, 2002). This indicates a problem that goes beyond the scope of this essay, that is, the problem of the irrelevance of law (Nino, 1994 and Redondo, 1999).

The problem of the irrelevance of the law can be aggravated if the axiological lacuna around the criminalization of animal abuse in the Colombian legal system is considered. As it was claimed, cephalopods and vertebrates are sentient beings and there is no relevant difference between them. If that is right. then there is no justification for the exclusion of cephalopods from the scope of protection provided by criminal law through the crime of animal abuse. It can be thought that the moral judgment from which the conclusion of a citizen or judge is derived is to illustrate:

- It is morally wrong to cause unjustified harm to any sentient individual (moral value).

Considering this, a citizen's reasoning regarding the deontic qualification of conduct classified under the general class “serious harm to non-human animals” would be established independently of what a legislator prescribes as follows:

[89] It should be noted that there are different conceptions of democracy. In this case, several authors have argued that the modern conception of democracy is radically different from the conception of that notion in ancient Greece. For Greeks, democracy is the ability to do things for the majority. The representation of that majority is the result of the election by lot. See: Ober, J. (2008) and Gómez-Albarello, J. (2019).

- It is morally wrong to cause unjustified harm to any sentient individual. (Moral value)
- Harming non-human animals with phenomenal consciousness is morally prohibited.
- I must not harm non-human sentient animals such as cephalopods.

In this case and in a certain sense similar to Thoreau, the judge can categorically accept a pure moral normative judgment. This can be made by the judge regardless of the negative consequence that the acceptance of that judgment will bring in the future. A judge's reasoning regarding the criminalization and punishment of animal abuse may be as follows:

- It is morally wrong to cause unjustified harm to any sentient individual. (Moral value)
- Both cephalopods and non-human vertebrate animals are sentient.
- It is unfair to exclude sentient beings such as cephalopods from the protection of criminal law.
- I must punish anyone who unjustifiably damages a biological individual classified within the cephalopod taxon.

Finally, the justification of the linguistic act by which a legislator prescribes a normative judgment can only rest on a specific normative judgment. This judgment legitimizes the legislator to prescribe that judgment taking into account the interests of all sentient beings (Nino, 1994). For this reason, the first step of the justification of the normative judgment that constitutes the conclusion of a judge's legal reasoning presupposes the legitimacy of the legislator to prescribe the normative judgments that he applies to particular cases (Nino, 1989b and 1994).

Furthermore, a certain agent or individual can not only act or decide something for prudential reasons, but also for moral reasons. In that case, to illustrate, a citizen accepts the duty prescribed by a legislator not by the fact of promoting his wellbeing by avoiding possible harm to his interests, but by the fact of considering the interests of all sentient beings (Nino, 1994).

If only moral reasons and judgments can justify the relevant acts and decisions of legislators and judges in relation to a legal system, the conclusion is inevitable: there is a necessary justificatory relationship between law and morality (Nino, 1989b and 1994). This implies that only morality understood as the set of principles and values that must be recognized by intentional agents provides

normative reasons to justify actions and decisions (Nino, 1989b). If that is true, the criminalization and punishment of animal abuse by judges and legislators can only be justified on moral reasons.

As mentioned above, this conclusion is the first step to answer the proposed problem. A complete answer involves establishing the existence or not of those moral reasons that normatively justify the legitimacy of a legal authority to establish the deontic qualification of animal abuse in a legal system. As is evident, this is a problem that must be solved considering the conceptual and methodological tools provided by political philosophy, normative ethics, and the philosophy of criminal law.

5. Conclusions

In the first chapter, the ontology and semantics of the expressions behind the problem that this work addresses were clarified, regarding the legitimacy of the criminalization of behaviors that cause harm to non-human animals. In that chapter, it was stated that taxa are historical entities and not natural classes with essences. As a consequence, it was concluded that taxa such as *Animalia* and *Homo Sapiens* are populations of unique biological individuals.

They do not share an essence or nature that is common of all and only the members of those populations Instead, they are classified in this way due to their causal relationship and the fact of sharing a common ancestor. The consequence of the above is that human nature does not exist, because the *Homo Sapiens* taxon is not a natural class. Therefore, there is no property or set of properties - such as rationality, as had been postulated by Aristotle - that all and only the biological individuals classified in that taxon must have.

Thus, it was also established that the taxon *Homo Sapiens,* as well as the kingdom *Animalia,* are nothing more than categories to classify some biological individuals that share certain common ancestors. This implies that the expression “non-human animals” refers to all biological individuals do not share the most recent common ancestor by which some biological individuals are classified as members of the species taxon *Homo Sapiens.* Nonetheless, it must not be forgotten that those biological individuals under the expression “non-human animals” share a common ancestor with the members of the taxon *Homo Sapiens,* for which they are classified as members of the kingdom *Animalia.*

According to this, it is the fact of sharing a common ancestor and not sharing an essence that explains the large number of similar properties that can be found both in biological individuals classified as *Homo sapiens,* as also in those grouped within the broadest biological category of animals.

Furthermore, in the first chapter animal abuse was defined in terms of harms. In turn, this notion was defined in terms of the decline of interests as components of an individual's wellbeing. In relation to animal abuse, it was established that to be harmed and individual must have wellbeing and interests. Additionally, it is defended that the sufficient and necessary condition to have wellbeing and interests is the capacity to be phenomenally conscious or sentient, instead of other traits such as life, self-awareness or autonomy.

Besides, it was argued that, according to the available scientific evidence, it can be stated that, by analogy with human beings, the biological individuals grouped within the subphylum *Vertebrata* and the class *Cephalopods* are phenomenally conscious beings. That is why they have a neurophysiology, a natural history and a set of behaviors through which it can be deduced with high probability that, like human beings, they are sentient.

This last statement may be open to the inclusion as sentient beings of other taxa, such as, for example, arthropods. As a matter of fact, the research in the field has supported the thesis that even bees and other insects have certain really sophisticated forms of consciousness (Chittka, 2023). If that is true, then those individuals have wellbeing and interests. Therefore, they may suffer harm and can be subjected to animal abuse. Though, as noted, the attribution of sentience or wellbeing to an individual depends especially on its capabilities. In fact, biological individuals, despite belonging to a certain taxon, due to evolution by natural selection or stages of development, may or may not have certain properties of that taxon.

In the second chapter, it was studied how the Colombian legal system has addressed the issue of the moral and legal status of non-human animals and the prohibition and criminalization of animal abuse. In this case, it was concluded that, In the context of this country, as well as in many other Western legal systems, a radical ontological and metaphysical distinction has been established between human beings and non-human animals. On the one hand, the former are considered holders of rights or worthy persons, due to the fact that they are moral and autonomous agents. On the other hand, non-human animals, since Roman and Greek times, have been categorized as things over which people can have property rights and, of course, as renewable natural resources useful for human beings.

Moreover, it was concluded that the Colombian legal system, without any distinction and without specifying the meaning of the concept, recognizes all non-human animals as sentient beings that can be harmed and benefited by the behaviors of human beings. This recognition has also led to

the enactment of legislation that prohibits and sanctions administratively and criminally some types of animal abuse. However, as a general rule, the scope of this criminalization and prohibition only covers those behaviors that cause harm to some non-human animals, mainly those classified within the *Vertebrate* subphylum. Thus, that criminalization excludes without obvious reason other beings that can also be considered sentient beings as to illustrate cephalopods.

Following other Western systems, the Colombian legal system, as a result of the interpretation of the Constitution by the Constitutional Court, has established that, human dignity, as it was defended by Kant, is the final foundation of the constitutional duty of animal protection. For that reason, this value grounds the constitutional prohibition of animal abuse and, therefore, the criminalization of those behaviors that cause harm to those non-human animals categorized as members of the *Vertebrate* subphylum. For the Constitutional Court, human dignity implies that human beings as subjects of rights, being moral and autonomous agents, have legal and moral duties with respect to sentient beings, as a term synonymous with the expression "non-human animals".

Regarding the above, in the second chapter it was concluded that the radical distinction between human beings - as people with dignity - and non-human animals - as mere things or renewable natural resources that are sentient beings - cannot be sustained. The above is a consequence of considering that this distinction is based on an essentialist approach that is false. In that chapter, it was argued that the idea that biological taxa such as *Homo Sapiens* are natural types cannot be supported.

Taxa are historical entities that do not have an essence, that is, a trait or set of traits such as, for example, autonomy, language or self-awareness that all and only members of a taxon must have. If *Homo Sapiens* is not a natural class with an essence, then the idea of human dignity cannot be defended. This is the consequence of asserting that human beings cannot be necessarily considered the only beings with dignity because all individuals of that taxon are the only beings that are moral and autonomous agents.

The main reason for the approach is that, within the framework of the theory of evolution by natural selection and the theory of common ancestry, it is impossible to claim that all and only members of the taxon *Homo Sapiens* has a nature or essence. Beyond having a common ancestor, they do not have a unique and exclusive property, such as autonomy or moral agency, by which all of them can be considered subjects of rights.

This conclusion implies that the moral and legal status of a being cannot be determined exclusively by its membership in a specific taxon such as *Homo Sapiens*. This also infers that, if there is no human dignity, it cannot be the reason for the establishment of the constitutional duty of animal protection. As a consequence, it cannot be the reason of the constitutional prohibition of animal abuse and of the criminalization and punishment of behaviors that harm some types of non-human animals.

After rejecting the idea that the legitimacy or justification of the criminalization of animal abuse can rest on the idea of "human dignity", in the last two chapters of the work, it is studied the normative dimensions of the research problem. That is to say, the normative question of if it is possible to justify the criminalization of behaviors that harm phenomenally conscious beings.

In the third chapter, it was demonstrated that this is a problem in which it is necessary to determine the normative reasons for the deontic qualification of a behavior in a normative system. In other words, if the criminalization of animal abuse is understood as a legal institution that is made up of a set of principles and rules that are addressed to citizens and judges, then the question that arises is why they must obey those rules and principles.

This last question entails an answer to the question of how that legal institution can be justified. As a matter of fact, this implies to look for the normative reasons of the normative subjects for behaving according with those principles and rules. These normative subjects are mainly two, citizens and judges as moral and autonomous agents. Citizens who have the capacity to be guided by those principles and rules. Judges who must interpret and apply them to particular cases.

The third chapter clarifies the theories, categories and normative methodologies behind this problem. That chapter stated that the notion of justification or legitimacy of a legal norm must be understood in terms of practical reasons. These practical reasons can be of three types: motivating reasons, explanatory reasons and normative reasons. Against this, it was argued that only normative reasons can justify decisions and actions. As a result, it is concluded that only normative reasons can justify legal norms such as those that criminalize and punish animal abuse.

Finally, in the fourth chapter, it was proposed that there is a necessary, but not conceptual, justificatory connection between law and morality. That is why, from the internal point of view of a normative system, if legal norms are justified, they are conceived as normative reasons for the action of an agent. This involves that the justification of a legal institution, such as the criminalization and

punishment of animal abuse, can only be based on moral reasons, that is, moral rules, principles and values that are rationally established by an ideal morality.

What that means is that the justification of the criminalization of animal abuse is based on moral reasons. Due to this, the morally neutral conceptual analysis, predominant in the *civil law* tradition around criminal law, cannot by itself be a suitable methodological approach to study the justification of a set of legal norms such as those that constitute the legal institution under examination.

This implies that only morality, understood as the set of principles and values that must be recognized by intentional agents, provides normative reasons to justify actions and decisions. If that is true, the criminalization and punishment of animal abuse by judges and legislators can only be justified on moral reasons.

As mentioned above, this conclusion is the first step to answer the proposed problem. A complete answer involves establishing the existence or not of those moral reasons that normatively justify the legitimacy of a legal authority to establish the deontic qualification of animal abuse in a legal system. As is evident, this is a problem that must be solved considering the conceptual and methodological tools provided by political philosophy, normative ethics, and the philosophy of criminal law.

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