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**ANIMAL RIGHTS IN THE NEW CONSTITUTION? SOME  
REFLECTIONS ON FOUCAULT, THE LAW, TECHNOLOGIES  
OF POWER AND SUBJECTIVE RIGHTS.**

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## **Abstract**

During the social protests that took place in Chile in October 2019, the idea of drafting a new constitution to replace the one imposed by Augusto Pinochet was once again at the center of national debate. As many have suggested, this scenario constitutes an excellent opportunity to include at the constitutional level some mechanism for the protection, respect, and exclusion of non-human animals from those outrageous power relations implying their exploitation and subjugation. In this context, many have pointed out that such formula must be based on the recognition of their legal personhood and subjective rights. However, for some other philosophical positions -such as the Foucauldian one- those technologies are more likely to be instruments of domination than of liberation. The following pages are intended to reflect on the convenience of using such formula, and to suggest where we should direct our efforts in designing an appropriate technology of animal liberty, both based on certain basic ideas found in the theory of power formulated by Michel Foucault.

**Key words:** Animal Law; Animal Legal Philosophy; Animal Rights; Michel Foucault.

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## **I.- Introduction**

In Chile, on the occasion of the social protests of October 2019, the idea of drafting a new constitution to replace the one imposed by Augusto Pinochet (who was the country's dictator between 1973 and 1989), was once again at the center of public debate. In this context, and given the referendum that would take place during the year 2020, many voices have been raised asking for the recognition of "animal rights" in the new constitution. Being this an excellent opportunity for the constitutional recognition of some formula that would allow to protect and respect animals, it is necessary to ask if this formula should be, or not, the recognition of their legal personhood and their aptitude to be a holder of subjective rights.<sup>1</sup>

Thus, the following pages will offer some reflections based on Foucauldian perspectives, which will allow us to meditate on the convenience of the recognition of animal rights in the constitution. The outcome of this exercise may be applied to other legal systems since these perspectives do not relate to endemic particularities of Chilean law, but rather to a theory of power and a theory of law which differs from the classic cultural conceptions rooted in our legal imaginary, which have been normalized through our law schools, our political systems, and *our* power structures.

## **II.- Preliminary considerations: Foucault, the Law and "Subjective Rights".**

### **1.- Michel Foucault**

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<sup>1</sup> When we talk about subjective rights, we refer to a "legal power recognized to a subject of law that allows him to enjoy and dispose of a thing or value or demand from another person a benefit, within the limits of good faith, the prohibition of abuse of rights and their antisocial exercise, and respect for other prohibitions imposed by law. It is distinguished from singular legal powers deriving from specific legal relationships". (REAL ACADEMIA ESPAÑOLA, DICCIONARIO DEL ESPAÑOL JURÍDICO, *Derecho Subjetivo* [On line]. [Last time visited: 04.15.2020]. Available at: <https://dej.rae.es/lema/derecho-subjetivo>.) Subjective rights can have their source in a legal norm, in an agreement of wills, and even, according to some, in "nature". In any case, the important thing to bear in mind is that subjective rights always presuppose the existence of an interest, and a mechanism of protection or guardianship for its defense, which will always be delimited by the general interest of society.

Michel Foucault (born October 15, 1926, Poitiers, France - died June 25, 1984, Paris), was a French philosopher and historian, and one of the most influential and controversial scholars of the post-World War II period.<sup>2</sup> Foucault is usually associated with the structuralist and post-structuralist movements, and had strong influence not only in philosophy but also in a wide range of humanistic and social scientific disciplines.<sup>3</sup> Michel Foucault had brilliant and important insights about power, which have had an important influence on many activist movements.<sup>4</sup> However, his understanding of power changes between his early work on institutions (Madness and Civilization, The Birth of the Clinic, Discipline and Punish) and his later work on sexuality and governmentality.<sup>5</sup>

## 2.- Duality between Law and Norm

According to Foucault, it was a mistake to believe that power is exercised only in an institutional way through legal mechanisms since there are other ways of exercising power among individuals and groups. These "other ways" combine with each other, creating relationships in which various types of unequal exchanges take place on different grounds.<sup>6</sup> Thus, the philosopher makes a distinction between *legal* power and *disciplinary* power, where the former is based on

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<sup>2</sup> ENCYCLOPAEDIA BRITANNICA, *Michel Foucault, French Philosopher and Historian* [On line]. [Last time visited: 04.15.2020]. Available at: <https://www.britannica.com/biography/Michel-Foucault>.

<sup>3</sup> STANFORD ENCYCLOPEDIA OF PHILOSOPHY, *Michel Foucault* [On line]. [Last time visited: 04.15.2020]. Available at: <https://plato.stanford.edu/entries/foucault/>.

<sup>4</sup> PHILOSOPHY TALK, *Foucault on Power* [On line]. [Last time visited: 04.15.2020]. Available at: <https://www.philosophytalk.org/blog/foucault-power>.

<sup>5</sup> PURDUE UNIVERSITY, COLLEGE OF LIBERAL ARTS, *Modules on Foucault: III: on Power* [On line]. [Last time visited: 04.15.2020]. Available at: <https://cla.purdue.edu/academic/english/theory/newhistoricism/modules/foucaultpower.html>.

<sup>6</sup> BARDI VALE, Carmen Elena. *El Derecho como Discurso: Una Perspectiva Foucauldiana* [On line]. Universidad Pontificia Comillas (Madrid, España), 2014. [Last time visited: 04.15.2020]. p. 9. Available at: <https://repositorio.comillas.edu/xmlui/handle/11531/514>.

sovereignty, on a discourse of justice, obedience and the norm, and which is exercised in a centralized and descending manner; and where the latter is, on the contrary, a power distributed by society, without a concrete epicenter, which is exercised in an ascending manner and is based on a scientific discourse of normalization.<sup>7</sup>

According to Foucault, this duality between Law and norm has a historical *raison d'être*, since, in the Middle Ages, society was regulated by mechanisms of power based on the domination of land and people,<sup>8</sup> and where the existing "Law" was based on custom, and its application was utterly arbitrary.<sup>9</sup> In this context, the advent of the "monarchy" would have revolutionized these institutions, since it was based on legal principles that limited the unwritten power of the feudal lords over the subjects of their lands.<sup>10</sup> However, between the 17th and 18th centuries, there was a shift from the legal power of the State to disciplinary power, based on "normalization" and not on Law,<sup>11</sup> which is why we live today riddled with this duality of powers.

Consequently, the author does not only refer to the Law as an opposition to discipline - both conceptually and as a method of resistance- but also conceives it as a vehicle for perpetuating the norm,<sup>12</sup> since in some instances it exerts a normalizing effect that reinforces the power relations of dominant groups, and the domination of certain social groups over others.<sup>13</sup>

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<sup>7</sup> Ibid.

<sup>8</sup> (e.g., the system of vassalage)

<sup>9</sup> BARDI VALE, *El Derecho*, cit. (n. 6).

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid. p. 22.

<sup>13</sup> Ibid. p. 23.

### 3.- The Law

From "the thought of the outside", a short writing in which he examined Blanchot's work from the perspective inaugurated by "The Order of Things", to "Discipline and Punish", the French philosopher modified his position concerning the Law and its importance as an instrument of normalization, regulation, and domination in modern societies.<sup>14</sup>

#### 3.1. First stage: The Law is everywhere.

In an early stage, Foucault conceived that the Law was omnipresent; it was found "even in the most invisible interstices", insofar as it regulates all human activities and conducts, being present even in those cases where it is no longer expressed as a sanction.<sup>15</sup> In this sense, disobedience of the Law would not imply its disappearance but, on the contrary, its reaffirmation, since at that time, it would encompass everything that wanted to transgress it, everything that tried to tear it down.<sup>16</sup> Thus, the disobedient person would also be an agent of the Law and its order, since his acts contribute to enhancing the effects of the Law.<sup>17</sup> In the words of the philosopher, "liberties are not capable of interrupting the law; one can come to believe that one has disregarded it, that one observes its application from outside; at the moment when one believes that one is reading from afar the secrets that are valid only for others, one cannot be closer to the law".<sup>18</sup>

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<sup>14</sup> MIELES, Ernesto. *El Concepto de Derecho. Foucault, la Ley y la Crítica del Paradigma Liberal* (NE, Colombia). Iusta. July, 2016, 2 (10):114-119. p. 114.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid. p. 115.

<sup>18</sup> Ibid.

## 2. Second stage: Reconsidering the role of the Law in a disciplinary society.

During the second stage in his thought, Foucault concluded that the Law was unable to penetrate the disciplinary devices where subjectivation is produced, those devices of a panoptic nature where a "non-law", or a kind of *infra-law*, operates.<sup>19</sup> Thus, even though our societies are placed under the visible symbol of the Law, the most numerous, effective and persistent mechanisms of power operate in the "interstice" of the laws, according to different modalities to the Law and according to a different objective that is not "the respect of the Law".<sup>20</sup> Therefore, at this stage, according to Foucault, the strategy of power exceeds the purely normative, crossing the social body and producing it, in such terms that the punitive methods are not the material effect of legal norms but of more complex power techniques.<sup>21</sup>

## 4.- Infra-Law, Micro-physics of Power and Technologies of Power

In Foucauldian philosophy, the *infra-law* stands as the instrument of normalization inherent to the disciplinary society, that is, the "surveillance society where observation of the bodies can be carried out without interruption."<sup>22</sup> This *infra-law* is the regulatory archetype of similar disciplinary devices,<sup>23</sup> such as schools, universities, prisons, and psychiatric hospitals, which share similarities regarding their mechanisms for the extraction of knowledge, surveillance, and the exercise of power. In other words, *infra-law* is a "set of standards that constitute guidelines for conduct, reasons for action, parameters of correction, and references for punishment. The norms

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<sup>19</sup> Ibid. p. 116.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid

that compose the infra-law, but not the Law, stipulate what is normal and define what is deviant”.<sup>24</sup>

Consequently, given the existence of a Law and an infra-law that regulate interactions within a society, it is possible to observe that the State does not concentrate all political and social power. Because of this, it is necessary to study the *micro-physics of power*.<sup>25</sup> In this sense, the philosopher maintained that power is a relation of command-obedience in which the docility of human bodies is built through multiple disciplines of knowledge.<sup>26</sup> Thus, knowledge and dominion over the body is not a privilege of the ruling class, nor is it reduced to state relations, but rather constitutes the effect of the whole -or rather the system in general- that manifests itself in all the groups that use it to their advantage.<sup>27</sup> These kinds of complex, diffuse, and reciprocal relations are called "micro-powers",<sup>28</sup> whose relationships are articulated in a given society through specific regimes of truth -or *discourses*-<sup>29</sup>, which use *technologies of power*<sup>30</sup> to reproduce and to maintain themselves through space and time.

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<sup>24</sup> Ibid. p. 117.

<sup>25</sup> Ibid.

<sup>26</sup> GONZÁLEZ RODRÍGUEZ, Jorge, *Michel Foucault: Micropoder, Poder y Tecnología Política* (La Habana, Cuba). Horizontes y Raíces. January-July, 2015, 1 (3):24-32. p. 27

<sup>27</sup> Ibid.

<sup>28</sup> Ibid.

<sup>29</sup> “Discourses” can be defined as “(...) ways of constituting knowledge, together with the social practices, forms of subjectivity and power relations which inhere in such knowledges and relations between them. Discourses are more than ways of thinking and producing meaning. They constitute the 'nature' of the body, unconscious and conscious mind and emotional life of the subjects they seek to govern (...) a form of power that circulates in the social field and can attach to strategies of domination as well as those of resistance” MASSEY UNIVERSITY OF NEW ZEALAND, *Foucault* [On line]. [Last time visited: 04.15.2020]. Available at: <https://www.massey.ac.nz/~alock/theory/foucault.htm>.

<sup>30</sup> Technologies of power are those "technologies imbued with aspirations for the shaping of conduct in the hope of producing certain desired effects and averting certain undesired ones (...) The two main groups of technologies of power are technologies of the self, and technologies of the market. Foucault defined technologies of the self as techniques that allow individuals to effect by their own means a certain number of operations on their own bodies, minds, souls, and lifestyle, so as to transform themselves in order to attain a certain state of happiness, and quality of life. Technologies of the market are those technologies based around the buying and selling of goods that enable us to define who we are, or want to be. These two technologies are not always completely distinct, as both borrow bits of

## 5.- Political Order and Law

Foucault in "Society Must Be Defended" mentions the idea that although political power stops war and makes peace reign -or at least tries to do so - it does not do so to neutralize the effects of war, nor the imbalance manifested in its final battle.<sup>31</sup> On the contrary, political power takes on the role of perpetually re-inscribing this relationship of force through a kind of 'silent war', re-inscribing it in institutions, in economic inequalities, in language, and in human bodies.<sup>32</sup>

In this sense, inverting Clausewitz's aphorism, Foucault maintains that "politics is the continuation of war by other means; (...) it is the sanctioning and extension of the imbalance of forces manifested in war".<sup>33</sup> Consequently, "(...) political struggles, confrontations regarding power, with power, for power, changes in the relations of power-actuations on one side, investments, etc.-all this, in a political system, should be interpreted only as the aftermath of war. And it should be deciphered as episodes, fragmentations, displacements of the war itself."<sup>34</sup>

Thus, for Foucault, the "Law" is nothing but an actual instrument of war that masks a strategy of total governance over society,<sup>35</sup> and which perpetuates and normalizes the relationship of forces underlying the current order. Thus, in the words of the philosopher, "The legal system and the judicial field are the permanent vehicles of relations of domination, of polymorphic

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each other from time to time." WIKIPEDIA, *Governmentality, Technologies of Power* [On line]. [Last time visited: 04.15.2020]. Available at: [https://en.wikipedia.org/wiki/Governmentality#Technologies\\_of\\_power](https://en.wikipedia.org/wiki/Governmentality#Technologies_of_power).

<sup>31</sup> FOUCAULT MICHEL, *Defender la Sociedad. Curso en el Collège de France (1975-1976)* (2ª edition in Spanish), Buenos Aires, Argentina. Fondo de Cultura Económica de Argentina S.A., 2000. p. 29.

<sup>32</sup> Ibid.

<sup>33</sup> Ibid.

<sup>34</sup> Ibid.

<sup>35</sup> MIELES, *El Concepto*, cit. (n. 14). p. 118.

techniques of submission. I believe that the law should not be seen as a legitimacy to be established, but rather as the mechanisms of submission that it puts into action. Therefore, the question for me is to elude or avoid the problem, central to the law, of the sovereignty and obedience of the individuals subjected to it, and to highlight, instead of one or the other, the problem of domination and submission".<sup>36</sup>

## 6.- Some conclusions

After a very brief examination of some basic notions of Foucault's theory of power, we can conclude that the Law constitutes a cultural institute that is inserted within a certain paradigm of social ordering, which exercises the role -among many others- of a technology of power which crystallizes and normalizes the current political order, as well as other cultural elements.<sup>37</sup> Moreover, the Law or legal system, in addition to "normalizing", fulfills the functions of ordering, disciplining,<sup>38</sup> and punishing the conducts and bodies of the administered individuals.

In this context, the recognition and content of "subjective rights" in a certain legal system is the consequence of the struggling of forces preceding the political order that has enacted them. For this reason, subjective rights constitute an integral part of that discourse, and stand as

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<sup>36</sup> FOUCAULT, *Defender la Sociedad*, cit. (n. 31) p. 36.

<sup>37</sup> Even though its normalizing effect may be less relevant or more "symbolic" than that of other power technologies.

<sup>38</sup> Although Foucault distinguishes legal power from disciplinary power, we cannot avoid the fact that in certain contexts the law exercises a power that exceeds the merely normative and becomes intertwined with disciplinary power, particularly in those cases where its substantive content begins to operate as a normalizing element, modulating cultural reality. So, for example, let us examine the maxim "do not kill". The legal prohibition to kill another will operate in an intense way against the transgressor of the norm, insofar as it will imply the exercise of the punitive power of the state over his body and legal status. Furthermore, it will operate less intensely on third parties, in that many will refrain from killing to avoid suffering the legal consequences of the transgression. I believe that both effects could be understood within the "normative effects" of the criminal prohibition. However, the atheist third party with little access to cultural elements - that is, a third party who does not have access to other discourses that prohibit killing - will probably have the notion that "killing is bad", which will be determined to a greater or lesser extent by the existence of the criminal prohibition. In such a restricted context, the legal rule could have a disciplinary effect.

normalizing, alienating and legitimizing instruments of the current order. In other words, subjective rights constitute another technology at the service of the power structure underlying the legal and political order of a society, in a specific place and time.<sup>39</sup>

### **III. - Are animals part of this?**

In general, the trend to advocate for the recognition of subjective rights in favor of non-human animals predominates in certain groups of society, which are directing their efforts and resources to create a more just world for them. However, based on the considerations made in the previous chapter, it is worth asking whether or not animals are part of this discursive scheme of power and control. The aforementioned is crucial, especially if our purpose is to exclude non-human animals from those outrageous relations of exploitation and subjugation instituted in our societies and normalized for human benefit.

#### **1.- Animals and the Law**

We have pointed out that both the Law and subjective rights fulfill the role of ordering, disciplining, controlling, punishing, and normalizing the conducts and bodies of the administered individuals, as well as they also contribute to the process of crystallization and legitimization of the political order underlying the legal system. However, it is strange to think that, in our societies, we would have the need to discipline, control, punish, and normalize non-human animal conducts

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<sup>39</sup> In this sense, the "legitimizing effect of the political order" of subjective rights is related to the psychological effect constituted by the illusion of freedom that the holder of the right perceives. This effect is also related to the existence of other legal norms establishing differentiations or alterations in the exercise of subjective rights with respect to those who demonstrate conducts that delegitimizes the current order -or conducts "of the enemies" of society-. For example, I understand that I must not steal; otherwise my freedom will be restricted, but if I comply with the criminal order in force, my freedom will remain "intact". Thus, I could consider that my subjective right to freedom, or the right to not be deprived of it, constitutes a "protection" against the power structure of the State. Such reasoning is fallacious since the parcel of freedom protected by the respective subjective right constitutes a cultural and political delimitation of certain forms of individual behavior in the face of State coercion). In this sense, given the psychological aspect of the subjective rights as technologies of power, we could conceive such instruments as "technologies of biopower", since it stands as an instrument that governs the body and psyche of individuals.

and bodies through the legal system. It is also useless to try to take away from them "the legitimization or normalization of the current political order", since it seems intellectually impossible.

Notwithstanding the above, and despite the fact that animals should be excluded from the "Law" -as a technology of power- in order to safeguard their freedom radically, these individuals are usually the object of legal regulation in the majority of modern legal systems. Furthermore, it is also common for these legal systems to consider non-human animals as objects or *things*, rather than subjects or *individuals*. This reification of non-human animals through the legal discourse contributes to the deterioration of animals' position in the political system and favors the crystallization of anthropocentric and speciesist conceptions.

For this reason, we should pursue a material -and not merely theoretical or symbolical- recognition of animal dignity and individuality, but above all, the effective protection of its liberty. In this sense, the protection of animals' liberty must be understood as their absolute liberation from all kinds of exploitation exercised by humans, in such terms that all phases of their lives are determined by themselves, by their social group, and by the natural interactions between trophic levels in the ecosystems to which they belong.

## 2.- Animals and infra-law

Besides, animals are inscribed within the web of multidirectional power relations forming the infra-law, and it's clear that they are the object of the exercise of biopower technologies, insofar as their bodies, minds, and conducts are intervened, modulated and reconfigured for the benefit of those who use them.

In this sense, it is possible to appreciate how the different power relationships affecting animals are, in the end, reflected in a factually different valuation or treatment of them, depending

on the animal and the context in question.<sup>40</sup> Thus, for example, a farm animal will typically enjoy a lower *de facto* status than a companion animal; and in turn, a companion animal abandoned on the streets of Detroit will enjoy lower *de facto* status than one owned by a high-income family in Portland. In this sense, although such differentiation of status will not enable the animal to intervene as an active subject in any of the power relationships in which it is circumstantially involved, such differences will be relevant for other subjects who participate in those relationships, conditioning the consequences of their actions and eventually affecting their inclination for certain forms of behavior over others.<sup>41</sup>

Moreover, animals have also been the object of the exercise of biopower, since their bodies and minds have been intervened by man, in different contexts and forms. Thus, for example, animals in agriculture are subjected to standardized and accepted husbandry practices designed to adapt their bodies to the production processes to which they are subjected.<sup>42</sup> Another example is the intentional genetic crossing of non-human animals to obtain specific physical and/or psychological characteristics that will better satisfy the purposes for which the animals have been destined. Thus, for example, the breeds of dogs that are currently recognized as such by those institutions controlling the breeding discourse have quite defined genetic characteristics, which are the outcome of selective breeding over generations.

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<sup>40</sup> Regardless of the different legal valuation that may exist between one animal species and another (e.g., a pet versus a fish).

<sup>41</sup> Thus, for example, the animal abuser would probably prefer to beat a pig than a dog, or the dog abuser would prefer to abuse an abandoned dog than a dog owned by a human.

<sup>42</sup> Examples include debeaking of chickens, dehorning of cattle, tail docking of cows, castration without anesthesia in a variety of animal species, force-feeding in concentrated animal confinement operations, and many others. Even more, in the aquaculture context, we can mention the case of the "AquAdvantage" salmon, which was genetically designed to grow all year round and not only during spring and summer.

Such biopower practices<sup>43</sup> can thus be classified into *internal* or internalized practices and *external* practices. The former consists of human disciplinary practices that affect the subjectivity of animals, in the same way that disciplinary practices affect and construct the subjectivity of humans.<sup>44</sup> Examples could be training techniques, domestication, and teaching, which, in a variety of ways (including "reward" and "affection"), make animals more useful for the fulfillment of human purposes.<sup>45</sup> In turn, external practices are those affecting the outside of the animals' bodies and/or circumstances, such as confinement, isolation from other members of their species, castration (as well as other forms of standardized mutilation), physical punishment, expulsion from their habitat, and a wide variety of uses of their space.<sup>46</sup>

However, it should be noted that these practices cannot be easily separated from each other, as externalized practices such as confinement, physical punishment, and even castration have significant effects on the subjectivity of non-human animals.<sup>47</sup> Examples include learned helplessness in confined animals, or decreased physical activity in dogs that have been spayed or neutered.

#### **IV.- ¿What reflections can we make on this?**

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<sup>43</sup> Such techniques of regulation, control and discipline may be repressive, but they are also creative, while they construct subjects in particular ways amenable to the state (so that they are appropriately socialized, developing desirable habits and values and believing that the state operates with their consent as autonomous citizens). PALMER, Clare, "*Taming the Wild Profusion of Existing Things*?" *A Study of Foucault, Power, and Human/Animal Relationships*. In: CHRULEW, Matthew and WADIWEL, Dinesh Joseph, *Foucault and Animals*. Brill. 2017. (339-358). p. 345.

<sup>44</sup> Ibid

<sup>45</sup> Ibid.

<sup>46</sup> Ibid.

<sup>47</sup> Ibid.

From everything exposed and reasoned in the previous pages, it is possible to make the following reflections regarding the recognition of subjective rights for non-human animals in our legal systems, particularly at the constitutional level:

### 1.- The Law

First of all, the "Law" constitutes a crystallization and a symbolic perpetuation of the outcome of the struggle of forces preceding the current political order within a society. In this sense, the legal system does not have authority because of being a legislated norm, but because of the forces underlying and modulating it. In this context, the Law does not intend to regulate, standardize, punish, or discipline animal conducts. Or at least it should not. Furthermore, the Law does not seem to be an appropriate technology to pursue the legitimization of the political and legal order in the subjectivity of a non-human animal. Moreover, as the reader will be able to see, this task seems not only to be pointless but also unnecessary, given the material control that humans have over animals.

### 2.- Subjective Rights

Secondly, subjective rights<sup>48</sup> are an essential factor in the legitimization and normalization of the political order on individuals -that is, human beings-. Moreover, subjective rights can be considered as a technology of biopower, insofar as through psychology, they exercise control over the human "spirit", generating a false sense of freedom and protection against state coercion. And not only that, subjective rights can lead to certain conducts, dissuading others, and can generate

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<sup>48</sup> Subjective rights maintain a gender-species relationship with the "Law", the latter being the gender and subjective right being the species.

classes of individuals through the differentiation of legal status.<sup>49</sup> Thus, the functions that subjective rights fulfill in the political system concerning its holder are irrelevant and also harmful to animal freedom, conceived as an absolute autonomy from all forms of exploitation by humans.

### 3.- Infra-law

Thirdly, we can point out that non-human animals are inserted within the networks of power that Foucault calls to be studied from the "microphysics of power". Furthermore, non-human animals are objects of the exercise of biopower technologies and are an integral part of the predominant discourses that contribute to the normalization of their objectivization or reification. However, the fact that animals are the object of the exercise of legal and normative power does not mean that it has to be like that. It does not mean that it is favorable or beneficial to non-human animals' interests.

### 4.- Technologies of (Animal) Liberty?

In fourth place, it is necessary to indicate that it is not possible to modify overnight the set of discourses, disciplines, and technologies norming the relationship between human and non-human animals<sup>50</sup> (infra-law), in order to procure their liberation. It is also challenging to achieve the necessary legal amendments that would allow the abolition of all forms of animal exploitation (Law). However, what is possible for us, what is within our capabilities, is to avoid incurring in legal amendments, both at a constitutional and legal level, that include animals within the legal scheme that disciplines, administers, normalizes, punishes, and "seduces" human beings. In that sense, a *technology of animal liberty* at our disposal to attempt their liberation is precisely the

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<sup>49</sup> In this sense, let's think about the immigrant; about the Indian caste system; or simply about the existence of different catalogues of rights for different native peoples in the Constitution of the Republic of Bolivia.

<sup>50</sup> Particularly because they have been embedded in our cultural discourses for centuries, if not millennia; and because they are rooted in our bodies and psyches.

abstention of the recognition of subjective rights for them, and of course, the abstention of the recognition of non-human animals as "legal persons".

#### 5.- The Uselessness of Subjective Rights

We have already pointed out that it is futile to expect animals to be able to legitimize the existing political and legal order. Furthermore, we have noted how subjective rights are a technology of bio-power, conceived in a purely anthropocentric discourse, and whose object of government, administration, and discipline is the human being, and not the non-human animal. Moreover, subjective rights do not constitute a technology of animal liberty that serves the objective of procuring its liberation from human exploitation, as these have the virtue of generating the exact opposite effect, that is, perpetuating the domination of humans over animals through the symbolic crystallization of that relationship of domination.

#### 6.- Then, where to direct our efforts?

Given all the above, we can conclude that our dogmatic efforts should be directed to devise legal mechanisms that allow the total exclusion of animals from any direct juridification, whether active or passive. In order to achieve this, it is necessary to understand that the protection of animal liberty and dignity does not necessarily imply their inclusion within the legal discourse, at least in the way that it has been performed until now, or in the way some groups claim it should be performed.<sup>51</sup>

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<sup>51</sup> For example, the "Animal Rights Movement" maintains that animals are holders of "moral rights", which must be recognized on a legal level. In this sense, authors like Tom Regan and Gary Francione do not only fail while trying to understand the political and legal nature of subjective rights but also while structuring their ideology over the absolute normalization of this technology of power, associating the need of protecting animal liberty with the lucubration of moral rights. The aforementioned is an example of the technical sloppiness of the movement, and the early evolutionary stage in the construction of a coherent theory for animal liberation.

In this sense, the new mechanisms or *legal technologies of animal liberty*<sup>52</sup> should be oriented to administer, order, discipline, and control the exercise of human "liberty", so that it does not affect animals' liberty. Likewise, these technologies should be directed at normalizing the limitation of human liberty for the benefit of animal liberty, through the symbolic crystallization of this new power relationship. Within this new paradigm, the non-human animal would exercise only a guiding role, and not a direct role as subject or object of the exercise of power.

In this way, the life, dignity, liberty, and natural processes of non-human animals could be protected through regulations and limitations of human freedoms erected on current environmental, criminal, administrative, civil, and family law, among others. In turn, the active exercise of legal actions, rights, and prerogatives, as well as the passive exercise of duties, obligations, burdens, and legal actions designed to defend animal freedom, would fall on human beings. Under this paradigm, the direct juridification of the animal should be restricted to very exceptional cases, in order to deconstruct to the greatest extent possible the anthropomorphic conceptions of the non-human animal in the cultural discourses of the human-animal.

Thus, the protection of animal liberty could be achieved in a logical way, in which the human being would intervene as the subject and object of that power relation, limiting his own liberty in benefit of non-human animals through the use of legal and infra-legal institutes belonging to the human cultural imaginary. "Render unto humans the things that are human's, and render unto animals the things that are animal's."<sup>53</sup> Or should we regulate our human behaviors based on non-human cultural codes? Based on how other species behave and interact with each other?

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<sup>52</sup> A paradoxical combination of words.

<sup>53</sup> Render unto Caesar is the beginning of a phrase attributed to Jesus in the synoptic gospels, which reads in full, "Render unto Caesar the things that are Caesar's, and unto God the things that are God's" (*Ἀπόδοτε οὖν τὰ Καίσαρος Καίσαρι καὶ τὰ τοῦ Θεοῦ τῷ Θεῷ*). WIKIPEDIA, *Render unto Caesar* [On line]. [Last time visited: 04.15.2020]. Available at: [https://en.wikipedia.org/wiki/Render\\_unto\\_Caesar](https://en.wikipedia.org/wiki/Render_unto_Caesar).

Should we perhaps behave "like animals"? If the answer is no, then why have we let the opposite happen to non-human animals?

## **VI. Conclusion**

Both objective and subjective rights constitute human cultural lucubrations that set themselves up as technologies of power whose active and passive subjects are human beings. These institutions are alien to animals, their ethology, their nature, and their interests.

However, there are groups that have promoted animal liberation and abolition, and to this end, have proposed the recognition of animal "moral rights" on a legal level, as "animal rights". Thus, these groups have associated the idea of liberty, dignity, and protection of animal autonomy with the recognition of subjective rights. Nevertheless, to reach this conclusion, it is necessary to assume that subjective rights are also a suitable way of recognizing and protecting the liberty, dignity, and autonomy of human beings, which constitutes a serious but extremely normalized cultural confusion in our predominant cultural discourses.<sup>54</sup>

As a final reflection, we must remember that both the Law and the judicial process appeal to a ritual, psychological, and emotional component, which contributes to producing subjectivation and normalization in the individual. In this sense, thinking that subjective rights produce liberty, is concrete proof of the success of the Law as a technology of power, as soon as it has managed to penetrate the mind of the administered individual, profiling itself as an agent of freedom and not

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<sup>54</sup> In this context, our law schools have a transcendental role in the normalization of these technologies of power, and in the exclusion from legal discourse - which they seem to control - of those perspectives that violate these predominant conceptions.

as an agent of submission and subordination. This resembles the Stockholm Syndrome in its "coping" and "adaptation" phases.<sup>55</sup>

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<sup>55</sup> Stockholm syndrome is the description of a psychological reaction, precisely a post-traumatic effect. This syndrome takes place when a victim feels an affective bond with her kidnapper or jailer, which occurs because she misinterprets the omission of violence as a sign of humanity or empathy. Thus, the syndrome has four phases: triggering, reorientation, coping, and adaptation. In this context, the "coping" phase is the one in which the victim self-incriminates herself of the facts, adopting the way of thinking of her aggressor; and the "adaptation" phase, the one in which the victim ends up identifying herself with the aggressor, looking for the cause of her pain in third parties or abroad - such as the government, her family, her friends, the community, etc. SÍNDROME DE ESTOCOLMO.INFO, *Explicación y Fases del Síndrome de Estocolmo* [On line]. [Last time visited: 04.15.2020]. Available at: <https://sindromedeestocolmo.info/sindrome-estocolmo-fases-explicacion/>.