THE CONSTITUTIONAL DUTY TO FORMULATE AND IMPLEMENT PUBLIC POLICIES FOR THE PROTECTION OF DOMESTIC ANIMALS IN A SITUATION OF ABANDONMENT IN URBAN CENTERS

O dever constitucional de formulação e implementação de políticas públicas à proteção dos animais domésticos em situação de abandono nos centros urbanos

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ABSTRACT

This article presents the result of a bibliographical research elaborated from the deductive method, for the purposes of approach, and monographic, as a form of procedure, on the theme of the constitutional duty to protect domestic animals in situations of abandonment in urban centers, having the main objective is to analyze who is responsible for this duty and whether the omission of the competent entity may lead to liability. Thus, in the course of the work, we sought to answer the following question: could the omission of the constitutional duty to formulate and implement public policies aimed at domestic animals abandoned in urban centers give rise to responsibility to the public authorities? Therefore, a study of the main aspects was carried out, among which the ecologically balanced environment as a fundamental right and state constitutional duty, as well as the constitutional protection of non-human animals from the perspective of this fundamental right and the possibility of state accountability by the absence of public policies aimed at these animals. Finally, among the results found in response to the problem, there is that the omission of the constitutional duty to formulate and implement public policies aimed at domestic animals abandoned in urban centers may give rise to responsibility to the municipal government.

KEYWORDS: Abandoned domestic animals; Abandonment of animals; Constitutional duty to the environment; Right to the environment; State accountability for damage to the environment.

RESUMO

O presente artigo expõe o resultado de uma pesquisa bibliográfica elaborada a partir do método dedutivo, para fins de abordagem, e monográfico, como forma de procedimento, sobre o tema do dever constitucional de proteção aos animais domésticos em situação de abandono nos centros urbanos, tendo por objetivo principal analisar a quem compete este dever e se a omissão do Ente competente poderá ocasionar responsabilização. Assim, no decorrer do trabalho, buscou-se responder a seguinte pergunta: a omissão ao dever constitucional de formulação e implementação de políticas públicas voltadas aos animais domésticos abandonados nos centros urbanos poderá ensejar responsabilidade ao poder público? Para tanto, realizou-se um estudo dos principais aspectos, dentre os quais o meio ambiente ecologicamente equilibrado como um direito fundamental e dever constitucional estatal, assim como a tutela constitucional dos animais não humanos sob a perspectiva

deste direito fundamental e a possibilidade de responsabilização estatal pela ausência de políticas públicas destinadas a estes animais. Por fim, dentre os resultados encontrados como resposta ao problema, tem-se que a omissão ao dever constitucional de formulação e implementação de políticas públicas voltadas aos animais domésticos abandonados nos centros urbanos poderá ensejar responsabilidade ao poder público municipal.

PALAVRAS-CHAVE: Animais domésticos abandonados; Abandono de animais; Dever constitucional ao meio ambiente; Direito ao meio ambiente; Responsabilidade estatal por dano ao meio ambiente.

1 INTRODUCTION

The environment in Brazil, since the colonization period, was seen as an instrument to acquire economic wealth. Mainly, with the enactment of the Federal Constitution of 1988, which established third-dimensional rights, the environmental demand was consolidated as a fundamental right, placing it not only as a right for current generations, but also for future generations.

It is noted that legal protection in favor of non-human animals is a theme that has been gaining more and more space nowadays, given that there are discussions concerning whether or not they are subjects of law, even if they have already acquired this status with the current constitutional text, which in its article 225 provides for the fauna, flora and their means of respect, protection and promotion.

However, with the large number of non-human animals abandoned on the streets of urban centers, the picture becomes increasingly disturbing, because this overpopulation of abandoned animals can cause several adversities, both for themselves, with regard to the well-being of animals and quality of life, as well as for human beings, because given the environmental degradation there is direct consternation to the public health of the population.

Public policies in the environmental sphere, encompassing fauna, become objective instruments of state purposes in search of an ecologically balanced environment, especially when there is a direct link with the fundamental right to health, as in the case of the control of zoonoses in abandoned domestic animals.

Given the relevance of the topic and the consequences for the urban environment, as well as for non-human animals, the research is justified by the need to develop a study that clarifies important points about this theme, with the main objective of finding results for the following problem: can the omission of the constitutional duty to formulate and implement public policies aimed at domestic

animals abandoned in urban centers give rise to responsibility to the public power?

Seeking answers to the problem, the deductive method was used for the purposes of approach, because the study started from a more comprehensive investigation of the subject, that is, from the specification of the constitutional device, legal section stipulated by the authors, of protection to the ecologically balanced and non-human animals covered by the same device, to, from this broader approach, investigate the responsibility of municipalities in the face of the omission of public policies for animals abandoned on the streets.

Also, for procedural purposes, the monographic method was used, since this method consists in the study of certain individuals, professions, conditions, institutions, groups or communities, with the objective of achieving generalizations. The investigation should explore the chosen theme, observing all the factors that influenced it and analyzing it in all its particularities. For this, the technique of bibliographic research was used, from the reading of books, scientific articles, theses and dissertations on the subject in question, using records and abstracts.

In order to reach the objectives, the research was divided into three sections, in which the main aspects related to the theme will be addressed, such as the constitutional duty to an ecologically balanced environment, the constitutional protection of non-human animals under the aegis of the fundamental right to the environment to, at the end, address the possibility of responsibility of the municipalities for the omission in the formulation and implementation.

It should be noted that, with the present study, we seek to collaborate with the progress of investigations on the subject, given that the protection of non-human animals, even with all the advances made, is still a paradigmatic theme within Law, and also outside of it, certifying the responsibility of the Public Power, notably of the Municipality, in order to raise awareness and implement the constitutional duty of protection of the Brazilian fauna, and, through this, to implement the principle of animal dignity for non-human animals abandoned in the urban centers.

2 THE ECOLOGICALLY BALANCED ENVIRONMENT AS A FUNDAMENTAL RIGHT AND STATE CONSTITUTIONAL DUTY

In the Brazilian Federal Constitutions preceding the current one, there has never been full protection of the environment, including in infra-constitutional laws, as there are contemporaneously. In fact, what moved the interest in natural resources was only the dynamics that had at their core economic prospects that needed them. Nowadays, the environment is seen as a good, that is, an object of its own by law (SOUZA, 2012, p. 4065-4066).

In this context, the Federal Constitution of 1988 can be understood as a "Green Card", because the indicators of environmental protection are not only available in Chapter VI, of Title VIII, addressed to the Social Order, but are also in other chapters of the constitutional normative text. Also, when determining the environment as a collective good, the character of “subjective public right” was recognized, so that the State has constitutional responsibility, through the obligation to make, protect and preserve the environment (MILARÉ, 2013, p. 159-160).

The right to an ecologically balanced environment was confirmed by the constitutional legislator by the caption of article 225 of the Federal Constitution of 1988, recognizing it as a fundamental right, applying the duty of aid and preservation to the Public Power and, also, to society as a whole (BRASIL, 1988).

It’s important to transcribe the passage in the heading, which reads: “Art. 225. All have the right to an ecologically balanced environment, asset of common use to the people and essential to a healthy quality of life, being the Public Power’s and the collective’s duty to defend and preserve it for the present and future generations” (BRASIL, 1988).

It is clear that there is a need to discuss the concept of fundamental rights and also their importance in the national legal system. Thus, for Ramos (2005, p. 97), these rights are characterized as the obligations and personal guarantees that are intrinsic to the subjects of law, “which establish various limits to the power entrusted by the social body to its representatives and effect the responsibility of right of protection to the population, both when designating negative orientations coming from the Public Power, and in the autonomy to consummate these rights”, in a way that prevents interference by the State and society that may harm these rights.

Accordingly, it is alluded that this recent fundamental right configures an extension of the right to life itself, contemplating the legitimacy of a right of all individuals. It is notably a human right due to the suitability of its parallelism with the responsibility of ensuring an ecologically balanced

environment as a safeguard for the survival and conservation of the species of human animals (RAMOS, 2005, p. 98).

Bortolozi (2011, p. 41) perceives, in this sense, that the primordiality of the right to the environment has its domicile in the very connection between the need for its conservation, providing it with a legitimate particularity and the minimum life situations, both for the current and future generations. Without the existence of this balance, there is no way to even talk about survival in the face of the destruction of natural resources.

Still, doing justice to this thought, the author makes this significance definitive by reiterating that it is not enough just to survive, one must live with quality and ensure environmental goods for future generations. From this perspective, the environment came to be treated as a fundamental constitutional right of the human person (BORTOLOZI, 2011, p. 41).

It is necessary to elucidate the ratification of the environment as a good categorized to itself, a judgment that further emphasizes the new status granted to the environment in the Federal Constitution of 1988 when confronted with the previous legal provisions. However, there is nothing more to say about the simple conservation of resources to which excessive economic value was attributed, lowering the results from the exploitation, in addition to the insufficiency of resources, but about the instant obligation of protection of a legal asset, object of Law (SOUZA, 2012, p. 4065).

In this sense, “goods for the common use of the people” are “all those intended for the use of the people without any restriction, other than good conduct, under the terms of the law, or customs, especially with regard to public morals and good customs” (FARIA, 1999, p. 401). Or even, “those that, by legal determination or by their very nature, can be used by everyone on equal terms, without the need for individualized consent on the part of the administration” (DI PIETRO, 1994, p. 427).

As it is a legal asset of the collectivity, sovereign and available to all, it has at its core diffuse nature, so all acts must be enfoceable, even if unfavorable, of those to whom the legal responsibility of protection and safeguard (RAMOS, 2005, p. 98).

In the same sense, Souza (2012, p. 4069) argues that the goods of common use of the community establish one of the categories of the so-called public domain goods of the State, which affects the goods of special use, its second category. As it deals with goods that can be enjoyed by anyone, collectively or individually, this use becomes a typical constitutional right that, due to the hesitation of the subjects who can exercise it, obtains the nomenclature of Diffuse Law. Still, it is emphasized that to this category of right, protected constitutionally, the constituent acted to generate effective tools to the protection of its exercise. And, in the dimension in which the environment is

cataloged in the text of the Federal Constitution of 1988 as a good of common use, the immediate result of this classification is that the environment was founded as a typical diffuse right, acquiring the safeguards and defenses reserved to it.

Going further, the moment it becomes not only a public good, but a fundamental right, it starts to possess both dimensions. The first, subjective, in the sense that any citizen can demand it as the subjective public right that it is. The second, objective, which imposes on the state the duty of respect, protection and promotion (ALVES; GAERTNER, 2016, p. 223).

In order to provide the integral protection of the environment, it was prudent to use effective tools, with the granting of legitimation and distribution of competences in terms of the environment, arranged in different norms, which can be distributed in four groups (MILARÉ, 2013), p. 165).

The first refers to those entitled to protect the environment. The Federal Constitution of 1988 grants the prerogative of protection to all citizens, who can file a public civil action (popular action) aimed at the annulment of an act harmful to the environment, as, according to article 5, item LXXIII, of CF/88, “any citizen is a legitimate party to propose a popular action aimed at annulling an act harmful to public property or to an entity in which the State participates, to administrative morality, to the environment [...]” (BRASIL , 1988).

The Constitution also attributed, among its institutional competences, to the Public Ministry the competence to initiate a civil investigation and propose a public civil action for the protection of the environment, according to its article 129, item III (BRASIL, 1988).

In the second group, the norms referring to the constitutional competences in matters of the environment can be arranged, being that, when establishing the executive competences of the Federative Entities, the CF/88, in its art. 23, determines the common competence of the Municipalities, the Federal District, the States and the Union to protect natural landscapes, item III; protect the environment and contain pollution, item VI; and conserving forests, fauna and flora, item VII.

With regard to legislative competences, it determines the concurrent competence between the Union, the State and the Federal District to provide for the fauna, flora, hunting, fishing, protection of the soil and natural resources, the protection of the environment and the management of pollution, according to article 24, item VI, as well as disciplining liability for environmental damage, item VIII (BRASIL, 1988).

In the third group, it is possible to list the norms that constitute diffuse commandments to environmental preservation, such as those provided for in article 170, item VI, which provides for the defense of the environment among the principles of the economic order, in art. 174, § 3, which conditions the exploitation of mining to protect the environment, among others. Finally, in the last group are the strict norms for the environment, set out in Chapter VI of Title VIII, which deals with the social order (BRASIL, 1988).

With regard to environmental issues, the change through which society permeates and the consequent inclusion in the social agenda of new values congruent with the needs and historical demands of society becomes notorious. This occurs in the dimension in which new political, economic, ideological and ecological characteristics emerge, which are notably rooted and controversial in the discussions that permeate fundamental rights. Nevertheless, there is a lack of fair and legitimate solutions, in line with the provisions of the Federal Constitution of 1988 (BORTOLOZI, 2011, p. 41).

It is considered that the contemporary predisposition is caution with diffuse interests, especially with the environment, which, once reputed as a good of common, individual and collective use, must be forwarded to all supports so that the integral protection is legitimate, which encompasses the protection of natural resources, such as water, air, flora and fauna (BORTOLOZI, 2011, p. 41).

3 THE CONSTITUTIONAL PROTECTION OF NON-HUMAN ANIMALS FROM THE PERSPECTIVE OF THE FUNDAMENTAL RIGHT TO THE ENVIRONMENT

In view of the precepts set out above, it is understood that the legal protection of non-human animals enshrined in the Federal Constitution of 1988 is undeniable, integrating them as a legal asset, object of law, and encompassed by an ecologically balanced environment (ALBUQUERQUE; MEDEIROS, 2013, p. 17).

For Sarlet and Fensterseifer (2014, p. 51), in the current constitutional context, “the formatting of an ecological – inclusive – dimension of human dignity is consolidated, which encompasses the idea of environmental well-being (as well as of social well-being) indispensable to a dignified, healthy and safe life”.

The fundamental right to environmental protection is a peculiar fundamental right, “it is a right that is presented from a new perspective, in view of embodying in its structure a right-duty, based on the third dimension of fundamental rights, therefore, the right of solidarity” (MEDEIROS, 2013, p. 111).

Concerning the legal duties of humans towards non-humans, it is asserted that in the face of the existence of recognition of an inherent value for other forms of life, a moral and legal duty of humans towards animals is identified and these duties are enshrined as fundamental duties. In view of this, the fundamental duties and, especially, "the fundamental duty to protect non-human animals are embodied in the need to limit and contain the freedom of action of non-human animals, when their practices are not guided by respect for life and dignity of all members of the chain of life" (MEDEIROS, 2013, p. 114).

Taking into account article 225 of CF/88, the definition of a third-dimensional right determines an environmental protection behavior that goes beyond the need to support and preserve the environment, since it incorporates the very basic needs for the human livelihood. In this sense, the action of the constituent, by encompassing the environment and all its components as a good that is subject to legal protection, deals with a new dimension of the right to life and, also, with the republican foundation of the dignity of the human person. (ALBUQUERQUE; MEDEIROS, 2013, p. 17).

For Carvalho (2015, p. 25-26), the word "animals" can be seen in article 225 of CF/88, which, as mentioned, deals with the right to the environment. Likewise, the Constitution mentions "fauna" three times when referring to non-human animals and including domestic animals that are the focus of the research. In article 225, § 1, VII, which is incumbent on the Public Power to protect "fauna and flora, prohibited, in accordance with the law, practices that jeopardize their ecological function, cause the extinction of species or subject animals to the cruelty"; in article 23, VII, which provides for the common competence between the Union, the States, the Federal District and the Municipalities, to "preserve forests, fauna and flora"; and, last but not least, in article 24, VI, when it establishes the concurrent legitimacy to legislate on "forests, hunting, fishing, fauna, nature conservation, defense of the soil and natural resources, protection of the environment and pollution control".

In the meantime, CF/88 also portrays non-human animals in article 225, §1, VII, when it brings the word "species", by repressing acts that lead to "extinction of species or subject animals to cruelty". It is palpable that non-human animals are included in the constitutional text directly or indirectly in the words "fauna", "animals", "species extinction", among others. the analysis of its applicability to operators in the legal field (CARVALHO, 2015, p. 27).

Thus, in a broad sense, fauna can be characterized as a group of non-human animal species from a specific country or region. In a stricter sense, it is still valid to highlight the wild fauna, which is integrated by wild, non-domesticated animals, not limited only to those that have their habitat in the

jungle, but their legal literality for separating domestic fauna and natural life outside or even in captivity (MACHADO, 2015, p. 943-944).

Wild fauna (strictu sensu) can be defined as the group of non-human animals that, in addition to living in a specific region or country, have a natural habitat in forests, rivers and seas, and which, as a rule, keep away from the experience of human beings (SIRVINSKAS, 2006, p. 274). In other words, it can be characterized as the "set of animals that live in a certain region, environment or geological period", considering wild those "non-domesticated, living free and independent of human interaction"[1] (MILARÉ, 2013, p. 552-). 555).

With regard to domestic fauna (strictu sensu), it can be elucidated that dogs, cats and some birds are more common among domestic animals in Brazil, however, horses, turtles, fish, iguanas, among other animals in this condition, are not excluded. In this perspective, it is alluded that the definition of domestic animal has been maximized over time, because some non-human animals, which are originally reputed to be wild, manage to live in "harmony" with humans, as is the case with some birds and snakes, which are often subject to speciesist actions, including by law itself, when they can be traded and exploited. In addition, domestic animals are those that have specific and opportune peculiarities for full coexistence with humans and lack sui generis care, that is, according to the needs of the species.

The Brazilian Institute for the Environment and Renewable Natural Resources – IBAMA, in Ordinance No. 93, of July 7, 1998, in its art. 2, item III, defined as domestic animals, or domestic fauna, all non-human animals that, through "traditional and systematized processes of management and/or zootechnical improvement, have become domestic animals, presenting biological and behavioral characteristics in close dependence on humans", and may present a variable phenotype, different from the wild species that originated them".

It is important to highlight that Law No. 9,605 of 1998, the environmental crimes law, does not characterize, in its article 32, domestic animals, as does Decree Law No. 24,645, of July 1934. Therefore, in the absence of a federal law, the state laws bring this section. In view of this, in the Code of Law and Animal Welfare of the State of Paraíba, domestic or domesticated animals are characterized as "those living with human beings, dependent on them and that do not repel the human yoke, or even

[1] For information purposes, it is pertinent to say that many wild animals are bred in Brazil as if they were domestic animals and, when they reach a certain age or need more specific care, they are left to their own devices. In this sense, according to the National Network against Trafficking in Wild Animals (RENCTAS, 2004, [s.p]), many of these animals, raised as domestic animals, are apprehended and kept in an irregular manner, corroborating the trafficking, with Brazil being the third largest illegal market in the world in this practice, being responsible for the removal of 38 (thirty-eight) million of these animals from nature annually in the country.

those of populations or populations that are dependent on them and that do not repel human yoke, or, even, species resulting from artificial selection imposed by man, which altered characteristics present in the original wild species, becoming domesticated" (PARAÍBA, 2018). And the State Code for the Protection of Animals of the State of Rio de Janeiro, brings that domestic animals are:

> [...] all those animals whose species that, through traditional, systematized processes of management or zootechnical improvement, with the purpose of companionship, breeding or production, present biological and behavioral characteristics closely related to humans, and may present a varied phenotype, different from the wild species that originated them, as defined by the competent environmental agency (RIO DE JANEIRO, 2002).

In a census carried out by the Brazilian Institute of Geography and Statistics - IBGE, it was understood that Brazil is the fourth country in the world that has more domestic animals in their homes, around 132 (one hundred and thirty-two) million, in addition to being the second country with the highest number of dogs, cats and songbirds and ornamental birds, with approximately 52.2 (fifty-two point two) million dogs, 22.1 (twenty-two point one) million cats, 37.9 (thirty-seven point nine) million birds and 2.2 (two point two) million other species, including reptiles and small mammals (IBGE, 2013, p. 01).

These data corroborate the thesis that, nowadays, in Brazilian homes, there is a greater number of domestic animals than children. Also, it is clarified that, according to the World Health Organization (WHO), there is an estimate that in Brazil alone there are more than 30 million abandoned domestic animals, about 10 (ten) million cats and 20 (twenty) millions of dogs (WORLD HEALTH ORGANIZATION, 2020).

Therefore, it is important to highlight that the responsible custody of domestic animals should be pointed out as a tool that promotes the effectiveness of the protection of dignity. In this sense, "responsible custody is configured as an ethical duty that the guardian should have in relation to the protected animal, ensuring that it is supplied with its basic needs and obliging itself to prevent any risks that may reach the animal and society itself" (SANTANA; OLIVEIRA, 2006, p. 87).

Using, in general, the Universal Declaration of Animal Rights, promulgated in Brussels in 1978, at UNESCO (UN), it is alluded that the concept of responsible custody reflects on the conduct of humans to give the domestic animal the respect, not subjecting it to mistreatment and cruel acts, nor exploiting it and promoting its unnecessary or cruel extermination, putting into effect the principle of dignity.

Here, there is talk of analyzing an inverse interpretation of Federal Decree No. 24,645 of 1934, which establishes measures to protect animals, and constitutes a true historical document for the defense of non-human animals. This is because the Decree establishes in articles 3 and 8 the definition of ill-treatment, and the concept of responsible custody is logically the opposite of what these provisions propose.

In this logic, responsible custody consists on the following terms:

> Do not practice acts of abuse or cruelty on any animal (item I); keep animals in hygienic places that allow breathing, movement, rest, air circulation and access to light (item II); not voluntarily, injure or mutilate strike, except in the case of castration and operation aimed at animal welfare (item IV); not abandon the sick, injured, exhausted or mutilated animal, offering it humanitarian assistance (item V); sell it in conditions worthy of hygiene and comfort (inc. XXIII); not exposing animals under their care to fights with other animals of their species or not (item XXIX) (SANTANA; OLIVEIRA, 2006, p. 89).

Therefore, responsible custody brings the paradigm of an ethics between man and animal. Therefore, harmony and stability in the relationships between human beings and nature are paramount, with due attention to the protection of the environment and all its constituent members, so that there is a balance and an appropriate life for both. As far as nature is concerned, it could not be treated otherwise, since non-human animals are found in its conservation and guardianship brings reflexes for, in addition to themselves, the conservation of human life[2] (BORTOLOZI, 2011, p. 24).

In view of the constitutional section chosen by the authors, with regard to the effectiveness of the fundamental right to an ecologically balanced environment, Law No ° 5.197, of january third, 1967, provides for the protection of fauna, including domestic animals. Therefore, their legal protection is not only relevant for the protection of an ecologically balanced environment, which is a legal asset in itself, but also for the reciprocal relationship that exists between the subject and nature, because without the protection of one there will be a continuation of the other species (ALBUQUERQUE; MEDEIROS, 2013, p. 22).

[2] It is important to highlight that there must also be a balance between fauna and flora, so that there is equity in biological diversity. Fauna must be protected not only because it complements the environment, which, as already explored, is legitimized in article 225 of CF/88, but also because of the reciprocal relationship between it and the flora, so that one does not survive without the other, making this relationship maintain the conservation of both (SIRVINSKAS, 2006, p. 273).

In summary, it can be elucidated that the greatest contemporary barrier is the understanding that in addition to human will, non-human animals are also beings worthy of life and have their intrinsic needs for survival. Honoring the environment of every living being, human or not, is also to encompass the provision 225 of the CF/88 and to collaborate for the ascension of the dignity of the human person.

However, even in the face of the constitutional provision for the protection of non-human animals, the realization of the fundamental right to the environment, which is incumbent on executive powers common to all Entities of the federation, is not sufficient, especially in urban centers, which, increasingly, accumulate hundreds or thousands of abandoned domestic animals, injuring a constitutional provision, submitting them to cruel situations without any dignity, and causing an imbalance not only to the environment, but also to public health, as well as evidencing the lack of effective public policies to solving this social problem.

4 THE ABSENCE OF PUBLIC POLICIES AIMED AT NON-HUMAN ANIMALS AS DAMAGE TO PUBLIC HEALTH AND THE ENVIRONMENT: THE POSSIBILITY OF RESPONSIBILITY OF THE PUBLIC AUTHORITY

From the outset, it is emphasized that public policies can be understood as the gathering of state actions aimed at fulfilling their ends. In other words, it concerns the set of laws elaborated by the Legislative Power, actions carried out by the Executive Power and decisions handed down by the Judiciary Power, aimed at achieving the purposes inherent to the State (CANELA JUNIOR, 2009, p. 69).

In other words, “public policies are the mechanism for achieving the fundamental objectives of the State itself” (ZUFELATO, 2012, p. 311). Thus, it is plausible to understand that, since the protection of non-human animals is an obligation of the Public Power, as demonstrated in the previous section, there is a constitutional duty to implement public policies to implement this subjective public right and objective public duty.

The formulation and implementation of public policies takes place in five phases, comprising 1st) the perception and definition of problems; 2nd) insertion in the political agenda; 3rd) the formulation; 4th) implementation; and 5th) the evaluation, being possible to glimpse the first three in the formulation stage and the last two in the public policy implementation phase (LEAL; ALVES, 2015, p. 121).

It can be seen that, in the Brazilian scenario, there is a need to perceive and define the presence of abandoned animals in urban centers as a social problem and, politically, to be inserted in the political agenda. This will only be achieved by admitting that non-human animals are sentient

beings[3], that is, capable of feeling pain and pleasure, and their interest in not suffering must be preserved, recognizing an inherent value to these beings, and that their guardianship is not conditioned to human benefits, but corresponds to the preservation of the physical and psychological integrity of the animals (PALAR; RODRIGUES; CARDOSO, 2017, p. 310).

Faced with this reality, there is a need to raise awareness and reformulate the relationship between human beings and nature, abandoning the stereotypes of non-valuation of non-human animals and the non-recognition of their intrinsic values, as sentient beings, should no longer be the target of submission and human cruelty (BRAZ; SILVA, 2015, p. 50).

In this line of reasoning, it is important to discuss the control of zoonoses, which is encompassed by the fundamental right to health, provided for in art. 6 of CF/88, as well as the state competence for its execution, in order to maintain the dignity of non-human animals.

When establishing the understanding that the control of zoonoses is essential for the realization of the right to health, it is possible to extract from its objective dimension the state obligation to its realization. It means to say that "it cannot be denied that the Federal Constitution, while establishing the fundamentality of the social right to health, confers on the State the attribution of promoting a set of actions and public services indispensable to the reduction of the risks of diseases", as well as "guaranteeing the population universal and equal access to actions and services for the promotion, protection and recovery of health" (CIARLINI, 2008, p. 24)

The Constitution itself provides guidelines for the realization of this social right from article 196, which provides that "health is a right of all and a duty of the State, guaranteed through social and economic policies aimed at reducing the risk of disease and other injuries and universal and equal access to actions and services for their promotion, protection and recovery" (BRASIL, 1988).

Thus, there is no doubt that the control of zoonoses must be included among the health actions to be promoted by the government. This is because zoonoses are understood as all naturally transmissible infectious diseases that spill over to human animals from non-human animals. Animals, therefore, play an essential role in the maintenance of zoonotic infections in nature, which can be bacterial, viral, parasitic or even caused by unconventional agents, being, therefore, a public health problem (WORLD HEALTH ORGANIZATION, 2020), and also because it is a problem that also subjects animals to cruelty.

[3] It is important to clarify the fact that characterizing non-human animals as "sentient" is different from saying that they are only "alive". In other words, "sentient" is to say that the being "is aware of pain and pleasure; there is an 'I' that has subjective experiences. Not everything that is alive is necessarily sentient; for example, as far as we know, plants, which are alive, do not feel pain" (FRANCIONE, 2013, p. 55).

Still, it can be mentioned that "It is understood that zoonoses are infections common to man and other animals" (LIMA et al, 2010, p. 1458). For Vasconcellos (2001, p. 63), veterinarian, Full Professor at the University of São Paulo:

> Zoonoses, defined as diseases or infections naturally transmissible between vertebrate animals and humans, are distributed across the globe at varying levels of occurrence according to environmental factors of a physical-chemical-biological and even socio-economic-cultural nature. Vertebrate animals that harbor the etiological agents of zoonoses: wild, domestic (production, work and company) as well as synanthropic animals are the main target of control actions aimed at blocking the emergence of cases of zoonoses in humans.

Here, it is worth noting that, generally, zoonoses migrate to the urban environment given the unbalanced actions of the human being towards the environment and, consequently, causing changes in the habitat of non-human animals, which may cause damage to public health through infectious diseases, as well as accidents. Therefore, there must be a change in the paradigm conception where there is effective integration between human and non-human animals.

Therefore, in order to guarantee public health and the control of these infectious diseases, the Ministry of Health edited Ordinance No. 1,138, of May 23, 2014. Article 6 of this regulation provides in its text that "surveillance, prevention and control actions of zoonoses and accidents caused by pestilent and venomous animals, of relevance to public health, must be included in the Annual Health Program (PAS), observing the guidelines contained in the Health Plans" (BRASIL, 2014).

It is noted that in this provision there is the competence entrusted to the State to maintain preventive controls, that is, actions that seek to predict a possible zoonosis or a lack of control of these pathologies; surveillance, which concerns the bodies responsible for monitoring these possible diseases and whether the available public actions are being applied correctly; and, finally, the zoonosis control itself (BRASIL, 2014).

Thus, the Ministry of Health prepared a Manual for Surveillance, Prevention and Control of Zoonoses in 2016. Concerning control, for the Ministry of Health, it is the phase in which, when a real risk situation for public health is observed, uses methods for disease control, subdivided into three stages: control of the imminent risk of zoonosis transmission, control of incident zoonosis and control of permanent zoonosis (BRASIL, 2016).

By controlling the imminent risk of zoonosis transmission, through direct and indirect actions aimed at non-human animals, it aims to break the cycle of transmission to human animals; the control of the incident zoonosis, in turn, is carried out through actions to reduce, control or eliminate the

zoonosis; and, finally, the control of permanent zoonosis refers to the search for interrupting the cycle of the relapsing disease, reducing or eliminating it, always consulting “the technical manuals of the Ministry of Health, in addition to other current technical guidelines, as well as specific guidelines in this Manual” (BRASIL, 2016).

As for zoonoses transmitted by abandoned domestic animals, cats and dogs, the Ministry of Health provides a vaccine called “anti-rabies” (BRASIL, 2016). This vaccine is for the control of the rabies virus, however this disease spreads from the bat to other animals, affecting both human and non-human animals. It is noted that this is a matter of concern, because it is human interference in the environment that makes these wild animals migrate to urban centers and cause this problem, and there should not be a transfer of responsibility for the transmission of this zoonosis to domestic animals that are abandoned on the streets and, consequently, are at the mercy of mistreatment, not having their dignity respected. Furthermore, this vaccine is the only one, in Brazil, provided by law for use in the public service (BRASIL, 2016).

Also, it should be noted that this vaccine can be made in two ways, as provided by the Ministry of Health in its manual, and can be "massified or by focus blocking", which is one of the tools of the National Rabies Surveillance and Control Program in Brazil. The first is organized through a campaign, which can be carried out from house to house, through fixed posts or, even, through a strategy that uses both forms. And, the second, “according to the epidemiological situation, some States carry out vaccination through annual campaigns, and others, only through focus blocking activity” (BRASIL, 2016).

That said, it is understood that it is the responsibility of the executing health agency (Municipal Health Department) to supervise and take the necessary measures for the control and prevention of this zoonosis, under the coordination of the State Health Department. Still, it is worth noting that it is through the National Program for Surveillance and Control of Rabies in Brazil, that the respective exercise is carried out.

Thus, under the coordination of the States, it is up to the municipalities to implement public policies and preservation tools not only aimed at human beings, but also at non-human animals, in order to have the effective right to animal health and dignity.

Therefore, in addition to the commitment to the health and well-being of animals that are in a situation of vulnerability on the streets, in improper conditions of food and shelter, it is noted that there is an imminent risk to human and environmental health, forming the two pillars that, together with non-human animal health, make up public health, which implies a redesign, with the sharing of constitutional competences, so that, in practice, these policies are effective.

Here it is worth highlighting the Political Theory of Animal Rights, which seeks to help the already established traditional theories of Animal Rights, in favor of greater effectiveness and politicization of the rights of non-human animals. This theory was proposed by Sue Donaldson and Will Kymlicka, in the book entitled "Zoopolis: a political theory of animal rights", published in 2011, the authors seek to "take a step beyond traditional Animal Rights perspectives by developing a political theory of animal rights, considering that the interests of individuals of other species must be taken into account in determining the common good of society as a whole" (SOUZA, 2015, p. 72).

> Donaldson and Kymlicka elaborate their thesis based on institutes such as citizenship and sovereignty, and suggest reflection on the relationships hitherto established between human beings and animals, with a view to recognizing positive human duties and responsibilities. This is a complicated task, given the enormous variability of these relationships, as the authors warn:
> "Human relationships with animals differ in their positive and negative impacts, levels of coercion and choice, interdependencies and vulnerabilities, emotional attachments and physical closeness. All these (and other) factors seem morally relevant."
>
> Thus, expanding the concept of citizenship, domesticated animals (which are those that have lost the ability to live independently in nature, due to domestication, living in close proximity to human beings, in urban environments, such as residences, laboratories, farms), would become members of our community (since they were brought into society), entitled to the status of fellow citizens (citizenship theory) and holders of relational membership rights (SOUZA, 2015, p. 72 - 73).

Bobbio (1993, p. 954), in a text on "Politics", discusses the concept of contemporary State as being the activity or set of activities that, in some way, has as a reference the *polis*, that is, the State. Thus, the State is the legitimate subject to promote actions that seek to order or veto something with binding effects for all members of a specific social group, such as, for example, "the exercise of an exclusive domain over a certain territory, the legislating through valid *erga omnes* norms, the taking and transfer of resources from one sector of society to another, etc.; other times it is an object, when actions such as conquest", conservation, protection, "expansion, strengthening, overthrowing, destruction of state power", among others, are referred to the sphere of politics.

The Brazilian federative state is a model of political-administrative organization that has decentralization, sovereignty and autonomy among themselves as a particularity. Thus, according to article 1 of the Federal Constitution of 1988, the segments of this State have self-organization, self-administration and self-government as characteristics (BRASIL, 1988).

Self-organization is provided for in article 25 of CF/88, which provides that “States organize themselves and are governed by the Constitutions and laws they adopt, observing the principles of this Constitution” (BRAZIL, 1988), or that is, it refers to the competence that federative entities have to establish their own structure and organization. Self-administration is provided for in §1 of article 25 of CF/88, which provides that “the powers that are not prohibited by this Constitution are reserved for States” (BRASIL, 1988), so it is noted that the States have legislative and non-legislative capabilities of their own.

Due to the possibility for the units of the Federative Republic of Brazil to enact their own laws, with regard to the issue of animal protection, some state laws are in force, such as Law No. January; Law No. 12,854 of 2003, of the State of Santa Catarina; Law No. 14,037 of 2003, of the State of Paraná; Law No. 11,977 of 2005, of the State of São Paulo; Law No. 8,060 of 2005, of the State of Espírito Santo; Law No. 15,226 of 2014, of the State of Pernambuco; and Law No. 8,366 of 2017, of the State of Sergipe, all of which instituted the State Code for the Protection of Animals; Also, Law No. 4,060 of 2007, of the Federal District, which established the sanctions to be applied for the practice of acts that constitute mistreatment of animals; Law No. 10,169 of 2014, of the State of Maranhão, which defined “norms for the protection of animals in the State of Maranhão, aiming to make socioeconomic development compatible with environmental preservation” (MARANHÃO, 2014); Law No. 11,140 of 2018, of the State of Paraíba, which constituted the Code of Animal Law and Welfare on the basis of sentience and recognized fundamental rights to animals, in a precursory way (PARAÍBA, 2018); Law No. 10,326 of 2018, of the State of Rio Grande do Norte, which established the Law for the Protection and Defense of Animals, observing “the Universal Declaration of Animal Rights, the Federal Constitution, as well as the federal legislation applicable to the matter” (RIO GRANDE DO NORTE, 2018); Law No. 11,915 of 2003, of the State of Rio Grande do Sul, which proposed the State Code for the Protection of Animals; Law No. 15,363 of 2019, State of Rio Grande do Sul, which consolidated animal protection legislation; Law No. 15,434 of 2020, also of the State of Rio Grande do Sul, which brings animal sentience, rights concerning animals and recognized their special legal nature, in the case of domestic and pet animals; and, finally, Law nº 22.231 of 2016, of the State of Minas Gerais, which deals with the definition of animal abuse, and, in 2020, its legal text evolved.

Furthermore, based on article 30, items I and II of CF/88, municipalities have legislative competence to create laws on paradigmatic and important matters for the interests and needs of each place, as is the case of animal law and even, complementary to current state and federal laws. In turn, among the common executive powers “of the Union, the States, the Federal District and the

Municipalities", is to "protect the environment and combat pollution in any of its forms", as well as "preserve the forests", fauna and flora", according to article 23, items VI and VII of CF/88 (BRASIL, 1988).

In this context, it is important to clarify that there are some basic principles that guide the legitimacy of the norms that protect non-human animals. Among these principles is the principle of animal dignity, which, in Brazil, is based on the constitutional provision that prohibits cruelty to animals (ATAIDE JUNIOR, 2020, p. 122), already explored.

In the words of Judge Manoel Carneiro (2020, s.p.), if non-human animals can suffer, because they are sentient, they have the right not to suffer, which refers, in other words, to the concept of dignity, "meaning that humans and animals also have dignity, not occurring, as many understand, an equality between us and those other forms of life, what is equal is the right not to suffer due to human cruelty".

> So we already know that dignity is a concept that is intrinsically linked to suffering, as the philosopher Kant said, dignity is having intrinsic value, it is not being an instrument for the satisfaction of another, dignity is simply the right not to suffer, and this right animals also have, so there is human dignity and animal dignity, and one does not exist without the other, the only difference is that the rights to guarantee our dignity are more numerous and more complex than those related to animals (CARNEIRO, 2020, s.p.) .

This principle was referred to in the Code of Animal Law and Welfare of the State of Paraíba (Law No. 11,140 of June 8, 2018), which states that "the value of each animal being must be recognized by the State as a reflection of ethics, respect and universal morality, responsibility, commitment and **appreciation of dignity** and diversity of life, helping to free them from violent and cruel actions" (PARAÍBA, 2018) (emphasis added). At the municipal level, the Municipality of Belo Horizonte, in the State of Minas Gerais, is listed through Decree 16,431 of 2016, which establishes its policy for the defense and protection of animals and included the principle of animal dignity in its article 3, IV, "recognizing that the animal has its intrinsic value and that **human dignity and animal dignity are inseparable**" (Municipal City Hall of BELO HORIZONTE, 2016) (emphasis added).

It is noted that dignity, in this way, is not a specific attribute of the human person, but also of all other forms of life that inhabit the planet, assuming fundamental values not only for human life, but the protection of all natural resources, including other forms of existence (SILVA, 2015, p. 76).

The principle of universality, which complements the principle of animal dignity, establishes the subjective range to recognize non-human animals as beings with rights, so all animals have the right to a dignified existence (ATAIDE JUNIOR, 2020, p. 124) .

Still, regarding this principle, in the words of Edna Cardoso Dias[4], "because they are rights recognized in several international treaties, and because, regardless of whether there are laws protecting human or animal rights, people and animals have the inalienable rights inherent to their condition as human beings or animals, wherever they live" (DIAS, 2020, p. 12).

For Heron José de Santana Gordilho,

> One of the main problems faced by the abolitionist theory of Animal Law is to determine which animals would be entitled to be subjects of law, even because there is no consensus on the definition of animal law. Furthermore, there is a great risk that this theory will be ridiculed if ants, mosquitoes or cockroaches become part of procedural legal relationships (GORDILHO, 2008, p. 149).

With the aim of protecting non-human animals, the precautionary principle "promotes the universality of animal protection, by preventing the evasion of fundamental rights due to the lack of scientific evidence about the consciousness or sentience of a certain animal species", among others (ATAIDE JUNIOR, 2020, p. 133).

According to the Declaration of Rio de Janeiro on Environment and Development, of the United Nations Organizations (UN), of 1992, in its Principle 15, one has that in order to protect the environment, the precautionary principle must be observed by the States broadly, according to their capabilities. "Where there is a threat of serious or irreversible damage, the absence of absolute scientific certainty should not be used as a reason for postponing effective and cost-effective measures to prevent environmental degradation" (UNITED NATIONS, 1992).

[4] In the words of Danielle Tetü Rodrigues, PhD in Environment and Development from the Federal University of Paraná, in the Preface to the work "They write Edna: homage to the pioneer woman of Animal Law in Brazil", under the coordination of Laura Braz: Doctor "Edna Cardozo Dias , renowned writer on animal protection and the pioneer in dealing with the issue legally in Brazil, with her work *The Legal Protection of Animals*, the result of her doctoral thesis at the Federal University of Minas Gerais in 2000. From a work in its version first, our honoree aligned the reader's expectations with the theories that would be developed and acclaimed by so many followers over the years, reflecting the socio-historical situation of animal protection, in which her work is inserted as an inspiring source for thousands of researches. The jurist's studies on animal protection innovated the theme in an exemplary way, demonstrating that she was decades ahead of her time and proving to be one of the most active and influential writers of our era" (RODRIGUES, 2020).

These principles act as commandments of state action, which will make it mandatory and responsible for the public power to manage the environment. Thus, with regard to the term responsibility, both in the etymological and legal sense, it is alluded that it has at its core the idea of obligation, burden, consideration. However, it is important to emphasize the difference between obligation and responsibility, whereas obligation is an original legal duty and responsibility is a legal duty arising from the violation of an obligation (CAVALIERI FILHO, 2010, p. 03).

When talking about responsibility, here, it is associated with the notion of the very origin of the term, derived from the Latin respondere, which means to answer for something, that is, the need to hold the subject responsible for the commission of acts that cause harm to others. That said, it is understood that it is possible to hold the State responsible for the absence of effective public policies for the care of animals in a situation of abandonment.

This responsibility, unlike the general rule applicable to omissions, is objective, having a preventive and reparatory character. Although it can be understood that art. 37, § 6, of CF/88, which deals with the objective responsibility of the State, applies only to its actions and not to omissions, it cannot be disregarded that this is damage to the ecologically balanced environment, and must be interpreted together with the art. 225, §3, of the same constitutional text, which alludes that "conducts and activities considered harmful to the environment will subject violators, individuals or legal entities, to criminal and administrative sanctions, regardless of the obligation to repair the damage caused" (BRAZIL , 1988).

The Federal Supreme Court has already established in its jurisprudence that the responsibility referred to in art. 225, § 3, is objective, in any of the fields, including the criminal one[5]. Going further, with regard to civil compensation for the damage caused, the court has already established a thesis of general repercussion in the sense that this is an unavailable fundamental right, which even excludes its statute of limitations[6].

Thus, the objective civil liability in this case is applied in the light of the theory of integral risk and not of the administrative risk, not admitting excluding causes of liability, according to the already consolidated jurisprudence of the Superior Court of Justice, when interpreting Law No. 6,938, of August 31, 1981[7] (National Environmental Policy Law).

[5] In this regard, see: Habeas Corpus No. 83.554-DF, rel. min. Gilmar Mendes, J. 2005-8-16, 2nd T, DJ of 10-28-2005.
[6] In this regard, see: RE 654.833, rel. min. Alexandre de Moraes, j. 20-4-2020, P, DJE de 24-6-2020.
[7] In this regard, see: REsp nº 1672280-SC, rel. min. Herman Benjamin, j. 27-06-2017, DJE de 30-06-2017; REsp nº 604.725-PR, rel. min. Castro Meira, j. 21-06-2005, DJ 2-08-2005.

It is, therefore, a diffuse damage, whose ownership of the Public Power's right of accountability (fundamental right not available) falls on society in a broad sense. Thus, it is envisaged in the Public Prosecutor's Office, by virtue of art. 127 of CF/88, as a "permanent institution, essential to the jurisdictional function of the State, incumbent upon it to defend the legal order, the democratic regime and unavailable social and individual interests", the active legitimacy of the Public Civil Action of liability for the damage caused to abandoned animals.

Thus, it remains evident that there is a state mandate to formulate and implement public policies that aim to protect the right to the environment and public health. If this does not happen, given the omission of the public power, the committing of diffuse damage remains evident, the responsibility of which falls on the Municipality, and may be brought by the Public Ministry, as the legitimate guardian of diffuse and collective rights and interests.

5 CONCLUSION

Given the enactment of the Federal Constitution of 1988 and the regulation of the matter provided for in article 225, the right to an ecologically balanced environment was fundamentalized, constituting an unavailable fundamental right and, at the same time, a constitutional duty of the State, which includes the necessary actions to the protection of fauna, whether wild or domestic.

In view of the above, it is clarified that the political-administrative organization of the State grants the federative entities the triple autonomy, being self-organization, self-government and self-administration, with legislative (competing) and executive (common) powers, covering the protection of the environment.

Therefore, the conservation of the environment and all its elements, including the fauna and, consequently, non-human animals abandoned in urban centers, is a common competence between the federative entities, occurring in a coordinated way, with the Municipality responsible for execution task, such as the control of zoonoses.

It is at this point that the right to the environment intertwines with the right to health, since the lack of resolution of the problem of abandonment of animals in urban centers does not only cause an affront to the principle of animal dignity, provided for in the Federal Constitution, which prohibits cruelty, but also refers to an imbalance in the environment and consequences for the human being, insofar as it can affect public health.

Thus, it can be clarified that the municipality has the obligation to protect the environment and, in view of this, non-human animals in all its varieties, being liable for responsibility for the omissive

conduct that it may practice, such as the absence of effective public policies for domestic animals in a situation of abandonment.

Unlike the applicability of the general rule to State liability for omission, which is the application of subjective liability, in the case of damage to the environment, strict liability will apply, dispensing with the demonstration of the subjective element of guilt or willful misconduct in the state's omissive conduct. This means that, once the (diffuse) damage to the environment is configured and that it results from omissive state conduct, the fundamental right will remain unavailable to its repair, which is owned by society.

That said, it is possible to say that, among the results found in response to the problem that gave rise to the research, the omission of the constitutional duty to formulate and implement public policies aimed at domestic animals abandoned in urban centers may give rise to responsibility to the municipal government.

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