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CONSTITUTIONALITY OF THE PROHIBITION OF COCKFIGHTS (CONSTITUCIONALIDAD DE LA PROHIBICIÓN DE PELEAS DE GALLOS)

CASE: *Amparo en Revisión 163/2018*

REPORTING JUSTICE: Arturo Zaldívar Lelo de Larrea

DECISION ISSUED BY: First Chamber of Mexico's Supreme Court of Justice

DATE OF THE DECISION: October 31, 2018

KEY WORDS: right to culture, right to cultural participation, right to equal protection, right to private property, right to choose an occupation and right to engage in work, animal protection, proportionality test, animal cruelty and mistreatment.

CITATION OF THE DECISION: Supreme Court, *Amparo Directo en Revisión 496/2014*, First Chamber, Arturo Zaldívar Lelo de Larrea, J., decision of October 31, 2018, Mexico.

The full text of the decision may be consulted at the following link:

<https://www.scjn.gob.mx/derechos-humanos/sites/default/files/sentencias-emblematicas/sentencia/2022-02/AR%20163-2018.pdf>

CITATION SUGGESTED FOR THIS DOCUMENT: Center for Constitutional Studies of Mexico's Supreme Court of Justice, Excerpt of the *Amparo en Revisión 163/2018*, Mexico.

SUMMARY OF THE *AMPARO EN REVISION* 163/2018

BACKGROUND: On December 6, 2016, in his own right and as President of the Mexican Cockfighting Promotion Commission (the Commission), ERE (the petitioner) filed an *amparo* lawsuit before a district court in Veracruz against the Congress and the Governor of the same State for the issuance of a decree published on November 10, 2016, which reformed various articles of the Animal Protection Law for the State of Veracruz. These articles established that animal fights were prohibited because they were acts of cruelty and mistreatment. Bullfighting shows, *faena campera*, horse racing, and activities related to the sport of *charrería* and *jaripeos* were excluded from the application of these prohibitions. The petitioner and the Commission considered that these rules violated their right to culture and to property, the right to choose an occupation and engage in work, as well as the right to equal protection and non-discrimination. On June 5, 2017, a district judge issued a decision in which he decided to deny the *amparo*, so the petitioner and the Commission filed a *recurso de revisión* and the Mexico's Supreme Court of Justice (this Court) reassumed its original jurisdiction to hear the matter.

ISSUE PRESENTED TO THE COURT: Whether the ban on cockfighting violates the right to participation in cultural life and to property, the right to choose an occupation and engage in work, and the right to equal protection and non-discrimination

HOLDING: The decision challenged was upheld essentially for the following reasons. This Court considered that any practice involving the mistreatment and unnecessary suffering of animals cannot be considered a cultural expression protected by the right to participate in cultural life. The right to property and right to choose an occupation and engage in work are prerogatives whose exercise is limited by the prohibition of cockfighting; however, this is an appropriate measure, necessary and proportional to the valid constitutional purpose it seeks, which is the protection of animal welfare. Finally, this Court determined that the challenged rules establish two expressly differentiated legal regimes, consisting of a prohibition regime for animal fights and a permissive legal regime for bullfighting shows, *faena campera*, horse racing, and activities related to the sport of *charrería* and *jaripeos*. However, the fact that some of these activities also

lead to mistreatment of animals and are also objectionable does not make the ban on animal fighting arbitrary, nor the animal fights permissible or legitimate.

VOTE: The First Chamber decided this case unanimously with the vote of the five justices Norma Lucía Piña Hernández (reserved the right to issue a concurring opinion), Arturo Zaldívar Lelo de Larrea, José Ramón Cossío Díaz (reserved the right to issue a concurring opinion), Jorge Mario Pardo Rebolledo and Alfredo Gutiérrez Ortiz Mena.

The votes may be consulted at the following link:

<https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=231361>

EXTRACT THE *AMPARO EN REVISION* 163/2018

- p.1 Mexico City. The First Chamber of Mexico's Supreme Court of Justice (this Court), in session of October 31, 2018, issues the following decision.

BACKGROUND

- p.1-2 On December 6, 2016, in his own right and as President of the Mexican Cockfighting Promotion Commission (the Commission), ERE (the petitioner) filed an *amparo* lawsuit before a district court in Veracruz against the Congress and the Governor of the same State, for the issuance of a decree published on November 10, 2016, which reformed the second paragraph of Article 2, Article 3 and sections V, VIII and X of Article 28 of the Animal Protection Law for the State of Veracruz.
- p.3 In the view of the Commission and the petitioner, these rules violated their rights to culture and to property, the right to choose an occupation and engage in work, as well as the right to equal protection and non-discrimination.
- p.2 These articles established that animal fights were prohibited because they were acts of cruelty and mistreatment, so the holding of fights between animals, the use of animals in the celebration of clandestine rites and patron saint festivities that could affect animal welfare and, in general, any act or omission that could cause pain or suffering, that endangered the life of the animal or affected its welfare were to be sanctioned. However, these rules established that bullfighting shows, *faena camperas*, horse racing, and activities related to the sport of *charrería* and *jaripeos* were excluded from the application of these prohibitions.
- p.3 On June 5, 2017, the district judge issued a decision in which he decided to deny the *amparo* and protection requested.

Therefore, on June 15, 2017, the Commission and the petitioner filed a *recurso de revisión* against this determination.

- p.4 The Collegiate Circuit Court asked this Court to exercise its original jurisdiction to hear the *recurso de revisión*, so heard the case.

STUDY OF THE MERITS

I. Impacts on the right to culture, right to choose an occupation and engage in work and the right to property

A. Analysis of the impact of the challenged legislative measure on the *prima facie* content of the rights

1. Right to culture

- p.25 The ban on cockfighting in the challenged articles is a legislative measure that does not involve an intervention in the right to culture.
- p.25-26 This is because the First Chamber of this Court, whilst resolving the *Amparo Directo* 11/2011, determined that the right to culture provided for in article 4 of the Federal Constitution has at least three aspects: 1) as a right that protects access to cultural goods and services; 2) as a right that protects the use and enjoyment thereof; and 3) as a right that protects intellectual production, making it a universal, indivisible and interdependent right.
- p.26 This Court considered that the challenge is based on the right to participate in cultural life provided for in article 15.1 a) of the International Covenant on Economic, Social and Cultural Rights.
- p.27 This aspect of the right to culture is not a social right, but what is traditionally known as a right to freedom. Indeed, the right to participate in cultural life allows individuals to freely enter into a wide variety of activities individually or collectively, but at the same time imposes a duty on the State not to engage in arbitrary interference in such cultural practices.

- p.28 If the challenged norms constitute a prohibition on animal fighting, what this Court has to determine at this stage of the constitutionality review is whether cockfighting constitutes a "cultural expression" protected at least *prima facie* by the right to participate in cultural life.
- p.30 First, it is indisputable that certain "cultural expressions" derived from custom or tradition cannot be covered under a constitution such as Mexico's that assumes the democratic values of pluralism and respect for the dignity and autonomy of individuals. In this regard, it should be considered that there is a constitutional mandate to eradicate many of these cultural expressions, such as gender-based violence, discrimination, or religious intolerance, to mention just a few of them.
- p.31 In this particular case, the cultural expression under consideration does not directly affect people, but the animals used in it.

This Court understands that cockfighting is indeed an expression of a certain culture.

- p.32 However, the fact that cockfights generate the interest of social sciences as an object of study does not imply that they are a cultural expression worthy of constitutional protection. Regardless of the deep meaning that anthropologists attribute to this social practice, cockfights can be described as a duel to the death between animals organized for sport, entertainment or simply cruelty.

Thus, for this Court, cockfighting does not find coverage in the right to participate in cultural life. While it cannot be considered to be an activity that directly violates any constitutional provision, this does not imply that it should be considered protected by the Constitution as a "cultural expression".

In this regard, no practice involving the mistreatment and unnecessary suffering of animals can be considered a cultural expression protected either *prima facie* or definitively by the Constitution.

- p.33 In accordance with the foregoing and taking into account the scope of the right to participation in cultural life, this Court considers that the normative portions challenged constitute a legislative measure that does not intervene in this aspect of the right to culture.

2. Right to property

- p.35 Article 27 of the Federal Constitution provides as a guarantee that the State may only limit private property if the modalities it imposes pursue an end that may be considered to be in the public interest.

The Plenary of this Court held in the *Amparo en Revision* 6408/76 that a modality of private property must be understood as the establishment of a general and permanent legal norm that essentially modifies the form of that right.

- p.37 In addition to the above, it should be remembered that our Constitution does not contain any provision from which it can be deduced that the legislator is constitutionally obligated to issue rules that protect animals from mistreatment, nor is there a constitutional duty to establish rules that go beyond the legal status of animals as "objects" or "things" that can be appropriated and advance the process of "de-commodification" of animals.
- p.38 This does not imply that legislations adopting this type of regulation are unconstitutional. Enacting rules with this content is undoubtedly a legitimate objective for the legislator.
- p.36 Therefore, it is necessary to determine whether the challenged rules of the Animal Protection Law for the State of Veracruz represent an intervention in the right to property.
- p.39 Thus, two questions must be ascertained: whether the measure is established in a general norm with an intent of permanence; and whether it affects any of the attributes of private property: use, enjoyment and disposition.

In this specific case, this Court considered that both requirements are met. On the one hand, the challenged measure is laid down in several general norms intended to be permanent. And on the other hand, the articles challenged indirectly impose a modality on the property rights over fighting cocks, since the prohibition of holding animal fights is

a limitation on the owner's use of the birds and also a limitation on the benefits they could obtain from those assets, since the ban also legally precludes the making of profits from cockfighting.

p.41 Thus, in accordance with the foregoing, this Court considers that the challenged normative portions do constitute an intervention in the guarantee established in the third paragraph of article 27 of the Constitution, since in pursuing the public interest certain attributes of the right to property are limited.

3. Right to choose an occupation and engage in work

p.42 In order to determine whether the challenged norms actually infringe the right to choose an occupation and engage in work, it is necessary to establish the scope of this fundamental right.

p.42-43 The right to choose an occupation and engage in work is a right clearly linked to personal autonomy, insofar as it allows individuals to engage in the professional activity that best suits their life plan.

p.43-44 With regard to the right to choose an occupation and engage in work, this Court has reiterated its well-known *dictum* that fundamental rights are not absolute. In effect, the Plenary of this Court, in resolving the *Action of unconstitutionality* 10/1998, held that the individual right enshrined in article 5, first paragraph, of the Constitution, is not absolute, in that it balances the legality of the activity in question as well as the rights of third parties and of society in general, thus setting limitations on said right based on fundamental principles that must be taken into account in order to enforce and protect it.

p.44 That precedent also explained that the right to choose an occupation and engage in work is not unrestricted and unlimited but conditioned on the satisfaction of certain fundamental prerequisites: a) that it is not an illegal activity; b) that the rights of third parties are not affected; and c) that the rights of society in general are not affected.

In this precedent it was explained that the Legislative Branch, in its function of enacting laws, may restrict the right to choose an occupation and engage in work in a general, impersonal, and abstract manner, determining that an activity is illegal, but it may not establish restrictions on that right in relation to a particular individual.

- p.45 Once the scope of the right has been established, the courts must determine whether the challenged norms affect the right to choose an occupation and engage in work.

In this regard, this Court understands that the Legislative Branch has broad discretion to pursue legitimate objectives through legislation, which obviously may include changing the legal status of an activity.

- p.46 However, if in this specific case the challenged norms establish a prohibition that legally prevents the Commission and the petitioner from engaging in cockfighting, since the effect of the prohibition is that such activity must be considered illegal as of the entry into force of the reforms, it must be concluded that the challenged normative portions do in fact affect the right to choose an occupation and engage in work.

B. Proportionality analysis of the challenged legislative measure

1. The legitimacy of the purpose pursued with the measure

- p.47 This section of the analysis will identify the purposes pursued by the challenged measure in order to be able to examine its legitimacy from the constitutional point of view.
- p.49 In the recitals of the challenged reforms to the law, it is highlighted that the prohibition of animal fights is intended to protect the welfare of animals in the State of Veracruz. In relation to this point, our Constitution does not contain any provision requiring the legislator to protect animals beyond the protection of wildlife that could arise from the right to a healthy environment provided for in Article 4 of the Constitution. However, the protection afforded by this right cannot be equated with the protection of animal welfare.
- p.50 Although the protection of animal welfare is not a constitutionally required purpose, this does not mean that it should be understood to be constitutionally prohibited, since there

is no rule in the Constitution that expressly prohibits the democratic legislator from advancing measures to fulfil this purpose.

- p.51 Thus, the question this Court has to answer in this tier of the proportionality test is whether, under the aforementioned normative conditions, the protection of animal welfare is an end that can legitimately justify the limitation of fundamental rights of individuals, such as the right to property provided for in article 27 of the Constitution and the right to choose and occupation and engage in work contemplated in article 5 of the Constitution.

This Court considered that the protection of animal welfare is an aim that may legitimately limit the fundamental rights of the petitioner and of the Commission, because it is an aim that is fully compatible with the values of a constitutional democracy. In this way, this Court understands that in a "free and democratic society" the protection of animal welfare can justify a limitation on fundamental rights.

- p.52 In this specific case, the mediate purpose of the ban on animal fighting is the principle of protecting animal welfare; while the immediate purpose is the state of affairs required to achieve that principle, which in the case of the challenged norms can be identified with the welfare of animals, understood as a condition in which they are generally not mistreated and specifically not treated with cruelty.

2. The appropriateness of the measure

- p.53 In this specific case, it must be determined whether the ban on animal fighting is appropriate for animal welfare.

This Court reiterates that prohibitive norms cannot be unconstitutional because they are ineffective in motivating people's conduct.

- p.54 Therefore, the correct way to examine the appropriateness of such a rule of conduct is to verify whether the prohibited conduct actually harms what the prohibition intends to protect.

In this case, the prohibited conduct consists of holding animal fights. Thus, the empirical question that must be answered is whether animal fights organized by human beings actually affect the welfare of animals, understood as a condition in which they do not suffer mistreatment in general, or acts of cruelty in particular. As can be seen, this case can be answered without the need to resort to specialized knowledge from science or technology, since it is enough to rely on the general knowledge widely shared in society in relation to what happens in animal fights.

p.54-55 In the specific case of cockfights, it is widely known that these are duels between two birds that are spurred on by humans and are equipped with sharp weapons in order to ensure the lethality of the fight. In this regard, it is an observation based on common sense to state that the fights cause significant physical harm to the birds that participate in them, with the aggravating factor that in most cases that harm consists of the death of one of the contending animals.

p.55 In accordance with the foregoing, this Court considered that the prohibition of animal fights is an appropriate measure to protect animal welfare, since the prohibited conduct actually causes physical harm to the animals involved in such fights.

3. The need for the measure

Unlike the suitability tier in which the causal effectiveness of the challenged measure is analyzed, the necessity test is configured as an efficiency analysis: the capacity of the challenged measure, in comparison with alternative measures, to achieve the proposed purpose with the least possible impact on the rights regulated.

p.56 In this case it must be determined whether the ban on animal fighting is a necessary measure to achieve the welfare of animals, understood as a condition in which they are not mistreated in general or specifically subjected to acts of cruelty by people.

A first option as an alternative measure would be the liberalization of the activity subject to prohibition, which in this case would presume that animal fighting would not be prohibited.

However, that option must be quickly rejected because, although it is an alternative measure which is less restrictive of the Commission's rights, it is totally unsuitable for advancing the purpose pursued by the challenged measure. If the Commission were allowed to continue to have cockfights, these animals would continue to be treated in a cruel and undignified manner.

p.57 A second possibility as an alternative measure would be to reduce the scope of the regulation of the norm exclusively to those specific aspects of the activity that actually affect animal welfare, such as establishing a norm that would only prohibit cocks from being fitted with knives for fights. In this respect, it would undoubtedly be a measure less restrictive of the rights of the Commission and the petitioner, since they would be able to continue using their cocks for fights.

However, it is also clear that this alternative measure does not promote animal welfare with the same intensity as the challenged measure, because even without these sharp instruments, there would be no guarantee that the cocks involved in the fights would not suffer significant physical injuries or die. Consequently, an alternative measure such as this is not equally suitable as the challenged measure.

Furthermore, other measures that do not seek to prohibit this cultural expression but rather to transform it through public policies with "educational" or "promotional" content must also be ruled out as equally suitable.

p.58 This is because it does not appear that such measures can have the same causal effectiveness in the short term.

In accordance with the foregoing, this Court considered that the prohibition on holding animal fights is a necessary measure to protect the welfare of animals, since there are no

alternative measures that, being less restrictive of the rights of the Commission and the petitioner, may promote that end with the same intensity as the challenged measure.

4. Proportionality in the strict sense of the measure

p.59 At this stage of the scrutiny, it is necessary to ponder the benefits that can be expected from a limitation from the perspective of the ends pursued by the measure with the costs that will necessarily be produced from the perspective of the fundamental rights affected.

With regard to the intervention in the guarantee established in the third paragraph of article 27 of the Constitution, the owners can still make use of the birds; their use and enjoyment is only restricted in relation to an activity they can no longer perform: the fights. The scope of the limitation on the right to choose an occupation and engage in work is also limited, since it is not forbidden to carry out a wide range of activities, but exclusively to engage in a very specific one: animal fights.

p.60 However, the benefits gained from the ban on animal fighting are very high in relation to animal welfare, which is the intended objective. The challenged measure greatly advances animal welfare because it is indisputable that animal fights cause significant physical harm to the animals involved and cockfighting often results in the death of one of the contending animals.

In accordance with the foregoing, this Court considered that the prohibition of fighting passes the proportionality test in the strict sense, since it efficiently achieves the promotion of animal welfare, while the limitations on the right to choose an occupation and engage in work and the right to property of the Commission and the petitioner are not very intense considering the way in which the prohibition affects those rights.

II. Analysis of the legislative distinction contained in the second paragraph of Article 2 of the Animal Protection Law for the State of Veracruz.

p.65 The First Chamber of this Court, in resolving the *Amparo Directo en Revision* 3445/2014, pointed out that the right to equal protection and non-discrimination in its aspect of formal

equality or equality before the law entails a mandate addressed to the legislator that requires the equal protection of all people in the distribution of rights and obligations. Along these lines, it was held that normative discrimination exists when two equivalent factual situations are regulated unequally without a reasonable justification for granting such differential treatment, clarifying that the justification for legislative distinctions that distribute burdens and benefits is determined on the basis of an analysis of the reasonableness of the measure.

The mentioned precedent explained that according to specialized doctrine, among the myriad forms that normative discrimination can take, the most common are tacit exclusion and express differentiation.

In this regard, discrimination by tacit exclusion of a benefit takes place when a legal regime implicitly excludes from its scope of application a factual situation equivalent to the one regulated in the normative provision, which usually occurs when a certain group is established as the recipient of a legal regime without mentioning another group that is in an equivalent situation.

p.66 On the other hand, discrimination by express differentiation occurs when the legislator establishes two different legal regimes for equivalent factual situations, such that the exclusion is entirely explicit, since the legislator not only establishes a legal regime from which a group is excluded, but also creates a different legal regime for that equivalent factual situation.

Thus, in the aforementioned precedent, this Court also explained that when the legislator establishes a distinction that results in the existence of two legal regimes, the distinction must be reasonable to be considered constitutional, and clarified that showing that the distinction is not reasonable requires indicating why the factual situations regulated by both legal regimes are equivalent or similar and therefore should not be distinguished.

p.67 In this case, the legislator eliminated cockfighting from the activities excluded from the application of the Animal Protection Law for the State of Veracruz.

Thus, the effect of removing cockfighting from this regulatory portion in which they were contemplated before the reform, is the configuration of two expressly differentiated legal regimes.

- p.68 In this specific case the distinction is between prohibited activities (those involving animal fights) and permitted activities (bullfighting shows, *faenas camperas*, horse racing, activities related to the sport of *charrería* and *jaripeos*).
- p.70 However, the fact that the challenged norm includes within the list of permitted activities an activity which should not be included, does not justify the claim that all activities involving mistreatment of animals should be included in the permissive regime. From the perspective of the right to equal protection, the Commission and the petitioner cannot benefit from the legislator's inconsistency in including an activity that should not be included among the permitted activities.

The fact that there are other activities which, because they involve great suffering for animals are also objectionable, does not make the ban on animal fighting "arbitrary, or much less make them permissible or legitimate".

In accordance with the foregoing, this Court considered that the distinction between prohibited activities and permitted activities is reasonable, so the right to equal protection in its aspect of formal equality before the law, provided for in article 1 of the Constitution, is not violated.

DECISION

- p.71 This Court considered that the grievances of the petitioner and the commission are ungrounded, so it is appropriate to confirm the decision challenged and deny the *amparo*.