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ANIMAL TURN AS A META-TURN?[1]

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ABSTRACT: Human sciences as a reflection of social transformations fluctuate with dynamic changes of current cognitive paradigms. Following the textual and visual turn and the turn towards things (objects), there are intensified tendencies to think in terms of an "animal turn", which becomes close not only to activists and pro-animal activists but also to scientifically engaged humanists. I believe, however, that the animal turn should be treated as a meta-turn: a process that requires a change in the relationship between the reflecting subject and the object of reflection, and not only as a specific kind of representation of the surrounding world. In the proposed text, I attempt to analyze the causes of the turn towards animals. I also address the theme of cognitive resistance in view of the recognition of animal studies as a fully-fledged theoretical and research area of contemporary humanities.
KEYWORDS: animal turn, turn to animals' relations, man, animal, animal studies

Nowadays, humanities and social sciences when attempting to describe and analyze the social and cultural reality are guided by cognitive pluralism, embedded in a post-modern perspective which proposes to adopt the assumptions of the process of inter-

[1] This article was published in Polish as subchapter titled "Zwrot animalistyczny jako meta-zwrot" in Mamzer Hanna and Isański Jakub. 2018. *Socjologia kultury w świecie inteligentnych zwierząt i uczących się maszyn*. Bydgoszcz: Epigram.

preting reality for all the reflections. We must however be ready to accept the consequences of these assumptions: the obvious existence of many interpretations of the world. Each of these interpretations is realized through a unique kind of discourse based on a peculiar metaphor and a peculiar language. The multitude of the created mental worlds makes us realize that the reflecting subject has no access to the world as such - it has access only to the representation of the world, created through the mind that discovers this world. As I wrote in another place: "The concept of representing reality through various forms of reflection arises in humanistic discourse from the approach proposing the assumption as the basic thesis that objective recreation of reality is not possible, that it always requires the use of a kind of "community" perspectives (borrowed, of course, from the influence of culture and social context) that alter not only the form but also the meaning of the analyzed phenomena. Psychologically, this is a universally accepted process when considering the accuracy of human perception. However, the popularization of approaches emphasizing the importance of interpretation has also allowed to propagate the idea of transforming the perceived world, not only on the level of mental processes taking place in the mind of the subject, but above all on the level of socially regulated cultural processes that influence the way of seeing, writing and understanding the world and the way of transferring the knowledge about it" (Mamzer 2008: 62).

The representation of the reality through the metaphors of discourses has until now taken two significantly visible forms - textual turn embedded in poststructuralism and carrying a rational message, and the opposite visual turn embedded in postmodernism, which restores intuition and emotions and their role in human perception of the world. This opposition was formed on the basis of the Cartesian concept of psycho-physical dualism: not only antagonizing these two ways of cognition, but also hierarchizing them in such a way that the discredited emotional cognition was for many years removed from research practice as inferior, unworthy and... feminine. The Descartes' way of looking at the world of living beings only strengthened the vision already proposed in ancient times, especially by Aristotle: "The post-humanistic perspective is associated with animal studies only when it implies a critical attitude towards anthropocentrism and not an anticipation of the post-human or the post-human era. In our culture, the privileged status of man inherited from the Greeks and strengthened by Christianity involves the glorification of the mind, the language and the immortal soul" (Bakke 2011:199). Thus, both the hierarchical perception of the world built on anthropocentrism and the strengthening of psychic-somatic opposition (and thus: emotional opposition and rational perception of the world) were sanctioned.

Over the last forty years, however, there has been an intensification of yet another tendency, which I initially thought of contrasting with textual and visual turns, although after a thorough reflection, I think it is a meta-turn. If this concept is introduced, then in terms of a meta-turn we should define such changes in the pattern man relates to the world that not only refer to the way of representing the world ("visual" or "textual"), but also refer to the model of perceiving its construction. In this sense, a potential animal turn would have to be approached at a similar level of generality

as a turn "towards things". Such a structure of at least two levels of thinking about the world seems conceivable, particularly as the empirical observation inclines to this reflection. More specifically, the social awareness of the relationship between man and the rest of the living world takes on a polarized form today: on the one hand, through functioning in post-industrial societies, we lose contact with nature in its broadest sense, animals become only theoretical constructs, whose presence is justified with names, and contact with them is basically limited to the consumption in various forms and shapes (de Mello 2012). There is also an increasingly dynamic reflection on whether an anthropocentrically oriented world is the only world and on the consequences of the current human approach to nature for future generations. After many earlier cognitive turns, limited basically to the metaphor of logos, the turn towards animals, deepens the post-humanistic reflection on the responsibility of the human being for the rest of the living world and for relations with this world, also in a pragmatic dimension.

The two aforementioned approaches to perceiving the reality reflect certain methods in the application of different discourses - involving distinct methods of viewing and describing the world. It should be recognized, however, that these are "methods of representing the world" precisely through the use of specific metaphors. These turns, however, have a different character than two subsequent meta- turns: a turn to things and a turn to animals. They should gain the meta status, which means changes not only in the method of perceiving the world, but above all in the method of creating relations with the surrounding and researched world. K. Weil has a similar opinion:

If the linguistic turn insisted that we have no access to unmediated experience or knowledge but only to representations that are themselves fraught with linguistic and ideological baggage, the turn to animals can be seen as responding to a desire for a way out of this "prison-house of language". It responds to a desire to know that there are beings or objects with ways of knowing and being that resist our flawed systems of language and who may know us and themselves in ways we can never discern (2010:9).

The turn towards things (which I will not address in this text) was most strongly observed in history (including archaeology) and sociology. As Ewa Domańska writes: "The interest in things and animals and the successive turns (a turn towards things, materiality turn, as well as a performative turn or agency are not the result of intellectual fashions, cognitive curiosity of avant-garde researchers, but are the result of a growing conviction that current ways of perceiving the world do not reflect the changes it undergoes (genetic engineering, transplantology, psychopharmacology, nanotechnology)" (2008:12). While on an archaeological level the turn towards things brought interesting conclusions and proposals (and on a historical level it could bring) (Domanska 2008), on a sociological level it turned out to be a dead end leading to a kind of cognitive impasse: by offering the attractive on a performative level practice of visual representation of things, on a reflective level it turned out to be completely futile. This is because the cataloguing of images of reality does not show anything, as long as it is devoid of verbal commentary. W. J. Thomas Mitchell has already noticed this in *Picture Theory Essays on Verbal and Visual Representation* (1994) while discussing the impact of a photo-essay. Sociologically, the turn towards things was supposed

to attribute to things the driving force of provoking and modifying social relations, as well as the secondary function of the effect/product of those relations.

In this paper, however, I would like to focus on the increasing interest in a turn towards animals - a post-humanistic way of revaluating relations between man and the surrounding natural world, especially the animal world. On the discourse level, it is visible not only in humanities, but also in social sciences and sciences as well[2]. Such discourses serve to describe the observed social and cultural reality that questions the hitherto anthropocentric being in the world, for the sake of sustainable development, ecoservices and partnership relations with the natural environment. The change in these relations is reflected in the activities at various levels of generality: from global political decisions[3], to local solutions at meso-level [4] to local practices of small communities. [5] and ending with individual choices and consumption trends (e.g. eco-parenthood, vegetarianism, veganism, etc.). In this sense, the particularity of the animal turn lies not only in the change of discourse, logos and the subject itself, but also in the change of the level of empathy. The person who writes about animals and has no relationship with them is detached from the subject matter. This creates a sense of being non-substantive, which is basically paradoxical, because it seems that the cognitive-relational transformation we are talking about here - especially on the Polish ground - was initiated by literary scholars and linguists (feminized disciplines - or, therefore, more emphatically approaching the environment?). The necessity of establishing the link between humanities and natural sciences is also noticed by Ewa Domańska who writes: "When looking at the historical research from the point of view of cf. rative research on the theory of humanities, the possibility of refreshing reflections on the past I see: first of all, in the development of the re-established dialogue between humanities and natural sciences" (2008: 27). The mutual resentment of historians and natural scientists, described by Domańska, is not only typical for history. Unfortunately, other areas of humanities also present a similar attitude. Undoubtedly, establishing a transdisciplinary dialogue is not easy - nevertheless, especially in the context of animal studies, it is necessary. Because the turn in the relationship between humans and other animals is defined as such, the need to determine in whose interest do we conduct our research at all seems cognitively basic. The production of knowledge on animal studies disturbs the existing structure of knowledge, forcing confrontation with the unknown: at the level of humanistic discourse it becomes too abstract and must be confronted with the realities of animals. This question is answered by Pedersen (2014), who was quoted earlier, with the title of her text: „Knowledge production in the "animal turn": multiplying the image of thought, empathy, and justice" - suggesting that the production of knowledge in the field of so-called animal studies should lead to building empathy, reflection and animal rights. The author continues to write: "In the *animal turn* we are indeed *doing theory*, but we are not doing theory in

[2] Where, for example, on the grounds of pragmatic zootechnics, animal welfare is widely discussed. cf. Kołacz, Dobrzański 2006; Gardocka et al. 2014.

[3] The rejection of the CETA agreement by Belgium (BBC News 2016).

[4] Firecrackers and fireworks banned in Rome (TVN 24 2016).

[5] The residents' resistance to investments that affect the environment.

complete isolation from the actual life situation of animals; we also want to develop a knowledge base for theoretically informed action and politics for animals that intervenes in processes of escalating oppression. one of the driving forces behind the formation of the *animal turn* research theme at Lund University was the question of how we can create a space in academia where an animal perspective is present: A space which allows us to speak about, and also work to change, the experiences of animals in human society" (2014: 17), which leaves no doubt about the need to combine theoretical considerations with animal welfare practice.

Are the humanists ready for this? Pedersen says: "As a social scientist, I acknowledge my ignorance and my own disciplinary limitations in the area of animal sentience and behaviour, and greatly appreciate the expert knowledge that ethologists and other scientists bring to these dimensions of the "animal turn". (2014:14)- and this testimony should be treated as an illustration of the commonly occurring situation, which also occurs in Poland. Many representatives of humanities involved in the activities within the framework of the animal turn openly declare that they are not able to be confronted with tangible empiricism that presents the actual actions of people towards other animals. This is not only a significant cognitive challenge, but especially an emotional one: empathy and even syntony. Monika Bakke already in 2011 presented it as follows: "Since the 1970s, we have been witnessing the formation of new academic disciplines that are committed and from the very beginning inherent in various forms of activism. These include studies on gender, trauma, homosexuality, women, and animal studies. The latter would lose their vital strength and sense of existence without contact with specific practice and direct or indirect involvement in animal rights activities" (2011: 200) and further on: "Probably the most serious of these allegations is the lack of connection between theory and practice, which means a real animal being. It is not so much a question of finding a compromise research path that would neutralize controversy and avoid politics, but rather of taking care of the relationship between discipline and social practice" (2011: 200), and human practices towards other animals. The postulate indicated by the author is therefore extremely important: it is impossible to undertake actions or reflections in the field of animal studies, without contact with the knowledge about animals and without contact with the knowledge about how they are treated by humans". Steve Best, one of the founders of the Institute for Critical Animal Studies, clearly emphasizes the necessity of the connection between theory and practice, demanding more radical attitudes from academics; while Susan MacHugh warns that turning only in the circle of metaphors exposes us to "the danger of reaching the same old conclusions that animals are just lite subjects for humans" (Bakke 2011: 200). As Bakke writes: "If we assume that the current increased interest in human-animal relationships is a sign of a kind of animal turn, then in order to understand its meaning, we must first consider its causes and context. On the one hand, these are social movements, the development of science and technology, and on the other - within the framework of the academic debate - the need to rethink the position of a human - subject in the face of anti-essentialist trends in humanities. Let us remind ourselves that a favourable context for the development of animal studies appeared already in the last century thanks to the movements for

civil rights, women's rights and ecological rights, especially those of a non-anthropocentric character, such as the movement for the liberation of animals and deep ecology" (Bakke 2011:194).

According to Wolfe (2011:1), animal studies did not function as a separate field of humanistic reflection until 1995: "there was no *animal studies* when I published my first essay in that emerging field in 1995". Wolfe claims that the terms "man" and "animal" are now relicts of humanism (2011: 3), flattening the complexity of the definition of who is one and who is another.

The phrase "animal turn" as a phraseological term was probably used for the first time in 2003 by Sarah Franklin during a conference organized by the Cultural Studies Association of Australasia", writes Pedersen in her text with a significant title: *Knowledge production in the "animal turn": multiplying the image of thought, empathy, and justice.* The author states: "in their book Knowing Animals (2007), Philip Armstrong and Laurence Simmons trace the phrase "animal turn" back to 2003, when Sarah Franklin brought it up during the Cultural Studies Association of Australasia conference. In 2007, Harriet Ritvo notes in the journal Daedalus that the "animal turn" suggests new relationships between scholars and their subjects" (Pedersen 2014:13). Referring to the above-mentioned authors, Pręgowski also raises the issue of the increasing expressiveness of the animal turn in the humanities. Particularly important for this text is Ritvo's statement suggesting a change in the relationship between the cognitive subject and the object of cognition, which in the case of the animal turn is of particular significance. The essential sources of the animal turn should be sought in attempts to redefine the relationship between man and nature and in reflecting on the essence of subjectivity. The redefinition of the binary opposition of humanistic nature-culture proposed by Braidotti (2013) and the consideration of human culture as a natural extension of nature, the adaptation of man to the requirements of the environment through the creation of such an intersubjectively communicable set of normative and guiding rules, abolishes the dilemma of philosophy concerning the reflection on how much is there of an animal in a human being. The continuation of these reflections redefines the subjectivity which, according to Braidotti, is anyone who can build relationships: therefore, people and other animals. The change in the perception of the relationship between man and animal brings perhaps the most spectacular questions in the form of Bruno Latour's reflections on whether, as a species, we have even gone beyond nature? It is strengthened by the opinion of Donna Haraway, who says that "we have never been human", because today it is obvious that as people, at the same time, we are always non-humans by necessity. We - i.e. the living bodies - participate in the exchange of matter and energy with the non-human environment. Also, at molecular level we are not only human: we discover in ourselves animals, plants and microbes. It is the critical posthumanism that underlines our material condition, not to regret it, but, on the contrary, to add value to it. (Bakke 2011: 199). In Poland, the problem of reformulating animal-human relations is also included in the area of important reflective considerations (but also within specific activist initiatives). While in the social practice of everyday life this is becoming more and more visible, insofar human-animal studies, also called animals studies, have a difficult access to the aca-

demic world: "In Poland, animal studies, understood as a field of research, have been in existence for some time now, albeit in a rather modest dimension, but they are not yet present as a separate academic discipline" (Bakke 2011: 194). Social demand for education in this area is increasing significantly, however, in the scientific and academic worlds, animal studies are hardly adopted. This issue provokes reflection on the existing state of affairs.

There are three reasons behind this - firstly, the introduction of the animal studies into the curriculum of academic teaching can be interpreted as an indication of the collapse of the modernist system of exercising positivistically oriented science. Regardless of whether it concerns the sciences or broadly understood humanities. Animal studies naturally introduce empathy and feeling in irrational terms and from the position of animals other than humans. This questions the standard "hard research methods" as the only applicable means of cognitive, legitimate research activity. The introduction of this kind of reflection is a precedent for the appreciation of the emotional perception of the world and the cognition through intuition. The area of animal studies is dominated by women's cognitive activities (as well as the activist area of activities for animals)[6]. The admission of such a cognitive trend and such authors appreciates their creative activities. Thirdly, the reflection on the attitude of humans and other animals towards each other leads to questioning, or at least testing, the stability of anthropocentric behaviours. These three reasons have a common denominator: it is the destabilization of the existing order embedded in established hierarchies and allowing to function without going beyond the sphere of comfort. All three features described above cause that this frozen, safe situation is redefined in a dynamic process, in which it is necessary to learn to act effectively again, and what is more, taking into account the changed axiological assumptions. Ritvo claims that there is still much to be desired on the issue of full recognition of animal studies as a valuable scientific discipline: "Within my own experience as a scholar, the study of animals has become more respectable and more popular in many disciplines of the humanities and social sciences, but it is far from the recognized core of any of them. It remains marginal in most disciplines, and (not the same thing) it is often on the borderline between disciplines" (Ritvo 2007: 121-122). Similar opinions are expressed by Monika Bakke (2011): "Expectations towards researchers are high, as they are required to reject the known and accepted methodology - imposing the necessity of reformulating opinions, entering the unknown, not to mention such obvious aspects as the necessity to observe the world literature and actively participate in current debates. Unfortunately, however, this invigorating attitude is met with open criticism at our universities, and often with hostility because there are still accusations of novelties and faddism and, above all, it is considered unbearable to engage politically or emotionally in the subject matter of research, which allegedly completely discredits its scientific character. But it's not all about the blind engagement, it's more about the critical empathy" (2011: 203). It should be emphasized that "Recently in Poland there has been a growing interest in

[6] Cf. *Empathic Misanthrops?* - image of people working in non-governmental organizations for animals. Research Report. 2012.

the subject of human-animal relations, which is reflected in the rapidly growing number of publications, exhibitions, debates and conferences on these issues. This trend has emerged much earlier in the West and has already resulted in a new transdisciplinary research area and institutionalized academic discipline, namely human-animal studies or animal studies" (Bakke 2011: 193)[7]. The author also believes that "Animal studies in Poland still focus primarily on humans and are still far on the margins of academic life, having an incidental and fragmentary character" (2011: 201). Unfortunately, despite the passing years, this description still accurately reflects the state of animal studies at Polish universities.

It would be hard not to agree with Bakke, who says that "In Poland, the *animal turn* is taking place slowly but noticeably - for example, during the recent presidential elections, when many of us realised that, like others, we do not support the killing of wild animals for entertainment and expressed it publicly. There are probably many factors of *moral evolution* that have led us to the point where formulating such an accusation is not synonymous with being ridiculed. What matters is the change in sensitivity and its specific effects - the saved animal lives - and the social pressure forced the hunter to put down his weapon and refrain from the pleasure of hunting" (2011: 198). Indeed, the animal turn is gaining momentum[8]. The demand for education in this area is therefore growing.

A change in the perception of the relationship between a human being and an animal is a multi-layered phenomenon that takes place at the level of individual and social consciousness, expressed with the help of various logos and practices. There are also changes in the axio-normative systems regulating human activities - the appearance of a debate on the moral status of animals - promotes equality and justice in relation to animals, treating speciesism on equal basis with intra-human discrimination (racism, sexism, ageism, etc.). This erodes the carefully cultivated border between humans and other animals and shifts the hitherto unambiguous demarcation line between humans and other animals, created with the help of science and humanities in all fields of academia, culture and history. The fact that this border is fluid and the division itself is a social construction facilitates its relativization and weakens its power (although abolishing some borders requires establishing others). Paradoxically, however, talking about the border strengthens it - as Ritvo claims: "the regard to the study of animals, this often means that explicit claims of unity (humans are animals) paradoxically work to rein force the human-animal boundary they are intended to dissolve. That is to say, such claims incorporate a grudging acknowledgment that this boundary is widely recognized and powerfully influential. Why else would it be continually necessary to deny its validity or remind ourselves of its arbitrariness?" (2007: 119).

Reflection on the existing anthropocentric orientation of human activities has led

[7] Ritvo shares this opinion: „nevertheless, during the last several decades, animals have emerged as a more frequent focus of scholarship in the humanities and social sciences, as quantified in published books and articles, conference presentations, new societies, and new journals" (2007: 119).

[8] In this context, we should give the unprecedented examples of the blocking of hunting in Wielkopolska, which was carried out by animal activists in 2015, as a continuation of the example cited by Bakke.

to an increased awareness of the negative effects of this dichotomous attitude of humans towards other animals (on the one hand, loss of contact with them, and on the other hand, intensification of consumption of zoonotic and animal-based products); raising awareness of animal welfare neglect, in particular in the light of increasing knowledge of animal ethology and animal needs, the impoverishment of eco-system homeostasis through carbon dioxide emissions (particularly those resulting from mass production of animals), improper waste management, tropical forest deforestation for crops essential for the feeding of farmed animals (in particular genetically modified soya), overproduction of animal protein (and milk and meat), climate change imbalances and the introduction of genetically modified organisms into the environment.)

The civilizational development, enrichment of societies and the increase of living standards and the quality of life result in higher empathy and care for the natural environment and its resources, as well as the in the awareness of the necessity to implement the principles of sustainable development (especially in the context of excessive animal production). The progress of civilization is commonly treated as a determinant of the relation to animals. These processes are facilitated by the general access to information related to the effects of anthropocentric attitudes exploiting other animals.

Academic resistance to the recognition of the animal turn as an undeniable fact, expressed in the reluctance to accept animal studies as a full-fledged research field of a complex heterogeneous character, bears the marks of a Freudian mechanism of ego defense: either denial or negation. Not without reason, I mention the notion of "ego", which should be treated as an analogy of the institutional status quo.

Introducing animal studies into the academy and simultaneously addressing the challenges posed by the animal turn, questions the established and respected principles. Fear of disturbing those principles requires the rejection of these areas of interest as unserious, emotional and irrational. I have an impression that the postulate of combining theory and practice of empiricism, abstract considerations with concrete findings, arouses particular discomfort. One can get the impression that it is precisely this jumping from the world of abstraction to the world of concreteness that is inconvenient for many.

The recognition of the animal turn as a fact has yet another kind of consequence: it forces us to notice, and blocks the unnoticed, unethical and immoral exploitation of animals, which homo sapiens reproduces every day on a massive scale. Awareness of this scale and these practices is one thing. However, the next challenge is to confront this awareness with own individual choices as to the extent to which I want to participate in the Holocaust of animals. It is not convenient to confront these issues and it causes discomfort - first of all the mental discomfort - it forces us to go beyond a comfortable and safe circle of well-established findings. We are obliged to address ethical issues related to our coexistence with animals. Not because their lives influence ours. But because ours influence theirs (Weil 2010: 14). If animal studies did not exist, there would be no need to confront these moral and ethical dilemmas. Whether desired or not, we will all eventually have to accept that: "Coming from the margins, human-animal studies have the potential to question and deconstruct settled assumptions and to

gain progressive momentum, similar to other 'counter-hegemonic disciplines'" (The Animal Turn and the Law 2017).

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WHAT IS AN ANIMAL: LEARNING FROM THE PAST – LOOKING TO THE FUTURE

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ABSTRACT: Can western human society apply its definition of the term "animal" on itself? Is it possible that a "person" is not only human? In this article, I explore and analyze various and interdisciplinary doctrines and approaches towards nonhuman animals in order to question the current status-quo regarding nonhuman animals.

Throughout history, as Man developed self-awareness and the ability to empathize with others, hunters were associated with wolves and began to domesticate them and other animals. With the introduction of different religions and beliefs into human society, Man was given the lead in the food chain, and the status of the nonhuman animals became objectified and subject of the property of human animals. Common modern taxonomy identified and described approximately 1.9 million different species. Some estimate the total number of species on earth in 8.7 million. The Human is just one of 5,416 other species in the Mammal class and shares a place of honour among hundreds of other Primates and Great Apes.

It appears to be commonly and scientifically accepted that humans are animals. Humans, as other nonhuman animals, all meet the definitions of the term. However, it seems that there is a wide gap between the human-generated definitions (HGDs) and the human social practice that created a distinct line between humans and "animals". This alienation is best illustrated by the commonly mistaken equivalence between the terms "human" and "person", as at least some nonhuman animals answer to many other HGDs. In this article I try to show that a rational and logical interpretation of these definitions' nonhuman animals (at least some), should be regarded as persons and to suggest an approach to implement in the future.

KEYWORDS: human-animal studies, sociology, anthrozoology, animal rights, speciesism, attitudes toward animals

INTRODUCTION

Animals have been an inseparable part of human societies for millennia. From the early times when hunters-gatherers began to communicate with wild wolves and domesticated them to some extent, through the use of animals as assistants for hunting other animals (Harari 2011), the use of their skin and fur for clothing and their flesh for food. Although biologically similar to many other species, few would disagree with the claim that humankind has conquered Earth and is its undisputed ruler. However, is this undisputed fact enough in order for an immoral approach towards other species?

Humans communicate mainly through language. Put, language is a system comprised of words that have meaning. This meaning enables different individuals in a particular society to communicate and exchange ideas. Thus, the distinguished readers of this paper are able to understand the messages conveyed in it. However, these words and terms are Human Generated Definitions (Hereinafter: "HGDs"). Terms like "animal", "person" and "rights" are HGDs which meanings and interpretations are being cast by humans, although they affect other animals.

Human societies have created various institutions, such as legal systems and laws in order to function and operate in a more transparent and more secure manner. Whenever there was a dispute regarding the interpretation of a given HGD, such institutions of a particular society gave their opinion and ruling, thus clearing the dispute and setting the meaning of said HGD. That is also the case of the status of animals in human society.

This status has changed throughout history and differed in various human societies and went from mere "property" to "personality" and recently there are voices which call to debate it again in order consider the status of animals and their rights in a human-centred society. Some courts around the globe already acknowledged that although legally animals are considered property in most western countries, socially (specifically in the cases of companion animals and sometimes primates) they are considered by human individuals as persons and sometimes even family members and as a specific legal system exists to serve society, it has to reflect the changing ethics and values of said society and adapt to them.

In this article, I will try to suggest a different and novel moral interpretation and practice towards animals, based upon the constant change in the status of animals in a human-centred society, while drawing ideas and principles from various and interdisciplinary doctrines and integrate them.

WHAT IS AN ANIMAL?

In his 1735 book *Systema Naturae*, the "animal kingdom" (Animalia), Carl Linnaeus (1707-1778) firstly introduced what we refer today as common and modern taxonomy. Today modern taxonomy identified and described approximately 1.9 million different species (Mora et al. 2011). Some estimate the total number of species on earth in 8.7 million, including unidentified ones (Sweetlove 2011).

A species is the lowest category of the animal kingdom. For example, the Human is just one of 5,416 other species in the Mammal class (Wilson & Reeder 2005). The

Human shares a place of honour among 190-448 other Primates and seven other Great Apes (Mora et al. 2011).

The primary definition of the word "animal" in the Oxford dictionary is extensive. It states that an animal is a "living organism that feeds on organic matter, typically having specialized sense organs and nervous system and able to respond rapidly to stimuli". However, some of the secondary definitions expressly define an animal as "opposed to a human being" and "A person without human attributes or civilizing influences, especially someone who is very cruel, violent, or repulsive". The dissonance between these two possible interpretations is apparent, and so, very interesting (Hurn 2012). The fact that human cultures and societies address unwanted human behaviour as "animalistic" only intensifies the self-alienation of the human from the animal realm, for no objective, logical or scientific reason.

This approach is anthropocentric in its core. It basically claims (even if not always states that bluntly), that humans are the only ones to have moral standing and that nature as a whole (including nonhuman animals but excluding humans) is viewed solely by its value to humans. Even the frequent claim that humans should "save the planet" and advocates for the preservation of natural resources and wildlife are anthropocentric in their essence as usually they are being advocated as a reason to enhance and better the human life quality (Barry and Frankland 2002).

It appears to be shared (and of course scientifically) accepted that humans are animals. Humans, as other nonhuman animals, all meet the definitions of the term. However, it seems that there is a wide gap between the aforementioned definitions and the human social practice that created a distinct line between humans and "animals". It is said that human race's anthropocentric philosophies and beliefs and its almost "martial" approach towards nature, only to "show off" its power and superiority over other species and natural resources have led to this sharp and often bloody distinction (Pocar 1992).

Man, he has always sought after the differences between himself and the natural world that surrounds him, mainly between himself and other animals (Douglas 1975; Horigan 1988). Archaeological findings show that only about 40,000 years ago, Man developed self-awareness and the ability to empathize with others, and from then on man's attitude toward the animal was empathetic and not indifferent. Over the years, hunters were associated with wolves and began to domesticate them and other animals. With the introduction of different religions and beliefs into human society, Man was given the lead in the food chain, and the status of the nonhuman animal became objectified and subject of the property of human animals (Serpell 2007).

In the first chapter of the book of Genesis in the bible (the Old Testament), the sacred book of the most ancient monotheistic religion, Judaism, God has said "Let us make man in our image, after our likeness. Furthermore, let them have dominion over the fish of the sea and over the birds of the heavens and over the livestock and over all the earth and over every creeping thing that creeps on the earth".

In these words, God grants Man a divine seal of approval that not only that Man is distinct from any other species but is also superior to them and should control them and dominate over them.

Armed with this divine superiority, further perceptions and philosophies have evolved and guided more human societies to distinguish themselves from the animal kingdom and nonhuman animals. As will be elaborated later in this research, some of these perceptions claimed that while Man has a "soul" nonhuman animals do not. This is an anthropocentric perception that places man at the centre of the world and sanctifies him and so natural, and animals should be controlled by him (Caplin 1990).

It is imperative to understand or at least assume that in ancient times when cultures were mostly religious, these so-called divine axioms were their moral and social guidelines (Blackburn 2001).

This primal order to the first Men and has been adopted for generations thereafter, and in my opinion, has "laundered" and bleached Humankind's distinctive, abusive and degrading approach towards and in relation to nonhuman animals.

It is somewhat amusing that Humankind has alienated itself from nonhuman animals ever since self-consciousness, philosophy and religion entered its social life, while "In recognizing our humanity there is an implicit, if largely unrecognized, admission of our animality" (Bennison 2011).

Such alienation is best illustrated by the standard mistaken equivalence between the terms "human" and "person". As will be broadly discussed in this research, these terms are not synonymous, to say the least (Cohen 2017).

All of these terms are anthropocentric in their core. Humans have defined them, cast content into them and interpret them in their research. Just as an "aperitif" I would bluntly claim that the question of personhood is a cross-species one. A human animal can be regarded as a "person" as much as a non-human animal can. It all depends on the various criteria according to which we define this term.

Wynn R. Schwartz (1950) tried to define the term in a descriptive psychology approach and divided it to eight sub-categories from "non-persons" to "super persons". I believe that the most relevant for this research is the "potential person" one (Schwartz 1982). Schwartz claims that a potential person is a "behaviorally complicated organism capable of socially exchanging varied and complex communications" and that if there is evidence that a particular individual acted with deliberation or used a form of language, it should suffice to suspect that that individual is a person, "regardless of his embodiment" (Schwartz 1982).

A different approach was taken by Mary Anne Warren (1946-2010) defining the cognitive criteria of personhood (Warren 1973).

Warren suggested (regarding the legal status of abortion), that in order for a thing to be considered a person, it should have five characteristics: consciousness (including the capacity to feel pain), reasoning, independent deliberated activity, communication capabilities and self-awareness[1].

[1] It is essential to note that Warren's criteria of personhood in regards to abortion have been intelligently criticized by those who hold different views, mostly be fellow academic Robert F. Card, who bluntly accused Warren in promoting and moralizing infanticide. As the debate on the issue of abortion and the relation of the definition of personhood is a bloody battlefield between conservatives and liberals, religious and secular beliefs, some scholars rely on Warren's criteria of personhood solely to present

It is common knowledge today that nonhuman animals are "capable of intelligence and planning, capable of emotion and responsiveness, capable of awareness of another animal's feelings, capable of recognizing one another and members of other species as individuals, capable of joy, humor, and delight" (Nussbaum 2001)[2].

Beyond the fact that the definition of the term "animal" is an HGD, human society is divided into many different cultures and societies in which the practical interpretation of this term (if any) is different. As a derivative result, the human attitude and sentiments towards nonhuman animals differ from one human society or culture to another and varies through time and place (Ingold 2016).

There are various factors that affect humans' perspectives towards other animals, such as cultural, utilitarian, ecological and others (Ingold 2016). In most western countries, the attitude towards nonhuman animals and the interpretation of their behaviour are dichotomous to humans' whereas eastern and other societies' view and attitude towards nonhuman animals are inherently different. Whereas in Tel Aviv, Israel for example, many consider cats and dogs as companions and even family members, in various and vast areas of Asia cats and dogs, are being bred and sold as food for humans (BBC 2017). On the other hand, if we compare the same societies and jurisdictions, in Tel Aviv, cattle is being served as food whereas in India, cattle (and other animals) is not only considered sacred by the Hindu religion, but have been recently declared and recognized by the secular Supreme court as "wards" of all humans in a way that forces them to act as their guardians and to take all necessary steps to prevent any harm to cattle (Robinson & Cush 1997; Uttarakhand High Court 4.7.2018).

It is imperative to discuss these approaches and take them into consideration when trying to draw conclusions about the human attitude toward nonhuman animals, although this research was written from a Western point of view.

THE HISTORY OF HUMAN-NONHUMAN SOCIAL RELATIONS AND STATUS

The status of nonhuman animals has changed and varied throughout history. There were times where nonhuman animals had equal right to standing in human legal and social instances. In some cases, an attorney was appointed to the animal, in order to give the best defence, it could get.

With time, as Man developed different schools of thought and philosophies, nonhuman animals have been degraded to the level of mere property for the functional use of humans. Through the nineteenth century, new perspectives evolved and gave the proprietary animals some rights, mainly the right not to suffer. In order to offer some conclusions regarding the research question, it is imperative to understand how

the possibility of using them to question non-human animals' eligibility to human society's rights, and in this paper, so will I.

[2] I believe many would agree that a human fetus in its mother's womb for less than 90 days answers less cognitive criteria such as consciousness and self-awareness than a 4-year-old ape, yet western societies have legislated laws that prevent the abortion of 90 days and older fetuses on the grounds that the fetus is at this stage already a "person" with "rights".

human society regarded nonhuman animals in the past, what rights were allocated to them and upon what criteria.

Although it might indeed sound like a fairy tale to the modern human ear, it appears that centuries ago nonhuman animals received equal treatment and attitude to humans by human society, at least regarding the society's norms, laws and regulations.

This research will explore some cases in which nonhuman animals were involved and analyze society's attitude to them, in order to better understand the development of the social status of nonhuman animals in human society.

ANIMALS IN ANCIENT GREECE

In the past, back in the times of ancient Greece, it was customary to prosecute non-human animals that committed a criminal offence. In fact, humans at the time considered animals as equal to them regarding civil and criminal obligations (and in some cases also as having equal rights, as will be elaborated later) and a mental capacity and intention to commit a crime[3].

There are also references and sources that show that animals were tried before a court for such crimes, usually being sent to their death for killing people, even in biblical times (Finkelstein 1981). Interestingly and surprisingly, even in the 19th century in Western Europe, animals were still tried before a court, and sentenced to death and various other punishments, as will be elaborated later on.

In ancient Athens, not far from the famous Acropolis structure, there was another structure called the "Prytaneion" or "Prytaneum" (Jones 1956). This structure was a social, political and cultural centre where ceremonies and various events were held.

Among the other institutions that occupied the Prytaneion was a special court to discuss and hear only three types of cases: A. Cases in which the identity of a murderer is unknown or cannot be identified, B. Cases in which an object caused the death of a person and C. Cases in which a non-human animal killed a human person (Finkelstein 1981).

Little is known of the proceedings regarding non-human animals that were tried in the Prytaneion court instance; however, it is well known that the procedure in this instance was like any other judicial instance, and there was no substantive difference between them.

By way of example of the Prytaneion decisions, I chose to bring forward a case in which a child was killed by a javelin thrown by an athlete during his regular training at the stadium.

The Prytaneion court that dealt with the case and was supposed to decide who (or what) was responsible for the death of the child dealt not only with the possible guilt of the child and the athlete but also with the possible guilt of the javelin itself. In this case, the Prytaneion did not deal with an animal that caused the death of the child, but this example can testify and explain the ability that society attributed to objects and

[3] It may be assumed that the concepts at the time were not „criminal intention" and „criminal responsibility", instead that society at that time considered animals as personalities who could decide and intent to commit crimes and thus break the law.

animals and their responsibility and culpability for such acts (Jones 1956).

It should be noted that where the Prytaneion court found the defendant (an object or an animal) guilty, it issued an order instructing it to be exiled outside the city borders: "[I]f an inanimate object falling on someone hits him and kills him, a trial is held for it in [the Prytaneion], and it is cast beyond the frontier" (Macdowell 1965)[4].

Human society's approach to animals as entities with equal legal status continued to exist in later centuries. Evidence of this exists from the ninth to the nineteenth centuries and crosses borders and nationalities. Most of these examples came from Western Europe and took place between 824 and 1906 (Evans 1906).

IDENTITY OF CONDITIONS OF DETENTION, IMPRISONMENT AND PUNISHMENT OF HUMAN AND NON-HUMAN ANIMALS

When an animal was accused of committing a crime, or at least was suspected of committing it, it received the same treatment as a human person suspected of committing the same crime (Orbison 1985). This reinforces the assumption that nonhuman animals were a legal personality for all intents and purposes and not necessarily a scapegoat or a black sheep (literally).

Animals suspected of committing a crime (usually the murder of a human) were arrested by the authorities and placed in detention cells along with human detainees (Evans 1906). As I shall elaborate below, even after the beginning of their trial, animals received the same treatment as humans and were even granted, pardons and conditional release, which also attests to equality under the law.

Assuming that the animal was found guilty at the end of the process, it was generally sentenced to death and executed in the same ways that people were executed. On the day of the execution, the animals were sometimes placed on a torture apparatus that stretches the victim, in order to extract confessions before they die. On the way to the place of execution, the animal was dragged along the streets of the city, as befits a dangerous criminal, so that the public could see the law done and for criminals like him to see and be seen. The execution was usually carried out by hanging, but there are findings showing that animals were also burned at stake or buried alive.

1457, SAVIGNY, FRANCE – SOW CHARGED WITH MURDER

At the beginning of 1457, a sow was accused of murdering a boy. The sow was sentenced to death by hanging on a tree. The indictment also included the sow's six piglets as accomplices to the crime and therefore demanded their execution. The reason for this demand was that the puppies were all stained with the child's blood, and therefore presumably took part in the crime. In this case, the court held that because of the lack of substantive evidence linking the piglets to the crime, the piglets should be released and returned to their owners, under the obligation of the owners to return the piglets to continue the trial, where a direct connection between the puppies and the crime

[4] This is a passage from the arguments of Demosthenes, the renowned jurist and author of Athens' speeches, who lived between 384 and 322 BCE (Berman 2000).

will be found. The ruling of this court can be seen as a release on bail for house arrest, a right given to humans on trials: "In lack of any positive proof that they assisted in mangling the deceased, they were restored to their owner, on condition that he should give bail for their appearance, should further evidence be forth-coming to prove their complicity in their mother's crime" (Berman 2000).

1522, AUTUN, FRANCE – RATS CHARGED WITH CAUSING DAMAGE

In 1522 in the Autun region of France, many farmers discovered that their crops were being destroyed. The crop, the only source of livelihood of the farmers, was eaten by rats. As a result, the farmers filed a complaint with the ecclesiastical court in their district, demanding that they investigate the events and find a suitable solution. The court was required to investigate the "crime" and issued an indictment for the rats. The court gave the order to a court officer who arrived at the rat's whereabouts (where the crime was committed) and read out the summons so that the rats could hear it and respond to it. Strange as this would sound, the court-appointed a young lawyer named Bartolomée Chassenée to the rats to represent them in the proceedings (Hyde 1916).

Not surprisingly, the rats did not respond to the summons and did not appear on the day of the court hearing. Chassenée claimed that the order had not been duly delivered to his clients and argued that this was an issue that was relevant to the entire rat population, and not necessarily to the specific rat community that allegedly consumed the crop. Thus, Chassenée argued, that all rats must be aware of the trial and the essence of the act. At his request, the judges issued a new summons. When the rats did not appear in court again, Chassenée hastened to argue that since the entire rat population was scattered all over France, they needed more time to get to the hearing. After he was given another extension and his clients were still not in sight, Chassenée added that his clients were eager to appear in court and go to a fair trial, but the roads lurk with life-threatening dangers like wild dogs and street cats, and therefore, despite their strong desire to appear and win the trial, they cannot be expected to risk their lives.

1750, VANVER, FRANCE – A FEMALE DONKEY RAPE

In 1750, in Vanver, France, a peasant was convicted of having sex with a female donkey he owned. In those days, the law stated that the punishment for all parties committing the offense of bestiality, human and nonhuman, was a death sentence. However, in the case in question, the donkey was acquitted because she was a victim of the acts the peasant and did not voluntarily participate in the sexual act. The defense in this case claimed not only that the crime was committed without her consent, but also brought character witnesses, neighbors of the of the peasant who committed the crime, who claimed to have known the donkey for many years, because the donkey's behaviour was always exemplary inside and outside her home and never caused problems to any of them: "They were willing to bear witness that she is in word and deed and in all her habits of life a most honest creature" (Berman 2000: 148). What can be deduced

from this case is that not only did society grant legal status to an animal in court and appointed a lawyer for its defense, but the animal's defence claims were based on its character and its pleasant and comfortable attitude toward the people surrounding it; claims that are being used to describe human characteristics.

2018, UTTARAKHAND, INDIA – COURT DECLARES ANIMALS HAVE SAME RIGHTS AS HUMANS

Just like by a customized order, after my first meetings with my supervising professor and right before submitting the research proposal, on the Uttarakhand high court in India gave a groundbreaking ruling in the state of Uttarakhand in India (Daily Telegraph 5.7.2018).

The case revolved around claims raised by a local citizen named Narayan Dutt Bhatt against the Indian government. Bhatt claimed that horses are being used for commercial transportation into India pulling overloaded carts while causing cruelty to the horses. Bhatt sought directions to the government to restrict the movement of horse carts and to provide vaccination and medical checkup of the horses for suspected infections before entering into the Indian territory.

In its judgment, the court held that "The entire animal kingdom, including avian and aquatic are declared as legal entities having a distinct persona with corresponding rights, duties and liabilities of a living person. All the citizens throughout the State of Uttarakhand are hereby declared persons in loco parentis as the human face for the welfare/protection of animals" (Uttarakhand High Court 4.7.2018).

We have seen up to this point, at least partially, that nonhuman animals have been practically a part of human society. We have observed various examples which cross time and place of nonhuman animals that have been granted (legally and/or socially) individual rights that were equal to humans.

SOCIOLOGICAL AND PHILOSOPHICAL APPROACHES TO NON-HUMAN ANIMAL RIGHTS

It is essential to understand how history, philosophy and sociology intersect and reflect on how humans see nonhuman animals and what kind of relationship humans have with them. Should nonhuman animals be regarded as wards whereas humans are guardians? Should they be considered property with some rights or maybe full citizens? All these are not fairytales in the minds of "tree-huggers", but rather learned and well-reasoned proposals of many sociologists and philosophers.

Also, in discussing the status of animals and their rights, various philosophical points of view must be taken into consideration. One must distinguish between two fundamentally different terms that tend to be confused: animal rights and animal welfare.

The perception that animals have rights relies on the claims according to which animals are entitled to certain rights and that these rights should be allocated to them by society and supported by the law. This approach rejects the proprietary approach to

animals which see animals as tools or mere property in the hands of their owners and claims that animal rights should be allocated on a moral basis. The concept of animal welfare, however, does not address their rights, taking account of the fact that animals can suffer and that humans can be cruel to animals, and this should be prevented, but this does not stem from a moral obligation toward animals.

In my opinion, animal welfare stems at least in some sense, from the recognition of the animal's fundamental right not to suffer. However, not all the philosophers discussing the matter see it this way.

The fundamental change in the perception of animals as having a social and legal status began with the Age of Enlightenment in the seventeenth century. René Descartes (1596-1650), who is considered the father of modern philosophy, saw animals as no more than tools given to man by God to help him in his work and to satisfy his needs.

Descartes assumed that animals are devoid of consciousness, feeling, and emotions, and therefore cannot suffer, feel pain or sorrow. Descartes, therefore, maintains that animals are merely biological machines designed to function for man. For him, only entities with consciousness, reason, or language deserve moral and other rights. Therefore, man owes no moral obligations to animals, just like he owes no moral rights to machines (Voelpel 2010).

Descartes' conception of man as the centre of the world and emphasizes the use of the animal as a human tool and claims that an animal that cries is nothing more than a creaking machine that needs good lubrication: "In his books, he [Descartes] describes the nerves as tubes, which, thanks to the pressure of a gas, inflate and transfer their contents to the muscles. When one muscle empties and the other swells, from the gas that is transferred from the nerves, the swollen muscle becomes shorter and stretches the organ... Descartes described the main activity of the body of all animals... as explained by fairly simple mechanical operations, a kind of living machine" (Scharfstein 1978).

Some disagreed with Descartes' notion that animals were soulless machines that could not suffer, but still held that despite their ability to suffer, the man owed no moral obligations to animals. The German philosopher Immanuel Kant (1724-1804) recognized the ability of animals to suffer but denied a moral commitment to them because he assumed, they were irrational and had no self-awareness. In Kant's view, animals are nothing but tools in man's hands that exist solely for his own use and have no value in themselves.

Kant's justification for protecting animal life stems from this perception that an animal is a tool for human use. In Kant's opinion, a person will not harm an animal because the animal probably belongs to another person, and harming the animal is doing injustice to another: "[H]e who is cruel to animals becomes hard also in his dealings with men" (Kant 1963: 240).

Although humans believe that they should prefer themselves to animals in a conflict of interest, most of them unequivocally accept the assumption that since animals are capable of suffering, they have a direct moral obligation not to cause them unnecessary suffering.

This behaviour of humans has been called the "Humane Treatment" principle. The origin of this principle lies in the theory of lawyer and philosopher Jeremy Bentham (1748-1832).

Bentham believed that although humans and animals are different, they share at least one common trait, the ability to suffer. This ability to suffer is the only criterion that needs to be examined where the question arises, whether it is proper to give legal protection and owe moral obligations towards nonhuman animals. Other criteria such as consciousness, feelings or language are irrelevant to this question. In Bentham's view, animals have been lowered to the level of inanimate objects, since humans have chosen to ignore the apparent interest of animals not to suffer: "A full-grown horse or dog, is beyond comparison a more rational, as well as a more conversable animal, than an infant of a day, or a week, or even a month, old. However, suppose the case were otherwise, what would it avail? The question is not Can they reason? Nor can they talk? But can they suffer?" (Bentham 2005).

Isidore Marie Auguste François Xavier Comte (1798-1857) was a French writer and philosopher who called for a new social doctrine based on the sciences. Comte regarded sociology, as a new field of science and an important one, preceding anthropology. He believed that sociology, as a study of human behaviour should include and intersect with all other sciences (Comte 1877).

Comte claims that the law of intellectual development is a universal law and that all fields of human knowledge goes through three theoretical evolutionary stages (known as the three-step law): "the theological or fictitious; the metaphysical or abstract; and the scientific or positive" (Comte 1877). According to Comte, these stages are intertwined with the same stages in the development of human society.

Comte was a significant influence on Karl Marx (1818-1883), whose writings are considered to be one of the cornerstones of sociological analysis. At the time of his writing, when the power of capitalism and its ability to generate wealth began to dominate, Marx tried to examine how the system worked, what way is the capitalistic society headed and in what ways the system is different from previous ones (Fasenfest 2007).

Marx developed his critical theory of society, being influenced by the scientific sociology of Comte and based on social and political theories and the political economy. Marx paved the way for a more critical study of society, one that not only analyzes the present according to the past but instead tries to forecast the future or try to influence it by analyzing both past and present. A critical theory is a theory that tries to "liberate human beings from the circumstances that enslave them" (Horkheimer 1982). One could easily interpret this aim for liberation is that critical sociology promotes and encourages a more active and initiative sociology research.

Whereas mainstream sociology takes society as given, tries to filter and categorize society's relationships and activities and tries to understand end express society's progress without setting a specific ideal or goal, critical sociology observes society in a dual-lens. The social relationships in a particular present society are the product of that society's past but also the root of its future and only through academic research and comprehension of how society came to be, it will be possible to promote a change

in the future (Fasenfest 2007).

It is common knowledge that animals are taking part in human society in many ways for millennia. They accompany us as pets; they work with us on the fields, they fight with our armies, they save us from fires and avalanches, we use them for transportation and heavy duties, we use their faeces to grow plants, we eat them and experiment medications on them in laboratories.

Although this cross-species interaction has been gone for many years, the study of human-animal relations is entirely new, being developed in the midst of the twentieth century.

Having a sociological perspective when studying human-animal relations and their social implications is of utmost importance: "human interaction with nonhuman animals is a central feature of contemporary social life" (Sanders 2007).

In 1947, Max Weber (1864-1920) introduced a new perspective on nonhuman animals' status in human society. He claimed that because many animals can understand and relate and respond to human communication and as they can feel hate, love, fear and they express conscious thought based on experience, it is possible to have a sociology of humans and animals (Weber 1947).

In 1975, Peter Singer published his groundbreaking book *Animal Liberation*. In this book, Singer claims that when members of a particular species treat with prejudice or biased attitude in favour of their own and against those another species, it is considered "speciesism", a term he coined. Singer's book has led to tremendous change in animals and served as an ideological basis for the establishment of many animal movements around the world.

Singer pointed the abnormality of protesting against individual acts like experimenting on lab animals or bullfighting on the one hand while continuing eating meat and eggs from mistreated animals on the other hand. He argued that such opposite and contradictory actions are just like "denouncing apartheid in South Africa while asking your neighbours not to sell their houses to blacks" (Singer 2009). According to Singer these are considered acts of speciesism. Singer does not accept that morality is relative or subjective and suggests that rational ethics with universal characteristics is possible by giving equal importance to the interests of nonhuman animals as well as to human interests (Singer 1999).

Singer's speciesism could easily be regarded as a response to humanist perceptions, claiming basically that humanism is actually speciesism and therefore humanity is in some way "racist" towards those who are not of the human species.

Some sociologists have raised the notion that indeed animals are an inseparable part of human society, and in that regard, sociology should address animals and their relationship with humans in their research (Irvine 2008).

In the past three decades, the animal rights movement has flourished throughout the world. Human consciousness has evolved and accepted specific perspectives and thoughts that were merely fringe concepts earlier. Animal welfare legislation became more frequent on both sides of the Atlantic Ocean, in the Americas, in Europe and also in certain areas of the Middle East and Asia (Donaldson and Kymlicka 2011). However, these trends had little effect if any, on the everyday life of most animals worldwide.

Ever since the 1980's human population has tripled and expanded its control over animals and their habitats (land, air and water) and killed approximately 60 billion animals per year by doing so (Donaldson and Kymlicka 2011).

In their book *Zoopolis*, Donaldson and Kymlicka differentiate between three moral structures: the welfarist, the ecological and the basic rights approaches.

In short, the welfarist approach assumes that the welfare of animals should be considered and protected, as long as it does not contradict with any human interest. This is still and anthropocentric approach that places human interests above any interest of other animals. The main problem with this approach, according to Donaldson and Kymlicka, is that there is no distinct, precise and broadly accepted line under which no animal exploitation is allowed and above which such exploitation is forbidden. This lack of clarity leads to the cruel exploitation of animals for mere human interests such as fashion and cosmetics.

The ecological approach assumes that humans should not interfere with ecosystems in which animals reside, rather than the welfare of individual animals or species. This approach promotes the holistic state of ecosystems and their importance to the world. Still, where a destructive intervention is allegedly needed in order to support or protect a specific ecosystem, this approach favours the intervention over the lives of animals in that ecosystem (such as hunting for purposes of dilution and regulation of animal populations).

Therefore, a third approach is suggested according to which "the only truly effective protection against animal exploitation requires shifting from welfarism and ecological holism to a moral framework that acknowledges animals as the bearers of certain inviolable rights". According to this approach, all animals, whether human or nonhuman, are born with the right not to be subject to medical experimentation, to live freely, not to be tortured, harmed or separated from their families.

One of the more thought-provoking approaches is Kymlycka's and Donaldson's novel concept of "animal citizenship", which is a possible outcome of the fundamental rights approach (Kymlicka and Donaldson 2011).

In a recently recorded interview, Kymlicka explained the concept and explored what led to it. As human brought animals to their homes throughout history, thus turning them to domesticated animals, it is evident to Kymlicka that humans took animals into their society: "That is what domestication means. We have taken them out of the wild, bred them to be dependent on us and incorporated them into our society" (Kymlicka 2014).

Kymlicka suggests that recognizing animals as members of a shared society with humans is a matter of justice and therefore tries to apply for the citizenship socio-legal status upon them. Such status will allow nonhuman animals to enjoy different fundamental rights as public health insurance, disability pension and be subject to the same labour rights as the humans they work with.

Animals also share our homes with us, and many of us consider them family members. In the United States of America alone, more than 70% of the households have dogs, cats and even birds and about half of these households consider their companion animals as family members (AVMA 2007 in: Irvine 2008). In Europe, at least 49%

of the households have one dog or one cat (FEDIAF 2018).

On the other hand, most of us wear their skin and consume their flesh. The inherent ambivalence toward animals is a sign of strong social forces that prevent people in modern society from sensing its problematic nature (Arluke & Sanders 1996).

As stated above, societies have established the court system in order to interpret their laws and regulations in order to better conduct the daily life of said societies and to live according to some certainty. People who have companion animals have a strong bond with them, almost a parental relation to them one might say. Children are attached to their companion animals, treat them and play with them as if they were young family members, almost like siblings.

It is therefore essential to address how various courts addressed the question of animals as family members of humans and try to understand if this "feeling" that many people in human societies have towards their companion animals are reflected and solidified in practical law.

In 1981 in the state of Texas, the court of appeals dealt with the status of the Arrington family's companion dog when the Arringtons decided to divorce. The husband appealed the decision not to appoint him as guardian of the dog. The court acknowledged the couple's love to the dog and its particular characteristics but ruled nevertheless that its legal status is proprietary and therefore the relationship of guardian and ward is not suitable to it. However, the court agreed that Mr. Arrington should be permitted to visit the dog, and elaborated on the importance of love:

> Mr Arrington agreed to Mrs. Arrington's custody of the dog if he could have reasonable visitation. He does not complain of lack of visitation; only that he was not appointed managing conservator. We… hope that both Arringtons will continue to enjoy the companionship of Bonnie Lou for years to come within the guidelines set by the trial court. We are sure there is enough love in that little canine heart to 'go around'. Love is not a commodity that can be bought and sold or decreed. It should be shared and not argued about (Arrington v. Arrington 1981).

In 1994, also in Texas, another vital precedent was made. The case was an appeal on a ruling that was given by a lower court, according to which the appellant, Mr Bueckner, who shot to death both dogs of appellees, Mr Hamel and Ms Collins, had to pay them damages. In its decision, the court gave a groundbreaking ruling stating unequivocally that society's recognition that animals are sentient and emotive beings, capable of providing companionship to the they live with should be reflected by the law and that accordingly "courts should not hesitate to acknowledge that a great number of people in this country today treat their pets as family members. Indeed, for many people, pets are the only family members they have" (Bueckner v. Hamel 1994).

In 2004 in Israel, a Family Court discussed for the first time of the state's history an interesting case dealing with human-animal relations in general and specifically with the status of an animal as a family member. The relationship between a couple who raised together "blind cat and wombless dog" (sic) ran aground, and the woman left the house and took the cat with her. About two years later, the man filed an action for joint custody of the animals, and "an equal division of the animals time between the

plaintiff and the defendant". Both parties detailed in their arguments the warm and loving relationship between them and the animals and the constant care they gave the animals. The Plaintiff described the nursing actions he performed for the cat when she was collected from the street in its infancy and the Defendant detailed the severe medical problems the dog suffered from, requiring complicated and costly medical treatment, which was entirely funded by her.

In light of all this, the judge stated that "it seems that the couple treated the animals as their minor children, and in my understanding, they would have continued to treat them as such as long as they continued to live together under one roof".

The judge similarly addressed the animals as if they were the couple's children and based his judgment on the principle of the "the best interest of the child", mutatis mutandis with the interests of the animals. The approach that guided the judge was that the best interests of animals and what was right for them and not what was suitable for the parties themselves should be taken into consideration. Therefore, the judge held that A. The connection between the defendant and the animals is a profound emotional bond; B. The animals find it difficult to separate from the defendant and in a renewed encounter with her their mutual joy is evident; C. The relationship between the blind cat and the dog is warm, and they play together; D. The relationship between the dog and the defendant is at a higher level of closeness than between the dog and the plaintiff – and thus the cat must not be separated from the dog and both animals should not be separated from the Defendant. The judge also ruled that the Plaintiff's insistence on taking the dog came out of a desire to maintain some connection with the Defendant and not out of a genuine desire to see the dog. Therefore, in order to preserve the best interest of the animals, the judge did not allow visual encounters between the plaintiff and the animals.

It seems that throughout time and place, humankind in a cross-cultural perspective has observed and placed other animals on an axis that moves between two opposing poles: on the one side "personality" and on the other side "property". On the one hand, many consider and treat some animals as companions and family members for all intents and purposes while on the other hand, they accept a different treatment (such as selling, eating and experimenting on) to animals which do not live with them as companions. As discussed earlier, these (and others) are HGDs, and as such they cannot be criticized or interpreted by any other animals, even though they affect them and may change their life and well-being from one end to end.

FINAL THOUGHTS

Under this assumption (not to say a fact) and under the assumption that it is highly unlikely that Man will easily relinquish his supremacy in controlling the earth and its ecosystem, a new or different approach might be offered.

The very definition of what is an animal (or its de-facto anthropocentric interpretation) subjectifies the nonhuman animal. The fact that modern human societies chose to differentiate humans from other animals albeit HGDs, leads to the conclusion that in order to actually prevent animal exploitation, mistreatment and suffering or at

least decrease its level, a certain society must use its political, legislative and judicial systems and powers to clearly define the wanted borders and relations between humans and animals. Should more modern human societies take into consideration the fact that other ones have already adapted novel standards in relation to animals, the status of animals will gradually move from an object to a subject and from mere property to personality.

Maybe the process of acknowledging animal rights should be gradual: at first, animals that humans accept as pets and companions and primates, based on the relations of humans with companion animals and on the genetic and other resemblances of the primates to humans, and only later to other animals upon previous gathered information.

Should we want to challenge the current status of human-animal relations in a social perspective, we should not completely rule out the possibility that animals should be recognized as part of human society, at least not theoretically at this stage.

Critical sociology is not necessarily a product of recent decades. If I could say so myself with regards to human-animal relations in a sociological perspective, traces of it could be found in the writings of Kinji Imanishi (1902-1992), a Japanese ecologist, anthropologist and primatologist.

Imanishi wrote two books in the midst of the second world war and introduced in them a unique and different approach to sociology in general and to the sociology of human-animal relations specifically.

In his 1941 book *Seibutsu no Sekai* (*The World of Living Things*) Imanishi offered a society that is not necessarily based on group formations but instead according to the relevant surroundings and ecosystem on which diverse organisms share their lives. This "life-field" is a habitat for several and diverse individual life forms that are interconnected and interdependent to some extent (Sugawara 2018). Therefore, Imanishi divided the living world into three layers: the Individual, the Specia and the Holospecia. The specia, which means a "species society", is the primary term Imanishi focuses on and according to him it is not just a concept but rather an actual reality. Every species has its own society built on similar individuals. Hence, there are many different specia which together form the holospecia, holistic perception of interspecies coexistence (Matsuzawa and McGrew 2008).

It is important to note that the specia is not a biological term. A "species society" is not identical to a "biological species". It is a sociological term which means a system that is consisted of all its member individuals, no matter how to spread they are in a certain territory: "Every living thing is considered to be a subjective autonomous entity that acts on and interacts with other living things and its environment. These living things form a species society, which in turn, in a similar manner, acts on and interacts with other species societies to form the whole living world" (Imanishi 2002 [1941]).

I believe that such a holistic perception of life on earth, when applied sociologically, could promote this much needed change.

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(NON) HUMAN(IMAL) RIGHTS: DISMANTLING THE SEPARATENESS IN LAW AND POLICY

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ABSTRACT: In 2016, the South African Constitutional Court recognised that the guaranteed human right to the environment, as contained in the Constitution, includes animal welfare. In its judgment, the court stated that the suffering of individual animals is correctly linked to conservation and that this "illustrates the extent to which showing respect and concern for individual animals reinforces broader environmental protections. Animal welfare and animal conservation together reflect two intertwined values". Although the effect of the statement by the highest court in the land is yet to be fully realised, the court unambiguously demonstrated in its ruling the clear link between human rights and animal interests. These interests are not only to be interpreted in the broad sense relating to species-conservation, but rather the interests and welfare of individual animals.

Building on from this approach and the rationale provided by the court, this Paper looks to explore more broadly the interaction and linkages between human and animal rights and interests. More particularly, it attempts to illustrate how these concepts may reinforce and enrich one another and how this relationship may be better reflected in law and policy. It will argue that sophisticated democracies and movements require an integrational approach. By expanding the scope and interpretation of certain human rights to include animal interests; and through coordinated, targeted efforts – we ensure notion of justice is achieved, for all who require it.
KEYWORDS: human rights, animal rights, integrational approach, law, constitution, integrative approach, social justice

STATUS QUO

"I am the king, I can do whatever I want." – Scar[1]

Human rights, as the name suggests, are the rights granted to members of the *homo sapiens* species. These are gifted to us as a birthright, with an acknowledgement that "all human beings are born free and equal in dignity and rights" (Universal Declaration of Human Rights, Article 1). We recognise that the "inherent dignity and the equal inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world" (UDHR, Preamble).

While vast strides have been made in the human rights movement over the last few decades, when one considers the current state of the world, there is not only non-achievement of rights, but clear violations. The stark reality is one of indignity, restriction, discrimination and injustice and a state of social, political, economic, and environmental crisis. In many instances, this is as a result of action or omission by the very bodies meant to respect, protect and promote these rights. We live in a deeply divided society and the consequences of this division and inequality bleed into every facet of daily life.

More so than any other point in our history, our entire survival hangs in the balance. Despite humans being "endowed with reason and conscience" we appear to be disregarding these and to have contempt for our own morality, failing to act "towards one another in a spirit of brotherhood" (UDHR, Article 1).

Separateness

"Everything you see exists together in a delicate balance. As king, you need to understand that balance and respect all the creatures, from the crawling ant to the leaping antelope." – Mufasa

Putting aside the failures in respect of these rights, they are inevitably constructed by humans, for humans, and no one else. The other inhabitants of our earth are not the bearers of these rights, do not benefit from these and their interests are not acknowledged. The mere fact that they do not belong to this human family has the consequence that their own capacities, needs, worth, consciousness and sentience are rejected from our scope of consideration.

This position is clearly reflected in the majority of behaviors, practices, and im-

[1] I have referred to quotes and themes from the movie *Disney's The Lion King* (2019) throughout, given its recent release at the time of writing and the fact that I believe it provides simplistic yet important messages. Perhaps trivial to an academic audience, it may assist in simplifying some complex issues for a non-academic one. There is a want and need to reach a broader audience and while complex ideas and terminology are recognisably important - in a call for mass change requiring mass action - one needs to connect with an uncomplicated narrative. In addition, I have utilised lions as an example to illustrate some of the overlap with human and animal interests in a theoretical and practical context later on in this Paper.

portantly, legal systems. Generally, nonhumans are not mentioned in the documents grounding the foundation for rights, and in the rare occasion that they are, their reference is one relating to their use or benefit to humans[2].

Thus, in addition to the existing inequities and distinctions made between our fellow humans, we have drawn a line between ourselves and the remainder of beings on earth. This separating line has allowed our insatiable need to dominate and commodify to thrive – at the expense of everyone and everything around us. The use of both differentiating and euphemistic terms such as "natural resources" and "sustainable use" in relation to animals[3] has served to further entrench this deep divide and provide justification for our (sometimes abhorrent) actions.

We have been so desensitised to the interests of animals, and have rather, since birth, been led to believe that their wide-scale use and abuse is somehow acceptable. Humans, as the "top of the food chain", may dictate the manner, time and place of the lives and deaths of others.

Every single day, millions of animals around the world are ruthlessly utilised, tortured and violently killed. For the most part, such actions occur largely out of sight, are sanctioned by the legal system[4] and endorsed by society. We are all complicit in a system that (based purely on numbers) is the most violent and unjust in all of history.

In addition to the first layer of separateness among humans themselves; the second layer among humans and nonhuman animals; there exists a third layer of separateness - the disconnectedness between humans and our own habitat[5]. Earth itself is being destroyed on a daily basis - deliberately, through legal means, and predominantly for commercial gain which benefits very few.

It should be increasingly apparent that this culture of *separateness* - this "exclusionary approach" - has failed us. Until we explicitly acknowledge the interlinkages between our own interests and the interests of others and stop excluding members of our society from any real consideration – justice in the true sense of the word will never be achieved.

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[2] Notably, animals are expressly included in certain foreign constitutions in a protective way, such as in the constitutions of Switzerland (1973), India (1976), Brazil (1988), Slovenia (1991), Germany (2002), Luxembourg (2007), Austria (2013), and Egypt (2014). The content of these inclusions differs, but regardless, has still largely failed to meaningfully change the daily realities for animals in these countries who are still utilised and abused in a broad variety of ways.

[3] Including "pork" and "beef" (not pigs or cows) "culling", "destroying" and "harvesting" (not killing); "game" (not wild animals), and various other terms.

[4] There are of course actions in relation to animals that are considered unlawful and criminal. There is accordingly not carte blanche to simply abuse animals as one wishes. Most jurisdictions at a minimum provide for certain acts of cruelty towards (at least some) animals in legislation, but the majority of laws still allow for arguably cruel practices for certain uses of animals (including for example animals in agriculture), and do not always protect all animals (often excluding fish or invertebrates as a common example).

[5] While the exploration of the disconnectedness between humans and earth is an important idea to explore, it is outside the scope of this Paper.

This Paper

"You have forgotten who you are and so forgotten me. Look inside yourself Simba, you are more than what you have become, you must take your place in the circle of life" – Mufasa

There is, in my view, a fundamental, undeniable link between the interests of humans and of animals. Accordingly, there is a necessity to recognise this in our legal system, policy considerations and activism efforts. With limited scope to cover subject matter which is highly complex and controversial, this Paper attempts a rudimentary introduction to the subject of human rights and animal rights and more specifically the interlinkages between the two. I hope to develop this more rigorously in the future as this issue warrants an in-depth exploration and raises many complex ideas and consequences[6].

In my experience, the terms "human rights" and "animal rights" are predominantly utilised in two ways in relation to one another. The first is comparatively – with the narrative of "either or". The second is directly contra distinctly with one another – with the narrative of "vs.". Rarely, have I encountered the two terms utilised in a meaningful, inclusive way in relation to one another – with the narrative of "and".

The former two narratives are not sourced only from or utilised by industry or government, but unfortunately, from activists on either "side".

Human rightists rarely include nonhumans in their efforts or work – perhaps due to the fear that this may diminish their work for humans; they may be restricted by a finite number of resources; they may hold a belief that animals are not worthy of inclusion, or other factors. Correspondingly, animal rights activists have a reputation for not caring enough (or at all) about human interests. In fact, animal activism has largely been criticised for almost completely excluding (even being militantly opposed to) human interests. A perfect example to illustrate this principle would be where animal activists celebrate the occasion where a poacher is killed. The loss of this human life (in this instance) is considered somehow beneficial or worthy of rejoice, with little mourning or thought of the broader landscape in which this issue operates[7].

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[6] As a passionate activist and budding academic, I realise that some contentious claims are contained herein and may be better articulated than the way that they are. My intention is not to isolate but rather to include. As someone who grew up in post-apartheid South Africa with a privileged life, this has undoubtedly shaped the lens through which I view the world. It has always been apparent to me that separation, oppression and injustice did not end with apartheid. My experiences living in the country have led me to a point where I cannot simply accept the *status quo*. I therefore must attempt to find a better solution for a divided, inequitable and unjust society. Although I wish to learn and expand on the ideas herein and the paper reflects my personal experiences and views. I have no doubt that these require and warrant more time and proper consideration.

[7] Many may not be aware that poachers may themselves also be victims. These are, in many instances, persons plagued by poverty, lack of education, are also oppressed and also subject to injustice. While the act of poaching is by its nature illegal and not to be sanctioned, the issue is much more complex than the simple commission of a crime.

These failures and separate approaches have, in my view, hampered the progress of both groups in achieving their aims and served to obstruct broader ideas of justice. Those who have benefited (and continue to benefit) from these failures are the oppressors – the common enemies of the notion of justice.

As both a human and animal rights activist, in my animal rights work, I have run into a lot of "whataboutism":

> What about homelessness? Or racism? Or sexism? Why are you wasting your time on chickens when so many human beings are suffering?... Whataboutism is a rhetorical strategy meant to paralyze, not persuade. But it works because it plays on a real fear: that compassion is a zero-sum resource, and political capital even more so. The energy we spend on chickens is energy stolen from the opioid epidemic (Klein 2019).

It appears to offend people that I could even consider expending resources on beasts and brutes, when I could (for example) be utilising my knowledge, skills or time for saving children[8].

Activist capacity excepted, as a lawyer, I have further observed that in legal efforts to further animal protection, human rights and interests are often utilised purely as a means to an end[9]. Thus, where animal protections are lacking in law, human-centric legislation and protections are employed to attempt to benefit animals, although *perhaps* not with the genuine intention of furthering human protection as well[10].

With the above observations in mind, there exists major missed opportunities to *inter alia* combine efforts and resources, particularly when there is a common goal or mutual "enemy" (which is more often than not). Current systems undermine the foundational values on which rights are built and the victims are both nonhuman and human animals.

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[8] At this point however, my personal view is that my animal activism led me to be a much better advocate for humans. Fighting for rights, justice or against oppression is not a zero-sum game, and it has never been more necessary to expand our circles of compassion and consideration.

[9] This is at least sometimes out of sheer necessity and due to the legal frameworks within which animal protection lawyers must operate. For example - in jurisdictions such as the United States of America - farmed animals are excluded from legal protections (including in some instances, the legislative definition of "animal"). If they are not outright excluded from the definition, farming /traditional "agricultural practices" may be specifically exempted – such as from anti-cruelty provisions. Thus, when these lawyers are aiming to obtain better protections for agricultural animals (as an example), they must rely on utilising the provisions of other legislation or other areas of law. These may include consumer protection law, environmental law, administrative law and other areas aimed at the protection of humans. Furthermore, it is not only the content of laws that are problematic but other legal barriers to obtaining better protection – such as standing requirements to bring animal cases in in the court system itself in the court system itself, barriers to enforcement of laws by government departments, and other issues.

[10] This is obviously not always the case as many organisations are committed to obtaining overall justice. This statement rather refers to ingenuine efforts to utilise human protections to better animal protections with no real concern for the impact that same might have on humans.

Accordingly, it is becoming increasingly important (and I submit absolutely essential) that in the fight for protection of rights and interests of humans and animals (respectively) – these endeavours follow an integrational approach.

While it is apparent that there will be instances when these interests and rights will conflict, this is no reason to discount the other interests *ab initio*[11].

If conflict itself was a sufficient basis for the non-consideration of interests or granting of rights, then there would be very few (if any) guaranteed human rights.

Importantly, the law already recognises that rights and interests of individuals will conflict and sets out procedures and mechanisms to deal with the limitation of rights.

Therefore, for purposes of this Paper, I explore at a high level some of the potential ways in which human and animal interests[12] intersect by utilising specific examples of industries where animal exploitation and suffering are present and legal, and examining how these factors impact on human rights. I then suggest how by including animals and their interests in our scope of consideration, certain human rights may be better achieved[13]. My focus will be on the South African context, although such an approach has extraterritorial application, particularly in constitutional states with values and rights similar to those contained in the South African Constitution. I am further of the view that as a country, it presents a good case study - given its history, current inequalities and the critical role that animals play in its society. My focus will also be narrowly on law and broader policy considerations as compared with some of the higher-level philosophical debates[14].

I will begin by providing a brief introduction into the nature of rights generally and then specifically within the South African context. I will then explore the foundations of a new integrational approach, with two selected examples of overlapping human and animal interests in practice. I will move to briefly set out some potential difficulties and challenges with the proposed integrational approach and conclude with specific examples of how such approach may potentially be incorporated in legal and activism efforts.

My starting point is that nonhuman animals, like human animals, have intrinsic worth and individual interests and are worthy of protection in their own right[15].

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[11] More specifically, the consideration of animal interests and animals as stakeholders in their own right. Human interests and humans as stakeholders are already accepted as worthy of consideration.

[12] I refer to both rights and interests herein on the basis that both humans and animals have interests, however only humans have legally recognised "rights" at this point in time.

[13] This is due to the fact that the exclusion of and complete disregard for animals' interests as well as their current treatment has led to the non-attainment and active violation of guaranteed human rights.

[14] Importantly, I will not be focusing on animals as rights bearers of a specific rights, nor legal persons as such - although personally, I do believe that animals should be rights bearers, and this should be reflected in law. There are various legal efforts to obtain the status of legal persons for animals, to apply constitutional rights directly to animals, as well as other legislative rights to animals. While these are important, this is not my specific focus for this Paper. I will also not be considering further why it is arbitrary not to include them, as I believe this has already been well articulated.

[15] This is a critical point. Although I will be referring substantially to human rights herein and focusing

THE IDEA OF RIGHTS AND THE NOTION OF JUSTICE

"Life's not fair is it." – Scar

Human Animal Rights – Generally

Human rights are:

> (…) an important tool to hold states, and increasingly non-state actors accountable for violations and also to mobilise collective efforts to develop communities and global frameworks conducive to economic justice, social wellbeing, participation, and equality. Human rights are universal, inalienable, interdependent and indivisible (ESCR 2019).

The above definition highlights a number of important characteristics of rights – including accountability for the achievement of rights, as well as their interdependent and indivisible nature.

As a society, we understand that as beings with worth, such worth must be respected; as beings with dignity, we must be treated with such; and as beings with fundamental interests, these must be protected in law to be effective:

> [l]aw is the architecture of society; it ensures that society protects its common interests and realizes its goals by influencing behavior; and based on its temporally forward-looking view, law acts now to make possible a certain kind of world and society for the present and for the future (Kotze 2014).

The law is thus the perfect way to influence public behaviour and make changes that have a large impact on society.

Rights (as one of the expression of our interests in law), are not absolute; they are generally qualified and limited. This can be done in the content of the provision itself[16]; through a general limitation clause, and/or through other general principles

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on the impact that our treatment of animals has on humans - individual animal interests are implicated in a major way in each and every instance. I wish to emphasise that my argument is not that humans should protect animals because failure to do so harms us. Rather, my starting point is that animals, just as humans, are worthy in their own right of protection, and this is why such interests must also be considered. My goal, however, is to convince even the anthropocentric reader that animal protection is a human rights issue. Traditionally, and in many instances, animal protection has been recorded in law solely for human benefit – for example "to prohibit one legal subject behaving so cruelly to animals that he offends the finer feelings and sensibilities of his fellow humans". (South African case of R v Moato 1947 (1) SA 490.) However, the South African courts have now acknowledged that animals deserve to be protected because they have intrinsic worth and our duties to them have shifted from merely safeguarding human interests. This is more fully as will be set out in further detail below.

[16] One example is the right to freedom of expression in the South African Constitution contained in section 16 of the Bill of Rights. The rights offered by the first paragraph are qualified by the second indicating that the right does not extend to "propaganda for war…incitement of imminent violence… or advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm." (South African Constitution 1996: section 16 of Chapter 2).

(such as that reasonableness)[17]. Rights are broad and meant to act as a base providing a minimum threshold. However, their existence on paper is only the first step, with an intention that they are to be respected, protected, promoted and fulfilled[18]. Rights need to come with action, particularly, when rights contain realisation provisions, these actions include policy and legislative measures, executive actions and through adjudication by the judiciary. As the content and actioning of rights may not be clear, and because the ultimate goal is their achievement - rights need to be interpreted - which is a dynamic process, evolving based on the changing needs of society, contextual and other considerations.

The South African Context

Humans and Rights

"Oh yes, the past can hurt. But from the way I see it, you can either run from it, or learn from it." – Rafiki

Apartheid (literally translated meaning "separateness") was the system of racial segregation and discrimination that forced different racial groups to live separately, use different facilities and otherwise develop severally (Wilson 2019).

With the end of its tyranny, South Africa was reborn as democratic nation, with its birth certificate - the Constitution. Among its many notable and important aims, the Constitution (and more specifically its predecessor, the Interim Constitution) essentially acted as a bridge to assist us to cross over from our sordid past to a better future[19]. Mureinek notes one of the main goals of this dispensation was a move away from a system of parliamentary sovereignty to one of justification.

Importantly, if the Constitution is a bridge away from a culture of authority, it is clear what it must be a bridge to. It must lead to a culture of justification—a culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defense of its decisions, not the fear inspired by the force at its command. The new order must be a community built on persuasion, not coercion (Mureinek 1994:31).

As a constitutional state, this document is the supreme law of the land, the *lex*

[17] In the South African context, the concept of "reasonableness" has arisen in various contexts. For further reading on the subject of rights and their limitations in the South African context particularly reasonableness and proportionality – see Young 2017. The "reasonableness review" also arose in the important South African Constitutional Court case of Grootboom (2000).

[18] This sentiment appears in Section 7 of the Bill of Rights in the South African Constitution "The state must respect, protect, promote and fulfil the rights in the Bill of Rights".

[19] It was the Interim Constitution of 1994 that aspired to be 'a historic bridge between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex'. These words appear in the postamble to the Constitution, entitled 'National Unity and Reconciliation'.

fundamentalis. All law must be consistent with it and it is enforced and upheld by the Constitutional Court.

The Preamble to the Constitution states a belief that South Africa belongs to "all who live in it, united in our diversity". It furthermore seeks to establish a society based on democratic values (human dignity, equality and freedom); social justice; and fundamental human rights.

The Bill of Rights contained in Chapter 2 of the Constitution is the cornerstone of democracy in the country. The state must respect, protect, promote and fulfil the rights in the Bill. The rights are not absolute and subject to the limitations – as contained or referred to in section 36, or elsewhere in the Constitution.

Certain rights contain realisation provisions, which, although the wording differs, place an active duty on government to achieve these rights "through reasonable legislative and other measures"[20].

Realisation is not straightforward – there are restraints in achieving rights and some can thus only be achieved over time. This is the idea of "progressive realisation" which appears in relation to certain socio-economic rights in the South African Constitution. Notably, in the context of economic, social and cultural rights:

Progressive realization of ESCR does not mean that governments do not have obligations in terms of these rights until a certain level of economic development is reached but rather that there will be continual progress on the status of these rights and therefore states should take deliberate steps immediately and in the future towards the full realization of ESCR (ESCR).

This idea still requires active steps and the utilisation of all available resources to achieve these rights but acknowledges that these are not achieved "overnight".

Another concept of relevance (albeit controversial) is that of "transformative constitutionalism" which entails that the Constitution in South Africa was not designed simply to entrench the status quo: rather, it was enacted for the purpose of fundamentally transforming society[21].

All courts in South Africa must apply the Constitution and promote the spirit, purport and objects of the Bill. It applies to all law, and binds the legislature, the executive, the judiciary and all organs of state. Section 39 of the Bill of Rights provides guidance on interpreting the Constitution, as do a plethora of cases that have been heard since its inception:

> [The Supreme Constitution] is a mirror reflecting the national soul, the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and tenor of the

[20] Examples of rights with these provisions include the rights to housing (section 26); environment (section 24); and health care, food, water and social security (section 27). (As contained in Chap. 2, the Bill of Rights).

[21] Notably, Professor David Bilchitz has written on the idea of transformative constitutionalism specifically in relation to animals. Bilchitz argues that this notion would require the recognition of animals' interests in the Constitution – either through a direct amendment thereto or through an interpretation thereof (Bilchitz 2009).

> Constitution must therefore preside and permeate the process of judicial interpretation and judicial discretion (S v Acheson 1991).

While there are various approaches to judicial interpretation, two worthy of mention are the "literal approach" and the "purposive and contextual approach". Without exploring the former, the latter means that the purpose or object of the relevant legislation is the prevailing factor in interpretation. According to certain case law, "a supreme Constitution must be given a generous and purposive interpretation" (Shabalala v The Attorney-General of Transvaal 1995).

This background seeks to illustrate the extremely complex nature of rights, and the need to consistently evaluate their content and realisation, in accordance with the landscape in which they operate. Based on all of these factors and considerations, South Africa may appear to be the ultimate hub of justice. Yet, despite all of these values and promises - the realities for the vast majority of the South African population include poverty, violence, crime, and discrimination. In 2018, the World Bank deemed South Africa as the most unequal[22] society in the entire world (Time 2019). This illustrates that the divisive system did not end with the new democracy. Further to this, the country's education system[23] has also been rated as one of the worst in the world (Economist 2017).

The country has an extremely diverse population of approximately 57 million people and 11 official languages. Whilst its unique cultural and belief systems should be celebrated, particularly in the wake of its past, certain policies and laws aimed at addressing inequalities can have the effect of negatively emphasising differences and furthering the societal and racial divide[24].

Above the societal level, the expectations of an accountable, transparent government and a culture of justification have been met with the reality of corruption and a plethora of political issues.

Nonhuman Animals

Whilst the societal divide among the human population is largely as a result of a legal system of oppression which officially ended 25 years ago, a legal distinction and system of oppression still exists between humans and nonhumans.

As with most jurisdictions in the world, animals are considered as mere property. They are accounted for in the legal system on the basis of such property status, and "protection" is offered through either anti-cruelty statutes and/or environmentally based statutes dealing with "conservation", "biodiversity" and similar concepts.

Animals are not expressly mentioned in the Constitution, other than in relation to

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[22] Contrast this with the foundational constitutional value of "equality".

[23] Contrast this with the right to education contained in section 29 of the Bill of Rights.

[24] Examples include black economic empowerment (or broad-based black economic empowerment – often referred to as "BEE" and "BBBEE" respectively) and the proposal to amend the Constitution to provide for land expropriation without compensation, neither of which concepts have been expanded on for purposes of this Paper.

which levels of government have competencies to deal with matters relating to them[25].

The predominant legislation relating to animal protection[26] was passed nearly 60 years ago and has not undergone significant changes since its promulgation. The current legal inclusion of animals is largely deficient and fails to protect them or their interests in any meaningful way – treating them as commodities and/or tools.

A NOVEL APPROACH

Human interests and animal interests: inclusive jurisprudence

"Change is good." - Rafiki

In 2016, the Constitutional Court[27] recognised that the guaranteed human right to the environment, as contained in the Constitution, includes animal welfare. In its holding, the court stated that:

> (…) animal welfare is connected with the constitutional right to have the "environment protected through legislative and other means". This integrative approach correctly links the suffering of individual animals to conservation, and illustrates the extent to which showing respect and concern for individual animals reinforces broader environmental protection efforts. Animal welfare and animal conservation together reflect two intertwined value. (NSPCA 2016:58)

This *integrative approach* referred to by the court in the former quote, recognises the impossibility of simply separating out environmental concerns and concepts from animal welfare and protection for their significant interests. This approach requires an attitude of respect for individuals that make up a whole. This compared with an "aggregative" approach – which involves a focus on overarching holistic goals (i.e. that many individuals may be sacrificed for a wider goal) (Bilchitz 2017).

The court further stated that "the rationale behind protecting animal welfare has shifted from merely safeguarding the moral status of humans to placing *intrinsic value on animals as individuals*" (NSPCA 2016:57) (emphasis added).

In its judgment, the Constitutional Court referred to an earlier judgment by the Supreme Court of Appeal[28]:

> The duty resting on us to protect and conserve our biodiversity is owed to present and future generations. In so doing, we will also be redressing past neglect. Constitutional values dictate a more caring attitude towards fellow humans, animals and the environment in general. (Lemthongthai 2016: 20)

With these statements from the court[29], the judiciary appears to have unambigu-

[25] As contained in Schedules 4 and 5 to the Constitution respectively.

[26] The Animal Protection Act of 1962 as amended.

[27] The Constitutional Court is the highest court in South Africa with 11 judges which preside over matters of a constitutional nature brought before them and are tasked with upholding the Constitution.

[28] The Supreme Court of appeal is the highest appeals court after the Constitutional Court.

[29] As well as other positive statements, such as Cameron JA's minority judgment in Openshaw which

ously acknowledged the interaction (and more specifically, the interlinkages) between animals and their interests and human rights. This is not simply based on conservation of animals at a species level, but rather includes the consideration of individual animal's interests. Thus, in our consideration of the content of these human rights, animals and their interests must be considered, when they are impacted by same. This jurisprudence creates opportunities for the framing of future legal cases in relation to other rights, and the interests of animals (and I allege, the attainment of inclusive justice).

The need for an integrational approach

As the above cases illustrate, animals and their interests may be included in the *scope of content* of certain rights. However, taking it a step further, to the extent that such rights impact on or are impacted by them, animals and their interests can and should also be included in *the achievement or realisation of such rights*. Through this, human rights may be reinforced and strengthened, and the individual interests of animals may be respected and promoted.

If all law is required to be interpreted through a lens of constitutional values and constitutional values dictate a more caring attitude towards animals, then the lens through which we interpret rights must include a care for animals and their interests when same affects them. Once we acknowledge that animals have interests and that these interests impact on our interests, in the achievement of human rights, we cannot consistently limit our consideration to humans. Put differently, animals themselves must also be included as interested stakeholders[30].

Turning now to some tangible examples of these overlapping and intersecting interests of animals and humans. For purposes of this Paper, I wish to briefly highlight two specific examples – the agricultural industry and the captive lion breeding industry[31].

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recognised that animals are worthy of protection not only because of the reflection that this has on human values, but because animals "are sentient beings that are capable of suffering and of experiencing pain" (National Council of Societies for the Prevention of Cruelty to Animals v Openshaw [2008] ZASCA 78; 2008 (5) SA 339 (SCA) (Openshaw 2008: 38).

[30] In my practice of animal law in South Africa, the concept of "interested stakeholders" is one which has arisen time and time again. Although this is applied to individual humans and organisations, I believe this term may be expanded to include animals in discussions/issues relating to them. This would include providing them with the necessary representation, among other resources. I would like to expand on this idea in future writings. A recent Constitutional Court case may be helpful in this regard, *South African Veterinary Association v Speaker of the National Assembly 2019 (2) BCLR 273* (CC) at para 43 to the following effect: - "The more discrete and identifiable the potentially affected section of the population, and the more intense the possible effect on their interests, the more reasonable it would be to expect the Legislature to be astute to ensure that the potentially affected section of the population is given a reasonable opportunity to have a say."

[31] In a previous article I highlighted how issues overlap with animal and human interests (with some

The tragedy of Ag

Background

While entire books could be (and have been) written on the injustices of the animal agricultural industry, I have attempted to summarise a few particularly pertinent issues herein – specifically the interaction between the industry (characterised by mass animal suffering) and guaranteed constitutional rights.

In the USA specifically, this industry – tasked with the hugely important mission of feeding a nation - in many instances rather starves both animals and humans of their rights. It is the exemplar of commerce and economic interests trumping public interest. The current system not only supports mass institutionalised cruelty of billions of animals on a daily basis but causes huge environmental damage; contributes to climate change; infringes on the rights of workers in the industry; impacts surrounding communities (who are mostly vulnerable groups and people of color); and detrimentally effects human health (to name but a few)[32]. The legal system and government support industrialised animal agriculture, with the "objects" thereof (farmed animals) either specifically excluded from the definition of "animal"[33] in relevant legislation, or normal agricultural practices being exempted from cruelty legislation (Cassuto & Cayleigh 2016). Furthermore, due to other laws, activists and others attempting to expose cruelty at factory farming (or other animal) operations can face criminal or civil penalties[34] (these are broadly referred to as "ag-gag" laws) or be branded as a "terrorist" (AETA 2006). Conversely, the industry receives economic[35], political[36], legal[37], social and other forms of support and protection and in some instances, even immunity.

While ag-gag laws do not exist in South Africa, nor are farmed animals specifically

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reference to industries) from a South African perspective. These range from Tourism and International Opinion; Violence and Crime; Racial Considerations; the Toxic Relationship with Food; Land; Family; and Corruption (Wilson 2019).

[32] Accordingly, the victims of this industry span a variety of factors: including species, races, locations, professions, and others.

[33] The Animal Welfare Act, the predominant piece of Federal legislation defines "animal": "…but such term excludes other farm animals, such as, but not limited to livestock or poultry, used or intended for use as food or fiber, or livestock or poultry used or intended for use for improving animal nutrition, breeding, management, or production efficiency, or for improving the quality of food or fiber" (AWA §2132(g)).

[34] For further explanation see Marceau 2014.

[35] Through various financial assistance including subsidies, profit protection, research and development, purchasing programs and otherwise. For more information on this see The Greenfield Project 2019.

[36] Campaign financing often comes from animal agricultural groups including the meat and dairy industry. See for example Open Secrets 2019.

[37] Through efforts that support and protect industry, harm activists, provide little transparency and otherwise. See for more information Animal Legal Defense Fund 2018.

excluded from the primary animal protection act[38], cruel animal practices occur on a daily basis and affect millions of animal (and human) lives.

These animals suffer in repulsive circumstances through practices that violate the most basic of considerations. The practices furthermore (i) infringe on guaranteed human rights and interests, (ii) have consequences that reinforce inequalities and fail to protect vulnerable members of society and (iii) are injurious to constitutional values.

Rights and interests infringed

Section 27 of the Bill of Rights states that everyone has the right to have access to (*inter alia*) sufficient food and water; and furthermore, that the state must "take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights". Studies show (among other things) that animal products have a particularly large water requirement per unit of nutritional energy compared to food of plant origin, and that the production of meat requires and pollutes large amounts of water (Leenes, Mekonnen, Hoekstra: 2013).

Analysing this provision in more detail then, based on:

(i) *Content*: of these guaranteed rights (sufficient food and water)

(ii) *Obligations:* associated obligations on government (to achieve their realisation through reasonable legislative and other measures)

(iii) *Status Quo:* existing circumstances (the current and ongoing drought faced by the country)

(iv) *Relevant factors:* in the achievement of this right (animal agriculture is the confirmed highest use of fresh water[39] in the country (WWF 2016)).

(v) *Alternatives*: other means to achieve the right (e.g. in this instance the provision of food/protein) that are less wasteful/harmful or otherwise preferable? (Reports that indicate that "meat, aquaculture, eggs, and dairy use ~83% of the world's farmland and contribute 56-58% of food's different emissions, despite providing only 37% of our protein and 18% of our calories" (Poore and Nemecek 2018)).

Could a government that supports increased animal agriculture be said to be *en route* to achieving the progressive realisation of the right to water?

Then, continuing with the same industry but a separate guaranteed human right, the right to environment contained in section 24[40], also contains provisions relating to the progressive realisation thereof by government. There are various studies illus-

[38] Although, certain animals are excluded from the definition of animal and the scope of the act and, notably, prosecutions for farmed animals in terms of this act are virtually non-existent.

[39] Cape Chameleon. 2018. *The Water Footprint of What We Eat* (https://capechameleon.co.za/the-water-footprint-of-what-we-eat/).

[40] Section 24 reads: "Everyone has the right:…a. to an environment that is not harmful to their health or well-being; and b. to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that…i. prevent pollution and ecological degradation; ii. promote conservation; and iii. secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."

trating the harsh impact of current animal agricultural farming systems have on the environment (Clark & Tilman 2017). Studies show that a further consequence of the intensive farming of animals is the huge amount of greenhouse gas emissions associated therewith (Poore and Nemecek 2018). As the association of increased greenhouse gas emissions impacts climate change and environment, could this industry and the support for it provided by government not be seen to be in direct contradistinction of its obligations to not only promote an environment that is not harmful to one's health but also the obligation to protect it for current and future generations[41]? Instead, we see government support and encouragement for these industries promoting increased production, and failure to deal with the huge externalities and hold industries accountable (even though the country has signed on to international treaties relating to curbing emissions).

If we take the above analysis and not only limit consideration to the rights and these factors but expand it to include the consideration of the interests of animals (and according to the Constitutional Court animal welfare forms part of the right to environment) - the argument in the achievement and realisation of these human rights because even stronger. It places even further obligations on government to re-examine and asses the status quo and consider the impact on an entirely different group. We then start to see how the consideration of animal interests may reinforce aspects of certain human rights, and opportunities are created to challenge the status quo, utilising the law, with all of these considerations in mind[42].

Reinforcing Societal and Economic Inequities and Divisions

Apart from our blatant disregard for the other species impacted by this agricultural system, the current industrialised animal agricultural model has led to dire consequences and an unhealthy, unsustainable food system that disproportionately harms the most vulnerable and poorest human members of society. Two examples highlighted herein include climate change and human health. It has been well-documented that the effects of global warming (a major driver of which is animal agriculture) will be felt by poorer members of society: "While wealth and excess of the planet's rich drive the pollution responsible for global warming, it is the economically marginal that will be hardest hit by the environmental shocks that are the inevitable fallout of that pollution" (Goldenberg 2014).

From a human health perspective[43], the poorer members of society often rely on

[41] Instead government supports increased animal agricultural operations, which include factory farming related practices such as veal crates, sow stalls and battery cages.

[42] Notably, and not mentioned in the section, there are other rights and interests impacted by current agricultural methods including but not limited to consumer protection and human health (such as the transfer of zoonotic diseases, the rise of antibiotic resistance development, and increased obesity rates and their distribution and marketing impacts on consumer protection rights (Wilson 2019).

[43] This is in addition to the various other harmful effects that animal-based proteins have been found to have on humans (such as the World Health Organisation declaring processed meats carcinogenic).

lower grade meat as a source of protein. In 2017, South Africa had the largest outbreak of listeriosis ever recorded in history with over 1000 people being infected and 216 deaths[44] (Wilson 2019).

Workers in this industry are also victims, suffering from ailments including both physical and emotional ones such as post-traumatic stress disorder due to the work of slaughtering sentient animals repeatedly, day in and day out (Victor & Barnard 2016).

Anti-constitutional values

Further to some of the constitutional values impacted by the industry aforementioned, it largely self-regulates on specific standards (including animal welfare), with voluntary norms and standards set by bodies composed mostly of industry players[45].

Due to this, government has failed to promulgate proper regulation (which has checks and balances and requires specific processes to be followed), leading to a lack of accountability and oversight. This flies in the face of rights (such as just administrative action, contained in section 33 of the Bill of Rights), as well as constitutional values, including the elusive "culture of justification".

Wildlife

In the [concrete] jungle – the lion sleeps tonight

The intensive breeding of lions, and more particularly, the trade in lion bones is a loaded and hugely controversial topic. However, it presents another ideal example of overlapping human and animal interests[46]. More specifically, that by treating animals merely as commodities or cogs in this industry's wheel, with no consideration of their individual interests, human rights are clearly being violated as well as society more broadly[47].

The trade itself permeates various levels in society and has political, legal, social, cultural, economic, ethical, racial and international implications[48]. Similarly to the

[44] Of these, 85% of the victims were black, 7% were coloured, 7% were white, and less than 1% were Asian. Notably, within these categories, most affected were the more vulnerable members of society – children, pregnant mothers, the elderly, and those with compromised immune systems.

[45] For example, for pigs, only Voluntary standards exist which have been set by the "Livestock Welfare Co-ordinating Committee", the South African Pork Producers Organization, the Pig Veterinary Society and the NSPCA. These allow for gestation crates and farrowing crates which are largely considered cruel practices, which have been banned in various jurisdictions around the globe.

[46] Whilst there is a plethora of other issues with the industry, its placing here serves to illustrate a few overlapping human and nonhuman animal interests – outside of a domesticated animal context.

[47] While some of the considerations of rights impacted and infringed have been set out herein, there are others including (arguably) the constitutional right to environment (Section 24); fair administrative process; freedom of trade an occupation (Section 22); freedom from discrimination.

[48] I have previously written in detail of some of the legal and other issues relating to the captive lion bone breeding and trade – which should be consulted for a more detailed analysis on each of these lev-

(domestic) animal agricultural example – thousands of animals suffer (needlessly) for this industry which is largely self-regulated, has major legal loopholes, enforcement issues and which lacks government oversight and accountability[49] (Wilson 2019 Revelator).

In this instance, the demand is not for food (but rather largely entertainment) and is not domestically driven (but rather internationally) – however, the fruits similarly benefit very few (owners of these enterprises) but infringe on the rights and interests of many. Once again, the breeding of and trade in lions impacts the human right to environment, but notably it is the interpretation of this exact human right that has been utilised against animals. Through the emphasis on the words "sustainable…use of natural resources", government has enshrined their desolation and exploitation within the legal system.

On the economic side, the industry is having a major negative impact on the country's tourism, with a study indicating that as much as ZAR 56 billion in revenue could be lost if "business as usual continues" (Harvey 2018).

On the international front, the legal trade potentially fuels illegal trade, affects national security and wild lion (and other animal) populations and may include export of lion bones with tuberculosis to other countries (IWB 2017). Workers in the industry also face unsafe conditions handling wild animals, in many instances without the proper training and equipment.

The final and very important matter on this industry I wish to refer to is the lack of government accountability. Not only has the government failed to properly regulate this industry, and enforce laws where they do exist, the executive has actively ignored parliamentary committee resolutions (to shut down the industry) and failed to properly consult with the public. The previous Minister in charge of environment indicated that "If South Africa closes down the lion-breeding facilities and bans trade, there are more than 200 facilities and associated staff who will be negatively affected. In addition, thousands of lions will have no value and there will be no income" (EMS Foundation 2018).

All of the above however, is without mentioning of the fact that the large majority of the South African population finds the captive breeding of lions abhorrent and repulsive.

Importantly, a recent win was achieved in the courts by the NSPCA (the National Society for the Prevention of Cruelty to Animals), in relation to the determination of the 2017 and 2018 lion bone export quotas of South Africa (i.e. the number of lion skeletons the country may export each year – which is set by government). The NSPCA challenged the aforementioned quotas on various grounds including failure by government to consult and consider animal welfare. In the judgment, the High Court

els (Wilson 2019 *Revelator*).

[49] Recent horror stories of the state of lions kept at these facilities indicate that their welfare is of little concern. This is particularly relevant when the lions are being utilised in the lion bone trade, who do not need to appear healthy (compared with lions utilised for trophy hunts who need to appear healthy so they may be displayed after their death).

stated:

> When one then has regard to the connection between welfare interests of animals and conservation as reflected in the judgments of both the Supreme Court of Appeal and the Constitutional Court in Lemthongthai and NSPCA respectively, then it is inconceivable that the State Respondents could have ignored welfare considerations of lions in captivity in setting the annual export quota. (NSPCA v Minister of Environmental Affairs 2019: 74)

The judgment[50] re-emphasized the need to consider animal interests in decisions affecting them, as well as government accountability for failure to do so. This judgment together with those aforementioned, open the door for some opportunities to challenge the injustices relating to human and nonhuman animals in future.

THE PROBLEM OF ANIMAL RIGHTS

"That's beyond our borders. You must never go there Simba." – Mufasa

Animal Rights in South Africa

Post-apartheid, the focus of the South African legal system and many cases brought have been on the advancement of human rights and attempting to rectify the effects of hugely repugnant laws and policies of the past. Accordingly, it is not surprising why nonhuman animals have largely been left out of this discourse. Aside from the lacuna in the legal system, there are a number of other issues that complicate the landscape in the potential achievement of this approach. While these are outside the scope of the paper, two worth mentioning without further explanation herein include the lack of capacity and resources, and the role of African ethics and culture.

Two issues which I wish to delve in slightly more detail (albeit not fully) include racial considerations, and conflict of rights generally. While these are extremely complex matters which require much more detailed consideration, I have highlighted these in an attempt to open these for further discussion in future.

Racial Considerations

In South Africa, animal rights activism efforts are largely considered an issue driven by white middle class (mostly women). This perception (or reality) has (I believe) marginalised previously disadvantaged individuals from joining the movement. This perception has not been abetted by efforts exclusionary of human rights considerations. For example - animal activists may be extremely outraged and vocal about such outrage where a rhino is killed for its horn but may be silent about the death of (one or multiple) rangers in armed conflicts with poachers. As previously mentioned, they may even celebrate the death of a poacher and accompany this with a racial slur. This and other actions, reinforces a widely held view that wild animals receive more

[50] Although moot given the fact that the challenged export quotas had already been fulfilled when the case was heard.

concern than black people living in rural communities.

As one of the (highly controversial) political opposition leaders put it:

> One only needs to look at how cheap a black life truly is to white people by comparing the fact that 34 black mineworkers are massacred in broad daylight, and white people never even run a petition online. This tells you, right here in South Africa, a country with a majority of blacks, that black people are worth less than rhinos. Here, you find that the dogs and cats of white people have medical aid, while the black garden and kitchen workers do not and cannot afford it (Malema 2016).

Another, albeit differently themed statement by former (then) president of South Africa, Jacob Zuma in his first speech since being re-elected, indicated that having a dog is "un-African" – that spending money on buying a dog, taking it to the vet and for walks belonged to white culture and was not the African way, which was to focus on the family (Hans & Moolla 2012). The same news report paraphrased that "Instead, a person lost dignity and ubuntu, and was also likely to lose respect and love for his fellow human beings" (Hans & Moolla 2012).

The above sentiments importantly place human rights and animal rights in direct contradistinction with one another and illustrate the failure to recognise the interlinkages between the two. It serves only to divide and separate by associating care for animals with a neglect for humans, accompanied by a racist narrative.

Interestingly, from another black activist's perspective (albeit from America – but who represents a growing movement of people of colour to recognise overlapping oppressions), Syl Ko explains:

> The racial hierarchy and racism, not to mention the racial thinking it generates, was the novel way white, Western Europeans in the colonial period legally and morally placed groups outside the "human" zone. As a result, the authors of this system were deeply invested in a rigid species divide where "human" indicated the domain of morality and the law, and "animal was a space of absence of being and lawlessness inviting a need to be controlled, disciplined and contained by "humans" (Ko 2017: 46).

It is clear to me that if we truly want to take white supremacy, racism and coloniality (however one wants to talk about it) to task, then we need to do the same to the continuing, uncontroversial view that "the animal" is the opposite status marker to "the human" (Ko 2017: 47).

Recognising similarities between the racial divide and human/animal divide, Ko rejects these divisions as well as the system of oppression accompanying them.

Conflicts/Limitations

Another potential challenge to including animal interests in our scope of consideration or the interpretation of certain rights, is that this may appear to place clear limitations on human rights. For example, the human rights to freedom of religion, belief and opinion and the right to language and culture: in many instances, religious and

cultural practices involve ritual slaughter and other uses of animals, which would inevitably conflict with an animal's interest in a right to life. It may arise in the context of the humans right to property: given the current legal status of animals as property, ones rights to do with ones property as one wishes would undoubtedly be impacted. Similarly, in the context of the right to freedom of trade and occupation: where animal use (alive or dead) forms the basis of such occupations/trade and employment.

Whilst this Paper does not present a solution to this dilemma, it suffices (for now) to say that human rights conflict with other human rights all the time, these are adjudicated on and weighed and balanced. Furthermore, taking into account relevant factors and principles, such as the principle of proportionality and reasonableness, rights may be limited. It is largely the task of the judiciary to adjudicate on these, in accordance with the relevant procedures[51].

As aforementioned, the mere fact that rights and interests' conflict are not an argument against considering or granting them, *ab initio*.

LOOKING AHEAD: A JUST SOCIETY

Animal Rights as a social justice issue

"Out of the ashes of this tragedy, we shall rise to greet the dawning of a new era." – Scar

Recognising the overlap of interests and the non-realisation of guaranteed fundamental human rights – the inclusion of animal interests in our scope of consideration should increasingly be considered an issue of social justice.

Jones argues that:

> (…) the philosophical foundations for establishing robust moral status and moral entitlements for nonhuman animals are sound; that these moral entitlements make other-than-human animals proper and legitimate subjects of justice; and, from the fact that nonhuman animals suffer systemic and institutional domination and oppression, it follows that animal rights are a social justice issue (Jones 2015: 467).

He provides a solid philosophical basis why non-human animals should be included in our consideration and strivings for justice and why animal rights are a social justice issue.

Ko further explores the interlinkages of oppression, through the example of racism "We think that something crucial has been missing from most discussions about racism and from *almost all strategies* to resist or combat racism: the situation of animals" and goes further – "there is an *open acceptance* of the negative status of "the animal"… Which… is a *tacit acceptance of the hierarchical racial system and white supremacy in general*". The human-animal divide is the ideological bedrock underlying the framework of white supremacy. The negative notion of "the animal" is the *anchor* of this system". In essence we need to "actively de-link ourselves from Eurocentric, white-su-

[51] Section 36 of the Bill of Rights provides specifically for the limitation of rights and the factors to be considered in this process.

premacist ways of thinking" (Ko 2017).

With these ideas, Ko acknowledges how the divide between animals and humans, specifically with regard to racial issues, has anchored a colonial system and has assisted in reinforcing injustices. If this argument is acceptable, then in some instances the victims of human rights violations and animals have a common enemy as such, a system (and those who perpetuate it) built on domination, inequality and oppression (and even exploitation, violence and the like).

Gorski highlights corporate interests as the common tangible enemy:

> The worst human rights offenders, systematically speaking, are the worst animal rights offenders and the worst environmental offenders. Yes, there are individual oppressors of people, animals, and the environment. But when I consider local, national, and global systems of power—the kinds of systems which can socialize masses of people to comply with, or ignore, certain practices and policies or which have the economic sway to pressure the state into sponsoring (such as by loosening regulations on) these abuses—what I find is the same, regardless of whether I'm targeting animal, human, or environmental injustice: corporate interests (Gorski 2009:2).

These ideas illustrate how the separation ideology (and "othering") which allows the systems of oppression to flourish, benefits only the oppressors and their interests. At the same time, disempowering the victims and ensuring the continuation of their suffering. Thus, only through the dismantling of this separateness may the victims of such oppression (as well as society more generally) gain empowerment.

Legal Context

Transitioning from practical examples and philosophical ideals to what material change may look like in law and policy. As with many governments, South Africa operates through the separation of powers doctrine with three branches of government being the legislative (lawmakers); executive (implementation and agency bodies) and the judiciary (courts and adjudication bodies). Unfortunately, the legislature has done little to improve protections for animals - even efforts to ban the cruel testing of cosmetics on animals initiated in 2017 have yet to come to fruition[52].

The executive departments within whose mandate animals fall appear to have a very clear idea of how animals should be treated – which unsurprisingly, seeks to promotes their use and commodification over consideration of their individual interests or well-being. Earlier this year, the ambit of the act that provides for "the breeding, identification and utilisation of genetically superior animals in order to improve the production and performance of animals in the interest of the Republic" was extended to include certain wild animals, effectively enshrining the domestication of wild animals for various uses similar to agricultural animals (Animal Improvement Act 1998).

Accordingly, it may be that the judiciary is the only branch of government that may have an impact in improving the protection of animal (and in so doing, humans).

[52] Even then, this legislation was introduced by means of a private member's Bill.

While the judiciary does not have *carte blanche* to interpret either the Constitution or legislation in an unreasonable way and there are very strict checks and balances, it is submitted that through strategic litigation and creative lawyering - the door may be opened for material change to occur. If cases are presented in such a way that courts may properly consider the interests of both human and nonhuman animals and interpret the Constitution or other laws in line with this and the relevant constitutional values, the common law may be developed[53]. Such cases challenging legislation and practices should include scientific and well-reasoned arguments and potential alternatives[54].

In preparation for this, sensitisation to the integrational approach and animal rights as a social justice issue needs to occur at various levels: including law students and lawyers, human rights activists, animal rights activists and educators[55]. Lawyers must be sensitised in law school[56], and in practice to allow a holistic view in their work (whether this is in private practice, for non-profits or otherwise).

In a similar vein, human rights and animal rights activists and organisations should be sensitised to the plights and efforts of each other. When the opportunity arises, in litigation one may support the efforts of the other by filing amicus briefs, or even jointly filing or defending litigation. Similarly, when there are calls for public comment on legislation and policy that affect both, efforts and resources may be enjoined to the extent feasible.

"Sometimes what's left behind can grow better than the generation before." – Simba

While the inclusion of the consideration of animals' interests may not solve *all* of the major human rights violations occurring today, a change in approach is unequivocally

[53] In S v Mhlungu Sachs J explained this ever-changing process of interpretation as follows: I regard the question of interpretation to be one to which there can never be an absolute and definite answer and that, in particular… how to balance out competing provisions, will always take the form of a principled judicial dialogue, in the first place between members of this court, then between our Court and other Courts, the legal profession, law schools, parliament, and indirectly, with the public at large (S v Mhlungu).

[54] One example may be the interpretation of the term "sustainable use" contained in the environmental right of the Constitution – which the executive has interpreted in the context of wildlife to mean consumptive use of animals.

[55] Humane education in the traditional sense is simply not enough (and is not even legislatively mandated). Education should and needs to be holistic in the sense that children should be taught about their actions and behaviours and the broader impact that these have. After all, it is their future that is being compromised and they will suffer the ill-effects of the actions of the generations before them.

[56] Many well-respected law schools around the world are including animal law in the curriculum with over 187 schools in the USA teaching this in some form. Additionally, the growth of animal law clinics, where law students get practical experience working in this realm has proven successful, including two at Lewis & Clark Law School and Harvard Law School recently joining the ranks of schools offering this option.

necessary.

It is evident throughout history that systems based on the practices of asserting dominance, emphasising differences and promoting separateness have led to horrific consequences. Only now are we starting to realise the consequences of our actions relating to our treatment of animals – including the sixth mass extinction and climate change.

In delivering the judgment for the 2016 NSPCA Constitutional Court case, Justice Khampepe stated:

> From the ancient Khoisan reverence of the eland to the contemporary conception of the dog as "man's best friend", humans and animals have a storied relationship, one that is a part of the fabric of our society, homes and lives. Animals have shifted from being "mere brutes or beasts" to "fellow beasts, fellow mortals or fellow creatures" and finally to "companions, friends and brothers" (NSPCA 2016).

The abovementioned statement indicates the interwovenness between human animals and nonhuman animals, and our capacity to be companions, friends and even brothers. If all beings are all threads composing one tapestry – it is currently on fire[57].

This sentiment has been echoed in other ways – by the previous South African President when announcing the Interim Constitution stated:

> At times, and in fear, I have wondered whether I should concede equal citizenship of our country to the leopard and the lion, the elephant and the springbok, the hyena, the black mamba and the pestilential mosquito. A human presence among all these, a feature on the face of our native land thus defined, I know that none dare challenge me when I say – I am an African! (Mbeki 1994).

While narratives tend to indicate that animal and human rights are a zero-sum game, a recent Harvard study found that support for animal rights was also correlated with support for LGBT individuals, racial and ethnic minorities, unauthorized immigrants, and low-income people (Klein 2019).

Thus, if we understand that violence,[58] injustice, oppression and the like do not occur in a vacuum – in the pursuit of combatting these - we cannot allow the culture of separateness to disempower us. Regardless of oppressor or the oppressed, "injustice anywhere is a threat to justice everywhere"[59] – and thus systems promoting this must be dismantled through all tools necessary. It is only through recognition of our to-

[57] Ironically, at the time of writing this – so is the earth, with record-breaking wildfires raging across parts of South America as well as Australia.

[58] We also understand that violence against humans doesn't occur only in relation to humans. A well-emphasised often utilised example is that of "the link". There is a large body of research on this and it should be consulted for further examples of interlinking human and animal interests.

[59] Martin Luther King Jr., Letter from the Birmingham Jail 16 April 1963. In the same letter he wrote: "We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly, affects all indirectly. Never again can we afford to live with the narrow, provincial 'outside agitator' idea".

getherness can we begin to empower ourselves and claim a just and equitable society for all who live in it.

Sophisticated democracies and movements require an integrational approach. By expanding the scope and interpretation of human interests to include the consideration of animal interests; and through coordinated, targeted efforts – we may ensure that the notion of justice is achieved, for all who require it.

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HOW COMMUNITY ATTITUDES CAN STRENGTHEN ARGUMENTS FOR CHANGING THE LEGAL STATUS OF ANIMALS

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ABSTRACT: The current legal categorisation of animals as property has its historical roots in Roman Law. The long history of this status prompts one to wonder whether it reflects modern community attitudes. It is, however, difficult to answer this question, as there is a dearth of empirical data on attitudes towards the legal status of animals. In light of the widely-accepted relationship between law and community attitudes, particularly in democratic societies, this paper highlights the need for empirical examinations of social attitudes towards the legal status of animals. It is suggested that such empirical exercises can help scholars and lawmakers more accurately understand whether a change in the legal status of some or all animals is politically achievable. Empirical studies of community attitudes can also provide direction to scholars, who theorise legal frameworks to define the legal status of animals, and animal advocacy groups, which seek to educate the community about the legal status of animals.
KEYWORDS: legal status of animals, animals as property, animal personhood, animal rights

Historian Yuval Noah Harari (2011) points out that what distinguishes *Homo sapiens* from other species of animals is our ability to co-operate with a large number of individuals. *Homo sapiens* have the unique ability to form large groups and to create social order amongst millions of people. This ability, which Harari explains emerged

as part of the Cognitive Revolution, is enabled through the creation of fiction or what Harari describes as imagined realities. Nations, corporations and laws, for example, do not exist in real; they are imagined entities or systems developed to enable a large number of humans to cooperate. To change how society is organised, or how power is distributed, a large enough number of people ought to be convinced about new fiction.

Herein lies the challenge surrounding the legal status of animals. The role of legal fiction is all too familiar for animal lawyers. Indeed, fiction is often brought up in debates and litigation about the legal status of animals. A legal person, it is frequently argued, does not necessarily connote a human being. It is a construct of the law that can be, and already has been, extended to include non-human entities, such as corporations, rivers and idols. The task of "animal rights" advocates, therefore, is to convince legal or political institutions that this fictional concept of personhood should be expanded to include some or all animals. If successful in doing so, the legal fiction regulating human-animal relations would potentially carry significant implications for society.

This paper emphasises the need to understand community attitudes towards the legal status of animals better. It suggests that empirical examinations of social attitudes can provide valuable insight into the debate concerning the categorisation of animals as property. In particular, knowledge of community attitudes can provide a better sense of whether a change in the legal status of some or all animals would be politically achievable. It can also provide direction to scholars who theorise legal frameworks to define the legal status of animals. Such data can also guide the educational agenda of advocacy groups, as they can identify issues that are not salient or well understood in the community.

The paper first examines the legal status of animals as property, including the origins and implications of this status. It then provides an overview of various different theoretical frameworks for making animals subjects, rather than objects, of the law. It also notes the scepticism expressed by some scholars in respect of proposals to change the legal status of animals. It becomes evident at this point that the hypotheses made in relation to the feasibility of implementing any of those models are generally based on intuition rather than relevant empirical data. This paper then examines the relationship between law and society to explain the importance of gathering empirical data on attitudes towards the property status of animals. The next part observes that such empirical evidence is currently lacking; it then proceeds to highlight the findings and implications of an Australian study that reveals a lack of community awareness about the legal status of animals and indicates that attitudes towards the legal status of animals are variegated. Finally, this paper concludes by providing direction for future research in this space.

To clarify, it is not the intention of this paper to suggest that the legal status of animals should be determined by community attitudes alone. It is appreciated that such an exercise can be misguided, as community attitudes may not always be aligned with moral principles. Further, human behaviour may not always accord with prevailing social values (Gibson 1985). Even though certain values may be highly regarded in society, economic or habitual factors may compel humans to act contrary to those values.

Additionally, empirical data may not always provide an accurate account of community attitudes. For example, often, respondents do not have an opinion about questions they are asked in a survey, especially where they relate to complex issues (Burstein 2006). In such cases, reliance on empirical data alone can be imprudent. The aim of this paper, therefore, is merely to highlight the value of measuring and understanding community attitudes in informing the debate about the legal status of animals and in determining an appropriate legal status for some or all animals.

THE LEGAL STATUS OF ANIMALS

Most animals in western countries are classified as things or property. Property rights in respect of wild animals are generally more restricted in comparison to domestic animals, but they lack personhood, nevertheless. The legal categorisation of animals as property can be traced at least as far back as Roman Laws. Under Roman Law, everything was divided into three legal categories: *personae* (persons), *res* (things) and *actiones* (actions) (Naffine 2009; Thomas 1976). Persons were entities capable of being affected by the law, while things were rights and duties that persons could have. Thus, persons were the subjects of the law, while things were objects of the law. Within this tripartite system, animals were classed as things (Pottage 2004). Roman Law ultimately inspired civil and common law systems throughout the world, including the British Common Law system that went on to be adopted in many other British colonies (Cao 2015; Domingo 2011). The categories of persons and things and the legal objectification of animals were carried forward and kept alive in the process. The treatment of animals as the property was justified in later centuries by Christian beliefs. For example, eighteenth-century philosopher, William Blackstone (1794), explained that animals were the property of humans because God gave humans dominion over everything that lived on Earth. Secular beliefs too glorified the status of humans in light of humans' advanced cognitive abilities and, on that basis, provided further justification for the property categorisation of animals (Naffine 2012).

The categories of persons and things were never defined or clearly differentiated by Gaius and Justinian, the jurists who originally conceptualised and adopted these terms (Trahan 2008; Kurki 2017a). There is some indication that the categories were not intended to be exclusive. Salves, for instance, were categorised as both persons and things (Kurki 2017b). However, the meanings attached to the terms "person" and "thing" have remained elusive and contested. Indeed, there are debates today about the meaning and requirements of personhood.

While the legal divide between persons and things continues to be evident in common law and civil law systems, the categories have evolved over time to suit changing needs and times. Scientific, technological and social developments have blurred the lines between the two categories, giving rise to debates about the legal status of the unborn, the dead, non-biological machines and nature (Pottage 2004). In light of growing environmental consciousness, for example, a few rivers, forests and mountains around the world have been declared to be legal persons (Maloney 2018).

Similarly, scientific developments and changing relationships between humans and

animals have called into question the appropriateness of the property status of animals. Towards the end of the 20th century, philosophical and legal minds started to question whether animals should be persons rather than property. Francione (1995) was one of the first to argue that sentient animals should be persons rather than property and that all forms of animal use should be abolished as a result. Since then, a variety of arguments for and against animal personhood have been put forward in a passionate and growing debate.

Animals are different from other types of property. Unlike chairs and cars, animals are sentient, living beings. As objects of the law, they are theoretically at the mercy of persons who are subjects of the law. While there are undoubtedly animal welfare laws that recognise the sentience of animals and seek to curtail the property rights of humans with respect to animals, animals are unable to enforce the protections granted to them under those laws. That is because legal standing is required to enforce those protections, and legal personhood is generally a requirement for legal standing (Tudor 2010; Stein 1979; Bagaric and Akers 2012). A more serious implication of the property status of animals, some argue, is that animals are disqualified from bearing rights (Korsgaard 2013; Wise 2000). Not everyone agrees with this position, as some argue that animals as property can and do have rights, albeit in a weak form (Sunstein 2003; Favre 2010).

The property status of animals has a number of other implications. As personal property, which can be subject to ownership, sale, purchase, gifts and theft, animals are commodified. The commodification of animals is most apparent in animal farming and in the breeding, selling and relinquishing of companion animals (White 2016). The treatment of animals as commodities is problematic because it "enables the instrumental treatment [of animals] by others subject only to a *de minimis* standard of regulation" (Deckha 2015:64). At a symbolic level, too, the property status of animals promotes the objectification and instrumental treatment of animals. The semantics imply that animals are a means to an end, rather than ends in themselves. Such a perspective can overlook the inherent interests or intrinsic value of animals (Bogdanoski 2013).

MAKING ANIMALS SUBJECTS OF THE LAW

In light of the sentience of animals, as well as the shortcomings associated with the property status of animals, a debate has emerged about whether the property status of animals should be abolished. Those who are opposed to the property status of animals often contend that animals should be regarded as legal persons. Francione and Wise take this position, although the scope and approach of their arguments differ.

Francione (1995; 1996; 2000; 2008; 2010) strongly opposes all forms of animal use, particularly the use of sentient animals. His position is premised on the belief that sentient animals, which possess some level of self-awareness, have an interest in living and not suffering. These interests, he argues, are incompatible with their characterisation as property. He points out that animals share an interest in not suffering from humans. Applying the principle of equal consideration, which requires likes to

be treated alike, Francione argues that like humans, animals too should not be treated as property. Francione thus demands the abolition of the property status of sentient animals, and advocates for the recognition of their right not to be treated as property. Because he believes that personhood is a perquisite for legal rights, he calls for animals to be granted legal personhood.

The consequences of Francione's vision would be significant if materialised. He acknowledges that the implications of the abolitionist view are radical. It would mean that the institutionalised exploitation of animals for food, biomedical research, clothing and entertainment would have to end. Given the prevalence of animal-use practices today, it does seem unlikely that the community is likely to support an end to all forms of animal use. However, whether there is sufficient community support for the abolition of animal-use and whether there is sufficient community support for animal personhood or an alternative legal status for animals, are different questions. While the previous question is likely to be answered in the negative, there is a lack of empirical data from which the answer to the latter question can be extrapolated. Even if it appears that legal personhood for all sentient animals is too ambitious, it is worth questioning whether there might be adequate community support for changing the legal status of at least some animals.

Wise (2000; 2002; 2004) pursues this question. While Francione's arguments are founded on purely moral considerations, Wise accepts that "progress is impeded by physical, economic, political, religious, historical, legal and psychological obstacles" (2002:9). Wise, therefore, advocates for the personhood of only a small class of animals, for the purposes of a limited set of rights. In particular, he argues that animals that possess practical autonomy should be recognised as legal persons who are entitled to the rights to liberty and equality. A being has practical autonomy if they can desire, intentionally try to fulfil their desire, and possess some level of self-awareness. Wise suggests that the more the behaviour of an animal resembles human behaviour, and the taxonomically closer the animal is to humans, the more likely the animal is to possess practical autonomy. At the very least, based on current scientific literature, Wise identifies great apes, Atlantic bottle-nosed dolphins, African elephants, and African grey parrots as animals that meet the requirements of personhood.

The peril of Wise's approach is that it could re-draw the lines of the existing hierarchy that places the human species over all other species. It would deny personhood to animals that lack practical autonomy, or animals that have not scientifically been proven to possess the required cognitive abilities. It should be remembered, however, that it is not Wise's intention to deny personhood to animals that lack practical autonomy. He makes it transparent that "[i]]f I was Chief Justice of the Universe, I might make the simpler capacity to suffer, rather than practical autonomy, sufficient for personhood and dignity rights" (2002:32). Wise employs a narrow-focused approach because he is conscious of the significant resistance to the idea of making all sentient animals legal persons, especially in light of the wide-ranging implications of a sentience-based strategy.

Not everyone who disagrees with the current legal status of animals pushes for

animal personhood. Favre (2000; 2004; 2004), for example, proposes a guardianship model. Animals would remain property under this model, but instead of having owners, they would have guardians who are required to act in the best interests of the animals. Favre is mindful that the legal status of animals depends in large part on what society thinks. On this basis, he stresses "it is important to distinguish first steps of change within the legal system, where maximum consensus ought to exist, versus the ultimate destination of legal change" (2004:236). Recognising political and social realities, Favre suggests an incremental approach ought to be taken where the property status of animals is modified rather than abolished.

Under this modified approach, title to an animal would be divided into legal and equitable elements. Humans would retain legal title to the animal, while animals would have equitable self-ownership. The legal title owner would owe duties directly to the self-owned animal and would be required to make decisions that are in the best interests of the self-owned animal. Self-owned animals would also have the ability, through court-appointed guardians or private parties, to enforce their legally recognised interests. Ultimately, Favre seeks to develop a model for animals that provides "an intermediate ground between being only property and being freed of property status, where the interests of animals are recognised by the legal system, but the framework of property law is still used for limited purposes" (2000:476). However, he acknowledges that this model too can only be implemented if it finds social acceptance.

More recently, recognising the social approval needed to make drastic changes to the legal status of animals, Favre (2010) proposed a more conservative model where sentient animals would be placed in a new subcategory of the property called "living property". It is important to recognise that, unlike Francione and Wise, Favre contends that animals as property can and do have legal rights. Thus, he considers it ethically acceptable, at least in present times and subject to some modifications, to retain the property status of animals.

According to Favre, animals with DNA have inherent interests and moral value. Thus, the law ought to protect the interests of animals. Despite the broad implications of his position on the moral status of all, rather than just sentient animals, he proposes two qualifications for eligibility into the category of living property. First, the animals have to be knowingly possessed by humans. This would exclude most wild animals. Second, the category would be restricted to vertebrate animals to "keep the discussion focused on those who have the most complex needs and for whom we can do the most" (2010:1045-6); Favre does suggest, however, that this line could be redrawn in the future as more scientific information on the interests of non-vertebrate animals becomes available. Because legal personality is a prerequisite for legal standing, the existing property would be granted limited personality. This would enable living property to enforce their interests. As to which interests the law would protect, Favre believes it is a "social and, therefore, political judgement" (2010:1053). Hence, the law would protect those interests that can garner sufficient political support.

Pietrzykowski (2017; 2018) also offers an innovative approach for the legal treatment of animals. Rather than advocate for animal personhood, he believes that a new legal category ought to be established for sentient animals. The new legal category,

called non-personal subjects of law, would make sentient animals subjects of the law without granting them legal personhood. Pietrzykowski's approach is constructed on the belief that sentient animals do not belong in either of the categories of persons or things. He is of the opinion that the sentience of animals makes their treatment as things inappropriate, but they also lack capacities that are generally associated with personhood. Pietrzykowski further suggests that personhood is not necessary for animals to become subjects of law because, contrary to popular belief, the categories of persons and things are not exhaustive. He contends that the establishment of a new legal category would recognise the similarities between humans and animals without ignoring the differences between humans and other animal species.

As non-personal subjects of law, animals would be capable of bearing rights. In particular, animals would have a single right to have their interests considered in all decisions affecting the realisation of those interests, including decisions made by lawmakers and individuals. This right would ensure that the interests of animals cannot be ignored. Pietrzykowski accepts that merely mandating the consideration of animals' interests may not produce significantly different outcomes from the present framework where animals are property. He explains, however, that his goal is not to provide for the immediate eradication of all animal suffering but to design a system for facilitating gradual attitudinal shifts and improvements to the conditions of animals. Accordingly, the legal protections provided to animals must not go beyond predominant social expectations; rather, they should be reconcilable with existing practices. It follows for Pietrzykowski that the extent to which this model will be able to protect the interests of animals better will depend on the evolution of social attitudes.

With several different models proposed for defining the legal status of animals, it is natural to wonder which of these models could successfully be implemented with the least amount of controversy or resistance. Currently, there is limited empirical data that sheds much light. Without empirical evidence, one can only speculate about whether any of those alternative legal statuses for some or all animals would find social acceptance. Indeed, arguments in favour of abolishing the property status of animals are often met with pessimism. These too appear to be based on intuition rather than empirical evidence.

Garner (2002; 2010a; 2010b; 2016), for example, does not necessarily disagree with the goal of abolishing the property status of animals. However, he contends that the ambition is unachievable in the current political climate. Distinguishing between what is ethical and what is politically achievable, Garner asserts that the property status of animals is "merely a reflection of wider societal attitudes" (2002:80). Garner's calculations may appear correct in light of existing animal-use practices. However, without empirical data, it is difficult to assess the extent to which Garner's predictions are correct. While his conclusions about social attitudes might indeed be accurate, it is also possible that attitudes towards the legal status of animals are more nuanced. It may be that there is sufficient community support for the abolition of the property status of at least some animals, such as the cognitively advanced animals or companion animals.

For Lovvorn (2006), arguing for the abolition of the property status of animals is an "intellectual indulgence" (p. 139). Relying on a number of American polls, he asserts

that abolishing the property status of animals is politically unachievable. The data Lovvorn refers to does suggest a lack of support for bans on the use of animals in medical research, product testing, hunting and clothing. However, the data does not illuminate attitudes towards the legal categorisation of animals as property or alternative legal status. The statistical evidence that forms the basis of Lovvorn's sceptical position does not necessarily indicate community support for the current legal status of animals.

Similar predictions have been made more recently by Cupp (2007; 2016; 2018). Cupp agrees that human-animal relations in urbanised and industrialised societies commonly involve emotional, rather than purely economic, connections. He further accepts that public support for better animal protection laws is likely to continue to grow. He believes, however, that most people oppose the idea of legal personhood for animals. Again, there is a lack of empirical data to back this cynicism. The deductions made by Garner, Lovvorn and Cupp from current social practices may indeed be correct. However, without empirical evidence, they remain speculations that do not necessarily weigh any greater than the assumptions embedded in the works of those who propose an alternative legal status for animals.

A review of existing literature on the legal status of animals thus highlights the need to measure community attitudes towards the legal status of animals. Such empirical research is needed to test the hypothesis that abolition of the property status of animals is politically unachievable. It is also needed to ascertain whether the alternative legal statuses for animals proposed by proponents of change would enjoy community support. This data may ultimately add strength to arguments for abolishing the property status of some or all animals, particularly in light of the interconnectedness between law and social attitudes.

THE RELATIONSHIP BETWEEN LAW AND SOCIETY

To appreciate the importance of surveying community attitudes towards the legal status of animals, the relationship between law and society needs to be understood. It will perhaps seem obvious to most people that "[l]aw is a social phenomenon" (Anleu 2000:1). Notwithstanding this intuitive belief, law and society scholars have been studying the relationship between law and society for a long time. It is widely accepted within this scholarly field that law mirrors or reflects the values of the society in which it operates (Selznick 2006). Friedman (1996), for example, observes specifically in respect of western legal systems:

> Legal systems do not float in some cultural void, free of space and time and social context; necessarily, they reflect what is happening in their own societies. In the long run, they assume the shape of those societies, like a glove that moulds [sic] itself to the shape of a person's hand (p. 72).

The extent to which law reflects community attitudes should not be overstated. As Tamanaha (2001) thoroughly explains, there are a number of reasons why the law often does not reflect the prevailing attitudes in society. The voluntary or involun-

tary transplantation of laws is one such cause, resulting in an alien society having a greater influence over the laws of a particular state. An excellent example of this is the adoption of colonial laws in countries such as Australia, a process through which the property status of animals was inherited.

Further, Tamanaha points out that complex societies have warranted sophisticated commercial and administrative laws that are inspired to a greater extent by economic considerations than social values. Corporations, securities and other complex commercial legislation provide good examples. Globalisation too has diluted the extent to which laws mirror a local society, as often laws are introduced by a state to remain part of international institutions or agreements, such as the European Union or the General Agreement on Tariffs and Trade.

However, despite presenting a detailed critique of the mirror thesis, even Tamanaha does not deny the relationship between law and society. To say that a range of factors can influence the content of law does not entirely negate the relationship between law and society. Arguably, even complex commercial and administrative legislation are founded on social values of justice and fairness. It is true, as Tamanaha suggests that societies now have less influence over laws in comparison to traditional and less complex societies. Nonetheless, an essential connection between law and society remains.

The connection between law and society is especially expected in democratic societies. A democratic society requires that "decisions implemented on its behalf reflect the preferences of its members" (Przeworski 2010). It is premised on the principle of self-governance or "rule by the people" (Tideman 1994). The rationale behind democracy is that citizens are not coerced into complying with the legal order. Instead, they freely provide consent to be bound by that legal order (Komberg and Clarke 1992). Society's influence over law may not be obvious or direct in a representative democracy, where representatives are chosen by society to govern the country (Schumpeter 2013). Nevertheless, the idea behind a representative democracy is still to enforce the will of the people – or at least a majority of the people – through the election process and representative governments (Plotke 1997).

It would be naïve to suggest that society is homogenous. While "[r]epresentative government was born under an ideology that postulated a basic harmony of interests in society" (Przeworski 2010: 20), it is certainly not the case today. Societies today are more likely to be pluralistic in nature, where there are competing values and attitudes (Jacobs 2014). Consequently, self-governance in such societies is better described as a system where "the reins of government should be handed to those who command more support than do any of the competing individuals or teams" (Schumpeter 2013:272). In representative democracies, therefore, elected governments and legislatures seek to balance and juggle conflicting public views.

A benefit of aligning the law with society's expectations is that people are more likely to comply with laws that conform to community attitudes (Tyler 1990). Such conformity provides substantive legitimacy. It is achieved where the law is perceived by the community to be consistent with community attitudes (Wintgens 2007). In other words, legitimacy is derived from the rational justifications for the law. It is in light of the tendency of people to comply with substantively legitimate laws that Tyler and

Darley (2000) suggest that "focusing upon the social values held by the public is one key component of an effort to create and sustain a legal order, the effectiveness of which is linked to the consent and cooperation of citizens" (p. 708).

The connection between law and society implies that legal change and social change are also related. That legal change follows social change is not controversial. This is demonstrated by the development and strengthening of animal welfare laws throughout the world (Herzog, Rowan and Kossow 2001). What is contentious is the idea that legal change can lead to social change. Many accept that legal change can engineer social change (Friedman 1973; Castro 2012). The regulation of smoking and the supply of tobacco products, for example, have been found to have changed smoking habits in different societies (Cummings 2002; Orbell 2009; Lidón-Moyano 2017) However, it is unlikely that legal change can affect radical social change. Law is unlikely to inspire social change if it conflicts too much with prevailing values and moral ideals, or if the law is not supported by powerful and elite members of society (Vago and Barkan 2017). Nevertheless, while the extent to which social change and legal change can lead each other may not be equal, there is a growing recognition that law and society have a circular, reciprocal relationship. Both occur in tandem and influence each other (Sifris 2010).

WHAT DOES SOCIETY THINK ABOUT THE LEGAL STATUS OF ANIMALS?

Once the relationship between law and society is comprehended, and the history of the property characterisation of animals appreciated, the value of examining social attitudes towards the legal status of animals becomes apparent. Currently, it is difficult to describe community attitudes in this context accurately. Data about attitudes towards the legal status of animals is scarce. Therefore, it is difficult to ascertain the extent to which different societies agree or disagree with the legal classification of animals as property. As a result, it is difficult to draw conclusions about whether the law is consistent with modern attitudes. Further, as highlighted earlier, in the absence of such knowledge, one can only speculate about whether legal subjecthood for animals, in any form, would enjoy communal acceptance.

One small-scale exploratory study undertaken in the Australian state of Victoria (Shyam 2018) attempted to explore such attitudes and address these questions. A survey of 287 Victorians aged over 18 was undertaken in Melbourne city and two rural regions of Victoria (Ballarat and Gippsland) between December 2013 and July 2014. A short questionnaire consisting of eleven questions was designed to ascertain the extent of the respondents' knowledge of the property status of animals, as well as the extent to which they agreed or disagreed with that status. The self-administered survey was conducted at train stations, tram stops and bus stations, employing convenience (non-probability) sampling.

A key finding of this research was that knowledge of the property status of animals is lacking in society. The study found that over half of the respondents to the survey did not know that animals are legally classified as property. Additionally, a third of the respondents to the study did not know the implications of legally categorising

animals as property. Many of the respondents thought that the property status of animals entitles animals to legal protections for their welfare. This lack of knowledge and understanding is problematic because if members of a society are unaware of the property status of animals and the implications of such classification, they are unlikely to challenge, or think critically about, that legal status. Moreover, without such awareness, society is unlikely to evaluate their preference for alternative legal statuses for animals, such as those described above.

Noting the lack of awareness about the legal status of animals, this study reported common disagreement with the property categorisation of animals. Most respondents to the study disagreed with the property status of at least some animals, although the study did not ask respondents to identify animals whose property status they did not approve of. Before asking respondents whether they agreed with the legal classification of animals as property, the survey also asked respondents how they perceived their pets (if applicable), farm animals and wild animals. The results indicated that the majority of respondents did not perceive any of those categories of animals as property, although farm animals were more likely to be perceived as property in comparison to pets and wild animals. The results of this study cannot be generalised due to the small sample size and the use of non-probability sampling. However, to the extent that the results provide a snapshot of modern attitudes towards animals in Victoria, these results do lend support to the argument that the property status of animals fails to reflect community attitudes.

This study also highlighted that community attitudes towards animals are variegated. While pets were largely perceived as "members of the family" or "friends", farm animals were more likely to be seen as "living beings different to humans". Wild animals were the least likely to be seen as property, and were mostly perceived to be "important national treasures". These findings confirmed that different sentiments are attached to different kinds of animals. Thus, the study also adds weight to the proposition that different kinds of animals ought to be assigned a different legal status. Legal systems such as the one in Australia already provide different levels of protection for different kinds of animals. For example, in all Australian states and territories, the welfare of companion animals is protected to a greater extent than farm animals, and native animals receive greater protection than introduced species of animals (White 2013). Such legal systems are therefore already capable of distinguishing between different kinds of animals. As such, it is not difficult to conceive of a legal framework that assigns different legal statuses for different kinds of animals.

THE PATH TOWARDS A NEW LEGAL FICTION

In light of the intricate relationship between law and society, it is worthwhile examining whether centuries-old laws continue to reflect contemporary attitudes. This is especially useful where an aspect of the law starts to feel counter-intuitive, such as with respect to the legal categorisation of animals as property. In this context, empirical studies can help shed light on whether the categorisation of animals as property is consistent with community attitudes.

This paper has highlighted that a lot of intellectual effort is being expanded on formulating models for defining the legal status of animals and hypothesising about which of these models will work. There is also much deliberation about whether any change in the legal status of animals would be socially acceptable. It is suggested that empirical inquiry of community attitudes towards the legal status of animals can inform this debate and guide the development of legal models that can successfully be implemented.

Accordingly, it is suggested that attitudes towards animals, especially their legal status, should continue to be surveyed. For a truthful understanding of these attitudes, such surveys should ascertain respondents' awareness and understanding of the property status of animals. The surveys should also account for variegated attitudes towards the legal status of animals, and therefore ask respondents whether they agree with the property status of specific types of animals.

If empirical studies continue to support the proposition that some or all animals are not perceived as property in contemporary societies, arguments for abolishing the property status of those animals will be strengthened. Such data can then be used to persuade and even pressure lawmakers to change the legal status of the relevant kinds of animals. Even where different sentiments are attached to different kinds of animals, the data may help identify animals whose legal status may be easier to change than others.

Given that there appears to be a lack of understanding in the community about the legal status of animals, education will have an important role to play in efforts to change the legal status of animals. The public needs to be educated about the legal status of animals as property, as well as about the implications of giving animals that legal status. This education may emanate from advocacy groups in the form of awareness campaigns. Incorporation of this subject into school curriculums could also ensure a demographically wider understanding of the legal status of animals. This knowledge will empower the community to develop informed opinions, and in the longer term, prompt lawmakers to review and reassess the legal status of animals.

Education, whether delivered by educational institutions or advocacy groups, can be informed by empirical data as well as animal law scholarship. Empirical data will highlight knowledge gaps in the community, while animal law scholarship will help determine and deliver the educational content. For this reason, it is vital that scholars continue to research and deliberate on the implications of legally classifying animals as property, and to debate about how animals should be categorised by the law. Such academic pursuits should use existing and new empirical data as a reference to innovate or develop alternative legal models for defining the legal status of animals. Thus, if attitudes towards animals are variegated, scholars should strive to understand and reflect the attitudinal nuances in alternative models. Aside from feeding into educational initiatives, such scholarship can also assist lawmakers in their reform agendas.

There is no doubt that animal welfare laws are a useful way of eliminating or minimising the suffering of animals. Efforts to improve animal welfare laws should, therefore not be reduced. It is important to realise that animal welfare laws do not stand in opposition to arguments for abolishing the property status of animals. The need for

such laws will continue to exist even if animals become subjects of the law through personhood or some other legal categorisation. Just as specific laws exist for the protection of workers, who are legal persons, it will be necessary to have laws for the protection of animal subjects. Animal welfare laws may need to be modified to reflect the new legal status of animals, but their use will not become redundant.

Notwithstanding the necessity of animal welfare laws, opportunities to improve the legal status of animals must be seized. Failure to do so may keep a fiction alive that makes it easier to facilitate the subjection of animals to pain and suffering. Capitalising on modern community perceptions of animals may add weight to arguments for changing the legal status of animals, thereby making it easier to shatter the fabricated conception of animals as property. As Harari cautions, imagined reality has become more powerful over time, to the point that the survival of objective realities, such as rivers, trees and animals, now depends on the grace of imagined entities.

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THE LINK BETWEEN INTERPERSONAL VIOLENCE AND ANIMAL ABUSE

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ABSTRACT: In 2018, more homes in the US have pets than those that have children. Though pets are regarded as property by US law, a majority of people identify pets as part of the family unit. Animal abuse and cruelty have been identified as a potential indicator and precursor to interpersonal violence (IPV). Moreover, child maltreatment, domestic violence, elder abuse, and animal abuse co-occur in households and communities link together to indicate the nexus of these heinous crimes; these co-occurring forms of violence have been increasingly referred to as *The Link,* to indicate the linked violence. However, there is an incongruence in the definition of animal abuse and cruelty; thus, documenting cases, bringing charges, and achieving a conviction is difficult. Furthermore, the initial education to learn of these topics in human service professions, such as social work, remains absent from many curricula. In practice, cross-reporting of suspected abuse or neglect is a vital mechanism for connecting human and animal professionals to address the issues between human and animal welfare systems. This sharing of information can increase the likelihood that clients experiencing IPV will receive comprehensive services that can improve their

level of safety and quality of life. By providing professionals with education for indicators of abuse, and strategies for how to make a report, communities can build stronger support networks for those in need. Herein, Ohio legislation and current community efforts serve as a case study to define animal abuse, delineate transdisciplinary factors for relevance, and make recommendations for addressing this vital social welfare need. The strategies within this case-study are encouraged to be adapted and applied nationally and internationally.
KEYWORDS: interpersonal violence, cross-reporting, animal abuse, social work, The Link

INTRODUCTION

The Link is a term used to refer to the concordance of interpersonal violence (IPV) and animal abuse and neglect. Just as IPV occurs between two or more people within the context of a relationship, animal abuse and neglect are a tactic that occurs in the context of IPV. Rather than considering violence against pets as separate to IPV, considering animals as part of the family structure, impacted by violence in the same manner as their human counterparts, sheds light on instances of animal abuse and neglect as part of the familial cycle of violence. Pets occupy a central role in many relationships and families (Turner 2006), and can serve as a source of companionship, a confidant (McNicholas & Collis 2006), and a vital member of an individual's support system (Wood et al. 2015). Being part of the family means that the relationships between humans and animals in a household may mirror the status of the health and safety of the people in that family (Hoffer, Hargreaves-Cormany, Muirhead & Meloy 2018).

Given the authors' scope of practice, predominantly as social workers, content relevant to mental health, is discussed through a social welfare lens of practice and education. Though medical and mental health professions have mandatory education and reporting for child abuse, elder and animal abuse are still absent from many educational curricula and standards of practice. Social work remains a *human-centered* field of study and practice. Many social work professionals do not have sufficient education regarding *The Link* as it is not yet commonplace in educational curricula. Inclusion of pets throughout social work, clinical and community practice, is vital to understanding the health and well-being of clients holistically. As such, if a practitioner is not taught how to define, identify, and report animal abuse in the classroom, it is not reasonable to assume they will engage in such practices once coursework concludes (Risley-Curtiss 2010).

Social Workers may feel unqualified to judge what is report worthy, nor may they know to whom a report should be made. Without education and organizational support, reporting animal abuse may be a conceptually low priority in social service agencies where resources such as time and money are lacking. Concern as to whether making this report will damage the social work professional's relationship with the client, as well as the potential lack of professional protection, can make reporting animal

abuse an anxiety-provoking proposition. Other objections for reporting include fears of violating client confidentiality, lack of training to identify and report suspected abuse, and the lack of a unified definition of abuse. Without clear standards for reporting, social workers may be reluctant to involve another government agency, such as police or animal control, for fear of making a client situation even more complicated (Favar & Strand 2008). Given the new evidence of *The Link,* it is imperative that mandated reporting of abuse and neglect is inclusive of animals across multiple health professions including social work, medical/health, veterinary, and allied professions (Simmons & Lehmann 2007; Febres et al. 2014; Roguski 2012).

ABUSE DEFINED

In *Link*-related research, animal abuse has historically been defined similarly with slight, but critical, variations of the language. One common definition is '[s]ocially unacceptable behavior that intentionally causes unnecessary pain and suffering, or distress to and or death of an animal' (Ascione 1993: 28). Similarly, Agnew defined abuse as '[a]ny act that contributes to the pain or death of an animal or that otherwise threatens the welfare of an animal' (1998: 179). In this definition, even socially acceptable behaviors, like hunting, may be considered abuse. Thus, it is essential to use a definition that is socially and culturally acceptable as a baseline, then modify as appropriate to meet the needs of the community. The definitions of animal abuse or cruelty are typically more pragmatic in the day-to-day application by law enforcement or animal control. State laws as well as local ordinances specify the parameters of what is or is not legally a form of animal abuse; descriptions of abuse generally include intentional physical injury or death of an animal, and the lack of appropriate food, water, shelter, or medical care, along with definitions of what is considered 'appropriate' standards for animal care.

Animal abuse can take many forms that often parallel human abuse: neglect, physical abuse, animal sex abuse (also referred to as zoophilia, or interspecies sexual assault), and animal fighting (Randour 2008). As in the case of children and the elderly, neglect is the most common form of harm towards animals and may include the lack of appropriate food, water, shelter, or medical care. Most active forms of physical abuse are inflicted to control, retaliate, satisfy a prejudice, or meet a desire for non-specific sadism. Abuse of animals by children is one of the strongest predictors of later abuse (DeGue & DiLillo 2009). With this understanding, researchers and practitioners are better able to understand and support those who are marginalized and at-risk.

STATE OF RESEARCH ON ANIMAL ABUSE AND INTERPERSONAL VIOLENCE

Increasingly throughout the past two decades, leaders in violence and trauma prevention have advocated for the importance of assessing for co-occurring violence exposures in research and practice (e.g., Finkelhor, Turner, Hamby, & Omrod 2011; Musicaro et al. 2017). Despite the fact that growing evidence of the frequent overlap of animal abuse with intimate partner violence, child maltreatment, and elder abuse, the Link

between interpersonal violence and animal abuse remains vastly under-researched and discussed in academic and practice settings. Moreover, a majority of studies to date have been cross-sectional and/or retrospective in design. Within this body of work, studies have primarily focused on two major areas of *The Link* violence: 1) associations between animal abuse and intimate partner violence, and/or 2) associations between childhood animal cruelty and adult violence. In this section, we discuss the current state of research in these areas, review gaps in the literature, and recommend future directions for social work research.

ANIMAL ABUSE AND DOMESTIC VIOLENCE

Much of the work examining links between animal abuse and family violence has centred on understanding the prevalence and function of animal abuse in the context of intimate partner violence. Ascione and colleagues conducted much of the early research in this area. In a national survey of the largest U.S. shelters serving women and child survivors of domestic violence (DV), Ascione, Weber, and Wood (1997) found that 83% of surveyed shelters indicated that they had observed the coexistence of DV and animal abuse in their work. In a later study of women accessing DV services, Ascione (1998) found that 71% of pet-owning women reported their partner had threatened and/or killed their pet. Indeed, Ascione (2007) found that women accessing IPV services were nearly 11 times more likely than a comparison group of non-victimized women in the community to report that their partners had hurt or killed a pet on purpose. Animal abuse by DV perpetrators may take on many forms (hitting, burning, intimidating, choking, shooting; McDonald et al. 2015) and may be a mechanism of coercion to influence an intimate partner, a reactive disciplinary response to animal behavior, a coercive parenting tactic, and/or rooted in other motivations (Collins et al. 2018; DeGue 2011; Hardesty, Khaw, Ridgway, Weber & Miles 2013). DV perpetrators may be more likely to engage in animal abuse if their victim has a strong bond with the pet (Collins et al. 2018).

Due to the strong bonds many DV survivors have with their pets, animal abuse may exacerbate the psychological trauma of DV abuse and serve as an additional obstacle in many survivors' safety planning efforts. Ascione et al. (2007) reported that nearly 22% of DV survivors delay entering a shelter because of concerns for their pet. This may be further exacerbated by children's attachments to pets, although few studies have examined how children's relationships with abused and non-abused pets impact safety planning and survivors' ability to access shelter services (Collins et al. 2018). A 2012 study conducted by Krienert and colleagues found that only 6% of DV services offered pet-sheltering or fostering services. Given increased attention to this issue in the past few years, as well as increased legislative progress that has resulted in many states permitting pets to be included on protection orders in domestic violence situations, we suspect this number has increased in recent years. However, we are unaware of any nationally representative research reporting on the prevalence of pet-sheltering and pet-fostering services in the United States since 2012.

INTERSECTION OF ANIMAL AND CHILD WELFARE

Generally, knowledge concerning how animal abuse impacts children in households experiencing IPV is limited. Several recent studies indicate that exposure to animal abuse is a robust predictor of compromised adjustment in children. For example, McDonald et al. (2016) found that animal cruelty exposure was associated with increased risk of compromised socioemotional functioning among 291 children recruited from community-based DV services. Specifically, children exposed to animal abuse were 3.26 times more likely than children with no animal abuse exposure to experience co-occurring internalizing and externalizing problems, and 5.72 times more likely to experience co-occurring behavior problems, attention problems, social problems, and callous/unemotional traits that were clinically significant. Moreover, McDonald et al. (2016, 2017) found that exposure to animal abuse was the strongest predictor of children's compromised adjustment in a model that included the severity of exposure to maternal IPV and other sociodemographic factors (e.g., gender, household income).

Similar findings have been mirrored and expanded upon in retrospective reports with adult samples. For example, Girardi and Pozullo (2015) found a significant interaction between participants' level of bonds with pets and animal abuse exposure, controlling for co-occurring emotional abuse in childhood. Adults who reported medium-level bonds with pets who were exposed to animal abuse in childhood had significantly higher depression and anxiety scores in adulthood than those who were not exposed to animal abuse. In contrast, adults who reported medium-level bonds with pets and had not been exposed to animal abuse in childhood had lower anxiety and depression scores in adulthood than those with low-level bonds.

As previously mentioned, animal abuse may take many forms in households affected by DV, and there is emerging evidence that it may be important to consider the type of animal abuse to which children are exposed. McDonald et al. (2015, 2018, 2019) suggest that children living in households where IPV occurs are exposed to multiple manifestations of violence involving animals, including 1) animal abuse as a coercive DV tactic, 2) animal abuse as a coercive parenting tactic, 3) animal neglect, 4) cruel play by siblings, and 5) harsh physical punishment/discipline of pets. Moreover, children may be more likely to intervene in specific forms of animal abuse. For example, McDonald et al. (2015) report that children may be more likely to become involved in incidents of DV involving animals, which may increase their risk for physical injury or death by a caregiver. To date, children's involvement in violent animal-related incidents has largely been ignored in research and intervention with families affected by DV, yet this work has important implications for understanding risks to children's health and wellbeing, as well as their intervention needs. In particular, children exposed to DV are at greater risk for perpetrating animal cruelty, which has been linked with antisocial behavior across the lifespan (Baldry 2005). A cross-sectional study by Currie (2006) found that among a community-sample of U.S. children ages 5 to 17 years, those who reported exposure to DV (17% of the sample) were nearly three times more likely to report having engaged in animal cruelty than children who had not been exposed to DV.

Although evidence of links between exposure to animal abuse and compromised adjustment in childhood and adulthood is increasing, it is important to note that a major limitation of prior research has been investigators' reliance on cross-sectional data and the inability to adjust for the potential confounding effects of co-occurring child maltreatment and/or other forms of violence that overlap with IPV (e.g., community violence). Deviney, Dickert, and Lockwood (1983) found that animal abuse was present in 88% of households with substantiated reports of child maltreatment. In addition, a recent study of Child Protection Workers in Canada found that 44% had observed an animal be physically abused during an investigation in the past year. Ninety-four percent reported that they had observed evidence of animal neglect in the past year during an investigation.

CHILDHOOD ANIMAL CRUELTY AND ADULT INTERPERSONAL VIOLENCE

The Link between animal abuse in childhood and later violence toward humans and animals has also received increased attention in the past few decades. As previously mentioned, abusing animals during childhood is linked to later violence and antisocial behavior, including abuse of children, spouses, and elders (Walton-Moss, Manganello, Frye & Campbell 2005). Bullying and delinquent behaviors have also been extensively documented in childhood animal abusers (Becker, Stuewig, Herrera & McCloskey 2004; Gullone & Robertson 2008). Moreover, childhood animal abuse is receiving increased attention as an indicator of early childhood trauma and adversity (Bright, Huq, Spencer, & Applebaum 2018). Several cross-sectional and longitudinal studies link childhood animal abuse to family violence exposure, including violence against pets (McDonald et al. 2018b). A recent retrospective study of juvenile offenders across nine years found that youth who engaged in animal abuse were more likely to have experienced more than four adverse childhood experiences ('ACEs'), and present to law enforcement at early ages. Thus, attention to childhood animal cruelty is essential for early intervention and trauma-informed violence prevention.

Relatedly, another aspect of *The Link* that has received increased attention is the association between animal abuse and adult crime. A recent study of men incarcerated for domestic violence-related offenses found that 38% reported abusing animals in childhood and nearly 86% reported abusing animals at some point in their lifetime (Haden, McDonald, Booth, Ascione & Blakelock 2018). This study also found that childhood animal abuse was significantly associated with psychological abuse and sexual coercion in the context of intimate relationships. It should be noted that there is a relatively weak association between animal abuse and violent crime, as the majority of people who perpetrate animal abuse do not go on to engage in violence offenses against people (Patterson-Kane 2016). Instead, animal abuse should be viewed as one of many risk factors for later violence, criminal behavior, and the intergenerational transmission of family violence behaviors.

LIMITATIONS AND DIRECTIONS FOR RESEARCH

Although this emerging body of work points to the important links between IPV, animal abuse, and child welfare, nationally representative longitudinal studies of ethnically and culturally diverse samples are needed. This is particularly important given the rapidly changing U.S. demographics and changing social context. For example, there is some evidence that the use of animal abuse as a coercive control tactic is less prevalent among Latino populations, particularly immigrants from Mexico (Hartman, Hageman, Williams & Ascione 2018). African American and Black families have been sorely underrepresented in research in this area, along with other ethnic and cultural minority groups. Similarly, research omits other marginalized and underrepresented groups such as elders and the connection with elder abuse (Peak, Ascione and Doney 2012; Arkow 2015). It is important to determine the cross-cultural relevance of *The Link* when informing related practice and policy changes, and to identify how the intersection of multiple minority identities (e.g., race, religion, sexual orientation, disability) may impact relations between violence to human and non-human animals within households and communities.

STATE OF PRACTICE: CROSS-REPORTING

Cross-reporting is centred upon the idea that no one profession is equipped to address any and all situations that may arise within a client system, and therefore it is necessary to seek assistance from and share information with professionals in other specialties. Cross-reporting is an intentional strategy that can improve the community's response to crimes against both people and animals and may also help prevent future violence. The notion of cross-reporting presupposes that four types of family violence — DV, child abuse, elder abuse, and animal abuse — rarely occur in a vacuum (Ascione 2005; Ascione 2008; Ascione & Arkow 1999). They often overlap, and the commission of one of these crimes often is a 'red flag' that other forms have occurred or will be coming next. For various reasons, animal cruelty, abuse, and neglect are often the sentinel warning signs, and the first 'link' in the chain of family violence (Ascione 2005).

While the primary discussion is on the role of social workers and animal control in cross-reporting, there are several other key professions who much be engaged to be successful. At a minimum, veterinarians, legal professionals, and medical doctors should also be active contributors and collaborators. Fields allied to social work, such as child protective services and departments for ageing are also assets to effective community service. Specifically, the inclusion of veterinarians among required reporters of animal abuse may aid in saving animals' lives as well as their human counterpart.

Laws for reporting abuse vary by state, most notably in two aspects. First, by which professionals are mandated to report abuse. For example, in some states, only particular professions are mandated reports of child abuse, while in others every resident of the state is considered a mandated reporter. Secondly, states vary by whether professionals are *required* or *permitted* to report suspected abuse. Additionally, while some level of mandated reporting of child and elder abuse is present in all fifty states, laws

requiring the reporting of animal abuse are nowhere near so prevalent. This legal variation from state to state can leave mental health professionals with an ethical dilemma. For example, the National Association of Social Workers (NASW) Code of Ethics is intended to guide social workers to enhance human well-being. As such, questions about client privacy and confidentiality often come to the forefront when the issue of reporting animal abuse is discussed. In some states, cross-reporting laws specify the type of professional that can report animal abuse in the course of their work. For example, in the state of Tennessee, the cross-reporting law (Tennessee Code Annotated 38-1-402) specifically names government officials working in child protective or adult protective services as mandated to report animal abuse they encounter or suspect in the line of duty (National Link Coalition 2019). However, what about a social worker that learns about animal abuse during a therapy session? Or on a home visit from a non-government agency? What obligation or protection those social workers may have is unclear.

Cross-reporting is a mechanism for agencies to have a current and connected picture of the violent acts that are occurring in a specific environment (i.e. household) which may enable the agencies to develop more effective intervention strategies. If a social worker, in the course of a home visit necessitated by reports of child maltreatment, elder abuse, or DV, sees signs of animal abuse and is required to contact animal control/humane enforcement, they may have the ability to save an animal's life and help to prevent the escalation of violence in the household.

As an example, an animal control officer made a report regarding a parent with young children wherein the parent attests to beating the family dog with a belt. Using this report as a guide, the child protective services worker was alerted to look for specific types of physical injuries on the children (i.e., belt marks). Another example, applying a recent case from Franklin County, Kentucky, deputies arrested a woman on elder abuse charges with a warrant issued for animal cruelty and neglect of an adult. This situation came to light because, while deputies were doing a welfare check on the animals at home, they found her 75-year-old mother on the floor covered in animal feces. Four of the nine dogs in the house had to be euthanized due to their health status (Blair 2017). With appropriate training, as well as state and organizational policies and procedures, cross-reporting can be a useful tool for both animal and human welfare professionals.

USING DATA TO INFORM POLICY

Compounded data over the last four decades have illuminated the need to address *The Link* in the policy. Key data points that have been raised as justification for political engagement include: a review of New Jersey families (n=53) that were referred to the state for physical assault of children, and found that pet abuse was present in 60% of those homes (DiViney, Dickert & Lockwood 1983); in a retrospective, cross-sectional study of college students (n=860), 60% of participants who witnessed or engaged in animal cruelty also experienced either child maltreatment or DV (DeGue & DiLillo 2009). In another study, 41% of men arrested for DV had committed at least one act

of animal cruelty since age 18 (Febres 2014). Perhaps most significantly, pet abuse is one of the four primary risk factors associated with men who become batterers (Walton-Moss, Manganello, Frye & Campbell 2005). Locally, a 2010 survey of state DV programs by the Ohio Domestic Violence Network (ODVN) reported that more than 40% of respondents recalled cases where pets had been threatened with harm, actually harmed or killed (ODVN 2019). Culling together data has led to momentous efforts to advance state and national policy to support the needs of victims and survivors of *The Link*.

The Link was acknowledged in September 2014 when the Federal Bureau of Investigations (FBI) Director approved the recommendation from the Criminal Justice Information Services Advisory Board to add animal cruelty crime data to the Uniform Crime Report - National Incident-Based Reporting System (UCR-NIBRS) (National Link Coalition LINK-letter, October 2014). Most recently, the recognition of *The Link* was explicitly considered when Congress passed the Pet and Women Safety (PAWS) Act in the 2018 Farm Bill, which extends current federal DV protections to include pets and authorizes $3-million dollars per year in grant money through 2023 for emergency and transitional housing options for DV survivors with companion animals.

The growing body of research illustrating the correlations between the presence of IPV and violence towards animals, as well as an increase of public awareness of *The Link*, has prompted many states to enact laws, or combinations of laws, to increase cross-reporting. In general, these laws stipulate that while working in an official capacity, protective service professionals and animal welfare professionals who observe abuse or neglect of children, vulnerable adults, or animals, respectively, are obligated to report their observations to the appropriate agencies. An example of a combination of laws that enables cross-reporting would be if a state already had mandatory reporting of child abuse or elder abuse, and a new law is passed that allows social workers to report suspected cases of animal abuse (i.e. House Bill 33 in Ohio 2019). In addition to mandating what must be reported, the laws typically specify to whom agency's reports must be made, and the timeframe within which a report should be filed.

In response to the need to cross-report family violence between professions, professionals in multiple disciplines are actively re-examining the complex motivations behind acts of animal cruelty, advancing innovative public policy reforms, implementing programmatic innovations, and using animal-assisted interventions to help the perpetrators and victims of violence. One such mechanism is state-level legislation to facilitate cross-reporting among human services and animal protection agencies that would provide civil immunity for reporting. This policy would also provide civil immunity for reporting in good faith and workshops that provide professionals with ongoing education to refine their skills towards effective cross-reporting.

MANDATORY VS. VOLUNTARY CROSS-REPORTING

The current approach states have taken is split between mandatory vs. voluntary reporting (*full state-by-state list accessible at* National Link Coalition 2019). Though many advocate for cross-reporting to become mandatory, the systems must be estab-

lished with protocols and processes to do so. Currently, states that have passed laws regarding the reporting of animal abuse are split between mandatory and voluntary reporting.

In regard to reporting child abuse, nine states mandate humane agents/animal control officers to place reports formally, three states mandate veterinarians to report, and seventeen states mandate all professions to report suspected abuse. Regarding veterinarians reporting animal abuse: 16 states mandate reporting, nineteen states permit voluntary reporting, and one state, Kentucky, prohibits reporting. Regarding Adult Protective Services reporting animal abuse: four states mandate reporting, and one state, California, permits voluntary reporting. Animal abuse reporting by Child Protective Services and social workers is mandated in seven states and permitted voluntarily in five (National Link Coalition 2018).

For professions initially coming under mandatory reporting, questions often arise as to how to benchmark a specific type of abuse, and who the primary community contact is for the entities to which abuse reports are to be made. These questions cannot be answered by the legislature, making it important to have organizations step in to provide training and networking of diverse professions on a local level. In order for cross-reporting to be efficiently implemented, both animal and human welfare professionals need to be trained regarding their respective issues. Through education opportunities, agencies can build cooperative relationships in which each agency has a clear understanding of what the other does, its general policies, and what its limitations are. To ensure that the trainings are accessed, licensing and credentialing bodies are encouraged to make continuing education mandatory, just as the medical community did for child abuse in the 1990s.

In addition to identifying the appropriate oversight entity if mandatory reporting is required, state legislatures must also determine the appropriate profession to receive abuse reports. When abuse is suspected or confirmed, knowledge of the process to make a report is essential. This is often a barrier either because of lack of access, professional fear of reporting, or lack of knowledge for whom to report to. Furthermore, professionals must be aware of their licensing body's stance and state policy on mandatory reporting. Information regarding protection for those who place a report is beneficial to increasing the potential of report claims. Lastly, professionals may benefit from education about what content is necessary for a report. Providing accurate information increases the likelihood of professionals engaged in cross-reporting receiving the information they need to follow through with an investigation. Mostly, the questions that social workers and allied professions need to address to be effective in their role are: Who is responsible for making the report? What is the time frame in which a report should be made? How is the report to be made (telephone, website, in writing, etc.)? Will clients be informed that a report was made?

Similar to any direct service field, client privacy and confidentiality are always of concern in social work practice. One way some organizations address this issue is by adding language regarding the reporting of animal abuse to their informed consent policies; similar to the statement for reporting self-harm or harm to other persons. This way, the client is aware of the parameters of confidentiality before beginning

with the social worker, should animal abuse conversations arise.

TOWARDS ESTABLISHING CROSS-REPORTING: THE OHIO MODEL

As of 2018, Ohio hosts a population of 11.69 million, of which 2.6 million are children. Within these homes, there are 2.73 million dogs and 3.79 million cats. As cited by Arkow (2019), Ohio law enforcement averages over 177 calls per day, with approximately 25 calls per hour to the crisis hotline. On average, there are 47 civil protection orders filed, and 456 reports per day for child abuse. Of the abuse reports made, 48% are for neglect, 43% for abuse, and 19% for sexual abuse and 48% of these reports meet the threshold to be evaluated (Arkow 2019).

Ohio's current animal abuse language falls under the Animal Security Ordinance (959.01-959.99) which specifically mentions: abandonment, malicious or willful injury of an animal, poisoning, and dog/cock fighting**.** The state was an early pioneer in developing a cross-reporting mechanism. States' humane societies have been empowered to investigate child abuse as well as animal cruelty for decades (i.e. ORC 1717.14). Similarly, to those in law enforcement, cross-reporting has been in place in Ohio for a long time (i.e. ORC 1717.01-1717.15, 174). This is because humane officers, animal control, and police have worked in concert with relative efficiency. However, other human and animal serving professionals have been omitted from the table, including social workers, veterinarians, and other allied professionals.

The national trend is to work toward mechanisms to support cross-reporting of animal, child, and elder abuse which is an initiative the Animal Welfare Institute (AWI) is actively engaged in (AWI 2018). A cross-reporting mechanism aims to ensure that inter-professional communication occurs in an effective and timely manner. When suspected abuse occurs, a communication chain is triggered to ensure that the human and animal needs are promptly addressed. Ohio is actively engaged in developing this mechanism from grassroots and policy levels simultaneously.

LEGISLATION

Ohio policymakers have recognized *The Link* over the last several years through the passing of legislation. AWI has successfully advocated for animal welfare legislation in the state related to family violence issues including pet protective orders, animal sexual abuse, and felonies for extreme animal cruelty (i.e. ORC 3113.31 (F) (3), 959.21, 959.31, 959.99, and protective order form 10.01-M). While serving as legal tools to address animal abuse, each legislative success is useless if the abuse is not being reported. In Ohio's 2019-2020 general session, AWI worked with the Ohio legislature to introduce House Bill 33, which requires cross-reporting between human services and animal protection agencies. Ohio's House Bill 33 mandates veterinarians, licensed social workers, social service professionals, law enforcement, humane agents and dog wardens to file reports. With the push of House Bill 33, the landscape and conversation have shifted to be far more inclusive and specific.

A thorough effort was made to research the issues of reporting, and work with all

named professions to assure the legislation would bring about positive change in addressing IPV. This included working with each profession's state representative to determine what entity would be the appropriate oversight body for the professionals and whether there would be warnings and penalties for those who do not report. Through conversation, representatives decided that the lack of reporting will likely trigger a violation that may take the form of a warning, a penalty, or a misdemeanor. NASW-Ohio has been active in this conversation as social workers would become mandated reporters of animal abuse should this bill pass. As such, representation from NASW has been taking on the challenge of identifying an appropriate entity to provide oversight of professionals and facilitating conversation towards agreement on fair a repercussion should the reporting not be completed as determined by the law. These are difficult challenges for state legislatures – identifying appropriate professional representation has been an asset for the social work community.

However, the passage of legislation does not guarantee the successful implementation of the laws, nor does it educate the professionals responsible for implementation. Inter-professional relationships are essential to ensuring that effective cross-reporting occurs. To achieve this aim, seminars were designed and conducted in an effort to strategically curate relationships between human and humane services that lay the foundation necessary for successful cross-reporting.

COMMUNITY OUTREACH

Through the seminars, titled *Cross-Reporting for Humane and Human Services: A Species-Spanning Approach to Safer Families and Communities*, supported by the Kenneth A. Scott Foundation Trust, a KeyBank Trust, and Maddie's Fund®, AWI conducted regional training in three of Ohio's major cities – Toledo, Cleveland, and Columbus. AWI will conduct similar workshops in Dayton, Cincinnati and Athens this coming year. The conversation focused on *The Link* and its implications for human and humane services. The seminars described new strategies, public policy, research, and programs to prevent family violence and how to respond to its human and animal victims.

The target audience for the seminars included professionals working with human or animal abuse including social workers, humane agents, dog wardens, veterinarians, law enforcement and prosecutors – many of the same professions included in the Ohio legislation, House Bill 33. It was thus critical for AWI to collaborate with national, state and local partners to assist in strategy, logistics, and the marketing of the seminars. AWI recruited the National Link Coalition, Ohio Domestic Violence Network (ODVN), the Ohio Animal Welfare Federation, the Ohio Veterinary Medical Association, Ohio State Bar Association, NASW, Case Western Reserve University Mandel School of Applied Social Sciences, University of Toledo College of Social Justice and Human Services, Cleveland Animal Protective League, Toledo and Columbus humane societies, and Central Ohio Area Agency on Aging. NASW, Ohio State Bar Association, and Ohio Veterinary Medical Association, through the Ohio Veterinary Medical Board, provided continuing education units for professionals in attendance.

The seminars were arranged to allow interaction among professions throughout

the day, including group discussion to generate ideas on how to enhance professional relationships and develop communication processes that foster cross-reporting. In the group discussions, many social workers shared that they were not aware of *The Link* between animal and human violence and were thankful for the information and opportunity to incorporate this knowledge into their practice. Social workers also identified the need to either expand or create local multidisciplinary task forces, that include humane agents, so that all aspects of family violence could be addressed.

The result of this work nationally is an increase in conversation about the importance of recognizing *The Link*, and concrete objectives to effectively address the human and animal needs that arise. At the macro level, the FBI generated database has aided researchers in understanding the longitudinal effects of *The Link* and human behavior. Mezzo practice has included robust community efforts towards establishing co-shelter organizations, developing state-wide legislation, and interdisciplinary cross-reporting mechanisms. The micro practice is ever evolving as the conversation becomes more robust. Practitioners have increased access to webinars, course content, and peer-reviewed literature to aid in developing a common language, questions to ask, and cues for noticing *The Link*.

CONCLUSION

Pets are vital and vivacious members of the family unit throughout millions of American homes. *The Link* recognizes the multifaceted relationship between child maltreatment, domestic violence, elder abuse, and animal abuse that may co-occur in household or community. Interdisciplinary education, with a unified definition of animal abuse and neglect and clear professional standards of practice, may help professionals to identify suspected maltreatment, and initiate effective support inclusive of reporting. In particular, social work education is encouraged to move away from its human-centered roots and embrace our multispecies homes.

In practice, cross-reporting of suspected abuse or neglect is a vital mechanism for professionals to connect human and animal welfare systems. This sharing of information can increase the likelihood that individuals experiencing IPV will receive comprehensive services that can improve their level of safety and quality of life. Though Ohio is actively pursuing legislation to enact professional mandates and a state-wide cross-reporting system formally, there is still much work to be done. Other states are engaged in this work as well and are at varying stages of success. Some states have active community practices (i.e. hotline phone numbers that can be called to trigger the cross-reporting system) but limited policy, while other states have a robust state-wide policy, but no mechanism. By working from the grassroots and policy level simultaneously, Ohio is effectively establishing policy and practice that reinforce each other.

The Ohio model utilizes legislation, professional training and local multi-disciplinary task forces to implement cross-reporting of human and animal violence among diverse professions responsible for investigating family violence. No singular profession can address *The Link* independently; efforts must be interdisciplinary. Educational training must be offered regularly and in a uniform manner so that all inter-

disciplinary professionals can work in concert with the same language, understanding, and aims. To that end, the opportunities for accessible (i.e. continuing education credit, low/no cost) webinars have been increasing in frequency and attendance. This is similar to the education regarding child abuse in the 1990s, which was mandated by medical professionals.

When, not if, social workers become mandated reporters of animal abuse, so too should *The Link* content be mandatory in continuing education and social work curricula. The overall aim is to increase the likelihood that individuals experiencing family violence will receive comprehensive services that can improve their level of safety and quality of life, and that animals experiencing violence receive prompt aid. By providing professionals with guidance with what to look for and how to make a report, communities can build stronger support networks for those in need. In this regard, cross-reporting has the potential to be a useful tool in the assessment for *The Link*.

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SYMBOLIC PROTECTION OF ANIMALS

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ABSTRACT: The purpose of this article is to attempt to understand some institutions of Polish animal protection law using the concept of "symbolic legislation". The law is symbolic when, despite apparently ordering or prohibiting certain behaviours, it does not establish effective mechanisms for enforcing these obligations. The authors on selected examples show that in the field of animal protection law, there are no such symbolic solutions. At the same time, they indicate that not all of these situations deserve a negative assessment and come to the conclusion that the "symbolism" of regulation is not always the fault of the legislator himself. The concept of symbolic legislation allows a better understanding of how a legal act can affect social reality - among others, where there is a strong need for social education, such as in the field of animal protection.
KEYWORDS: symbolic legislation, animal protection, legal interpretation, practical dimension of law, legislative process

The scientific and journalistic discourse on law-making has often seen opinions that specific provisions are "dead", "fiction" or "ineffective". In the theory of law, such situations are analysed using the concept of symbolic legislation. The attribute "symbolic" correctly renders the essence of the issue, for it applies to something which "has little practical influence on a situation"[1]. Symbolic provisions or legislation are mere substitutes of "real law", and not an effective instrument for regulation of the social order. The symbolic legislator creates orders and prohibitions, but at the same time

[1] Cambridge Dictionary. Retrieved August 24, 2019 (dictionary.cambridge.org, entry *symbolic*).

does not aim to establish effective mechanisms for the enforcement thereof, and does not strive to ensure that the addressees thereof will fulfil the obligations laid down in the law (van Klink 2016: 20-21); symbolic provisions are not an adequate measure to achieve the officially proclaimed goal (van Klink: 19)[2]. As such, they do not have any actual and direct impact on the behaviours of their addressees (cf. Tushnet and Yackle 1997: 3).

I. 'BAD' AND 'GOOD' SYMBOLIC LEGISLATION

While symbolic legislation is usually viewed negatively in the science of law, other, more favourable opinions on this phenomenon can be found as well. Accordingly, we shall speak of "bad" and "good" symbolic legislation. *Prima facie*, it appears that the criterion behind this division is the attitude towards the proclaimed goal – if the legislator actually has no intention of achieving it and instead strives to accomplish other, extra-legal tasks, it will be an example of bad legislation. Conversely, if the legislator demonstrates care of the goal proclaimed, but fails to implement provisions to ensure the accomplishment thereof, it may be a case of good symbolic legislation. In fact, however, the problem is far more difficult, if only because it is hard to objectively determine what the legislator's attitude to the proclaimed goal is and to establish the motives that guided the members of the legislature.

Symbolic legislation – the kind that can be described as "bad" – is created to achieve various extra-legal objectives. At this point, we shall focus on two. First of all, laws can be used by members of the legislature (the parliamentary majority) as a means of demonstrating their strength and the ability to control the external world. This type of demonstration can be useful for calming down public opinion in crisis situations[3]. Alternatively, for merely increasing one's chance of success in the next election (van Klink 2016: 23). Indeed, voting for the "realisation" of noble ends can bring several political gains at minimum cost (Dwyer 1990: 233) – the ostensible nature of a reg-

[2] It appears that this is what Marek Smolak had in mind when explaining the concept of "imitative statutes", as illustrated by the example of Art. 2(3) of the so-called remedial enactment (Act of 22 December 2015 amending the Law on the Constitutional Tribunal, JoL of 2015, item 2217), which stipulates that the dates of hearings during which petitions are examined shall be appointed following the chronological order in which cases have been filed and received by the Constitutional Tribunal of Poland – starting from the oldest ones. The author believes that this type of provision could not have contributed to achieving the objective proclaimed by the legislature, namely streamlining the work of the Tribunal. At the same time, M. Smolak provides a number of arguments to demonstrate that enactment of imitative statutes is immoral. See. Smolak 2016.

[3] An exciting example of this type of provisions from the Polish legislative practice were §§ 4 and 5 laid down in Art. 25 of the Act of 6 June 1997 – the Criminal Code (currently Art. 231b of the Criminal Code), introduced as a reaction to the shocking murder of a police officer intervening to defend public property. According to Celina Nowak, this was an example of a "solution that guaranteed sentimental and emotional satisfaction" and, as explained by Włodzimierz Wróbel "(...) a response to a specific event causing social emotions. In most cases, these events have a special character, and proposals for legislative changes emerge even before the perpetrators are held to account by court. On the one hand, the enactment of new laws is supposed to demonstrate that politicians care for citizens' safety, and on the other one, it is a symbolic punishment of the offence by the legislator" (Wróbel 2009: 105-106).

ulation weakens the intensity of protests on the part of those addressees who could be affected by the effects of the new provisions. One case discussed in this context in literature is the American Clean Air Act. In this case, members of the Congress voted in favour of a regulation that was a message of unequivocal support for the protection of public health and natural environment and an expression of objection to "trading life for dollars". At the same time, however, they delegated the requirement to set the extremely restrictive and costly norms for emissions of air pollutants on an external entity – the governmental Environmental Protection Agency (Dwyer 1990: 237-239). According to J.P. Dwyer, these types of provisions should not be read literally, as if the Congress had actually required the Agency to draw up a strict list without regard to economic and social costs. Instead, the regulation was a general signal: on the one hand, to the general public, that the legislature is aware of the severe threat to public health and environment, and on the other one – to the EPA, so that the Agency would make a dedicated effort to achieve adequate supervision over the emissions of these substances (Dwyer 1990: 250).

The case referred to above also exhibits the second reason for the enactment of symbolic laws: confirmation of the value system defended by a particular group (van Klink 2016: 23)[4]. Here, the legislator expresses official approval for certain values but does not provide any real safeguards for the realisation thereof. This act of affirmation can, at the same time, be motivated by an attempt to take control over a crisis social situation or an attempt to increase one's election chances. It, therefore, does not have to be the case that the two motives for the enactment of bad symbolic legislation are disjunctive.

Why are symbolic laws viewed negatively? Unenforceable provisions can pose a threat to the authority of law (Niesiołowski 2017: 599). Indeed, if a certain legal institution is ineffective, this undermines social trust in the effectiveness of law as such, and if – for whatever reason – judges or government officials have to "enforce" provisions that are in their literal form unenforceable, they may be triggered into doing two sorts of things – both having negative consequences. First of all, a judge or government official may eschew issuing a decision or delay doing so, in the hope that the provisions will change in the meantime. Secondly, the law enforcement authority may attempt to creatively interpret the current symbolic provisions and assign them a more functional form (having little to do with their literal wording). The rewriting of provisions of law by law enforcement authorities certainly does not have a positive influence on the feeling of legal security of citizens. It can furthermore decrease the quality of public debate due to the judges of government officials concealing the true

[4] In a similar context, "symbolic crusades" such as the alcohol prohibition in the USA have been discussed by L.W. Koch and J.F. Galliher (Koch, Galliher 1993: 327). These crusades are supposed to symbolise the moral superiority of a lifestyle promoted by particular social groups; if these are reflected in the legislation, this will undoubtedly mean that the proposed lifestyle has been acknowledged and accepted by the legislator. Van Klink mentions the third reason behind the creation of this type of legislation, one that appears in some ways related to expressing affirmation for a system of values held by a specific group – resolution of conflicts between social groups or political parties. See van Klink 2016: 23.

motivations behind their actions (Dwyer 1990: 281-282). For how many law enforcement authorities will be ready to admit that they reject the literal meaning of a provision and use it to create a new legal norm (in a situation when law-making is not a competence vested in the law enforcement stage)?

As already mentioned, the science of law is also no stranger to more favourable views on symbolic legislation. Indeed, "symbolic" may apply to not only the absence of a "real meaning" of provisions of law, but also to provisions "symbolizing" something more important: the axiological choices of the legislator (van Klink 2016: 20-21). Good symbolic legislation may be a tool for raising the awareness of the existence of certain problems among citizens. It can also build ground for deep and lasting social changes. Here, the legislator abstains from issuing classic prohibitions backed up with severe sanctions. Instead, he creates regulations geared to changing behaviours not through fear-inducing rhetoric, but through raising awareness through debates and mutual interactions between sometimes radically different social groups (cf. van Klink 2016: 19-20). Such symbolic laws are so general in nature that they in fact merely establish the framework for further social discourse – understood as a debate that will take place at the stage of application of the law and not its creation. Vague terms (e.g. general clauses) intentionally used in such legislation have to be filled with content – what is more, the legislator allows the content to change as social beliefs do. Symbolic legislation thus becomes a "vocabulary that affects the way in which legal and political actors perceive reality. Reality is accessed through the concepts and distinctions provided by the law" (van Klink 2016: 25).

Good symbolic legislation can be treated as a way of determining the direction of a state's policy, and as a moral and educational impulse for both those who obey and break the law, through the determination of what constitutes a publically acceptable/unacceptable behaviour. This can lead to long-term changes in both the law and society, without having to resort (despite the absence of) to mechanisms for "enforcing" changes using sanction instruments (Baum 2011: 113). In this context, legislation means sending signals to society, showing that it is morally essential and considered legitimate by the legislator. It is, therefore, possible that it is not about whether this kind of legislation "works", but whether the process of law-making affects the social discourse (and thus constitutes a sort of signal that triggers the search for new collective solutions).

This does mean that the legislator, using a thus understood symbolic legal act, always declares values that without any doubt, should be considered as "noble". The implied, moral layer of legal acts can, in fact, be a tool for doing symbolic harm to social minorities. In this context, it is worth discussing a case from the British law concerning pre-implantation genetic diagnosis and in vitro fertilisation. The legislator determined therein that "healthy" embryos should always be picked for implantation before the "sick" ones, which followed from poorly-justified concerns that persons with a disability (e.g. deafness) could prefer to have children similar to themselves in this regard. According to J. L. Scully, the provision requiring that preference in each case be given to a "healthy" embryo is at the same time a message that the legislator considers a life with a disability (e.g. deafness) to be a poor quality life, which may

spark a vivid and legitimate outcry among many deaf people (Scully 2011: 206-207).

To recapitulate on what has been discussed herein so far, we should stress that the symbolism of law-making may have two different aspects. Firstly, there are no "hard" guarantees for the enforcement of the law; this aspect is common for both the "bad" and "good" symbolic legislation. Secondly – it is about being a vehicle for specific values. Given the explicitly stated sanction, nobody will consider the provision laid down in Art. 148 § 1 of the Polish Criminal Code[5] To be an example of symbolic legislation, although it undoubtedly constitutes an axiological declaration on the part of the legislator. The absence of typical mechanisms for the enforcement of obligations is, therefore, a requisite condition if one is to apply the notion analysed herein in the process of assessment of any regulation. However, it does not necessarily follow that if the first condition is met, and so is the second one – a provision symbolizes certain vital values – the provision in question will automatically merit being labelled as good symbolic legislation. In fact, it is far more complicated. It appears that the assessment of a specific law or provision will, on the one hand, depend on the values accepted by the person doing the assessment, and on the other one – on its practical effects (van Klink 2016: 27-32). A significant role in this regard can also be played by expectations as to what outcomes a regulation is supposed to bring[6].

It is not easy to determine whether we are dealing with bad or good symbolic legislation. This does not mean, however, that discussions on this cannot be based on empirically verifiable arguments. After all, one can predicate, with higher or lower probability, how the promulgation of a law affected the social awareness or whether the overly ambitious or pointless from the start attempt at the "realisation" of a specific objective by the legislator did not result in the deprivation of the allegedly affirmed values of any and all protection. It has to be noted that the assessment of an instance of legislation or provision will frequently depend on what its application in practice turns out to be like. Indeed, it is often the practice that determines whether an attempt on the part of the legislator will be considered as good or bad symbolic legislation, for practice can in many cases "revive" provisions intentionally created to play the role of "dead law" and conversely – practice can "kill" a law that was intended by the legislator to launch a debate on fundamental values.

To conclude this part of the analysis, it is worth pointing out that the concept of symbolic legislation is associated with another, historically older, construction, namely the *leges imperfectae*. Let us then briefly outline the essence of this type of legal

[5] Act of 6 June 1997 – The Criminal Code (uniform text JoL of 2018, item 1600, as amended). Pursuant to Art. 148 § 1 thereof, "Whoever kills a human being shall be subject to the penalty of deprivation of liberty for a minimum term of 8 years, the penalty of deprivation of liberty for 25 years or the penalty of deprivation of liberty for life".

[6] With reference to the US Congress ignoring the economic costs of air protection (the aforementioned Clean Air Act case), a proponent of environmental protection could argue that this was an instance of affirmative legislation, worthy of a public support of values. If these provisions triggered social debate and drew attention to the problem of emission of pollutants to the air, they could be conceived as good symbolic legislation. However, if the person doing the assessment expects the formulated prohibitions to be read literally, he is bound to view these types of provisions negatively.

solutions. When the *leges imperfectae* are described as norms without sanction, it is pointed out that the very term "legal sanction" is polysemous (…) taking into account the *leges imperfectae*; it is most appropriate to regard a legal sanction in its linguistic meaning, namely as a prognosis of negative consequences in the event of behaviours violating the law" (Niesiołowski 2017: 598). Where the legislator does not provide for such negative consequences, we can speak of *lex imperfecta*. When this is the case, we usually have to do with a conscious forgoing of a sanction: the legislator does not make a mistake, but instead consciously decides to forgo a sanction as "in certain spheres subject to legal regulation, establishing sanctions in provisions of law is, for various reasons, impossible, unnecessary, or not conducive to making the norms effective" (Jabłońska-Bonca 1984: 152)[7]. Irrespective of the above, the term *leges imperfectae* is not used with reference to norms which, although some sanction (understood literally) is provided for, are not – for various reasons – enforced in practice. Where this is the case, we rather speak of "dead law"[8]. Measures should be undertaken to eliminate such regulations from the legal system, as they pose a significant threat to its authority and lead to the formation of undesired attitudes (Niesiołowski 2017: 599). Seldom conducted, analyses of the *leges imperfectae* concentrate on an indication of conditions where these types of provisions can be deliberately and legitimately created by the legislator. It can, therefore, be presumed that if the *leges imperfectae* at the same time refer to specific fundamental values, they can resemble good symbolic legislation. Meanwhile, "dead law", when contrasted with the *leges imperfectae,* would bear a resemblance to negative symbolic legislation. The above, however, are merely ancillary observations, and the establishment of more exact relations between symbolic legislation, the *leges imperfectae* and other notions (such as soft law[9]) requires in-depth analyses, which goes beyond the framework of this article.

II. SYMBOLIC AND REAL LAYER OF THE PRINCIPLE OF DEREIFICATION

Legal acts that determine the status of animals often express loud axiological declarations that can be read as an expression of people's concerns as to the wellbeing of animals. Needless to say, this is most visible in those legal acts that establish animal protection for humanitarian reasons, and not e.g. due to their economic value. The most prominent example of such a declaration is the provision of Art. 1(1) of the Animal

[7] "(…) creation of legal norms in the form of the *leges imperfectae* can be rational. In constitutional law, safeguarding all norms laid down in the Constitution with a legal sanction can prove impossible, as in the case of the so-called programmatic norms. It is important in this regard to not that a major role in constitutional law is played by political sanctions. Meanwhile, in family and guardianship law, the establishment of legal sanctions many prove futile" (Niesiołowski 2017: 600).

[8] On the other hand, however, it is argued that it would be an overstatement to say that a provision without a sanction is a provision that the legislator failed to provide with effective enforcement mechanisms. As J. Jabłońska-Bonca has pointed out, the exact opposite is the case: the legislator should create such provisions only where he expects a norm to be useful even without sanction. See. Jabłońska-Bonca 1984: 164.

[9] More on this see e.g. Skuczyński (2008); Bańczyk (2016).

Protection Act[10], which expresses the so-called principle of dereification: "The animal, as a live creature, capable of suffering, is not a thing. Man should respect, protect, and care for it". What is essential, the declarations referred to above are expressed in the body of the text of legal acts, which highlights that they are intended to express binding rules of practice. The Polish law-making practice is familiar with preambles as those parts of legal acts that, on the one hand, make it possible for the legislator to present values he holds dear[11], and on the other one – that are not considered to be as binding as the body of the text[12]. This, even more, triggers questions as to the symbolic and "real" layer of provisions containing axiological declarations. Are these types of provisions effective in affecting the relations between humans and animals outside "the world postulated by the law"[13]? Do they actually improve the situation of animals, or are they merely a fig leaf, partly concealing human supremacy over animals?

The quoted above Art. 1(1) of the Animal Protection Act is a provision that can be seen as an attempt on the part of the legislator to re-establish relations between people and animals. It is worth noting that the placement of this provision in such a prominent section of the act – one intended as a "constitution"[14] For the legal status of animals at that – is indicative of the legislator's intention for the principle of dereification to be taken into account not just in the process of application of the Animal Protection Act and its secondary legislation but also all the other legal acts. The provision laid down in Art. 1(1) of the Animal Protection Act provides, in most general terms, a model for the treatment of animals that must be taken into account by courts and public administration authorities in the assessment of specific behaviours towards animals. The axiological weight of this provision is undeniable: in the value system of the legislator, it is unacceptable to treat living creatures, capable of suffering, in the same way as entities that do not have these attributes. Through this provision, the legislator furthermore expresses his moral disapproval of views that man's control over an animal is no different than his control over a thing. The legislator's position is clear: no animal[15] Is a thing, regardless of the extent to which it can feel

[10] Animal Protection Act of 21 August 1997 (uniform text JoL of 2019, item 122, as amended).

[11] Recent years have brought a renewed increase in the popularity of preambles in the Polish law-making – see e.g. the preamble to the Act of 16 November 2016 on the National Fiscal Administration (uniform text JoL of 2019, item 768, as amended), or the preamble to the Act of 15 September 2017 on the National Freedom Institute – Centre for the Development of Civil Society (uniform text JoL of 2018, item 1813).

[12] Opinions on the issue of a normative character of a preamble of a legal act is presented e.g. in Stefaniuk 2010.

[13] To use a term coined by M. Matczak (see Matczak 2019).

[14] The use of this term to denote a particular statute (or collection of statutes) of a critical importance for a specific scope of matters has also been on the rise in recent years. Examples include the "Constitution for Business" (https://www.gov.pl/web/przedsiebiorczosc-technologia/konstytucja-biznesu) or the "Constitution for Science" (https://konstytucjadlanauki.gov.pl).

[15] While the Animal Protection Act regulates the "treatment of vertebrate animals" (Art. 2(1), the principle of dereification can be applied more extensively, for it should be emphasized that the legislator in Art. 1(1) does not stipulate that only vertebrate animals are not things; furthermore, in the structure of the Animal Protection Act, this provision comes before a provision that limits the scope of application

suffering. As a side note, we could ask whether a man can assess these capabilities and decide what "pain and suffering threshold" is sufficient for an animal to be granted this special status (Goettel 2013: 46). It is worth noting that further in the act the legislator supplements provision of Art. 1(1) with the requirement of humane treatment of animals, understood as treatment that factors in an animal's needs and ensures that it receives care and protection[16].

The principle of dereification triggers theoretical-legal disputes as to its impact on animal rights. As Ewa Łętowska points out, "the point of the entire operation [dereification] depends on whether law enforcers are ready, eager, and sensitive enough to use this provision correctly (Łętowska 1997: 86). Art. 1(1) of the Animal Protection Act in itself does not require the public to give up exploitation of animals altogether in various fields. Instead, it constitutes a kind of agreement (or rather a public promise, for it is difficult in this case to speak of an agreement between two parties) that civilizes the way people behave towards animals (Pazdan 2012).

The traditional treatment of animals as things was connected e.g. with the fact that they were a subject of civil-law transactions. One may question whether putting an equation mark between animals and things were "a direct, consciously accepted philosophical-axiological consequence reflecting *the overall* attitude of people towards animals" (Łętowska 1997: 81). The elaboration of the principle of dereification was a confirmation of quite universal and well-established social tendencies that manifested themselves in the development of a positive attitude towards animals[17]. On the other hand, some authors view the introduction of Art. 1(1) of the Animal Protection Act as a revolutionary breaking point, radically revising the relations between people and animals. Nevertheless, Dorota Probucka cools down over-optimism and argues that the Animal Protection Act is just the beginning of a breakthrough and proof that legal protection of animals is insufficient and ultimately serves people's interests (Probucka 2015: 306).

It should be stated that the principle of dereification has all it takes to be considered as an example of good symbolic legislation. It is beyond any doubt that it expresses the legislator's affirmation for specific values – ones that, as it appears, are highly regarded by the society at that. At the same time, it is a very general provision that in itself does not establish any sanctions for its violation. Admittedly, deciding

of the Act. We believe it indicates that only the provisions of the Animal Protection Act that come later (starting from Art. 2) have a thus narrowed down subjective scope.

[16] Art. 5 in connection with Art. 4 point 2 of the Animal Protection Act.

[17] Its introduction into the Polish legal system meant copying positive legislative trends that had earlier appeared in the legislation of other European countries. For instance, Germany has a relatively long-standing tradition of regulating the legal status of animals. The National Socialist Law for the Protection of Animals (1933) remained in force after the World War II virtually unchanged. A new law was enacted as recently as 1972 and has remained in force to this day (Tierschutzgesetz). Dereification of animals was conducted through the introduction of Art. 90a, explicitly stating that animals are not things, to the German Civil Code (BGB) in 1990. However, the most significant change as regards humanitarian protection of animals was the introduction of animal protection into the German Basic Law (Grundgesetz) in 2002. The same was done in Austria, where Art. 285a was added to the ABGB (Nazar 2002: 129-130).

on whether an animal has been treated as a thing could prove to be a difficult challenge for both courts and public administration authorities. It is emphasized in the science of law that principles express values protected by the legislator and, by their very nature, are meant to be used jointly with other provisions, for instance, those that impose certain specific obligations. Therefore, the principle of dereification is predominantly a position that law enforcers must take into account while interpreting other provisions. This can lead to the adoption of those interpretive hypotheses that, to a more significant extent safeguard the wellbeing of an animal. At the same time, the wording of the principle is general enough to ensure an ongoing debate on what the assertion that an animal is not a thing means, and the convictions as to the scope of protection that must accordingly be awarded to an animal can evolve.

At the same time, it should be pointed out that the legislator expressly entrusted the interpretive community with leading the discussion on relations between people and animals. More specifically, in the provision laid down in Art. 1(2) of the Animal Protection Act, the legislator determined that in matter not provided for in the Act, provisions concerning things shall apply - subject to the provision that they should be applied "accordingly". As agreed in the theory of law for many years now (Nowacki 2003: 455-457), this means either direct application of specific provisions, with necessary modifications, not applying them at all. Which of the legal institutions applicable to things can be applied to animals, which ones require codification, and which ones cannot be applied at all, is to be decided by the interpretive community. As the legislator was not ready to resolve specific problems, he only created a general framework for the discussion that must proceed on an ongoing basis among both law enforcement authorities and citizens.

In the existing practice of application of law, the principle of dereification has found reflection in the legal protection of domestic animals. This symbolic declaration increasingly pervades into case-law, as exemplified by judgments where domestic animals were treated as *quasi* family members[18]. However, the legislator's declaration is of marginal importance when it comes to farm animals. For how can one reconcile the dereification of animals and the requirement for humanitarian treatment of animals with today's industrial breeding standards? After all, we are talking here about animals that spend their entire lives in captivity, kept in limited space, often without access to natural light, unable to satisfy their basic species-specific needs. We are talking here about separating animals from their mothers, beak trimming, castration without anaesthesia, or animals waiting in horror to be slaughtered. Although, as per the legislator's will, these animals, too, are not things, it is not easy to name significant differences between them and things. They are traded, are in an economic relationship with man, and this relationship determines their life (cf. Breczko 2013: 22). In this case, the principle of dereification has in fact been labelled as "legal fiction" (Probucka 2015: 306). The principal goal of the numerous regulations concerning farm animals is not to ensure they have right living conditions, but to safeguard agricultural production

[18] Judgment of the Regional Court in Krakow of 7 September 2017, II Ca 1111/17; Judgment of the Regional Court in Krakow of 22 November 2016, II Ca 1883/16.

and protect human life[19]. This is a sad, shameful, and often cruel face of the noble idea of dereification species other than human.

III. PROHIBITION ON TRANSPORTING AND KEEPING LIVE FISH WITHOUT WATER

In addition to the highly general principle of dereification, the Animal Protection Act introduces a number of obligatory modes of treatment, specified in great detail, protecting different aspects of the wellbeing of animals. In particular, this law prohibits animal abuse, understood as "inflicting or consciously permitting the infliction of pain and suffering"[20]. Violation of this prohibition constitutes an offence punishable by deprivation of liberty for up to 3 years[21], and if the perpetrator acts with particular cruelty – the penalty is between three months and five years of deprivation of liberty[22]. The legislator, most likely fearing a situation where courts would excessively strictly interpret the criteria of this prohibited act (and thus distort the idea of humanitarian protection of animals[23]), decided to use a detailed, but at the same non-exhaustive list of actions that must be considered as animal abuse. This can be indicative of the legislator's determination to enact "hard" guarantees for a minimum level of protection of animals against pain and suffering, independent of current convictions and social or individual interests. One of such exceptional cases of animal abuse has been named in Art. 6(2) point 18 of the Animal Protection Act – it is transport or keeping of live fish for sale without sufficient amounts of water to allow breathing[24]. Interestingly, at first glance, this prohibition appears to have significant potential in terms of affecting the reality – after all, we are talking here about an offence punishable by a severe penalty and at the same time one that is quite simple from the perspective of its detection and proving. While it is evident that doubts may arise as to how, in the light of the vague

[19] For instance, regulations concerning farm animals focused on the production of food (Chapter 3, Art. 12-14 of the Animal Protection Act, Chapter 10 [Animal slaughter, putting animals to death, controlling animal populations], Art. 33-34 of the Animal Protection Act; Act of 29 June 2007 on Animal Breeding and Reproduction (JoL of 2017, item 2132); Act of 22 July 2006 on Feed (JoL of 2019, item 269); Act of 10 December 2003 on Veterinary Control in Trade (JoL of 2019, item 475); Act of 29 January 2004 on Veterinary Inspection (JoL of 2018, item 1557); Act of 25 August 2006 on Food and Nutrition Safety (JoL of 2018, item 1541).

[20] Art. 6(1a) and 2 of the Animal Protection Act.

[21] Art. 35(1a) in connection with point (1) thereof.

[22] Art. 35(2) in connection with point (1a) thereof.

[23] Interestingly, the legislator did not use a similar technique with respect to the abuse of a person – as referred to in Art. 207 § 1 of the Act of 6 June 1997 – the Criminal Code (uniform code JoL of 2018, item 1600, as amended): whoever mentally or physically mistreats a person close to him, or another person being in a permanent or temporary state of dependence to the perpetrator, shall be subject to the penalty of deprivation of liberty for a term of between three months and five years. On the concept of "abuse" about animals and people (see Więckowska 2017: 156-160).

[24] The prohibition was introduced into the Animal Protection Act by an amendment that entered into force on 1 January 2012 (JoL of 2012, item 1373). Initially, its wording carried an obvious legislative error, for it prohibited the transport of keeping of live animals for sale without sufficient amounts of water to prevent breathing.

criterion of "without sufficient amounts of water to allow breathing", one should treat borderline cases, it appears, though, that in this regard one could rely on evidence from an opinion issued by experts.

The type of animal abuse discussed above obviously has its origins in the omnipresent in Poland retail sale of live carps during Christmastime. Carrying fish in plastic bags, without water, not only causes them stress due to taking them away from their natural environment but – most of all – causes them suffering due to difficulties breathing. This way of transporting may lead to a slow and painful death of fish as a result of suffocation. A similar assessment must be made of keeping excessive numbers of fish in barrels or fish tanks, prior to selling them to customers.

It should be pointed out that each year the Chief Veterinary Officer issues guidelines on how to treat live fish meant for retail sale. The document lays down "good practices" for the sale of live fish. The guidelines for the period 2012-2017 provided, among other things, that one of the acceptable methods for transporting fish is transport without water, provided that packing requirements are met. The packaging was supposed to allow gaseous exchange, which is possible when the packaging does not come into contact with the animal's skin (as is the case with plastic bags) or has elements that separate the animal's body from the surface of the packaging. Furthermore, the packaging cannot be closed (tied). Pursuant to the guidelines, these requirements are met by bags equipped with a ribbed container or properly perforated plastic inlay, placed around the body of the fish. Such methods for the transport of fish are nevertheless in contradiction to not just current knowledge on whether fish feel pain[25], but also to the wording of Art. 6(2) point 18, which expressly sets out the obligation to transport fish in a sufficient amount of water to allow breathing. The guidelines by the Chief Veterinary Officer undoubtedly largely contributed to the prohibition in question becoming a dead law. A document of this type is not a source of generally applicable law, and its interpretation should definitely not be in contradiction to the Act. However, these guidelines, through their wording and the fact that was endorsed by a central government authority, became a sort of excuse for large retail establishments, used to justify measures contravening the Animal Protection Act.

It is beyond any doubts that the prohibition of transport of live fish or keeping of live fish for sale without sufficient amounts of water to allow breathing has a symbolic value, especially if we consider how widespread it was prior to the introduction of the prohibition. In doing so, the legislator expressed his moral condemnation of these sorts of practices and equated them – in terms of the applicable penalty – with such acts as animal abandonment (especially abandonment of a dog or cat) by its owner, organisation of animal fights, or sexual intercourse with an animal[26]. At the same time, however, the real relevance of this prohibition was marginal although – as already mentioned – violations of these sorts of prohibitions do not seem difficult to detect and prove. In fact, it appears that the reason why the provision in question had little

[25] Opinion of the Museum and Institute of Zoology of the Polish Academy of Sciences of 15 March 2010 on the carp's ability to feel pain.

[26] Art. 6(2) point 11, 15 and 16 of the Animal Protection Act.

but symbolic significance was firstly prevalence of the issue and social acceptance of it, and secondly – the attitude of law enforcers. An extraordinary example of this sort of attitude was the guidelines by the Chief Veterinary Officer, which ignored the substance of the prohibition introduced by the legislator to safeguard particular economic interests. However, it seems that the provision discussed herein may actually gain real – not just symbolic – relevance, thanks to the judgment of the Supreme Court of 13 December 2016[27]. Therein, the Court considered that transport and keeping of carps without water constitutes animal abuse even though the acts had been committed before the legislator added the prohibition to the list of distinctive forms of animal abuse. Regardless of that, this kind of treatment of fish fulfils the general criteria of "inflicting or consciously permitting the infliction of pain and suffering".

A question that should be asked as regards the case above is whether the legislator from the very beginning strived to establish a merely symbolic provision (in the case of which penal sanction was only intended to strengthen the symbolic message), or whether the provision only becomes symbolic legislation in the process of application of the law. The requirement to provide live fish with the right transport and keeping conditions is not an excessive burden, impossible to carry out by business entities and customers. The sanction for failure to comply with the requirement is not impossible to enforce, either. Hence, it is rather a case where the provision was intended by its authors to have an actual and direct impact on the reality but transforms into symbolic regulation through the practice of application of the law. The creation of the prohibition referred to above had initially significant potential in terms of raising social awareness of the ability of live fish (carps in particular) to feel pain in an environment without water. However, the power of this message significantly decreased due to the official, expressly stated the position of a public authority, which makes it legitimate to speculate that perhaps the symbolic message may, too, have become "blurred" by now. Nevertheless, as already mentioned, this is not irreversible – the provisions referred to above can improve its actual relevance in the course of evolution of judicial decision-making practice.

IV. PROHIBITIONS CONCERNING ANIMAL TETHERING

Another requirement that can be analysed from the perspective of the concept of symbolic legislation has been laid down in Art. 9(2) of the Animal Protection Act. It stipulates that domestic animals must not be permanently tethered for more than 12 hours a day or in a way that causes bodily harm or pain and prevents necessary movement. The length of the tether must not be shorter than 3 metres. Violation of this requirement constitutes a misdemeanour subject to the penalty of the arrest of a fine of up to 5.000 zlotys[28]. In the symbolic layer, these provisions express the legislator's moral disapproval of improper tethering of domestic animals, which seems consistent with

[27] II KK 281/16.

[28] Art. 37(1) of the Animal Protection Act in connection with Art. 24 § 1 of the Act of 20 May 1971 – The Petty Offence Code (uniform text, JoL of 2019, item 821, as amended).

social assessment of this phenomenon[29]. As a side note, it should be added that no such condemnation was expressed by the legislator with respect to similar practices involving farm animals such as cows or horses.

From the perspective of humanitarian animal protection, the axiological declaration expressed in Art. 9(2) of the Animal Protection Act, deserves full support. At the same time, this provision *prima facie* establishes very precisely formulated conditions keeping domestic animals and is additionally safeguarded by a penal sanction – it can, therefore, be expected to shape the way people behave towards animals directly. In reality, however, the possibilities for its enforcement are so limited that is must be qualified as one of the dead provisions – at least inasmuch as it provides for a twelve-hour limit for animal tethering. Indeed, how can one verify this? To prove the commission of the misdemeanour, one would have to submit a video recording what was happening to an animal over this period of time, and the video would have to be over twelve hours long. Who, on what basis and using what funding should organise monitoring encompassing natural persons' backyards? The enforcement of this prohibition by public services appears impossible due to a shortage of human and financial resources; one can also hardly expect social organisations to carry out such supervision as unpaid volunteer work (aside from the issue of the legality of permanent observation and data collection). Thus, the prohibition of prolonged tethering of animals is unenforceable, and the legislator must have been aware of the factors referred to above. The legislator, then, must have known from the very beginning that the provision would have no actual impact on reality. In fact, the only relevant layer of this provision is its symbolic layer. Does this mean that it should be viewed negatively? Admittedly, provisions that only "threaten" with sanctions but in fact, cannot be effectively enforced potentially decrease the authority of law and can affect social obedience to norms. However, is it possible to ensure that animals are not tethered for extended periods of time in a manner other than through education and raising social awareness? It may be the case that over specific periods of time, symbols are the only tools the legislator has to influence reality.

V. SYMBOLIC BAN ON THE USE OF ANIMALS IN CIRCUSES

Another example of pro-animal measures worth discussing here is the increasingly issued bans on the organisation of circus shows with animals. The changes taking place in this sphere are so profound that they are likely to rebuild the foundations of our tradition. For decades, circuses using animals were totally acceptable and morally "safe". It was a commonly held belief that the circus was a right place for children, a place to see wild animals that love to show off their skills and potential. At that time, neither knowledge on animals nor knowledge on how they are trained for the circus was readily available – it only became shared with the society with the arrival of universal Internet access. In Poland, the objection to the use of animals in circus-

[29] According to CBOS research, Survey Report *Dobre zmiany w ochronie prawnej zwierząt [Positive changes in the legal protection of animals],* two-thirds of respondents (65%) are in favour of introducing a provision that would prohibit keeping dogs chained.

es is usually expressed through manifestations and Internet campaigns organized by non-governmental organisations[30]. Given the lack of activity on the part of the legislator in this regard[31], local authorities of some communes took the lead, with their respective mayors issuing relevant ordinances. It should be noted, though, that these laws do not provide for a total ban on the organisation of circus shows on the territory of the commune, for there are no legal grounds for that. These ordinances are bans on supporting or allowing the organisation of circus shows with animals, for the communes are trying to exercise their property and management rights as regards their own property and property owned by the State Treasury. A typical ordinance of this type consists of two elements: first of all – the obligation for city or town officials to not make the property available "for purposes related to the organisation and holding of travelling circus shows having in their programme (repertoire) animals", and secondly – the prohibition for officials to sell tickets to circus shows with animals and to promote them using municipal assets[32].

It should be noted at this point that these ordinances undoubtedly have potential to directly affect reality, for in many cases communes are owners and administrators of a considerable proportion of property situated within their administrative borders and in particular those intended for the organisation of mass events. Unfortunately, the prohibitions discussed here are assessed differently in case-law of administrative courts. While there are judgments where courts uphold communal bans on supporting the organisation of circus shows with animals[33], in an equal – or perhaps even larger – proportion of jurisprudence these ordinances are considered to be issued in breach of the law[34].

[30] In particular, the campaign and coalition „Animal-free circus": https://www.cyrkbezzwierzat.pl, https://www.otwarteklatki.pl/cyrk-bez-zwierzat/ (Retrieved August 3, 2019). One of the first campaigns against circuses in Poland was launched in 1991 by Gaja Club (see Furtak 2016).

[31] It is worth noting that the ban on the use of animals in circus shows was one of the proposals of a revolutionary deputy's bill amending the Animal Protection Act, submitted to the Sejm on 6 November 2017 (file no. MK-020-751/17). The same bill also provided for introduction of a ban on keeping animals for fur, which attracted exceptional attention from the public. The bill, submitted by MPs from the then-parliamentary majority and publicly endorsed by the Chairman of the Law and Justice party (at least with respect to the ban on fur farming – see https://www.youtube.com/watch?v=i8c1WtyWZkQ), caused a stormy public debate and elicited vivid protests from entrepreneurs, including circus owners. And while the bill has not been assigned a Sejm paper number to this date, which means that the actual legislative works are yet to commence, it should be stressed that in the self-amendment of 3 January 2019 (file no. MK-020-751(10)/17) the authors resigned from the most controversial proposals, including the ban on organisation of circus shows with animals.

[32] Ordinance no. 521/2018/P of the Mayor of Poznań of 16 July 2018, http://bip.poznan.pl/bip/zarzadzenia-prezydenta/521-2018-p,k,521-2018-P/ (Retrieved August 10, 2019).

[33] "(…), the Court cannot accept the argument of the petitioners that they were unlawfully excluded from potential lessees of municipal property (…) The contested ordinance did not reduce any rights of the petitioners as they were not entitled to any rights with respect to this property. The ordinance in question did not violate the freedom of economic activity carried out by the petitioners" – reads the final and binding judgment of the Voivodship Administrative Court in Gdańsk of 11 October 2016. See also the decision of the Supreme Administrative Court issued in this case on 5 April 2017, I OSK 27/17.

[34] "According to the Court ruling on the case, a local government unit's decision, taken in the form of an

The actual impact of bans on supporting the organisation of circus shows with animals is limited to the territory of a commune, or actually – to part of this territory, for it does not apply to property not owned or managed by the commune. Additionally, the real causative power of these bans can be lifted if the administrative court considers them illegal. What matters more than the real layer of these legal acts is, therefore, their symbolic layer. Through these acts, public administration authorities express their moral disapproval of the use of animals in circuses. What is more, the impact of this message can also transcend beyond the administrative borders of a commune – it appears that an official message issues by the authorities of Słupsk or Poznań can just as quickly stimulate discussion in Dębica or Nowa Sól, as evidenced by the growing number of similar prohibitions issued in other communes, encouraged by the regulations introduced earlier in other parts of the country[35].

It is difficult to determine whether the communes that were first to have introduced the ban on supporting the organisation of circus shows with animals merely intended to take some symbolic measures. Regardless of the original intentions, the symbolic layer appears to be the dominant one – especially in view of its potential to transcend administrative borders of a specific commune. The symbolic character of the ordinances will be particularly visible in the next local government units that decide to issue such laws despite knowing that administrative courts are not always well disposed towards such legislation.

VI. CONCLUDING REMARKS

The introduction of the Animal Protection Act into the Polish legal created a new situation where animals are protected due to their intrinsic value, and there is a requirement for their humane treatment in all spheres of life. It might seem as though the very enactment of the act was a significant step in humanitarian animal protection. In reality, however, the act is merely (or perhaps as much as) a confirmation of previously existing – which is not to say commonly acceptable – social, moral intuitions as to how animals should be treated. In particular, the act constitutes an attempt at defining certain necessary borders for our coexistence and determining acceptable ways and conditions of using animals for people's purposes, including economic and emotional ones. However, can provisions of the law themselves change the actual status of animals where one cannot resort to state compulsion? The society received an apparent signal from the legislator, but will this suffice? Can the legislator shape people's convictions in the right direction and change them without resorting to – adequate to

administrative act, that a specific group of entities whose activity, as the Court wishes to emphasise, is not prohibited by law, cannot apply for the possibility of concluding a communal property lease agreement, is in violation of the principle of freedom of economic activity, as laid down in the Constitution (...) and of the principle of equal treatment by public authorities" – reads the final and binding judgment of the Voivodship Administrative Court in Warsaw of 14 September 2016, I SA/Wa 604/16. See also the judgment of the Supreme Administrative Court issued in this case on 17 May 2017, I OSK 2937/16 and judgment of the Voivodship Administrative Court in Wrocław of 25 October 2016, II SA/Wr 372/16.

[35] These types of bans are already in force in over 30 Polish towns and cities; the updated map is available at www.cyrkbezzwierzat.pl (Retrieved August 12, 2019).

the aim – control and compulsion? The phenomenon of symbolic legislation ("good" symbolic legislation) appears to be indicative, at the very least, of the lawmakers' faith in their potential to influence the society in such a "soft" manner.

The examples analysed in the article were intended to show the vital role played by symbolic provisions in humanitarian protection of animals. In many cases, these provisions do not have a direct influence on the behaviours of their addressees and cannot forcefully impose certain practices. At the same time, they convey secure axiological messages that may indirectly affect social beliefs and convictions. The principle of dereification plays a central role in this regard. The provision laid down in Art. 1(1) of the Animal Protection Act does not impose any specific conduct; such conducts are, at most, a consequence of refining of the principle of dereification by the legislator in specific orders and prohibitions set forth further in the Animal Protection Act and other legal acts. The principle plays at least a threefold role, however: (1) emphasizes the intrinsic value of the life of each animal, (2) constitutes a particular model to which one should refer when interpreting detailed orders and prohibitions and (3) is an incentive for the community of law enforcers to continually think about the proper scope of humanitarian protection of animals – it opens discussion, gives it legitimacy, for example through the requirement to determine how to "respectively" apply provisions concerning things to animals. This will last until the legislator decides to otherwise, more precisely, determine the status of animals – after all, one could ask what they are, if they are no longer things and not yet entities.

It appears that the provision laid down in Art 1(1) of the Animal Protection Act, in the case of which the legislator consciously stopped at the symbolic layer and did not strive to give it any "real" character, Direct influence on how the addressees behave was supposed to be exerted by specific requirements and prohibitions established in the Animal Protection Act and other legal acts. However, in some cases, although specific conduct is indicated, it is impossible to issue adequate provisions for objective reasons. This can be due to factual restrictions, as in the case of the ban on keeping domestic animals tethered for over 12 hours, where the state apparatus does not have an adequate control mechanism. This may be a result of legal restrictions that, e.g. local governments trying to implement the ban on supporting the organisation of circus shows with animals are facing. In both cases, the fact that these provisions, indirectly at least, influence people's attitude towards animals and encourage self-reflection and discussion, should be recognised. What is interesting, it turns out that the symbolic dimension of legislation can be stronger than the real one, in that the power of the symbol is not confined by jurisdiction boundaries of the state or its administrative units.

In the last two cases, we have abstained from explicitly stating whether these provisions deserve to be labelled as good symbolic legislation. We see certain obstacles to that, for despite laudable goals and smaller or more significant social impact, these provisions can have a destructive influence on the perception of the law as such. In the case of keeping animals tethered, we are dealing with the establishment of an explicit penal sanction that will be perceived as an "empty threat". Meanwhile, in the case of the ban on supporting the organisation of circus shows with animals we can speak of

exceeding of official powers, i.e. violation of the law – albeit it is not yet known which line of interpretation will prevail in the case-law of administrative courts.

The absence of protection of live fish against keeping and transport without sufficient amounts of water should be viewed negatively although the legislator explicitly prohibited this on pain of a considerable sanction – much higher than in the case of improper tethering of a domestic animal. What is more, it is difficult to see any actual restrictions to the enforcement of this ban. It, therefore, seems that the legislator did not intend to enact a provision deprived of the real layer – instead, the provision lost this layer in the practice of its application. Fortunately, the scale of activity on the part of non-governmental organisations in the period before Christmas and the consistency of such measures are clear signals that the provision will "be brought back to life" and will no longer be an example suitable for analysis using the concept of symbolic legislation.

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RE-EVALUATION OF ANIMAL PROTECTION BY THE FINNISH ANIMAL RIGHTS LAWYERS SOCIETY

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ABSTRACT: The recognition of animals as sentient beings in the Treaty on the Functioning of the European Union (TFEU) gave rise to expectations as to real concern and care for animal welfare and a balance of human-animal interests. However, both the EU-legislation and the Finnish animal protection legislation is based on an animal welfare paradigm, meaning that animals have a weak legal status compared to humans that makes it impossible to de facto balance human and animal needs and interests in an effective manner from an animal point of view. The weak legal status of animals in the hierarchy of norms in the Finnish legal system contributes to the continuation of the oppression and exploitation of animals. The Finnish Animal Rights Lawyers Society have therefore made a proposal to strengthen animals' legal status by including animals in the Finnish Constitution (FC) by safeguarding animals' certain fundamental rights, thereby providing tools for balancing of human-animals interests. This article focuses on the re-evaluation of animal protection from an animal and constitutional point of view.
KEYWORDS: human-animal interests, animal law, animal's fundamental rights, re-evaluation of animal protection

1. THE FINNISH LEGAL SYSTEM AND SOURCES OF LAW IN RELATION TO ANIMALS

The main questions in this article are how animals'[1] Legal status and protection from

[1] "Animals" refers to all other species than humans, *homo sapiens*, in other words to nonhumans. The article

harmful human impact can be strengthened in law and how we can move towards a more respectful and balanced coexistence between humans and nonhumans. The recognition of animals as sentient beings in the Treaty on the Functioning of the European Union (TFEU) gave rise to expectations as to genuine concern and care for animal welfare and a balance of human-animal interests. However, both EU legislation and Finnish animal protection legislation are based on an animal welfare paradigm that it is acceptable to use animals for human purposes as long as we treat them well and do not impose unnecessary suffering on them (more precisely about the welfare paradigm in Francione & Garner 2010). This in itself, however, limits what is possible to achieve in terms of the law for the protection of animals, as I will explore further in this article.

In accordance with the hierarchy of norms and Finland's membership of the European Union (EU) since 1995, Finland's national legislation and interpretation of the laws concerning animal protection have been bound by EU treaties and the animal protection legislation of the EU. The content of Article 13 in the TFEU demands that since animals are sentient beings, both the Union and the Member States shall in formulating and implementing the Union's agriculture, fisheries, transport, internal market, research, technological development and space policies, take fully into account the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States (MS) relating in particular to religious rites, cultural traditions and regional heritage[2]. Considering that animals are also classified as "agricultural products" within the TFEU[3] And that animal welfare is not one of the objectives of the Union set out in the Treaty on European Union (TEU) Articles 2–3[4], the notion of "sentient beings" and the requirement to "pay full regard

includes mainly animals that are used in food production.

[2] Consolidated version of the Treaty on the Functioning of the European Union, OJ C 202, 7.6.2016, p. 1–388 (EN).

[3] TFEU Article 38.

[4] Article 2: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail." Article 3: "1. The Union's aim is to promote peace, its values and the well-being of its peoples. 2. The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime. 3. The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance. It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child. It shall promote economic, social and territorial cohesion, and solidarity among Member States. It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced. 4. The Union shall establish an economic and monetary union whose currency is the euro. 5. In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute

to" in relation to the MS legislative and administrative provisions and customs, the content seems primarily to be a justification for the conventional use of animals for human purposes (See in further detail the complex set of questions the TFEU gives raise to in Sowery 2018:55).

According to the Finnish Constitution (FC 731/1999) Chapter 8, Sections 94 and 96, the Parliament's approval is required for treaties and other international obligations that contains provisions of a legislative nature. The Parliament considers the proposals for acts, agreements and other measures that are to be decided in the EU. An Act of Parliament is adopted once Parliament has approved a government bill for the act and the President of the Republic signs the law to come into force[5]. The authorisation to issue Decrees has to be given in the FC, or in another Act, to the President of the Republic, the Government or a Ministry.[6] The principles governing the rights and obligations of private individuals and other matters that under the FC are of a legislative nature shall, however, be governed by an Act.

There is no Constitutional Court in Finland, but the Parliament's Constitutional Law Committee shall issue statements on the constitutionality of legislative proposals as well as on their relation to international human rights treaties and other international commitments[7].

It is stated in the Constitution that Decrees or other statutes of a lower level than an Act shall not be inconsistent with the FC or another Act. In such a case, the courts or any other public authority shall not apply them[8]. In matters where the application of an Act would be in evident conflict with the FC, the courts have to give primacy to the provision in the FC[9]. Additionally, according to the Code of Judicial Procedure (4/1704), Section 11, "A judge shall carefully examine the true purpose and grounds for the law and render judgment accordingly, and not as he or she pleases, against the law. In the absence of statutory law, the custom of the land, if not unreasonable, shall also be his or her guide in rendering judgment".

The sources of law are classified into groups according to their degree of binding force and position in the hierarchy of legal sources. The status of the sources is divided into authoritative and substantive sources of law (justification). The hierarchy of national statutes is categorised from strongly binding sources of law to permitted sources of law as follows:

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to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter. 6. The Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties." Consolidated version of the Treaty on European Union. OJ C 202, 7.6.2016: 13–388.

[5] FC Chapter 6, Section 77.

[6] FC Chapter 6, Section 80. If there is not an authorization, the Decree has so be given by the Government.

[7] FC Chapter 6, Section 74.

[8] FC Chapter 10, Section 107.

[9] FC Chapter 10, Section 106. Note that this obligation concerns only courts, not other authorities.

Strongly binding/Authoritative sources: European Union (EU) law and the Finnish Constitution, Act (Act of Parliament), Decree, Decision of the Council of Ministers, Decision of a Ministry, other authoritative instructions (based on an Act), i.e. written law. Established custom is a strong binding source of law as substantive justification (substantive source of law).

Weakly binding/Substantive sources: Court decisions, Travaux Préparatoires (Government Bills).

Permitted: Jurisprudence (official justification), general principles of law (substantive justification), factual arguments (substantive justification), and morality (substantive justification) (Pöyhönen 2002:24-30).

The essence of the hierarchy of norms is that a lower-level statute can only be given based on a provision on a higher-level statute. An interpreter can decline from following the prevailing law when a provision in a national statute of the lower level is in conflict with a higher-lever provision, or when a provision in a national statute is in conflict with a supranational provision[10]. In practice, it is rare for national or supranational provisions to be in direct conflict. It is more common than the national interpreter must choose the alternative that is most in harmony with the provisions in the supranational legislation (Pöyhönen 2002:27).

Depending on the legal context in question, animals in the legal system are considered as:

(a) *legal objects* that are protected by laying some welfare requirements on humans, i.e. animals do not have fundamental, subjective rights as humans (natural persons) or rights as legal persons, but have to be taken care of and be protected by humans to a certain degree[11] (the welfarist approach);

(b) *property* as in the context of property law, meaning, for example, that a property owner has a right to sell, give away or euthanise an animal (the property);[12]

(c) *things* as referred to in the Finnish Trade Code as things that can be borrowed or rented. "who borrows something from the other, without breath or living, give it back as good as it was. […]"[13]. Concern such as renting "horses, wagons and

[10] A third option is that a provision has fallen into desuetude. However, its significance is nearly non-existent in practice.

[11] Note that Kurki points out that animals already are holders of certain rights (as 'animal persons') because of humans decire to protect them from suffering by law (the legal safeguards that are designated as rights), but these are not fundamental rights. The outcome depends on the incidents the rights are endowed with (Kurki 2017).

[12] In divorce situations, animals are considered as property and dealt with accordingly based on the Marriage Act 234/1929, the Sale of Goods Act 355/1987, the Act on Certain Joint Ownership Relationships 180/1958, the Act on the Dissolution of the Household of Cohibiting 26/2011 and the Animal Protection Act 247/1996.

[13] Finnish Trade Code 3/1734, Chapter 11, Section 1.

boats" are assimilated in the code[14].

Furthermore, "wild animals"[15] are placed in a different legal position from other animals, one can argue, by the recognition of the intrinsic value of nature, which wildlife is part of, as recognised in the Government Bill to the Finnish Constitution (GBFC), Section 20. However, this recognition is not written into Section 20 and is thereby not authoritative and influential binding concerning the sources of law. Nevertheless, species can be protected, and the public can be addressed with requirements under the Nature Conservation Act (1096/1996), and administrative coercive measures can be taken against individuals who violate the Animal Protection Act (APA 247/1996), which applies to all animals. In that respect, wildlife has, at least theoretically, a stronger legal status in Finnish law than other animals. However, environmental regulations do not generally focus on animals as sentient beings (or animal individuals), but on the species.

Since the current Constitution entered into force in 2000, constitutional anchoring has been strengthened in ordinary law and in the interpretation of the law in Finland. Thus, on what level in the hierarchy of norms, the provisions are legislated upon is substantial for the outcome. This is particularly important to bear in mind with regard to the possibilities to balance human-nonhuman interests according to the law.

Fundamental human rights are legislated in the EU at the primary law level[16] and in Finland in the Finnish Constitution[17], the protection of animals is legislated in the EU at both the primary[18] and secondary[19] law levels, while in Finland only at an ordinary

[14] Finnish Trade Code Chapter 13, Section 13(4). In the Construction Code is also laid down the provisions on how to keep animals and how to keep them from doing damage. Finnish Construction Code 2/1734 Chapter 9, 11, 12, 21 and 22. Note that these are ancient provisions, but still in force.

[15] Meaning animals living in nature without interference or help from humans.

[16] Charter of Fundamental Rights of the European Union, OJ C 202, 7.6.2016, p. 391–407.

[17] FC Chapter 2.

[18] TFEU Article 13. However, note the content of the article which from an animal perspective is quite meaningless.

[19] Regulations: Council Regulation (EC) No 1099/2009 of 24 September 2009 on the protection of animals at the time of killing, OJ L 303, 18.11.2009, p. 1–30; Regulation (EC) No 1523/2007 of the European Parliament and of the Council of 11 December 2007 banning the placing on the market and the import to, or export from, the Community of cat and dog fur, and products containing such fur, OJ L 343, 27.12.2007, p. 1–4 (the ordinance protects cats and dogs indirectly); Council Regulation (EC) No 1/2005 of 22 December 2004 on the protection of animals during transport and related operations and amending Directives 64/432/EEC and 93/119/EC and Regulation (EC) No 1255/97, OJ L 3, 5.1.2005, p. 1–44. Directives: Directive 2010/63/EU of the European Parliament and of the Council of 22 September 2010 on the protection of animals used for scientific purposes, OJ L 276, 20.10.2010, p. 33–79; Council Directive 2007/43/EC of 28 June 2007 laying down minimum rules for the protection of chickens kept for meat production, OJ L 182, 12.7.2007, p. 19–28; Council Directive 2008/119/EC of 18 December 2008 laying down minimum standards for the protection of calves, OJ L 10, 15.1.2009, p. 7–13; Council Directive 2008/120/EC of 18 December 2008 laying down minimum standards for the protection of pigs, OJ L 47, 18.2.2009, p. 5–13; Council Directive 1999/74/EC of 19 July 1999 laying down minimum standards for the protection of laying hens, OJ L 203, 3.8.1999, p. 53–57; Council Directive 1999/22/EC of 29 March 1999 relating to the keeping of wild animals in zoos, OJ L 94, 9.4.1999, p. 24–26; Council Directive 98/58/EC of 20 July 1998 concerning the protection of animals kept for farming purposes, OJ

law level (i.e. an Act of Parliament)[20]. In the light of the hierarchy of norms and the content of Article 13 in the TFEU and TEU Article 3–4 as points of reference for animal protection legislation in Finland (and in the EU), it is actually impossible in legal terms to *de facto* balance human and animal needs and interests in an effective manner by significantly taking into account also the animal perspective, i.e. animals' needs and interests (In detail Sowery 2018). This combined with the lack of statutes concerning animals in the Finnish Constitution together with the traditional understanding of animals mainly as objects, products, protected by an anthropocentric view, ensures the superiority of humans in relation to other sentient beings in both legal and practical terms.

Thus, at the same time as more statutes than ever are in force with the aim to protect animals[21], it is nevertheless legal that every year millions of animals are bred, raised, kept, killed and slaughtered by human unnecessarily for human survival additionally to the detriment of nature. Specifically farm animals are excessively exploited by humans; for instance, in Finland alone, 79 475 404 animals, i.e. sentient beings (cattle, pigs, poultry, sheep, goats and horses) were slaughtered in 2018[22], also mean-

L 221, 8.8.1998, p. 23–27.

[20] Three (3) acts are in force protecting animals in a direct way in Finland: Animal Protection Act 247/1996, Animal Transportation Act 1429/2006 and Animal Protection During Experimentation Act 497/2013 (the translations are not official). Furthermore there is seventeen (17) decrees in force for the protection of animals (given on the basis of an authorisation given in the acts mentioned): Government Decree on the Protection of Sheep 587/2010, Government Decree on the Protection of Goats 589/2010, Government Decree on the Protection of Farmed Deer 590/2010, Government Decree on the Protection of Pigs 629/2012, Government Decree on the Protection of Bovine Animals 592/2010, Government Decree on the Protection of Ostriches 676/2010, Government Decree on the Protection of Chickens 673/2010, Government Decree on the Protection of Dogs, Cats and Other Small Pet Animals 674/2010, Government Decree on the Protection of Horses 588/2010, Government Decree on the Protection of Farmed Bison 591/2010, Government Decree on the Protection of Fur Animals 1084/2011, Government Decree on the Protection of Ducks and Geese 675/2010, Government Decree on the Protection of Turkeys 677/2010, Government Decree on the conservation of farmed fish 812/2010, Government Decree on the Protection of Chickens 375/2011, Ministry Decree on Prohibition of Use of Dogs in Animal Competitions or Display that have Undergone an Alteration to the Appearance 1070/2000, Ministry decree on Animal Welfare Requirements for the Holding of Animals in a Zoo and in Permanent Animal Exhibition 2/EEO/2003. There is also three (3) binding decisions by the Ministry of Agriculture and Forestry of Finland: Animal protection requirements for the slaughter of animals 23 / EEO / 1997, Animal protection requirements for the killing of farm animals of mammalian and bird species 18/EEO/96,

Animals Protection in a Circus and Other Comparative Exhibition 22 / EEO / 96. Note that the translations of the names are not official All the animal protection legislation can be found on the Ministry of Agriculture and Forestry of Finland's webpage: https://mmm.fi/lainsaadanto/elaimet-elintarvikkeet-ja--terveys/lainsaadanto/f-rekisteri (only in Finnish) and by ordinance number at www.finlex.fi (the acts in English).

[21] "Nature" in its extensive meaning including the context of "environment" and "climate" (In detail IUCN Annual Report 2018, Rojas-Downing et.al. 2017:16: 145–163, Isomäki 2016, Gerten et.al. 2015:348(6240), Bailey et.al. 2014, Scarborough et.al. 2014:125:179–192, Koneswaran et.al. 2008:116(5): 578–582).

[22] Natural Resources Institute Finland's (Luke) webpage: http://statdb.luke.fi/PXWeb/pxweb/en/LUKE/LUKE__02%20Maatalous__04%20Tuotanto__06%20Lihantuotanto/02_Lihantuotanto_teurastamoissa_v.px/table/tableViewLayout1/?rxid=a7659b81-5c13-4105-b63e-037f817a31e1. Retrieved February 2019. Fish are

ing an industry which is impacting our universal nature negatively. Furthermore, the use, breeding and trading of "companion animals" (also called "pet animals") have increased every year[23], as well as – I would dare to claim – the suffering caused to these animals by human impact, for instance, by breeding and trading. This is not to overlook the harm that hunting cause to animals' possibility to live and to the eco-balance of nature.[24]

If life itself is considered as fundamentally valuable to sentient beings, and oppression and exploitation as forms of violence against them, it is clear merely from these numbers that the aim of animal protection law is not fulfilled from an animal perspective. By this, I am not claiming that all co-existence between humans and animals is characterised by oppression and exploitation, but I claim that the oppression and exploitation of animals we are witnessing today is an inevitable outcome of current animal protection legislation. This is due to the weak constitutional basis of the protection of animals combined with the legislation based on the animal welfare paradigm, i.e. an anthropocentric animal protection legislation[25]

2. THE OBJECTIVE OF THE FINNISH ANIMAL PROTECTION LAW

When reviewing the content of the animal protection legislation, the lack of legal consistency and justification for the use of animals for human purposes is apparent. The grade of protection that is targeted at an animal depends on: 1) the human interest and context in which the animal or species in question is used, i.e. a pig on a farm can legally be caused pain and have a much more restricted life compared to a pig living as a "companion". It is, for example, legal on a farm to castrate a piglet younger than eight days without any painkilling medicine or anaesthesia[26]; 2) the effectiveness for humans of the action in question, e.g. to keep sows in farrowing crates where they cannot move other than to lie down or stand up and take one step backwards and

not counted as individuals but as kg/person. In 2017 the consumption of fish was 13,9 kg/person. Luke: http://statdb.luke.fi/PXWeb/pxweb/en/LUKE/LUKE__06%20Kala%20ja%20riista__06%20Muut__02%20Kalan%20kulutus/2_Kalankulutus.px/table/tableViewLayout2/?rxid=9fbe13f2-4b82-4e42-bb9c-76c551b27c91. Retrieved February 2019.

[23] According to the Statistic Finland, 35 % of the households had a pet animal in 2016 (latest statistic): http://tilastokeskus.fi/til/ktutk/2016/ktutk_2016_2016-11-03_tie_001_en.html?ad=notify. Retrieved February 2019.

It is reasonable to assume that the number of households keeping animals has increased during the past years. In the U.S., the companion animal industry is the seventh-largest retail industry (Hessler et al. 2017:xxxi).

[24] According to the latest hunting legislation raccoon dogs, minks, aphids, junkies and raccoons can be caught all year round from June 2019, even during the spring, which is usually forbidden due to ethical reasons. Government Decree on the Management of the Risks of Alien Species 704/2019.

[25] Also called animal welfare legislation in some countries. See the overview of the current laws on Global Animal Law Project's webpage: https://www.globalanimallaw.org/database/national/index.html. Retrieved February 2019.

[26] The Finnish Animal Protection Decree 396/1996, Section 23(5). Furthermore, the starting point for a pig on a farm is that it will be slaughtered contrary to the pig as a companion.

forwards, which are generally illegal actions in keeping animals, but legal on farms to make "production" effective[27]; and 3) the jurisdiction in which the action takes place, e.g. a person who owns a mouse cannot legally cause the mouse pain with a needle, but the same person can go to work as a researcher and legally use a needle on a mouse in a laboratory[28].

Apart from the Preamble (10) to the Directive 2010/63 on the protection of animals used for scientific purposes, where it is stated that "While it is desirable to replace the use of live animals in procedures by other methods not entailing the use of live animals, the use of live animals continues to be necessary to protect human and animal health and the environment", there is no criterion of necessity laid down in EU or Finnish animal protection legislation for the use of animals. In other words, the use and level of protection depending on the human context. One may question if the different contextual outcomes that cause animal suffering or significantly limit animals' living conditions or possibilities, i.e. the reality in which several animals live under human control, are supported by science-based knowledge concerning animals that the animal protection laws are supposed to be based on[29]. It is common knowledge

[27] The Government Decree on the Protection of Pigs 629/2012, Section 3. Note that there are some time limits for the action. However, sows live most of their lives in these crates. Farmers usually justify the use of crates by claiming that it is for the protection of the piglets. Nevertheless, the death of piglets by suffocation under the sow is avoidable by offering more space and possibility for the sow to build a proper nest OR by the best option from an animal perspective, with no 'production' of pigs.

[28] Animal Protection Act 247/1996, Article 12 (2): "An animal may not be injured or treated in a violent manner. […]", and the Directive 2010/63/EU of the European Parliament and of the Council of 22 September 2010 on the protection of animals used for scientific purposes, OJ L 276, 20.10.2010, p. 33–79: Chapter 1, Article 1(5): "This Directive shall not apply to the following: […] (f) practices not likely to cause pain, suffering, distress or lasting harm equivalent to, or higher than, that caused by the introduction of a needle in accordance with good veterinary practice."

[29] However, also the current aim to have a science-based animal protection legislation has an anthropocentric goal expressed, e.g. in the European Parliament resolution of 26 November 2015 on a new animal welfare strategy for 2016-2020 (2015/2957(RSP)) as follows: „A. whereas EU legislation in the field of animal welfare contributes to a level playing field within the Union and thereby to a well-functioning internal market; […] C. whereas national rules on animal welfare must not be contrary to the principles of the EU single market; […] E. whereas, owing to their complexity and differing interpretations, EU and national rules on animal welfare create legal uncertainty and can put producers in the certain Member States at a serious competitive disadvantage; […] G. whereas animal welfare should be further improved on the basis of prevailing scientific findings and with due regard for the efficiency and competitiveness of agricultural livestock husbandry; whereas coherent animal welfare standards across the EU would benefit from a definition of good animal husbandry; […] 3. Calls on the Commission to ensure an updated, comprehensive and clear legislative framework which fully implements the requirements of Article 13 of the TFEU; reiterates, however, that under no circumstances must animal welfare levels be lowered on account of administrative simplification; stresses that these objectives are not mutually exclusive; 4. Stresses that Article 13 of the TFEU is of general application and horizontal, and as such is as important as the provisions on agriculture, the environment or consumer protection; […] 13. Recalls that producers are overburdened with administrative requirements and that, in the continued search for administrative simplification, this European strategy should not further increase the existing burden; stresses the need to ensure stability and predictability of investments in the sector, while ensuring fair competition internationally; […]" *OJ C 366, 27.10.2017, p. 149–150.*

today that humans cause many animals severe suffering unnecessarily for our own survival or good quality of life.

The objective of the Finnish Animal Protection Act, Section 1, is to protect animals from distress, pain and suffering in the best possible way and to promote the welfare and proper treatment of animals. However, in Section 3 of the APA concerning the general principles of keeping animals, the prohibition to inflict suffering, distress or pain on animals is limited to *undue* suffering, pain and distress[30]. Concerning the objective to promote animal welfare, the same provision requires that animals' physiological and behavioural needs must be taken into account in the keeping of animals, in other words, both in the legislation based on the Act and in the application of the law. Yet, this does not mean that animals' needs, not to mention rights, have to be satisfied or that their interests have to be balanced with human interests. Nor is it necessary to justify the use of animals for human purposes in the law. It is taken as a given that humans can use animals and inflict severe suffering on them according to the law, even though it is not explicitly expressed this way in the provisions.

Since 2010, an overall reform of the legislation concerning animal protection has been in progress in Finland. In the Government Bill to the new Animal Welfare Act (GB 154/2018)[31], the objective of the Act is phrased as follows: "to promote animal welfare and to protect animals in the best possible way from harm to their welfare. The aim is also to increase respect for animals and ethical treatment". As a general principle and responsibility, it is required that "animals must be treated well and be respected. It is prohibited to inflict undue pain or to suffer on animals, or to jeopardise animal welfare"[32].

Compared to the objective of the APA in force, the objective of the new act, as written in the GB, is rhetorical and does not appear to represent fundamental changes in the protection of animals or in society concerning the use of animals. Both the current and the suggested objectives illustrate an animal welfare paradigm that aims to make the use of animals for human purposes more "humane" and ensures a continuation of the anthropocentric regulation. Therefore, the proposed objective, in combination with animals' weaker status in relation to humans and humans' fundamental rights, is that there are no fundamental changes to be expected from the law reform. It should be borne in mind that the objective of the law is significant also for the provisions issued by Decrees because an interpreter may not overrule the purpose of the law in the interpretation of the applicable provisions *in cas*[33].

[30] "(1) Animals must be treated well, and no undue distress may be caused to them. Inflicting undue pain and distress on animals is prohibited. In addition, maintaining the health of animals must be promoted in keeping animals, and the physiological and behavioural needs of the animals must be taken into account.

(2) Further provisions as to what is to be considered as inflicting undue distress, pain and suffering on animals may be issued by Decree." APA, Section 3.

[31] Note that the Act is not yet in force.

[32] Note that the translations are unofficial.

[33] The European Court of Justice (ECJ) has determined that the interpretation of applied provisions in casu shall not lead to such an outcome that the objective is nullified. See, e.g. C-300/05, C-455/06, C-491/06, C-416/07. For

It is entirely possible for humans to co-exist with other animals in a respectful manner. This meaning an existence in non-violence where different needs and interests are *de facto* balanced in conflict situations for the benefit of both humans and animals (and nature which we have in common). A respectful coexistence requires a possibility to *de facto* balance human and animal needs and interests by law. An establishment of effective legal tools for balancing of these interests requires in turn that animals' legal status is stronger in relation to humans. The instrumentalised and anthropocentric approach towards animals in law only determines the poor level of protection granted to animals in reality.

However, the ongoing reform in Finland does not include the establishment of animals' fundamental rights in the FC, which would significantly change the legal status of animals in relation to humans. Such a constitutional amendment would have a significant impact on the content of the entire animal protection legislation and on the interpretation and application of the written law made by the courts and other authorities. It would also force every human being to re-evaluate their relationship to animals and the use of animals for human purposes. In the following chapter, I will introduce the legal tools provided by the Finnish Animal Rights Lawyers Society for this purpose.

3. SAFEGUARDING CONSTITUTIONAL RIGHTS TO ANIMALS

Because there appears to be no indication that the basis of animals' legal status nor the content of the animal protection legislation would be significantly developed from an animal perspective by the animal protection/welfare law reform, a group of lawyers and legal scholars – the Finnish Animal Rights Lawyers Society, have written a proposal to include animals in the FC by safeguarding certain fundamental rights for animals.[34] The proposal re-evaluates the current protection of animals with a focus on the legal status of animals and animals' fundamental rights.

The proposal for the fundamental rights of animals is divided into five sections: Section 1 concerns general terms of animal protection (four subsections); Section 2 deals with safeguarding fundamental animal rights (two subsections), whilst, Section 3 focuses on the fundamental rights of wild animals (two subsections); Section 4 examines the fundamental rights of animals dependent on human care (five subsections), and Section 5 is a prohibition on animal breeding. In this paper, only the main content of the rationale is presented.[35] The chapter division in the paper follows the article division in the proposal.

general comments about the interpretations made by the ECJ in animal protection cases (see also Wahlberg 2011, available only in Swedish).

[34] The proposal is made by *Wahlberg, Birgitta*, Dr.Soc.Sc (public law), university teacher at Åbo Akademi University (President) & *Kurki, AJ Visa*, J.D., researcher at the University of Helsinki (Vice-President) & *Pirilä, Susanna,* LL.M. (Secretary) & *Koskela, Tarja,* J.D., university lecturer at the University of Eastern Finland (Member of the Board) & *Jäntti, Albert,* law student at the University of Helsinki and *Kanninen, Roope,* law student at the University of Lapland.

[35] See the whole proposal and its rationale (translation from the original Finnish version) on the Finnish Animal Rights Lawyers Society's homepage: https://www.elaintenvuoro.fi/#english. Retrieved April 2019.

3.1. General terms on animal protection

According to Article 13 in the TFEU, in the proposal Section 1, *subsection 1*, animals are recognised as sentient beings. Sentient beings are individuals, and a sentient individual has intrinsic value. Sentience is defined as a capability for experiencing positive and negative emotions. However, it is currently not possible to make a precise distinction between sentient and insentient species, especially in assessing the sentience of invertebrate species. The delimitation of sentient and insentient species is continually changing, and thus, when determining individual sentience in practice, a *Principle of Precaution* has to be applied for the benefit of the animal. According to the precautionary principle, all animals are considered sentient unless there is evidence to the contrary.

Furthermore, respect for animal sentience entails that the self-understanding or cognitive capacities, or incapacities, of animals are irrelevant with regard to the protection of animals. Humans must protect a sentient being for its own sake as an individual. However, the capacities of an animal affect the intensity and variety of its experiences. This, in turn, is of relevance when assessing the optimal interests of the animal according to the best scientific understanding and knowledge. Thereby, the lack of scientific certainty cannot be an excuse for neglecting the fundamental animal rights.

Perhaps the essential requirement in the proposal is that, according to Section 1, *subsection 2:* the interests of animals and their individual needs must be taken into account in all public and private activities that have a significant impact on animals' living conditions or possibilities.[36] An activity will substantially affect the living conditions or possibilities of an animal if it affects the fulfilment of the animal's fundamental rights granted under Sections 3–5 in the proposal. Among other issues, the special status of an animal means that there is an obligation to take into account its individual qualities in all decision-making. The fulfilment of species-specific needs alone does not suffice. According to subsection 1, the resolution of matters concerning an animal must be based on available scientific information on animal welfare and also, if possible, available information on the animal's individual needs and habits.

According to *subsection 3*, animals have legal standing before the authorities and in the courts. Legal representatives shall be authorised by an Act to speak on the animal's behalf. Such a representative shall be heard in legal proceedings that concern the animal's rights or interests, and he or she may appeal the decision on the animal's behalf. The animal's owner may represent the animal if the interests of the animal and the owner do not conflict. This kind of arrangement is not unusual in Finnish law. Under certain conditions, registered associations and foundations have the right to appeal against authority decisions under the Nature Conservation Act (1096/1996), the Environmental Protection Act (527/2014), the Water Act (587/2011) and the Waste Act (646/2011).

[36] This idea is based on the argumentation presented by Pietrzykowski in 2018 on why animals' interests should be taken into account in all decision-making. In the proposal, the word 'living conditions' refers to animals dependent on human care and the word 'living possibilities' to wild animals.

Ensuring the fundamental rights, welfare and protection of animals is the responsibility of every one according to *subsection 4*. Similar to Article 20 of the FC (Chap. 2), which states that nature is the responsibility of everyone, this responsibility lies with public authorities as well as natural persons and legal persons. This means that everyone has a specific duty according to the FC to treat animals in accordance with the fundamental rights of animals and the animal welfare regulations. This duty applies to both animals dependent on human care as well as wild animals and does not depend on who the owner of the animal is, or whether the animal is owned by anyone. By providing that this responsibility belongs to everyone, it is also emphasised that the animal protection pursuant to Section 1 calls for extensive cooperation between the various authorities and other parties.

The aim is for a balanced assessment of the interests of humans and other animals. The responsibility for animals includes caring for the typical living environment and respecting all sentient individuals that live there with due regard for their fundamental rights. This responsibility includes both the promotion of animal welfare and the elimination and prevention of suffering. The contribution of an individual person to the protection of animals and the assurance of animal rights may take the form of actively pursuing or passively refraining from actions that infringe upon animal rights. Although animals' fundamental rights and the rights of human beings are not the same, they shall be equivalent as a starting point when weighed against each other.

3. 2. Safeguarding fundamental animal rights

Section 2, *subsection 1,* stipulates explicitly that public authorities must safeguard fundamental rights for every animal within their jurisdiction. This corresponds to the obligation of public authorities to safeguard the fundamental human rights stipulated in Section 22 of the FC. Such safeguarding means a constitutional mandate to develop legislation concerning animals and other initiatives to bring animal rights and interests to the attention of the public and to work towards realising them, i.e. to develop a society in a way that a respectful coexistence between humans and animals is factually possible. The public authorities have to create such conditions whereby the rights are also protected against single violation. Public authorities must refrain from infringing upon fundamental animal rights.

Subsection 2 determines that the fundamental rights of animals can only be restricted if it is necessary to protect the fundamental rights of people or animals (*Principle of Necessity*). The principle of necessity also covers the right to life proposed under Section 3 (1) of the fundamental rights of wild animals' respectively and Section 4 (1) of the fundamental rights of animals in need of human care. An animal can only be killed if it is necessary and if there are no other reasonable means to protect humans, animals or a particular species or the environment. The killing of an animal must be carried out in the manner prescribed by law, that does not cause unnecessary suffering to the animal.

When setting restrictions, the essential content of the rights must be respected, and the restrictions must be as limited as possible to the objective pursued (*Principle*

of Proportionality). However, exceptional circumstances may justify a broader restriction, as for example in a general emergency, but even in such a case, the restrictions should be kept to a minimum and be removed by law as soon as possible.

Furthermore, the restrictions on the fundamental rights of animals must be regulated by law. The requirement of law-making implies a prohibition on delegating the power to restrict fundamental rights to a lower level than an Act.

3. 3. Fundamental rights of wild animals

The rights provided in Section 3 of the proposal apply to wild animals. "A wild animal" means an animal that lives independently of humans in a natural habitat. This article also applies to animals that have adapted to life in a human-made environment, e.g. cities, but that are not dependent on human care.

According to *subsection 1*, wild animals have the right to live in freedom and in their natural habitat. Three rights are guaranteed in this section: the right to life, the right to live in freedom and the right to natural habitat.

In general, it is forbidden to keep wild animals in a domestic setting. However, temporary capture is allowed to provide medical care for an animal or for other acceptable reasons. However, an animal kept for the purpose of providing temporary medical care, or for some other acceptable temporary necessity, must be released into the wild when its condition allows for this, assuming it can re-adjust to life in the wild without any difficulties[37].

The right to life is closely connected to the other rights protected under this subsection since the right to freedom and the right to natural habitat also protect life. The right to life protects the animal from the deprivation of life both by killing and by causing the destruction of its living possibilities. Obviously, the right to life does not protect the animal from destruction and suffering occurring in nature.

The right to freedom includes the right to engage in the animal's natural behaviour freely, the right to move freely and choose its location in the environment, and the right to bodily integrity. Bodily integrity presumes the right of the animal to be secure against actions that could cause bodily harm. However, this right does not exclude the resettling of an animal to a more suitable environment if the coexistence of humans and animals in the same area is impossible in practice.

The right to live in its natural habitat protects the animal from such interferences with the habitat that will result in a decrease in the animal's chances to survive or will render those chances non-existent. This right takes precedence in situations where measures aimed at changing the environment would if implemented, endanger the conditions for the welfare or life of an animal. Because the habitat requirements of animals can vary greatly, the right to live in their natural habitat must be examined in the context of the needs of the species and of the individual animal. Certain species require particular living conditions, while others will thrive in a variety of habitats.

[37] If the animal requires permanent care and this can be arranged without infringing upon its fundamental rights, the animal is considered as belonging to the category of animals listed in Section 4 of the proposal.

The *second subsection* of Section 3 provides that efforts must be made to help a sick, injured or otherwise incapacitated wild animal. However, if the animal is in such a condition that keeping it alive would clearly be cruel, the animal must be euthanised in compliance with the demands provided in an Act. In assessing apparent cruelty, the animal's overall condition and its prospects for future life must be taken into account in addition to its suffering.

3. 4. Fundamental rights of animals dependent on human care

The rights provided in Section 4 apply to animals that are dependent on human care. The owner or caretaker of the animal is not absolved of their responsibility towards the animal that is dependent on their care by releasing the animal into the wild, unless the release is a solution justified by its benefit to the animal. Such situations may, for example, occur in conjunction with animals released after medical care, as noted in a previous paragraph in this paper.

According to *subsection 1*, animals have the right to life and to express natural behaviours and to have their basic needs fulfilled. These rights are closely interlinked with the other rights stipulated by this section. The right to life has two dimensions. Firstly, an animal has the right not to be deprived of its life intentionally or negligently. Secondly, the right to life entails the duty to secure by active measures for the animal the conditions for its life. Such measures include preventive animal protection and health care.

Natural behaviour means the behaviour that the animal is strongly motivated to engage in and that this engagement reduces the motivation for the said behaviour[38]. In other words, the animal's need to behave in a certain way is reduced to the satisfaction of the animal. Natural behaviours vary between different animal species. However, the main behavioural characteristics include, in all cases, movement and physical activity, grooming, exploration and feeding behaviours, playing, care and species-specific rest activities (such as hens need to sleep on a perch). The right to exhibit natural behaviours also entails, depending on the animal species, the right to live alone or with other members of the species.

Care, as a behavioural need, involves both taking care of another and being cared for. It involves the right of an animal to care for its offspring and the right of the offspring to be cared for. The right to natural behaviour also includes the behaviours that are necessary for the animal only in certain situations or stages of life, such as a calf's need to suckle or a sow's need to nest before farrowing. The right to natural behaviour shall be evaluated both from the perspective of the species and of the individual animal.

Fulfilling the animal's basic needs means ensuring the rights stipulated in Section 4 so that the animal may fulfil its needs independently or with the help of a human activity. Human activity means, for example, walking a dog so that the animal can engage in exercise and relieve itself outside. Fulfilling the rights stipulated in this sec-

[38] This definition is made by the emeritus professor in veterinary medicine Bo Algers in Sweden (Algers 1990 and 2008).

tion also means measures designed to prevent disordered behaviour and suffering in animals. According to the proposal, those measures shall be specified in an Act.

According to *subsection 2*, an animal has the right to experience and express positive emotions, as well as the right to be protected from fear, pain, distress and suffering caused by humans. This subsection mainly stipulates the rights relating to animals' range of experiences and stipulates both negative and positive obligations on humans. A person shall refrain from measures that cause suffering or other negative emotions to an animal. At the same time, active attention shall be paid to the fulfilment of the right to natural behaviour stipulated in *subsection* one by allowing the animal to experience and express positive emotions.

According to *subsection 3,* an animal has the right to suitable food and drink in sufficient amounts that are necessary for its welfare and for preserving its health. The energy and food requirements of individual animals depend on the species, age, animal premises, air temperature, physical condition of the animal and the energy expenditure of the animal at a given time. A sufficient amount of food also means that the animal can experience satiety. The caretaker of the animal is responsible for meeting its nutritional needs and for the suitability of the food provided to promote the health and welfare of the animal in question. The food shall be provided in a manner that enables the animal to eat in a natural posture. The animal has the right to decide when to eat according to its individual needs. The animal must not be overfed on purpose or due to negligence so that the animal's welfare or health is adversely affected by excess weight. An animal species must also not be bred in such a manner that its need to eat detrimentally affects the animal's wellbeing or health, leading for instance to obesity or constant hunger. If such a breed has already been produced, the breed may not be sustained by producing new members. Animal breeding and the prohibition of breeding are explicitly regulated in Section 5 of the proposal.

Access to water is a fundamental physiological need of an animal. The water provided for the animal must be of good quality, sufficient in quantity and made accessible so that the animal can drink without difficulty. The animal has the right to decide when to drink according to its individual needs. Therefore, water must be always available if it is not justified otherwise for veterinary medicine reasons. Supplying the animal with frozen water is not in compliance with the right to drink provided in this section.

According to *subsection 4*, an animal has the right to an appropriate living environment, including shelter and a rest area. The living environment must be sufficiently spacious, well lit, clean, safe and also appropriate concerning the needs of the animal and the species. In assessing the appropriateness of the living environment, the other rights guaranteed by Section 4 must be taken into account. For example, when assessing sufficient spaciousness of the living environment, the right to the natural behaviour guaranteed in *subsection* one must also be taken into account. Furthermore, an animal has the right to shelter, for example, from adverse weather conditions. The temperature of the shelter must be suitable for the animal's welfare. Therefore, in a hot environment, access to shade or a cooler area must be granted. To fulfil the animal's need for rest, there must be a rest area included in the living environment. The

qualities of the rest area must meet the needs of the animal and therefore be sufficiently large, clean and dry.

According to *subsection 5,* an animal has the right to receive appropriate medical care without delay. However, an animal has the right to be euthanised if it is in such a condition that keeping it alive is cruel. The rationale of Section 3, *subsection 2,* stipulates a respective right with regard to wild animals. The responsibility for continuing appropriate treatment on the premises after the veterinary or other medical care is completed to the caretaker. The animal must also be guaranteed peace and a chance to recover after treatment.

To summarise Section 4, the aim is to create the solid legal ground, as comprehensively as possible, for the balancing of different interests in human-animal relations *de facto*.

3. 5. The prohibition of animal breeding

The fifth section pertains to animal breeding. In animal breeding, the starting point should always be the best interests of the animal. Hence, breeding must not cause harm to the welfare or health of animals.

Thus, Section 5 requires that only physically and psychologically healthy animals may be used for breeding. It is prohibited to use for breeding animals that will suffer or might suffer physical or psychological harm as a result. An animal may not be inseminated or made to inseminate other animals against its will. This prohibition applies to both male and female animals.

As one can note, this section does not prohibit all breeding of animals. *The Finnish Animal Rights Lawyers Society* working group discussed the topic profoundly and comprehensively and concluded that, if the breeding is carried out respecting the requirements and rights stipulated in the proposal, it may be helpful for the health and welfare of animals under certain circumstances. Regulating the matter at the constitutional level gives it the gravity needed at the current time. The primary understanding and the goal to strive for is, however, that humans do not breed animals at all for human purposes in the future.

4. FINAL REMARKS: FUNDAMENTAL ANIMAL RIGHTS AS NORMATIVE RESPONSES TO OPPRESSION AND EXPLOITATION

In 1993, Catharine McKinnon wrote about human rights as a normative paradigm, that "(…) behind all law is someone's story – someone whose blood, if you read closely, leaks through the lines" (MacKinnon 1993:84). Concerning the oppression and exploitation of animals, we do not even have to read between the lines to see the blood leaking out. It is present everywhere in society (and in the state of the Earth).

To be oppressed is to be subjected to the unjust or cruel exercise of power or authority (Winston 2007:287). In human rights law, the oppressed are defined by Morton Winston "as an especially powerless and vulnerable class of persons because they are subject to forces that are beyond their control that deny them the ability to pro-

tect their most basic interests" (Winston 2007:287). He characterises oppression as consisting of three elements: 1) it relies on an assortment of different practices that together function to create the systematic nature of oppression; 2) the objects of systematic oppression are necessarily unable to rescue themselves from their situation; and 3) objects of systematic oppression are oppressed because of a group identity (Winston 2007:287–288). For instance, women are oppressed *qua* women; animals are oppressed *qua* animals.

The definition of the systematic nature of oppression is also well suited to the characterisation of the current systematised oppression and exploitation of animals. This means that: 1) the welfare paradigm as the basis for animal protection/welfare legislation makes legal and maintains the systematic exploitation of animals, 2) animals cannot help themselves out of systematic exploitation and oppression by humans, and 3) animals are exploited by humans because they are *animals* and thereby subordinated (by) humans. In other words, animals are subjected to human power as a given. As such, also current animal protection legislation is both a response and an outcome of that oppression, and at the same time a prerequisite for the continuation of the systematic exploitation, that, for instance, conventional farming[39] of animals reflects.

An example within the EU of legal oppression and exploitation of animals is the practice of transporting (exporting) live animals within the EU and from the EU to third countries. It is well documented that there are severe welfare problems and severe suffering caused to billions of animals annually during transport[40] regardless of Council Regulation (EC) No 1/2005 on the protection of animals during transport and the several judgements made by the Court of Justice of the European Union (ECJ) concerning the enforcement of the law, stating that the interpretation of a specific provision should not make the aim of the statute in question meaningless[41]. However, even with stricter animal welfare legislation based on a welfare paradigm and effective enforcement, the negative impact on animals would be significant. Notably, in this case, because animal suffering is inherent, especially in long-distance transport and also because the transport takes the animal to the endpoint of its life (unnecessarily for example of human survival). In general, this is because the anthropocentric basis of the legislation (the welfare paradigm) substantially restricts the lawmaker and the interpreter of the animal protection legislation. As noted already earlier in the paper, the content of Article 13 in the TFEU and animals' weak legal status about

[39] Including the transportation and slaughter of animals.

[40] The Parliament of European Union: Animal welfare: Parliament wants better protection for transported animals: http://www.europarl.europa.eu/news/en/headlines/society/20190206STO25113/animal-transport-parliament-wants-better-protection. Published February 2019. Retrieved April 2019.

[41] Find all the judgements by the ECJ concerning the transportation of animals here: https://eur-lex.europa.eu/search.html?typeOfCourtStatus=COURT_JUSTICE&DB_TYPE_COURT=COURT_JUSTICE&textScope0=ti-te&qid=1561987559036&DB_TYPE_OF_ACT=judgment&DTS_DOM=EU_LAW&typeOfActStatus=JUDGMENT&type=advanced&lang=en&andText0=animal%20transport&SUBDOM_INIT=EU_CASE_LAW&DTS_SUBDOM=EU_CASE_LAW and the Animal Angels reports on live transports of animals: https://www.animals-angels.de/en/publications/documentations.html (especially the report on the Myth of Enforcement).

humans makes, the outcome inevitable and maintain the instrumentalised approach towards other sentient beings. Therefore, it is equally undeniable that, changes in legislation that are based on the welfare paradigm cannot lead to significant changes in human-nonhuman coexistence. To bring about that kind of change, fundamental and re-evaluative normative responses are needed to strengthen the legal status of animals in relation to humans and, most importantly, to change human behaviour and attitudes towards animals.

The protection of life itself and the safeguarding of the fundamental interests and rights of sentient beings should not be dependent on the species in question or on the self-righteous supremacy of humans. As the history of human rights shows, legislation on fundamental rights has been the foundation of change, a normative response by society to end oppression and exploitation (Winston 2007:286), and so too will the fundamental rights of animals be in the future.

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THE GROWING REALITY OF LEGAL RIGHTS FOR COMPANION ANIMALS

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ABSTRACT: Over the past decade, the fifty state legislatures of the United States have been adopting legislation for the benefit of the group of animals known as companion animals (pets). When considered together as a set, these laws create an initial set of legal rights for that group of animals. To explore that conclusion, the definition of a legal right and the particular statutes, such as new divorce laws, are considered.
KEYWORDS: animal rights, animal interest, companion animals, victims, trust, divorce

INTRODUCTION

Many of the articles in this esteemed publication use the phrase "animal rights". Nearly everyone writing for this publication and reading the articles are in favor of animal rights. However, my forty years of experience in this field suggest that most people do not actually know what the phrase means in the world of law, or how the animals will get them, or how it would affect specific animals.

In the European Union and other civil law countries considerable energy has been spent in establishing, as a first order of action, the creation of a new legal category for animals (Giménez-Candela 2018:28-47). While this is all very good, it does not by itself create any new legal rights in animals. In the U.S. we have the valiant efforts of the Nonhuman Rights Project seeking to establish that a chimpanzee or elephant is a legal person under the common law cause of action known as habeas corpus. However, to date, it has not been fully successful[1].

One key misperception held by many is that a set of "rights" will be granted to all animals in one sweeping statement of legislation. This is actually highly unlikely. The

[1] Nonhuman Rights Project, Inc., on Behalf of Tommy, v. Lavery, 124 A.D.3d 148 (S. Ct, 3rd Dept. NY, 2014); Matter of Nonhuman Rights Project, Inc. v Lavery, 31 N.Y.3d 1054, 100 N.E.3d 846 (2018).

world is too complex with too many human economic and cultural issues in conflict to resolve all the animal issues with one law. The nature of our law creation process is piecemeal, by topic. Legal rights arise for various communities or species of animals. Those in commercial food facilities are treated differently from those who live with us, and from those used in entertainment. For the following discussion, the focus will be solely on "Companion Animals", as they are the group of animals who presently are receiving legal rights in the United States. Their presence and importance in the core of the family is now recognized by various legislatures (for full discussion of the science of the importance of companion animals to the humans who have them, see Favre and Dickinson 2017).

When discussing animals in the legal context, it is often suggested that animals are property, things, and thus cannot be legal persons; that is, they do not possess that legal characteristics known as personhood (Personhood does not refer to individual humans, but to those entities that have legal rights within our system, such as cities and corporations). This is a false dichotomy, suggesting that if you are a thing, property, you cannot hold a legal right. While this has been true historically, it is not true today. Some animals, in some countries, are accumulating some legal rights. It is only the lack of legal imagination that limits the acknowledgment that some dogs in the United States presently possess a few legal rights. To acknowledge this possibility requires the dismissal of the precept that property cannot have legal rights. Rights may be allocated to property if deemed appropriate by the lawmakers of that society[2]. Companion animals may be owned by humans, but nevertheless, possess legal rights assertible within the legal system. The presence of dogs within the intimate family is the driver of this new political and legal reality. Of course, cats are also important within a family, but dogs seem to be the driving species.

The line between property and legal rights holders has always been a bit fuzzy (law not philosophy). Human beings themselves have wanders over and back across that line. What is often forgotten today is that humans have often been considered property and yet also have limited rights. In the historical common law system, wives, as well as children, were considered the property of the husband. It has taken centuries for women to become the legal equal of men. For example, receiving the right to hold title to property, or vote, or the right to be a lawyer, or to be admitted into major public universities. While it is no longer the case that children are considered the property of the parents, there is still great discretion, power, that the parent has over the child. The legal rights of a human fetus are clearly at issue today (Walen 2005).

The prior examples all involved human beings, and the reach over the property line to bring in non-human animals into the circle of legal right holders is a wider step. However, it is not impossible. This is because, like all humans, all animals (drawing a line at vertebrate animals for this discussion) have "interests" which can come into conflict with human interests. The interests include: access to food and water, the ability to exercise the genetically provided capabilities of an animal (wings, claws and

[2] In 2014 New Zealand signed a treaty with the Maori people that recognized that the Whanganui river has the rights of a legal person (Boyd 2017, chap. 8).

sense of smell, for example), to reproduce, and of course, to live, which requires a place to live.

It will be the case that claims for animals' rights will conflict with the interests of some humans. Is it not the purpose of the legal system to resolve conflicting interests? (Pound 1959: 103) While these conflicts in interests have always existed, it is in today's small family environment, combined with a more elastic definition of family, that society is giving more weight to the animal interests, particularly companion animals. For companion animals, the transition from mere personal property to living property (Favre 2010), with a status more like children, is underway.

Before considering the specific examples set out below, there must be a clear context by which to judge presence of a legal right. Rights in the world of philosophy are part of an eternal debate, opinions tossed back and forth and there is no ultimate decider of who is right about rights. For the law there is the reality of the judge who must say yes or no; there is an appropriate claim of legal rights before the court or there is not. The judge makes two different judgements. First, is the 'being' knocking on the door of the courtroom capable of holding any rights? Assuming the first is satisfied, then the second question is whether the being before the court possesses the right asserted. In a 2018 federal case, the 9th Cir. Court of Appeals (a court just below the U.S. Supreme Court) held that while the macaque Naruto had the capacity to hold a legal right, the federal Copyright Act did not extend the legal protections of the Act to primates[3].

ANIMALS AS VICTIMS OF CRIMES

As with all areas of law, animals are initially, historically, seen as property. One recent case suggests that the status of animals within the criminal legal system are moving into a new phase. This deals with a fundamental conceptual view of what is an animal, simple property or individuals, acknowledged as such. For example, if someone breaks into a home, and destroyed some furniture and perhaps a computer, the personal property is lumped together, and it would be considered one crime for purposes of sentencing a guilty defendant. In 2018, the Oregon Supreme Court had the issue come before them in the context of the sentencing a defendant, where the state wanted 11 counts of violation of the cruelty law, one count for each animal that has been harmed by the defendant[4]. The defendant claimed the actions merited only one count and therefore he should receive a lesser sentence of jail time. The Court held that each animal was a victim and therefore that the charge of eleven counts was correct. This is the first time a high court has allowed an animal the status of a victim in the context of human criminal law.

REPRESENTATION

On the other side of the country, another new step exists for dogs and cats caught

[3] Naruto v. Slater, 888 F.3rd 418 (9th Cir. 2018).

[4] Oregon v. Crow, 294 Or. App. 88 (2018).

up in criminal proceeding against human actors. It is now customary to provide an opportunity for the human victim of a crime to have a voice in the proceedings, particularly at the sentencing stage. What happens when the victim is an animal? For dogs and cats, being members of that special class of companion animals, this is now happening in the state of Connecticut. Under a 2017 law,[5] the court may appoint an attorney or a law student to aid the court in a criminal anti-cruelty proceeding. Law students at the University of Connecticut are actively taking advantage of this power and being appointed to help in a number of cases.

EXTRA PROTECTION FOR COMPANION ANIMALS

The legal system has long provided protection for animals against intentional acts of cruelty and the unnecessary infliction of pain and suffering. The introduction of aggravated animal cruelty legislation has been among the more significant recent changes. The State of Illinois, for instance, adopted a special provision under the title *Aggravated Cruelty* as follows: 'No person may intentionally commit an act that causes a companion animal to suffer serious injury or death'[6]. Liability under general animal cruelty law provisions are usually qualified by or conditioned on various factors such as 'unnecessary', 'knowingly' and 'cruelly'. The language from the Illinois statute is, however, without qualification. Therefore, if, while driving a car in Illinois, a person intentionally runs over a cat or, alternatively, a raccoon, both acts would be a crime. However, hitting the cat would be a much more serious crime[7].

ANIMAL ABUSER REGISTRY

Another example of the criminal law providing increasing consideration to the importance of animals is the creation of an Animal Abuser Registry. These state registries parallel the registries for those who have been convicted of sex abuse crimes. For example, see the provision from the Tennessee Animal Abuser Registration Act adopted by Tennessee in 2015[8]. The Registry is a public internet database with the name, addresses and animal crimes of defendants[9].

TRUST AND WILL

It is now accepted in all fifty U.S. States that pet trust, the setting aside a sum of cash for the care of companion animals, can be created in a personal will or as a freestanding trust[10]. Again, the pet is in almost the same legal status as that of a child. The courts have the power to force the trustee to abide by the conditions of the trust for the benefit of the animals named in the trust.

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[5] Conn. G. Stat. Anno. § 54-86n.

[6] 510 Ill. Comp. Stat. 70 §3.02(a).

[7] Also see, Tenn. Code Ann. §39-14-212.

[8] Tenn. Code Ann. Sec. 40-39-103.

[9] See: https://www.tn.gov/tbi/tennessee-animal-abuse-registry.html.

[10] Unif. Trust Code § 408, Unif. Law Comm'n 2000.

COMPANION ANIMALS IN HOT CARS

In 2018 Louisiana enacted a law that grants immunity to Good Samaritans who forcibly enter a motor vehicle to save minors (children), or dogs and cats in distress[11]. Under Louisiana law, there is no liability on the part of a person for property damage or trespass to a motor vehicle, if the damage is caused while the person was rescuing a minor or an animal in distress. Note that nearly identical statutory language exists for both human children, and dogs and cats. Over a dozen states have passes such laws[12].

RESTRAINING ORDERS

Companion animals have legal visibility when the courts' grant personal restraining orders, normally to protect one spouse from confronting the other. In the fall of 2016, the State of Alaska modified existing divorce law to allow victims of domestic violence to seek an order for protection of property including "a pet, regardless of … ownership"[13]. The new provisions also allow a court, in the context of a protection order request, to order the payment of funds by the named party for not only support for the adult victim and minor children, but, also for pets in the care of the petitioner[14]. In this context, a companion animal receives protections similar to those of a child. By the end of 2016, thirty-two states had protective order provisions that included animals (Wisch 2019).

DIVORCE

Until 2017, in all fifty states, the divorce laws did not distinguish a dog or cat from other personal property during the judicial division of property. In that year, Alaska was the first state to adopt a new provision for companion animals, followed shortly thereafter by Illinois and California. The Alaska law allows the relevant court to make specific provision in a final divorce judgment: "for the ownership or joint ownership of the animal, taking into consideration *the well-being of the animal* (Emphasis added.)"[15]. This statute clearly acknowledges that animals have interests independent of those of the spouses and that those interests deserve consideration by the legal system when a divorce proceeding impacts the animal. In 2019, New Hampshire adopted a law with slightly different language: "taking into consideration the animals' wellbeing"[16]. Note that exactly which interest of the companion animal, and how to weigh the interests,

[11] http://www.legis.la.gov/legis/ViewDocument.aspx?d=1101104.

[12] For more detailed information on these laws, please visit the comparative law table on the topic at https://www.animallaw.info/topic/table-state-laws-protect-animals-left-parked-vehicles.

[13] Alaska Stat. §18.66.100(c)(10) 2016.

[14] Alaska Stat. §18.66.100(c)(12) (2016).

[15] Alaska Stat. §25.24.160(a)(5) (2016). Also see, 750 Illinois Codified Stat. 5/501 – 503; Calif. Family Code § 2605.

[16] State Of New Hampshire, "An Act relative to property settlement including animals." HB 361 2019 SESSION (19-0820).

are not provided for in any of these statutes. No cases have been decided under any of these new laws.

REMOVAL OF AN ANIMAL FROM A HOME

Another parallel between the legal protection of companion animals and children manifests when the state seeks the removal of the animal from the household to protect the animal from the risk of future harm. If the owner of an animal is charged with a criminal violation of state anti-cruelty law, perhaps beating an animal or failing to provide adequate care for an animal, then even before the criminal charges are decided, the state may seek the removal of the animal from the defendant's control with a forfeiture action[17].

JOINING THE FAMILY ON A DINNER NIGHT OUT

In 2018, Ohio joined 10 other states that have laws allowing restaurants to maintain 'dog friendly' patios[18]. The new law provides a "retail food establishment or food service operation" the ability to allow dogs in outdoor dining areas provided they met some modest requirements. These laws suggest, again, that the public is increasing accepting that companion animals are part of the intimate family, and that they be extended the privileges joining their family when the humans are out on the town for dinner.

CONCLUSION

All of the above legislation occurred without anyone mentioning 'animal rights', rather, it was the perceived as right thing to do by the elected legislators, to protect and acknowledge these new important members of the human family. These quiet steps forward have arisen in the naturally political process of the States of the United States. Humans with concerns about the companion animals they live with convince legislators to do the right thing. If you want to obtain legal rights for animals, a strong focus on family and criminal law is the place to start. Being property while having a presence in the legal system is clearly possible. The question for the future is how far this should go, and when and how will it apply to other categories of animals.

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[17] For example, see Mich. Comp. Laws Anno. § 750.50(3).

[18] The bill amends section 3717.05 of the Ohio code and enacts section 3717.14 of the Revised Code.

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ANIMAL LAW: ETHICS, SOCIETY AND CONSTITUTIONS

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ABSTRACT: The paper discusses and criticizes views on various aspects of the situations of animals within human societies offered by authors presenting at the seminar held at the Research Centre for Public Policy and Regulatory Governance. They include legal, ethical as well as socio-psychological problems about animal welfare and the attempts to improve the conditions in which animals are treated. The author hints at the theoretical background as well as implications of some of the ideas that are advocated in the ongoing legal and ethical debates over animal welfare. The discussion aims to shed some light on how the cross-disciplinary studies and exchanges that include biologists, psychologists, sociologists as well as legal researchers may contribute to numerous controversies in the contemporary animal law scholarship.
KEYWORDS: law, animals, constitutions, ethics, welfare, status, rights

The domain of animal studies remains a thoroughly interdisciplinary project, linking natural scientists with philosophers, sociologists, lawyers and specialists in many other fields. It is crucial, therefore, that the discussion of animal issues take place across traditional boundaries of research disciplines. The seminar on animal law in the context of ethical, social and constitutional consideration of the protection of animals, held on May 2 2019 at the University of Silesia in Katowice, is an excellent example of such a cross-disciplinary event. It was convened by the Research Center for Public Policy and Regulatory Governance, which was established at the University of Silesia in 2018 to deal with all kinds of public and legal policy involving the need to solve regulatory problems. One of the main focuses of the research pursued at the Center is the legal policy on animal protection with particular attention to reforms of the legal status of animals. The seminar was part of that strand of the Center's activities, and its central objective was to prompt interdisciplinary discussion on various

issues surrounding the process of constitutionalization of animal protection around the world. The seminar attracted a number of renowned biologists, psychologists, sociologists and lawyers interested in the question of animal protection.

Plenary speeches were delivered by Diana Fleischman and Andrzej Elzanowski. Diana Fleischman is a rising star of evolutionary psychology and one of the most widely known advocates of a sentientist approach to animal ethics. Andrzej Elzanowski is a renowned biologist currently affiliated with the "Artes Liberales" Faculty of the University of Warsaw. Recently Elzanowski has also been elected the chairman of the Polish Ethical Society and remains one of the scientific pillars of the Polish animal welfare movement.

Diana Fleischman's speech was devoted to an evolutionary perspective on understanding animal ethics. She argued that modern animal ethics is based on our ability to recognize animal sentience, which has developed as a by-product of the human practice of hunting and killing animals. Thus, paradoxically enough, our selfish attitude towards animals provided the background without which the compassion for and ethical care of animals could not have emerged.

Nonetheless, according to Fleischman, the evolutionary basis of morality creates also some barriers towards the development of a full-fledged animal ethics that would be able to govern people's attitudes toward animals on a wide scale (on that subject see also Fleischman 2019). These include lack of reciprocity in human-animal contacts and lack of reputational consequences for wrongs done to animals in private (due to their inability to communicate these wrongs to other people). She also discussed the so-called vote-buy gap. What she meant by that was the empirical finding that many more people tend to support bans on animal exploitation than are prepared to refrain from taking advantage of such exploitation individually. This gap seems to have important implications for the further development of animal protection. It may suggest that the approach based on individual persuasion to alter habits entailing industrial animal exploitation (such as adopting veganism or giving up other kinds of animal products) may be even more ineffective in comparison with lobbying to improve legal standards of animal treatment than is ordinarily assumed.

This thought was also buttressed by the argument and data offered in a speech delivered at the seminar by Wlodzimierz Gogloza. He compared the modern campaigns aiming at changing attitudes toward consuming animal products to the abstention movement in the 19th century. Efforts to appeal to peoples' conscience in order to persuade individual citizens to voluntarily give up using the products of slave labour largely failed. Slavery could be effectively combated only by political decisions and legal bans. Hopes that the effects could also be achieved by means of individual conversions prompted by moral argument were futile.

According to Gogłoza, this is an important historical lesson for advocates of the cause of animal rights today. It is confluent with the psychological data provided by Fleischman. Both the historical and psychological views strongly support the legal approach to animal protection that focuses on lobbying lawmakers for changes to the law so that cruel forms of animal exploitation shall either be banned or will become economically unprofitable due to improved welfare conditions that corporations have

to meet.

Andrzej Elzanowski spoke on another kind of gap, namely the one between raising awareness of animal suffering and the "business as usual" reality of the animal products industry. He inquired why the ubiquitous public declarations of compassion and care for animals become ever more distant from the brute reality of animal exploitation, which continues to flourish without any real progress being made to alleviate it. Seeking an explanation for this gap, Elzanowski argued that it needs elucidation of a difference between personal morality and ethics. The development of sound, scientifically informed and rational ethical theories are not accompanied by corresponding changes in popular morality. As the latter remains unaffected, the discrepancy between the level of ethical progress and the positive morality governing individual behaviour increases.

By personal or positive morality, Elzanowski meant the actual psychological attitudes based on emotions and normative reactions that emerge from individual experience and internalized ways of conceiving the world shaped by one's own socialization process. Morality so conceived is hardly controlled by ethics, that is, reflective thinking and argumentation which takes place among a relatively small number of people who are capable of post-conventional examination of the dominant patterns of behaviour constituting the positive morality of their time.

That is why scientifically-informed awareness of the complexity of animal consciousness is rarely perceived as having any normative implications. Animals cannot reciprocate; that is, they lack the vital capacity that was the evolutionary cornerstone to the development of morality among humans. Thus, conventional morality does not regard animals as authorized parties to moral relations. As animals in their standard relations with people can seek neither revenge nor reward for what is done to them, there is no ground on which conventional morality could stand. This argument, one may add, is a modern variation and empirical substantiation of the classical explanation of animal subordination offered by David Hume[1].

Similar to Fleischman, it is animals' general inability to reciprocate that Elzanowski identified as one of the main obstacles to extending conventional morality to non-human species. The other major obstacle he located in the phenomenon described by the so-called terror management theory (Pyszczynski, Solomon, Greenberg 2015). This may suggest that people perceive animals as inferior, purely biological, creatures because they need to hold this view in order to cope with their own awareness of mortality. Therefore, juxtaposing animals to people serves the latter to help them believe in their own allegedly higher and more meaningful kind of existence. This, in turn, underpins conventional morality, making it resistant to the discoveries and scientifically-informed arguments proposed in ethical discourse.

[1] Hume famously argued that: "Were there a species of creatures, intermingled with men, which, though rational, were possessed of such inferior strength, both of body and mind, that they were incapable of all resistance, and could never, upon the highest provocation, make us feel the effects of their resentment; the necessary consequence, I think, is, that we should be bound, by the laws of humanity, to give gentle usage to these creatures, but should not, properly speaking, lie under any restraint of justice with regard to them, nor could they possess any right or property, exclusive of such arbitrary lords" (Hume 1998:190).

Thus, to Elzanowski, it is morality, with all its intricacies and psychological and evolutionary entanglements, that should be the main target of the legislation. It is not enough to base legal claims on sound ethical theories, since the latter may diverge radically from the die-hard views of the conventional morality of a given time. The law is, however, able to instigate changes in morality as well, but in much more complex and subtle ways than just imposing duties that are substantially different from those that people find justified in their own moral beliefs.

Speeches were also delivered by three eminent American scholars: Steven Wise, David Favre and Pamela Frasch.

Steven Wise outlined his litigation strategy, which has been adopted by the Non-Human Rights Project, the organization he leads. It aims at seeking a single right to be judicially declared to pertain to even a single animal. That, according to Wise, would make for a breakthrough in judicial thinking about the status, ultimately, of all animals and bring about a change in the most crucial social justice question in history. His American colleague from Michigan State University College of Law, David Favre, argued for seeking recognition of some fundamental rights for dogs rather than for other mammals. Favre pointed out that the widespread human sentiment of treating pets as family members is a much better foundation for a potentially successful legal argument than scientific expert evidence and logically compelling reasoning. Treating some animals as a particular category of "living property" (the term has been coined as a part of the theory of a legal status of animals developed by Favre, 2010) is just a small step from actual recognition of rights and interests of individual animals as a subject rather than objects of the law. Favre believes that dogs may be the best "gateway animals" to try to make that further step to recognizing animals as holders of their own individual legal rights.

The next speaker, Pamela Frasch, Associate Dean of the Animal Law Program at the Lewis & Clark University School of Law, discussed the question of animal cruelty images in the context of the constitutional protection of free speech. She argued that the case for exempting animal cruelty from the scope of constitutionally protected free speech under American law is actually convincing. The issue is, however, far from being finally resolved and the free speech argument still remains valid under the constitutional regime of the First Amendment. To overcome this, depictions of animal cruelty would have to be conclusively deemed a new category of legally unprotected expressions (Perdue, Lockwood 2014). Although Frasch has not approached the problem from the perspective of the constitutionalization of animal protection, it seems that the difficulty she has addressed is at least partially an example of the imbalance arising from the contrast between constitutional rights of people (in this case – freedom of speech) and the lack of constitutional rank for the legal principles governing the protection of animal interests.

The seminar also included a fascinating sociological session. The paper presented by Geeta Shyam of Monash University, Adelaide focused on an empirical study of the actual attitudes of members of local Australian communities towards the question of animals as property. The study suggests that the majority of people intuitively conceive animals as subjects rather than as property (Shyam 2018). Shyam proposes that

the results of the research she has carried out can be instrumental in evaluating competing theoretical accounts of animal status in law as well as the viability of many arguments concerning legal reform – namely those that are based on what the community attitudes actually are. Insofar as it is claimed that the law ought to reflect the real attitudes of people, an empirical clarification of those attitudes is needed for the evidence on which legal policy towards animals should be based.

The second speech in the sociological section of the seminar was delivered by Hanna Mamzer from Adam Mickiewicz University in Poznan. She discussed an experiment performed in Poland concerning the perception of pets by children. One of the outcomes of this study showed that children not only tend to conceive animals as their kindred but often place them among the most important members of their families. Interestingly, there seems to be some correlation between the material conditions in which a child lives and the perception of pets. The better off the family, the more critical an animal becomes for the child, and the more often the parents were missing from the family depictions produced by the children. This may suggest, according to Mamzer, that pets may to some extent, serve as substitutes for human relations when parents concentrate on their professional careers.

The paper presented by Birgitta Wahlberg from Åbo Akademi in Turku dealt with the draft amendment to the Finnish Constitution that has been prepared by a team of leading animal lawyers in Finland. The draft of a new article of the Constitution is based on the idea of the recognition of individual animals as holders of their individual interests and the establishment of a constitutional duty to take those interests into account in all decisions that may seriously affect them (Pietrzykowski 2017). Apart from thoroughly thought-over general principles, the bill contains a set of detailed and carefully drafted rules concerning various issues of the situation of animals.[2] Undoubtedly, at the moment the Finnish draft amendment must be considered the best model of constitutionalizing animal protection that has been proposed anywhere in the world. The only part of the draft that may seem questionable is the principle of precaution, according to which all animals should be regarded as sentient as long as there is sufficient scientific evidence to the contrary.

The contribution of Sacha Lucassen concerned analysis of QBA (Quality Behavior Assessment) as the preferred method of examining the welfare of individual animals. She thoroughly explicated the theoretical basis of the QBA methods – namely the assumption that in the case of sentient creatures, their patterns of behaviour ought to be interpreted as expressions of feelings and other subjective states of mind. In this way, external behaviour analyzed by a set of scientifically-informed descriptors can constitute a reliable window onto animals' subjective experience.

The speeches delivered by Tarja Koskela and Amy Wilson pertained to more practical aspects of the legal protection of animals in Finland and South Africa, respectively. Additionally, a guest presentation on animal law in the context of animal activism was delivered by Jakub Stencel, representing Otwarte Klatki (Open Cages) – the leading Polish animal activist NGO.

[2] The draft is available at https://www.elaintenvuoro.fi

Each presentation was followed by an intense discussion in which various legal, ethical and sociological themes interweaved. This indicates that at the present stage of development of the animal rights cause in public discourse, these three levels are in no small extent inseparable. In particular, any discussion on constitutionalizing animal protection or taking any other significant step forward in the laws concerning the protection of animals inevitably raises legal as well as ethical and sociological questions and concerns. That is why the most fruitful and productive approach to discussing animal law is to embed it in the interdisciplinary context of philosophical and sociological investigation into the domains underpinning the existing or postulated content of legal or constitutional rules. This was the reason for holding a seminar, the program of which would encompass the constitutional, sociological and ethical aspects of animal law. The proceedings and outcomes of all its sessions demonstrate that the initial idea was unquestionably well-founded.

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ANIMAL-BASED MEASURES: A STEP TOWARDS RIGHTS FOR FARM ANIMALS?

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ABSTRACT: While more than ever we are discussing animal rights and considering the possibility to extend the circle of our moral consideration, we are also more than ever inflicting suffering on more animals than in any time in history. This is especially the case for farm animals. This article aims to demonstrate that introducing animal-based measures into the legal system can be a practical and realistic step towards changing the familiar perspective of farm animals as mere commodities into the sentient beings they are.

Currently, legislation on farm animals builds on what are called resource-based measures. These measures are not based on the animals but on their environment and the conditions in which the animals are living. They are very compatible with the legal system being relatively easy to assess, less subjective and highly repeatable. However, compliance with resource-based measures does not always mean good animal welfare, since these measures are generally considered to be less well correlated to the experiences of the animal.

Animal-based measures, on the other hand, measure the state of the animal based on the actual animal, its behaviour (e.g. repetitive behaviour, human-animal relationship) and/or appearance (posture, facial expression, body condition).

A change where laws on animals actually require looking at the animals has the potential to improve the relationship to the animals and is an essential shift towards farm animals being regarded as someone and not something. By acknowledging animals as whole sentient beings, we do not just see a complex system of 'behaviours' (e.g. walking), but first and foremost we see a "behaver", a dynamic living being, whose movements are always meaningful and psychological expressive.

In conclusion, animal-based measures force us to look at animals and recognize that they are able to feel pain, love, joy, loneliness and fear. Implementing animal-based measures for farm animals makes us, in a practical and realistic way, take those ani-

mals that are mostly considered as mere commodities, into our moral consideration, and unveils aspects of their sentience, which are currently hidden by the law.
KEYWORDS: animal welfare, animal rights, animal-based measures, resource-based measures

INTRODUCTION

Humans and animals both belong to the biological world and share the natural world. They have lived in co-existence for decades, but in recent times humans have taken increasing procession of animals. This procession is based on a view of human supremacy and an anthropocentric perspective which have led to humans inflicting suffering, on more animals than in any time in history. The most evident example of this is animals used in intensive farming since intensive methods of farming are causing daily suffering for the billions of animals we raise for food around the world.

The number of farm animals reared for food globally has risen to just over 70 billion a year, and two out of three farm animals are now reared intensively (Compassion in World Farming 2017:3).

Farm animals are for many considered mere products to be used, traded, bought, transported and discarded or slaughtered. However, in recent years, consumers have become increasingly concerned about the way animals are raised, for public health, food safety and animal welfare reasons. This concern has displayed an increased interest to protect the farm animals and make sure we regulate around our use of them.

The interest in animal welfare can be seen in the Special Eurobarometer 442 on the Attitudes of Europeans towards Animal Welfare which demonstrated an increasing interest in society for better welfare for animals (Eurobarometer 2016). The support for animal welfare was not restricted to a small number of member states or any particular corner of Europe. Interest in animal welfare was proven robust throughout the EU with 82% stating they believe farm animals should be better protected than they are now (Eurobarometer 2016: 4).

This interest and concern in animal welfare has led to an increase in the number of legal acts. Nevermore than in present time have there been adopted laws on the protection of animals. However, millions of animals continue to suffer, and some would argue there has also never been more suffering of animals than there is today. This is often stated because of the increased use of animals in intensive farming systems (Francione 2008). As seen in the Eurobarometer there is an increasing concern regarding the farm animals´ restricted freedom of movement and ability to exercise natural behaviour due to the way the animals are housed, treated, transported and killed. This concern has led to a movement in a society where many citizens are demanding a change on the use of farm animals.

Farm animals are considered both “sentient beings” and “tradable goods” within the legal framework of the European Union. This dual status creates tension as the traditional paradigm for regulating animals in the Union has been primarily on animals as economic entities. The change in concern of farm animals has given rise to a paradox of considering the well-being of animals as “sentient beings”, while they are

still considered "agricultural" products within the Treaty.

This article aims to demonstrate that introducing specific animal-based measures into the legal system can be a practical and realistic step towards changing the familiar perspective of farm animals as mere commodities into the sentient beings they are.

ANIMAL PROTECTION IN THE EU

Animal welfare legislation on farm animals has developed and expanded its coverage since the first EU legislation on the welfare of animals was adopted in 1974. Today the European Union is said to have some of the world's highest animal welfare standards when it comes to farmed animals (Special report No 31, 2018). In general farm animals are protected by a minimum standard of welfare, and this standard is set at EU-level by the Common Agricultural Policy (CAP) – the EU's support system for agriculture. EU legislation covers with provisions the farming of poultry, calves and pigs as well as, for all species, transport and slaughter operations. In particular, the EU has banned traditional cages for laying hens and requires group housing for pregnant sows. Animal welfare under the CAP began as an agricultural production policy designed to ensure food supplies and agricultural incomes.

The concept of animal welfare is enshrined in the Treaty on the Functioning of the European Union (TFEU), which recognizes animals as sentient beings:

> In formulating and implementing the Union's agriculture, fisheries, transport, internal market, research and technological development and space policies, the Union and the Member States shall, since animals are sentient beings, pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage.

This offers a potential foundation for an approach to animal welfare in the EU that is motivated by a moral concern for the welfare of individual animals. It implies a move from an economic understanding of animals as "products" – with an extrinsic value for humans - to a moral understanding of the value attached to the needs of animals (Sowery 2018:56).

The legal protection of animal sentience

Animal sentience is a contested concept; it implies a holistic approach to the needs of animals on the understanding that they are able to experience several emotions associated with pleasurable states such as joy, and aversive states such as pain and fear (Broom 2007:100). Although the scientific research in this area is equivocal, the consensus is that most animals used for human purposes are sentient and thereby capable of feeling both positive and negative feelings. The recognition of animal sentience has fostered the question how to protect these sentient beings in a legal context. There can be recognized two main legal approaches to the protection of animal sentience: animal welfare and animal rights.

The first approach to protect animals is the welfare-based approach that deals with

animals as objects – the property of legal persons – that are to be protected. In the nineteenth century, the animal welfare position became popular and still to this day is the dominant view of society and therefore, the legal foundation on animals. The animal welfare approach is based on the fact that we have a moral and legal obligation to treat animals humanely and to avoid imposing unnecessary suffering on them. The primary focus of animal welfare is hereby the regulation of animal treatment (Francione 2008).

The second approach is the rights-based approach under which animals should be protected through legal rights (Sunstein & Nussbaum 2005). It means recognizing that animals are not ours to use – for food, clothing, entertainment, or experimentation.

Rights versus welfare

It is essential to acknowledge the critical distinction between animal rights and animal welfare – which revolves around ethical questions as to whether animals should be killed for human consumption or used for certain activities. While both animal rights and animal welfare positions find their basis in the recognition of animals as "sentient beings", they differ as to what the recognition of sentience should entail in practice. For animal rights supporters, animal sentience requires equal consideration to human sentience, and therefore no form of animal use, regardless of how 'humanely' animals are treated, can be justified. By contrast, welfare supporters focus on particular tenets of the concept of sentience, such as hunger, pain, fear and joy. To this extent, they often sustain the species divide between humans and animals to justify the use of animals (Graça 2014: 749).

The European Union employs an animal welfare approach in protecting animals as sentient beings. This means the laws regulate around farm animals as a property that exists for the benefit of humans, while we have to ensure their basic needs are met and prevent unnecessary suffering and cruel treatment (Regulation No 1099/2009 on the protection of animals at the time of the killing, OJ 2009 L 303. and Article 3 Regulation 1/2005 of 22 December 2004 on the protection of animals during transport and related operations and amending Directives 64/432/EEC and 93/119/EC and Regulation No 1255/97 OJ L 3, 5.1.2005, p. 1–44 , lays down an overarching requirement that transporters must not transport any animal, or cause any animal to be transported, in a way which is likely to cause "injury or undue suffering" to that animal).

ASSESSING ANIMAL WELFARE: RESOURCE-BASED MEASURES VERSUS ANIMAL-BASED MEASURES

When it comes to assessing animal welfare at the farm level, two broad categories of measures can be distinguished. The first category contains the resource-based measures, i.e. input assessment; they measure the conditions in which the animals are living, e.g. stocking densities, cubicle size, and flooring. They are input factors or risk factors affecting animal welfare.

The second category contains the animal-based measures, i.e. output assessment;

they measure the welfare state of the animal, e.g. behaviour, injuries and diseases. Thus, they assess the outcome or effect of a number of risk factors.

Because resource-based measures are generally less subjective than animal-based measures, often more accessible to audit and highly repeatable, these measures are more frequently included in animal welfare legislation. However, resource-based measures are generally considered to be less well correlated to the experiences of the animal (EFSA 2012a). The reason for this is that many factors might affect the welfare of the animals, which makes it difficult to include them all in legislation.

The current legislation on farm animals builds on resource-based measures. However, because of the weak correlation between the actual welfare of the animals and resource-based measures, the European Union has shown considerable interest in making use of animal-based measures. The interest in using animal-based measures at EU-level has been outlined in the European Union Strategy for the Protection and Welfare of Animals 2012-2015. It suggests a new EU legislative framework for animal welfare that may include the use of scientifically validated animal-based welfare measures to complement prescriptive requirements, thereby simplifying the legal framework and allowing flexibility to improve the competitiveness of livestock producers (EFSA 2012b:4).

Qualitative Behavior Assessment as an example of an animal-based measure

The European Union and has funded several research projects in the field of animal-based measures. One EU funded project is Welfare Quality®, which is the largest European project to focus primarily on animal-based measures. It has been influential in developing a standardized system for the assessment of animal welfare.

In the Welfare Quality®, several animal-based measures are validated for inclusion in the welfare assessment. One animal-based measure from the project is Qualitative Behavior Assessment (QBA), which was concluded to be satisfactory with regard to inter-observer reliability, having high feasibility and being very relevant for the welfare of animals. It, therefore, should part of the Welfare Quality monitoring tool (Wemelsfelder, Millard, De Rosa, Napolitano 2009).

QBA is a whole-animal approach, and the underlying premise is that human observers can integrate perceived behavioural details and signals to judge an animal's behavioural expression, using qualitative descriptors (e.g. relaxed, anxious) that reflect the animals' affective (emotional) state (Wemelsfelder 1997 & Wemelsfelder 2007). In the Welfare Quality® the QBA as a method relies on the ability of human observers to integrate perceived details of behaviour, posture, and context into descriptions of an animal's style of behaving or "body language", using descriptors such as "tense", "frustrated" or "content". Such terms have an expressive, emotional, connotation and provide information that is directly relevant to animal welfare. Carrying out this observation method, the observer watches the animals and marks if he finds the term to be, e.g. absent or dominant for the animals under the study. The Welfare Quality® concludes that the application of QBA on-farm is highly feasible and easy to learn; however, assessors must be experienced in observing cattle and be given additional

training on cattle expressions.

THE ANIMAL AS SUBJECT

Qualitative Behavior Assessment was initially developed with the aim of providing more space for the animal's perspective – the "animal-as-subject" - in scientific studies of animal emotion and welfare. Pioneering field ethologists such as Jane Goodall and Cynthia Moss, in their life-long studies of chimpanzees and elephants, used it to describe the characters and emotions of the animals they knew so well. QBA's aim was to extend this work, proposing that from a whole-animal perspective, qualitative terms such as "anxious" and "relaxed" do not merely describe "behavioural style", but also address what animals actually, subjectively, feel.

The starting point is that animals are whole sentient beings and that when we acknowledge them as such. We do not just see a complex functional system of 'behaviours' (e.g. walking), but first and foremost we see a "behaver", a dynamic living being, whose movements are always meaningful and psychologically expressive. Scientists are trained to measure what animals do physically (e.g. walk, sniff, rest), but it is in observing how animals do what they do, that we can get closer to how they experience the situation they are in. An animal can walk, fly or swim around in a way that is relaxed and curious, or tense and anxious; the behaviour is the same, but the expressive quality differs, providing a window on the animal's feelings. QBA asks people to interpret and quantify these qualities and then uses statistical analysis to identify patterns of expressivity that describe how individual animals, or animals in groups, can differ in their emotional response to a situation.

Qualitative Behavior Assessment in the legal system

In the legal system, we regulate farm animals as property and only provide them only the minimum to meet their basic needs. I.e. the welfare of pigs is assured by Council Directive 2008/120/EC applies to all categories of pig and lays down minimum standards for their protection. Council Directive 2008/119/EC prohibits the use of confined individual pens after the age of eight weeks. The Directive, amongst other things, sets out minimum dimensions for individual pens and for calves kept in a group.

There is a shared belief, however, that the welfare of animals encompasses more than just the absence of suffering. QBA regards animals as sentient beings capable of having a variety of feelings which all affect their welfare.

QBA differs fundamentally from the current legislation with resource-based measures where the focus is on the input of the animals. With QBA time is taken to carefully observe animals and the quality of their expressions, which first of all give us a more in-depth insight into their welfare but also provides a profound change in the way we perceive these animals.

Only limited amount of research has been done on the implementation of animal-based measures in the legal system. It can be stated, however, that it is unlikely that animal-based will replace resource-based measures because of legal challenges.

Nevertheless, animal-based measures can be implemented in the legal system in many forms, as a top-up on resource-based measures. Considering the European Union's interest in making use of animal-based measures because of their advantages, it is likely we will see the implementation of them in future legislation.

CONCLUSION

The current legislation on farm animals builds on resource-based measures which are implemented to prevent and predict welfare issues. They are regarded as minimum standards that the farmer must meet. However, while resource-based measures are suitable to prevent poor welfare and identify risk factors, animal-based measures are perceived as better correlated to the actual state of the animal. Therefore, it seems that animal-based measures can better make sure the objectives of the animal welfare legislation are achieved, and the level set by the legislators can be reached.

The purpose of this article was to demonstrate how animal-based measures have the potential to also serve as a step for farm animals having rights. These measures force us to look at animals in a different way than ordinary resource-based measures. They enable us to recognize that farm animals are able to feel pain, love, joy, loneliness and fear. Implementing these measures into legislation requires farmers and professional assessors to investigate the emotional state and behaviours of farm animals. This provides a profound change from the current legislation and has the potential to perceive farm animals as the living sentient beings they are stated to be in the Lisbon Treaty.

In conclusion, implementing animal-based measures for farm animals makes us, in a practical and realistic way, take those animals that are mostly considered as mere commodities, into our moral consideration, and unveils aspects of their sentience, which are currently hidden by the law.

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ANINAL AS AN ALIEN[1]

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ABSTRACT: The aim of the text is to reflect on defining animals as negative opposites of human beings, that contradict humanistic values and ideals. In a posthuman thought Rossi Braidotti proposes zooegalitarism, aiming at providing animals and humans with equal rights. In cultural human tradition, one can find deeply rooted tendency to oppose humans and animals. Looking at this phenomenon from a humanistic point of view, we can notice that proposed by Lévinas cathegory of *the Other*, has no application here. To contrary: animal is treated as an alien, and all negative qualities of the alien are automatically assigned to animal as well. What purpose this opposition serves? And what happens if this opposition disappears?
KEYWORDS: animal, human, alien, identity

INTRODUCTION

The culturally embedded images of a man and an animal and their mutual relations reflect deeper psycho-social processes hidden underneath them. The way we "see" animals and what statuses we attribute to them as well as the culturally accepted status of humans can be treated as a projection diagnostic element. Therefore, in this text, I propose to see animals as being treated like aliens, which highlights the concerns expressed by humans. I do not address the issue of authentic imagery, visualization of an alien - an animal, but I focus on the mental construction of this image.

[1] This article was published in Polish as "Zwierzę jako obcy" in *Filo-Sofija* 17(36): 609-621.

IDENTITY - THE OTHER - ALIEN

The processes of constructing human identity are nowadays understood in terms of fluidity and variability as well as in terms of following the change as a desired value (see Bauman 1997 and Giddens 1991). Such an approach to identity results from embedding it in a theoretical context, initially psychological, which indicates that the development of a man continues throughout his life, and the very concept of the development should be broadly defined as the process of adapting to the variability of situations and to the existing, surrounding conditions of the social environment. In this context, the development is not synonymous with the progress, on the contrary: in certain areas, the regress can be treated as a form of adaptation to the situational circumstances and can therefore be defined as a development. Thus, recognizing that changes in human identity take place throughout the entire life of a person because the social environment is constantly being modified, it is automatically presumed that a person develops throughout the entire life. Such an understanding of the identity (not as permanent and unchangeable state - which was characteristic of the positivistic paradigm of thinking) resulted in a complex reflection concerning the relation of human identity, and more broadly the subject, to others - to other people and to other subjects in general. While in this context, the reference of a man to another human being is a clear and accepted model of functioning within the scope of defining oneself, the reference to an animal may still be controversial. What is more, it arouses controversy, especially among those humanists who still associate their basis of thinking with positivism.

Treating identity as a process, has led to metaphorization of the concept and its application to other fields of humanities and social sciences - in the sense that it has become, in fact, a supra-disciplinary concept which, by crossing the boundaries of disciplines, combines them into a whole of multithreaded and multifaceted reflection on the phenomenon of building the identity. This enriched the reflection on identity and led to the emergence of attempts to create syncretic approaches that would combine reflections from different traditions. This is a very effective method of cognitive conduct, because it allows us to understand the regularity of phenomena important from the point of view of other fields of humanities. It should also be assumed that, within the current reflections on the concept of identity, there is a consensus that the identity of the human subject is constructed largely on the basis of opposition to something/someone else, and generally to the identity of other human subjects. The formation of these oppositions acquires more or less extreme figures: the most radical (confronting the most distant beings) is the opposition of the human subject versus the object. The least radical: the human subject versus the human subject.

The opposition of the human subject versus the inhuman subject/animal should be placed in the middle of this scale. In this way, not only is the animal itself a boundary category (for the time being let us use this term): neither man nor object; but also the opposition of the human subject versus the non-human subject/animal becomes the middle opposition, and thus in a sense also the border opposition.

The element of the binary opposition of the I - not the I, is visible in the establish-

ment of individual human identities. Similarly, it also happens at the level of determining group statuses. It is in this context that I am interested in the concept of an ALIEN. The opposition: an akin- an alien allows to achieve a sense of security in the world filled with uncertainty: the security has its roots in the border phenomenon. It is the border that becomes what separates akin from the other, known from the unknown and safe from the dangerous. This is especially familiar to social psychologists and sociologists who, while analyzing the specificity of building and strengthening group identities, have already taken for granted that group identity is based on two oppositely oriented processes: the differentiation of group identity by emphasizing elements different from the social environment and, on the other hand, by emphasizing the similarities existing within the group[2]. Paradoxically, the stronger the two opposing tendencies, the more homogeneous and unambiguous the group identity and the more explainable and comprehensible is the world around us. The phenomenon of marking off and establishing demarcation lines, which determine the divisions between the two groups, remains a fascinating issue also for philosophers and anthropologists. For it is clear that, especially in the case of cultural phenomena, all boundaries are conventional: "The demarcation of boundaries, which always takes place when something is different from the other, eludes the gaze and slips out of hand; it can only be described as a trace left after demarcation. In this respect, border demarcation is similar to the signing of a contract that does not enter into the matter of the agreement itself, but it is not directly identifiable in the change of my obligations" (Waldenfels 2009: 22). All beings remaining on the border (border-line type) cause uncertainty: in fact, it is not clear whether one should be afraid of them, whether they should be tamed, whether they will be predictable or not. It is precisely this ambiguity, staying *in between* that is disturbing.

BORDER - BETWEEN HUMAN AND ANIMAL

The border is a completely ambiguous concept, intersubjectively determined, modifiable and changeable while at the same time it has such a great significance in stabilizing perception and determining the categories of the division of the world. It is similar in defining the relationship between man and animal. The use of the term "animal" has the same character: as Derrida (2008) says, people behave as if they had the eternal right to call other entities by referring to them as non-human entities, as if these divisions were based on universal law, while they gave themselves the right to do so.

The use of the concept of the border in human-animal relations serves to strengthen the anthropocentric way of looking at the world (see Koza 2014: 164) and is based on the attempts to define it by the lack of [3]: what kind of qualities, functions and abilities an animal is deprived of, which would allow to classify it as a category other than man and to strengthen this division, on the basis of a border which does not exist

[2] This mechanism is sometimes reinforced, for example, by the use of costumes or rituals that are characteristic of a particular social group, clearly throwing out of parentheses those who look/behave differently.

[3] B. Waldenfels also points this out: "All these describe a foreigner through some kind of absence" (2009: 113).

and which appears by placing obstacles founded on the distinction between one and the other. This approach has an aim to discover where animals are "inferior", more "handicapped", incomplete, and where there is still a dominant position for a man. As Michał Koza states following Derrida: "The list of interrogators includes, in particular: Aristotle, Descartes and Kant and, of course, Heidegger, Lévinas and Lacan (...), who ask whether the animal can think, reason, master the technology, and especially speak, express and imitate the logos by means of signs, a rational discourse that would also be reachable for the human being" (Koza 2014: 166). Especially noteworthy is the last condition of communicating in a manner which "would also be reachable for the human being". In this way, animals are faced with an impossible to fulfill requirement: not only thinking or communicating, but also a condition that would be cognitively accessible to humans. It seems absurd to impose such a condition. This can be proved by reversing this reasoning and requiring a man to demonstrate for example the ability to communicate in a manner that would be comprehensible to animals[4] (it is worth noticing that we do not indicate here for WHICH animals). Indication of the lack, by revealing that the interlocutor DOES NOT OWN or HAVE something automatically condemns the subject to a lower position, in relationship to the evaluating dominant[5]. In this context, the evidence of absence means the indication of "inferiority". If this cognitive procedure is applied to animals, it automatically enhances the anthropocentric well-being of the interviewer by prioritizing subjects. On the other hand, examining the ability of animals to function cognitively or emotionally, which is typical for humans, unambiguously brings to mind the ethnocentric practice of assessing cultures as better or worse, by responding or not to the standards imposed by the evaluator.

Waldenfels also follows this lead for some time when he writes about the differences between humans and animals: "An old saying: "Man is a living being with speech and reason" can be rephrased: "Man is a living being that gives answers. The difference between man and animal must be rethought, as well as the difference between a man and a machine (Waldenfels 2009: 59).

Following Derrida, M. Koza also points out in his text that the use of such a border is aimed at immunization (2014: 167) - making man immune to the suffering of animals, building a barrier that does not allow to notice the similarity of feelings experienced by man and animal, allows to exploit animals with impunity.

In discussions focused around the manner of defining the human subject (in the context of post humanistic analyses), it was only when the question of the possibility

[4] Such a cognitive procedure brings to mind the use of tools in the form of intelligence tests to evaluate the intellectual potential, which are not culturally adapted to the conditions of the examined person. Through such a procedure, the researched person is inevitably condemned to failure: how is the person supposed to respond correctly, since the content comes from a completely different cultural context? Probably the person could know the answer to a similar question but related to the native context (the tool would then have to be based on questions like: "Who was the first president of YOUR country? and not for example the USA or Russia).

[5] A well-known procedure, appearing in the psychoanalytical concept of Zygmunt Freud, which draws a hierarchy between men and women based on the absence of a penis (Oedipus complex and Elektra complex in particular).

of suffering was raised that the division between humans and animals was disturbed.[6]. But it must be remembered that over the centuries this attribute, too, has not been considered to be proper: many who followed the Cartesian way of looking at animals did not see them as capable of suffering. "By posing the problem of the border, the philosopher proposes that the criterion of its certainty, which shapes the line on which it runs, should be instead of the Cartesian clarity and obviousness, the 'irrefragability'. As Derrida says, this means the impossibility of denying the suffering, fear or panic, terror or fear that can affect certain animals and that we humans can testify to" (Koza 2014: 167).

Derrida concentrates on the very concept of a border, the confrontation between a man and an animal and the fact that such a relationship is not simple, unambiguous and convenient. At first sight it has many hidden aspects - such as, for example, putting man and animal against each other, while an animal can be everything from a horse to an ant. It is not Derrida's idea to abolish this border, but to show its complexity and this goal was undoubtedly achieved by the French philosopher.

However, whether from the point of view of ethnocentrism, anthropocentrism, or any other kind of "centrism", and regardless of the axiological markings given to such practices, the division by demarcation of borders has an important function: precisely the function of defining safe, controlled areas, superior to dangerous, uncontrolled and worse ones. From the point of view of the process of constructing and then maintaining the human identity, the creation of a border that defines the alien is therefore important. It is all the more important because in everyday functioning (linguistic, cognitive and emotional) "alien" means bad; "alien" hides in itself the association with negativity. Bernhard Waldenfels writes: "To say it in the native language of Western philosophy: different (...) and alien (...) are distinct things. The alienation of a guest (...), the alienation of another language of another culture, the alienation of a different sex or 'different state' is not reduced to the fact that something or someone turns out to be different. Building materials like wood and concrete, or wines like Beaujolais and Rioja, are completely different from each other, but usually nobody will maintain that they are unfamiliar to each other. The alienation creates its own domain and its own being of what is Self (ipse, self), and this Self must not be confused with the same one (idem, same) which is distinguished from something else" (2009: 17).

The creation of a human identity is therefore based on the process of categorization through the delineation of boundaries and then through the juxtaposition of the two sides, which, as I have pointed out above, has three fundamental forms:

The human subject versus the human subject. This opposition is most deeply analyzed in the reflection current embedded in the philosophy of dialogue. In particular, Emmanuel Lévinas (1998), Paul Ricoeur (1992) and Martin Buber (1962), draw attention to the inseparability of the opposite processes, which are indispensable for the constitution of human identity as a process of creating

[6] It was attempted to separate man from animals on the basis of: ability to think, creativity, ability to sense feelings, religiousness, morality, technical skills, and numerous "attributes of others" (erect attitude, nudity, deviations, play, cooking and dressing, etc.). (see Lejman 2008: 49).

quality based on a sense of continuity, cohesion and identity at the same time (Ricoeur 1992). This approach to the identity of the human subject is constantly changing based on its confrontation with other people, which would be described by symbolic interactionists as a communication with others based on symbols: this is how the concepts of the "significant other" (H. Sullivan) appear, but above all "the looking glass self" in Charles Cooley's view. Also, George Herbert Mead (2015) points to a constant reference of the I, to other "I", which allows us to define "the selfhood" and the limits separating it from "otherness". In this and in the key approaches proposed by symbolic interactionists, identity is always built on the basis of numerous sources of information and the important is what we are not, i.e. the information about the possibility of denial by defining oneself. In human identity, this element of distinctiveness, detachment or even contradiction allows for a precise definition of what I am: I am what I am NOT. Using some generalization, it can be assumed that in the above-mentioned concepts - the Other is defined in positive terms, its positive image is emphasized as well as its positive impact on the formation of the individual self. Even if Emmanuel Lévinas speaks of the Other as a "widow and orphan", pointing out that the relationship with the Other is not always simple and straightforward, he insists on the need for a positive attitude towards the Other (see 1998, 1999). The Other written with the capital "O" unquestionably has the status of a subject: and even if someone does not want to recognize it, it is POSTULATED. So strongly that, in principle, it constitutes the definition of the Other. The Other is therefore someone who, although radically different from me, MUST be treated with due respect and must be recognized (in the categories proposed by Paul Ricoeur, see 1992). The Other is seen here as valuable, by the influence he even unintentionally exerts on someone else, and not by the type of his actions or the specificity of his behavior.

The human subject versus the object. The most radical, previously indicated oppositional identity, which provides support for the identity of the human subject, places it in front of the object. Here it is clearly defined what the human subject is and what the object is. While the human subject has the rights and causative power of intentional action, the object does not have any rights, intentions or possibilities of conscious action. Sociology, while reflecting on how people relate to objects, points to their "causative power" to the fact that by triggering emotions and provoking actions, objects become contributors to building relationships and references to the self in relation to the outside world. However, they do not initiate them on their own. In this area, unambiguous so far, we have also observed breaches in the form of emerging and increasing concerns as to how to define the subject and how to separate it from the object: an example here are activities combining in their nature interventions through advanced technologies in the human body (bio-art, creation of hybrids connecting the body of the human subject with objects, nano-biotechnologies or intelligent technological solutions supporting the functions of the human body - techno-

logically advanced robotics).

Human subject versus non-human subject/animal is an ambiguous opposition and, moreover, has the characteristics of negative references. The history of contrasting man and animal treated as an object is most visible in Descartes' thought, who sees the animal as a machine. Descartes' definition of animals as objects contributed to the establishment of such an approach in Western European culture, which at the level of causative actions triggered indescribable damage in the form of psycho-physical dualism (with which, unfortunately, the contemporary psychology and medicine still have to cope to this day). Above all, however, it has built a belief that an animal, as a kind of object (machine), is devoid of feelings and emotions and therefore can be treated as an object.
In the middle of the line of radical comparisons, the relationship between a man and an animal can be divided into two categories: man, and animal as the other and man and animal as the alien. In this text I focus on the latter type of relationship when an animal is perceived as an alien. I am interested in the necessity of obtaining a cognitive conviction that evil is an alien and an alien is bad which accompanies such opposition. Therefore, a stranger becomes, in the case of defining humanity, what is bestial, inhuman and monstrous, evil and instinctive. Pushing beyond I the negative descriptions that oppose the I, assumes an unclear form of an alien. An animal. In this context, it is necessary to recall all those definitions which connect an animal and an evil: bestiality, beast and animalism which lose their meaning only when confronted with monstrous human behaviors, when the people who reflect on them say "animals do not behave like this", animals are better and have their own morals. As Derrida says, we never refer to animal bestiality, because bestiality is reserved exclusively for man as ultimately his characteristic and right (see Derrida 2008). The beast is not a human therefore, neither an animal. Derrida shows in his essay *The Animal That Therefore I Am* that the creation of the opposition: man – animal, is not aimed at discussing animals. It aims to talk about "non-humans". It is proven (as I mentioned above) by pointing out that an animal in this contraposition is a completely heterogeneous category and contains many species that cannot be compared to each other at all (Derrida 2008). One of the attempts to abolish the border between a man and an animal was Edward Wilson's proposal (2000), which took the form of sociobiology. It provoked numerous protests from opponents, based on more or less rational arguments. These attempts to undermine Wilson's reasoning revealed his opponents' attachment to anthropocentric reasoning and categorizing the world in the same manner. All the submitted arguments - about the destruction of culture and its values, Wilson's rejection of religion and his fascination with eugenics - were, in fact, desperate attempts to keep in force the existing order in which man was granted dominance, animals were subordinated to him and constituted an antithesis of human attributes[7].

[7] A similar reflection can be found in Desmond Morris's popular science work *The Human Animal*: "There are one hundred and ninety-three living species of monkeys and apes. One hundred and ninety-two of them are

The role of the alien in an animal is to exaggerate those features that carry a negative mark - not to show the animal in a bad light, but to show the human being in a good one. Similar measures were applied in the colonial era, where the conquered nations were described as wild, barbaric and uncivilized, with the intention of showing in a positive manner their opposite: a civilized and cultural man. But the alien carries with it the sense of negativity in general: "Escaping the Self means that the moments of the alien in Self, the moments of the strangeness in all orders are toxic" (Waldenfels 2009: 25). This ethnocentric type of application of an alien category shows that this concept is a broad classification, in principle common to all humanities, freely crossing the lines of artificial divisions. It is present wherever cognitive functioning of a man exists. It seems impossible to define a category of "an alien": "The problem of an alien starts when it is named. Nothing more ordinary than the word 'foreign' and its many variations and derivatives like 'foreigner', 'foreign', 'strange', 'foreign language', 'alienation' or alienating" (Waldenfels 2009: 109). Further, the author points out that attempts to render the meaning of the term "alien" reveal various shades of these meanings: 1) foreign means something occurring outside any given area, 2) foreign means someone else's or alienated, 3) foreign means another kind, different. Waldenfels stresses that an element of a location makes a given shade of alienation more distinct: in principle, when we talk about a stranger, we talk about someone who is not from here. The basic definition of an alien can be found within the same author, who describes it in the following way: "If we take the most common expressions of alienation, which are indispensable for ethnology as well, we constantly come across two expressions, namely the inaccessibility of a certain area of experience and meaning, and the lack of affiliation to a group. In the first case, something is alien to me or to us, in the second case, others are alien to me or to us" (Waldenfels 2009: 113).

"When we talk about otherness, however, we often mean nothing else but otherness, but often we drift away into conceptual twilight, which does not allow a radical question about the alien to emerge at all. (...). The fact that something gains its identity only in such a way that it is different from other things is a discovery of Platonic dialectics, which until the times of Hegel resulted in a substantial speculative capital. The contrast between the same and the other, which underlies every order of things, stems from the separation that distinguishes one from the other" (Waldenfels 2009: 110-111).

All these reflections ultimately lead us to the conclusion that the foreign is intimately intertwined with itself and that these are two qualities that cannot exist without each other. An animal as an alien becomes an antithesis of a man as himself, but at the same time it is bonded with him. As Waldenfels correctly states "If a man is astonished by an alien and terrified of it, then a man is not in control of himself.

covered with hair. The exception is a naked ape self-named Homo sapiens. This unusual and highly successful species spends a great deal of time examining his higher motives and an equal amount of time studiously ignoring his fundamental ones. He is proud that he has the biggest brain of all the primates but attempts to conceal the fact that he also has the biggest penis.... He is an intensely vocal, acutely exploratory, over-crowded ape, and it is high time we examined his basic behaviour". "That's how I started the introduction to my book, which I wrote in the 1960s and which caused a great wave of criticism" (1994).

Interpersonal or intercultural alienation cannot be separated from interpersonal or intra-cultural otherness. That is not all. It should be added that the otherness we encounter in others leaves the stronger traces in us, the more it relies on something familiar, denied, devoted to something of our own" (Waldenfels 2009: 118)[8]. In other words, we are afraid of ourselves when we are afraid of an unfamiliar animal. By separating ourselves from the animal, we are isolating from ourselves. The animal is in us, and its verbal alienation is necessary for us to define ourselves. Hence, those who do not recognize the animal as a subject, give it a lower status and reveal their own fears and uncertainties. It is hard to deny this in the context of the above considerations.

An animal is an alien, but an alien becomes an animal: the word "animal" becomes a negative epithet given to the Other, which allows for its humiliation and disdain. The epithet: classifying someone else in the category of animals diminishes his status. This lavish use of an animal negative epithet is evident in the whole objectifying metaphor of the holocaust - the torturers are not only supposed to be animals, who, by the way, call the victims animals; but animals also become real victims of the everyday holocaust in slaughterhouses. Apart from the last case, an animal is an epithet attributed to a human being who behaves not as a human being, but also not as an animal, because animals are not capable of such behavior (see Łagodzka 2015: 173). Naming someone an alien is a performative act: it changes not only the name but also the real status of the subject lowering its value.

Marginalization of the Other by means of a label given to an alien, in the case of interpersonal relations, is considered an expression of authoritarian and fearful personality traits (see Adorno 1968). In fact, there is no reason to interpret the rejection of the Other, the animal differently.

CONCLUSIONS

The analysis of people's attitudes towards animals over the centuries (see Serpell 2012), shows signs of growing anxiety and takes the form of actions aimed at separating people from animals by means of various cognitive categories, in order to maintain one's own definition of the self, based on the belief that man is something/someone unusual and significantly different from animals. Assigning characteristics of an alien to an animal indicates that, as a species, we are increasingly defensive towards animals. The higher the technological development, the more polarized this attitude is. As Wojs writes: "The human race has achieved its humanity at the cost of alienation from the natural environment. As a part of nature, man opposed nature as an observer, ruler and user, and this dialectic is becoming more acute in relation to the animal world" (1993: 5). It is hard to deny the accuracy of this observation, and even more it makes us reflect on the next one - that the more man develops in terms of technology, the more he moves away from the world of animals. And the more often animals are defined as aliens. However, we have in common characteristics with the animals and

[8] A little earlier Waldenfels also writes: "If one's self is intertwined with a foreign, it also means that the foreign begins in ourselves and not outside of us, or, to put it another way: it means that we are never fully self" (Waldenfels 2009: 116).

their presence makes it difficult to establish an unambiguous relation to the animals. As a species we demonstrate a kind of cognitive dissonance in relation to other animals. We have built certain cognitive, emotional and behavioral categories that have given us the tools to defend ourselves from connecting with the animal world. On the other hand, however, not all of us abide by this (artificial?) dichotomy. What's more, I would say that today we reach a turning point - a kind of "animal turn" in the perception of not only animals but also people and, above all, the relationship between animals and people. As if human cognitive manipulations in this area, exceeded some acceptable for our species limit of this separation from the animated world. The animal movements, but also the increasingly clear reflection on the relationship between man and other animals, are gaining strength and their voice is becoming clearer. However, this does not evoke acceptance everywhere, and in particular in numerous media reports one can find voices of criticism[9]. This is where our human fears reveal themselves: I refer to fears of a symbolic nature, which are based on anxiety about the essence of one's own identity, which is perceived as so fragile that it must be defended through the creation of radical divisions. Unambiguous and indisputable boundaries are needed in clearly defined cases of threat: physical when walls and impassable barriers are created; psychological when categories that order the world are introduced. Everything on the border is unclear, uncertain and frightening.

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[9] In this context, it is worth mentioning the criticism of animalistic movements, particularly intensified in the Polish media, visible in the years 2014-2015. Where, in particular, in the opinion of right-wing, unequivocal and categorically speaking politicians and activists, "Animal Studies", just like issues related to gender discourse, are the source of evil itself.

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SOMEONE BETWEEN: ETHICAL AND MEDICAL PROBLEMS OF HUMAN AND (NON)HUMAN ANIMAL ENHANCEMENT

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ABSTRACT: Human dreams of a long and healthy life are becoming increasingly real. The advancement of medical technology allows to modify the genome or personalised therapy in order to avoid troublesome side effects. This process also leads to the blurring of boundaries between humans and animals. Rats with induced human diseases are used for testing drugs for incurable illness; humanised pigs can donate organs that are compatible with the genome and immune system of the recipient. A brave new human is approaching, and new "human" animals are making this possible. The main objective of the article is to show the differences between the refinement of people and other animals and to analyse this phenomenon from an ethical point of view.
KEYWORDS: bioethics, animal ethics, posthumanism, transplantation

INTRODUCTION

The accelerated development of technology and biomedical sciences is inevitably making an impact on humans. Both the length and quality of human life have changed over the last century (Lancaster 1990; Stomma 2008). At the same time, humans are increasingly marking their domain over Earth, creating new forms of life. Dubbed "liminal lives" by Susan Squier (2004), these have come to existence following biotechnological experiments in controlled laboratory conditions (Bakke 2014).

The concept of the Anthropocene, which describes this situation, is becoming more and more apparent in scientific reflection. The situation provokes questions about people's place in the world and their relationship with other animals and the environment. Is the human right to use the planet and others unlimited? How far can we go in using other animals to extend human life, or even to enhance people, referred to as "accelerating evolution" by transhumanists?

Bringing the Earth under human control is not a new phenomenon. Already during the transition from a hunting and gathering to a pastoral and collecting society, people changed their way of thinking and shaped plants and animals to meet their needs (Banaszak and Kmita 1994). However, never before were these changes so rapid and precise.

ANTHROPOCENE

The "Anthropocene" is a term that defines the present geological era characterised by the dominance human of activity and its effect on Earth (Waters 2016; Ellis 2018). The term was first used in the contemporary context by Paul Crutzen in 2000 (Zalasiewicz et al. 2010; Grinevald et al. 2011), suggesting that the modern era began in the second half of the 18th century:

> To assign a more specific date to the onset of the "Anthropocene" seems somewhat arbitrary, but we propose the latter part of the 18th century, although we are aware that alternative proposals can be made (some may even want to include the entire Holocene). However, we choose this date because, during the past two centuries, the global effects of human activities have become clearly noticeable. This is the period when data retrieved from glacial ice cores show the beginning of a growth in the atmospheric concentrations of several "greenhouse gases", in particular, CO_2 and CH_4. Such a starting date also coincides with James Watt's invention of the steam engine in 1784 (Crutzen 2002).

The International Commission on Stratigraphy (ICS) or the International Union of Geological Sciences (IUGS) have not yet approved the term "Anthropocene" as the official name of the current geological period (Subramanian 2019), it is nonetheless commonly used in the scientific literature. The dispute over the Anthropocene primarily concerns the identification of a point in history when the Earth had actually changed. Simon L. Levis and Mark. A. Maslin suggest that 1610 marks the onset of the new era. In their opinion, the arrival of Europeans in America irreversibly affected the planet (Lewis 2015). In 2019, the Anthropocene Working Group (AWG) was established to define the beginning of the era. Among the 34 members of the AWG panel, 29 voted in favour of using the term as of the mid-20th century, when the rapidly growing human population stepped up the rate of industrial production, the use of agricultural chemicals and other human activity. Their decision was also affected by the use of nuclear weapons, resulting in radioactive debris that became embedded in sediments and glacial ice, becoming part of the geologic record. The panel is currently planning to submit a formal proposal to determine the start of the new epoch by 2021 to the

International Commission on Stratigraphy, which oversees the official geologic time chart (Subramanian 2019).

Another element that proves irreversible human interference in nature is the decline in the diversity of the species that inhabit the planet. Today we are left with a relatively depauperate fauna, and we continue to lose animal species to extinction rapidly. Although some debate persists, most of the evidence suggests that humans were responsible for the extinction of this Pleistocene fauna (Vignieri 2014). For example, in the last two decades, Europe has seen a considerable decline in the population of the House Sparrow (*Passer domesticus*). In the Netherlands, the birds have been put on the red list of endangered species. The cause of this can be contributed to the thermal insulation of buildings (Marchowski 2015), which prevents the sparrows from nesting, as well as the use of chemical plant protection agents or lack of access to grain due to changes in corps storage (Leasure 2013).

(NON)HUMAN ANIMAL ENHANCEMENT

Human control of nature is also apparent in the desire to enhance people and in genetically adapting animals to human needs. According to transhumanists, humans, as they are today, are only in a transitional stage towards their future form. Already two decades ago, Nic Bostrom and David Pearce initiated the project Humanity+, whose roots can be traced to the French post-structuralists (Bakke 2010; Loba 1999; Miś 1994), but not until now were the goals of the project likely to come into effect. The central tenets of transhumanism are contained in the Transhumanist Declaration, published in 1998 by the World Transhumanist Association. The Declaration stresses the transhumanists' enthusiasm for state-of-the-art technologies which will influence radical changes in humans (Humanity+ 1998). The anticipated changes are to impact on nearly all aspects of human life: life span, physical and intellectual ability, as well as the creation of artificial intelligence. Recent scientific discoveries make it possible to accomplish the transhumanist visions, for instance, the controlling of heredity in an increasingly foreseeable way due to IVF mitochondrial transfer or CrisprCAS9 (Żok 2018). Whilst bioethicists display an extremely opposite approach to the possibility of treating humans by way of genome editing, in principle the disputes concern differences in deontological and consequentialist reasoning. It is, nonetheless, indisputable that the reason for reprogenetics research is to improve human health and quality of life. On the other hand, from a post-humanist point of view, doubts arise from the fact that all medications and technologies that allow people to enjoy a long life and good health are, before being used in therapy, tested on animals. Additionally, deeper insight into the molecular foundations of life reveals a genetic similarity between humans and non-human animals, opening the possibility of matching the similarity to fit human needs. Animal enhancement takes place on two levels: animals are modified to be more useful to people and to use them to test therapies aimed at improving the quality of human life. Subsequently, animal enhancement serves a completely different purpose than human enhancement; hence the ethical evaluation of this procedure can be entirely different. Developments in biotechnology over the past 25 years

have allowed scientists to engineer genetically modified (GM) animals that are used in agriculture, medicine and homelife. An example of animal enhancement to better serve human needs is the modification of dairy cows or chicken to raise their productivity. These modified animals should also gain weight faster or be immune to diseases caused by intensive animal farming. Despite such a rationale, the changes cause the animals to suffer. For example, the joints of chicken often cannot withstand their weight (Forabosco et al. 2013; PETA 2017).

Another example of animal enhancement is laboratory animals modified to be animal models for human diseases. Although the use of anatomy and physiology began in ancient Greece, the discoveries of the New Genetics have allowed for lasting and more useful improvement of animals (Ericsson et al. 2013).

The most widespread response among both medical researchers and ethicists was brought about by the creation of the *oncomouse* at Harvard University in 1984[1]. Inducing human breast cancer cells into mouse embryos created an animal that is vulnerable to oncological diseases. The model is currently used in preclinical trials of oncological therapies. Another example are animals with induced diabetes, depression or Huntington's disease. From the point of view of basic and pharmaceutical research, these animals provide an ideal research model for specific diseases.

However, another example of using animals to advance medical research is a specific group of transplantation procedures, namely xenotransplantation (also called heterogenous transplantation). The procedures consist of transplantation between two different species. According to the definition of the U.S. Public Health Service:

> Xenotransplantation is now defined to include any procedure that involves the transplantation, implantation, or infusion into a human recipient of either (a) live cells, tissues, or organs from a non-human animal source or (b) human body fluids, cells, tissues or organs that have had ex vivo contact with live nonhuman animal cells, tissues, or organs. Furthermore, xenotransplantation products have been defined to include live cells, tissues or organs used in xenotransplantation. The term xenograft, used in previous PHS documents, will no longer be used to refer to all **xenotransplantation** products[2].

Due to a shortage of organs and limited possibilities of conducting allotransplantations[3], xenotransplantation is used as an alternative solution, which is, nonetheless, controversial in terms of medical, as well as ethical, social, legal and religious considerations.

The medical success of xenotransplantation is limited due to the risk of hyperacute rejection of the transplanted tissue or organ by the recipient's body, which may be a source of medical complications (Rowiński et al. 2014). Primarily, this includes the risk of transferring animal pathogenic factors onto humans. Simultaneously, nonmed-

[1] European Patent Register entry for European patent no. 0169672, under *Inventor(s)*. Consulted on February 22, 2008.

[2] U.S. Public Health Service Guideline on Infectious Disease Issues in Xenotransplantation. Retrieved August 4, 2019 (https://www.cdc.gov/mmwr/preview/mmwrhtml/rr5015a1.htm).

[3] Allotransplantation (homotransplantation) is transplantation within one species.

ical philosophical concerns identify the potential risk of manipulating animal organs, which specifically refers to the so-called *humanised pigs*[4] (Bohatyrewicz 1991; Kościelniak 2005) or to using monkeys (especially baboons as heart donors and chimpanzees as liver donors). The first xenotransplantation procedure was performed in Russia in 1682, where a piece of a dog's skull was used to replace a missing skull fragment in a wounded man[5] (Smorąg et al. 2011). The actual development of experimental transplantation medicine, including transplantation of animal grafts, began in the early 1920s. It is estimated that between 1906-1995, 70 animal-to-human transplantations were performed (Daar 1999). The best known and controversial xenotransplantation procedure was conducted in 1984 by Leonard Bailey, who attempted to transplant a heart from a baboon to a baby. In literature, this is known as the case of Baby Fae, named so to protect the family's anonymity. The procedure garnered a widespread reaction when the patient died within 20 days. According to many respondents, the procedure was unwarranted, no alternative treatments were sought, nothing was known about the parents' informed consent, and doctor Bailey was reluctant to work with the media (Borowiec 2019; Tilney 2019).

In Poland, since 2003 the Institute of Zootechnics in Balice has been conducting research on transgenic pigs, supervised by prof. Zygmunt Smorąg. The project, ordered by the Ministry of Science and Informatisation, involves 11 research teams representing various fields, including molecular biology, embryology, virology, immunology, as well as transplantation surgery. The project aims to breed transgenic pigs with an edited human gene in order to crossbreed the animals to obtain the best possible transplantation organ, and thus, to lower the immunological barrier between humans and pigs (Smorąg and Słomski 2005). So far, the outcome of the project is the TG1154 transgenic hog, whose semen is used to inseminate and reproduce subsequent specimens. Professor Smorąg stresses the importance of various procedures and requirements regarding how xenotransplantation products are obtained. A major requisite is the source of organs and their effectiveness which leads to appointing a specific series number, as well as their safety with regard to their maximum and documented sterility (Smorąg 2006). Indisputably, the advantage of xenotransplantation is that it responds to the human organ shortage, in addition to the possibility of thoroughly testing, supervising and fully controlling a specific graft (i.e. its size and genetic profile), as well as specifically planning transplantation procedures.

Apart from biotechnical, medical and organisational aspects, xenotransplantation involves social and ethical concerns. By their very nature, xenotransplantation gives rise to moral dilemmas. Most people approach the use of heterogenous organs with reserve. Some fear the existence of an *alien*, heterogenous organ inside the human body: the most perfect, most advanced evolutionary organism. Others are simply afraid of rejection or inefficiency of the animal graft. Western European societies clearly differ-

[4] Xenotransplantation has, for some time, been perceived as an equivalent alternative to allotransplantation. See: Kościelniak P., Transgeniczne wnuki, „Rzeczpospolita", 06.12.2005.

[5] Smorąg et al. 2011. On the other hand, different sources claim that the first dog-to-human bone transplantation was performed in 1501 in Iran. See: Umana 1995:1481.

entiate between organs in respect to their species of origin. Considerably less controversial is the use of transgenic animals, for instance bred organs from pigs, than using organs from monkeys, despite their anatomic and physiologic similarity to people. Primates seem especially close to the human species due to the affinity between them (being the closest phylogenetically related). This, however, raises some concerns, as the relatively high level of compatibility means that some baboon and chimpanzee viral pathogens can infect people (Smorąg and Słomski 2005). Moreover, the breeding of monkeys is more demanding. Their fertility is much lower and gestation longer in comparison to pigs, which have turned out to be the optimal animals.

Furthermore, public discourse attaches great importance to religious issues. The three monotheistic religions (Judaism, Christianity and Islam) accept xenotransplantation, allowing the use and modification of nature (including the animal world) if this serves the development and welfare of humankind. Humans have the right to intervene in the work of God. Moreover, Islam and Judaism accept pig xenotransplantation, because they do not see this as the consumption of meat, but as a considerable advantage resulting from using animal organs (Smorąg 2011).

In the Catholic Church, already in 1956 Pope Pius XII spoke of xenotransplantation in his address to the Italian Corneal Donors Association and the Italian Blind Association, stating that it is acceptable when the transplanted organ does not violate the recipient's mental and genetic identity, and the risk associated with the procedure is relatively small (Kniaź 2005). Nonetheless, it should be stressed that the Catholic Church has spoken against xenotransplantation in relation to gonads and brain cells (Smorąg 2011).

Some other religions, for instance, Buddhism and Hinduism, have different perceptions of the relationship between humans and animals, whilst concerns regarding animal organ transplants are left to the believers' individual judgement. In addition, cultural factors play a significant role in the acceptance of xenotransplantation in countries where post-mortem allotransplantation is not possible from a social point of view. For example, in Japan and India organ transplants from animals are a feasible alternative, but the opponents of these procedures cite various arguments against them, including philosophical, legal and medical factors. Of significance are also the above-mentioned arguments concerning the pursuit of anthropocentrism at all costs, and the utilitarian nature of such activity when animals become a "reservoir of spare parts" for people. Other issues involve potential problems with the recipient's identity and concerns relating to the "tyranny of the gift"[6].

In general, transplantation is usually perceived as a gift (Chyrowicz 2011), as an informed and fully voluntary decision. But can we really speak of informed decisions in the case of animals? Could the moral dilemma that is harvesting animal organs be solved by measures taken to increase the number of allotransplantations? These

[6] The term was used in a somewhat different context by prof. Szawarski in an interview conducted by Jakub Kowalski: Kowalski J., Odwaga rezygnacji, „Rzeczypospolita", Człowiek i nauka, z dn. 26.11.2003. In the case of animal organ transplantation, the "tyranny of the gift" may mean a burden that is hard to bear by the potential recipient due to the actual source of the organ.

measures should target the largest possible groups of recipients to reliably present to them the dangers of organ donation, in addition to making them aware that transplantation is a lifesaving procedure which has no other substitute (Baum 2017). Using animal organs would not be necessary if there was a significant increase in donations from relatives and other unrelated living donors[7].

Legal issues are also a cause of concern as the recipient loses at least some of their rights to anonymity and privacy, whilst being obliged to inform the people around them (including the medical community) of having a xenograft in their body (Smorąg 2006). This may cause the organ recipient to feel discomfort and a sense of discrimination. Another legal aspect is the possible existence of "xenotourism", in other words, organised and commercial journeys to countries where xenotransplantation is possible[8]. Nowadays, another example of controversial ethical research is creating animal embryos that contain human cells and transplant them into surrogate animals. The study was approved in 2019 in Japan (Cyranowski 2019).

Xenotransplantation should, therefore, be perceived not only from the anthropocentric perspective, which refers mainly to the risk of rejection of the heterogenous transplant but also from the point of view of ecology ethics where the major aspects include animal welfare and avoidance of unnecessary pain and stress. Furthermore, the decision to perform xenogeneic transplantation should be preceded by a thorough analysis of the potential gains and risks. In addition, alternative methods should be considered, as well as the specific patient's choice (Smorąg and Słomski 2005).

SUMMARY

Today, scientists who use animals in scientific research must meet a range of criteria established in EU directives and local laws (Żok 2019) to provide the animals with an appropriate level of wellbeing[9] (Mamzer 2016). However, the aim of the research is not to improve the health of the animals. First of all, the actual term "animal enhancement" is ambiguous, since the wellbeing of the "enhanced" animals is very much reduced. In human enhancement, the situation is clear: humans decide for themselves which traits are evolutionarily desirable, and which should be discarded. Thus, animal enhancement happens from an extremely anthropocentric standpoint whereby people decide how to change the animal genome, guided by their own profit. Reservations concerning human enhancement result mainly from the historical implications of eugenics. It is worth noting that in this context, humans are autonomous agents (Żok, Baum 2018), whereas the same cannot be said of animals. The dispute around using animals in this way is apparent both in debates about eating animals and their mass breeding, as well as using them in laboratories. The ethical evaluation of animal en-

[7] In 2018, only 23 liver transplantations from living donors and 295 from deceased donors were carried out in Poland. See: Poltransplant, http://www.poltransplant.org.pl/statystyka_2018.html.

[8] The issue is analogical to the functioning of the so-called "black market for organs".

[9] In this respect, the concept of wellbeing is regarded from various perspectives, including the following areas: somatic, physiologic, behavioural, emotional, cognitive, psychological and social. The areas overlap and are inherently connected by complex and reciprocal interactions. See: Mamzer 2016.

hancement will, therefore, depend upon the adopted ethical standpoint.

The first approach is that of human domination (Szewczyk 2009), which is extremely anthropocentric based on the belief that only humans can feel pain and emotions and have a consciousness. Nowadays, this assumption does not seem accurate, because there is no doubt the non-human animals can feel pain and emotions. Furthermore, this approach does not seem to benefit humans. The Anthropocene era[10], where people have strongly marked their existence on Earth, has led to global warming and littering the planet.

An opposing approach, codified by Tom Regan, emphasises animal rights. Furthermore, Peter Singer advocates treating people and animals with equal respect. Referring to the philosophy of Jeremy Bentham, Singer situates his theory in direct opposition to the Cartesian assumption of absolute human domination. Both humans and non-human animals have the ability to feel pain; therefore, all beings have equal rights to be free from suffering. In *The Case for Animal Rights* (Szewczyk 2009), Regan notes that all sentient beings have basic rights and interests that should not be violated. Most importantly, making such beings suffer should not be allowed, and subsequently, people are obliged to take care of animal welfare. Accordingly, Regan believes that anthropocentric research on animal enhancement excludes the animals' basic rights.

Yet another approach supports the priority of human interests over animal rights. Consequently, researchers can use animals but should minimise their suffering and reduce their numbers in experiments (Szewczyk 2009). The proponents of experiments on animals believe that most achievements in medical sciences up to the late 19th century would not have been possible if biomedical research did not use animals (Mephan 2008). Subsequently, animal enhancement leads to an important gain for humans. The organs grown on humanised animals can considerably improve the quality of life of people awaiting transplantation.

As a tenet of the Anthropocene, endeavours to adapt Earth to meet human needs include the adapting of non-human animals. The ethical assessment of this phenomenon will depend on the actual advantage for humans, caring for the modified animals' welfare and the ecological impact of such organisms on the environment.

Another problem is the fluidity of transition between bodies. Human cells are implanted in other animals, allowing to grow organs used in transplantation or to increase the efficacy of tested therapies in humans. With this approach to genetically modified animals, an appropriate concept would be that of "biopower" used by Foucault and Donna Haraway.

The latter compares the hierarchy of organisms to patriarchal or oedipal family narratives (Haraway 1997; Braidotti 2006). This understanding of speciesism constitutes an important rationale in contemporary philosophy. In their undefined status, the concepts of "cyborg", "coyote", "trickster" and "oncomouse" disrupt this discourse.

[10] The concept of the "Anthropocene" is used to describe the contemporary geological age. The Anthropocene narrative presents humanity as a species taking control of the rest of the Earth System. See: Malm and Hornborg 2014.

Haraway sees the oncomouse as a technical body par excellence: it was created to serve profitable trade between the laboratory and the market, between patent offices and research centres (Haraway 1997). On the other hand, Haraway emphasises the kinship between transgenic animals and humans by calling the oncomouse her sister (Haraway 1997). Citing the oncomouse as an example, Haraway also notes that transgenic animals are becoming contemporary Christs who sacrifice themselves for people. The sacrifice of the oncomouse and other transgenic animals will, for instance, give many women a chance to recover from diseases that, until now, did not prognoses well.

Moreover, transgenic animals disturb the "culture vs. nature" opposition. Animal reproduction is removed from the natural process and takes place with laboratory precision to increase its usefulness. This enmeshed approach to the oncomouse is characteristic of Haraway's project, which includes both cognitive and ethical aspects. It consists in thinking across established categories, for example, "nature vs culture" or "human-made vs human-born". But it is also a criticism of commodity fetishism and the so-called "market economy" in its corporate and global stadium.

With regard to ethics, the project concerns a new system of affinity to or new forms of social connections with "techno-others" (Braidotti 2006a). In the context of relationships resulting from affinity, the question arises of the relationship between the organ recipient and the animal carrier. To use Haraway's metaphor, the animal, in this instance, ceases to be the recipient's mythical sister actually to become their daughter created directly from their genetic material. This leads to a new relationship between the donor and the recipient, and those existing until are now, in this case, no longer of use (Baum and Wiertlewska-Bielarz 2012). Nonetheless, from an ethical point of view, it is difficult to treat the animal as an object. Despite prioritising human interest in medical sciences, the animal has to remain important in this relationship. On the one hand, it becomes the embodiment of the post-humanist understanding of the human-animal unity and symbiosis, whilst on the other, it deepens the anthropocentric relationship whereby humans are able to control natural processes and increase their biopower with respect to nature.

Moreover, Jurgen Habermas observes that the non-human is approached with enthusiasm, as well as fear of potentially losing one's position in the centre of the world (Habermas 2003). Experiments consisting of raising the genetic affinity between non-human animals and humans blur the differences between them, whilst reinforcing human domination on Earth. At their core, medical, philosophical, ethical and social concerns refer to the problem of objectified animal sacrifice and their suffering to the advantage of humans, which in reality is a dispute between value systems. Within this dispute, it is important to remember the anthropomorphism, evolutionary affinity, social relationships and intelligence of animals, so that the so-called "Thrasymachus Law" (Plato 2003), where justice is seen as the "interest of the stronger", does not determine our humaneness.

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