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Against Dignity: An Argument for a Non-Metaphysical Foundation of Animal Law[2]

1. Introduction

Animal protection as an emerging field of legislation needs to be constitutionalized as well as comprehensively expounded by legal scholars. As it is a growing body of regulation and concomitant legal theories, it needs to develop a solid conceptual and axiological framework, in particular a set of basic values and principles on which detailed rules are to be founded. Lacking these, the domain of animal law is still in the pre-paradigm stage and remains an assemblage of dispersed ideas, concepts and regulatory measures. It yet has to develop into a coherent whole that may grow to be a mature regulatory and doctrinal domain of law. In order to reach this stage, it should be founded on clear theoretical and constitutional grounds. Lacking those, its further development and effective operation may be seriously impeded.

There seem to be two basic approaches that may serve as the possible foundations for a viable model of animal protection law. The first may be referred to as the "dignity" approach and the other, as the "sentientist" approach. According to the first of those two approaches, animal protection law should rely on the concept of animal dignity as its philosophical foundation. Animals are to be treated with appreciation for their inherent dignity which the law ought to recognize and respect. Switzerland was the first country to apply the concept of dignity in respect of non-human creatures, albeit it happened partially as a side-effect of expanding the concept of dignity to respond to the challenges of genetic engineering.[3] Nonetheless, since then it has gradually become the cornerstone of Swiss animal protection law, in particular after the revised Animal Welfare Act (German: *Tierschutzgesetz*) declared in its opening article that the aim of

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[3] See more on that origin in S. Stucki, *Grundrechte für Tiere* [Eng. *Fundamental Rights for Animals*], Baden-Baden 2016, p. 92ff; Ch. Ammann, B. Christensen, L. Engi, M. Margot (eds.), *Würde der Kreatur. Ethische und rechtliche Beiträge zu einem umstrittenen Konzept* [Eng. *Dignity of Living Beings. Ethical and Legal Essays on a Contested Concept*], Zürich 2015.

its provisions is to protect "the dignity and welfare of animals".[4] Since then, a similar path has been followed by Liechtenstein where the same wording was incorporated into its Animal Welfare Law (German: *Tierschutzgesetz*).[5]

The second approach rejects the idea of animal dignity as a defensible basis of the relevant legislation on the grounds of it being philosophically dubious and entailing objectionable normative consequences for the scope and content of the legal protection of animals. Thus, it rather aims at founding legal norms and policies directly on scientifically informed theories of sentience, evolutionarily developed nervous structures underlying cognitive and emotional capabilities or species-typical biological and psychological needs that condition the subjective well-being of a given creature. It postulates that the legal situation of animals ought to be regulated directly based on empirical evidence provided by science and its ethically sound implications without deploying the concept of "animal dignity" which may prove more troublesome and misleading than contributive to rational law- and policymaking.

The aim of this paper is to analyse and discuss both these approaches and to argue that the former is philosophically, conceptually and practically flawed. The second approach, even despite some serious disadvantages, is therefore deemed to be preferable and more promising.

2. The dignity approach

The contemporary concept of human dignity is rooted in the religious tradition of man as a creature endowed with an immortal soul and thus elevated above all other entities.[6] Its secular version is rooted in the modern rationalistic thought that stems from 17th century humanist philosophy. Its most prominent expression was the Kantian idea of reason as the condition of the moral standing of human beings and their status as ends in themselves (as opposed to other beings which were held to be of merely instrumental value).

Human dignity so conceived is the cornerstone of the modern human rights ideology. It is regarded as the source and foundation of human rights. In virtue of his or her dignity, every human being deserves recognition and respect for its basic personal entitlements. Thus, dignity as an attribute of human beings serves to distinguish people from all other kinds of creatures and even from human beings as persons before the law.[7] Despite all individual differences, each and every human person is believed to be ultimately equal in her or his dignity and to deserve some elementary level of legal recognition as an individual being. According to this ideology, even if there are other goods worthy of legal protection, they are instrumental and subordinate to the fundamental value of human dignity, which is absolute and impervious to any balancing.

Having played such a key role for the contemporary conceptions of personhood and rights, the idea of dignity has become a natural stepping stone to theories advocating fundamental changes in the legal approach to non-human animals. Science has been providing ever more discoveries about the complexities of animal minds. The revealed evolutionary continuity in cognitive and emotional capacities across species is turning

[4] Animal Welfare Act of 2005 (German title: Tierschutzgesetz), 16.12.2005 (AS 2008 2965).
[5] Animal Welfare Act of 2010 (German title: Tierschutzgesetz), 23.09.2010 (LGBl 455.333).
[6] See e.g.: M. Rosen, *Dignity. Its History and Meaning*, Cambridge (Mass.) 2012.
[7] For more detailed examination of this issue see: T. Pietrzykowski, *Personhood Beyond Humanism. Animals, Autonomous Agents and the Law*, Cham 2018, p. 27ff.

the alleged gap between human and non-human animals into an obsolete superstition.[8] Therefore, it seems natural to seek a solution to the problem of inadequate treatment of animals by extending the concept of dignity onto at least some non-human species. Their too long overlooked or ignored moral similarities to human beings should be reflected in the likeness of their recognition and protection under the law. The claims that some animals, such as chimpanzees, dolphins or elephants, should be granted the status of persons in law implies that the underpinning concept of dignity needs to be extended beyond the narrow boundaries of one species only.[9] There are powerful scientific and ethical reasons to close the legal gap that has been sustained between human beings as persons in law and non-human creatures as mere objects of property. The consequence of the legal personification of animals is believed to lead to direct outlawing and abolition of horrible and immoral practices of exploitation.[10]

3. Dignity in the modern legal discourse

Though the idea of dignity plays a key role in the modern constitutional discourse, it is hardly defined as a term of legal language. It is rather conceived as a philosophical or moral notion underpinning the central status of a human being in a legal system. It is dignity that explains why each and every human being irrespective of individual differences should be regarded as a person in law and deserves basic human rights. In this sense, dignity functions in the legal discourse as an intermediate concept, basically bridging the domains of what is (*sein*) and what ought to be (*sollen*). The sole fact of being born as a human being "endows" one with dignity. Then, as a creature having their own dignity, he or she ought to be treated in a certain way. In other words, membership in the human species confers dignity on a creature, which in turn implies certain normative consequences.

Arguably, the dignity so conceived is one of the most spectacular examples of what Alf Ross once famously exposed as *Tû-Tû.*[11] It does not have to denote anything real, since its role in practical discourse (and set of beliefs) is just to link certain facts with some attributed behaviours regarded as their normative implications. The main aim of Ross's attack was to strip the legal language of metaphysical concepts that do not refer to anything actually existing but still operate in practice solely through the shared beliefs and intellectual constructions of their users whose actions constitute the social reality of law. The concepts that were the main target of the realist's attack included legal notions such as "norm", "right", "obligation", "binding force", "validity", "derogation" and the like. It still continues to be debated whether all non-factual terms in the legal language

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[8] See e.g.: D. Griffin, *Animal Minds, Beyond Cognition to Consciousness*, Chicago 2001; G. Roth, *The Long Evolution of Brains and Minds*, Dordrecht 2013; S. Wise, *Drawing the Line. Science and the Case for Animal Rights*, Cambridge (Mass.) 2002.

[9] See: S. Wise, *Drawing*…; G. Francione, *Animals as Persons. Essays in the Abolition of Animal Exploitation*, New York 2008.

[10] The most radical stance linking animal personification with immediate abolition of their exploitation is advocated by Gary Francione (G. Francione, *Animals...*, p. 23). Saskia Stucki argues that the status of a person entails basic rights to the respect of one's dignity, life, liberty and integrity, ruling out most existing ways of exploitation (S. Stucki, *Grundrechte*..., p. 365ff). Also for Steven Wise, the concepts of autonomy, personhood, and respect for the basic dignity-rights are intimately connected – see: S. Wise, *Rattling the Cage. Toward Legal Rights for Animals*, Cambridge (Mass.) 2000, p. 243ff. For a criticism of limiting the implications of granting personhood to "basic" rights only see: O. Le Bot, *Introduction au droit de l'animal* [Eng. *Introduction to Animal Rights*], Paris 2018, p. 127ff.

[11] A. Ross, *"Tû-Tû"*, "Harvard Law Review" 1957/70, p. 812ff.

may be regarded as purely "intermediate", *tû-tû* concepts.[12] It seems, however, that if Ross's analysis was correct in respect of many legal concepts, it appears to be correct for the concept of dignity too.

It is not difficult to observe that the way the concept of dignity is used in the legal discourse is as if it actually referred to a certain quality possessed by creatures that are thought to be endowed with it. It is believed to explain and justify why they occupy a certain moral status, which, in turn, entails their inherent right to be recognized as legal persons as well. Every bearer of this metaphysical quality is entitled to be recognized as a person solely in virtue of this "fact", irrespective of any actual properties one possesses or lacks.[13] Moreover, it is treated as the key moral and ontological distinction between human and non-human beings as well as a constitutive feature of human personhood. It is so fundamental, though, that its meaning and reference is conceived as self-evident and unpackable only by philosophical, not legal, investigations. When courts or legal scholar undertake to explain the concept of dignity, the outcomes usually demonstrate typical *ignotum per ignotum* or *idem per idem* ways of thinking.[14]

4. Why not dignity for animals?

The concept of human dignity has played an unquestionably progressive role in the development of modern human rights' protection. Above all, it helped to overcome the most severe inequalities of people before the law. Today, it remains the basic conceptual shield against the ideas undermining the equal basic status of all human beings and thus helps to prevent the deprivation of many group of people of fundamental legal protection.[15] Nonetheless, it is so effective mainly thanks to its metaphysical flavour and principal vagueness. Due to this nature, it may be used as if it denoted a sort of mysterious property giving the human species its ethical and ontological superiority over the rest of creation. In this sense it has become a kind of modern and secular spell, turning a biological organism into a good in itself as well as an inherent personal rights-holder.[16]

Therefore, dignity as the source of human rights operates in "all or nothing" fashion. A creature either does or does not have it. Consequently, the relevant set of rights either belongs or does not belong to the creature in question. Unless one is a dignity-holder, one does not deserve to be regarded as a good in oneself, whose interests matter irrespective of the interests and rights of human persons.[17] The artificiality of this approach becomes even more clear in view of the progressing technologies that make it possible biologically to combine human and non-human organisms (by means

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[12] T. Gizbert-Studnicki, M. Klinowski, *Are Legal Concepts Embedded in Legal Norms?*, "International Journal for the Semiotics of Law" 2012/25, pp. 553–562; B. Brożek, *On "tû-tû"*, "Revus. Journal for Constitutional Theory and Philosophy of Law" 2015/27, pp. 15–23.

[13] For analyses of the ways in which the concept of dignity is used in various legal contexts see e.g.: S. Riley (ed.), *Human Dignity and Law: Legal and Philosophical Investigations*, New York 2018.

[14] Typical explanations refer to the concepts of the inherent or absolute value of a human being, her or his worth, autonomy or rationality, personal integrity, source or basis of basic human rights etc.

[15] See e.g.: C. Von Geusau, *Human Dignity and the Law in Post-War Europe. The Roots and Reality of the Ambigous Concept*, Oisterwijk 2013; P. Gilbert, *Human Dignity and Human Right*, Oxford 2019.

[16] Thus, one having an inherent dignity is a perfect example of a "queer" fact in the sense famously discussed and criticized in J.L. Mackie, *Ethics. Inventing Right and Wrong*, London 1977, p. 38ff.

[17] One could object that juristic (corporate) persons are commonly regarded as independent rights-holders. I criticize this view elsewhere, arguing that actually corporate personhood is an additional legal devise to let people pursue some of their interests in more efficient, organized way. If this is correct then corporate and "natural" personhood should not be seen as equivalent. See: T. Pietrzykowski, *Personhood*…, p. 31ff.

of creating chimeras and hybrids).[18] At the same time, the on and off nature of dignity legally conceived makes it quite inconvenient to improve the legal situation of animals.

4.1. Dignity and equality

The important function of the modern concept of dignity is to make all people equal in their basic legal status. Therefore, if it was to be expanded to animals, there would be basically two options. Either it would be more or less arbitrarily ascribed to a sub--group of animals (e.g. chimpanzees), making them "equal" to human beings in the sense of having similar kinds of "dignity" as their foundation.[19] All of them would have to be a similar kind of "persons" enjoying similar sets of basic personal rights stemming from their inherent dignity. Obviously, this group would have to be distinguished on the basis of some criteria, sufficient level of cognitive capabilities, practical autonomy, evolutionary affinity to humans or the like.

Nonetheless, the outcome of the application of such a criterion would have been, again, the split of animals in an on-and-off manner. Some of them would belong to the group that, having met the set criteria and deserving "full" legal protection, is regarded as persons having their own dignity. All the other animals would remain outside this "expanded circle". The legal universe would remain ultimately dual, composed of persons and things, yet divided by a line drawn across the non-animal animal kingdom rather than between human and non-human animals (as it is the case today). On one of the sides of the line would be some "human-like" animals ascribed with dignity, while on the other, the remaining "undignified" animals (presumably deprived of any inherent value and thus deserving no special moral concern, at least for their own sake).

4.2. Dignity, personhood and agency

Furthermore, the extension of the concept of dignity beyond the boundaries of the species would make it difficult to differentiate between human and non-human personhood. Both of them would have the same axiological foundation in dignity as the principal source of rights. These two "kinds" of legal rights-holders should, however, be differentiated due to the gap that unquestionably exists between moral agency (which human beings possess) and the status of a moral patient (which would be that of the dignified animals).

The juxtaposition of capabilities underlying moral agency and patiency is well-established in ethical theory. In animal rights discourse, it has been memorably introduced by Tom Regan, for whom moral agency is the possession of abilities allowing for free choice and considerate moral action.[20] As opposed to that, moral patients lack such an ability.[21] It is not only animals, but also human infants, and people with serious mental or neurological dysfunctions that belong to the category of moral patients rather than moral agents. Moral patients do count morally and should be protected from wrongs done

[18] See: J. Taupitz, M. Weschka (eds.), *Chimbrids. Chimeras and Hybrids in Comparative European and International Research. Scientific, Ethical, Philosophical and Legal Aspects*, Dordrecht 2009.

[19] An interesting discussion of the levelling quality and conventionality of such distinctions may be found in A. Peters, *Liberté, Égalité, Animalité. Human-Animal Comparisons in Law*, "Transnational Environmental Law" 2016/1, pp. 25–53.

[20] T. Regan, *The Case for Animal Rights*, Berkeley–Los Angeles, p. 151.

[21] T. Regan, *The Case*..., p. 152.

by others. Moreover, due to their lack of capacities to act in an ethically meaningful way, moral patients should also be prevented, whenever necessary, from doing harm to others or to themselves, but their actions do not fall within the scope of moral accountability. It is a well-established principle of developed legal systems that moral agency is a prerequisite of legal responsibility, in particular culpability in criminal law.[22] Moral patiency, in turn, should be regarded as a sufficient condition for legal protection against wrongs, even if the creatures in question cannot be held morally or legally responsible for their own actions.

Overlooking the distinction between the moral agency of an average human being and the moral patiency of an average vertebrate animal underlies an all-too-frequent argument (stemming from the Kantian tradition) that animals cannot have rights because they are incapable of assuming obligations. Once animals are conceived as moral patients rather than agents, there is no basis for linking the potential ascription of legal rights with the corresponding obligations (whether and why legal rights ought to be attributed to animals and, if so, what rights to which animals is another question, though). Additionally, only some interests-rights (aspects of well-being protected in the form of a subjective legal right) would be beneficial for animals, while most choice--rights (those that allow human agents to trigger deliberate legal effects that they intend to bring about) would be of no use to them.

Thus, there is a remarkable gap between the human-like and a potential animal-like personhood (as a right-holding capacity). Arguably, it is of principally different nature than the distinction between natural and juristic (corporate) persons; therefore the argument that there are already "non-human" persons in law seems to be rather misconceived in the context of animal personhood.[23]

The gap between human and animal capabilities of agency and the kind of right--holding should not be diminished even if in the past it has greatly overshadowed the even more important gap between all sentient creatures and the rest of nature. There can be no doubt that the emergence of sentience in the course of evolutionary history of life on Earth was and remains ethically the most significant breakthrough, giving rise to subjects whose existence may be subjectively better or worse, without which no choices could have any moral bearing. In other words, there is not only one, but two important moral divides that should be recognized and reflected in the law.

The first is sentience – it begets subjective interests emerging from the capability of experiencing one's existence as composed of positive and negative stimuli. Essential ethical implications of such subjective interests are obvious.[24] The second is moral agency that underpins moral duties and responsibilities. It also makes it plausible to endow the agent with rights, while the awareness of those rights permits the individual to deliberately operate in his or her social environment. Animals, as moral patients, have interests that should be recognized and respected by the law, but there is no point in granting them at least those personal rights that are of no benefit for one who is incapable of relying on them while planning one's actions and shaping relationships with others.[25] The only point of ascribing such a bring "legal rights" is to clarify the normative force

[22] See e.g.: A. Duff, *Intention, Agency and Criminal Liability: Philosophy of Action and the Criminal Law*, Oxford 1990.

[23] More on that in T. Pietrzykowski, *Personhood*…, p. 31ff.

[24] Ch. Korsgaard, *Fellow Creatures. Our Obligations to Other Animals*, Oxford 2018, p. 16. See also: A. Elzanowski, *Individual Interests*, in: M. Bekoff, C. Meaney (eds.), *Encyclopedia of Animal Rights and Animal Welfare*, Westport 1998, pp. 311–313.

[25] N. Hoerster, *Haben Tiere eine Würde? Grundfragen der Tierethik* [Eng. *Do Animals Have Dignity? Fundamental Questions of Animal Ethics*], München 2004, 95ff.

of the duty that moral agents should be subjected to of respecting the vital interests of each and every individual moral patient.[26]

4.3. Dignity and degrees

An alternative option that could be taken into account when discussing how the concept of dignity could be adapted to the situation of animals is to turn that concept into one that admits degrees. It would make it more appropriate to capture variations in sentience and cognitive capabilities manifested in the animal kingdom (even if limited to vertebrates only). In such a case, human and non-human creatures would have different sorts or extents of dignity, depending on the kind of conscious phenomena that could be plausibly attributed to their species (or individual condition). Therefore, the scope of normative consequences, namely rights resulting from the dignity of a given creature, could substantially differ depending on bio-psychological qualities of the given dignity-holder. This approach has, however, two obvious drawbacks.

Firstly, it would profoundly alter the concept of dignity in comparison with how it has been conceived and used in modern moral and legal discourse. It is doubtful whether insisting on applying this particular notion with so fundamentally changed meaning is conceptually and practically plausible.[27] Secondly, it could seriously undermine the basic value of the concept of dignity as applied to human beings, that is, as I mentioned before, guaranteeing all human beings basic equal treatment before the law. Making the scope and normative consequences of the inherent dignity of a creature ultimately dependent on one's particular biological qualities (and thus somehow "naturalizing" the metaphysical notion of dignity) could easily backfire against underdeveloped human beings.[28] In effect, it would have to be reinterpreted contrary to its essence and lose the key value it has in contemporary legal thinking. This is a well-known concern often raised by those lawyers who remain sceptical as to whether a legal theory of animal rights and personhood is mature enough to be practically applicable in courts or legislation.[29]

By way of objection to the above arguments one can claim that it is possible, in principle, to distinguish at least human and animal dignity. Such a distinction could partially solve the problems I have discussed above. Human dignity may preserve its integral character as a distinct quality possessed by everyone in virtue of belonging to the human species (I ignore here the growing difficulties resulting from technologies allowing us to blur distinctions between species[30]). Animal dignity may be more internally differentiated, admitting degrees and variations depending on species or even individual qualities of a given non-human creature.[31]

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[26] It is important to note that the argument above does not necessarily entail the endorsement of the will theory of rights as such. See: T. Pietrzykowski, *From Two Conceptions of Rights to Two Kinds of Rights-Holders*, in: T. Pietrzykowski, B. Stancioli (eds.), *New Approaches to the Personhood in Law*, Frankfurt am Main 2015, p. 147ff.

[27] F. Zuolo, *Dignity and Animals. Does it Make Sense to Apply the Concept of Dignity to all Sentient Beings?*, "Ethical Theory and Moral Practice" 2016/19, pp. 1117–1130.

[28] The limits of naturalization of the concept of personhood I discussed in more detail in T. Pietrzykowski, *Towards Modest Naturalisation of the Personhood in Law*, "Revus. Journal for Constitutional Theory and Philosophy of Law" 2017/32, pp. 59–72.

[29] See e.g.: R. Posner, *Animal Rights. Legal, Philosophical and Pragmatic Perspectives*, in: C. Sunstein, M. Nussbaum (eds.), *Animal Rights. Current Debates and New Directions*, Oxford–New York 2004, p. 51ff.

[30] For more see: T. Pietrzykowski, *Personhood*..., p. 56ff.

[31] For an attempt to defend the concept of "animal dignity" along these lines see: E. Kempers, *Animal Dignity and the Law: Potential, Problems and Possible Implications*, "Liverpool Law Review" 2020/41, pp. 173–199.

Apart from other possible weaknesses, there is still one more important disadvantage of attributing to animals their own, species- or even individually-specific dignity. Following the way in which it is conceived in respect of human beings, it would probably lead to the outlawing of not only inflicting harm on animals, but also treating them in a "demeaning" manner considered to be a violation of their dignity. Such effects are already manifest in Swiss animal law, where the concept of animal dignity is invoked in order to ban acts ridiculing animals (by means of dressing, shaving, etc.) irrespective of whether or not it actually makes them suffer.[32]

From the rational point of view, however, animals should be strictly protected from pain, suffering, and distress caused by human beings for unjustified reasons. But extending this protection to the case of non-harmful situations which would be considered humiliating or demeaning for human beings seems to demonstrate anthropomorphic superstition rather than the plausible scope of respecting animal interests.

5. What if not dignity? An alternative approach

An alternative starting point to constructing the philosophical base of animal protection law is the concept of sentience. In contrast to dignity, it can provide a scientifically and philosophically robust foundation for the laws protecting animals. Moreover, it allows for more realistic, incremental progress toward an adequate status of and respect for the interests of animals, without the need for deep reconsideration of the well-established principles of human equality and personhood.

5.1. The moral significance of sentience

The moral implications of sentience are well-recognized in both major ethical traditions, i.e. utilitarianism and Kantianism. In the case of utilitarian ethics, pains and pleasures constitute objective values. Therefore, all sentient creatures matter morally as potential subjects of inherently good or bad experiences. The fact that only human beings are able to recognize the ethical significance of the pain and pleasures of others make them bound by duty to act according to the paramount moral principle, i.e., maximizing overall happiness in the world (that is, all happiness experienced by all the creatures capable of experiencing pains and pleasures).[33]

For Kantianism, the rational creatures are the only members of the moral community. Nonetheless, the leading contemporary Kantian philosopher, Christine Korsgaard, persuasively argues that the premises on which Kant's moral theory has been based actually do not imply the irrelevance of other sentient creatures as Kant himself seemed to believe.[34] According to the revised Kantianism proposed by Korsgaard, given their sentience, animals must be regarded as ends in themselves. Because they lack reason they cannot enact moral principles and remain incapable of moral actions. Nonetheless, they are part of the moral community since their good is a fully legitimate object of

[32] See: G. Bollinger, *Animal Dignity Protection in Swiss Law – Status Quo and Future Perspectives*, Zürich–Basel–Geneva 2016, p. 47ff.

[33] For more on utilitarianism see e.g.: A. Quinton, *Utilitarian Ethics*, London 1989; K. de Lazari, *Point of View of the Universe. Sidgwick and Contemporary Ethics*, Oxford 2016; J.J.C. Smart, B. Williams, *Utilitarianism. For and Against*, New York 1973.

[34] Ch. Korsgaard, *Fellow*…, p. 77ff.

moral concern and has to be respected by the rules binding in the kingdom of ends, even if the rules themselves are made and followed by rational creatures only. As far as reason remains the criterion of being an active legislator in the moral community, sentience is the criterion of who matters as an end in itself for the rules adopted in that community by those who can act morally.

In both major ethical traditions, sentience may be seen as the foundation of moral status. The capability of experiencing pain and pleasure as an evolutionary emerged way that some species (mainly vertebrate) developed to navigate the environment and seek survival and reproduction is also well-established in science. A philosophical explanation of the question of how purely electro-chemical processes translate into qualitatively different conscious states may remain the "hard problem" of our understanding of the mind, but on the descriptive-explanatory level of natural science, the existence of sentience, its neural basis and evolutionary origin have become an uncontroversial part of evolutionary biology and comparative psychology.

In view of all that, it seems fully defensible to argue that two basically different kinds of subjecthood should be distinguished.[35] One is personhood, which is related to rationality and a highly-developed reflective level of consciousness and considerable ability for deliberate self-management of one's own instinctive or intuitive responses to stimuli. Such capability seems to remain a unique or almost unique property of human creatures (or extending, at best, to a few other non-human species).

The other sort of subjecthood is its non-personal variation, based solely on sentience, which is widely present across the animal kingdom and embraces all vertebrate species as well as at least some invertebrates (such as cephalopods). Non-personal subjects have their own morally relevant interests related to their ability to have subjectively experienced lives, which can be better or worse for them. At the same time, they remain principally incapable of acting morally, in the sense of being aware of moral duties and intentionally respecting the value of interests of others.

5.2. Kinds of subjects and the law

How could this distinction be reflected in the law? Arguably, instead of trying to shift the boundaries of personhood, there is a need to establish a new, third category to fill the space between persons and things (objects). It would be a category of non-personal legal subjects designed for those creatures that are sentient but not "rational" (in the moral sense). The underlying reason is that the adequate legal implications of the moral qualities of animals hardly fit the traditional concepts of natural or juristic (artificial) personhood. On the one hand, animals do not need (nor are suited for) typical sets of personal rights traditionally associated with the concept of a person. Such personhood is "too much" for animals. On the other hand, the existing juristic personhood is a technical device, devoid of strictly moral foundations, developed to make the law a better instrument for pursuing human interests (e.g. to act collectively in a cooperative and organized manner). In this sense, juristic personhood is "not enough" for animals, since the recognition of their status and interest is based essentially on moral reasons and aims to constrain rather than further human interests. That is why adequate animal protection requires a deep reconstruction of the moral foundations of the legal system,

[35] For the ethical elaboration of this distinction see: P. Singer, *Practical Ethics*, New York 1993.

which up to now has been principally focused on an anthropocentric worldview, in which human interests are the only ones that matter and the only ones that the law serves to promote.

All of the above supports the view that instead of shifting the boundaries of personhood (natural or juristic), the conceptual framework of the law needs to develop a new kind of non-personal subjecthood fit to the specific condition of sentient, albeit non-rational, creatures. They should occupy a space of neither persons nor things, but with clear and direct recognition of their status as subjects instead of objects of law. The consequence of that will be to regard their individual interests as valid reasons capable of constraining human choices and actions, but without granting them the set of rights traditionally attributed to persons.

The interests of sentient animals *qua* non-personal subjects of law should be balanced with the reasons behind the actions undertaken by legal persons. In some cases, the outcomes of such balancing should be entrenched in the form of explicit legal rules specifying what is allowed and what is prohibited in the human treatment of animals. All other conflicts, uncovered by such specific rules, should be decided on the basis of a general principle that animal interests must be duly considered and respected in all relevant legal (legislative, administrative, judicial) decisions. The balancing of conflicting interests should be governed and solved by the procedurally well-established and known standards of proportionality.

In other words, the pursuit of one kind of rights or interests may be preferred over competing ones only if the basic conditions of the test of proportionality are met. Namely, compromising animal interest must be unavoidable to satisfy the competing interest of a human being; the method chosen to satisfy the latter makes it achievable at the lowest possible costs for the compromised animal interests, and finally, the relevant human interests are not disproportionately trivial in comparison with the animal interests at stake.

Clearly, the balancing and application of proportionality standards are an essentially evaluative undertaking, open to a wide range of different outcomes justifiable by the same criteria. It is a matter of axiological and interpretive reasoning and argumentation with no particular result guaranteed by the factual and legal premises. But this is by no means an exceptional case in the practice of legal and ethical reasoning. And shifting the burden of seeking a proper balance between human needs and ethical concerns for animals to judges reviewing, from this perspective, actual exploitation practices may turn out to be an additional way to effectuate incremental improvements in the relevant legal standards. In many cases it may prove more instrumental to social change than occasional legislation (which is, however, by no means unimportant).

5.3. The sentience approach

This kind of sentience-based approach has some clear advantages over the dignity approach. Firstly, it avoids mysterious, metaphysical middle-terms and, therefore, it much better corresponds to the scientific grounds on which ethics and law should be based. Secondly, it preserves the morally important distinction between rational, moral persons (agents) and sentient subjects that may be (and usually are) deprived of the essential person-making qualities. Thus, it respects the second most important moral distinction – between persons and non-personal, albeit sentient, subjects – after the most

important one, between sentient creatures and the rest of the organic and non-organic world. None of these distinctions should be neglected in sound ethical and legal theories.

Thirdly, it allows for much more flexibility in the treatment of particular species (or even individuals) in complex situations in which conflicting interests have to be balanced, reconciled and traded-off. It also leaves space for more incremental changes in the level of the legal protection of interests of particular species in different situations. This, in turn, makes it better suited for the realistic claims of much faster, but still evolutionary, improvements of legal systems in respect to the treatment of animals. The extent to which human law at a given moment would give priority to animal interests when these are in conflict with various well-established human exploitative practices may much more accurately correspond to the actually prevalent attitudes. The law may try to implement changes but cannot become too far detached from the real social background of the legal rules and practices.

The last difference mentioned above is at the same time the most important weakness and peril relating to the sentience approach. Introducing the "weaker" category of non-personal subjects of law constructed along the lines sketched above may relatively easily become downplayed in legal practice so that no substantial progress in the humane treatment of animals will be obtained. This risk, however, is strictly interwoven with the role that the law plays and is able to play in changing social attitudes. It should not be underestimated – the appropriate content of the law is usually a necessary condition to soliciting such changes. But it must not be overestimated either.[36] The law, by itself, is incapable of miraculously converting people's minds, habits and consciences. It may – to some extent – help to stimulate such changes but they have to be driven principally by other social and cultural forces. Therefore, the law should be, above all, open and flexible enough not to inhibit such changes. In case of animal status, it may also support the reframing social perception of animals as subjects having their own legitimate interests rather than objects of property and discretionary power of their human "owners". But to expect more from the law may reveal a naive faith in the omnipotence of an institutional level of reality that is more a reflection than a source of deeper social and cultural evolutions.

In view of the limited capabilities for change elicited solely by legal reforms, it is better to seek legal solutions that will be open and opportune to extra-legal social progress, as well as flexible enough to seamlessly accommodate changes in community attitudes. The idea of sentient animals as non-personal subjects of law seems to meet these conditions much better than do attempts to attribute to them personhood based on their own dignity.

6. Conclusion: toward proper constitutionalization of the animal status

The distinction between objects, subjects and persons should be reflected in the law while its proper theoretical formulation and practical implementation might well be the main challenge to the moral development of the law in the decades to come. After

[36] See e.g.: D. Mandeleker, *The Role of Law in Social Change*, "Osgoode Hall Law Journal" 1970/2, pp. 355–363; T. Stoddard, *Bleeding Heart: Reflections on Using the Law to Make Social Change*, "New York University Law Review" 1997/5, pp. 967–991. See also: A. Podgórecki, *Socjologiczna teoria prawa* [Eng. *Sociological Theory of Law*], Warszawa 1998. On the relations between law and society see generally B. Tamanaha, *A General Jurisprudence of Law and Society*, New York 2001.

recognition of the personhood of each human being, the next step is to adequately address the huge gap between the relatively well-designed basic protections of human beings and the faulty legal protection of animals based on poorly elaborated theoretical foundations. Up to now, animal interests have been the legal constraints to human prodigality to a very limited extent. Such constraints take the form of the specific anti-cruelty provisions of animal welfare laws. Sometimes the law even declares that animals, as a matter of principle, should not be regarded as objects (property). These so-called "dereificatory" clauses in statutes have been introduced in several national legal systems, such as German,[37] Polish,[38] and French.[39] The position has been also adopted on the level of the European Union treaties (at present, in Article 13 of the Treaty on the Functioning of the EU), recognizing animals as "sentient creatures".[40]

There is, however, no single example of a legal system in which animals are granted a clear status as a subject of legally valid interests that should be mandatorily taken into consideration in all the decisions that may adversely affect them. As a tacit, moral premise this is, nonetheless, present in many actual legal reasonings concerning the limits of the legitimate use of animals. However, there is hardly an adequate and sufficient conceptual framework by means of which the changing moral attitudes to animals could be captured by the law. That is at least partially why it is so difficult for lawmakers to make a step beyond the detailed regulations typical for traditional anti-cruelty laws toward setting forth a new status of sentient animals that would impose some executable, general duties on legal agents.

There is a social pressure and a perceived need to find such a general normative solution removing animals from the category of mere objects (property). It is manifested by the growing number of dereificatory clauses as well as the ever-stronger rhetoric of some judicial decisions (such as in the famous recent Argentinian cases of judges liberating two chimps, Sandra and Cecilia). But the theoretical basis for the new status of animals is still to be worked out and without providing sound and robust conceptual foundations, no substantial changes of the law should be expected. One way might be the dignity approach, as suggested in Article 120(2) of the Constitution of Switzerland[41] together with Article 1 of the Swiss Animal Welfare Law. It is a way which, in my opinion, would lead us astray. The alternative one is to theoretically elaborate and implement a new category of non-personal subjecthood in the constitutions. Its purpose would be to establish a new legal status for sentient animals mandating consideration of their interests in all decisions relevant to their individual well-being.

In order to make such a change effective for not only judicial or administrative, but also legislative decisions, it should be given a constitutional status. Present constitutions hardly ever mention animals at all and, if they do, it is usually a reference to either anti-cruelty legislation or specifying animals as part of the environment that should be protected.[42] Generally, most of them remain rather timid and inconsequential. Even in the most promising cases, they seem at best incomplete. An example of such a promising,

[37] Article 9a of the German Civil Code (German title: Bürgerliches Gesetzbuch), 2.01.2002 (BGBl. I S. 42).

[38] Article 1 of the Animal Welfare Act (Polish title: Ustawa z 21.08.1997 r. o ochronie zwierząt, tekst jedn.: Dz. U. z 2020 r. poz. 638).

[39] Article 515–14 of French Civil Code (French title: Code Civil), 16.02.2015 (Jorf 0040–2015).

[40] Consolidated version of the Treaty on the Functioning of the European Union (OJ C 326, 26.10.2012, pp. 47–390).

[41] Federal Constitution of the Swiss Confederation of 1999 (German title: Bundesverfassung der Schweizerischen Eidgenossenschaft), 18.04.1999 (AS 1999 2556).

[42] For more see: O. Le Bot, *Droit Constitutionnel de l'Animal* [Eng. *Constitutional Animal Rights*], Paris 2018.

albeit incomplete, mention is Article 9(6) of the Constitution of the Land of Salzburg.[43] It stipulates that the tasks and objectives of the public actions to be taken by the authorities include the respect for and protection of animals as fellow-creatures of men, who bear responsibility for all living creatures.

The wording of this provision goes in the right direction although as long as it lacks a robust and full-fledged conceptual and theoretical background, it is bound to remain only a half-empty ideological declaration. It also goes too far as it does not refer to sentience as the basis of the duty of human beings to their fellow-creatures.

These gaps seem to have been avoided in the draft amendment to the Finnish Constitution proposed by the Finnish Animal Rights Law Society. Section 1 thereof sets forth that "animals are sentient beings and must be respected by humans", while Section 2 provides that "the interests and individual needs of animals must be taken into account in all decision-making that has a significant impact on their living conditions".[44]

This certainly captures the central idea advocated here, although instead of limiting it to sentient animals, it mandates that all animals should be presumed sentient as long as there is no scientific evidence to the contrary. This approach seems untenable since there are millions of simple, invertebrate organisms where no sufficient direct evidence exists to the effect of their lack of sentience (simply because they have not been specifically studied), although there is not the slightest evidence of their sentience either. It is practically impossible to treat them, even tentatively, as sentient. Thus, unless the proposed wording is not limited to vertebrate animals, it could be much stronger if Section 1 stipulated instead that sentient animals are subjects of law, whose interests deserve legal recognition and respect, pursuant to the further regulations of the constitution and the subsequent legislation. Nonetheless, the Finnish bill remains at the moment the best attempt to translate into legal language the sentience-based approach to the fundamental reform of animal status in the law.

Against Dignity: An Argument for a Non-Metaphysical Foundation of Animal Law

Abstract: Animal protection as an emerging field of legislation needs to be constitutionalized as well as comprehensively expounded by legal scholars. As it is a growing body of regulation and accompanying legal theories, it needs to develop a solid conceptual and axiological framework, in particular a set of basic values and principles on which detailed rules are to be founded. Lacking these, the domain of animal law is still in the pre-paradigm stage and remains an assemblage of dispersed ideas, concepts and regulatory measures. It yet has to develop into a coherent whole that may grow to be a mature regulatory and doctrinal domain of the law. In order to reach this stage, it should be founded on clear theoretical and constitutional grounds. Lacking those, its further development, and effective operation may be seriously impeded. There seem to be two basic approaches that may serve as the possible foundations for a viable model of animal protection law. The first may be referred to as the "dignity" approach and the other, as the "sentientist" approach. According to the first of those two approaches, animal protection law should rely on the concept of animal dignity as its philosophical foundation. The second approach rejects the idea that the concept of animal dignity as the basis for the relevant legislation as philosophically dubious and entailing objectionable normative

[43] Constitution of the Land of Salzburg of 1999 (German title: Landes-Verfassungsgesetz), (LGBI Nr 25/1999).

[44] Finnish Animal Rights Law Society, *Proposal: Fundamental Rights for Animals*, elaintenvuoro.fi, https://www.elaintenvuoro.fi/english/, accessed on: 28 May 2019.

consequences for the scope and content of legal protections of animals. Thus, it aims rather at legal norms and policies being based directly on scientifically informed theories of sentience, evolutionarily developed nervous structures underlying cognitive and emotional capabilities or species-typical biological and psychological needs that condition the subjective well-being of a given creature. The aim of this paper is to analyse and discuss both these approaches and to argue that the former is philosophically, conceptually and practically flawed. The second approach, even despite some serious disadvantages, is therefore deemed to be preferable and more promising.

Keywords: animals, dignity, rights, law, constitution, ethics

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