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# BEYOND HUMAN RIGHTS

An Argumentation for the Expansion of Human Rights to Animals through an  
Examination of the Relationship between Animal and Human Rights

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## ABSTRACT

This thesis advocates for the expansion of human rights to include non-human animals. The argument will be presented by examining the relationship between human and animal rights in three different dimensions: *Animal Rights as Human Rights*, *Animal Rights for Human Rights*, and *Animal Rights vs. Human Rights*.

Firstly, it will be demonstrated that the foundations of human rights are not that exclusively human after all, but inherently extendable to other sentient beings (*Animal Rights as Human Rights*).

Secondly, it will be assessed whether animal rights can benefit human rights, addressing concerns about the 'levelling-down' effect of including animals and highlighting the synergetic relationship between the two (*Animal Rights for Human Rights*).

Lastly, the potential conflicts between animal and human rights and possible solutions to solve them will be examined (*Animal Rights vs. Human Rights*). This will underscore the necessity of granting animals fundamental rights status, which brings these conflicts to light and allows them to be addressed on equal terms. While fundamental and radical changes are necessary for the full protection of animal rights, this thesis will also consider how to find just solutions during these transitional processes.

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## INTRODUCTION

Can we imagine a world in which animals are seen as members of our political community, as workers with corresponding working rights or as self-determinate communities with a right to their own territories and protection for their own family and social life, as well as legitimate victims of war, (reproductive) violence, torture and genocide; a world in which animals possess “human” rights? What seems hard to imagine for many and even ridiculous for some, is actually not that farfetched. Animals have always been part of our society, as companion, family members, friends, workers, sacred beings, but also as mere products to exploit for food, medical research, entertainment, as well as (perceived) threats for human life and health. Animals are beings with a subjective experience of life and certain interest, needs and vulnerabilities, as well as often fascinating capabilities.

The law, however, has long objectified and reduced animals to their sole use for human interests, enabling and supporting the oppression, exploitation and violence from human beings against animals. But we have been witnessing a growing trend of questioning the position of animals within the law in the past decades. And this development is accompanied by and entangled with a larger debate in various academic fields, ranging from anthropology, biology, neurosciences, psychology to social sciences and other disciplines, that increasingly questions the human-animal divide (or more broadly the human-nature divide) and challenges the sole focus on the human being, sometimes expressed as anthropocentrism or humanism.<sup>1</sup>

While the question of our relationship to and treatment of animals was long debated as a matter of personal morality, it has more been recently formed into a political demand of justice, asking what we owe as a society towards animals, and it even entered a number of legal debates and court rooms. The Supreme Court of India for example decided, regarding Art. 21 of the Indian Constitution, that:

‘Every species has a right to life and security, subject to the law of the land, which includes depriving its life, out of human necessity. Article 21 of the Constitution,

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<sup>1</sup> See for example: S Eben Kirksey and Stefan Helmreich, ‘The Emergence of Multispecies Ethnography’ (2010) 25(4) *Cultural Anthropology* 545; Marc Bekoff and Jessica Pierce, *Wild Justice: The Moral Lives of Animals* (Chicago University Press 2009); Frans de Waal, *Are We Smart Enough to Know How Smart Animals Are?* (W&W Norton 2016); Cary Wolfe, *What Is Posthumanism?* (University of Minnesota Press 2009); Kristof Dhont and others, ‘Rethinking Human-Animal Relations: The Critical Role of Social Psychology’ (2019) 22(6) *Group Processes & Intergroup Relations* 769; Bruno Latour, *Politics of Nature: How to Bring the Sciences into Democracy* (trs by Catherine Porter, Harvard University Press 2004), Anne Peters, *Animals in International Law* (Brill 2021).

while safeguarding the rights of humans, protects life and the word “life” has been given an expanded definition and any disturbance from the basic environment which includes all forms of life, including animal life, which are necessary for human life, fall within the meaning of Article 21 of the Constitution. So far as animals are concerned, in our view “life” means something more than mere survival or existence or instrumental value for human beings, but to lead a life with some intrinsic worth, honor and dignity.’<sup>2</sup>

In the United States, the Non-Human Rights Project by Steven M Wise and the Cetacean Community tried to bring legal claims on the behalf of animals.<sup>3</sup> And in Switzerland, the dignity of animals is recognized within the constitution since 1992<sup>4</sup> and central element of the animal welfare legislation since 2008<sup>5</sup>. In short: ‘Animal rights is an idea whose time has come’.<sup>6</sup>

I will contribute to the debate and defend the demand for fundamental rights for animals as new human rights claims in this thesis while looking at the relationship of animal rights and human rights from three different perspectives: *Animal rights as Human Rights (I.)*, *Animal Rights for Human Rights (II.)* and *Animal Rights vs Human Rights (III.)*.

Before engaging with the subject of this thesis, I will define what is meant by referring to “animals” and “animal rights”, since it is not as clear as one could assume at first glance. These preliminary questions will be answered in the following part.

My analysis will then show that the very foundation of human rights is inherently extendible to animals, thus animal rights can be understood *as* (new) human rights (claims) (I.). I will furthermore demonstrate that animal rights are in principle beneficial *for* human rights and that levelling-down concerns in relation to human rights are unjustified (II.). And lastly, I will examine possible conflicts between human and animal rights. While fundamental and radical changes are necessary for the full protection of animal rights, this thesis will also consider how to find just solutions during these transitional processes with regard to human rights (III.).

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<sup>2</sup> *Animal Welfare Board of India v. A. Nagaraja & Ors* [2014] 7 SCC 547 [62].

<sup>3</sup> *Cetacean Community v Bush* [2004] 386 F.3d 1169 (9th Cir); *Nonhuman Rights Project v Lavery* [2014] 124 A.D.3d 148 (NY App Div).

<sup>4</sup> The respective article, Article 120 (2) of the Swiss Federal Constitution was incorporated in the context of genetic manipulation, Stephanie Schindler, ‘The Animal’s Dignity in Swiss Animal Welfare Legislation – Challenges and Opportunities’ (2013) 84 *European Journal of Pharmaceutics and Biopharmaceutics* 251.

<sup>5</sup> Schindler Ibid.

<sup>6</sup> Saskia Stucki, *One Rights: Human and Animal Rights in the Anthropocene* (Springer 2022) 1.

## PRELIMINARY CLARIFICATIONS: ANIMALS, SENTIENCE AND RIGHTS

Who is the Animal? This depends of course of whom we ask or from which perspective we look at the question. From a biological perspective, one could define animals as follows: ‘Even though members of the animal kingdom are incredibly diverse, animals share common features that distinguish them from organisms in other kingdoms. All animals are eukaryotic, multicellular organisms, and almost all animals have specialized tissues’.<sup>7</sup> This definition includes human beings, as well as vertebrates, fish and insects; and it tells us very little about the moral and legal relevance of those beings. In comparison, the way we commonly use the term “animal” is meant to distinguish human beings from all other animals on the one hand and plants on the other hand, and sometimes even to distinguish mammals or vertebrates from all other animals (namely fish, reptiles, insects), implicating a differing moral and/or social status. Most scholars of legal or moral philosophy arguing for animal rights refer to animals as sentient animals or animals that possess consciousness, since their conception places these characteristics as the relevant criteria for moral (and thus legal) consideration.<sup>8</sup> Alasdair Cochrane, a British political theorist and ethicist, known for his work animal rights from the perspective of political theory and arguing for sentience as the relevant criteria for the foundation of rights, for example, defines sentience as ‘the capacity for conscious experience’.<sup>9</sup> A bit more detailed, one could define sentience as the ‘capacity to subjectively experience the world, including experiencing positive emotions or states such as happiness and joy, and negative states like pain and suffering’.<sup>10</sup> It is important to highlight, that this encompasses not only the ability to feel physical pain, but a variety of emotions and states, including positive emotions. In order to determine whether a particular species or individual animal possesses sentience scientist usually look for nociceptors,<sup>11</sup> the brain's ability to receive information from

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<sup>7</sup> University of Minnesota, ‘93. Features of the Animal Kingdom’ (Introductory Biology: Evolutionary and Ecological Perspectives 2023) <https://pressbooks.umn.edu/introbio/chapter/animalsfeatures/> accessed 10 July 2024.

<sup>8</sup> Martha C Nussbaum, *Justice for Animals: Our Collective Responsibility* (Simon & Schuster 2022) 6, 118ff; Alasdair Cochrane, *Sentientist Politics: A Theory of Global Inter- Species Justice* (Oxford University Press 2018); Alasdair Cochrane, ‘From Human Rights to Sentient Rights’ (2013) 16(5) *Critical Review of International Social and Political Philosophy* 655; Saskia Stucki, *One Rights* (n 6).

<sup>9</sup> Cochrane, *Sentientist Politics* Ibid 15.

<sup>10</sup> Jane Kotzmann, ‘Sentience and Intrinsic Worth as a Pluralist Foundation of Fundamental Animal Rights’ (2023) 43(2) *Oxford Journal of Legal Studies* 405, 409.

<sup>11</sup> Nociceptors are responsible for the transmission of information about stimuli that are potentially injurious to the respective organism and give rise to pain, see Lynne U Sneddon, ‘Evolution of Nociception in Vertebrates: Comparative Analysis of Lower Vertebrates’ (2004) 46 *Brain Research Reviews* 123, 124.

various sensory inputs, neural pathways connecting nociceptors to integrative brain regions, behavioral responses to diverse stimuli, self-protective actions, the formation of associations, and attributing significance to pain relief.<sup>12</sup> Nevertheless, these factors are only indirect indicators for sentience, since sentience itself cannot be objectively measured.<sup>13</sup> Moreover, sentience can be better understood as a spectrum, than a yes-or-no-question, since it is a subjective experiences that varies across and within species; some animals (as well as some humans) have greater capacity for awareness and emotions than others.<sup>14</sup> Despite the ambiguities that exists around the determination of sentience, it is generally agreed that all vertebrates possess sentience.<sup>15</sup> Other studies furthermore suggest that amphibians, reptiles, fish, cephalopods and decapod crustaceans are also sentient.<sup>16</sup>

Taking into account, that sentience operates on a spectrum and there are species for which it is still unclear whether they generally possess sentience, I propose to work with the term “animal” referring to sentient animals as an open-ended term. We should give these animals, for which it is unclear whether they possess sentience, namely invertebrates, “the benefit of the doubt” and include them in the definition of animal, despite persisting uncertainties, until it is scientifically proven (to a reasonable degree of certainty) that they do not possess sentience in the described sense. Even if we will learn through future research that certain species of animals do not possess sentience, no great harm can be expected from treating those species in respect for their assumed moral rights, stemming from an assumed sentience. However, we can expect – and we are currently witnessing – great harm the other way around, treating animals that actually do possess sentience as they would not. Thus, the term “animal” is used throughout this thesis as referring to all animals in a biological sense (except human beings), unless there are proven not to possess sentience.<sup>17</sup>

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<sup>12</sup> Jonathan Birch and others, ‘Review of the Evidence of Sentience in Cephalopod Molluscs and Decapod Crustaceans’ (London School of Economics and Political Science 2021) 17, Kotzmann (n 10) 409.

<sup>13</sup> Helen Proctor, ‘Animal Sentience: Where Are We and Where Are We Heading?’ (2012) 2 *Animals* 628, 630; Raffael N Fasel, *More Equal than Others: Humans and the Rights of Other Animals* (Oxford University Press 2024) 121.

<sup>14</sup> Donald M Broom, *Sentience and Animal Welfare* (CABI 2014) xiii–xiv; Kotzmann (n 10) 409. For an extensive discussion of the Sentience ‘Spectrum Problem’ see Fasel, *More Equal than Others* Ibid 119ff.

<sup>15</sup> Robert C Jones, ‘Science, Sentience, and Animal Welfare’ (2013) 28 *Biology and Philosophy* 1, 4, Proctor, (n 13) 632.

<sup>16</sup> Jones Ibid 4ff; Donald M Broom, ‘Considering Animals’ Feelings’ (2016) 5 *Animal Sentience* 1, 8; Proctor (n 13) 634f.

<sup>17</sup> See as well Art 13 Treaty on the Functioning of the European Union (TFEU) [2016] OJ C326/47 that recognizes animals as sentient beings.

Regarding the term “animal rights” some clarification is necessary as well, since there is a differentiated use in the literature. Some scholars have argued that animal do already possess rights under existing animal welfare law,<sup>18</sup> using a so-called ‘thin’ or ‘simple’ conception of rights.<sup>19</sup> Under this conception, rights can be understood as legal protections that arise from duties imposed on human beings that are beneficial to animal welfare and thus protect some basic animal interests to a limited extend. ‘Thick’ or ‘fundamental’ rights in comparison can be understood as granting robust legal protection for fundamental interests.<sup>20</sup> I will use the term “animal rights” in the second sense, as fundamental rights for animals, in the following.

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<sup>18</sup> See for example: Cass R Sunstein, ‘Standing for Animals (with Notes on Animal Rights)’ (2000) 47 *UCLA Law Review* 1333, 1333-36; David Bilchitz, ‘Moving Beyond Arbitrariness: The Legal Personhood and Dignity of Non-Human Animals’ (2017) 25(1) *South African Journal on Human Rights* 38, 43ff, 50 fn 61.

<sup>19</sup> See Saskia Stucki, ‘Towards a Legal Theory of Animal Rights: Simple and Fundamental Rights’ (2020) 40(3) *Oxford Journal of Legal Studies* 533, 551f; Raffael N Fasel and Sean C Butler, *Animal Rights Law* (Bloomsbury 2023) 83ff for a concise summary of the distinction and the respective terms.

<sup>20</sup> *Ibid.*

## I. ANIMAL RIGHTS AS HUMAN RIGHTS

The notion that all human beings (and only human beings) possess human rights ‘simply in virtue of being human’ is supported by the majority of human rights scholars<sup>21</sup> and reflected in some of the most important human rights documents.<sup>22</sup> However, if one looks closer, it becomes clear that this ‘common place’<sup>23</sup> within the human rights literature and practice stands on surprisingly undertheorized foundations.<sup>24</sup>

Although still on the margin of the human rights discourse, a small but growing number of scholars argues for the implementation of animal rights in the concept, language and framework of human rights.<sup>25</sup> This trend has been described as the ‘human rights turn’.<sup>26</sup> In order to do so, most of these scholars, take a closer look at the very source of human rights first and critically ask whether it is really as exclusively human as it seems. We will follow that trend and ask ourselves first: what is the source of human rights and is it applicable to animals?

In general, two main positions to ground human rights can be distinguished in human rights theory: Naturalistic accounts (also called essentialist or foundationalist), which ground human rights in certain features that all human beings are claimed to naturally possess, and political accounts (also called non-essentialist or non-foundationalist), which ground human rights in

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<sup>21</sup> See for example James Griffin, *On Human Rights* (Oxford University Press 2008) 2; John Tasioulas, 'The Moral Reality of Human Rights' in Thomas Pogge (ed), *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor?* (Oxford University Press 2007) 77; Alan Gewirth, *Human Rights: Essays on Justification and Applications* (Chicago UP 1982) 41; David Miller, 'Joseph Raz on Human Rights: A Critical Appraisal' in Rowan Cruft, S Matthew Liao and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (Oxford University Press 2015) 233.

<sup>22</sup> See the respective preamble of the: Universal Declaration of Human Rights, GA Res 217A (III), UN GAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71, the American Convention on Human Rights, 'Pact of San José, Costa Rica' (adopted 22 November 1969, entered into force 18 July 1978) OAS Treaty Series No 36, 1144 UNTS 123 and the African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217.

<sup>23</sup> Raffael N Fasel, 'Simply in virtue of being human? A critical appraisal of a human rights commonplace' (2018) 9(3) *Jurisprudence* 461.

<sup>24</sup> James Griffin, 'First Steps in an Account on Human Rights' (2001) 9(3) *European Journal of Philosophy* 306, 306-307; Griffin, *On Human Rights* (n 21) 14; Stucki, *One Rights* (n 6) 8.

<sup>25</sup> Paola Cavalieri, *The Animal Question: Why Nonhuman Animals Deserve Human Rights* (Oxford University Press 2001); Alasdair Cochrane, *Animal Rights Without Liberation: Applied Ethics and Human Obligations* (Columbia University Press 2012); Cochrane 'From Human Rights to Sentient Rights' (n 8); Martha C Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Harvard University Press 2006); Martha C Nussbaum, *Justice for Animals: Our collective Responsibility* (Simon & Schuster 2022); Stucki, *One Rights* (n 6), Joe Wills, 'Animal Rights, Legal Personhood and Cognitive Capacity: Addressing 'Levelling-Down' Concerns' (2020) 11(2) *Journal of Human Rights and the Environment* 199; Will Kymlicka, 'Human Rights Without Human Supremacism' (2017) 48(6) *Canadian Journal of Philosophy* 763.

<sup>26</sup> Stucki, *One Rights* (n 6) 3, 5.

political practices and decisions.<sup>27</sup> Correspondingly, the argument for extending human rights towards animals can be based on the finding that both, human and animal rights, essentially stem from the same source of legitimation, drawing on naturalistic approaches,<sup>28</sup> and the observation that the principle of justice demands the application of human rights, when looking at human rights from a political perspective.<sup>29</sup> Both arguments will prove to be convincing, looking at some of the most common naturalistic (1.) and political approaches (2.) that have been put forward as a source for human rights.

## 1. NATURALISTIC APPROACHES

Naturalistic approaches ground human rights in certain attributes that all human beings are claimed to possess, oftentimes in contrast to all animals. Possible features that have been put forward diverge from species membership, personhood, rationality, agency, to language and culture, needs and interests or human dignity.

A lot of fundamental international and national human rights treaties reflect this approach in their preamble: The preamble of the UN Declaration of Human Rights from 1948 states for example: ‘Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world’.<sup>30</sup> In similar manner, the preamble of the American Convention on Human Rights from 1969 says: ‘Recognizing that the essential rights of man are not derived from one's being a national of a certain state, but are based upon attributes of the human personality’.<sup>31</sup> In the Preamble of the African Charter on Human and People’s Rights from 1981 this view is expressed through the following passage: ‘Recognizing on the one hand, that fundamental human rights stem from the attributes of human beings which justifies their national and international protection’.<sup>32</sup> All of these preambles evoke the assumption that there is something distinctive about the human person, whether it is dignity or another (not specified) quality, that is protected by human rights and forms the very basis of human rights.

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<sup>27</sup> For the distinction and the respective terms see Raffael N Fasel and Sean C Butler, *Animal Rights Law* (Bloomsbury 2023) 102 and Stucki, *One Rights* (n 6) 17ff.

<sup>28</sup> Stucki, *One Rights* (n 6) 17ff.

<sup>29</sup> Stucki, *One Rights* (n 6) 49ff.

<sup>30</sup> Universal Declaration of Human Rights, GA Res 217A (III), UN GAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71 [Emphasis added].

<sup>31</sup> American Convention on Human Rights, 'Pact of San José, Costa Rica' (adopted 22 November 1969, entered into force 18 July 1978) OAS Treaty Series No 36, 1144 UNTS 123 [Emphasis added].

<sup>32</sup> African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217 [Emphasis added].

In the following, I will demonstrate that there is no non-arbitrary feature that all human beings possess and no other animal at the same time that could form the basis of human rights. I will do so by distinguishing four different types of conceptions: Specie membership (**a.**), ‘under-inclusive approaches’, focusing on advanced mental capacities, such as rationality or moral agency (**b.**), ‘over-inclusive approaches’, focusing on vulnerabilities, interest and needs (**c.**) and dignity (**d.**). The differentiation is due to the following: Specie membership is the only criterion that, as I will argue, successfully includes all human beings and no other animal at the same time, since this distinction is the meaning of the criterion itself. However, it doesn’t provide any other substantial meaning in relation to morality and is therefore an arbitrary criterion for the foundation of rights. Secondly, there is a number of approaches putting forward certain attributes as a basis to grant human rights that require complex mental capacities. While these approaches are quite successful in convincingly excluding (almost) all animals, they fail to include all human beings at the same time. This phenomenon has been described as ‘the problem of under-inclusiveness’.<sup>33</sup> On the other hand, there are proposals that reflect another image of human beings, focusing on their shared needs, interests, vulnerabilities and capabilities instead. While these conceptions are quite successful in identifying characteristics that are shared by all human beings, they usually fail to convincingly exclude animals since the characteristics can be observed in animals as well (‘the problem of over-inclusiveness’).<sup>34</sup>

#### a. SPECIE MEMBERSHIP

Perhaps the most prominent approach of this kind, which dates back to the Enlightenment, grounds human rights simply in their membership in the species of homo sapiens.<sup>35</sup>

The problem that this view encounters, however, is its arbitrariness. As the Australian moral philosopher Peter Singer has argued in his famous book ‘Animal Liberation’, denying a creature that possesses the same characteristics or possesses the same interests as another creature the same treatment, violates the principle of equal treatment.<sup>36</sup> In this regard, denying animals moral consideration, and consequently fundamental rights, simply due to their specie membership can be compared to the arbitrary practice of denying rights to human beings due

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<sup>33</sup> Raffael N Fasel, ‘Simply in virtue of being human? A critical appraisal of a human rights common place’ (2018) 9(3) *Jurisprudence* 461, 474.

<sup>34</sup> Ibid.

<sup>35</sup> Fasel and Butler, *Animal Rights Law* (n 27) 103.

<sup>36</sup> Peter Singer, *Animal Liberation* (Harper Collins 1ed 1975); *Animal Liberation Now* (Harper Collins rev ed 2023) 1-5.

to their sex or ‘race’.<sup>37</sup> In this context, Singer popularized the term, ‘speciesism’, which was originally invented by Richard R Ryder, an English writer, psychologist, and animal rights advocate, analogous to the terms sexism and racism.<sup>38</sup>

However, there are also scholars who explicitly defend specie membership as a relevant moral criterion and a foundation to grant human rights.<sup>39</sup> The English moral philosophy scholar and professor Bernard Williams, who is known for his critical view on moral universalism and his context dependent view on morality for example, has argued that there is no cosmic point of view to measure the morality of our actions, because the question of morality itself is inherently linked to our humanity and can therefore not be applied to other non-human agents, like aliens, gods or animals.<sup>40</sup> Therefore, in his view, the comparison between the arbitrary treatment of human beings based on their gender or “race” to the supposed arbitrary treatment of animals cannot be made.<sup>41</sup> To support the argument, Williams also furthermore refers to an often-claimed sharp gap between human and animal behavior.<sup>42</sup>

The argument is thus flawed in two ways: First of all, if we are taking this view on moral subjectivity seriously, we would have to conclude that an alien who possesses more or less the same attributes as a human being would deserve no moral consideration from our side since the alien would not be part of “our” subjective view on morality.<sup>43</sup> Moreover, it would also imply that no moral consideration at all is due to animals, no matter how much pain a human behavior would inflict on an animal, it could not be considered as immoral behavior. These results appear utterly unjust since they would violate the general principle of equal treatment, that demands that equal cases are treated alike. If the alien in our case above only differs from human beings in “category”, but not substantially, meaning in regard to its’ attributes, the principle of equality would demand equal treatment. The same applies to animals, since they possess the relevant characteristics for moral consideration, namely sentience.

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<sup>37</sup> Ibid.

<sup>38</sup> Richard D Ryder, ‘Speciesism Again. The Original Leaflet’ (2010) 2 *Critical Society* 1.

<sup>39</sup> Bernard Williams, *Philosophy as a Humanistic Discipline* (Princeton University Press 2006) 138 ff; Douglas MacLean, ‘Is “Being Human” a Moral Concept?’ (2010) 30 *Philosophy and Public Policy Quarterly* 16; Cora Diamond, ‘The Importance of Being Human’, in David Cockburn (ed.), *Human Beings* (Cambridge University Press 1991) 35.

<sup>40</sup> Williams Ibid 138, in similar manner MacLean Ibid 16.

<sup>41</sup> Williams Ibid 139ff.

<sup>42</sup> Williams Ibid 140.

<sup>43</sup> This thought experiment has been made before, see for example: Donald VanDe Veer, ‘Whiter Baby Doe?’ in Tom Regan, *Matters of Life and Death: New Introductory Essays in Moral Philosophy* (2edn Random House 1986) 235.

Williams even submits himself that we nevertheless ought to respect some ethical principles regarding the treatment of animals.<sup>44</sup> But then again, the argument that we can only apply “our” morality to “us” humans is hard to defend because the reason we have to treat animals ethically can only be that they are morally relevant subjects.

Secondly, Williams’ conception on morality suggests a universal human viewpoint of morality, despite his critical view on universal morality in general. And more importantly it suggests, that in order to be of moral consideration, one has to be a moral agent oneself. However, human beings have moral duties towards other human beings regardless of their ability or willingness to subscribe to any kind of morality themselves as well.<sup>45</sup>

Perhaps, because of Singer’s above-described influential criticism<sup>46</sup> or the realization that the foundation of human rights has up to this point remained fairly under-theorized,<sup>47</sup> a number of human rights scholars began to ground human rights in a variety of supposed human (and only human) characteristics. Nevertheless, as we will see in the following part, they either run into the problem of under- or over-inclusiveness.<sup>48</sup>

## b. UNDER-INCLUSIVE APPROACHES

As previously said, there is a number of approaches putting forward certain attributes as a basis to grant human rights, such as rationality,<sup>49</sup> moral agency,<sup>50</sup> or personhood<sup>51</sup>, that are based on complex mental capacities. While these capacities might be exclusively human (even this is sometimes questionable), they are not inclusive enough to encompass all human beings in all stages of life and can be therefore described as ‘under-inclusive’.<sup>52</sup>

I will demonstrate this problem by using one particular example for this kind of approaches: the concept of ‘personhood’ by James Griffin, an American-born philosopher, who was White’s

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<sup>44</sup> Williams Ibid 141, 148.

<sup>45</sup> On the differentiation of moral agents and patients see Tom Regan, *The Case for Animal Rights* (California University Press 1983) 151ff.

<sup>46</sup> Fasel and Butler, *Animal Rights Law* (n 27) 103.

<sup>47</sup> Griffin, *On Human Rights* (n 21) 1-6.

<sup>48</sup> Both terms come from Fasel, ‘Simply in Virtue of Being Human?’ (n 33) 474.

<sup>49</sup> See for example: Margaret MacDonald, ‘Natural Rights’ (1947) 47 *Proceedings of the Aristotelian Society* 225, 231.

<sup>50</sup> Alan Gewirth, *Reason and Morality* (University of Chicago Press 1978); Alan Gewirth, *The Community of Rights* (University of Chicago Press 1996); Alan Gewirth, ‘The Content and Basis for Human Rights’ (1981) 23 *Human Rights Quarterly* 119.

<sup>51</sup> Griffin, *On Human Rights* (n 21) 32ff.

<sup>52</sup> Fasel, ‘Simply in Virtue of Being Human?’ (n 33) 474.

Professor of Moral Philosophy at the University of Oxford until 2019.<sup>53</sup> In Griffin's understanding, personhood means moral agency and consists of three central aspects: autonomy, liberty and what he calls 'minimum provision'.<sup>54</sup> He sees autonomy as the ability to have a conception of self, the past and the present and therefore the ability to 'choose one's own path through life', without being dominated or controlled by someone or something else.<sup>55</sup> Autonomy would therefore be inherently linked with having a set of necessary basic knowledge, capabilities, and resources to be able to choose. This is what Griffin calls minimum provision.<sup>56</sup> Furthermore, liberty, understood as the freedom from interference by others that blocks us from what we want to pursue in life, is needed to complete personhood.<sup>57</sup> Personhood would thus form the basis of all human rights and ought to be protected by the implementation of human rights. Furthermore, it would distinguish us from animals, although Griffin shows some limited openness towards including highly intelligent and human-like animals like great apes once there is scientific proof that those animals have the ability to imagine and pursue a good life.<sup>58</sup>

Concerning the last point, it is already questionable whether Griffin's approach can successfully exclude all animals. But even if it is true that Griffin's understanding of personhood convincingly excludes all non-human animals, it fails to include all human beings. Infants might not be considered persons yet, senile or comatose people could not be considered persons anymore and people with severe mental disabilities might, under this conception, never be considered as persons, which he acknowledges himself.<sup>59</sup> In similar manner, the proposed concepts of rationality<sup>60</sup> or agency<sup>61</sup> exclude the above-mentioned groups of human beings.

Different answers to those problems have been put forward: some argue that while not all human beings might (currently) possess these characteristics, they have at least the general

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<sup>53</sup> Griffin, *On Human Rights* (n 21) 32ff.

<sup>54</sup> Ibid 33.

<sup>55</sup> Ibid.

<sup>56</sup> Ibid.

<sup>57</sup> Ibid.

<sup>58</sup> Ibid 32.

<sup>59</sup> Ibid 83ff; For the same criticism see for example: Fasel and Butler, *Animal Rights Law* (n 27) 104. Unrelated to the question of inclusiveness, it can be furthermore criticized that the concept of personhood itself remains unclear and operates more like a placeholder for other concepts, therefore it cannot not convincingly be said to form the basis of human rights according to Jens David Ohlin, 'Is the Concept of Person Necessary for Human Rights?' (2005) *Columbia Law Review* 105(1) 209, 248.

<sup>60</sup> MacDonald (n 49).

<sup>61</sup> Gewirth (n 50). For a critical analysis of the so-called 'marginal agents' in Gewirth's theory see Josef Karl Lubenow, 'On the Foundations of Human Rights' (PhD thesis, University of Chicago 2013) 8 ff.

capacity of becoming persons,<sup>62</sup> the ‘genetic basis for moral agency’<sup>63</sup> or belong to a species whose members normally have the relevant features that are required for moral consideration.<sup>64</sup>

Nevertheless, there are cases in which it is clear that a human being will never become a person in the sense of Griffin, like human beings with severe mental disabilities, for example. Furthermore, it is a mere assumption and highly uncertain if there is actually a “genetic basis for moral agency” and how it should look like. Moreover, even if it existed, it is uncertain whether it could not actually be found in other species as well since we share a large part of our DNA with many animals.

And lastly, the argument that human beings belong to a species that “*normally*” possess the relevant features that are required for moral consideration, brings to light that it is, in fact, not possible to identify a single naturalistic attribute as a source for legitimation for human rights that is not possessed by animals but is possessed by all human beings at the same time. It rather highlights that human exceptionalism is an abstract and aspired assumption that some desire to defend despite the missing naturalistic foundation it claims to be based on. Moreover, as the political philosopher Will Kymlicka and Sue Donaldson, have pointed out very expressively, the underlying assumption of an existing “*paradigmatic human*” and “*exceptional cases*” is a deep misunderstanding:

The problem is not that we have a clear majority of ‘normal’ humans who pass the test of personhood and then a few marginal cases... None of us possess it when we are very young, and we all face periods of shorter or longer duration when it is temporarily or permanently threatened by illness, disability, and aging, or by lack of adequate socialization and education and others forms of social support and nurturance. If personhood is defined as the capacity to engage in rational argumentation and to conform to consciously understood principles, then it is a fluctuating characteristic that carries not only across human beings, but also across time within a life. To ground human rights in the possession of personhood in this sense would be to render human rights insecure for everyone.<sup>65</sup>

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<sup>62</sup> John Rawls, *A Theory of Justice* (Belknap Press of Harvard University Press 1971) 509.

<sup>63</sup> S Matthew Liao, ‘The Basis of Human Moral Status’ (2010) *Journal of Moral Philosophy* 7(2) 159, 163ff.

<sup>64</sup> Elizabeth Foreman, ‘Brain-Damaged Babies and Brain-Damaged Kittens: A Reexamination of the Argument from Marginal Case’ (2014) 4(1) *Journal of Animal Ethics* 58, 69 ff.

<sup>65</sup> Sue Donaldson and Will Kymlicka, *Zoopolis: A Political Theory of Animal Rights* (Oxford University Press 2011) 27.

To conclude, those conceptions of human rights, that rest on certain advanced mental capacities, can explain the exclusion of (most) animals, however, they either fail to convincingly explain human rights for certain human beings or in certain periods of the human life; or voluntarily exclude them.

### c. OVER-INCLUSIVE APPROACHES

As described above, there are proposals that reflect another image of human beings, focusing on their shared needs, interests, vulnerabilities and capabilities instead. These conceptions can be described as ‘over-inclusive’<sup>66</sup> in relation to animals because, while they are quite successful in identifying characteristics that are shared by all human beings, they usually fail to convincingly exclude animals since the same characteristics can be observed in animals as well. As we will see, some of the conceptions are (implicitly) thought to be exclusively applicable to human beings, although their logic is inherently extendable to animals, and some explicitly include animals in their conceptions.

Especially feminist and disability scholars have been criticizing the traditional picture of human beings as exceptional rational and independent agents and tried to highlight the shared vulnerability and dependency of humans instead.<sup>67</sup> Scholars like Martha Albertson Fineman, a law professor and philosophy scholar, specialized on critical legal theory and feminist jurisprudence, and Fiona Robinson, a professor of political science specializing in international relations and political theory, have stressed that the vulnerability perspective on humans enables us to encompass a wider range of varying and interrelated abilities and dependencies of human beings, including the lived experiences of infants, elderly, sick and disabled people.<sup>68</sup> Anna Grear, a British academic, author, and political activist, furthermore points to the remarkable, thus often unrecognized, fact that human rights (as positive law) historically emerged in the light of extreme human suffering during the Second World War and the Nazi Regime, which revealed the vulnerable nature of the human being and it’s need for protection in the most brutal way.<sup>69</sup> The British-Australian sociologist Bryan S. Turner argues for vulnerability as the basis

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<sup>66</sup> Fasel, ‘Simply in Virtue of Being Human?’ (n 33) 474.

<sup>67</sup> See for example: Martha Albertson Fineman, ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’ (2008) 20(1) *Yale Journal of Law and Feminism* 1, Anna Grear ‘Challenging Corporate ‘Humanity’: Legal Disembodiment, Embodiment and Human rights (2007) 7(3) *Human Rights Law Review* 511, 522; Alison M. Jagger, *Feminist Politics and Human Nature* (Rowman & Littlefield Publishes 1983) 28ff; Fiona Robinson, ‘Human Rights and the Global Politics of Resistance: Feminist Perspectives’ (2003) 29 *Review of International Studies* 161, 178.

<sup>68</sup> Fineman Ibid 11-12, Robinson Ibid 178.

<sup>69</sup> Grear (n 67) 521, 539.

of human rights as well.<sup>70</sup> Vulnerability can be understood as the ‘obviously corporeal dimension of existence; it describes the condition of sentient, embodied creatures who are open to the dangers of their environment and are conscious of their precarious circumstances’.<sup>71</sup> Already the definition used by Turner itself is not exclusively coined to human beings, but to *sentient, embodied creatures*. Although Turner acknowledges that his vulnerability conception is inherently open to the inclusion of animals, his position on animal rights remains a bit ambivalent: at first, he explains, how, ‘unlike humans, animals cannot exercise [...] rights directly without our intervention. Animals cannot represent themselves.’ and suggests that animal rights could be protected as part of a set of ecological rights, seeing ‘protecting animals as important for protecting human beings’.<sup>72</sup> But then proceeds to recognize that: ‘Giving rights to animals may not undermine the vulnerability argument, because animal rights are not unlike the rights enjoyed by other agents (children, the chronically sick, brain-dead patients, or the elderly) who cannot directly and actively enforce their own rights’.<sup>73</sup>

As a scholar of the ‘interest-based’ conception of rights,<sup>74</sup> David Miller, a moral and political philosopher and professor at the University of Oxford, for example, grounds human rights in (human) needs.<sup>75</sup> He distinguishes ‘real’ needs, needs that are universal and necessary for living a decent life and needs that are dependent on the varying societal context in the debate around cultural relativism.<sup>76</sup> According to his understanding, only the first, ‘real’ needs form the basis of human rights, however they are usually not translated ‘one-to-one’ into rights, since it can be that a human need is transformed into several distinguishable rights or that one specific right is based on several needs.<sup>77</sup> John Tasioulas, a Greek-Australian moral and legal philosopher, argues for a similar conception that grounds human rights in human dignity and universal human interests. He understands interests as something that once fulfilled improves the well-being of a person in at least one aspect.<sup>78</sup> Universal interests need to be of a qualified nature as

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<sup>70</sup> Bryan S Turner, *Vulnerability and Human Rights* (Penn State Press 2006) 1.

<sup>71</sup> Ibid 28.

<sup>72</sup> Ibid 37f.

<sup>73</sup> Ibid 38 [Emphasis added].

<sup>74</sup> For a concise summary of the two fundamental theories on the function of rights, the ‘will-based’ conception and the ‘interest-based’ conception, and their respective applicability on animals see Fasel and Butler, *Animal Rights* (n 27) 76ff.

<sup>75</sup> David Miller, ‘Grounding Human Rights’ (2012) 15 (4) *Critical Review of International Social and Political Philosophy* 407, 411.

<sup>76</sup> Ibid 413.

<sup>77</sup> Ibid 417.

<sup>78</sup> John Tasioulas, ‘On the Foundation of Human Rights’ in R Cruft, SM Liao and M Renzo (eds), *Philosophical Foundations of Human Rights* (Oxford University Press 2015) 51.

well in the sense that they have to be ‘objective, standardized, pluralistic, open-ended, and holistic’.<sup>79</sup> Although these approaches are originally designed for humans only, they also include a great potential for transspecies reconceptualization. While some more complex needs and interests, like searching for meaning in life, establishing and preserving culture, might be only applicable to some humans, the most profound interests and needs, like evading pain, suffering and death and having enough food, water, shelter and the ability to form and cultivate social relationships are shared by all humans and animals.<sup>80</sup> As we will see in the next section (d.), even Tsaioulas’ reference to dignity does not ultimately preclude the extension of the approach to animals either since dignity in a wider sense can be understood as having intrinsic value, a quality that animals can be convincingly said to possess as well.

Beyond that, there are voices in the academic field who explicitly argue for the inclusion of animals in their conception. Among them is the so-called capabilities approach by Martha Nussbaum, an influential US-American philosopher, legal scholar and professor.<sup>81</sup> The capabilities approach was originally invented by the Indian economist and philosopher Amartya Sen for human beings in the 1980’s and is defined by its focus on the moral significance of the individuals’ capability of achieving the sort of lives they have reason to value.<sup>82</sup> It was then further developed and recently applied to animals by Nussbaum.<sup>83</sup> The central idea of it is that all sentient beings have an individual set of capabilities that should be promoted to allow them ‘to flourish’ and live with dignity.<sup>84</sup> Rather than individual moral duties towards animals, the approach is designed to develop a political theory of justice, creating basic entitlements that society owes to individual beings.<sup>85</sup> It takes into consideration, that different human beings and animals have different capabilities and argues that justice is achieved when an adequate threshold of meeting their capabilities is met which doesn’t mean it has to be fully or equally met for all beings.<sup>86</sup>

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<sup>79</sup> Ibid.

<sup>80</sup> Stucki, *One Rights* (n 6) 37.

<sup>81</sup> Martha C Nussbaum, ‘Beyond Compassion and Humanity: Justice for Non-Human Animals’, in: Martha C Nussbaum and Cass R Sunstein (eds), *Animal Rights: Current Debates and New Directions* (Oxford University Press 2005) 299; Martha C Nussbaum, *Frontiers of Justice: Disability, Nationality, Specie Membership* (Harvard University Press 2006) 325ff; Martha C Nussbaum, *Justice for Animal: Our collective Responsibility* (Simon & Schuster 2022).

<sup>82</sup> Nussbaum, *Justice for Animal* (n 81) 82; Thomas Wells, ‘Sen’s Capability Approach’ (Internet Encyclopedia of Philosophy) <https://iep.utm.edu/sen-cap/> accessed 4 July 2024.

<sup>83</sup> Nussbaum, *Justice for Animal* (n 81) 82.

<sup>84</sup> Nussbaum, *Justice for Animal* (n 81) 81; Nussbaum, *Frontiers of Justice* (n 81) 327.

<sup>85</sup> Nussbaum, *Justice for Animals* (n 81) 80f; Nussbaum, *Frontiers of Justice* (n 81) 327; the focus on justice is already expressed by the title (n 81).

<sup>86</sup> Nussbaum, *Justice for Animals* (n 81) 80ff.

#### d. HUMAN AND ANIMAL DIGNITY

The concept of human dignity as a source for human rights is more difficult to approach since the concept itself is often intertwined with the claim of human exceptionalism and it is arguable whether dignity can actually convincingly be described as a naturalistic feature. Furthermore, there are many different conceptions of dignity, ranging from modern political philosophy, Kantian theories based on autonomous moral capacity, religious theories based on humans' being created in the image of God, dignity understood as a status and other conceptions.<sup>87</sup>

Yet, generally speaking, human dignity is often seen as the exceptional and transcendent quality that all human beings are born with and that sets them apart from all other animals.<sup>88</sup> As other animal rights scholars have analyzed, dignity is therefore oftentimes explicitly evoked as a defense for human exceptionalism against empirical arguments.<sup>89</sup> Sometimes it operates as a mere placeholder for some of the above-described alleged universal and exclusively human features.<sup>90</sup> In that case, the problem of under-inclusiveness oftentimes applies. Sometimes dignity also operates as a self-referring, independent value, which is not amenable to logical scrutiny.<sup>91</sup> Thus, it might actually be more productive to understand dignity from a political perspective (which I will turn to after this section), born from the need to highlight and reaffirm the inherent and immeasurable value of each human being in the light of concrete historical injustices, rather than as a specific transcendent feature that human beings naturally possess.

Moreover, the question also arises whether human dignity is a religious concept or more specifically a Judeo-Christian Western idea and can be said to be rather a culturally relative than a universal concept. Nevertheless, understood in a wider sense, the concept of human dignity does appear in many different cultures, including the cultures of the indigenous peoples of the Americas, the Islamic world, Hinduism, Buddhism, Confucianism, Chinese Daoism, and

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<sup>87</sup> Jeremy Waldron, 'Is Dignity the Foundation of Human Rights?', in Rowan Cruft, S Matthew Liao and Massimo Renzo (eds) *Philosophical Foundations of Human Rights* (Oxford University Press 2015) 117.

<sup>88</sup> Ibid; Holmes Rolston, 'Human Uniqueness and Human Dignity: Persons in Nature and the Nature of Persons' in *Essays Commissioned by the President's Council on Bioethics* (President's Printing Office 2008) 129, 130; George Kateb, *Human Dignity* (Harvard University Press 2011) 3f, 128; Cathrine Dupré, *The Age of Dignity: Human Rights and Constitutionalism in Europe* (Hart 2015) 28.

<sup>89</sup> Raffael N Fasel, 'The New 'Old' Dignitarianism' (2019) 25(4) *Res Publica* 531, 533; Will Kymlicka, 'Human Rights Without Human Supremacism' (2018) 48(6) *Canadian Journal of Philosophy* 763, 768ff, Stucki *One Rights* (n 6) 29.

<sup>90</sup> Samantha Besson, 'Justifications', in Daniel Moeckli, Sangeeta Shah, Sandesh Sivakumaran (eds) *International Human Rights Law* (3rd ed Oxford University Press 2018) 22, 34f; Laura Valentini, 'Dignity and Human Rights: A Reconceptualisation' (2017) 37(4) *Oxford Journal of Legal Studies* 862, 863; Stucki, *One Rights* (n 6) 30.

<sup>91</sup> Tomasz Pietrzykowski, 'Against Dignity: An Argument for a Non-Metaphysical Foundation of Animal Law' 2021 27(2) *Archiwum Filozofii Prawa i Filozofii Społecznej* 69, 71f; S Matthew Liao, 'The Basis of Human Moral Status' (2010) *Journal of Moral Philosophy* 7(2) 159, 161; Besson (n 90) 23.

the Ubuntu tradition in sub-Saharan Africa with a variety of slightly different interpretations.<sup>92</sup> Interestingly, one of the most notable differences between the numerous cultural conceptions of dignity is the position on the openness towards other species.<sup>93</sup>

And indeed, dignity understood as possessing inherent value, is an idea that is extendable to other than human beings.<sup>94</sup> Intrinsic value means that something has value ‘in itself’, ‘as such’ or ‘for its own sake’,<sup>95</sup> or being a ‘subject-of-a-life’ in the terms of the influential US-American animal rights philosopher Tom Regan,<sup>96</sup> and is therefore the opposite to possessing extrinsic value and having only instrumental value for a second entity.

What gives rise to a beings’ intrinsic value ultimately is its’ subjective experience of reality, its’ sentience, as defined before. Although intrinsic value is ultimately rooted in sentience, yet, we can and should abstract the two concepts from each other.<sup>97</sup> While sentience can fluctuate depending on the respective specie, individual or circumstances and therefore, might run in the same problem of under-inclusiveness regarding certain human beings as well,<sup>98</sup> the inherent value of a being remains immeasurable and stable.

Not only is the idea of animal dignity or animal’s inherent value supported by a number of scholars, but it is even implemented in a number of national legislations.<sup>99</sup> Most prominently, animal dignity is declared as the main aim of the Animal Welfare Law in Switzerland since

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<sup>92</sup> See Marcus Düwell and others (eds) *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (Cambridge University Press 2014) 147ff; Martyn Barrett, ‘Dignity, Respect, Human Rights, Cultural Diversity and Intercultural Relations’ (2022) 105 *Intercultura* 19.

<sup>93</sup> Barrett Ibid.

<sup>94</sup> Nussbaum, ‘Beyond Compassion and Humanity’ (n 81) 299ff; Nussbaum, *Frontiers of Justice* (n 81) 325ff; Martha C Nussbaum, *Justice for Animals* (n 81); Christine Korsgaard, ‘Fellow Creatures: Kantian Ethics and our Duties to Animals’ (2004) 24 *Tanner Lectures on Human Values* 77; Christine Korsgaard, *Fellow Creatures: Our Obligations to the Other Animals* (Oxford University Press 2018); David Bilchitz, ‘Moving Beyond Arbitrariness: The Legal Personhood and Dignity of Non-Human Animals’ (2017) 25(1) *South African Journal on Human Rights* 38; Kotzmann (n 10); Eva Bernet Kempers, ‘Animal Dignity and the Law: Potential, Problems and Possible Implications’ (2020) 41(2) *The Liverpool Law Review* 173; Michael Meyer, ‘The Simple Dignity of Sentient Life: Specieism and Human Dignity’ (2001) 32(2) *Journal of Social Philosophy* 115; Elizabeth Loder Reed, ‘Animal Dignity’ (2016) 23(1) *Animal Law Review* 1. For a critical discussion see: Federico Zuolo, ‘Dignity and Animals Does it Make Sense to Apply the Concept of Dignity to all Sentient Beings?’ (2016) 19(5) *Ethical Theory and Moral Practice* 1117.

<sup>95</sup> Kotzmann (n 10) 409; Michael J Zimmerman and Ben Bradley, ‘Intrinsic vs Extrinsic Value’, *The Stanford Encyclopedia of Philosophy* (Spring 2019) <https://plato.stanford.edu/entries/value-intrinsic-extrinsic/#WhaHasIntVal> accessed 4 July 2024.

<sup>96</sup> Tom Regan, *The Case for Animal Rights* (University of California Press 1983) 243, Tom Regan, ‘The Rights of Humans and Other Animals’ (1997) 7(2) *Ethics and Behavior* 103.

<sup>97</sup> Similarly, see Kotzmann (n 10) 414f.

<sup>98</sup> For an extensive examination of this problem see Fasel, *More Equal than Others* (n 13) 107ff.

<sup>99</sup> Switzerland, Federal Constitution (1999) Art 120 (2) and Animal Welfare Act (2008) Art 1 and 3a; Netherlands, Animals Act (2011) Art 1.3; Australia, Animal Welfare Act (1992) Part 4A(1)(b); Liechtenstein, Animal Welfare Act (2010) Art 1; Luxembourg, Animal Welfare Act (2018) Art 1; European Parliament and Council Directive 2010/63/EU of 22 September 2010 on the Protection of Animals used for Scientific Purposes (2010) OJ L276/33 Recital 12.

2008 and defined as ‘the inherent worth of the animal that must be respected when dealing with it’.<sup>100</sup>

In conclusion, dignity is a vague concept with many different interpretations. While some of them are even explicitly levelled against the inclusion of animals, some of them are inherently open towards the inclusion of animals. Yet, when human dignity is interpreted as referring to human exceptionalism without empirical reasoning, operating as a mere placeholder for other (under-inclusive) characteristics or a simply self-referring concept, it is stripped of any substantial meaning. It is thus more convincing to understand dignity as possessing intrinsic value, which can be convincingly said to apply to animals as well.

#### e. ANIMAL RIGHTS AS HUMAN RIGHTS UNDER NATURALISTIC CONCEPTIONS

To summarize, we have seen that the sole specie membership is an arbitrary criterion that doesn’t carry any moral significance and should therefore be rejected as the foundation of human rights. We have furthermore seen that those naturalistic accounts that focus on characteristics, that require quite advanced mental capacities as a foundation of human rights, might be successful in excluding (almost) all animals, but they fail to grant the human rights for a large number of human beings or make their status insecure throughout their lives. The only naturalistic accounts that can reasonably claim to form the basis of human rights for *all* human beings are the ones, that focus on characteristics like needs, interest, vulnerabilities and capabilities, but they are *not exclusively human* after all. Even the concept of dignity, understood as possessing inherent value, is in its’ core inclusive towards animals.

## 2. POLITICAL CONCEPTIONS

However, there exists another line of thought that conceptualizes human rights from a fundamentally different perspective. Perhaps triggered by the apparent difficulties that arise with grounding human rights in a specific natural feature, non-foundationalist or political approaches avoid grounding human rights in these supposed natural characteristics of human beings and rather justify them through looking at political practices or decisions. From this

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<sup>100</sup> See Art 1 and 3a of the Swiss Animal Welfare Act (2008), as well as Gieri Bollinger, ‘Legal Protection of Animal Dignity in Switzerland: Status Quo and Future Perspectives (2016) 22 *Animal Law Review* 311 and Stephanie Schindler, ‘The Animal’s Dignity in Swiss Animal Welfare Legislation – Challenges and Opportunities’ (2013) 84 *European Journal of Pharmaceutics and Biopharmaceutics* 251.

perspective, human rights are best understood as a social and political practice in their concrete historical context and not as logically deriving from the essence of human nature.<sup>101</sup>

As it will be demonstrated in the following, political approaches are open towards an extension to animals as well.

#### a. HUMAN AND ANIMAL RIGHTS AS REASONS FOR INTERNATIONAL INTERVENTION

As part of their liberal political philosophy, John Rawls,<sup>102</sup> Joseph Raz<sup>103</sup> and Charles R Beitz<sup>104</sup> for example, understand human rights in their specific function in international political practice. According to them, human rights form the limits of how states can treat individuals and allow other states to intervene, through diplomatic or economic sanctions, and even military force as an ultima ratio, if these limits are exceeded.<sup>105</sup>

At a first glance, one could simply conclude that this mechanism does not apply to animals. Taking a closer look, some scholars have pointed out rightfully that international intervention on behalf of animals has already been practiced by states and it is a rising claim in the field of international law.<sup>106</sup> Alasdair Cochrane, for example, points to the EU-ban on seal products in reaction to the cruel culling practices of seals in Canada, Norway and Namibia<sup>107</sup> and the international law scholars, Anthony D'Amatio and Sudhir K Chopra have convincingly argued that the conditions for the right to life for whales in international customary law have been already met.<sup>108</sup> More importantly however, while the approach can be really productive in analyzing how human rights have emerged and continue to function, the approach tells very

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<sup>101</sup> Norberto Bobbio, *The Age of Rights* (trs Polity Press Cambridge 1996) 18; Lynn Hunt, *Inventing Human Rights: A History* (W. W. Norton & Co. 2007) 21; Charles R Beitz, *The Idea of Human Rights* (Oxford University Press 2009) xii; Florian F Hoffmann, 'Shooting into the Dark: Toward a Pragmatic Theory of Human Rights (Activism)' (2006) 41(3) *Texas International Law Journal* 403, 405.

<sup>102</sup> John Rawls, *The Law of Peoples* (Harvard University Press 1999), John Rawls, 'The Law of Peoples' (1993) 20(1) *Critical Inquiry* 36.

<sup>103</sup> Joseph Raz, 'Human Rights without Foundations', in Samantha Besson, John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press 2010).

<sup>104</sup> Beitz, *The Idea of Human Rights* (n 98); Charles R Beitz, 'Human Rights and the Law of Peoples', in DK Chatterjee (ed), *The Ethics of Assistance: Morality and the Distant Needy* (Cambridge University Press 2004) 197.

<sup>105</sup> Rawls, *Law of Peoples* (n 99) 79-80; Rawls, 'The Law of Peoples' (n 99) 57; Beitz, *The Idea of Human Rights* (n 98) 31 ff; Raz (n 100) 328.

<sup>106</sup> Katie Sykes, 'Nations Like Unto Yourself: An Inquiry into the Status of a General Principle of International Law on Animal Welfare' (2012) 49 *The Canadian Yearbook of International Law* 3; Anthony D'Amatio and Sudhir K Chopra, 'Whales: Their Emerging Right to Life' (1991) 85(1) *The American Journal of International Law* 21, 50; Alasdair Cochrane, 'From Human Rights to Sentient Rights' (2013) 5 *Critical Review of International Social and Political Philosophy* 655, 664.

<sup>107</sup> Cochrane *Ibid.*

<sup>108</sup> D'Amatio and Chopra (n 106) 50.

little about the normative question of how human rights should continue to be conceptualized, expanded and implemented.

## b. HUMAN AND ANIMAL RIGHTS AS SHARED NORMATIVE RESPONSES TO INJUSTICE

But there are other non-foundationalist approaches that are more productive in terms of analyzing how new human rights claims can emerge or the whole concept itself can be extended. Other conceptions view human rights as norms that have been socially constructed under specific historical circumstances to serve certain important needs.<sup>109</sup> In that sense, human rights can be said to have emerged and expanded as political or normative responses to very concrete experiences of suffering, injustice, discrimination and war;<sup>110</sup> or simply put in the words of the US-American lawyer and constitutional and criminal law professor, Alan Dershowitz: ‘rights come from wrongs’.<sup>111</sup>

Animals need human rights as human rights are a normative response to shared experiences of suffering and injustice.<sup>112</sup> While Peter Singer’s groundbreaking work on the question of animals was still mainly concerned with the question what we as individuals owe to animals morally,<sup>113</sup> scholars including Martha Nussbaum, Sue Donaldson, Will Kymlicka and Paola Cavalieri have more recently turned towards the question of justice for animals as a collective demand from the perspective of moral, political and legal philosophy.<sup>114</sup>

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<sup>109</sup> Morton Winston, ‘Human Rights as a Moral Rebellion and Social Construction’ (2007) 6(3) *Journal of Human Rights* 279, 284; William F Schulz and Sushma Raman, *The Coming Good Society: Why New Realities Demand New Rights* (Harvard University Press 2020) 33.

<sup>110</sup> Regina Kreide, ‘Human Rights as Placeholders’ (2015) 8(3) *Fudan Journal of the Humanities and Social Sciences* 401, 405; Regina Kreide, *Globale Politik und Menschenrechte: Macht und Ohnmacht eines politischen Instruments* (Campus Verlag Frankfurt am Main 2008) 214ff; Bobbio (n 98) 18.

<sup>111</sup> Alan M Dershowitz, *Rights from Wrongs: A Secular Theory of the Origins of Rights* (Basic Books 2004).

<sup>112</sup> Saskia Stucki, *One Rights* (n 6) 53.

<sup>113</sup> Peter Singer, *Animal Liberation* (Harper Collins 1th ed 1975).

<sup>114</sup> Martha Nussbaum, *Justice for Animals: Our collective Responsibility* (2022, New York, Simon & Schuster); Christine M Korsgaard, *Fellow Creatures: Our Obligations to the Other Animals* (Oxford University Press 2018); Alasdair Cochrane, *Sentientist Politics: A Theory of Global Inter- Species Justice* (Oxford University Press 2018); Sue Donaldson and Will Kymlicka, *Zoopolis: A Political Theory of Animal Rights* (Oxford University Press 2011); Tom Regan, *The Case for Animal Rights* (California University Press 1983); Tom Regan *The Case for Animals Rights* (updated with a new preface, University of California Press 2004); Paola Cavalieri, *The Animal Question: Why Nonhuman Animals Deserve Human Rights* (Oxford University Press 2001); Mark Rowlands, *Animals Like Us* (Verso Books 2002); Gary Francione, *Introduction to Animal Rights: Your Child or the Dog?* (Temple University Press 2000); Steven M Wise, *Rattling the Cage: Towards Legal Rights for Animals* (Perseus Books 2000).

The way animals are treated by humans can be described as one of the worst crimes of our time.<sup>115</sup> Hundreds of millions of fish, 202 million chicken, 12 million ducks, 3.8 million pigs, 1.7 million sheep, 1.4 million goats and 900.000 cows are slaughtered for meat production alone every single day.<sup>116</sup> To put that in perspective, ‘more farmed animals are slaughtered in *one week* than the total number of people killed in all wars throughout human history’.<sup>117</sup> The population of wild animals has decreased by 50% in the last 40 years, as a result from human colonization and the exploitation and the destruction of wild animal habitat still continues.<sup>118</sup> Moreover, there is the concern that these practices will even intensify in the next decades.<sup>119</sup> Animals are subjected to exploitation, commodification, and objectification in countless ways and their bodies are utilized for labor, food, clothing, research, and entertainment.<sup>120</sup> Most importantly, the immense suffering and violence of animals caused by humans is institutionalized within an oppressive and discriminatory system of human domination.<sup>121</sup>

To make this visible, some scholars have reformulated and applied Iris Marion Young’s ‘5 faces of oppression’ (domination, oppression, exploitation, powerlessness, cultural imperialism and violence)<sup>122</sup> to animals.<sup>123</sup> While these terms are originally coined to describe injustice against groups of human beings, the concept is just as adequate to describe the circumstances under which animals live in relation to human beings.

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<sup>115</sup> Yuval Noah Harari, ‘Industrial Farming is one of the Worst Crimes in History’ (The Guardian 2015 <<https://www.theguardian.com/books/2015/sep/25/industrial-farming-one-worst-crimes-history-ethical-question>>) accessed 31 May 2024; Joe Wills, ‘Expanding the Moral circle to Non-Human Animals’ (Jurocity 2018 <<https://www.jurocity.com/knowledge/article/485f4484-492c-4568-afae-ae2bcb81ad75>>) accessed 31 May 2024; Will Kymlicka and Sue Donaldson, ‘Locating Animals in Political Philosophy’ (2016) 11(11) *Philosophical Compass* 692; Deborah Cao, ‘Crimes against Animality: Animal Cruelty and Criminal Justice in a Globalized World’, in Bruce A Arrigo and Heather Y Bersot (eds) *The Routledge Handbook of International Crime and Justice Studies* (Routledge 2014) 169.

<sup>116</sup> Max Rosner, ‘How Many Animals get Slaughtered Every Day?’ (Our world in data 2023 <<https://ourworldindata.org/how-many-animals-get-slaughtered-every-day>>) accessed 31 May 2024.

<sup>117</sup> Melanie Joy, ‘The Green Pill’, in Ezra Klein (prod) *The Ezra Klein Show* (Audio podcast 2018) <https://www.youtube.com/watch?app=desktop&v=cXY584pT4zk> accessed 2 July 2024.

<sup>118</sup> Will Kymlicka and Sue Donaldson, ‘Locating Animals in Political Philosophy’ (2016) 11(11) *Philosophical Compass* 692.

<sup>119</sup> Ibid.

<sup>120</sup> Robert C Jones, ‘Animal Rights is a Social Justice Issue’ (2015) 18(4) *Contemporary Justice Review* 467, 475.

<sup>121</sup> Ibid 467; Margo DeMello, *Animals and Society* (Columbia University Press 2012) 236ff.

<sup>122</sup> Iris Marion Young, *Justice and the Politics of Difference* (Princeton University Press 1990) 39ff.

<sup>123</sup> Lori Gruen, ‘The Faces of Animal Oppression’, in Ann Ferguson and Mechthild Nagel (eds) *Dancing with Iris: The Philosophy of Iris Marion Young* (Oxford University Press 2009); Jones, ‘Animal Rights is a Social Justice Issue’ (n 120) 473f.

Comparisons of animal suffering to concrete historical experiences of human suffering, like the degradation and oppression of slaves<sup>124</sup> and women,<sup>125</sup> or comparisons to the holocaust<sup>126</sup>, are usually rejected with disgust and outrage by the public. This is not surprising in a society in which being described as an animal or compared to an animal is understood as an insult, declaring someone of lesser or no moral value. Therefore, the common understanding of the comparison is a trivialization of immense human suffering.<sup>127</sup> The argument however is made to humanize animals, not to dehumanize humans. It is to highlight the moral and political relevance of animal suffering, not to diminish human suffering. This becomes apparent when we imagine how it would not be considered problematic for someone to say that certain groups of people were treated “like animals” because it highlights the unjust deprivation of a human being of its moral value in the light of oppression and violence, while enforcing the underlying assumption that animals are rightfully placed as beings with lesser or no moral value.

Nevertheless, the equalization of suffering is not necessarily needed to make the argument that animals experience injustice. We can acknowledge that every struggle against injustice is different and incomparable, valuing the pain and suffering of the victims and their descendants as such.<sup>128</sup> What unites all experiences of injustice however, is the underlying mechanisms that cause suffering, namely the sources of oppression<sup>129</sup> and violence, as well as the demand for a normative response, a liberation from the oppression<sup>130</sup> and a commitment to non-violence, expressed in the invention and expansion of human rights.<sup>131</sup>

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<sup>124</sup> See for example: Nigel Pleasants, ‘Structure and Agency in the Antislavery and Animal Liberation Movement’, in David Grumett and Rachel Muers (eds) *Eating and Believing: Interdisciplinary Perspectives on Vegetarianism and Theology* (T&T Clark 2008) 198; Gary Francione, *Introduction to Animal Rights: Your Child or the Dog?* (Temple University Press 2000) 30; Marjorie Spiegel, *The Dreaded Comparison: Human and Animal Slavery* (Mirror Books 1996); Sue Donaldson and Will Kymlicka, ‘The Moral Ark’ (2007) 114(2) *Queen’s Quarterly* 187; Paola Cavalieri, *The Animal Question: Why Nonhuman Animals Deserve Human Rights* (2001, Oxford, Oxford University Press) 142.

<sup>125</sup> Elizabeth Fisher, *Woman’s Creation: Sexual Revolution and the Shaping of Society* (Anchor Press 1979); Carol J Adams, *The Sexual Politics of Meat* (Continuum 1990).

<sup>126</sup> See David Sztybel (himself the child of a Holocaust survivor), ‘Can the treatment of animals be compared to the holocaust?’ (2006) 11(1) *Ethics & the Environment* 97; Charles Patterson, *Eternal Treblinka: Our Treatment of Animals and the Holocaust* (Lantern Books 2002).

<sup>127</sup> Will Kymlicka and Sue Donaldson, ‘Animal Rights, Multiculturalism and the Left’ (2014) 45(1) *Journal of Social Philosophy* 116, 119.

<sup>128</sup> In similar manner Stacy Banwell, *The War Against Non-Human Animals: A Non-Speciesist Understanding of Gendered Reproductive Violence* (Springer Nature 2023) 15.

<sup>129</sup> Ibid. On the shared sources of oppression see already the discussion in Chapter I. 2.

<sup>130</sup> Saskia Stucki, *One Rights: Human and Animal Rights in the Anthropocene* (Springer 2022) 54.

<sup>131</sup> Costas Douzinas, ‘The end(s) of human rights’ (2002) 26(2) *Melbourne University Law Review* 445.

But would (international) animal welfare laws not be enough to fulfill this need for a normative response in the case of animals? Why should animals necessarily have subjective (human) rights?

First of all, there is a number of reasons why animals need legal rights rather than animal welfare laws:<sup>132</sup> legal rights entail a more robust legal protection because they include the procedural element of having legal standing, the right to seek remedy, enforcement and compensation, enabling animals, represented by legal guardians, to initiate legal proceedings in their own behalf.<sup>133</sup> The enforcement would furthermore be decentralized from public authorities and thus expand the ways in which the question of animal justice can infiltrate the court rooms and simultaneously the arena of public opinion forming.<sup>134</sup> At least as important as the procedural enforcement, is that rights promise to guarantee more substantive protections, that are seen as equally important as other (human) rights and thus not as easily undermined.<sup>135</sup> The animal welfare approach entails a structural, a priori prioritization of human interests that can only be challenged by equipping animals with rights themselves. Not all interests that are generally recognized by law count equally when balancing them against each other in the case of conflict, interests that are qualified as rights usually are accorded more weight than unqualified conflicting interests.<sup>136</sup> As Saskia Stucki, a Swiss animal, environmental and human rights scholar, describes it: ‘Animal rights would create the structural preconditions for a level playing field where human and animal interests are both reinforced by equivalent rights, and can thus collide on equal terms’.<sup>137</sup> Moreover, rights are needed as defensive and counter-majoritarian institutions:<sup>138</sup> ‘Paradoxically, they [animal rights] incorporate animals into human society in order to create defenses against the destructive tendencies of human society against

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<sup>132</sup> On the distinction between ‘thin’ and ‘thick’ conception of animal rights see already Preliminary Clarifications.

<sup>133</sup> Christopher D Stone, ‘Should Trees Have Standing? Toward Legal Rights for Natural Objects’ (1972) 45 *South California Law Review* 450, reprinted in Anna Grear (ed.), ‘Should Trees Have Standing?’ (2012) 3 (*Special Issue*) 40 *Years on, Journal of Human Rights and the Environment* 4; Cass R Sunstein, ‘Can Animals Sue?’ in Cass R Sunstein and Martha C Nussbaum (eds), *Animal Rights: Current Debates and New Directions* (Oxford University Press 2005) 251; Anne Peters, ‘Liberte’, ‘Égalite’, ‘Animalite’: Human-Animal Comparisons in Law’ (2016) 5 *Transnational Environmental Law* 25, 47f.

<sup>134</sup> Saskia Stucki, ‘Towards a Legal Theory of Animal Rights: Simple and Fundamental Rights’ (2020) 40(3) *Oxford Journal of Legal Studies* 533, 553.

<sup>135</sup> *Ibid* 554.

<sup>136</sup> Frederick Schauer, ‘Proportionality and the Question of Weight’ in Grant Huscroft, Bradley W Miller and Gregoire Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press 2014) 177–8.

<sup>137</sup> Stucki, ‘Towards a Legal Theory of Animal Rights’ (n 134) 554.

<sup>138</sup> Mark Tushnet, ‘An Essay on Rights’ (1984) 62(8) *Texas Law Review* 1363; Gunther Teubner, ‘Rights of Non-Humans? Electronic Agents and Animals as New Actors in Politics and Law’ (2006) 33 *Journal of Law and Society* 497, 521. Rights also have been famously described ‘as trumps’ by Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977).

animals'.<sup>139</sup> Legal rights are the mechanism through which we structure our societies. Hence, to become full members of our society instead of mere objects or resources, animals need the emancipatory force of rights.

The emancipatory force of rights leads us to the second point, the emancipatory force of human rights in particular: the normative response to oppression, suffering and injustice has been and continues to be expressed in the invention and expansion of human rights.<sup>140</sup> Thus, human rights can be said to serve the overarching goal of justice.<sup>141</sup> As an instrument to achieve the meta goal of justice, human rights serve a number of functions, that can be distinguished in relation to the state of progress of the underlying human rights claims.<sup>142</sup> In a short-term perspective, human rights (language) serve(s) a 'spotlighting' or 'appellative' function, marking an issue as particularly pressing.<sup>143</sup> Within this stage, human rights are best understood as 'claim-to-be-rights', bridging the gap between morality and the law.<sup>144</sup> The gap between moral rights for animals and the current laws protecting animals is alarmingly large,<sup>145</sup> not to mention that the weak laws that already exists, are poorly enforced.<sup>146</sup> Thus, there is a great need for this particular function of human rights. In a mid-term perspective, human rights are supposed to transition from these moral or claim rights to positive international laws with the duty on states to 'respect, protect and fulfill'<sup>147</sup> these rights.<sup>148</sup> To protect animals effectively, we cannot simply rely on people respecting moral rights without any legal enforcement.<sup>149</sup> This process

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<sup>139</sup> Teubner Ibid.

<sup>140</sup> Costas Douzinas, 'The End(s) of Human Rights' (2002) 26(2) *Melbourne University Law Review* 445; Saskia Stucki, *One Rights: Human and Animal Rights in the Anthropocene* (Springer 2022) 54.

<sup>141</sup> Stucki Ibid 55. On the function of human rights as serving the overarching principle of justice in general see: Amartya Sen, *The Idea of Justice* (Harvard University Press 2009); Martha Nussbaum, *Creating Capabilities: The Human Development Approach* (Harvard University Press 2011); John Rawls, *A Theory of Justice* (Harvard University Press 1971).

<sup>142</sup> Stucki Ibid.

<sup>143</sup> Andreas von Arnould and Jens T Theilen, 'Rhetoric of Rights: A Tropical Perspective on the Functions of Claiming a 'Human Right to...'', in Andreas von Arnould, Kerstin von der Decken and Mart Susi (eds), *Cambridge Handbook of New Human Rights: Recognition, Novelty, Rhetoric* (Cambridge University Press 2020) 34, 39f.

<sup>144</sup> See Regina Kreide, 'Human Rights as Placeholders' (2015) 8(3) *Fudan Journal of the Humanities and Social Sciences* 401, 405, noting that human rights create 'performance pressure'; Joel Feinberg, *Social Philosophy* (Prentice-Hall 1973) 67, 84f; Joel Feinberg, 'In Defence of Moral Rights' (1992) 12(2) *Oxford Journal of Legal Studies* 149, 153; Stucki, 'Towards a Legal Theory of Animal Rights' (n 134) 534, Stucki, *One Rights* (n 140) 57.

<sup>145</sup> Will Kymlicka, 'Social Membership: Animal Law beyond the Property/Personhood Impasse' (2017) 40(1) *Dalhousie Law Journal* 123, 126; Saskia Stucki, 'Animal Warfare Law and the Need for an Animal Law of Peace: A Comparative Reconstruction' (2023) 71(1) *Oxford University Press* 189; Peter Sankoff, 'The Protection Paradigm: Making the World a Better Place for Animals?', in Peter Sankoff, Steven White and Celeste Black (eds) *Animal Law in Australasia* (2nd ed, The Federation Press 2013).

<sup>146</sup> See for example: Cass R Sunstein, 'Standing for Animals (with Notes on Animal Rights)' (2000) 47 *UCLA Law Review* 1333, 1334ff on US Animal Welfare Law.

<sup>147</sup> On the tripartite structure of human rights see Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (2nd ed Princeton University Press 1996) 53.

<sup>148</sup> Stucki, *One Rights* (n 140) 58.

<sup>149</sup> Martha C Nussbaum, 'Working for and with Animals: Getting the Theoretical Framework Right' (2017) 94(4) *Denver Law Review* 609.

can be described as institutionalization and universalization.<sup>150</sup> Lastly, human rights have transformative function, meaning that their incorporation in positive law should lead to corresponding changes in society.<sup>151</sup> And, while they usually cannot be fully achieved overnight, they always remain aspirational to some degree.<sup>152</sup> Connected to this aspirational nature is the tendency of human rights to expand, raising the standards of protection over time.<sup>153</sup> Therefore, the mere fact that the reality of fundamental rights for animals seems far away from our present reality, should not lead us to think that this could never change. Every emancipative struggle has once deemed to be just too unrealistic to ever happen.<sup>154</sup>

### c. ANIMAL RIGHTS AS HUMAN RIGHTS UNDER POLITICAL CONCEPTIONS

As we have seen, if we conceptualize human rights under political approaches, their inherent logic extends to animals as well. This is especially true, under the conception that understands human rights as norms that have been socially constructed in response to specific historical injustice (b.). However, even if one understands human rights as reasons for international intervention, it is possible to argue that human rights could in the future extend to animals (a.).

## 3. HUMAN RIGHTS AND ANIMAL RIGHTS AS CONCEPTUALLY ONE

As we have seen, it is therefore firstly, convincing to say that animal and human rights stem from the same source from the perspective of naturalistic conceptions. Because it is impossible to single out a non-arbitrary naturalistic feature that can serve as a source for human rights and reasonably includes all different kinds of human beings while excluding all other animals.

Secondly, it is also convincing to include animals in our conception of human rights from a non-foundationalist, political perspective. Animals and human beings share the experience of concrete injustice and therefore, are in need for a normative response in the form of fundamental rights.

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<sup>150</sup> Stucki, *One Rights* (n 140) 58.

<sup>151</sup> *Ibid* 60.

<sup>152</sup> Philip Harvey, 'Aspirational Laws' (2004) 52(3) *Buffalo Law Review* 701, 717.

<sup>153</sup> *Ibid* 722f. See also Anne Peters, 'Liberté, Égalité, Animalité: Human–Animal Comparisons in Law' (2016) 5(1) *Transnational Environmental Law* 25, 51 noting that rights have the 'tendency to overshoot', in general.

<sup>154</sup> Similarly, David Bilchitz, 'Moving Beyond Arbitrariness: The Legal Personhood And Dignity Of Non-Human Animals' (2009) 25(1) *South African Journal on Human Rights* 38, 69; Stucki, *One Rights* (n 140) 61.

Thus, we can conclude, that we should expand our theory of human rights towards animals, as suggested by a growing number of scholars.<sup>155</sup> In the words of Paola Cavalieri: ‘on the very doctrine that establishes them, human rights are not *human*’ because ‘it is the same justificatory argument underlying it that drives us toward the attribution of human rights to members species other than our own’.<sup>156</sup> Similarly, Tom Regan pointed out that the ‘theory that rationally grounds the rights of animals also grounds the rights of humans’.<sup>157</sup> Most explicitly, this reconceptualization is expressed in the term ‘One Rights’, as proposed by Saskia Stucki<sup>158</sup> or ‘Sentient Rights’, as proposed by Alasdair Cochrane.<sup>159</sup>

However, this does not have to mean *all* human rights are animals rights, nor that *all* animal rights are human rights. It could be possible to identify a core set of rights that are based on the overlapping fundamental interests and vulnerabilities of human beings and other animals as well as the overlapping need that emerges out of concrete injustices. This could include rights that protect the bodily and mental integrity, like the right to life and freedom from torture, cruel and inhuman treatment,<sup>160</sup> as well as the right to liberty and freedom of movement, the right to food, water and shelter and the protection of social relations and a family life.<sup>161</sup> Some other rights, like to right to marry, to education or freedom of religion make little sense for animals,<sup>162</sup> while there can potentially be other rights that animals require that are not relevant for human beings, like the right to be born, live and die in the respective natural habitat of one’s specie.<sup>163</sup> Most likely, there are furthermore specie-specific differing needs of animals, that require specie-specific rights.<sup>164</sup> These rights could be in a first step organized as group rights regarding the social relationship between human beings and animals and the specific corresponding needs: as Will Kymlicka and Sue Donaldson proposed in their political conception of ‘*Zoopolis*’, one could distinguish wild animals as sovereign communities, liminal animals (wild and domestic

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<sup>155</sup> See Paola Cavalieri, *The Animal Question: Why Nonhuman Animals Deserve Human Rights* (Oxford University Press 2001); Alasdair Cochrane, ‘From Human Rights to Sentient Rights’ (2013) 16(5) *Critical Review of International Social and Political Philosophy* 655; Martha C Nussbaum, *Justice for Animals: Our collective Responsibility* (Simon & Schuster 2022); Stucki, *One Rights* (n 140). Tom Regan, *The Case for Animal Rights* (1983 University of California Press); Will Kymlicka and Sue Donaldson, *Zoopolis: A Political Theory of Animal Rights* (Oxford University Press 2011) and others.

<sup>156</sup> Cavalieri (n 155) 139.

<sup>157</sup> Tom Regan, ‘The Case for Animal Rights’, in: Peter Singer (ed), *In Defense of Animals* (Basil Blackwell 1985) 13, 24.

<sup>158</sup> Stucki, *One Rights* (n 140).

<sup>159</sup> Alasdair Cochrane, ‘From Human Rights to Sentient Rights’ (2013) 16(5) *Critical Review of International Social and Political Philosophy* 655.

<sup>160</sup> Kymlicka and Donaldson, *Zoopolis* (n 155) 49.

<sup>161</sup> Stucki, *One Rights* (n 140) 96.

<sup>162</sup> *Ibid.*

<sup>163</sup> Tercer Juzgado de Garantías de Mendoza, 3 November 2016, Expte Nro P 72.254/15; Anne Peters, *Animal in International Law* (Brill 2021) 469.

<sup>164</sup> Or lists of capabilities in the language of Nussbaum, *Justice for Animals* (n 155) 96ff, 101ff.

species who live on anthropogenic food sources and share their living spaces with humans) as semi-sovereign communities and domesticated animals as members of our political community.<sup>165</sup> And in a second step, respective specie-specific needs and corresponding rights could be formulated. Moreover, it could be that certain human rights have to be re-interpreted in a specie-specific way in order to provide adequate protection for animals, like a broader understanding of “family”, that enables us to capture the social bonds of pack animals for example.

But this is in fact nothing extraordinary in the human rights field. While the first generation of human rights was very much orientated on the specific needs and interests of adult, able-bodied men, the international community soon came to realize that women, disabled people and children do have some specific needs that are not adequately met by these provisions.<sup>166</sup> Thus, new, specific rights were established. Similarly, there are proposals, to create specie specific lists of rights for different animals.<sup>167</sup>

Furthermore, animals would need to be granted corresponding procedural rights to enable them to ensure the implementation of these substantive provisions.<sup>168</sup> Additionally, animals would require political rights, enabling their interests to be adequately considered within the political system.<sup>169</sup>

In the following two chapters, we will furthermore engage with the relationship of animal and human rights, since the arguments against animal rights are oftentimes not conceptually but stem from the fear of them being detrimental to human rights in practice. To the contrary, it will be argued that animal rights are, *in principle*, rather supportive *for* the cause of human rights (II). Moreover, potential conflicts of animal rights *vs* human rights and ways to solve them will be highlighted (III).

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<sup>165</sup> Kymlicka and Donaldson, *Zoopolis* (n 155) 73ff.

<sup>166</sup> Stucki, *One Rights* (n 140) 96.

<sup>167</sup> Nussbaum, *Justice for Animals* (n 155); Raffael N Fasel, *More Equal than Others: Humans and the Rights of Other Animals* (Oxford University Press 2024) 163ff.

<sup>168</sup> Whether this would necessarily require legal personhood is arguable. In favor, see for example: Stephen M Wise, ‘Legal Personhood and the Non-Human Rights Project’ (2020) 17(1) *Animal Law Revenue* 12; David Bilchitz, ‘Moving Beyond Arbitrariness: The Legal Personhood And Dignity Of Non-Human Animals’ (2009) 25(1) *South African Journal on Human Rights* 38. Critical: Brian Favre, ‘Is there a need for a new, an ecological, understanding of legal animal rights?’ (2020) 11(2) *Journal of Human Rights and the Environment* 297.

<sup>169</sup> Kymlicka and Donaldson, *Zoopolis* (n 155); Alasdair Cochrane, *Should Animals have Political Rights?* (Polity Press Cambridge 2020).

## II. ANIMAL RIGHTS *FOR* HUMAN RIGHTS

There is persisting fear that giving human rights to non-human animals would have detrimental impacts on the enjoyment of human rights and freedoms,<sup>170</sup> erode the status of (some) human beings<sup>171</sup> or the status of the instrument of human rights itself,<sup>172</sup> in short: that including animals would “level down” human rights. And consequently, it seems that the underlying assumption in the human rights discourse is that 'the ongoing exclusion of animals is therefore a necessary evil to the higher goal of safe guarding human rights.'<sup>173</sup>

To the contrary, a growing number of voices points to potential synergies and mutual benefits, arguing that granting fundamental animal rights and advancing their protection could actually be beneficial for human beings as well.<sup>174</sup> In the following, I will firstly attempt to demonstrate that at least part of the arguments that have been levelled against expanding human rights to animals in defense of (some) human rights, are not actually arguments against the cause for animal rights itself. But they turn out to be rather directed at an underinclusive understanding of the source of rights for both human and animal rights or at the fear of an arbitrary implementation. Secondly, I will support the argument of a rather beneficial relationship between animal and human rights.

In the first section of this chapter (1.), we will see that levelling-down-concerns in relation to marginalized human beings, like mentally-disabled, sick and senile human beings, babies and children, only appear in response to an understanding of the source of granting human rights that might not be arbitrary in relation to specie-membership but continues to propagate an

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<sup>170</sup> See for example: David R Schmahmann and Lori J Polacheck, 'The Case Against Animal Rights' (1995) 22 *Boston College Environmental Affairs Law Review* 747, 749.

<sup>171</sup> Richard Crupp, 'Cognitively Impaired Humans, Intelligent Animals and Legal Personhood' (2017) 69(2) *Florida Law Review* 465; Richard A Posner, 'Animal Rights' (Review of 'Rattling the Cage: Toward Legal Rights for Animals' by Steven M Wise) (2000) 110(3) *The Yale Law Journal* 527; Laurence H Tribe, 'Ten Lessons Our Constitutional Experience Can Teach Us About the Puzzle of Animal Rights: The Work of Steven M Wise' (2001) 7(1) *Animal Law Review* 1; Licia Carlson, *The Faces of Intellectual Disability: Philosophical Reflections* (Indiana University Press, Bloomington 2010) 131ff.

<sup>172</sup> Michael Ignatieff, *Human Rights as Politics and Idolatry* (ed by Amy Gutmann, Princeton University Press 2001) 90, for example, warns against a 'rights inflation'.

<sup>173</sup> Saskia Stucki, *One Rights: Human and Animal Rights in the Anthropocene* (Springer 2022) 63.

<sup>174</sup> Stephen Keim SC and Jordan Sosnowski, 'Human Rights v Animal Rights: Mutually Exclusive or Complementary Causes' (2012) 8 *Animal Protection Law Journal (Australia)* 78; Anne Peters, Libert ,  galit , Animalit : Human-Animal Comparison in Law' (2016) 5(25) *Transnational Environmental Law* 25, 36; Stucki, *One Rights* (n 173) 63ff; Joe Wills, 'Animal Rights, Legal Personhood and Cognitive Capacity: Addressing 'Levelling-Down' Concerns' (2020) 11(2) *Journal of Human Rights and the Environment* 199; Will Kymlicka, 'Human Rights Without Human Supremacism' (2018) 48(6) *Canadian Journal of Philosophy* 763; Tom Regan, 'The Case for Animal Rights', in: Peter Singer (ed), *In Defense of Animals* (Basil Blackwell 1985) 13, 24.

under-inclusive criterion for the determination of moral status. This is however a criterion that does not have to be and should not be defended to include animals.

In the second section (2.), I will address the particular concern of a reinforcement of racial or cultural biases through the implementation of animal's rights and demonstrate that it is neither rooted in the cause for animals itself. Instead, it reflects a common problem in the human rights discourse and thus demands critical internal reflections in the scholarship and practice, as we have witnessed it and continue to witness it in other fields of human rights, such as the on-going struggle for women's rights.

In the third section of this chapter (3.), I will provide arguments suggesting that protecting animal rights can instead be seen as rather supporting the cause of human rights, since both normative enterprises push in the direction of valuing and respecting various forms of life and opposing hierarchical thinking, discrimination, violence, oppression and exploitation.

## 1. LEVELLING-DOWN CONCERNS STEM FROM UNDER- NOT OVER-INCLUSIVENESS

One who has explicitly positioned himself against animal rights due to levelling-down concerns is Richard Crupp, a legal scholar from the US. He argued, in response to the Non-Human Rights Project,<sup>175</sup> that granting fundamental rights to animals based on their sentience, consciousness and other abilities would constitute great risks for already vulnerable groups of human beings.<sup>176</sup> Richard A Posner and Laurence H Tribe, both US-American legal scholars as well, have expressed similar concerns,<sup>177</sup> noting that 'if we fail to maintain a bright line between animals and human beings, we may end up by treating human beings as badly as we treat animals, rather than treating animals as well as we treat (or aspire to treat) human beings'<sup>178</sup> or:

If your theory is that simply being human cannot entitle you to basic rights [...] I think you are on an awfully steep and slippery slope that we would do well to avoid. Once we have said that infants and very old people with advanced Alzheimer's and the comatose have no rights unless we choose to grant them, we must decide about

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<sup>175</sup> An US initiative founded by Steven M Wise that focusses on strategic litigation in order to achieve change in the legal status of animals, mainly concentrating on 'habeas corpus' claims for great apes and elephants that are held in captivity, for more information see: <https://www.nonhumanrights.org/>.

<sup>176</sup> Crupp (n 171) 499.

<sup>177</sup> Posner (n 171) 535; Tribe (n 171) 7.

<sup>178</sup> Posner Ibid.

people who are three-quarters of the way to such a condition. I needn't spell it all out, but the possibilities are genocidal and horrific and reminiscent of slavery and of the holocaust.<sup>179</sup>

In similar manner, there are serious concerns from the side of disability scholars, indicating that some of the arguments made for the case of animal rights could erode the moral and legal status of mentally disabled human beings.<sup>180</sup>

This criticism is however only justified in relation to a certain, under-inclusive understanding of what should be the foundation of the aspired new non-human-animal inclusive rights. The theory that is defended in this thesis does not at all intend to question the moral and legal status of babies, children, old, sick or disabled people. It does rather the opposite by pointing out that the logical consequences of many still existing human rights theories, defending human exceptionalism, either voluntarily exclude those human beings or fail to explain their inclusion, which makes their status insecure. The comparison to human beings with mental disabilities, sicknesses, babies and children is made to highlight this under-inclusiveness and to ground the argument for a more inclusive approach, that does not rely on certain proclaimed “human features” that not all human beings possess and in fact, none of us possesses at all points of our life (see previous chapter **I. 1. b.**). It is rather the exclusivity of such conceptions, that continue to propagate capacities like autonomy, rationality or personhood as necessary conditions for moral status that entail a dangerous potential for already vulnerable groups of human beings.

However, the way of making and presenting the argument for animals matters indeed. When Licia Carlson, a professor of philosophy and disability rights scholar, for example, criticizes that mentally disabled people are sometimes depicted as fundamentally different from “the paradigmatic-human being” except their specie membership and even pushed on the margins of humanity within the animals rights discourse,<sup>181</sup> sometimes exemplified by the use of the term “*the argument from marginal cases*”, she is right in being worried about the status of mentally disabled human beings.<sup>182</sup> Although the term “*marginal cases*” is not meant to imply that mentally disabled human beings for example are “*marginal humans*” or of “*marginal moral consideration*”, but that they can be said to be marginal in relation to the proposed under-inclusive understanding of the foundation of human rights, the use of the term bears the

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<sup>179</sup> Tribe (n 171) 7.

<sup>180</sup> Carlson (n 171) 131ff; Eva Feder Kittay, ‘The Personal is Philosophical is Political: A Philosopher and Mother of a Cognitively Disabled Person Sends Notes from the Battlefield’ (2009) 40(3-4) *Metaphilosophy* 307.

<sup>181</sup> Carlson (n 171) 148.

<sup>182</sup> Joe Wills, ‘Animal Rights, Legal Personhood and Cognitive Capacity: Addressing ‘Levelling-Down’ Concerns’ (2020) 11(2) *Journal of Human Rights and the Environment* 199, 206.

dangerous potential of misinterpretation and misuse in dehumanizing ways, and should thus be avoided.<sup>183</sup> Similarly, the disability and animal liberation scholar, Sunaura Taylor points out that threats to the status of mentally disabled people can arise if the moral relevance of capacities such as rationality remain unchallenged in the animal rights discourse, but acknowledges that the demand to expand moral and legal consideration to non-human animals itself ‘can even be understood as anti-ableist’ because it challenges exactly those exclusionary accounts of moral value that have degraded people with (cognitive) disabilities to a second-class moral status.<sup>184</sup>

The assumption that the inclusion of non-human animals would only come to the detriment of vulnerable human beings, mentally disabled people in particular, has thus been proven to be unjustified. It remains nevertheless the responsibility of the human rights academia and practice to ensure that a misinterpretation or misuse of the argument for non-human animals to the detriment of vulnerable human beings is dismantled as such and strongly rejected.

## 2. CONFRONTING CULTURAL IMPERIALISM AND RACIAL BIASIS

But there is another particular concern that needs to be addressed: As Will Kymlicka and Sue Donaldson have analyzed, especially the political left, which is traditionally concerned with marginalized groups and their struggle for liberation and justice, largely resists the idea to include the cause of animals.<sup>185</sup> And that is, not only because they fear that time and resources needed for other struggles will be used for the cause of animals and that already marginalized human groups will come under threat, but also, and perhaps most strikingly, that in practice, the struggle for animal rights would reenforce the privileged status of White middle class people in the West, while further stigmatizing and pressuring minority groups and non-Western societies.<sup>186</sup>

It is not unreasonable to raise this concern, since there is a long history of justifying the domination over people from the Global South, indigenous people and (religious or ethnic) minorities by referring to their alleged “barbaric-” or “backwardness” in relation to the treatment of women, children or animals.<sup>187</sup> And still today, there is a particular amount of

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<sup>183</sup> Ibid.

<sup>184</sup> Sunaura Taylor, *Beasts of Burden: Animal and Disability Liberation* (The New Press 2017) 68.

<sup>185</sup> Will Kymlicka and Sue Donaldson, ‘Animal Rights, Multiculturalism, and the Left’ (2014) 45(1) *Journal of Social Philosophy* 116.

<sup>186</sup> Ibid 120f.

<sup>187</sup> Ibid 121.

public attention on minority practices that involve animal cruelty, although they only represent a small part of the overall cruelty that humans cause to animals.<sup>188</sup> Cultural differences on the question of which animals can be used for food, clothing and scientific experiments, and which animals are seen as companion animals are often evoked to claim moral superiority.<sup>189</sup> Moreover, religious and cultural reasons to kill or harm animals are often seen as less significant than economic reasons within the public debate.<sup>190</sup> Unfortunately, the animal rights movement itself has sometimes been fueling these racial and cultural biases as well, for example in the way a vegan or vegetarian lifestyle has sometimes been presented as easily accessible for everyone.<sup>191</sup> As a result, animal advocacy is now often perceived as being inherently connected to or even performing Whiteness and Western Culture.<sup>192</sup>

However, if one looks a little closer, it is actually quite perplexing to suggest that Western superiority could be justified by its treatment of animals, given that the West is responsible for creating and spreading industrial-scale animal exploitation techniques.<sup>193</sup> Many Non-Western societies have traditionally maintained more respectful relationships with animals.<sup>194</sup> For instance, the rise of large-scale animal exploitation in countries like India is largely due to the influence of Western corporations and lifestyles, rather than indigenous religious or cultural practices.<sup>195</sup> As Kymlicka and Donaldson put it: ‘Respect for animals is clearly not the exclusive property of any one race, culture, or civilization—and certainly not the West’.<sup>196</sup> The fear of reinforcement of racial and cultural biases has nothing to do with the cause for animals itself but the way it is sometimes voluntarily instrumentalized to fuel racial and cultural

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<sup>188</sup> Ibid 121. See Paula Casal, ‘Is Multiculturalism Bad for Animals?’ (2003) 11(1) *Journal of Political Philosophy* 1, 2ff for case examples.

<sup>189</sup> On the hypocrisy of Western society in relation to animals in general see: Melanie Joy, *Why we love Dogs, Eat Pigs and Wear Cows: An Introduction to Carnism* (Conari Press 2011).

<sup>190</sup> Kymlicka and Donaldson, ‘Animal Rights, Multiculturalism, and the Left’ (n 185) 122.

<sup>191</sup> On the debate see for example: Peter Staudenmeier, ‘Ambiguities of Animal Rights’ (Communalism: International Journal for a Rational Society 2005) <http://www.social-ecology.org/2005/01/ambiguities-of-animal-rights/> accessed 12 July 2024; Kathryn Paxton George, ‘Should Feminists Be Vegetarians?’ (1995) 19 *Signs* 405 and the corresponding critical comments by Greta Gaard and Lori Gruen, ‘Comments on George’s ‘Should Feminists Be Vegetarians?’ 21(1) *Signs* 230; Cathryn Bailey, ‘We Are What We Eat: Feminist Vegetarianism and the Reproduction of Racial Identity’ (2007) *Hypatia* 22(2) 39; Amie Breeze Harper, ‘Race as a ‘Feeble Matter’ in Veganism: Interrogating Whiteness, Geopolitical Privilege, and Consumption Philosophy of ‘Cruelty-Free’ Products’ (2010) 8(3) *Journal of Critical Animal Studies* 5.

<sup>192</sup> Michael Lundblad, ‘Archeology of a Humane Society: Animality, Savagery, Blackness’, in Marianne DeKoven and Michael Lundblad, *Species Matters* (Columbia University Press 2011) 75; Harper, ‘Race as a ‘Feeble Matter’ (n 191); Claire Jean Kim, ‘Moral Extensionism or Racist Exploitation? The Use of Holocaust and Slavery Analogies in the Animal Liberation Movement’ (2011) 33(3) *New Political Science* 311; Bailey, ‘We Are What We Eat’ (n 191).

<sup>193</sup> Kymlicka and Donaldson, ‘Animal Rights, Multiculturalism, and the Left’ (n 185) 121.

<sup>194</sup> For further elaboration see: Amba J Sepie, ‘More than Stories, More than Myths: Animal/Human/Nature(s) in Traditional Ecological Worldviews’ (2017) 6(4) *Humanities* 78, for example.

<sup>195</sup> Kymlicka and Donaldson, ‘Animal Rights, Multiculturalism, and the Left’ (n 185) 121.

<sup>196</sup> Ibid.

stereotypes or unconsciously (or even consciously) promoted from the viewpoint of White middle-class people, assuming universality of the experience.

And both issues are in fact not unique to the struggle for animal rights but have been witnessed in the struggle for other human rights causes, like women's, LGBTQI+ and children's rights as well. In those cases, the response, however, was not to drop the cause and attack its' validity but to confront the underlying racial and cultural biases itself. The case of animal rights should be treated similarly. Different proposals to balance human and animal rights in terms of conflict with sensitivity to cultural and racial biases and power dynamics will be analyzed in **Part III** ("*Animal Rights vs Human Rights*").

### 3. ANIMAL RIGHTS ARE GENERALLY BENEFICIAL FOR HUMAN RIGHTS

After having confronted and refuted two assumptions about the supposed detrimental effects of animal rights for the cause of human rights. We will now go even a bit further, and argue that animal rights are not only not detrimental to the cause of human rights, but even supportive.<sup>197</sup>

As Tom Regan argues, 'the animal rights movement is a part of, not antagonistic to, the human rights movement' and 'those involved in the animal rights movement are partners in the struggle to secure respect for human rights - the rights of women, for example, or minorities, or workers', sine 'the animal rights movement is cut from the same moral cloth as these'.<sup>198</sup> Or as Gary Francione puts it: 'the argument for animal rights does not decrease respect for human life; it increases respect for all life'.<sup>199</sup>

Human and non-human animal rights threats oftentimes stem from the same roots. Both human and non-human animals are victims of war and armed conflict,<sup>200</sup> domestic and institutional

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<sup>197</sup> Keim and Sosnowski, 'Human Rights v Animal Rights' (n 174); Peters, 'Liberté, Égalité, Animalité' (n 174) 36; Stucki, *One Rights* (n 173) 63ff; Wills (n 175); Kymlicka, 'Human Rights Without Human Supremacism' (n 174); Tom Regan, 'The Case for Animal Rights' (n 174) 24.

<sup>198</sup> Tom Regan, 'The Case for Animal Rights' (n 174) 24.

<sup>199</sup> Gary Francione, *Introduction to Animal Rights: Your Child or the Dog?* (Temple University Press 2000) 174.

<sup>200</sup> On non-human animals as victims of war and armed conflict see: Anne Peters, Jérôme de Hemptinne and Robert Kolb (eds), *Animals in the International Law of Armed Conflict* (Cambridge University Press 2022); Anne Peters and Jérôme de Hemptinne, *Animals in war: At the Vanishing Point of International Humanitarian Law* (Cambridge University Press 2022); Marina Lostal, 'De-Objectifying Animals: Could they Qualify as Victims before the International Criminal Court?' (2021) 19(3) *Journal of International Criminal Justice* 583.

violence,<sup>201</sup> stigma and discrimination.<sup>202</sup> They suffer alongside each other under the exploitative forces of a capitalist system,<sup>203</sup> face the devastating consequences of climate change<sup>204</sup> and zoonotic diseases.<sup>205</sup> And some of the institutionalized violence against non-human animals, namely intensive animal farming,<sup>206</sup> contributes even further to climate change and often times causes the emergence of zoonotic diseases.<sup>207</sup> Simultaneously, enhancing animal rights protection follows the same fundamental principles that underlie enhancing human rights protection, such as striving for peace, non-violence, ending oppression and discrimination, ensuring safety, health and environmental protection, driven by feelings of empathy and solidarity.<sup>208</sup>

Human rights violations are often driven by ‘the emotion of negative sentiment which emerges as hate directed at the non-self ‘other’ and ‘devoid of affection, empathy, or solidarity’.<sup>209</sup> Correspondingly, the generation of positive sentiment in the form of ‘affection, empathy and

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<sup>201</sup> There is well established research on the link between domestic violence against human beings (including violence against women, intimate partner violence, child abuse and mistreatment, sibling abuse, abuse of older adults) and companion animals, see for example: Daniel Mota-Rojas and others, ‘Animal Abuse as an Indicator of Domestic Violence: One Health, One Welfare Approach’ (2022) 12(8) *Animals* 977; Crystal J Giesbrecht and others, ‘Companion Animals and Domestic Violence’ [https://link.springer.com/referenceworkentry/10.1007/978-3-030-85493-5\\_291-1#citeas](https://link.springer.com/referenceworkentry/10.1007/978-3-030-85493-5_291-1#citeas) accessed 28 June 2024; Carol J Adams, ‘Bringing peace home: A feminist philosophical perspective on the abuse of women, children, and pet animals’ (1994) 9(2) *Hypatia* 63.

<sup>202</sup> On the relationship between devaluing animals and human beings in the process of discrimination and prejudice see: Kimberly Costello and Gordon Hodson, ‘Exploring the roots of dehumanization: The role of animal—human similarity in promoting immigrant humanization’ (2010) 13(1) *Group Processes & Intergroup Relations* 3; Gordon Hodson and Kimberly Costello, ‘The Human Cost of Devaluing Animals’ (2012) 216(2895) *NewScientist* 34; Gordon Hodson, Cara C MacInnis and Kimberly Costello, ‘(Over)valuing “Humanness” as an Aggravator of Intergroup Prejudices and Discrimination’, in Paul G Bain, Jeroen Vaes and Jacques-Philippe Leyens (eds), *Humanness and Dehumanization* (Psychology Press 2013) 86.

<sup>203</sup> David Niebert, *Animal Rights/Human Rights: Entanglements of Oppression and Liberation* (Rowman & Littlefield Publishers 2002); Omar Bachour, ‘Alienation and Animal Labour’, in Charlotte E Blattner, Kendra Coulter and Will Kymlicka (eds), *Animal Labour: A New Frontier of Interspecies Justice?* (Oxford University Press 2019).

<sup>204</sup> International Animal Welfare Fund, ‘The Impact of Climate Change on our Planet’s Animals’ <https://www.ifaw.org/journal/impact-climate-change-animals> accessed 29 June 2024; Nicola Lacetera, ‘Impact of Climate Change on Animal Health and Welfare’ (2019) 9(1) *Animal Frontiers* 26; Briana Abrahms and others, ‘Climate Change as Global Amplifier of Human-Wildlife Conflict’ (2023) 13 *Nature Climate Change* 224.

<sup>205</sup> Zoonotic diseases are diseases transmitted between animals and humans and often cause enormous outbreaks such as Ebola, H1N1 influenza (commonly known as ‘swine flu’), avian influenza, MERS, and SARS, including SARS-COV-19. These outbreaks have resulted in thousands of deaths and substantial economic losses.

<sup>206</sup> This term will be used to describe the high-density, large-scale farming operations in which animals like poultry, cattle and pigs are bred and raised to be exploited and killed for food with maximum production efficiency. Other scholars might use terms such as ‘intensive livestock production’, ‘factory farming’ or ‘concentrated animal feeding operations (CAFOs)’.

<sup>207</sup> Anne Peters, *Animals in International Law* (Brill 2021) 41ff; Atsuko Matsuoka and John Sorenson, ‘Human Consequences of Animal Exploitation: Needs for Redefining Social Welfare’ (2013) 40(4) *The Journal of Sociology & Social Welfare* 7.

<sup>208</sup> On the role of solidarity and empathy see Stucki, *One Rights* (n 173) 73ff.

<sup>209</sup> Winston P Nagan, John A C Cartner and Robert J Munro, *Human Rights and Dynamic Humanism* (Brill 2017) 1.

solidarity’ can be seen as ‘the driving force for a world culture of human rights.’<sup>210</sup> Fostering a culture of empathy and solidarity even across species boundaries is therefore much likely beneficial for the cause of human rights.<sup>211</sup>

This inherent connection can be exemplified by a study from Yon Soo Park and Benjamin Valentino, using a combination of national public opinion surveys and cross-sectional data on animal protection legislation in the US and found ‘a strong connection between recognition of human rights and animal rights both at the individual attitude level and at the US state policy level’.<sup>212</sup> The study revealed that people with the most expansive conception of human rights and welfare were more likely to also support animal rights.<sup>213</sup> Tolerant attitudes towards homosexuality, support for universal healthcare, welfare for the poor, improving the conditions of African Americans and the rights of US-born children of undocumented immigrants correlated strongly with views about animal rights.<sup>214</sup> The connection continued even when controlling for political ideology and other potentially relevant factors, like gender, income, age, education or religiosity.<sup>215</sup> Even more, Park and Valentino found statistically significant results demonstrating a link between the extent to which States provided legal protection for human rights and animal rights.<sup>216</sup> To arrive at this conclusion, they used the Humane Society of the United States’ Humane State Ranking scores, and measured them against four variables to estimate each state’s degree of commitment to human rights: enhancing equality for LGBT, installment of hate crime protection measures, pro-poor social welfare measures and protection level of non-citizens.<sup>217</sup> The link furthermore still held even after controlling for each state’s economic dependency on animal agriculture and other potentially relevant variables.<sup>218</sup> Soo Park and Valentino concluded their findings with the following hypotheses: ‘Our results suggest that the future of progress on human rights will be determined in part by the degree to which individuals adopt a more expansive view of what kind of beings, perhaps including non-humans, are worthy of receiving rights.’<sup>219</sup>

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<sup>210</sup> Ibid.

<sup>211</sup> Stucki, *One Rights* (n 173) 73; On Inter-Species Solidarity in the context of work see: Kendra Coulter, *Animals, Work, and the Promise of Interspecies Solidarity* (Palgrave Macmillan 2016).

<sup>212</sup> Yon Soo Park and Benjamin Valentino, ‘Animals are People Too: Explaining Variation in Respect for Animal Rights’ (2019) 41(1) *Human Rights Quarterly* 39.

<sup>213</sup> Ibid 56.

<sup>214</sup> Ibid 52.

<sup>215</sup> Ibid 63.

<sup>216</sup> Ibid 56-62.

<sup>217</sup> Ibid 58-60.

<sup>218</sup> Ibid 63.

<sup>219</sup> Ibid 63.

Their research doesn't indicate, however, what the cause of that correlation is and whether it works from one direction or the other; or both. Charles Patterson, an US-American author, historian and animal rights advocate, argues that intergroup prejudice and violence among humans, for example, is driven, partly, by belief systems that developed to help humans justify the exploitation of animals.<sup>220</sup> According to Patterson, the enslavement and domestication of animals influenced the way humans related to their captive animals and in turn the relationship to each other: 'once animal exploitation was institutionalized and accepted as part of the natural order of things, it opened the door to similar ways of treating other human beings'.<sup>221</sup>

And Elizabeth Fisher, an US author and editor of the feminist literary magazine *Aphra*, made the same argument for the subordination of women, arguing that the domestication of women followed the initiation of animal husbandry.<sup>222</sup> Similarly, the American author and activist Carol J Adams argued in her famous book *The Sexual Politics of Meat* that the oppression of women and animals are interconnected through patriarchal structures that objectify and exploit both.<sup>223</sup> She highlights how meat consumption is linked to masculine identity and power as well as the sexual exploitation of women and critiques how language and imagery in society reinforce these connections.<sup>224</sup>

In fact, there has also been insightful research from social psychology that supports the thesis that animal subordination fosters human subordination and discrimination. Multiple studies found that the belief in human superiority to be a crucial factor in the process of animalization as a way of dehumanizing certain human outgroups such as People of Color and immigrants.<sup>225</sup> The social psychologists Kimberly Costello and Gordon Hodson found that 'fundamental beliefs in a human-animal divide set the foundation for outgroup dehumanization. [...] Specifically, beliefs in a human-animal divide allow people to exclude some humans from the realm of humanity by likening them to 'inferior' animals'.<sup>226</sup> Correspondingly, increasing the

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<sup>220</sup> Charles Patterson, *Eternal Treblinka: Our Treatment of Animals and the Holocaust* (Lantern Books 2002).

<sup>221</sup> Ibid 10-12

<sup>222</sup> Elizabeth Fisher, *Woman's Creation: Sexual Revolution and the Shaping of Society* (Anchor Press 1979).

<sup>223</sup> Carol J Adams, *The Sexual Politics of Meat* (Continuum 1990).

<sup>224</sup> Ibid.

<sup>225</sup> Kimberly Costello and Gordon Hodson, 'Exploring the roots of dehumanization: The role of animal—human similarity in promoting immigrant humanization' (2010) 13(1) *Group Processes & Intergroup Relations* 3; Gordon Hodson and Kimberly Costello, 'The Human Cost of Devaluing Animals' (2012) 216(2895) *NewScientist* 34; Gordon Hodson, Cara C MacInnis and Kimberly Costello, '(Over)valuing "Humanness" as an Aggravator of Intergroup Prejudices and Discrimination', in Paul G Bain, Jeroen Vaes and Jacques-Philippe Leyens (eds), *Humanness and Dehumanization* (Psychology Press 2013) 86.

<sup>226</sup> Kimberly Costello and Gordon Hodson, 'Explaining Dehumanization Among Children: The Interspecies Model of Prejudice' (2014) 53 *British Journal of Social Psychology* 175, 178.

moral status of animals by highlighting their similarities to human beings, was proven to significantly enhance attitudes and moral inclusiveness towards human outgroups.<sup>227</sup> Another influential study on social dominance orientation, a concept that describes peoples preference in regard to install or maintain dominance and inequality within society, revealed that there is a correlation between strong beliefs in human superiority in relation to animals and beliefs in hierarchies within the human species, favoring inequality and discrimination towards human (ethnic) outgroups.<sup>228</sup>

Moreover, there is well-established research on the link between violence against humans and violence against animals. Acts of animal cruelty and abuse are reliable indicators and/or predictors of crimes of interpersonal violence, including crimes of assault, rape, murder, arson, domestic violence, and sexual abuse of children.<sup>229</sup> Moreover, animal violence has been said to be a better predictor of sexual abuse compared to a criminal record of homicide, arson, or weapon convictions.<sup>230</sup> This knowledge led to a movement, trying to raise awareness for “*the Link*”<sup>231</sup> and is even used in criminal law enforcement and prevention by Federal Bureau of Investigation the US Department of Justice (FBI) since 2016.<sup>232</sup>

Perhaps most strikingly is the link between human rights, animal rights and environmental protection and global health.<sup>233</sup>

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<sup>227</sup> Brock Bastian and others, ‘When Closing the Human–Animal Divide Expands Moral Concern: The Importance of Framing’ (2012) 3(4) *Social Psychological and Personality Science* 421; Costello and Hodson, ‘Exploring the roots of dehumanization’ (n 202).

<sup>228</sup> Kristof Dhont and others, ‘Social dominance orientation connects prejudicial human–human and human–animal relations’ (2014) 61-62 *Personality and Individual Differences* 105.

<sup>229</sup> Randall Lockwood, ‘Animal Cruelty and Violence against Humans: Making the Connection’ (1999) 5 *Animal Law* 81; Linda Merz-Perez and Kathleen M Heide, *Animal Cruelty: Pathway to Violence Against People* (AltaMira Press 2004); Charlie Robinson and Victoria Clausen, ‘The Link Between Animal Cruelty and Human Violence’ (FBI Law Enforcement Bulletin) <https://leb.fbi.gov/articles/featured-articles/the-link-between-animal-cruelty-and-human-violence> accessed 1 July 2024.

<sup>230</sup> Charlie Robinson and Victoria Clausen, ‘The Link Between Animal Cruelty and Human Violence’ (FBI Law Enforcement Bulletin) <https://leb.fbi.gov/articles/featured-articles/the-link-between-animal-cruelty-and-human-violence> accessed 1 July 2024; National Link Coalition, ‘The Link Between Violence to People and Violence to Animals’ (Stratford National Link Coalition) <https://nationallinkcoalition.org/wp-content/uploads/2013/01/LinkSummaryBooklet-16pp.pdf> accessed 01 July 2024.

<sup>231</sup> There is a “National Link Coalition” in the USA (<https://nationallinkcoalition.org/> accessed 6 July 2024) and a similar association in Canada (<https://www.violencelink.ca/the-violence-link> accessed 6 July 2024) and in Europe (<https://www.europeanlinkcoalition.com/> accessed 6 July 2024).

<sup>232</sup> The FBI’s National Incident-Based Reporting System (NIBRS) collects detailed information on animal cruelty cases since 2016, for example: US Department of Justice, Federal Bureau of Investigation, ‘Tracking Animal Cruelty: FBI Collecting Data on Crimes Against Animals’ <https://www.fbi.gov/news/stories/-tracking-animal-cruelty> accessed 1 July 2024. See also National Sheriffs Association, ‘Animal Cruelty as a Gateway Crime’ <https://www.sheriffs.org/animalcrueltygateway> accessed 1 July 2024.

<sup>233</sup> On the beneficial effects of animal rights protection for human rights through the link to environmental protection and global health see Stucki, *One Rights* (n 173) 76ff.

The severe environmental crises that humanity faces today are in part driven by the systemic exploitation, killing and consumption of animals. Animal agriculture, industrial meat and dairy production in particular, contributes largely to climate change, greenhouse gas emissions, deforestation, and the loss of biodiversity and habitats.<sup>234</sup> There is a growing recognition of the importance of shifting to plant-based food systems and reducing global consumption of animal products as critical measures for mitigating climate change.<sup>235</sup>

Additionally, the exploitation of both farmed and wild animals poses significant public health risks, with three out of four emerging infectious diseases being zoonotic.<sup>236</sup> This has already been recognized by the World Health Organization and led to the adoption of a 'One Health' approach, that incorporates human, animal and planetary health.<sup>237</sup>

Advancing animal rights would therefore lead to a better protection of the environment, mitigate of climate change, and decreased risk of the emergence of zoonotic diseases and thus lower the human rights risk related risks connected to it.

#### 4. ANIMAL AND HUMAN RIGHTS ARE SYNERGETIC FORCES

As demonstrated, the assumption that animal rights would only come to the expense of (certain) human rights is unjustified.

Beyond that, it has been demonstrated that there is rather a significant overlap in both human and animal rights underlying principles, that manifests in concrete empirical research on the social-psychological mechanisms behind prejudice, discrimination and violence.

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<sup>234</sup> William J Ripple and others, 'World Scientists' Warning to Humanity: A Second Notice' (2017) 67 *Bioscience* 1026; Xiaoming Xu and others, 'Global Greenhouse Gas Emissions from Animal-Based Foods are Twice Those of Plant-Based Foods' (2021) 2 *Nature Food* 724; WWF, 'Stepping Up? The Continuing Impact of EU Consumption on Nature Worldwide: Summary Report' (WWF 2021) <https://www.wwf.de/fileadmin/fm-wwf/Publikationen-PDF/WWF-Report-Stepping-up-The-continuing-impact-of-EU-consumption-on-nature-worldwide-FullReport.pdf> accessed 10 July 2024 5; Timothy G Benton and others, 'Food System Impacts on Biodiversity Loss: Three Levers for Food System Transformation in Support of Nature' (Research Paper, Chatham House 2021) [https://www.chathamhouse.org/sites/default/files/2021-02/2021-02-03-food-system-biodiversity-loss-benton-et-al\\_0.pdf](https://www.chathamhouse.org/sites/default/files/2021-02/2021-02-03-food-system-biodiversity-loss-benton-et-al_0.pdf) accessed 10 July 2024.

<sup>235</sup> See for example: Horizon Magazine, 'Plant-based Diets Improve Health and Environment, says top EU Scientific Advisor' <https://projects.research-and-innovation.ec.europa.eu/en/horizon-magazine/plant-based-diets-improve-health-and-environment-says-top-eu-scientific-advisor> accessed 10 July 2024; European Commission, 'EU Pathway Towards Sustainable Food Systems Transformation' [https://knowledge4policy.ec.europa.eu/publication/eu-pathway-towards-sustainable-food-systems-transformation\\_en](https://knowledge4policy.ec.europa.eu/publication/eu-pathway-towards-sustainable-food-systems-transformation_en) accessed 10 July 2024.

<sup>236</sup> Richard Coker and others, 'Towards a Conceptual Framework to Support One-Health Research for Policy on Emerging Zoonoses' (2011) 11 *Lancet Infectious Diseases* 326.

<sup>237</sup> World Health Organization (WHO), 'One Health' <https://www.who.int/europe/initiatives/one-health> accessed 10 July 2024.

While it would be of course simplistic to assume that we could get rid of violence, oppression and discrimination among humans by ending violence, oppression and discrimination of animals, we can, however, conclude that enhancing a culture of cross-species empathy and care would foster empathy and care towards human beings as well. Even Immanuel Kant, who was opposed to the idea of moral duties towards animals themselves, concluded that: ‘Any action whereby we may torment animals, or let them suffer distress, or otherwise treat them without love, is demeaning to ourselves.’<sup>238</sup>

Furthermore, the connection between animal rights, human rights, environmental protection and global health speaks in favor for protecting animal rights to protect human rights. Thus, animal and human rights can be said to be principally synergetic forces, which makes strengthening animal rights *for* human rights a reasonable claim.

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<sup>238</sup> Immanuel Kant, 'Kants Gesammelte Schriften' 27:710, in Peter Heath and JB Schneewind (eds), *Lectures on Ethics* (Peter Heath tr, Cambridge University Press 1997) 434.

### III. ANIMAL RIGHTS VS HUMAN RIGHTS

It was argued before that human rights and animal rights stem from the same theoretical foundation, sharing their inner logic (I.) and that animal rights can be seen as rather supportive for the cause of human rights (and vice versa) (II.).

However, that does not mean that the two will always be in perfect harmony and that there will be no conflicts of rights between human and animal rights.<sup>239</sup> Here, Raffael Fasel and Sean Butler point out that: ‘the very purpose of granting animals right to bodily autonomy, integrity, and life, for instance, is to limit human’s right to property in these animals. This conflict can only arise once we recognize that animals have countervailing rights’.<sup>240</sup> It is true that granting animal rights is in part to limit countervailing human-rights and thus conflicts will arise. Yet, if we want to become clear of how human and animal rights can truly collide on equal terms, we need some clarifications first.

Looking closely at the statement by Fasel and Butler, we can see that it still reflects the idea of an unequal standing between animal and human rights: it assumes that we can uphold a humans’ rights to property in animals, while granting fundamental rights to animals, and that the right to life and bodily integrity of the animal will limit the human right to property in those animals; and we can eventually balance the two, applying the principle of proportionality.

Instead, we must conclude, in coherence with our findings, that human and animal stem from the same vulnerabilities, interest and needs, our shared inherent value, as well as a shared need in a normative response in the light of concrete struggles, that the ‘human right to property in animals’ is not a human right at all, but rather an ‘illegitimate right’.<sup>241</sup> Accepting that some (human) beings can claim property rights in other beings (animals) is inconsistent with the claim that they possess inherent value. Nothing can express ‘being just a means to an end’ instead of ‘an end’ itself more clearly than being deemed a property of somebody else.

In order to understand how animal and human rights can truly collide on equal terms, it is perhaps also helpful to know, that there are absolute and relative (and qualified) human rights

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<sup>239</sup> Certainly, potential conflict could also arise between different kinds of animals (over certain territories or resources, for example). Nevertheless, I will continue to focus on the relationship between animal and human rights in the following.

<sup>240</sup> Raffael N Fasel and Sean C Butler, *Animal Rights Law* (Bloomsbury 2023) 112.

<sup>241</sup> Steven M Wise, 'Hardly a Revolution: The Eligibility of Non-Human Animals for Dignity-Rights in a Liberal Democracy' (1998) *Vermont Law Review* 793, 796; Saskia Stucki, *One Rights: Human and Animal Rights in the Anthropocene* (Springer 2022) 64.

(and so would most animal rights).<sup>242</sup> Absolute rights (like the right to life, the right not to be tortured and freedom from slavery) are inviolable, which means that they cannot be legitimately limited or derogated regardless of the circumstances of the case.<sup>243</sup> Relative or qualitative rights on the other hand, can be limited if there are sufficiently valuable conflicting rights or interests, or derogated in times of emergency.<sup>244</sup> In the case of qualitative rights the possible limitations itself are limited to certain especially important reasons and thus have to meet a higher threshold of justification. If these non-absolute rights are in conflict with other (public) interests or other non-absolute rights, the proportionality test is applied to achieve a just balance between the conflicting rights or interests.<sup>245</sup>

If we hold true that, as argued throughout this thesis, human and animal rights share their inner logic, stemming from the same foundations, we must conclude that the same distinction between absolute and non-absolute rights applies for the case of animals and that animals to hold inviolable rights.<sup>246</sup> When we agree that we share our most fundamental needs and vulnerabilities with animals, and we agree that animals do possess inherent value, we cannot, at the same time believe that human rights should outweigh animal's right to life and not to be tortured, as long as there is proportionate balancing, since we would – rightly – reject the relativity of those rights in the human case.<sup>247</sup> We cannot uphold the view that Robert Nozick summarized concisely as ‘utilitarianism for animals, Kantianism for people’<sup>248</sup>: the belief, that we can never sacrifice the life of a human being for the purpose of saving other human beings for example because that would result in treating that first human being as mere means to an end (Kantianism), while we could do the same thing with an animal or are even morally obliged to, if the utility is just great enough (Utilitarianism).<sup>249</sup>

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<sup>242</sup> On the distinction in general see: Robert Alexy, ‘The Absolute and the Relative Dimensions of Constitutional Rights’ (2017) 37(1) *Oxford Journal of Legal Studies* 31, 34; European Commission, ‘Fundamental Rights’ (Online Glossary of the European Commission) [https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-asylum-and-migration-glossary/glossary/fundamental-rights\\_en](https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-asylum-and-migration-glossary/glossary/fundamental-rights_en) accessed 9 July 2024. In the context of animal rights see: Fasel and Butler, *Animal Rights Law* (n 240) 112f.

<sup>243</sup> European Commission Ibid; Rhona K M Smith, *International Human Rights* (Oxford University Press 2012) 184f.

<sup>244</sup> Ibid.

<sup>245</sup> Ibid.

<sup>246</sup> In favor of inviolable rights for animals: Paola Cavalieri, *The Animal Question: Why Non-Human Animals Deserve Human Rights* (Oxford University Press 2001); Gary L Francione, *Animals as Persons: Essays on the Abolition of Animal Exploitation* (Columbia University Press 2008); Gary Steiner, *Animals and the Moral Community: Mental Life, Moral Status, and Kinship* (Columbia University Press 2008); Sue Donaldson and Will Kymlicka, *Zoopolis: A Political Theory of Animal Rights* (Oxford University Press 2011) 19ff.

<sup>247</sup> Similarly, Donaldson and Kymlicka Ibid.

<sup>248</sup> Robert Nozick, *Anarchy, State and Utopia* (Basic Books 1974) 39.

<sup>249</sup> Donaldson and Kymlicka, *Zoopolis* (n 246) 20.

This might be quite an uncomfortable realization for many, since it means our obligation to grant, respect, protect and fulfill these rights to animals will demand a radical reconstruction of our societies in the long term. It also means that we will have to deal with a number of ‘tragic dilemmas’, concerning conflicting human and animal interest and rights in the meantime.<sup>250</sup> And we might wonder: “How can we move forward?”. I will focus on a few of the dilemmas that our non-ideal societies confront us with in the following, and I will propose that some limited ‘utilitarianism for animals, Kantianism for people’ in doing so, assuming that too that all animal rights are relative, while not all human rights are relative.

Arising conflicts between animal and human rights could then generally be solved how conflicts between human rights are commonly solved as well: through proportionate balancing<sup>251</sup> (1.). Furthermore, there are two other legal tools and principles that we can use to guide us in the transitional process: the principle of progressive realization (2.) and the principle of common but differentiated responsibilities (3.).

## 1. THE PRINCIPLE OF PROPORTIONALITY

The principle of proportionality (or proportionality test) was first developed in the late 19th century by the German administrative courts to limit police discretion and was later adopted and popularized by the Federal Constitutional Court of Germany (“Bundesverfassungsgericht”) to ensure that statutes and state actions limiting fundamental rights also meet this standard.<sup>252</sup> From there the principle of proportionality spread to most other European countries as well as a number of jurisdictions outside Europe and it is now routinely used by the European Court of Human Rights and in the European Court of Justice.<sup>253</sup> It can be now said to be one of the most, if not the most successful principle in law in general and a universal human rights principle, as it is explicitly enshrined in many contemporary constitutions, regional and international human rights charters, and used by the majority of courts across the world.<sup>254</sup> The definition and use of the principle can vary largely depending on the concrete jurisdiction,

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<sup>250</sup> For an examination of some of those tragic dilemmas see Martha Nussbaum, *Justice for Animals: Our Collective Responsibility* (Simon & Schuster 2022) 173ff.

<sup>251</sup> Fasel and Butler, *Animal Rights Law* (n 240) 112.

<sup>252</sup> Lothar Hirschberg, *Der Grundsatz der Verhältnismäßigkeit* (Schwarz 1981) 6.

<sup>253</sup> Dieter Grimm, ‘Proportionality in Canadian and German Constitutional Jurisprudence’ (2007) 57(2) *University of Toronto Law Journal* 383, 384.

<sup>254</sup> Jorge Silva Sampaio, ‘Proportionality: Measuring Impacts on Fundamental Rights’, in Mortimer Sellers and Stephan Kirste (eds), *Encyclopedia of the Philosophy of Law and Social Philosophy* (Springer 2023) 2863; Jan Sieckmann, ‘Proportionality as a Universal Human Rights Principle’, in David Duarte and Jorge Silva Sampaio, *Proportionality in Law: An Analytical Perspective* (Springer 2018) 3.

instrument or court.<sup>255</sup> But in general, the proportionality principle or test guides the balancing of human or fundamental rights in law, ‘requiring that the interference with rights must be justified by reasons that keep a reasonable relation with the intensity of the interference’.<sup>256</sup> A common version of the proportionality test includes these three steps:

1. The limitation must be an adequate means to promoting a legitimate aim (suitability or adequacy).<sup>257</sup>
2. The limitation must not exceed what is necessary to achieve the aim, meaning that no alternative measure is available that is less detrimental to the affected right and at least equally effective in achieving the objective of the interference” (necessity).<sup>258</sup>
3. The reason for the limitation (or the conflicting right) and the right that is about to be limited must be weighed against each other, striving for a reasonable relation between the intensity of the interference with the importance of the reasons for the interference (balancing or proportionality in its’ narrow sense).<sup>259</sup>

The abstract weight of both rights or interests, the degree of interference and the circumstances of the concrete case are relevant in determining the balancing.<sup>260</sup> There are different ways of determining the weight of the conflicting rights or interests in the exercise of balancing (step 3). According to Aharon Barak, a constitutional law scholar and professor and former president of the Supreme Court of Israel, the accurate weigh of a right is determined by the ‘social importance’ of realizing the purpose of protecting the one right compared to the social importance of avoiding a limitation of the countervailing right.<sup>261</sup> In order to determine the social importance, one has to look at the social and cultural norms, political and economic ideology, as well as the history of the respective society, considering the ‘normative structure of each legal system’.<sup>262</sup> Moreover, one has to assess the degree of the limitation, meaning

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<sup>255</sup> And there are also voices that criticize or even fundamentally contest the principle of proportionality it-self: Ernst-Wolfgang Böckenförde, ‘Schutzbereich, Eingriff, verfassungsimmanente Schranken: Zur Kritik gegenwärtiger Grundrechtsdogmatik’ (2003) 42(2) *Der Staat* 165, for example, argues that the expansive force of fundamental rights has gone too far, and consequently, the principle of proportionality has gained more and more importance, giving the courts too much leeway in their decisions and Stavros Tsakyrakis, ‘Proportionality: An Assault on Human Rights?’ (2009) 7(3) *International Journal of Constitutional Law* 468 argues that proportionality even constitutes an ‘assault’ on human rights.

<sup>256</sup> Sieckmann Ibid.

<sup>257</sup> Sieckmann Ibid 11; Fasel and Butler, *Animal Rights Law* (n 240) 113.

<sup>258</sup> Ibid.

<sup>259</sup> Ibid.

<sup>260</sup> Sieckmann Ibid.

<sup>261</sup> Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge University Press 2012) 349.

<sup>262</sup> Ibid 349f.

whether the right is only marginally affected or touched in its core, as well as the probability of the right's limitation.<sup>263</sup>

#### a. CASE EXAMPLES

Let us now consider two different scenarios to see how the principle of proportionality could be applied in order to find solutions in the case of conflict between animal and human rights:

In one scenario we have a wealthy and highly industrialized society with an abundance of nutritious food, including many plant-based options that can guarantee a sufficient protein and micronutrient supply for human consumption. However, there is persisting interest of human beings in the consumption of animal meat for pleasure and cultural reasons as well as economic interest in the meat industry. In the other scenario we have a society that lacks economic resources, nutritious food options are scarce and the livelihood of human beings depends largely on the consumption of animal meat.

In both cases the right to life is at stake on the side of the animals. The right to life is one of the most fundamental entitlements a being has. If a being is deprived of its' life, it is ultimately deprived of its' 'capability' to 'flourish'<sup>264</sup> and all other interests of that being will become corrupted. Therefore, the limitation would touch the right in its' core. If we truly understand the right to life of human beings and other beings as conceptually one, stemming from the same moral principles, we can conclude that it is of great social importance to protect the right to life of every being.

The conflicting interest in the killing of animals and the consumption of animal meat, on the other hand, is of completely different weigh in those two examples: The human interest in the pleasure of consuming meat, the economic interests of those working in the meat industry and the cultural practices connected to it are not trivial of course and they certainly constitute a legitimate aim. Depending on the economic, cultural and socio-historical context of that respective society they might even be particularly weighty. However, it is already questionable if we can conclude that a restriction on the right to life of the animals is necessary, considering that there are numerous alternatives available in that society to replicate the taste of animal meat and the function of animal meat in cultural practices. But even if we conclude that a restriction appears necessary, in relation to the fundamental interest of the respective animals in staying

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<sup>263</sup> Ibid 362.

<sup>264</sup> Martha Nussbaum, *Justice for Animals: Our collective Responsibility* (Simon & Schuster 2022) 81.

alive, the countervailing interests seem not to be weighty enough to justify a limitation on the right to life. This is completely different, however, if we consider what is at stake for the second society. Here, the supply of nutritious food and thus the livelihood of that society depends heavily on the consumption of meat. Which means that essential rights of human beings, such as the right to food, health and life, are at stake. In these circumstances, it appears justified to allow for a restriction on the right to life of animals.

Let us consider another case example, the one of animal cruelty in the following three scenarios:

In the first case scenario, we could consider animal cruelty to test product safety for the creation of cosmetic products. We can assume that the practice includes the forced application or feeding of potentially irritating or dangerous substances in a painful manner or doses and that the animals are furthermore forced to live under the following living conditions: lack of space, sunlight and access to the natural environment of the respective species as well as normal social interactions with other specie members. The described practices could potentially even amount to torture and/or inhumane and degrading treatment, but for the least, they touch the right to bodily and mentally integrity of the respective animals in its' core. While the aim itself is legitimate. A restriction doesn't seem necessary, considering that a large number of substances that has been tested and approved for use is already available. Balancing the rights of the animals and the rights of human beings in cosmetic products, which are not essential for human health or survival a restriction on the rights of the animals is not justifiable. Interestingly, Animal testing for cosmetics has been banned in the EU, Norway, Israel, India, Australia, New Zealand, South Korea and Colombia.<sup>265</sup> Which might tell us, that many societies are already performing the proposed balancing, although only to a limited degree and without the recognition of (fundamental) rights for animals.

In the second case scenario, animal cruelty is practiced routinely in the food industry in order to maximize the economic benefit trough cost-efficiency. The practices include mutilations performed without anesthesia, harmful genetic manipulations, forced impregnation, early separation of offspring und mother and a lack of space, sunlight, access to the natural environment of the respective species and normal social interactions with other specie members

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<sup>265</sup> Humane Society of the United States, 'Cosmetics Animal Testing FAQ', <https://www.humanesociety.org/resources/cosmetics-animal-testing-faq> accessed 12 July 2024.

as well.<sup>266</sup> These practices could potentially amount to torture and/or inhumane and degrading treatment as well. For the least, they also touch the right to bodily and mentally integrity of the respective animals in its' core. The conflicting interests on the other hand are mainly of economical nature or consist of (under the proposed conception of animal rights) illegitimate property rights. They could thus hardly justify a restriction on the rights of the animals.

In the third case scenario, we can consider animal cruelty conducted in medical research, including the forced infection with diseases and the application or intake of potentially harmful, irritating or painful substances in a painful manner or doses under similar generally inadequate living conditions, to develop new medications and treatments for human beings (and animals) or to conduct basic research that might potentially lead to advances in human medicine in the future.<sup>267</sup> Here, the balancing exercise seems more difficult. On the one hand, the right of the animals to bodily and mental integrity is touched in its' core, similar to the other two scenarios, while, on the other hand, the right to health and even the right to life of future and current generations of human beings might depend on the respective research. Thus, the result of the proportionality test depends on the specific circumstances of the case, including the concrete practices, the likelihood of the research to contribute significantly to the advancement of health of human beings and animals in the future. A guideline to the balancing could be seen in the famous '3Rs' in the practice of animal experimentation:

- 1. Replacement of animal use with non-animal alternatives, wherever possible;*
- 2. Reduction of animal numbers to the minimum possible;*
- 3. Refinement of animal use, to avoid or minimise animal pain, distress, or other adverse effects suffered at any time during the animals' lives, and to enhance well-being.*<sup>268</sup>

If the experiment is of high importance and high benefit for human beings and animals, the scientific benefit of testing on animals is proven, replacement is not yet possible, the number of animals used is reduced to the minimum possible, pain, stress and other negative effects of

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<sup>266</sup> These practices are common and legal in most industrialized countries, for an overview of the welfare status of farmed animals see 'Part II: Animal Farming, Transportation and Killing', in: Andrew Knight, Clive Phillips, and Paula Sparks (eds) *The Routledge Handbook of Animal Welfare* (Routledge 2023) 35-158, moreover, we can assume that the real situation is even worse since animal welfare laws are oftentimes violated.

<sup>267</sup> On the debate around animal use for scientific research see: Kathrin Herrmann and Kimberley Jayne (eds), *Animal Experimentation: Working Towards a Paradigm Change* (Brill 2019), Andrew Knight, 'Scientific and Educational Animal Use' in: Andrew Knight, Clive Phillips, and Paula Sparks (eds) *The Routledge Handbook of Animal Welfare* (Routledge 2023) 161.

<sup>268</sup> The three 'Rs' were originally introduced by William S Russell Rex L and Burch, *The Principles of Humane Experimental Technique* (Methuen 1959, re-issued by the Universities Federation for Animal Welfare 1992), Knight Ibid 167.

minimalized while positive aspects of well-being are improved (through giving access to sunlight, the natural environment and other species members), a restriction seems justifiable.

All of these case examples are, of course, simplified and in reality, the answers to the highlighted questions are not always that simple. In fact, there are often times real dilemmas. But these dilemmas already exist, they are simply rendered invisible by the missing recognition of animal's rights in the law. Laying them open by granting animal fundamental rights, would finally enable to discuss these conflicts on equal terms within the law and to solve them, using the proportionality principle.

## b. CRITICISM CONCERNING CULTURAL AND RACIAL BIASES

Coming back to the debate on cultural and racial biases, some scholars have questioned the application of the proportionality test as the right method to balance animal and human rights and argued in favor of a general prioritization of minority rights.

Iddo Porat, an Israeli professor and (comparative) constitutional law and legal theory scholar, for example, argues that the proportionality principle is not the right principle to find just solutions in cases of conflict between minority cultural practices and animal rights.<sup>269</sup> He suggests that the principle of proportionality is based on the false assumption 'that rational and neutral assessment of the conflicting values is possible and disregards the possibility that cultural bias shapes these assessments'.<sup>270</sup> Societies moral enhancements would thus often be carried out on the back of minorities (what he calls 'moral externalisation').<sup>271</sup> Instead, he proposes the so-called 'starting at home principle', which states that members of minorities should have a right not to be scrutinized by stricter moral criteria than the majority is willing to apply to itself, and exemplifies its' function in the debate on ritual slaughter and male circumcision in Europe.<sup>272</sup> When a society strives to implement demanding moral claims it is supposed to start with its' majority, not with its' minorities, according to Porat.<sup>273</sup>

Similarly, US-American Professor of Political Science, Anthropology, Law, and Public Policy, Alison Dundes Renteln argues for a formal recognition of culture in criminal and civil law ('The

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<sup>269</sup> Iddo Porat, 'The Starting at Home Principle: On Ritual Animal Slaughter, Male Circumcision and Proportionality' (2021) 41(1) *Oxford Journal of Legal Studies* 30.

<sup>270</sup> *Ibid* 32.

<sup>271</sup> *Ibid* 32.

<sup>272</sup> *Ibid* 30.

<sup>273</sup> *Ibid* 45.

Cultural Defense’).<sup>274</sup> She points out that culture, often unconsciously, shapes individual perception and influences human actions.<sup>275</sup> Therefore, individual justice would demand the recognition of the cultural heritage in assessing a disputed practice or action. This should, according to Dundes Renteln, entail a ‘principle of maximum accommodation’ for the minority culture or religion, understood as a general presumption in favor of their practices, such as ritual slaughter, for example.<sup>276</sup>

As already discussed, the fear of minority practices in relation to animals being disproportionately targeted is justified, hence, I generally agree with Porrat, that societies should ‘start at home’ before “attacking” minority practices. Nevertheless, if we agree with the general argument that has been made throughout this thesis, that animals are deserving of fundamental rights, we can perceive them as another group of oppressed subjects in our society (or as a minority in terms of power-relations) with similarly important interests.<sup>277</sup> Thus, a conflict of rights cannot be solved by a presumptive prioritization of one or the other. As Claire Jean Kim, a US-American political science scholar, specialized in Asian American politics, Black politics, comparative race studies, social movements, and human-animal studies points out, the question of which form of oppression is more serious, should be asked but stays, at least in its’ abstract dimension, irresolvable. Consequently, Kim rejects a ‘single-optic-vision’ (prioritizing one concern) and proposes a ‘multi-optic-vision’ instead.<sup>278</sup> As Kim describes it, this multi-optic vision: ‘entails seeing from within various perspectives, moving from one vantage point to another, inhabiting them in turn, holding them in the mind’s eye at once’<sup>279</sup> and is supposed to foster an ‘ethics of mutual avowal, or open and active acknowledgment of connection with other struggles’.<sup>280</sup>

Translated into the language of law, we are then left again with balancing the rights at stake in the light of the circumstances of each case.

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<sup>274</sup> Alison Dundes Renteln, *The Cultural Defence* (Oxford University Press 2004); Alison Dundes Renteln, ‘The Use and Abuse of The Cultural Defence’ (2005) 20(1) *Canadian Journal of Law and Society* 47.

<sup>275</sup> Dundes Renteln, ‘The Use and Abuse of The Cultural Defence’ Ibid 47-8.

<sup>276</sup> Dundes Renteln, *The Cultural Defence* (n 274) 112.

<sup>277</sup> Similarly, Claire Jean Kim, *Dangerous Crossings: Race, Species, and Nature in a Multicultural Age* (Cambridge University Press 2015) 19.

<sup>278</sup> Ibid 19-21.

<sup>279</sup> Ibid 19.

<sup>280</sup> Ibid 20.

## 2. THE PRINCIPLE OF PROGRESSIVE REALIZATION

It is clear that even a rudimentary protection of animal rights would entail a wide range of changes to human practices, like the abolition of industrial farming, and that these changes cannot be achieved over-night. Since our present societies are very far from being prepared to generally ban meat-eating and scientific experiments on animals for example, one could question whether it makes sense to already think about fundamental rights at all. In response to this, I shall recall the appellative and transformative function of human rights and remind us of how long other human rights claims that most of us now hold for being self-evident have resisted in an aspirational stage before finally transforming into positive law.<sup>281</sup> And yet, many of them are still not realized in every aspect and in every part of the world. But there is a principle in the field of human rights that is meant to bridge the gap between aspiration and “real-life capacity”: The principle of progressive realization. Drawing on the proposal of David Bilchitz, a South African constitutional and human rights scholar, professor and former judge in the Constitutional Court of South Africa<sup>282</sup> I will demonstrate how the principle of progressive realization could be applied in the context of realizing animal rights.

The concept of progressive realization was originally developed in the context of social, cultural and economic rights (see Art. 2(1) International Covenant on Economic, Cultural and Social Rights<sup>283</sup>, Art. 4 Convention on the Rights of the Child<sup>284</sup> and Art. 4(2) Convention on the Rights of Persons with Disabilities<sup>285</sup>). The rationale behind the development of this concept was the realization that states have differing capacities (in terms of economic resources) to ensure that human rights obligations are respected, protected and fulfilled and that this inequality should be considered when assessing the human rights compliance of a state. At its core, the principle requires a state to take appropriate measures towards the full realization of (economic, social and cultural) rights to the maximum of the available resources of the

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<sup>281</sup> See in similar manner David Bilchitz, ‘Moving Beyond Arbitrariness: The Legal Personhood and Dignity of Non-Human Animals’ (2009) 25(1) *South African Journal on Human Rights* 38, 69 referring to the abolition of apartheid and the fight for equality for gays and lesbians in South Africa.

<sup>282</sup> *Ibid.*

<sup>283</sup> *International Covenant on Economic, Social and Cultural Rights* (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

<sup>284</sup> *Convention on the Rights of the Child* (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

<sup>285</sup> *Convention on the Rights of the Child* (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

respective state.<sup>286</sup> In the process of realization, there remain the following five immediate obligations on states:<sup>287</sup>

1. The elimination of all forms of discrimination: States are obliged to eliminate all forms of discrimination (on the basis of ‘race’, color, sex, language, religion, political or other opinion, national or social origin, property, birth, disability or other status) regarding the implementation immediately.<sup>288</sup>

2. The implementation of those rights that don’t require a significant amount of state expenses: A state cannot excuse itself with a reference to the progressive realization clause if the implementation of the specific right does not actually require significant financial resources (for example: the right to form trade unions and strike under the ICESCR does not require large state expenses and must therefore implemented immediately).<sup>289</sup>

3. The obligation to take measures towards reaching the full realization: While the full realization may be achieved progressively, there must be intentional, concrete and appropriate measures towards the realization within a reasonable amount of time.<sup>290</sup> Appropriate measures can include: ‘Assessing the state of enjoyment of economic, social and cultural rights, including ensuring adequate mechanisms to collect and assess relevant and suitably disaggregated data; Formulating strategies and plans, incorporating indicators and time-bound targets, which should be realistic, achievable and designed to assess progress in the realization of these rights; Adopting the necessary laws and policies, and making adequate funds

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<sup>286</sup> Office of the High Commissioner for Human Rights, ‘Fact Sheet No. 33, Frequently Asked Questions on Economic, Social and Cultural Rights’ (December 2008) <https://www.ohchr.org/sites/default/files/documents/publications/factsheet33en.pdf> accessed 26 June 2024, 13; UN Committee on Social, Cultural and Economic Rights, ‘General Comment No. 3: The Nature of States Parties’ Obligations (Art. 2, para. 1, of the Covenant)’ (14 December 1990) UN Doc INT/CESCR/GEC/4758/E. Civil and political rights are commonly understood in their negative sense (meaning that the protection of the right mainly requires the state to refrain from interference), while in the case of social, economic and cultural rights the positive obligations are more apparent and thus the questions of sufficient resources was raised in the context of social, economic and political rights. For a critical discussion on the common differentiation between civil and political rights on the one hand and economic, social and cultural rights on the other see for example Flavia Piovesan, ‘Social, Economic and Cultural Rights and Civil and Political Rights’ (2004) 1(1) *International Journal on Human Rights* 21, Elif Gözler Çamur, ‘Civil and Political Rights vs. Social and Economic Rights: A Brief Overview’ (2017) 6(1) *Journal of Bitlis Eren University Institute of Social Sciences* 205.

<sup>287</sup> Office of the High Commissioner for Human Rights, ‘Fact Sheet No. 33, Frequently Asked Questions on Economic, Social and Cultural Rights’ (December 2008) <https://www.ohchr.org/sites/default/files/documents/publications/factsheet33en.pdf> accessed 26 June 2024 accessed 12 June 2024 15.

<sup>288</sup> Ibid.

<sup>289</sup> Ibid.

<sup>290</sup> Ibid 16.

available to put the plans and strategies into practice; Regularly monitoring and assessing the progress made in the implementation of the plans and strategies; Establishing grievance mechanisms so that individuals can complain if the State is not meeting its responsibilities.<sup>291</sup>

4. Non-retrogressive Measures: States must not allow the already existing protection to deteriorate and if they have to meet a high threshold of justification, demonstrating that they have taking all interests into account and other alternatives aren't available.<sup>292</sup>

5. Minimum Core Obligation: The respective treaty sets out a set of minimum core obligations. If a state lacks resources to fulfill these obligations, it must demonstrate that it has made every effort to use all available resources to prioritize these core obligations.<sup>293</sup> Even with limited resources, governments must implement low-cost, targeted programs to aid those most in need, ensuring efficient and effective use of resources.<sup>294</sup>

The concept of progressive realization and it's resisting core obligations can be applied on the case of animals if we make a few adjustments. We have to acknowledge first that the original rationale of the principle of progressive realization does not really match the one of the animal's case: In the case of animal rights, it is not just a lack of financial resources that hinders the implementation but also and maybe more importantly the lack of full societal acceptance of the cause.<sup>295</sup> What both cases have in common however, it the need for a solution that strives for an aspirational goal in its full dimensions and consequences, while acknowledging that not all states (in the case of animals maybe not even one) are currently in the position the realize that goal immediately. The five core obligations could thus be implemented in the following way:

1. The elimination of all forms of discrimination: this obligation cannot be translated to forbid speciesism since the whole point of the progressive implementation is to allow some form of speciesism in the transition process. But the non-discrimination clause can be fruitful in a different sense, namely to prevent an implementation that reenforces racial and cultural biases (on the debate see Chapter II, Part 2 and Chapter III, Part 1 b.). Therefore, it could be reformulated in

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<sup>291</sup> Ibid 16.

<sup>292</sup> Ibid 16.

<sup>293</sup> Ibid 16.

<sup>294</sup> Ibid 16.

<sup>295</sup> In similar manner Bilchitz (n 234) 69 Fn. 167.

a sense to prohibit an implementation that is levelled arbitrarily against only certain cultures and practices.

2. The implementation of those rights that don't require a significant amount of state expenses: this could include a right of wild animals to self-determination and to have access to their natural habitat.

3. The Obligation to take measures towards reaching the full realization: States would probably also have to collect data to assess the state of animal rights implementation and to identify priorities first. They should be obliged then to identify clear targets (like a phase-out of industrial farming of animals, for example) that are about to be fulfilled within concrete and realistic deadlines and accessible for review meanwhile.

4. Non-Retrogressive Measures: This could be especially relevant for states with rising animal farming industries and potentially worsening animal welfare.

5. Minimum Core Obligation: A minimum core of rights could be developed to which each animal is entitled. Here already existing Animal Welfare Laws and proposals could play a role. As David Bilchitz proposed for example, one could use the five freedoms developed by the UK Farm Animal Welfare Council: the freedom from thirst and hunger, the freedom from discomfort, the freedom from pain, injury and disease, the freedom to express normal behavior and the freedom from fear and distress.<sup>296</sup>

To conclude, the principle of progressive realization is a helpful tool that could be used to bridge the gap between the aspirational ideal of the full protection of animal rights and the inability of our societies to immediately implement them.

### 3. THE PRINCIPLE OF COMMON BUT DIFFERENTIATED RESPONSIBILITIES

The principle of proportionality helps to balance conflicting rights and interest in the context of their present significance within the respective jurisdiction under the specific circumstances of

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<sup>296</sup> Bilchitz (n 281) 70 Fn. 173; UK Farm Animal Welfare Council, 'Farm Animal Welfare Council: Press Statement' (December 1979) <https://webarchive.nationalarchives.gov.uk/ukgwa/20121010012428mp/http://www.fawc.org.uk/pdf/fivefreedom1979.pdf> accessed 26 June 2024.

the case. And the principle of progressive realization helps to balance the conflict between achieving full protection of rights and having limited financial resources and persisting societal structures that hinder the immediate implementation. The principle of common but differentiated responsibilities adds another dimension: namely the one of global responsibility and justice and can be summarized as follows: while all states share the responsibility of solving a global problem, the degree of responsibility varies between the states in accordance to their respective capacities and their contribution to the emergence and the scale of the problem. Admittedly, the principle of common but differentiated responsibilities is not a neat fit for the cause of implementing fundamental rights, since the implementation of fundamental rights should not be regarded as a global problem, and moreover, the responsibility of the state towards the individual is usually the same. Nevertheless, as I will demonstrate, the ratio of the principles fits to one of the most pressing issues of realizing animal rights: industrial farming.

The principle derives from the context of climate change. More specifically, it emerged in the UN Climate Conference of 1992 in Rio de Janeiro and is now enshrined in the United Nations Framework Convention on Climate Change (UNFCCC).<sup>297</sup> While the most developed and highly industrialized countries, such as the United States of America, Canada, the United Kingdom, Germany, France and other European countries have, historically speaking, contributed the most to the global greenhouse gas emissions causing climate change, many of the least developed and developing states in the Global South have contributed relatively little emissions, have less financial resources to mitigate and adapt and will often even face the harshest consequences of climate change. Interestingly, the application of the principle of common but differentiated responsibilities in the ‘livestock sector’ has been already proposed in the context of reducing its’ emissions.<sup>298</sup>

The principle is also present in other areas of international law, although sometimes in different wording and nuances.<sup>299</sup> According to Christopher D Stone, it emerged in all areas of international law concerned with ‘risk-related global public goods’, including (apart from the

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<sup>297</sup> The United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 says: ‘the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response, in accordance with their common but differentiated responsibilities and respective capabilities and their social and economic conditions’.

<sup>298</sup> Helen Harwatt and others, ‘Climate and Agriculture Scientists set the Record Straight – Emissions from the Livestock Sector Must Decline by 50% this Decade, and Some Countries Should Do More Than Others’ (12 March 2024) <https://animal.law.harvard.edu/news-article/paris-compliant-livestock-report/> accessed 13 July 2024.

<sup>299</sup> Christopher D Stone, ‘Common but Differentiated Responsibilities in International Law’ (2004) 98(2) *American Journal of International Law* 276, 277.

environment) peace, public health, and terrorism.<sup>300</sup> Thus, I propose that the principle could also apply in the context of the international protection of animal rights.

Animal rights violations appear in various forms and everywhere across the globe. But regarding intensive animal farming, the wealthiest countries usually breed, kill and consume the most farmed animals in global comparison.<sup>301</sup> Thus, it seems reasonable to conclude that those countries bear a greater responsibility in reducing the harm that is done to the global community.

#### 4. THE PRODUCTIVITY OF CONFLICT

In this chapter, the focus was on potential conflicts of human and animal rights and the tension that arises between the ideal, full and equal fundamental rights status for animals, and reality, which is characterized by lack of societal acceptance for the cause of animals as well as lack of resources and counter-vailing human interests. As we have seen, truly fundamental and radical changes in our society would be necessary to ensure full legal protection for animals. And within this process of transformation, compromises would inevitably have to be found to deal with the often tragic dilemmas that reality presents to us. Nevertheless, these conflicts and dilemmas should not tell us that the struggle for animal rights is hopeless or that they could never be fully implemented. We should rather see these conflicts as a possibility to seriously reconsider how our societies are structured now, how we want them to look like and how we can arrive there. While the law should keep pace with societal progress so as not to become empty phrases, especially human rights law also has the function to ‘over-shoot’ and expand the level of protection over time.

Granting animals fundamental rights status, while maybe not ensuring full equal status including the protection of absolute rights yet, would bring the conflicts to light, that we as a society have to deal with. As a way to solve these conflicts in the process of transformation, I proposed to make use of the principles of proportionality, progressive realization and common but differentiated responsibilities. These principles are well-established and well-equipped to deal with conflicting (human) rights and interests, as well as differing capabilities and responsibilities. They are meant to deal with achieving just solutions in case of conflict from

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<sup>300</sup> Ibid.

<sup>301</sup> See for example: German Federal Statistical Office (Destatis), 'Livestock and Meat Production Statistics', [https://www.destatis.de/EN/Themes/Countries-Regions/International-Statistics/Data-Topic/AgricultureForestryFisheries/livestock\\_meat.html](https://www.destatis.de/EN/Themes/Countries-Regions/International-Statistics/Data-Topic/AgricultureForestryFisheries/livestock_meat.html), accessed 13 July 2024.

three different perspectives: balancing between individual or group interests and rights within one society (proportionality), balancing capacity and aspired level of protection within one society (progressive realization) and balancing differing capacities and responsibilities as well striving to achieve universal protection across the global community (common but differentiated responsibilities). Complimented by the proposed adjustments these principles could be of great use in dealing with conflicts in the context of animal rights.

## CONCLUSION

In this thesis, I set out to defend the demand for fundamental rights for animals as new human rights claims while looking at the relationship of animal rights and human rights from three different perspectives: *animal rights as human rights*, *animal rights for human rights and animal rights vs human rights*.

Firstly, my analysis revealed that the very foundations of human rights are inherently extendible to animals, suggesting that human rights are not as uniquely “human” as they seem (I.). Following a trend among other scholars, I critically discussed multiple common approaches and their applicability to both human beings and animals, instead of committing to and defending one specific approach to ground both human and animal rights. Nevertheless, it is certainly worth thinking further about one holistic approach in future research.<sup>302</sup>

Secondly, I addressed criticism regarding the argument for animal rights in relation to human rights, particularly concerning already vulnerable groups of humans, such as persons with mental disabilities and racialized individuals. I demonstrated that much of the skepticism around the inclusion of animals pertains more to the manner of arguing and implementing fundamental rights for animals than to the cause itself. As shown, animal rights are likely to be more beneficial for human rights than disadvantageous (II.). However, the animal rights movement and academic scholarship must self-critically reflect on their arguments and their potential to be misused or arbitrarily applied against vulnerable groups.

While it might be tempting to remain on the previous point, that animal rights could generally be beneficial for the cause of human rights, I am convinced that it is especially important to highlight potential conflicts and dilemmas as well. Perhaps more than any theoretical argument against expanding the circle of right holders to animals, the inability to imagine ways to resolve these conflicts hinders many from accepting the idea of “*human*” rights for animals. I attempted to contribute to this difficult task by suggesting how we could utilize the general principles of proportionality, progressive realization, and common but differentiated responsibilities to solve these conflicts (III.).

Certainly, many open questions remain: We could ask which kinds of rights should be adopted and whether they should be granted universally to all sentient animals, including human

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<sup>302</sup> Proposals for a specific holistic foundation are for example: Alasdair Cochrane, ‘From Human Rights to Sentient Rights’ (2013) 16(5) *Critical Review of International Social and Political Philosophy* 655.

beings,<sup>303</sup> on a species membership basis,<sup>304</sup> or according to their relationship with humans. For instance, one could distinguish between domesticated, liminal, and wild animals<sup>305</sup> or other larger groupings. The question of which legal mechanisms could be used to ensure animal rights, such as legal guardianship, also deserves further consideration. Additionally, there is an ongoing debate about whether granting animals legal personhood is a necessary precondition for substantial rights and whether it is necessary at all.<sup>306</sup>

Beyond that, the debate around the inclusion of animals related to a broader discourse on the rights of nature.<sup>307</sup> This raises additional questions about the relationship between nature, animals, and human beings, concerning both the theoretical conception of human rights and the concrete conflicts of rights that may arise.

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<sup>303</sup> Ibid.

<sup>304</sup> Raffael N Fasel, *More Equal than Others: Humans and the Rights of Other Animals* (Oxford University Press 2024) 163ff.

<sup>305</sup> Sue Donaldson and Will Kymlicka, *Zoopolis: A Political Theory of Animal Rights* (Oxford University Press 2011).

<sup>306</sup> See for example: Stephen M Wise, 'Legal Personhood and the Non-Human Rights Project' (2020) 17(1) *Animal Law Revenue* 12; David Bilchitz, 'Moving Beyond Arbitrariness: The Legal Personhood And Dignity Of Non-Human Animals' (2009) 25(1) *South African Journal on Human Rights* 38. Critical: Brian Favre, 'Is there a need for a new, an ecological, understanding of legal animal rights?' (2020) 11(2) *Journal of Human Rights and the Environment* 297.

<sup>307</sup> Ovadia Ezra, 'The Rights of Non-Humans: From Animals to Silent Nature' (2017) 11(2) *Law & Ethics of Human Rights* 285.

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