

SYMPOSIUM ARTICLE

Liberté, Égalité, Animalité: Human–Animal Comparisons in Law[†]

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Abstract

This article problematizes the discrepancy between the wealth of international law serving human needs and rights and the international regulatory deficit concerning animal welfare and animal rights. It suggests that, in the face of scientific evidence, the legal human–animal boundary (as manifest notably in the denial of rights to animals) needs to be properly justified. Unmasking the (to some extent) ‘imagined’ nature of the human–animal boundary, and shedding light on the persistence of human–animal comparisons for pernicious and beneficial purposes of the law, can offer inspirations for legal reform in the field of animal welfare and even animal rights.

Keywords Animal rights, Human rights, Animal welfare, Speciesism, Discrimination, Cultural imperialism

1. INTRODUCTION: CIVILIZED HUMANS AGAINST ALL OTHERS

Between 1879 and 1935, the Basel Zoo in Switzerland entertained the public with *Völkerschauen*, or ‘people’s shows’, in which non-European human beings were displayed wearing traditional dress, in front of makeshift huts, performing handcrafts.¹ These shows attracted more visitors at the time than the animals in the zoo. The organizers of these *Völkerschauen* were typically animal dealers and zoo directors, and the humans exhibited were often recruited from Sudan, a region where most of the African zoo and circus animals were also being trapped. The organizers made sure that the individuals on display did not speak any European language, so that verbal communication between them and the zoo visitors was impossible.

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¹ B. Staehelin, *Völkerschauen im Zoologischen Garten Basel, 1879–1935* (Basler Afrika Bibliographien, 1993).

Births and babies were welcomed as crowd pullers. Business correspondence dealt with the procedures governing the human exhibits (their transport by ship, etc.) using the same words as those used for animals. One zoo poster advertised the ‘soon-to-be extinct lip negroes’.² The *Basler Nachrichten* newspaper wrote, on 18 June 1887: ‘In front of their huts cower several brown, half-naked figures, strongly reminiscent of the ape in terms of their bodily development, environment, and drapery’.³

This article first discusses the biological and cultural similarities and differences between humans and other animals and suggests that, in the face of scientific evidence, any legal boundary is far from self-evident, but needs to be properly justified (Section 2). However, the law as it stands mirrors and reifies a human–animal divide (Section 3). On the other hand, the legal discourse and the evolution of the law manifests numerous parallels, analogies, shared problems, transferable legal institutions, and similar driving factors in the fields of law relating to humans and law relating to animals (Section 4). Section 5 examines more closely – against the background of the volatility of the socially constructed boundary between animals and humans – whether the institution of rights could and should be extended to animals. Section 6 concludes that reflection on animal law and animal rights could benefit (in terms of content and structure) from comparison with the structure, form, and substance of human rights.

2. THE VOLATILITY OF THE HUMAN–ANIMAL BOUNDARY

The leisure activity of watching ‘savages’ in the zoo is only one illustration of the overall attitude of the general European public, apparently placing persons of African descent on a level with wild animals rather than with humans. The ‘primitives’ were relegated to the animal side of an imagined boundary.

2.1. *Differentia Specifica of Humans*

Where does the boundary really run? Tracing the relevant discourses in philosophy, anthropology, and zoology back through the history of ideas, we note that numerous criteria were invoked as *differentia specifica* of the human being, in order to justify the special and elevated status of humans among living beings. However, the dividing line between *homo* and *animal*, drawn by all sciences and the humanities, has proved to be contingent in terms of academic disciplines, culture, and history. Depending on time and place, not only has this boundary (as an intellectual construct) been moving, but so also have the reasons for placing animals and humans (or some humans) on either side of the boundary.

The Christian assertion that only humans have an immortal soul, traditionally very influential, is not accessible to any intersubjective appraisal of the question, and has been abandoned in the mainstream discourse. Other, seemingly more modern, criteria to distinguish humans from all other animals have been cognition and

² Reprinted *ibid.*, p. 154.

³ *Basler Nachrichten*, 18 June 1887, quoted in Staehelin, n. 1 above, p. 102 (my translation).

self-consciousness (reason, power of speech, use and manufacture of tools), social capacities such as culture, and, finally, moral capacities. However, over time, all of these purported unique characteristics of humans have been refuted as invalid by new findings of the natural sciences: some non-human animals speak;⁴ they use and make tools;⁵ they transfer learned techniques;⁶ and they show compassion across species boundaries.⁷

The more we know about biology, the greater appears to be the overlap in characteristics of members belonging to our own species and to other species. Also, medical-biological research is already now capable of creating mixed human-animal beings (chimaera).

On the other hand, increased biological knowledge sheds light on biological, including genetic, differences. For example, there is a qualitative difference between the language acquisition of chimps and the richer language use that is typical in humans. It would similarly be reductionist to equate the variations of tool making by different populations of crows with the variations of human handcraft and techniques.

Thus, it might be said that there is a ‘difference lite’ with regard to cooperation, language, and rationality.⁸ Some animals or animal societies may possess some of these features in a more or less rudimentary form, but none combine all three. Furthermore, the shaping and modification of our planet, which has earned our times the label of Anthropocene, has been undertaken only by the human species.

2.2. *The Human–Animal Boundary as a Social Construct*

The empirical question in the preceding section of whether supposed unique traits in humans can be confirmed by biological research must be distinguished from the ethical and legal question of whether the ventilated distinguishing criteria *should* be morally and legally relevant. A *moral* and *legal* divide between two species which are, from a biological standpoint, close relatives who share numerous features, is a social construct. The biological insights mentioned in the above section allow diverging constructs. On the one hand, it can be asserted that humans are in some way unique,

⁴ Cf. the famous Grey parrot Alex, trained by Irene M. Pepperberg: see I. Pepperberg, ‘Logic and Speech in Parrots’, *Scientific American Exclusive Online Issue*, Aug. 2004, pp. 34–8, available at: http://randesco.com/_img/blog/0710/talking_with_alex.pdf.

⁵ A.A.S. Weir, J. Chappell & A. Kacelnik, ‘Shaping of Hooks in New Caledonian Crows’ (2002) 297(5583) *Science*, p. 981; G.R. Hunt & R.D. Gray, ‘Direct Observations of Pandanus-Tool Manufacture and Use by a New Caledonian Crow (*Corvus moneduloides*)’ (2004) 7(2) *Animal Cognition*, pp. 114–20; C.D. Birda & N.J. Emery, ‘Insightful Problem Solving and Creative Tool Modification by Captive Non-Tool-Using Rooks’ (2009) 106 *Proceedings of the National Academy of Sciences*, pp. 10370–5.

⁶ M.J. Krützen et al., ‘Cultural Transmission of Tool Use in Bottlenose Dolphins’ (2005) 105 *Proceedings of the National Academy of Sciences*, pp. 8939–43. In Shark Bay, wild bottlenose dolphins use marine sponges as foraging tools; sponging shows an almost exclusive vertical social transmission within a single matriline from mother to female offspring. See also H. Whitehead & L. Rendell, *The Cultural Lives of Whales and Dolphins* (University of Chicago Press, 2015).

⁷ Dolphins help swimmers, seals help dogs, chimpanzees help birds: F. de Waal, *The Age of Empathy: Nature’s Lessons for a Kinder Society* (Harmony Books, 2009). For rats see I. Ben-Ami Bartal, J. Decety & P. Mason, ‘Empathy and Pro-Social Behaviour in Rats’ (2011) 334(6061) *Science*, pp. 1427–30. See also C. Safina, *Beyond Words: What Animals Think and Feel* (Henry Holt, 2015).

⁸ H.-J. Glock, *La mente de los animales: Problemas conceptuales* (KRK Ediciones, 2009).

so that humans and animals form two different and mutually sealed off groups, even with a ‘gap’ between them. On the other hand, the line between humans and animals appears blurry in many respects, which would mean that humans and animals could be construed as standing on a continuum.

Whatever social construct we prefer, our moral understanding is (and should properly be) co-shaped by our reflection on scientific data.⁹ Philosophical speculation about the essence of ‘humanness’ is not enough. Scientific discoveries about the abilities of other animals and about the continuum between ‘our’ genes and behaviour and ‘theirs’ create the necessity and obligation to properly *justify* any construction, either of human uniqueness, or of human animality. If, for example, no justification is given for attributing moral or legal rights (a very strong and specific legal institution¹⁰) only to humans (and not to other living beings), if these rights are said to flow from the intrinsic dignity that comes with being human, then such a statement would be nothing but pure speciesism.¹¹

This forces legal scholars to evaluate whether, and if so which of the above-mentioned commonalities and differences between humans and animals are relevant for ethics and the law (and for which specific regulation). The choice of relevant criteria for distinguishing humans from animals must be defended. Is there one single decisive distinguishing criterion, or are there several? Is the distinction not rather a cluster of predicates? Do we need to escape the self-bias inherent in our identification of those criteria,¹² or is that tailoring to our self-perception and our research questions legitimate?

On a more practical and concrete level, the legal reflection needed for identifying and promoting (international or domestic) legal rules appropriate for breeding, keeping, using, and killing animals to some extent depends on substantive evidence about what both humans and other animals are like (physiologically, emotionally, psychologically, socially, and so on). For example, the application of Martha Nussbaum’s capabilities approach to justice for animals¹³ depends on which capabilities human and non-human animals really have and which they share. If only the typically human capabilities are taken into account as being morally relevant, this is arbitrary and amounts to speciesism.¹⁴

⁹ Cf. Organisation Mondiale de la Santé des Animaux, 2nd OIE Global Conference on Animal Welfare, Cairo (Egypt), 20–22 Oct. 2008, Recommendations, Preamble, 8th indent: ‘Animal welfare standards should be democratically and transparently adopted and both science and ethics based ...’.

¹⁰ See in detail Section 5 below.

¹¹ On speciesism see n. 30 below.

¹² C.A. MacKinnon has aptly criticized the ‘like us’ standard: ‘So the question becomes: Are they like us? ... [T]he issue is: is this the right question? ... Why should animals have to measure up to humans’ standards for humanity before their existence counts?’: C.A. MacKinnon, ‘Of Mice and Men: A Feminist Fragment on Animal Rights’, in C.R. Sunstein & M.C. Nussbaum (eds), *Animal Rights: Debates and New Directions* (Oxford University Press, 2004), pp. 263–76, at 267.

¹³ M.C. Nussbaum, ‘Beyond “Compassion and Humanity”’, in Sunstein & Nussbaum, *ibid.*, pp. 299–319.

¹⁴ Nussbaum only vaguely deals with the problem of speciesism in her approach, by stating that the ‘capabilities approach, ... with its talk of characteristic functioning and forms of life, seems to attach some significance to species membership as such. ... [T]he species norm (duly evaluated) tells us what the appropriate benchmark is for judging whether a given creature has decent opportunities for flourishing’: *ibid.*, pp. 309–10.

To conclude, while the fact of a biological (and cultural) continuum (with common ancestors, common genome, common characteristics and behaviours) and overlap of features between non-human and human animals cannot in itself generate or prescribe any morals, this continuum/overlap must be taken into account by the participants in the discourse seeking to establish ethical (and, based on this, legal) precepts governing human interaction with animals.

3. THE GAP BETWEEN ANIMALS AND HUMANS IN THE LAW AS IT STANDS

The law as it stands (domestic and international) expresses a human–animal divide. Current international law especially is marked by a clear discontinuity: a highly differentiated body of international human rights law stands in stark contrast with the almost complete absence of international rules governing the welfare of animals.¹⁵ Only some international and European legal regimes protect endangered species,¹⁶ habitat for wild animals, and biological diversity. The welfare of individual animals as sentient beings is almost completely unaddressed in international law, although it does figure in several Council of Europe (CoE) Conventions¹⁷ and European Union (EU) law.¹⁸ In addition, animal welfare is a side effect of health regulation by international bodies such as the World Organisation for Animal Health (OIE) and the European Food Safety Authority (EFSA). International animals rights are unknown. Overall, the field is under-regulated.¹⁹

The gap between the law on humans and the law on animals is also manifest in the fact that violence permitted and condoned by law is constitutive of the two most important types of animal use in today's society: food production, and medical,

¹⁵ For an overview see S. Cuendet, 'Le bestiaire du droit international (ou la fable de l'animal voulant trouver sa place parmi les hommes et les états)', in S. Cassella & L. Delabie (eds), *Mélanges Pierre Michel Eisemann: Faut-il prendre le droit international au sérieux?* (Pedone, 2016 forthcoming).

¹⁶ Examples include the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), Washington, DC (US), 3 Mar. 1973, in force 1 July 1975, available at: <http://www.cites.org/eng/disc/text.php>; and the International Convention for the Regulation of Whaling, Washington, DC (US), 2 Dec. 1946, in force 10 Nov. 1948, available at: <https://iwc.int/convention>.

¹⁷ See the Preamble and Art. 4 of the Revised Convention for the Protection of Animals during International Transport, Chişinău (Moldova), 6 Nov. 2003, in force 14 Mar. 2006 (open for signature also for the EU and non-Member States of the CoE), available at: <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/193>; Arts 2(3) and 13 of the Convention for the Protection of Animals for Slaughter, Strasbourg (France), 10 May 1979, in force 11 June 1982, available at: <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/102>; and Art. 3 ('Basic Principles for Animal Welfare') of the Convention for the Protection of Pet Animals, Strasbourg (France), 13 Nov. 1987, in force 1 May 1992, available at: <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/125>.

¹⁸ On Art. 13 of the Treaty on the Functioning of the European Union (TFEU) see text at n. 65 below. See also Recitals 2 and 13 of the Preamble to Directive 2010/63/EU on the Protection of Animals Used for Scientific Purposes [2010] OJ L 276/1; Art. 3 of Directive 98/58/EC concerning the Protection of Animals Kept for Farming Purposes [1998] OJ L 221/1; Recitals 8–12 of the Preamble to Directive 2008/120/EC laying down Minimum Standards for the Protection of Pigs [2009] OJ L 47/5; and the Preamble to Directive 2007/43/EC laying down Minimum Rules for the Protection of Chickens Kept for Meat Production [2007] OJ L 182/19.

¹⁹ A. Peters, 'Global Animal Law: What It Is and Why We Need It' (2016) 5(1) *Transnational Environmental Law*, pp. XX–X.

pharmaceutical, and chemical testing. The latter use provokes more criticism, although it is minimal in terms of numbers compared with food production: in the EU, 'only' 11.5 million animals (of which 75% are mice and rats) were utilized in 2011 for experimental and other scientific purposes.²⁰ In contrast, 450 billion land animals are now factory-farmed every year.²¹ According to the United Nations (UN) Food and Agriculture Organization (FAO) and other sources, some 64 billion land animals were slaughtered worldwide in 2011.²² To this figure we should add approximately the same number of marine animals.²³ Fishing operations additionally involve a huge amount of bycatch (dead or dying animals) which are thrown back into the sea.²⁴

In Western industrialized societies, the food derived from animals is ridiculously cheap, as a result of its industrialized production. The average expenditure of a European household on food and non-alcoholic beverages in 2012 amounted to only 13% of total expenditure,²⁵ while this percentage was much higher (over 30%) as late as the 1950s. The average European consumer demands cheap products with specific characteristics. For example, in Switzerland (and similarly in other European countries), the male chicks of laying hens are killed immediately after they are born because they cannot be sold as meat chickens. According to Ruedi Zweifel, director of the Aviforum competence centre of the Swiss poultry industry, 'the visual aspect plays the key role ... The carcass of today's laying roosters does not meet consumers' expectations. It's pointy instead of heart-shaped'.²⁶ Also, these rooster 'layers' will not gain weight as quickly as those belonging to a 'meat strain' (that is, types of chicken which have been selectively bred in order to grow extremely quickly). Raising these 'laying' roosters is thus uneconomic. As a rule, newly hatched Swiss cockerels – 2.5 million each year – are therefore 'homogenized' (shredded), a practice expressly allowed by the Swiss animal protection ordinance, which is one of the strictest in the world.²⁷ The same happens, for example, in Germany, under the relevant EU Regulation under the heading of 'maceration'.²⁸ Here, the number

²⁰ This is the figure for 2011 for the EU-27, according to European Commission, 'Seventh Report on the Statistics on the Number of Animals Used for Experimental and Other Scientific Purposes in the Member States of the European Union', COM(2013) 859 final, 5 Dec. 2013. At the time of writing, no more up-to-date figure was available.

²¹ J.S. Foers, *Eating Animals* (Little Brown and Co., 2009), p. 34.

²² Available at: <http://faostat.fao.org>.

²³ Figures in tonnes are available at: <http://www.animaethics.org.uk/i-ch7-5-fish.html>.

²⁴ Foers, n. 21 above, p. 49: 'The average shrimp trawling operation throws 80 to 90 percent of the sea animals it captures overboard, dead or dying, as bycatch. (Endangered species amount to much of this bycatch)'.

²⁵ 'Final Consumption Expenditure of Households, by Consumption Purpose', available at: <http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&init=1&plugin=1&language=en&pcode=tsdpc520> (relating to the EU-28).

²⁶ M. Hofmann, 'Das kurze Leben der Legehennen', *Neue Zürcher Zeitung*, 23 Mar. 2013, available at: <http://www.nzz.ch/schweiz/das-kurze-leben-der-legehennen-1.18051922>.

²⁷ Art. 183 Tierschutzverordnung (TSchV), 23 Apr. 2008 (as of 1 Jan. 2013), SR 455.1.

²⁸ Regulation (EC) No. 1099/2009 on the Protection of Animals at the Time of Killing, Annex I: List of Stunning Methods and Related Specifications (as referred to in Art. 4), Ch. I: Methods, Table I – Mechanical Methods, No. 4: 'Name: Maceration; Description: Immediate crushing of the entire animal' [2009] OJ L 303/1.

amounts to 40 to 50 million shredded cockerels per year.²⁹ The laws governing chick ‘homogenization’ is only one example of how the law enables and perpetuates the exploitation, discrimination, and annihilation of animals.

To conclude, the problem is, firstly, that the protection of animals by law, notably international law, is deficient and, secondly, that ‘our current construct may actually be *impeding the quest for real change* by cloaking dubious practices in a veneer of legality’.³⁰ A ‘real change’ might be brought about by acknowledging animal rights. Such real change need not start from scratch but should draw on prior experience.

4. PARALLEL LEGAL DISCOURSES AND DEVELOPMENT

The ‘legal gap’ between humans and animals, evident in the law as it stands and described in the preceding section, stands in contrast to the historic parallels and intertwining of the legal discourse on humans and animals. The acknowledgement of these parallels and entanglements might not only be analytically useful but also normatively helpful in employing the law’s potential to help in combating and ending violence against animals.

So the question is how the potential of the law unfolded in the area of human rights. Which arguments were used invidiously to withhold rights from some groups of human beings (just like animals)? To what extent has injustice towards animals been compared, with a benign intention, with injustice committed against humans? Which legal arguments have so far been formulated in favour of improving the welfare of animals and potentially acknowledging their rights (partly by analogy with legislation in favour of humans)? Which arguments can be consistently made, respecting the rules of the legal profession, and which are morally appropriate?

4.1. *Parallel Discrimination: Racism, Sexism and Speciesism*

The philosophical-legal concept of ‘speciesism’³¹ is one example of human–animal parallels. The concept is a neologism building on the more established notions of racism and sexism. The purpose and function of this concept are to denounce as arbitrary moral and legal distinctions based on species membership. It suggests that

²⁹ In various German *Länder*, this practice is now being criticized and has in fact been prohibited by a ministerial decree of 26 Sept. 2013 in the Land of Northrhine-Westfalia with the argument that it violates the German animal protection law (*Tierschutzgesetz*), which prohibits killing vertebrate animals ‘without a reasonable justification’ (§ 1 *Tierschutzgesetz*). Farmers have already successfully challenged the decree in court: e.g. Administrative Tribunal (VG) Minden, Judgments of 30 Jan. 2015: 2 K 80/14 and 2 K 83/14. See in scholarship K. Köpernik, ‘Das Töten von Eintagsküken auf dem Prüfstand’ (2014) 44 *Agrar- und Umweltrecht*, pp. 290–3.

³⁰ P. Sankoff, ‘Chapter 1: The Protection Paradigm: Making the World a Better Place for Animals?’, in P. Sankoff, S. White & C. Black (eds), *Animal Law in Australasia*, 2nd edn (The Federation Press, 2013), pp. 1–30, at 28 (emphasis added).

³¹ R.D. Ryder, *Animal Revolution: Changing Attitudes Toward Speciesism*, 2nd edn (Berg, 2000; orig. 1989). The term was coined in R.D. Ryder, *Victims of Science: The Use of Animals in Research* (Davis-Poynter, 1975).

animals are one further vulnerable group that should come into the purview of the law, after women, ethnic minorities, children, or the disabled, and that the members of this group (animals) require legal protection through anti-discrimination laws.

In the 18th century, Jeremy Bentham implicitly denounced speciesism. He argued that animals' sensitivity to pain (in more modern terms, their sentience and capacity for experience) should be decisive for the ethics of their treatment. The famous Footnote 1 to the 'Introduction to the Principle of Morals and Legislation' of 1781 ends with the exclamation, 'The question is not, Can they reason? nor, Can they *talk*? but, Can they *suffer*?'. It is less well known that this footnote expressly makes a comparison with slaves:

Slaves ... have been treated by the law upon the same footing as in England, for example, the ... animals are still. The day may come when the rest of the animal creation may acquire those rights which could never have been withholden from them but by the hand of tyranny. The French have already discovered the blackness of skin is no reason why a human being should be abandoned without redress to the caprice of a tormentor. It may come one day to be recognized, that the number of legs, the villosity of the skin, or the termination of the os sacrum, are reasons equally insufficient for abandoning a sensitive being to the same fate.³²

Bentham's argument – which constitutes the foundation of a utilitarian animal ethics which is still valid today and further developed by Peter Singer in *Animal Liberation*³³ – thus rested on a comparison of animals with slaves; it denounced the moral irrelevance of biological criteria of distinction, and implied that speciesism is as bad as racism.

Sexism and speciesism can also be usefully compared. 'Women have been animalized, animals feminized, often at the same time', writes Catharine MacKinnon.³⁴ Legal rules (which have now long been repealed because they discriminate against women) were justified historically with reference to the supposed 'animalistic' nature of women, who were said to be at the mercy of their menstrual cycle and pregnancy, and thus moody, driven by instinct, sexually suggestive, insufficiently rational, and so on. As a reaction to this, the struggles for women's rights and for the protection of animals followed parallel trajectories, beginning in the 19th century. They targeted the practice of the oppression and exploitation of women as well as animals.³⁵

These feminists were again attacked in terms of the comparison with animals. An especially infamous example is a satirical response to a manifesto published in 1792, 'A Vindication of the Rights of Women', by the early feminist Mary Wollstonecraft.³⁶ An English author responded with a pamphlet of his own entitled 'A Vindication of the Rights of Brutes' in order to demonstrate how absurd the demand for women's

³² J. Bentham, *An Introduction to the Principles of Morals and Legislation* (Clarendon, 1781), pp. 310–1, n. 1.

³³ P. Singer, *Animal Liberation*, 4th edn (Harper Collins, 2009; orig. 1975).

³⁴ MacKinnon, n. 12 above, p. 271.

³⁵ C. Adams, *Neither Man nor Beast: Feminism and the Defense of Animals* (Bloomsbury, 1995).

³⁶ M. Wollstonecraft, *A Vindication of the Rights of Women with Strictures on Political and Moral Subjects* (J. Johnson, 1792).

rights was: if one started down that path, one might as well grant rights to animals.³⁷ Yet, today, is it possible to turn this argument around? Should the insight in the form of our recognition that the denial of women's rights is wrong, even absurd, help us to realize that the denial of animals' rights is also wrong?

Finally, it is worth noting that extreme forms of discrimination against humans have used animal comparisons. The exclusion of the other ('othering') – such as of Africans, Jews, and indigenous peoples – was often realized by first verbally, then legally, and finally physically excluding the other from human society. Calling people animal names is a typical component of these strategies. Nazis called the Jews 'rats'; Europeans and Americans referred to Blacks and Japanese as 'monkeys'. Hutus called Tutsis 'cockroaches'.³⁸ Homosexuals were another animalized group: until recently, for instance, the criminal laws of some states in the United States (US) and US military law³⁹ referred equally, in the same penal provision, to sexual acts with people of the same sex and with animals as 'sodomy', and as 'crimes against nature' or as 'unnatural intercourse'.⁴⁰ With these and similar insults, a rift is opened between a superior group of human beings and an animal-like group of others, which in extreme cases paves the way for the physical destruction of the animal-like group.

4.2. *International Relations: A 'Global Slaughterhouse'?*

Another most pertinent parallel has been drawn between violence against animals and international violence, departing from the argument that both human–animal relations and international relations are characterized by lawlessness, ruthlessness, and a fundamental power imbalance. Alejandro Lorite Escorihuela has compared the international relations of our times with a 'global slaughterhouse':

[I]t should be acknowledged that our global political condition lies not in the 'concentration camp', but in the paradigmatic space of the 'slaughterhouse'. (...) Metaphorically, the slaughterhouse is a space where animals and humans meet without any common rule or agreement, aside from overwhelmingly superior force (...).

³⁷ T. Taylor, *A Vindication of the Rights of Brutes* (London, 1792; reprint online Scholars' Facsimiles & Reprints, 1966, available at: http://www.scholarsbooklist.com/Scholars_Facsimiles_S_to_Z.html).

³⁸ C. Patterson, *Eternal Treblinka: Our Treatment of Animals and the Holocaust* (Lantern Books, 2002), Ch. 2: 'Wolves, Apes, Pigs, Vermin: Vilifying Others as Animals', pp. 27–50. Note that the demeaning effect always depends on which animal comparisons are drawn: describing a runner 'as fast as a gazelle' is not pejorative.

³⁹ See US Code, Title 10 – Armed Forces, Chapter 47 – Uniform Code of Military Justice, Subchapter X – Punitive Articles, s 925, Art. 125: 'Sodomy': '(a) Any person subject to this chapter who engages *in unnatural carnal copulation with another person of the same or opposite sex or with an animal* is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense. (b) Any person found guilty of sodomy shall be punished as a court-martial may direct' (emphasis added). US Code Title 10, Chapter 47, Subchapter X, s 925, Art. 125 was repealed by the US Senate in the 'National Defense Authorization Act for Fiscal Year 2012', 15 Nov. 2011, p. 147, available at: <http://www.gpo.gov/fdsys/pkg/BILLS-112s1867pcs/pdf/BILLS-112s1867pcs.pdf>.

⁴⁰ This was the case in Arkansas, District of Columbia, Idaho, Kansas, Louisiana, Maryland, North Carolina, Oklahoma, and Virginia. These legal provisions were declared unconstitutional by the US Supreme Court in *Lawrence v. Texas*, 539 US 559 (2003). As a result of this judgment, the state legislators have reduced the material scope of the criminal statutes to sexual behaviour involving animals: for Arkansas, for example, see the crime of 'bestiality' (Statute § 5-14-122).

Practically, the pre-social ‘state of nature’ is kept alive and perpetually reproduced in the many and concrete instances of that metaphor: lab experiments on animals, factory farms, horse races, circuses, hunting seasons. (...) The slaughterhouse makes genocide and colonial rule practically possible, and as long as both actual and metaphorical slaughterhouses exist, genocide and colonialism will remain among us.⁴¹

Lorite Escorihuela furthermore builds on the critique against the oppressive and hegemonic function of international law, which is voiced notably by critical scholars from the global South.⁴² Lorite Escorihuela’s new claim, then, is that this ‘hegemonic’ function also has a trans-species aspect to it:

[The role of international law] lies in the maintenance of a globally regulated space in which, from a species perspective, life can be turned into a thing to be appropriated by force and then be put into the service of human needs. (...) From there human slavery and ethnic annihilation remains a permanent political possibility, because all that is required is for certain humans to be turned momentarily into animals. Within that global order, justice and injustice among humans is, in a final way, rendered possible only against the common relation of humans to nonhuman animals otherwise subjected to the global governance of things.⁴³

While this point of view may appear one-sided, it has the merit of making us think about potential (and common) root causes of injustice in the relations among communities of humans and of animals, root causes the uncovering of which might also lead to parallel efforts for improvements.

4.3. Transferable Legal Concepts

In current animal protection law, we often encounter analogies drawn with established legal institutions and concepts for the benefit of human beings. One example is the ‘five freedoms’ for the treatment of livestock, which date back to an English expert report under the chairmanship of Roger Brambell in the 1960s, and which have since become a worldwide standard. The five freedoms are freedom from hunger and thirst; from discomfort; from injury, pain, and disease; the freedom to express normal behaviour; and freedom from fear and distress.⁴⁴ Their structure and terminology are based quite clearly on the ‘four freedoms’ applicable to human beings that US President Franklin D. Roosevelt had already formulated in 1941 before the

⁴¹ A. Lorite Escorihuela, ‘A Global Slaughterhouse’ (2011) 2 *Helsinki Review of Global Governance*, pp. 25–9, at 27–8.

⁴² B.S. Chimni, ‘Third World Approaches to International Law: A Manifesto’ (2006) 8 *International Community Law Review* pp. 3–27, at 15: ‘[D]ominant social forces in society maintain their domination not through the use of force but through having their worldview accepted as natural by those over whom domination is exercised. (...) The language of law has always played, in this scheme of things, a significant role in legitimizing dominant ideas for its discourse tends to be associated with rationality, neutrality, objectivity and justice. International law is no exception to this rule. It legitimizes and translates a certain set of dominant ideas into rules and thus places meaning in the service of power’; and at 26: ‘International law has always served the interests of dominant social forces and States in international relations’.

⁴³ Lorite Escorihuela, n. 41 above, p. 29.

⁴⁴ ‘Report of the Technical Committee to Enquire into the Welfare of Animals Kept under Intensive Livestock Husbandry Systems’, Cmnd 2836 (Her Majesty’s Stationery Office, 1965) (Chairman: Professor F.W. Rogers Brambell, FRS), p. 13.

US entered the Second World War (freedom of speech and expression, freedom of worship, freedom from want, freedom from fear).⁴⁵

Several other legal concepts, which initially applied only to human beings, have more recently been picked up by scholars or activists in order to employ them for the benefit of animals. This extends from the institution of stewardship over decolonization (release into independence), the responsibility to protect, to the Anglo-Saxon writ of *habeas corpus*.⁴⁶

The potential of these legal concepts with regard to the treatment of animals deserves further exploration. It also needs to be examined which of these legal concepts can and should be shaped and used in a transnational way, rather than restricted to one particular jurisdiction. The transnational nature of the issue of animal welfare⁴⁷ in principle calls for a multilevel approach which must encompass both national and international law. This would suggest that some concepts need to be endorsed at the international level, and that some rules of domestic animal law would need to be applied in an extraterritorial fashion in order to be effective.

4.4. *Objections against Comparing Human and Animal Suffering*

Many people find it problematic to compare animal suffering with human suffering. They object notably to the extension to animals of the concept of rights, which is currently reserved only for humans. This objection is usually fuelled by two concerns: the concerns of displacement and trivialization.⁴⁸ The fear of displacement is that devoting energy, time, and money to the animal cause will prevent spending those resources on the supposedly worthier cause of, for example, helping refugees. The fear of trivialization is that combating injustice committed against animals, and even granting animals rights, cheapens the concept of human rights.

Some Holocaust survivors have compared slaughterhouses with concentration camps. In one of his books, Jewish Nobel Laureate Isaac Bashevis Singer has his protagonist say '[i]n relation to them [animals], all people are Nazis; for the animals it is an eternal Treblinka'.⁴⁹ While the affected persons themselves can hardly be criticized for drawing such a parallel, outsiders doing the same risk treading on forbidden ground. German courts banned an animal protection poster of the non-governmental organization (NGO) People for the Ethical Treatment of Animals (PETA) bearing the slogan 'The Holocaust on Your Plate', arguing that such

⁴⁵ F.D. Roosevelt, 'The 1941 State of the Union Address', 6 Jan. 1941, available at: <http://www.presidency.ucsb.edu/ws/?pid=16092>. Cf. also the Preamble to the Universal Declaration of Human Rights, New York, NY (US), 10 Dec. 1948, GA Res. 217A (III), UN Doc. A/810, 71, available at: <http://www.un.org/en/documents.udhr> ('freedom of speech and belief and freedom from fear and want').

⁴⁶ See in detail below Section 5.2.

⁴⁷ Peters, n. 19 above.

⁴⁸ W. Kymlicka & S. Donaldson, 'Animal Rights, Multiculturalism, and the Left' (2014) 45(1) *Journal of Social Philosophy*, pp. 116–35, at 118–9.

⁴⁹ I. Bashevis Singer, 'The Letter Writer', in *Collected Stories* (Library of America, 2004; orig. 1968), pp. 724–55, at 750. Also used as a book title by C. Patterson, *Eternal Treblinka: Our Treatment of Animals and the Holocaust* (Lantern Books, 2002).

comparisons violate the human dignity of Holocaust victims.⁵⁰ This reasoning was upheld by the European Court of Human Rights (ECtHR),⁵¹ which found that the prohibition against publishing the poster was a legitimate restriction of free speech – at least in Germany because of its historical sensitivity – in order to protect the reputation or rights of others in terms of Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).⁵²

More generally, the reproach of ‘cheapening’ human dignity through the struggle for animal rights is being voiced. Richard Epstein writes:

By treating animals as our moral equals, we would undermine the liberty and dignity of human beings – making the slaughterhouses of Hitler, Stalin, or Pol Pot seem no worse than the daily activity of preparing cattle for the market. That is one kind of moral equivalence we must never allow. Animals are properly property. To misunderstand the rights of animals is to cheapen the rights of human beings.⁵³

In my view, upgrading the cause of animals in no way inevitably downgrades concern for humans. Aeyal Gross has captured the ambiguity inherent in our turn to animals. Expressing concern for animal welfare carries the risk that this is used ‘as a device to clear the consciences of those who are oblivious to the suffering of other human beings’, but at the same time it offers an opportunity to manifest ‘an overall sensitivity to the oppression and suffering of the Other and to the exploitation of the weak’.⁵⁴

Gary Francione highlights the opportunity by saying ‘[t]he argument for animal rights does not decrease respect for human life; it increases respect for all life’.⁵⁵ In practice, leaders of animal protection movements have been typically active in combating other forms of social injustice (such as child abuse and violence against women).⁵⁶ To conclude, a trivialization of the humanist agenda and its marginalization by intellectual (and practical) work in favour of animals is not inevitable and not even typical.⁵⁷ In theory, both agendas can go hand in hand. In practice, they normally do so.

⁵⁰ Landgericht Berlin, 27th Civil Chamber, 22 Apr. 2004 (AZ 27 0 207/04); Federal Constitutional Court, 1st Senate, 1st Chamber, 20 Feb. 2009 (1 BvR 2266/04; 1 BvR 2620/05).

⁵¹ ECtHR, *PETA v. Germany*, 8 Nov. 2012, appl. no. 43481/09, especially paras 44 and 49.

⁵² Rome (Italy), 4 Nov. 1950, in force 3 Sept. 1953, available at: <http://conventions.coe.int>.

⁵³ R. Epstein, ‘The Next Rights Revolution? It’s Bowser’s Time at Last’, *National Review*, 8 Nov. 1999, pp. 44–6, at 46.

⁵⁴ A. Gross, ‘Vegans For (and Against) Occupation’, *Haaretz*, 14 Nov. 2013, available at: <http://www.haaretz.com/opinion/premium-1.557912>.

⁵⁵ G. Francione, *Introduction to Animal Rights: Your Child or the Dog?* (Philadelphia Temple University Press, 2000), p. 174.

⁵⁶ E.g. the sponsor of an early English animal protection bill, Henry Stephens Salt (1851–1939) founded the Humanitarian League in 1891. This league fought for criminal law reform, against the death penalty and other inhuman punishments, and last but not least for stricter animal protection laws. For his biography see H. Stephens Salt, *Animals’ Rights: Considered in Relation to Social Progress* (Centaur Press, 1980; orig. Macmillan & Co, 1892), in the reprint at pp. 226–35. On the other hand, for the (mostly untrue) image of Adolf Hitler as an ascetic, vegetarian, and animal lover, as purposefully built up by Joseph Goebbels, see Patterson, n. 38 above, pp. 125–9 with further references.

⁵⁷ On the contrary, empirical psychological studies even appear to suggest that ‘the more sharply people distinguish between humans and animals, the more likely they are to dehumanize human outgroups’ too: Kymlicka & Donaldson, n. 48 above, p. 120. If this is true, an inverse correlation might exist as well: those who question human superiority over animals would be *less* prone to racism and other inter-human prejudices.

4.5. *The Parallel Problem of Cultural Imperialism*

A recurring normative objection against intensified animal protection law with a potentially global scope is the reproach of cultural imperialism.⁵⁸ Again, this objection can be better assessed when it is compared with the parallel, well-known objection against universal human rights. It then becomes obvious that the spectre of cultural hegemony, anti-pluralism, and lack of tolerance is a shared problem in both the field of human rights and the field of animal protection or rights.

In March 2013, the full EU prohibition against animal testing for cosmetics entered into force.⁵⁹ In a press release, the EU Commissioner for Health and Consumer Policy, Tonio Borg, said that the prohibition ‘gives an important signal on the value that Europe attaches to animal welfare. The Commission is committed ... to engage with third countries to follow our European approach. This is a great opportunity for Europe to set an example of innovation in cosmetics without any compromise on consumer safety’.⁶⁰ Something of a *mission civilisatrice* is implied here: ‘We’ Europeans show the rest of the world what it means to be civilized.

Another example in the field of animal protection is San Francisco’s prohibition in the 1990s of the sale of dogs as a delicacy and their slaughter in public in Chinatown markets. Is this not hypocritical, given that billions of pigs – which are at least as sentient and capable of experience as dogs – are slaughtered for consumption by Westerners, the sole distinction being that the slaughter of pigs is carefully hidden from the public? And what would a devout Hindu think on taking a look at our cattle slaughterhouses?

Animal protection measures are criticized on the ground that animal protection and the animal rights movement – like the human rights movement before it – are ‘yet another crusade by the West against the practices of the rest of the world’,⁶¹ and that the propagators of such crusades claim universal validity in order to impose their own purely local preferences on other cultures, so as to consolidate cultural and political dominance over the non-Western world, especially the global South. This charge is not entirely absurd or trivial.

There is a real risk that the protection of animals does target minority practices (such as Muslim ritual slaughter or indigenous seal and whale hunting), although these practices in numerical terms are insignificant in comparison with the majority’s ‘normal’ massive use and killing of animals. This targeting manifests and fuels majority prejudices against the singled out groups, and can pave the way for intervention and domination. In fact, ‘dominant groups have long justified their exercise of power over minorities or indigenous peoples by appealing to the “backward” or “barbaric” way they treat women, children, or animals’.⁶²

⁵⁸ The objection can also be directed against the imposition of strict animal welfare norms, but it seems particularly salient for attacking the ostensibly Western concept of animal rights.

⁵⁹ Regulation (EC) No. 1223/2009 on Cosmetic Products (recast) [2009] OJ L 342/59.

⁶⁰ T. Borg, ‘Full EU Ban on Animal Testing for Cosmetics Enters into Force’, Press Release, 11 Mar. 2013, available at: http://europa.eu/rapid/press-release_IP-13-210_en.htm.

⁶¹ This is how the fictional character Thomas O’Hearn, ‘professor of philosophy of Appleton’, puts it: J.M. Coetzee, *The Lives of Animals* (Princeton University Press, 1999), p. 60.

⁶² Kymlicka & Donaldson, n. 48 above, p. 127.

With regard to human rights, no response has been formulated so far that would rebut the charge of cultural imperialism completely and that would permanently satisfy all critics, not least because new situations arise all the time which can be interpreted as manifestations of hegemonic ambition.

Culture sensitivity must therefore accompany the further development of universal human rights law as well as the construction of a legal field of animal welfare law, or even animal rights law.⁶³ Along these lines, the Treaty of Lisbon⁶⁴ entered into force for the EU in 2009 with an animal welfare mainstreaming clause in Article 13 of the Treaty on the Functioning of the European Union (TFEU), but with a reservation for ‘religious rights, cultural traditions and regional heritage’.⁶⁵ It is not surprising that this reservation was included in the Treaty text after lobbying by Spanish diplomats,⁶⁶ and that a recent Spanish law has legally defined bullfighting as part of the ‘cultural heritage’ of Spain.⁶⁷

However, references to cultural traditions may, with regard to animal rights as well as human rights, forestall legal progress. The boundary between legitimate concerns of cultural diversity and the abusive invocation of ‘culture’ by those aiming to secure illegitimate privileges is not always easy to draw. In this area of tension, two points are worth noting. Firstly, we should not exaggerate cultural differences. After all, a *common* feature of almost all cultures of the world is their massive and taken-for-granted use of animals for human needs and the lack of any attempt to

⁶³ Cf., e.g., A. Kerr & Yu Dan, ‘Tradition as Precedent: Articulating Animal Law Reform in China’ (2015) 11 *Journal of Animal and Natural Resource Law*, pp. 71–85.

⁶⁴ Lisbon (Portugal), 13 Dec. 2007, in force 1 Dec. 2009, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:C:2007:306:TOC>.

⁶⁵ Art. 13 TFEU: ‘In formulating and implementing the Union’s agriculture, fisheries, transport, internal market, research and technological development and space policies, the Union and the Member States shall, since animals are sentient beings, pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage’. Exactly the same wording was before the text of the Protocol on Protection and Welfare of Animals (No. 33), annexed to the EC Treaty by the Treaty of Amsterdam, Amsterdam (the Netherlands), 2 Oct. 1997, in force 1 May 1999, available at: <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:11997D/DCL>.

⁶⁶ The Spanish Ambassador to the EC boasted of having achieved this with ‘[i]t cost me a couple of dinners’: F.J. Elorza, Interview with Lluís Amiguet, *La Vanguardia*, 2 June 1999, available at: <http://hemeroteca.lavanguardia.com/preview/1999/06/02/pagina-84/34488133/pdf.html>. Also quoted in P. Casal, ‘Is Multiculturalism Bad for Animals?’ (2003) 11(1) *Journal of Political Philosophy*, pp. 1–22, at 1. The Spanish lobbying success related to the identical text already enshrined in the 1997 Protocol, *ibid.*

⁶⁷ Art. 2 of the Ley 18/2013 of 12 Nov. 2013 on the Regulation of Bullfighting as Cultural Heritage (Ley para la regulación de la Tauromaquia como patrimonio cultural), *Boletín Oficial del Estado* núm. 272, 13 de Noviembre de 2013, Sec. I. Pág. 90737, No. 11837. Artículo 2. Tauromaquia como patrimonio cultural español. La Tauromaquia, en los términos definidos en el artículo 1, forma parte del patrimonio cultural digno de protección en todo el territorio nacional, de acuerdo con la normativa aplicable y los tratados internacionales sobre la materia. Artículo 3. Deber de protección. En su condición de patrimonio cultural, los poderes públicos garantizarán la conservación de la Tauromaquia y promoverán su enriquecimiento, de acuerdo con lo previsto en el artículo 46 de la Constitución. Art. 46 of the Spanish Constitution of 29 Dec. 1978 (as of 27 Aug. 1992): [National Heritage]: ‘The public authorities shall guarantee the preservation, and promote the enrichment, of the historical, cultural, and artistic heritage of the peoples of Spain and the property that makes them up, regardless of their legal status and their ownership. The penal law shall punish any offenses against this heritage’.

justify these practices in ethical terms.⁶⁸ Secondly, cultures do not unfold immutably, as if according to a genetically defined pattern. For example, eating shark soup made of fins cut off live sharks (or eating the flesh of cows which have been improperly stunned in a European slaughterhouse) may be a tradition, just like relegating women to the house and prohibiting them from exercising certain professions or driving a car. However, simply because these are traditions, they are not inevitable and are not worth protecting as such. Instead, morals, traditions and legal provisions are made, practised and applied by human beings capable of learning, and they can be changed.

4.6. *Parallel Drivers and Rationales of Legal Evolution*

Legal evolution does not depend only on concrete contents, but also on additional factors and on actors. Also at this level parallels between the protection of humans and animals can be discovered and potentially used in terms of legal policy.

Obviously, lawmaking processes vary from state to state, with a structural difference between democracies and undemocratic regimes. Democratic lawmaking happens in a public and deliberative process, channelled through parliaments the members of which are elected by the citizens. In contrast, undemocratic lawmaking processes tend to be non-public and non-discursive. International law is again created through different processes; the legal rules are negotiated in basically intergovernmental, diplomatic and closed settings.

Despite these structural differences, the actors, interests and ideas involved are comparable, while their relative impacts differ. Drivers of legal development are, firstly, non-material factors: ideals, convictions and principles; then interests, preferences and habits; and finally scientific insights. Secondly, and in addition, material factors enter: economic incentives, path dependency, interdependency, globalization, and competition over production sites.

The relevant actors are the lawmaking institutions (for international law these are primarily the state governments), civil society, and the economy. Today it is a matter of common sense that reforms can be achieved only through a joint endeavour of these groups of actors. For example, the German Scientific Agricultural Council, after identifying in a 450-page expert opinion ‘significant deficits’ of animal husbandry, insisted that, in order to improve animal welfare governance, measures need to be taken jointly by government, the private economy, and civil society.⁶⁹

A historic example of the key roles played in legal reform by the public and the business sector, in an amalgamation of the discourses on human rights and animal welfare, is offered by the slaughterhouses of Chicago. The new conveyer belt technique used for slaughtering in the 19th century was adopted by Henry Ford for use in his car factories, and the Nazis used both as their inspiration for industrialized mass murder. In 1906, the novelist Upton Sinclair published *The Jungle*, providing a

⁶⁸ Cf. Kymlicka & Donaldson, n. 48 above, p. 127. The conceptualization of a discipline of global animal law should help to break this ‘conspiracy of silence’: *ibid.*, p. 128.

⁶⁹ ‘Wissenschaftlicher Beirat für Agrarpolitik beim Bundesministerium für Ernährung und Landwirtschaft’, *Wege zu einer gesellschaftlich akzeptierten Nutztierhaltung: Gutachten* (Bundesministerium für Ernährung und Landwirtschaft, 2015), p. I.

literary denunciation of the conditions and procedures in slaughterhouses, which were cruel to animals and dangerous and exploitative for workers.⁷⁰ The sick and rotting meat served as a metaphor for capitalism. The public outcry was so great that within six months of the novel's publication, the US Congress adopted two hygiene laws.⁷¹ This story illustrates how legal progress can be made in a democratic system: using artistic means, potential voters were galvanized, and the slaughterhouse lobby itself called for stricter regulation to salvage its image and improve its business. To the author's disappointment, however, the public was outraged only because of the health risks of rotten meat; Sinclair's socialist message was ignored. Both workers' rights and the welfare of animals largely fell by the wayside during this process of legal development.

A comparison of the legal evolution with regard to the protection of vulnerable humans and vulnerable animals also reveals that the rationale of protective laws may change over time. While the laws relating to humans have come to protect the victims for their own sake, most legal rules relating to animals do not protect individual specimens for their own good. Anthropocentric justifications of animal protection have been prevalent so far. Legal provisions prohibiting the mistreatment of animals (beginning with English laws in the 18th century) were intended primarily to prevent the coarsening of human beings and thus to forestall violence against other persons. The classic formulation derives from Kant's 'Metaphysics of Morals'.⁷² The 'dulling of shared feeling' referred to by Kant is, in fact, supported by recent criminological research: reports by young people show that cruelty to animals is associated with a higher risk of committing criminal offences, according to a Swiss study in 2011⁷³ (although it does not prove any causal relationship).

An overview of existing animal protection legislation – the first examples of which have been enacted in various US American states since the 1820s⁷⁴ and in the United

⁷⁰ U. Sinclair, *The Jungle* (Double Day, Jaber and Co., 1906).

⁷¹ G. Kolko, *The Triumph of Conservatism* (New York Free Press, 1963); G. Eisnitz, *Slaughterhouse: The Shocking Story of Greed, Neglect and Inhumane Treatment Inside the US Meat Industry* (Prometheus Books, 1997).

⁷² I. Kant, 'The Metaphysics of Morals, Part II: Metaphysical First Principles of the Doctrine of Virtue, Section II: On an Amphiboly in Moral Concepts of Reflection, Taking What Is a Human Being's Duty to Himself for a Duty to Other Beings, s. 17', in M. Gregor (ed.), *Cambridge Texts in the History of Philosophy* (Cambridge University Press, 2015), pp. 192–3.

⁷³ S. Lucia & M. Killias, 'Is Animal Cruelty a Marker of Interpersonal Violence and Delinquency? Results of a Swiss National Self-Report Study' (2011) 1(2) *Psychology of Violence*, pp. 93–105. The findings are based on self-reporting of more than 3,600 Swiss pupils in 2006. In contrast, C. Hensley, S. Tallichet & E. Dutkiewicz, 'The Predictive Value of Childhood Animal Cruelty Methods on Later Adult Violence: Examining Demographic and Situational Correlates' (2011) 56(2) *International Journal of Offender Therapy and Criminology*, pp. 281–95, found that sex with animals was the only form of childhood animal cruelty that predicted the later commission of adult violent crimes. For secondary literature, with references to further empirical studies, see C. Siebert, 'The Animal-Cruelty Syndrome', *The New York Times*, 11 June 2010, available at: http://www.nytimes.com/2010/06/13/magazine/13dogfighting-t.html?_r=0; R.L. Bucchieri, 'Bridging the Gap: The Connection between Violence against Animals and Violence against Humans' (2015) 11 *Journal of Animal and Natural Resource Law*, pp. 115–35.

⁷⁴ Beginning in Maine in 1821 and in the state of New York in 1821, later in Vermont and Michigan: see the references in D. Favre & V. Tsang, 'The Development of Anti-Cruelty Laws during the 1800s' (1993) 1 *Detroit College of Law Review*, pp. 1–35, at 7. The first, not yet fully fledged law, but legal

Kingdom (UK) since the 1850s⁷⁵ – shows that legislators until now have hardly deviated from anthropocentric justifications. This is true despite the proclamation of so-called ‘ethically based’ animal protection by legislators and courts in recent decades.⁷⁶ The modern laws do purport to protect animals for their own sakes, but they are still based on human feelings of compassion, revulsion at cruelty, and on our idea of being ‘humane’. The ‘foundations of our analysis of what was good for their “sakes” was based on our feelings about what they were suffering’.⁷⁷

In the accompanying discourse, anthropocentric considerations are dominant as well. For example, it has been pointed out that the repeated official campaign to euthanize stray dogs in Bucharest (which has been the subject of several decisions by the Romanian Constitutional Court) constituted an attack on the human dignity of the city’s employees who would have to execute the ‘Great Dog Massacre’.⁷⁸

The persistence of that line of reasoning with regard to animal protection constitutes an important difference from the development of legal provisions for the protection of women and children. Originally – that is, until the beginning of the 20th century – all normative restrictions served to protect public morality, ‘decency’, or ‘chastity’. Accordingly, animal cruelty was a ‘public misdemeanour’⁷⁹ and prohibited only if it took place in public.⁸⁰ Similarly, early international treaties to suppress the

prescription in the world was passed by the Massachusetts Colony in 1641: ‘No man shall exercise any Tyranny or Cruelties towards any brute Creatures which are usually kept for man’s use’: Massachusetts Colony (N. Ward), ‘Off the Brute Creatures’, Liberty 92, in *The Body of Liberties of 1641*, reprinted in W.H. Whitmore, *A Bibliographical Sketch of the Laws of Massachusetts Colony from 1630 to 1686* (Rockwell and Churchill, 1890; Google Books: Online Library of Free eBooks). See also E. Stewart Leavitt, *Animals and Their Legal Rights: A Survey of American Laws from 1641 to 1990* (US Animal Welfare Institute, 1990).

⁷⁵ In 1849, the British Parliament enacted the Cruelty to Animals Act: an Act for the more Effectual Prevention of Cruelty to Animals, available at: <http://www.animalrightshistory.org/animal-rights-law/victorian-legislation/1849-uk-act-cruelty-to-animals.htm>. This Act was amended by the Cruelty to Animals Act 1876 to cover experiments on living animals (vivisection).

⁷⁶ See, e.g., Swiss Federal Tribunal, BGE 115 IV 248, Judgment of 2 Aug. 1989, p. 254 on ‘ethical animal protection’, ‘recognizing the animal as a living and sentient being whose respect and appreciation is a moral postulate of man who is *superior due to his mind*’ (my translation, emphasis added). See also § 1 of the German Animal Protection Law, which states the purpose of the Law is ‘to protect the animal and its life and well-being on account of the *responsibility of man* for other creatures’: *Tierschutzgesetz*, 24 July 1972, last amended 28 July 2014 (Bundesgesetzblatt 2014, vol. I, 1308) (my translation, emphasis added). On the new focus of the law on animal sentience see R. Bismuth & F. Marchandier (eds), *Sensibilité Animale: Perspectives juridiques* (CNRS Editions, 2015).

⁷⁷ T. Kelch, ‘A Short History of (Mostly) Western Animal Law: Part II’ (2013) 19 *Animal Law Review*, pp. 347–90, at 369.

⁷⁸ J. Weiler, ‘Editorial: The Great Dog Massacre’ (2012) 10(1) *International Journal of Constitutional Law*, pp. 1–5, at 2. See the classic R. Darnton, *The Great Cat Massacre: And Other Episodes in French Cultural History* (Basic Books, 2009; orig. 1984).

⁷⁹ Favre & Tsang, n. 74 above, pp. 6, 11, and 32.

⁸⁰ For an early European statute see the French *Loi Grammont* of 2 July 1850, which made it reprehensible to ill-treat animals *in public* without due reason, and thus penalized the mere offence against public decency: *Bulletin des lois de la république française* No. 283, No. 2261 – Loi du 2 juillet 1850 relative aux mauvais traitements exercés envers les animaux domestiques, Article unique: ‘Seront punis d’une amende de cinq à quinze francs, et pourront l’être d’un à cinq jours de prison, ceux qui auront exercé *publiquement* et abusivement de mauvais traitements envers les animaux domestiques. La peine de la prison sera toujours appliquée en cas de récidive. L’article 483 du code pénal sera toujours applicable’ (emphasis added). On 14 June 1850, General Philippe Delmas de Grammont tabled a bill in the French National Assembly to punish ‘anyone guilty of cruelty to animals’. On 2 July 1850, another

trade in women and girls (often referred to as the ‘white slave trade’) were intended to preserve morality; the idea of rights for women and children was unknown.⁸¹ In the latter sphere of rights, a paradigm shift has occurred since then, away from the protection of public morality and towards the protection of victims for their own sake. This at least shows that even entrenched legal institutions have, as a matter of historical fact, changed (even radically), and that such a paradigm shift is not necessarily illusory and impossible.

5. ANIMAL RIGHTS AND HUMAN RIGHTS

The most important legal institution that cements the current legal gap between animals and humans, and the accompanying legal hierarchy, is the concept of legal *rights*. In the law of presumably all legal systems, and international law as it stands, humans are accorded rights; animals are not. It is therefore worth examining, through a comparison of the structure and the rationale of rights, whether this legal gap is doctrinally consistent and morally fair. The question is whether the legal institution of rights should remain reserved for humans, or whether it could and should be usefully and properly extended to animals, or at least to some animals. The next question then is whether such animal rights would require global rather than simply domestic regulation – whether they should be endorsed through international hard or soft law texts.

5.1. *The Concept of Legal Rights*

By legal rights,⁸² I understand particularly strong legal institutions that protect interests which are deemed sufficiently important to ground the duties of

member of the Assembly replied: ‘I wish ... only to punish offences which, by their seriousness and their *public nature, pose a threat to public morals*’. In the final version, the Act punished ‘all those publicly and improperly mistreating animals’. See in detail E. Hardouin-Fugier, ‘From Animal Suffering to Animal Welfare: The Progressive Attainment of Animal Rights in Europe’, in Council of Europe (ed.), *Ethical Eye: Animal Welfare* (Council of Europe, 2006), pp. 171–84, at 175.

⁸¹ International Agreement for the Suppression of the White Slave Traffic, Paris (France), 18 May 1904, in force 18 July 1905, available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VII-8&chapter=7&lang=en, the Preamble to which reads: ‘(...) being desirous of securing to women of full age who have suffered abuse or compulsion, as also to women and girls under age, effective protection against the criminal traffic known as the “White Slave Traffic” [French: “*traité de blanches*”], have decided to conclude an Agreement with a view to concerting measures calculated to attain this object, (...)’; Art. 1: ‘Each of the Contracting Governments undertakes to establish or name some authority charged with the coordination of all information relative to the procuring of women or girls *for immoral purposes* abroad; this authority shall be empowered to correspond direct with the similar department established in each of the other Contracting States’ (emphasis added). Similarly, with a reference to ‘immoral purposes’, see Art. 2 of the International Convention for the Suppression of the White Slave Traffic, Paris (France), 4 May 1910, in force 18 July 1905 (in accordance with Art. 8), available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VII-10&chapter=7&lang=en; Art. 1 of the International Convention for the Suppression of the Traffic in Women of Full Age, Geneva (Switzerland), 11 Oct. 1933, in force 24 Aug. 1934, available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VII-5&chapter=7&lang=en.

⁸² On this subject see J. Waldron (ed.), *Theories of Rights* (Oxford University Press, 1984); E. Schulev-Steindl, *Subjektive Rechte: Eine rechtstheoretische und dogmatische Analyse* (Springer, 2008); W.A. Edmundson, *An Introduction to Rights*, 2nd edn (Cambridge University Press, 2012).

other actors.⁸³ The institution of *human* rights protects fundamental interests which are, according to historical experience, typically threatened by the state. Other rights for humans (in administrative law or civil law) protect interests which are less important, or ancillary, or not specifically threatened by governance institutions, but are still important enough to deserve special legal protection.

Rights in a narrow sense are not simply derived from someone else's legal duty. The textbook example is the prohibition against scribbling on the *Mona Lisa*. Museum visitors are under the legal obligation (duty) not to scribble on the *Mona Lisa*, but the painting *has no right* not to be scribbled upon. Transferred to animals, this means that animal protection laws oblige humans not to treat animals cruelly, so that humans are under a legal obligation to desist from committing abuse. This, however, does not necessarily mean, in law, that animals have a 'right' not to be treated cruelly. The legal norm containing the duty is often referred to as 'objective' law, while a (possibly, but not automatically) corresponding right is known as a 'subjective' right. Our legal systems are full of rules which are 'only' objective laws, and do not generate rights (as in the *Mona Lisa* example). Rights are rather the exception.

The old controversy, dating back to the 19th century, over whether the basis or rationale of rights is to allow rights holders to make choices (or to form a 'will'), or rather the protection of interests,⁸⁴ is still unresolved.⁸⁵ The better view is that rights are founded in interests,⁸⁶ because otherwise humans who are incapable of making choices (such as infants, the handicapped and comatose) would not have rights. The 'interest theory' suits animals, too. It is fairly intuitive to acknowledge that sentient animals at least have interests, notably the interest not to suffer. The alternative rooting of rights in choices would present some difficulties for the idea of animal rights. It might be argued that animals never or rarely 'choose', but are driven by instinct and therefore cannot have rights based on choices, although this objection could be refuted with the help of zoological insights into animal behaviour (see Section 2 above).

The animal rights framework has been dismissed as 'for all intents and purposes, a political non-starter'.⁸⁷ Also, the philosophical controversy about animal rights is often seen to have resulted in an intellectual deadlock. Finally, it has been pointed out

⁸³ J. Raz, *The Morality of Freedom* (Clarendon, 1988), p. 166: 'Definition: "X has a right" if and only if X can have rights, and, other things being equal, an aspect of X's well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty'.

⁸⁴ These two positions have been shaped by the German historical legal school of the 19th century. See paradigmatically for the focus on 'will' F.C. von Savigny, *System des heutigen römischen Rechts*, vol. 1 (Veit, 1840), p. 7; and paradigmatically for the focus on 'interests' R. von Ihering, *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung*, Dritter Teil, Erste Abteilung, 3rd edn (Breitkopf und Härtel, 1877), p. 339, with the definition: 'Rights are legally protected interests' (translation mine).

⁸⁵ For this controversy see M.H. Kramer, N.E. Simmonds & H. Steiner (eds), *A Debate Over Rights: Philosophical Enquiries* (Oxford University Press, 2000).

⁸⁶ In this sense see, e.g., J. Waldron, 'Rights in Conflict', in J. Waldron, *Liberal Rights: Collected Papers 1981–1991* (Cambridge University Press, 1993), pp. 203–24, at 205: The basis of rights is formed by 'individual interests [that] have sufficient importance'.

⁸⁷ S. Donaldson & W. Kymlicka, *Zoopolis* (Oxford University Press, 2011), p. 5.

that the philosophical debate on ‘rights’ is superfluous, or is at least unimportant, for the practical question of legislation for the protection of animals.⁸⁸

However, the historical experience that the boundaries shift between rights holders (legal subjects) and others (legal objects) (see Section 1 above), together with the insight that the scientific boundary between humans and animals is blurry (Section 2), urges a reconsideration of the question.

Are rights an appealing framework? In theory, rights (for humans) have been deconstructed as being an unstable, indeterminate, empty abstraction, and in practical terms useless.⁸⁹ In particular, human (fundamental) rights have been declared superfluous and their ‘twilight’,⁹⁰ or even their ‘end’,⁹¹ have been announced. Yet, in the practice of states, governments, activists, and individuals themselves, the attraction and the pull of rights – notably human rights – is unbroken. This concerns both the quest for human rights catalogues in domestic law, and maybe even more so the high prestige of international human rights covenants. Examining the structure, substance, and discourse practice on (national and international) human rights closely, with a view to learning lessons for animals, might lead a way out of the stalemate in the debate on animal rights and might give new impetus for litigation and legislative reform debates regarding animals.

5.2. Animal Rights in Recent Actions

Animal activists have repeatedly, but so far unsuccessfully, asserted the existence of an animal right of free movement in order to enforce judicially the release of great apes from confinement and zoos. Several years ago, Austrian activists invoked such a right for apes before the ECtHR, but their complaints were rejected on the ground of incompatibility *ratione materiae*.⁹²

The NGO Nonhuman Rights Project is currently filing suits in the state of New York on behalf of chimpanzees.⁹³ Three cases have been brought at first instance (Supreme Courts) in various counties of the state of New York: the case of *Kiko*,⁹⁴ the

⁸⁸ A.C. Zielinska & P.-Y. Quiviger, ‘De la notion de “droits des animaux”’ (2016) 32 *Recherches sur la philosophie et le langage*, pp. 319–35.

⁸⁹ Seminally, M. Tushnet, ‘An Essay on Rights’ (1984) 62(8) *Texas Law Review*, pp. 1363–403.

⁹⁰ E. Posner, *The Twilight of Human Rights Law* (Oxford University Press, 2014).

⁹¹ C. Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Hart, 2000).

⁹² ECtHR, *Balluch v. Austria*, appl. no. 26180/08, lodged 4 May 2008; *Stibbe v. Austria*, appl. no. 26188/08, lodged 6 May 2008.

⁹³ Available at: <http://www.nonhumanrightsproject.org>. For an overview of the early phase of the action see C. Siebert, ‘Should a Chimp Be Able to Sue its Owners?’, *The New York Times*, 23 Apr. 2014, available at: <http://www.nytimes.com/2014/04/27/magazine/the-rights-of-man-and-beast.html>.

⁹⁴ For the legal arguments see the transcript: State of New York Supreme Court, County of Niagara, In the Matter of a Proceeding under Article 70 of the CPLR for a Writ of Habeas Corpus, *The Nonhuman Rights Project, Inc. on behalf of Kiko v. Carmen Presti and Others*, Index No. 151725, before Hon. Ralph A. Boniello III, Supreme Court Justice, transcription of hearing of 9 Dec. 2013, available at: <http://www.nonhumanrightsproject.org/wp-content/uploads/2014/06/2.-Original-order-to-settle-record-et-al.-Kikos-Appeal.pdf>.

case of *Tommy*, and the case of *Hercules and Leo*.⁹⁵ The petitioners rely on the writ of *habeas corpus*, which offers protection from arbitrary detention and deprivation of liberty and was, in the 18th century, used in the UK as a legal weapon to deny recognition of the US institution of slavery.⁹⁶ In accordance with the current law of New York State, the writ entitles any ‘person’ who is ‘restrained in his liberty’ to petition (or have someone petition on his behalf) ‘to inquire into the cause of such detention and for deliverance’.⁹⁷ A key question, therefore, is whether the chimpanzees are ‘persons’ in the eyes of the law.⁹⁸ Being a person in law means to be capable of possessing rights; legal personality means legal capacity.⁹⁹

So far, the *Tommy* case has passed the second instance (appellate division of the Supreme Court). The competent appellate division declined to enlarge the common law definition of ‘person’ and concluded that ‘a chimpanzee is not a “person” entitled to the rights and protections afforded by the writ of *habeas corpus*’.¹⁰⁰ The main argument given by the court was the chimpanzees’ ‘incapability to bear any legal responsibilities and societal duties that renders it inappropriate to confer upon chimpanzees ... legal rights’.¹⁰¹

The court’s view that there must be a symmetry of rights and responsibilities should be rejected. It is based on a very narrow contractual notion of rights that applies only (if at all) to political rights. It also misses the current legal reality. The legal treatment of infants and mentally disabled humans in the legal systems of the

⁹⁵ The two chimpanzees have been used for experiments by Stony Brook University. The most recent judicial pronouncement seems to be *The Nonhuman Rights Project on Behalf of Hercules and Leo v. Samuel L. Stanley, as President of State University of New York at Stony Brook*, Decision and Order, Judge Barbara Jaffe, Supreme Court of the State of New York, Index No. 152736/15, 29 July 2015, available at: <http://www.nonhumanrightsproject.org/wp-content/uploads/2015/07/Judge-Jaffes-Decision-7-30-15.pdf>. Judge Jaffe, considering herself bound by the *Tommy* precedent, ordered that the petition for a writ of *habeas corpus* be denied and the proceedings dismissed. The Stony Brook University then announced it would transfer Hercules and Leo to a sanctuary. The Nonhuman Rights Project is currently preparing an appeal with the argument that, contrary to the judge’s view, the appellate court division is not bound by precedent.

⁹⁶ English Court of King’s Bench (Lord Mansfield), *Somerset v. Stewart* (1772) 98 ER 499, at p. 510.

⁹⁷ In the US state of New York, the writ is enshrined in Art. 70 of the Civil Practice Law and Rules: ‘§ 7002. Petition. (a) By whom made. A person illegally imprisoned or otherwise restrained in his liberty within the state, or one acting on his behalf ... may petition without notice for a writ of habeas corpus to inquire into the cause of such detention and for deliverance’: 2013 New York Consolidated Laws, CVP – Civil Practice Law & Rules, available at <http://law.justia.com/codes/new-york/2013/cvp/article-70>.

⁹⁸ Based on Roman private law (*ius civile*), many legal systems draw a fundamental distinction between *personae* (persons) and *res* (things). In Roman private law, one category of things was represented by the *res mancipi*, which comprised slaves and the children in the house. That old dichotomy between *personae* and *res* forms the background of the debates on requalifying animals in the civil codes of some countries and removing them from the status of ‘things’. The person/thing dichotomy is often expressed by the terms ‘subject’ vs. ‘object’. These are just different words for the same legal construction.

⁹⁹ Persons/subjects can be holders of rights; whereas things/objects, by definition cannot have rights. The latter can, in law, only be the beneficiaries of protective rules, which create duties for their addressees, but do not generate rights for the beneficiaries. While it is nowadays recognized that only persons/subjects may have rights and obligations, which concrete rights they indeed have is a different matter. Also, they may be accorded only rights but not duties.

¹⁰⁰ *The Nonhuman Rights Project on behalf of Tommy v. Patrick Lavery, individually and as an officer of Circle L Trailer Sales, Inc.*, State of New York Supreme Court, Appellate Division, Third Judicial Department, 4 Dec. 2014, pp. 2–3.

¹⁰¹ *Ibid.*, p. 6.

world shows that no legal system conditions having rights on being able to have legal duties. Having rights is also not conditioned on understanding them or being able to sue. Infants and mentally handicapped humans are under no legal obligations (or are at least not expected to comply with any), they do not understand their rights, and they are not competent to act in court. Nevertheless, we assume that they can and should have at least some rights.

The *Tommy* proceedings, at the time of writing, are pending at the third level – the Court of Appeals of the State of New York. In his *amicus curiae* brief addressed to the court, Harvard constitutional law professor Laurence Tribe argues that '[t]he Court of Appeals should recognize that Tommy is an autonomous being who is currently detained and who is therefore entitled to challenge the lawfulness of his detention by petitioning for the writ, even if that Court ultimately concludes that Tommy's detention is lawful'.¹⁰² Tribe also argues against the thesis of a necessary symmetry of rights and responsibilities, and finally reminds the Court that it must distinguish between having *habeas* jurisdiction and granting *habeas* relief.

A different legal action is ongoing in Argentina. A complaint on behalf of an orangutan, Sandra, in the Buenos Aires zoo has been dealt with by the competent Criminal Chamber of the Argentinean province of Buenos Aires. The Chamber acknowledged that animals may have rights.¹⁰³ However, the judicial statement in the very short court order lacked any explanation or justification.¹⁰⁴ It is not clear in which sense the Chamber understood the word 'rights' and, for this reason, the legal consequences of the ruling are unknown for the time being.

Overall, it is difficult to gauge the prospects of these cases and similar litigation. In any event, activism must be accompanied by conceptual work in order to gain persuasiveness. I submit that examining the benefits of rights for animals against the foil of benefits of rights for humans can contribute to a better understanding of the issue.

5.3. Benefits of Rights for Animals

What are the potential advantages in improving the lives (and deaths) of animals, in granting them any kind of ('subjective') rights, as opposed to merely protecting them through ('objective') law? After all, the normative question is not so much whether animals 'deserve' rights.¹⁰⁵ Rights are not like prizes to be given to meritorious actors.¹⁰⁶ The proper normative question rather seems to be whether

¹⁰² Brief of *amicus curiae*, Laurence H. Tribe, in support of motion for leave to appeal, Court of Appeals of the State of New York, In the matter of a proceeding under Article 70 of the CPLR for a writ of *habeas corpus*, *The People of the State of New York ex rel. The Nonhuman Rights Project, Inc., on behalf of Tommy v. Patrick C. Lavery, individually and as an officer of Circle L Trailer Sales, Inc.; Diane Lavery and Circle L Trailer Sales, Inc.*, 8 May 2015, p. 14.

¹⁰³ Argentinean Criminal Chamber, *Camara Federal de Casacion Penal*, Decision of 18 Dec. 2014.

¹⁰⁴ The Court simply wrote: 'Based on a dynamic rather than a static interpretation of the law, it is necessary to recognize the animal as a subject of rights, because non-human beings (animals) are entitled to rights, and therefore their protection is required by the corresponding jurisprudence' (my translation).

¹⁰⁵ But see P. Cavalieri, *The Animal Question: Why Nonhuman Animals Deserve Human Rights* (Oxford University Press, 2001).

¹⁰⁶ Donaldson & Kymlicka, n. 87 above, p. 28.

animals *need* rights.¹⁰⁷ This makes an inquiry into the added value of subjective rights over objective laws essential. (Recall the distinction made above in the *Mona Lisa* example between objective duties of A towards B without B having rights, in contrast to the rights of B against A). In concrete terms, what would be the difference in saying that, for instance, a European farmer is not only under a legal obligation to offer his hens cages of 750 cm² of cage area per hen,¹⁰⁸ but that the hens have *a right* (are entitled) to such a cage?

Generally speaking, the benefits of granting (or acknowledging) a legal right may unfold in quite different dimensions of social life. Rights may be practical in a hands-on sense; they may be theoretical; or their utility may lie more in the realm of emotions, expression and symbolism.

A first and very practical advantage of rights is often seen in facilitating proceedings in court. Indeed, some legal systems have traditionally defined rights by their judicial enforceability: ‘no rights without remedy’. It is no coincidence that Christopher Stone’s seminal article asked: ‘Should trees have standing?’¹⁰⁹ Standing is one indispensable element of procedural law which allows the judicial enforcement of law in court, and is usually granted only to rights holders. The question of rights for trees was thus implicit in Stone’s analysis, but he chose to highlight the practical, tangible consequence flowing from it – that of justiciability. At this point, it is often argued that the very question of standing shows animals rights to be superfluous. Animals will in any case never be able to go to court themselves; they will always need a human representative to enforce their rights. For this reason, it is asserted, the difference between animals having a right and animals being protected by rules which could be invoked by some state official acting for them in court seems trite at best.

However, justiciability is not a universal feature of all kinds of right in all legal systems. For example, when an international human right is violated, there is virtually no international judicial remedy available. Moreover, many domestic legal orders acknowledge rights which cannot, or cannot directly, be vindicated in the courts.¹¹⁰ This state of the law shows that, as a matter of legal theory and practice, the question of possessing a right (as part of substantive law) and the question of how and in

¹⁰⁷ On this question see W. Edmundson, ‘Do Animals Need Rights?’ (2014) 22(2) *Journal of Political Philosophy*, pp. 1–16.

¹⁰⁸ Art. 6.1(a) of Council Directive 1999/74/EC laying down Minimum Standards for the Protection of Laying Hens [1999] OJ L 203/53. Art. 6 (‘Provisions applicable to rearing in enriched cages’) has been compulsory since 1 Jan. 2012. See also European Commission, Reasoned Opinion, IP/12/629 of 21 June 2012, addressed to 10 Member States that failed to correctly implement Directive 1999/74/EC.

¹⁰⁹ C.D. Stone, ‘Should Trees Have Standing? Toward Legal Rights for Natural Objects’ (1972) 45(2) *Southern California Law Review*, pp. 450–501; reprinted in A. Gear (ed.), ‘Should Trees Have Standing?’ (2012) 3 (special issue) *40 Years on, Journal of Human Rights and the Environment*, pp. 4–55.

¹¹⁰ It is only since 2008 that French citizens have been able to complain directly about fundamental rights violations before the Conseil Constitutionnel (*question prioritaire de constitutionnalité*, QPC). In the UK, it is only since 1998 that citizens have been able to invoke fundamental rights as endorsed in the Human Rights Act 1998. However, UK courts are not allowed to disregard, amend, or annul a law that violates those rights; they may only issue a statement of incompatibility. In Switzerland, social rights (referred to as ‘social objectives’) under Art. 41(4) of the Federal Constitution are explicitly not justiciable in court.

which forums to enforce it (procedural law) are two separate issues. The usefulness of a right can lie elsewhere than in its judicial enforceability.

The second main function of rights lies in their emancipatory potential. Rights empower people, if not judicially then at least politically. As Cass Sunstein put it: 'It is surely plausible that the recognition of rights often converts people from victims into citizens. Certainly a major point of rights guarantee is to do precisely this'.¹¹¹ Along this line, William Edmundson recalls the function of rights as a 'lightning rod for reaction and resistance'.¹¹²

The rebuttal is that animals cannot fight for, use, or vindicate their rights themselves. However, they can be 'empowered' in the sense that their physical position (against being killed, for example) is strengthened; and the idea of their rights can be employed by others in the fight on their behalf. Here the 'speaking for the other' problem arises, as Catharine MacKinnon has pointed out. What we call animal law is human law: 'the law of humans on or for or about animals. Who has asked the animals? (...) How to avoid reducing animal rights to the rights of some people to speak for animals against the rights of other people to speak for the same animals needs further thought'.¹¹³ Again, it would help to scrutinize the theory and practice of (intra-human) paternalism in order to identify where exactly and in what respects speaking for animals differs from speaking for children and similar beings.

Thirdly, cloaking the question of our dealings with animals, and of the ensuing conflicts between human interests and animal interests, in the language of rights channels the discourse, and this is apt to impact on behaviour. The rights discourse and the burden of justification going with it 'socializes' the relevant actors. This has been empirically shown with regard to human rights, as an effect of endorsing and ratifying international human rights conventions.¹¹⁴ It is plausible that similar effects will be produced by the acceptance of a rights framework for animals. It is possible that such a discourse will, in the long run, render the involved actors more considerate towards animals.

Fourthly and importantly, the advantage of having rights as opposed to being merely beneficiaries of standards of conduct is an *increased and stronger protection*. The recognition of rights carries with it a powerful message of prima facie inviolability (which the metaphors of 'trump',¹¹⁵ 'stop-sign', 'shield' or 'armour',¹¹⁶ 'protective fences',¹¹⁷ and the like express). The protection is not absolute, but it is

¹¹¹ C.R. Sunstein, 'Rights and Their Critics' (1995) 70(4) *Notre Dame Law Review*, pp. 727–57, at 754.

¹¹² Edmundson, n. 107 above, p. 15.

¹¹³ MacKinnon, n. 12 above, p. 270.

¹¹⁴ B.A. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge University Press, 2009); R. Goodman & D. Jinks, *Socializing States: Promoting Human Rights through International Law* (Oxford University Press, 2013).

¹¹⁵ R. Dworkin, 'Rights as Trumps', in Waldron, n. 82 above, pp. 153–67.

¹¹⁶ F. Schauer, 'A Comment on the Structure of Rights' (1993) 27(2) *Georgia Law Review*, pp. 415–34, at 429.

¹¹⁷ B.E. Rollin, 'The Legal and Moral Bases of Animal Rights', in H.B. Miller & W.H. Williams (eds), *Ethics and Animals* (Humana Press, 1983), pp. 103–18, at 106.

stronger than it would be without rights. Rights are not absolutes because they can be interfered with, curtailed or restricted up to a certain point. In human rights law, the identification of the point where an interference amounts to an inadmissible violation of a right involves a balancing act. However, this rights-related balancing differs from the utilitarian calculus directed at identifying the ‘greatest happiness of the greatest number’ in Jeremy Bentham’s equation.¹¹⁸ As Jeremy Waldron points out: ‘There are differences between the trade-offs involved in utilitarian theory and the sorts of trade-offs that might be adopted as a solution to conflicts of rights’.¹¹⁹

From this perspective, the difference between having a right and being the object of welfare standards looks not so much like a difference in kind but more a matter of degree. The heightened protection offered by a right lies in the fact that a curtailment or restriction of a right must *be specifically justified*. Acknowledging a right places a burden of explanation and justification on the actor who wants to restrict the right (in the case of human rights this is notably the state). Only if the justification fails is the right violated.¹²⁰

This means that rights confer a stronger and more sustainable protection on individuals and their interests than the protection offered by ‘objective’ laws. Rights confer a legal position which is elevated above the ordinary balancing of conflicting goods. In a legal system that protects animals as the beneficiaries of protective rules, their welfare is but one interest among others. Balancing the animals’ interests against human interests typically (one might even say inevitably) ends up prioritizing the human interests, even those of a trivial nature. Arguably, this type of balancing (as prescribed in animal protection laws as they stand) is structurally biased against the animals. In contrast, animal rights would allow a fair balancing in which the proper value of fundamental animal interests (such as the interest to live) could be integrated. Animal rights would therefore preclude the current routine sacrifice of fundamental animal interests in favour of trite human interests.¹²¹

Fifthly, the utility value of rights, for humans and animals alike, lies in their dynamic and overshooting content. Neither the substance nor the addressees of rights are entirely determined, but they may change. As Joseph Raz writes, ‘one may know of the existence of a right ... without knowing who is bound by duties based on it or what precisely are those duties’.¹²² This means that the protection created through rights may become stronger (or weaker) with the circumstances.

In the field of human rights, the evolution of prisoners’ rights may serve as an example. Even as late as 1993, the ECtHR denied that a prisoner’s right to be treated humanely (Article 3 ECHR) was violated by his detention in a cell of

¹¹⁸ Bentham posited as a ‘fundamental axiom, it is the greatest happiness of the greatest number that is the measure of right and wrong’: J. Bentham, *A Fragment on Government, or, A Comment on the Commentaries*, edited with an introduction by M.C. Montague (Clarendon Press, 1891; orig. 1776), p. 93.

¹¹⁹ Waldron, n. 86 above, pp. 210–11.

¹²⁰ Here I follow the terminology of the ECtHR with regard to human rights: interference/restriction – justification – violation.

¹²¹ S. Stucki, *Grundrechte für Tiere*, Dissertation, University of Basel (Switzerland), 2015, s 5.2.

¹²² Raz, n. 83 above, p. 184.

6 square metres (m²).¹²³ This was in spite of the determination, in 1992, by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment of 7 m² per prisoner as a ‘rough guideline’ for a detention cell.¹²⁴ In a 2002 judgment, the ECtHR found that a prison cell in Russia, measuring between 17 m² (according to the applicant) and 20.8 m² (according to the government), designed for eight inmates but normally occupied by 18 to 24 inmates, was ‘severely overcrowded’, and that detention in such conditions amounted to degrading treatment under Article 3 ECHR.¹²⁵ The outreach and substance of that specific right not to be treated in an inhumane or degrading way has changed and will probably continue to change as a result of improved building, housing and sanitary conditions, and as a result of increased sensibilities.

In a 1999 judgment involving police brutality, the ECtHR explicitly *raised* the human rights standards. It considered that ‘certain acts which were classified in the past [only] as “inhuman and degrading treatment” as opposed to “torture” could be classified differently in future’. The Court took the view that ‘the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies’.¹²⁶

It is exactly that ‘flexible and open-ended’,¹²⁷ this ‘dynamic and generative’¹²⁸ quality of rights which has been recognized as crucial by ecologists. Christopher Stone explained this in the following way:

Introducing the notion of something having a ‘right’ (simply speaking that way), brings into the legal system a flexibility and open-endedness that no series of specifically stated legal rules like R1, R2, R3, ... can capture. Part of the reason is that ‘right’ (and other so-called ‘legal terms’ ...) have meaning – vague but forceful – in the ordinary language, and the force of these meanings, inevitably infused with our thought, becomes part of the context against which the ‘legal language’ of our contemporary ‘legal rules’ is interpreted.¹²⁹

Anthony D’Amato and Sudhir Chopra follow this up: ‘[H]aving rights is a generalized legal competence, whereas being the beneficiary of the obligations of others breaks down into a series of specialized, specific rules’. Also, ‘the idea of having “rights”

¹²³ European Commission of Human Rights, *Delazarus v. United Kingdom*, appl. no. 17525/90, Decision of 16 Feb. 1993: The detention for 14 weeks in a single cell measuring 3 by 2 metres (i.e. 6 m²) ‘with a high ceiling’ for 23 hours a day with 2 30-minute exercise breaks in an individual pen, the size of a tennis court did not constitute a violation of Art. 3 ECHR. See also ECtHR, *Guzzardi v. Italy*, appl. no. 7367/76, Judgment of 6 Nov. 1980 (compulsory residence for 3 years at Cala Reale on the island of Asinara was not a violation of Art. 3).

¹²⁴ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CTP), ‘2nd General Report on the CPT’s Activities covering the Period 1 Jan. to 31 Dec. 1991’, CPT/Inf (92) 3, 13 Apr. 1992, para. 43, available at: <http://www.cpt.coe.int/en/annual/rep-02.htm>.

¹²⁵ ECtHR, *Kalashnikov v. Russia*, appl. no. 47095/99, 15 July 2002.

¹²⁶ ECtHR, *Selmouni v. France*, appl. no. 25803/94, 28 July 1999, para. 101.

¹²⁷ A. D’Amato & S.K. Chopra, ‘Whales: Their Emerging Right to Life’ (1991) 85(1) *American Journal of International Law*, pp. 21–62, at 51.

¹²⁸ Edmundson, n. 107 above, p. 13.

¹²⁹ Stone, n. 109 above, p. 488.

includes a notion of moral rights that can inform existing law or even push it in a certain direction'.¹³⁰ The authors postulate an 'emerging' right to life of whales which is, at the same time, part and parcel of the international customary law on whales and its stimulus for further evolution.

Let us revert to our initial question of the benefits of giving caged animals rights as opposed to prescribing the size of their cages. If we acknowledge a laying hen's right of free movement, then the number of square centimetres of her cage is not fixed. Depending on social attitudes and on new zoological insights, the obligation flowing from that right could change, and could at some point in time require a bigger cage than 750 cm².

For these reasons, because rights trigger an obligation to justify their curtailment, because of the weight afforded to them in a balancing exercise, because of their tendency to overshoot, and the indeterminacy of the obligations flowing from rights, legal rights offer a stronger protection than the concrete and selective obligations to accord animals specific treatment (cage size, transport hours, and so on) which we find in the animal protection and welfare law as it stands. Again, a comparative look at the human rights discourse may help to better understand these dynamics.

In addition, it is worth considering whether animals are even *more* in need of rights than humans. If we adopt the view that subjective rights (and, more generally, all legal norms, including purely objective legal standards of protection) are only a 'fallback' or a 'background guarantee' in case social and moral responsibility fails ('when justice replaces affection'),¹³¹ then it must be conceded that animals need this background guarantee more than humans. As William Edmundson writes:

This need for fallback rights is far more acute in the case of animals. (...) Most humans are knit with other humans into an extensible fabric of affections that can in some cases (and maybe in the ideal case) substitute for rights. Most animals are not. For most of them, with respect to most of us, it is not enough to say that rights might serve them as a fallback. There is nowhere from which to fall.¹³²

Finally, the question needs to be addressed whether animal rights would need to be endorsed at the global level, in parallel with *international* human rights, or should solely be enshrined in domestic law. I submit that the principled arguments which have led to the codification of human rights in international catalogues are equally relevant for potential animal rights.

Firstly, from the perspective of fairness and justice, such rights (once accepted as a matter of principle) are incumbent on animals independently of their place of birth and abode. Secondly, international rights would serve as a benchmark for domestic law. International instruments would potentially allow for some monitoring of, or at least facilitate the formulation of criticism against domestic practices which do not satisfy the international standard. Thirdly, the endorsement of animal rights in

¹³⁰ D'Amato & Chopra, n. 127 above, p. 51.

¹³¹ J. Waldron, 'When Justice Replaces Affection: The Need for Rights' (1988) 11(3) *Harvard Journal of Law and Public Policy*, pp. 625–47.

¹³² Edmundson, n. 107 above, p. 14.

only one state would probably lead to the outsourcing of the relevant industries. This risk is already present when one state has higher protective standards than others, and it could be exacerbated when one but not all states embrace a rights-based approach to animal protection. In order to prevent a competitive disadvantage for industries subject to higher domestic standards, and in order to forestall a race to the bottom, harmonized universal standards and a level playing field must be sought.¹³³ Such harmonization is also desirable to accommodate consumers' concerns about the importation of animal products from low-standard countries, and would obviate import prohibitions based on such public morality concerns.

6. CONCLUSIONS

Looking back at the people's shows described in the introduction to this article demonstrates that 75 years ago, the moral, legal, and social gap between 'higher' and 'lower' living beings did not run along the species line, but divided Europeans from 'primitive' humans. This highlights the contingent character of this dividing line.

Looking back also illustrates how dynamically our conception of human dignity, liberty, and equality has progressed over recent decades. A 'people's show' of the type described here would be unthinkable in Europe; it would be prohibited by law or declared contrary to human dignity by the courts.¹³⁴ This suggests that a parallel dynamism in the field of animal law, and even animal rights, is conceivable.

Historically, legal protection and legal rights were not granted voluntarily to underprivileged humans by the elite. These benefits were instead won by the disenfranchised and the subjugated themselves, building on the ideas developed by philosophers, constitutional theorists, and lawyers, in opposition to the establishment and the dominant culture. Animals cannot themselves formulate legal arguments or fight for their rights – but this is no different for children and most oppressed groups of people, who as a rule require professional advocacy and assistance.

So as not to reinvent the wheel, the animal law discussion should continue to take up arguments, examine legal institutions including human rights, and transfer them – with the necessary modifications – to the field of animal law. What should also be considered are the sociological and economic constraints, the success factors, and the obstacles for any legal reform project which seeks to protect vulnerable and powerless groups in society.¹³⁵ The risks, and also the opportunities, of animal welfare legislation can be gauged more precisely that way.

¹³³ R. Baldwin, M. Cave & M. Lodge, *Understanding Regulation: Theory, Strategy, and Practice*, 2nd edn (Oxford University Press, 2012), pp. 356–69. From the primary literature see D. Vogel & R.A. Kagan (eds), *Dynamics of Regulatory Change: How Globalization Affects National Regulatory Policies* (University of California Press, 2004); D. Murphy, *The Structure of Regulatory Competition: Corporations and Public Policies in a Global Economy* (Oxford University Press, 2004).

¹³⁴ It would probably be unnecessary to even police such an entertainment, because there would be little commercial incentive to set it up; entrepreneurs would work on the basis of there being no interest in such a form of entertainment because of the availability of broadcast media, not to mention disdain for such a show.

¹³⁵ J.L. Anderson, 'Protection for the Powerless: Political Economy History Lessons for the Animal Welfare Movement' (2011) 4(1) *Stanford Journal of Animal Law & Policy*, pp. 1–63.

It is true that the plight of animals worldwide would already be much improved if only those states which currently lack animal welfare legislation were to introduce such standards (even if only in the form of ‘objective’ rather than rights-generating rules), and if existing laws were properly administered and enforced. The main practical problem is surely the enforcement gap.

Nonetheless, the still speculative legal institution of animal rights deserves serious consideration. A side glance at the evolution of human rights helps in assessing the theoretical, doctrinal, social, political, moral, and practical pros and cons of such an institution. Originally, not only the indigenous groups (some members of which inhabited the Basel zoo), but also those without property, women, children, foreigners, and so on, were not counted as persons in law, did not enjoy freedom, equality and brotherhood, as proclaimed in the French revolution. Since then, the community of rights holders has been expanded step by step. The prevailing views that human rights simply did not apply to these groups of human beings, that they neither deserved nor needed any rights have meanwhile been discarded. With this in mind, against the background of the volatility of the human–animal boundary, it is easier to accept that non-human living beings in principle could be recognized as persons in law, capable of possessing legal rights. Moreover, the examination of the benefits of rights for the relevant human groups suggests that animals, just like humans, *need* rights because rights grant stronger protection against abuses than purely protective laws.

Undeniably, accepting the possibility and necessity of animal rights in parallel with human rights will lead to further questions which cannot be resolved easily. Which animals can and should have rights: all sentient animals, or only great apes and cetaceans? Which legal rights should be acknowledged: the right to be free from torture, a right to life?

Finally, the slogan ‘Liberté, égalité, animalité’¹³⁶ is a reminder that humans need legal protection not least on account of their animal nature, their physical vulnerability and their ‘nakedness’, which they share with all other animals.¹³⁷ It is also a reminder of the fact that all legal progress needs political if not revolutionary action.¹³⁸ However, such action requires intellectual preparation. Unmasking the, to some extent, ‘imagined’¹³⁹ nature of the human–animal boundary, and thrusting light on the persistence of human–animal comparisons for pernicious and beneficial purposes of the law, might contribute to such intellectual groundwork.

¹³⁶ A similar slogan which inspired me, ‘Animalité, égalité, fraternité’, is quoted in C. Traïni, *La cause animale (1820–1980): Essai de sociologie historique* (Presses Universitaires de France, 2011), p. 103.

¹³⁷ S. Stucki, ‘Sind die Menschenrechte in Zukunft noch Menschen-Rechte?’, *Völkerrechtsblog*, 13 May 2014, available at: <http://voelkerrechtsblog.com/category/saskia-stucki>.

¹³⁸ A. Peters, ‘Animal Law: A Paradigm Change’, in A. Peters, S. Stucki & L. Boscardin (eds), *Animal Law: Reform or Revolution?* (Schulthess, 2015), pp. 15–32.

¹³⁹ Cf. B. Anderson, *Imagined Communities*, 2nd edn (Verso, 1991).