EMPOWERING ANIMALS WITH FUNDAMENTAL RIGHTS – THE VULNERABILITY QUESTION

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ABSTRACT

In the search of applicable methodological tools for analysing the phenomenon of empowering animals with fundamental rights, the question of animals as a vulnerable group has received (undeservedly) little attention. Animal rights is an area where sociological and legal sciences meet, making it an exemplary interdisciplinary research area. It appears that the question of attributing fundamental rights to animals has primarily been studied by legal scholars, who view this as an issue having strong ethical and philosophical component. The main legal theoretical approaches to animal rights – such as the welfarist, abolitionist and middle-position – avoid focusing on the question of vulnerability. This is probably because vulnerability is a sociological and not a legal criterion. What seems missing from today's global discourse on animal rights is an empirical aspect of how the society understands the need for protecting animals. The doctrine of vulnerability may serve as one interdisciplinary tool to analyse the growing attention to animal rights. There are many examples from the history of mankind that demonstrate how some vulnerable human groups have been deprived of basic rights and subsequently have been gradually provided with full recognition of their rights (ethnic and gender minorities, women, people with disabilities). The author is not arguing that there is sufficient theoretical or empirical information to consider animals as a vulnerable group. Nor is there a consensus about what vulnerability means in legal terms. The author wishes to demonstrate that the matter of vulnerability of animals is a research question that needs to be explored in depth, using both sociological and legal methods.

More broadly, this article shows that the current stage of theoretical analysis of the reasons for animal protection inevitably leads to the fundamental rights questions of animals. Conversely to international law, where the 'nuclear option' means the exclusion or exit of someone[1] or something, in the context of animal rights the 'nuclear option' means universal acceptance of the capability of animals to have fundamental rights, which will substantially change the human rights framework as we know it forever. The number of scholars who write about the need for change in theoretical and practical paradigms governing the protection of animals is reaching a critical point, which means that this shift is merely a matter of time. Recognising theoretically that at least some animals have at least some fundamental rights, and then proceeding to this recognition in soft and hard international law is inevitable, if my proposition of a paradigmatic change either on the horizon or already ongoing is correct.

As we will see below, during the short academic "excursion", when exploring diverse replies to the question of whether animals have or should have fundamental rights, these replies all take a position on whether fundamental rights for animals can be justified. The question about justification of human rights is nothing new. Robert Alexy has written that the existence of human rights depends on their justifiability and on nothing else.[2] What is justifiable is correct, according to Alexy. Once we can justify why animals should have fundamental rights, then at the same time we can have an argument of correctness requiring the global community to recognise that animals have fundamental rights. This, of course, will depend on whether fundamental rights for animals are justifiable.

[1] For example, a dissatisfied country exiting an international organisation or dissatisfied member states deciding to "close" down an international court.

[2] Robert Alexy, "The Existence of Human Rights", in: *Archives for Philosophy of Law and Social Philosophy*, supplementary volume 136 (2013), 11.

INTRODUCTION

The study of animal rights is an area where sociology and law meet. On the one hand, the debates around the possibility of recognising animals as a distinct group having certain rights – even fundamental rights – depends on how the society understands the need for such recognition. This is a sociological question, focusing on how social understandings are "translated" into legal norms. One can argue that without social acceptance of the need to recognise animals as having rights, law would not be able to achieve one of its goals – that is to turn social norms into legal norms. On the one hand, lawyers and legal scholars are not certain which approach is most suitable for meeting the heightened social awareness of the need of protecting animals. It appears that the usage and combination of both sociological and legal methods may be an answer to understanding why there is a growing need to speak about protecting animals, and which legal avenues are most suitable to achieve this goal.

Current scholarly debates around animal rights have not produced a consensual approach to some of the fundamental questions concerning this relatively new branch of law and legal research, such as the distinction between animal law and the legal regulation of animal welfare protection. A fundamental question within the discourse about animal rights is whether these rights are protected because humans recognise that animals (or at least some animals) have certain unalienable rights, or in alternative, because the protection of animals is part of protecting the fundamental rights (of humans) for sustainable environment and/or diversity of the habitat. Scholars are also debating whether animals are a vulnerable group and whether there are similarities in the social attitudes within the dynamic evolution of modern society towards the various vulnerable groups and now also towards animals.

There are some theoretical premises which seem to be accepted by a majority of authors. Both the social and legal scholars, the animal welfare activist communities and policy-makers at domestic and global levels seem to agree that animal welfare has become a global concern. There is increasing evidence that the civil society is aware of the need to recognise at the very least that animals deserve protection[3]. This conceptual agreement seems to disappear when the next question is asked – what should be the appropriate response via legal regulation, e.g. global vs regional vs domestic to achieving the goal of the protection of animals? Is it sufficient to rely on social norms, or is legal regulation unavoidable? A sociologist might argue that if the lawyers cannot agree on the ways in which to legally protect animals, then social norms may be sufficient. A lawyer, in turn, might reply that law can respond only when there is social consensus on which animals and to what extent need to be protected. Be as it may, since animals are used globally for various purposes (mainly economic, but also scientific and for providing enjoyment), social and legal norms must also respond globally. Therefore, across cultures there is a need for agreeing upon certain minimum standards of animal protection. The claim that certain standards of protection are needed may be agreed upon, irrespective of the question of whether one believes that animals have rights.

This paper will now briefly outline the main theoretical approaches to animal law and the question whether animals should/could have fundamental rights. The author will also add to each main approach presented a reflection on whether the idea of vulnerability of animals as a distinct group might fit into the respective argumentation. The question of animal protection and animal rights involves ethical, economical, philosophical, sociological and legal components.

The author will especially explore the applicability of the concept of vulnerability in understanding why the question of

[3] Several powerful global organisations have emerged with the goal or promoting world-wide understanding of the need to protect animals – see the World Society for the Protection of Animals (WSPA), the Animal Welfare Movement, but also the EU platform on animal welfare. See also scholarly discussion about the role of the civil society in fostering the understanding of the need to protect animals - International Handbook of Animal Abuse and Cruelty: Theory, Research, and Application (New Directions in the Human-Animal Bond), edited by Frank A. Ascione, Purdue University Press 2010.

animal rights is increasingly in the agenda of political and social debates, leading to the search of an appropriate legal response. Yoriko Otomo from the University of London has studied how emerging patters of economic interdependence have changed representations of women and animals[4]. It appears that the approach of viewing animals as a vulnerable group is not entirely new, although the majority of scholars do not explore this theoretical avenue. Even if, at the outset, the comparison of animals to a vulnerable group may be rejected as fundamentally unsound, at a closer look this approach deserves attention. It will be important to analyse the pros and cons of the concept of vulnerability and try to come closer to an understanding of whether this concept is an applicable instrument to the gradual recognition of the fundamental rights of animals. If there is ever to be a consensus among legal scholars, interest groups and global policy-makers that the concept of vulnerability is a theoretical pillar for developing animal rights law, this will inevitably lead to far-reaching consequences both in the legal protection of animals and in how the society understands animal rights. Martha Fineman, one of the globally known proponents of the vulnerability doctrine in human rights law, has written that acceptance of a vulnerability approach towards some specific legal issue is likely to lead to a paradigmatic change in the way in which the society addresses existing material and social inequalities[5]. Under the fundamental rights of animals, the author only has a limited number of fundamental rights in mind, which are recognised via various international instruments for humans – such as the right to food and water; the right not to be tortured; the right to be protected from disease and pain; the right to express normal behaviour; and the right not to be subject to fear and distress.

THEORIES

There are three main theoretical approaches, which address the question of why animals deserve legal protection.

First, there is the **"welfarist" position**, which argues that animals are protected not because they have rights, but because of the need to avoid unnecessary suffering[6]. Within this approach, the question of whether animals have rights has been of marginal interest, dominantly as a matter of theoretical or philosophical abstraction. Animal welfare emerged as a scientific concept, based on the presumptions that humans are bound by certain moral restraints when dealing with animals. The ethical component has not disappeared with the entry of the suggestion that animals have rights, but rather it has transformed into strengthening animal protection and adding a global aspiration, at least from the perspective of animal protection activist groups. According to this theory, animals should not be subject to suffering, but at the same time they have no right to life within the meaning as humans have the absolute right to life. The welfarism theory does not operate with the idea that animals have rights, but is based on the unchallenged idea that animals are property, albeit a special kind of property. The question of whether animals are to be viewed as a distinct vulnerable group seems to not have any purpose within this approach, since the idea of granting animals fundamental rights is excluded. Animals need to be protected because we as humans have moral obligations – therefore, this is predominantly a sociological question.

Second, in contrast to welfarism, the **"abolitionist" theory** argues that animals should be given certain rights, whereas the first right to be given is the absolute right not to be property. Although first introduced already in 1983 in the Western legal

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[4] Otomo, Yoriko and Mussawir , Edward, eds. (2012) *Law and the Question of the Animal: A Critical Jurisprudence.* Abingdon; New York: Routledge. (Law, Justice and Ecology)

[5] Fineman uses the 'paradigm' language as follows, "A vulnerability approach accomplishes several other important political objectives that illuminate both why a post-identity paradigm is necessary and how powerful it can be in addressing existing material and social inequalities" - Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition,* 2o Yale J.L. and Feminism 1, 2008 – 2009, at 17

[6] Robert Garner, A Defense of a Broad Animal Protectionism, in: Gary Francione and Robert Garner, The Animal Rights Debate: Abolition or Regulation? New York 2013, 129

discourse by Tom Regan, the idea of animals having rights has mainly stayed as a theoretical construct without practical "translation" into binding legal obligations. The term "abolitionism" in this context refers mainly to the need to abolish the exploitation of animals. This theoretical position seems radical (stigmatised by a situation of a monkey escaping from the zoo and shouting "freedom!"), which is difficult to realise in the modern economy. The scope of the abolitionist idea depends on the content of rights that one is ready to ascribe to animals, as well as criteria of such ascription. The "abolitionist" position argues that animals shall not only be treated humanely, but they should also be accorded rights or at least a few. This position has been advocated by Francione since the 1990s, and it leads to a logical conclusion that any modern commercial handling of animals needs to be abolished[7]. The question of animals as a distinct vulnerable group becomes irrelevant as well, but for an entirely different reason than with the first theoretical approach. Since the abolitionist position is already based on the recognition that animals have some fundamental rights, the concept of a vulnerable group is not needed to "make the argument".

Third, there is also a **"middle position"**, which argues that "animals are not autonomous, self-governing agents with the power to frame, revise, and pursue their own conceptions of the good and so do not have a fundamental interest in liberty. As such, animals have compelling rights that impose strict limitations on what we may permissibly do to them in a range of contexts. However, animals have no general right never to be used, owned, or exploited by human beings.[8]" Again, it seems that the discussion on whether animals can be viewed as a vulnerable group, to which in the future may be extended some fundamental rights, does not seem to be a suitable logical consequence of this line of thought.

However, a pattern still emerges from these considerations, indicating that there is a need for some fundamental change in the way in which human society thinks about animals in reference to their legal rights and status[9]. It seems, however, that the presumption of this call for a fundamental change may not yet be supported by empirical evidence. If lawyers are arguing that there is a need for a change, it does not necessarily mean that they have realised a social need for this change.

A philosophical aspect of this debate is whether the extension of a right to a right-holder is conditional upon this right-holder being aware that he/she/it holds the right? An affirmative answer would run contrary to the contemporary human rights discourse and main human rights protection instruments. If then a person can have rights without being aware of them, it means that the entitlement to some rights (at least some absolute fundamental rights) is not dependent on the will of the entitled person to actively enjoy these rights. Vulnerable groups like children, the elderly, and mentally disabled persons are the main groups that can be given as an illustration to this line of thinking. The following doctrine from the previous is that the divide between someone enjoying a right vis-à-vis the obligation of others to protect and respect this right does not depend on the conscious understanding on behalf of the right-holder that he/she/it has the right. Obligated persons would still have the obligation to respect and protect the rights of the vulnerable groups. From here, we are very close to describing the theoretical basis for recognising animal rights – animals as a vulnerable group have certain rights without the element of being aware of those rights, whereas there are obligations of third parties to recognise and protect these rights. In the view of the author of this article, this philosophical aspect – there is no morally valid argument to condition that a human rights holder should be aware of him/her holding these rights – should be one of the cornerstones for analysing the future of animal rights law.

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[7] Gary Francione, Animals, Property, and the Law, Philadelphia 1995

[8] Alasdair Cochrane, Animal Rights without Liberation: Applied Ethics and Human Obligations; New York 2012, p 210

[9] There is an emerging trend in literature to question whether the animal rights movement and animal protection doctrines are another attempt by Western countries to impose their own views and ethical understandings upon the rest of the world. For example, the standards advocated by the animal protectionists run counter to the practice of some indigenous people of whale hunting, or against the Muslim practice of animal slaughter. Therefore, it cannot be denied that certain cultural traditions may hinder the overall acceptance of the idea that animal have rights and deserve protection at least regarding some absolute rights.

Neither the **practice of international (regional) courts**, nor the international legal instruments view animals as a distinct vulnerable group, which may be entitled to fundamental rights protection. It appears that the issue is perhaps not so much that this concept has been rejected as a result of some comprehensive debate, but because there is a lack of consensual approaches to the animal rights protection as such, so the variety of conceptual approaches is not an issue.

The shift in the understanding of the human-animal divide may be far-reaching. It is argued that animal welfare legislation (including at the EU level, for example, the EU regime on the protection of animals in laboratory conditions – Directive 2010/63/EU) contains a fundamental bias for favouring the interests of humans over the interests of animals. This bias influences law- and policy-making, and there is a clear economic component. However, should it be recognised that animals have certain rights, then it becomes difficult to argue for the preponderance of human interests and rights over animal interests and rights. At the same time, there seems to be some evidence that characteristics which for a long time have been viewed as characteristic to humans only may also be attributable to some animals (not all at the same time) – for example, the ability to make tools, learn, express themselves, show compassion. Modern science argues that there is no clear line to divide humans from animals and the relationship is the one of a continuum. Should this be the case, then there is no ground to argue that certain social phenomena, like moral values, social and legal norms and rights can only be applied to the human society.

Although European countries have established regulations both at domestic and regional levels (through the EU and the Council of Europe) for certain norms to protect animals[10], there appears no consensual approach as to the foundations of the legislation. Nor have the regional courts any significant case law, which would address the fundamental question of why animals are protected[11]. In an article dealing with the question about the paradigmatic changes in animal law, Anne Peters has reported that "the protection of endangered species, habitat protection, and biological diversity, have been addressed on a global level, but not the welfare of animals, let alone their rights"[12].

The Inter-American Court has perhaps used the concept of vulnerability more frequently than the European Court of Human Rights. When analysing the Inter-American Court's approach to the doctrine of vulnerability, Ludovic Hennebel has shown that the Court systematically deduces a special need for protection tailored according to the vulnerabilities of certain groups, which are particularly targeted, and then protects their "best interests"[13]. The best interests approach has certain similarities to the capabilities approach developed by Martha Nussbaum and described later in this article. It is sufficient to note at this point that perhaps the approach to analyse animal rights from the perspective of their own capabilities and interests is universal and not limited to specific academic circles.

Be as it may, it can be concluded that the current legislative efforts globally and regionally are unable to reach the fundamental rights approach to animals without first arriving at a scholarly consensus that animals have fundamental rights in

[10] For example, there are norms to regulate the keeping of farmed animals, the transport and slaughter of animals and the keeping of pets – see the Convention for the Protection of Animals kept for Farming Purposes, Additional Protocol for the Protection of Animals during International Transportation (ETS No. 193); Convention for the Protection of Animals for Slaughter, Convention for the Protection of Pet Animals

[11] The European Court of Human Rights so far has no cases dealing with the rights of animals. There are cases which have dealt with the right to privacy under ECHR article 8 in connection with affection to an animal. The judgment in *Cha-are Shalom Ve Tsedek v. France,* no 27417/95, judgment of 27 June 2000, concerned the slaughter of ritual animals. No issues of animal rights emerged in this case.

[12] Anne Peters, Introduction: Animal Law- A Paradigm Change, *Animal Law: Reform or Revolution?,* Anne Peters, Saskia Stucki, Livia Boscardin (editors), Schulthess 2015, p 18

[13] Ludovic Hennebel, The Inter-American Court of Human Rights: the Ambassador of Universalism, *Quebec Journal of International Law (Special Edition) 2011,* p 64

need of protection. A topic which will remain unexplored in this article is whether a full or nearly consensual position of some relevant stakeholders, such as the business sector processing animal products, is needed to bring about a fundamental change in recognising animal fundamental rights.

The question about the need of a fundamental shift in the legal protection of animals

It can be argued that ongoing reforms of animal legislation have not improved the situation of animals, but on the contrary, have continuously reinforced the property status of animals and thereby increased their exploitation and suffering. The recent welfare reforms are, thus, viewed as counterproductive because their goal is simply to quiet the moral discomfort of humans when confronted with the slaughter and exploitation of animals[14]. It is argued that isolated welfare norms remain incidental in international legal regimes, which formulate as their primary objective the regulation of harvesting and trading animals, their conservation and protection of global biodiversity. This has led some authors to write about the non-existence of a transnational animal protection regime (C. Otter[15]), a lack of a coherent legal regime (S. White[16]), and a lack of consistent attention from the international community (Bowman[17]). On the other hand, there seems to be an increased interest from lawmakers to pay attention to animal welfare.

Anne Peters is a proponent of the view that animal law and accompanying legal scholarship is capable and in need of a revolution comparable to a transition to a new paradigm[18]. This is because we are becoming more and more aware[19] that something has gone fundamentally wrong in how we have so far understood the matter of the protection of animals.

One can argue that the failure to give a greater emphasis to the human rights approach regarding certain socially pressing issues is indicative of the uncertainty and debate about the proper place and approach of human rights law towards the respective issue[20]. This does not mean that there is a denial of the need to recognise such right, but simply that the "birth process" of universal recognition of some right is difficult and may mean a paradigmatic change.

It seems that the current human rights theory is challenging the traditional understandings of the right to privacy. Within these debates, certain new doctrinal approaches are being proposed and argued, which have the potential of assuming an overarching effect on how to understand the notion of privacy, not only limited to humans as the primary bearers of human rights entitlements, but also reaching out to other species.

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[14] Gary Francione and Anna Charlton, Animal Law: A Proposal for a New Direction, *Animal Law: Reform or Revolution?,* Anne Peters, Saskia Stucki, Livia Boscardin (editors), Schulthess 2015, p 18

[15] C. Otter, S. O'Sullivan and S. Ross, 'Laying the Foundations for an International Animal Protection Regime' (2012) 2 (1) *Journal of Animal Ethics,* pp 53 – 72

[16] S. White, 'Into the Void: International Law and the Protection of Animal Welfare' (2013) 4 (4) *Global Policy*, pp 391 - 398

[17] M. Bowman, P. Davies and C. Redgwell, *Lyster's International Wildlife Law,* 2nd edition (Cambridge University Press 2011)

[18] A doctrinal question is also, whether by extending (some) rights to (some) animals, the overall level of fundamental rights protection globally would weaken. This is the observation that if all rights are fundamental rights, what is their meaning?

[19] Anne Peters, Reform or Revolution, pp 25 – 26

[20] Dinah Shelton, *What Happened in Rio to Human Rights?,* Yearbook of International Environmental Law (1992), 82

One of the relatively new doctrines addressing the issue of privacy is **the theory of contextual integrity**, which is based on the idea of the 'reasonable expectation of privacy'[21] and articulates an 'alternative account of privacy'[22]. The contextual integrity theory is developed by the American scholar Hellen Nissenbaum and has as one of its fundamental building-blocks the idea that the understanding of privacy is based on ethical conceptions that evolve over the course of time. In other words, what may have been seen as falling outside of the notion of privacy, may no longer be so due to the development of the modern society. Privacy is a different category than just "being left alone". In the view of the author of this article, as soon as someone uses "human rights privacy language" in the context of an animal, for example, saying "give my cat some privacy" instead of saying "leave my cat alone", there is an implication that this cat is viewed by the owner as having human rights.

The author of this paper finds, based on the considerations outlined above, that **the aspect of animals as a vulnerable group** within the debate about the need to grant animals certain fundamental rights so far has not received enough attention. Although the vulnerable group argument does not seem decisive in any of the theoretical approaches, it may well complement the aspect where it is asked whether there are good reasons not to grant (some) animals (some) fundamental rights. This seems to be a situation, where sociological methods may provide an answer. If there is empirical evidence of social dynamics in recognising that some animals should be given fundamental rights, it may be difficult for the legal and political establishment to ignore this aspect. However, this question has not been studied comprehensively.

The main research question, as outlined above, is whether there is some similarity in the dynamics of social attitudes and the gradual legal recognition of the rights of vulnerable groups in the past with animal rights. This is not an entirely novel question, since in the academic debate some authors have pointed to the similarities of the current attitudes towards animals with the former attitudes towards some vulnerable groups.

Anne Peters has shown that as late as from 1879-1935 the Zoo in Basel organised so-called "peoples' shows", where those displayed (in captivity in cells) were non-Europeans in traditional clothing, who performed folkloristic dances and handcrafts.[23] She argues that these non-European people were not given any rights because they were viewed as morally inferior and incapable of taking care of themselves. Similar social attitudes can be seen from the discrimination of women and mentally ill individuals across the development of history. Current human rights practice is also addressing the matter of the vulnerability of prisoners and the question to what extent rights can be limited. Is there some similarity between the historical attitudes towards the vulnerable groups and the way in which contemporary society views animals from the perspective of whether they should be given some "fundamental rights"? It can be argued that implied speciesism is comparable to racism, or at least to discrimination with no just cause[24].

Comparison of social attitudes and expressions used towards vulnerable groups is a methodological challenge. When the hypothesis can be verified that animals are understood in the contemporary society as a vulnerable group, comparable

[21] R. Bellanova, 'Waiting for the barbarians or shaping new societies? A review of Helen Nissenbaum's "Privacy In Context", Stanford University Press, 2010)', (2011) 16 *Information Polity: an international journal on the development, adoption, use and effects of information technology 391, 393;* and T. Wong, 'Helen Nissenbaum's Privacy in Context: Technology, Policy, and the Integrity of Social Life (2010)' (2011) 12 *German Law Journal* 957, 965

[22] H. Nissenbaum, 'Privacy as Contextual Integrity", (2004) 79 *Washington Law Review* 101, 124

[23] A. Peters, 'Introduction: Animal Law – A Paradigm Change' see in literature review: A. Peters, S. Stucki, L. Boscardin, editors, see in literature overview, p 17 – 18

[24] A radical statement belongs to Alejandro Lorite Escorihuela, who compares the international treatment of animals to "global slaughterhouse".

to the way that human society in the past has defined certain vulnerable groups, then the logical development is that the overall recognition of animals having rights is not a matter of if, but matter of when. However, this conclusion only holds firm when one takes the position that there is no insurmountable watershed between humans and non-humans, which would make it impossible to even speak of extending human or fundamental rights to animals. This might even preclude extending to animals the handful of fundamental rights mentioned beforehand[25].

In order to verify the proposition of whether animals can be viewed as a distinct group, which may be subject to the benefit of progressive interpretation of human rights development, we have to look at whether there is any non-legal evidence regarding the possible dividing line between humans and animals. This search of the criteria allows to answer the question of whether it is a mission impossible to apply the same elements of legal dynamics to animals as towards other vulnerable social groups in the past. There appear two main lines of argumentation. One is arguing that humans are a unique group, sealed off from other living beings. The other is arguing that the dividing line between humans and animals is becoming more and more unclear, as the characteristics which for a long time were considered to be applicable only to humans also apply to some animals[26]. Based on the current scientific evidence, the author concludes that the argument about the possible insurmountable dividing line between humans and animals is primarily moral or legal and not biological.

Doctrines focusing primarily on the aspect of fundamental rights without reference to vulnerability

Before exploring the question of vulnerability further, the author asks whether there are currently specific doctrines, within the main theoretical approaches outlined above, that primarily focus on the question of extending or denying fundamental rights to animals without using the concept of vulnerability. Are there doctrines which *per se* exclude the possibility of animals ever being granted some fundamental rights, and if so, how do these doctrines relate to the concept of vulnerability? And then, if there are doctrines which consider the possibility of granting animals some fundamental rights, even theoretically, does it mean that the human rights language[27] used indicates similar dynamics to those that have occurred when other vulnerable groups have been gradually granted the full spectrum of fundamental rights?

A related scientific question is: which are the arguments usually applied when denying certain rights to some groups? This question can be researched from the perspective of arguments used to deny or withhold rights from certain groups (minority groups, vulnerable groups, groups on the basis of some ethical or religious characteristics). Then we can further ask, whether similar arguments are used to deny rights to animals.

The author of this paper wishes to outline some approaches which render even the theoretical possibility of extending to animals some fundamental rights questionable: these are the legal personhood approach and the non-personal subjects approach.

[25] right to food and water; right not to be tortured; right to be protected from disease and pain; right to express normal behaviour; right not to be subject to fear and distress.

[26] New scientific evidence shows that animals can speak, make tools, transfer learned techniques, make tools and show compassion. Some animal communities clearly have a social structure and forms of communication, which may even surpass the communication techniques among humans. See for example Carl Safina, *Beyond Words: What Animals Think and Feel,* Henry Holt 2015. It seems to the author of this paper that even if the limit to which animals can reason and think has not been conclusively proven, at the same time there is sufficient argumentation to show that animals have the features of feeling and reasoning.

[27] Sally Engle Merry, Anthropology and International Law, *Annual Review of Anthropology,* 2006, 99 – 116.

There is emerging literature on the question of whether animals should be granted "**legal personhood**"[28]. There are powerful non-governmental organisations, which claim the recognition of legal personhood of animals as their mission [29]. This aspiration, albeit legally challenging to lawyers and animal rights activists, seems to downplay the stigma of a fundamental right which exists with or without the bearer of this right having legal personhood. The approach of setting a condition for any living being to be granted fundamental rights – that this being also has a full standing before the law – may have its roots in the Enlightenment's understanding of morality being inseparable from legal personhood, but it does not seem to correspond to the contemporary understanding of human rights.

Beaudry concludes that the approach of seeking to grant some animals legal personhood is a dead end, which may succeed occasionally in separate court cases, but is not bound to overcome the theoretical barrier that legal personhood is inseparable from human beings[30].

The question of whether animals are comparable to a vulnerable group seems to not enter the discourse of lawyers and activists fighting for granting animals legal personhood. Rather, this approach seems to be based on the idea of a social contract stretched to encompass all living creatures. Like Christine Korsgaard has written, "We may demand that we not be tortured, injured, hunted, or eaten, not just because of the assault on our autonomous nature, but because of the assault on our animal nature; therefore we should not treat our fellow animals in those ways. Autonomy puts us in a position to make the demand, but it is not the reason for the demand."[31]

Another approach, which, if realised, would mean almost a paradigmatic change in our understanding of fundamental rights, calls for a **new category of non-personal subjects of law**, which would overcome the dead end of the legal personhood concept. The authors of this proposition, Polish legal scholars Tomasz Pietrzykowski and Aleksandra Lis formulate this as follows, "The recognition of animals as non-personal subjects of the law entails making their vital interests legally relevant considerations that must be taken into account in all decisions that could materially impact their well-being. The obvious differences between human beings and non-human animals suggest that the latter should enjoy only one legal right – to have one's individual, subjective interests taken into account whenever they may be seriously affected by decisions or actions of third persons. The concept of non-personal subjecthood avoids the obvious difficulties in attributing animals with the whole bundle of rights (most of which are bluntly inconsistent with the nature of even the most developed non-human animals) implicated by the ordinary concept of personhood in law.[32]"

When considering this proposition, one can ask whether there are fundamental differences between, from one side, the position that animals have only one right, e.g. to have their subjective interests taken into account when affected by decisions of third persons, and from the other side, with the approach there are certain vulnerable groups (young children, mentally disabled persons, old persons with dementia) that primarily have this same interest. Are there other criteria that need to be

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[28] Jonas-Sebastien Beaudry, From Autonomy to Habeas Corpus: Animal Rights Activists Take the Parameters of Legal Personhood to Court,

[29] For example, the US-based organisation the Nonhuman Rights Project (NHRP), which gives as its mission in its webpage, "Our mission is to change the legal status of appropriate nonhuman animals from mere 'things', which lack the capacity to possess any legal rights, to 'persons', who possess such fundamental rights as bodily integrity and bodily liberty" – see the website of NHRP at: www.nonhumanrightsproject.org

[30] Baudry, p 31

[31] Christine Korsgaard, Fellow creatures; Kantian ethics and our duties to animals, *Tanner Lectures on Human Values* 24, 100 – 101.

[32] Aleksandra Lis and Tomasz Pietrzykowski, Animals as Objects of Ritual Slaughter: Polish Law after the Battle over Exceptionless Mandatory Stunning, *Global Journal of Animal Law,* 2/2015, 1 – 13, p 13.

considered to distinguish such vulnerable groups other than their genetic code? If there are not, then we are close to a state where this new legal category, which the authors refer to, has some similarities with the doctrine of a vulnerable group[33].

The author notes that both approaches are legal doctrines and have not used empirical evidence obtained via using sociological methods in their argumentation. Perhaps this would even be difficult to imagine – how can you ask the population such a theoretical question, whether they think that animals should become legal persons, although the replies would be far-reaching. It might make much more sense to empirically study the question of whether the population views animals as a vulnerable group, because the categories used are far more understandable. The author of this article has come across a phenomenon of "human rights" language used towards animal suffering in judicial proceedings, which merits deeper research, but it has to remain for another article outside of the current one. When analysing recent Estonian court cases where animal cruelty was the subject matter, the author has come across many statements of charges where the prosecutor accuses the defendant of animal cruelty, causing the animal *mental* suffering. There is no mention of mental suffering as a qualifying criterion in respective Estonian penal legislation. Whenever someone causes another person mental suffering, consciously or not, this infringes on this person's right not to be tortured or be subject to inhumane treatment. The latter is a fundamental right[34]. Causing an animal mental suffering means infringing on this animal's right not to be subject to torture. It will be a challenge to study the reasons for the choice of words of these prosecutors when writing about the mental suffering causes of animals.

The question of vulnerability of animals in sociological and legal aspects

In order to test the hypothesis that the legal dynamics in the recognition of animals as a vulnerable group, thereby leading to the conversion of some fundamental rights to this vulnerable group, are comparable to the dynamics that have appeared in the past regarding other human vulnerable groups, two questions need to be addressed from the methodological perspective. The first question is whether animals are or should be viewed as having the characteristics of a distinctly vulnerable (non-human) group. The second question is whether there are some similarities in the progressive recognition of the rights of the vulnerable groups in general (which then in turn needs to be applied to any vulnerable group), which can then be compared to the legal discourse around the rights of animals. The first question is mainly sociological and its study requires sociological methods. The second question includes both sociological and legal methods.

Traditionally, vulnerable groups include indigenous peoples, ethnic minorities, refugees, migrant workers, women, children, people with HIV/AIDS, persons with disabilities and older persons. There are various international legal instruments which protect these rights, such as the Convention on the Rights of the Child, or the Convention on all Forms of Discrimination against Women.

It appears, however, that the concept of a vulnerable group within international human rights law has not been the subject of intense scholarly debates[35]. There seems to be some consensus that the concept of vulnerability is linked to the susceptibility of harm. For example, Mary Neal writes, "Vulnerability speaks to our universal capacity for suffering, in two ways. First, I am vulnerable because I depend on the co-operation of others (including, importantly, the State) … Second, I am

[33] Although remaining outside of this article, the author points out that perhaps the non-personal subject of a legal approach can also be a tool for addressing the matter of recognising the fundamental rights of artificial intelligence.

[34] Protected, for example, under the European Convention for the Protection of Human Rights and Fundamental Freedoms, article 3

[35] See, for example, the analysis in: Lourdes Peroni and Alexandra Timmer, Vulnerable groups: The promise on an emerging convent in European Human Rights Convention law, *International Journal of Constitutional Law* (2013) 11, 1056 – 1085. With reference to the jurisprudence of the European Court of Human Rights, the authors argue that the Court has only recently started to use the concept of a vulnerable group, originating from cases involving the Roma minority.

vulnerable because I am penetrable; I am permanently open and exposed to hurts and harms of various kinds.[36]" Regarding the term's origin, it has been pointed out that it originates from the Latin word *vulnus,* meaning the "wound"[37].

Within the discussion of vulnerability, the matter of **suffering** has special importance, since it has been used in the past to argue for the extension of fundamental rights to human vulnerable groups. The goal has been to universally recognise that these groups suffer and then find ways to eliminate the unnecessary suffering.

At first glance, when relying on the matter of suffering, there is striking resemblance with some fundamental arguments which have been used to ask whether animals should be extended fundamental rights. Already in 1781, Jeremy Bentham introduced the idea that there is a moral dimension in the treatment of animals, his famous statement being in reference to animals, "The question is not, can they reason? Nor, Can they talk? but, Can they suffer?"[38] Now, if one is judging on the basis of the ability of animals to suffer, then the questions of whether animals can be viewed as a distinct vulnerable group capable of having some fundamental rights extended to them is already answered in a positive manner. On the other hand, the ability to suffer can also be used in argumentation which does not necessarily lead to the acceptance of the proposition that animals should be accorded fundamental rights.

In the 1960s, the British Farm Animal Welfare Council formulated five freedoms for animals: freedom from hunger and thirst; freedom from discomfort; freedom from injury, pain and disease; freedom to express normal behaviour; freedom from fear and distress. (Comparable to the "four freedoms" formulated by F.D. Roosevelt in 1941: freedoms of speech and expression, freedom of worship, freedom from want, freedom from fear). The key concept of these freedoms is not that animals have rights, but the idea that animals should not be subject to unnecessary suffering. However, these freedoms would be close to rights, if they were accorded to animals. It seems that the watershed between a "freedom" and "right" is not something of substance, but rather linguistic expression of how the one asking the questions replies to the main issue – do animals have rights? It needs to be noted that the freedom to "live" (an animal's right to life) is not mentioned among these freedoms. It can, therefore, be argued that animals are not protected because they have rights, but because humans recognise the duty to protect them because of ethical and perhaps economic reasons. The ethical reason here would be primarily the need to avoid unnecessary suffering. The main research question in this context is somewhat "traditional": are some animals protected in the contemporary society because they have rights, or because humans protect their own rights through the concept of animal welfare? This question can be viewed through concrete legal and social sub-questions. The media sometimes seems to devote more time to cruelty against animals than against humans, accompanied by public compassion exhibition. Is media doing this because it is concerned about the cruelty towards animals as such, or is it a concern about violence as an undesirable social phenomenon in general behind these reports?

Be as it may, it seems that the concept of suffering by itself is not sufficient to guide one to the simple statement, "Animals can suffer, consequently, they need to be extended some fundamental rights with the view of averting the suffering". However, at the same time it is also not sufficient to deny this conclusion.

The concept that animals are to be viewed as a distinct vulnerable group is gaining some recognition and theoretical back-

[36] Mary Neal, Not Gods but Animals: Human Dignity and Vulnerable Subjecthood, *Liverpool Law Review* (2012), 177

[37] Brian Turner, *Vulnerability and Human Rights,* Essays on Human Rights, Penn State University Press 2006.

[38] It may be interesting to note that René Descartes was of the view that animals do not have a mind, and as a mind is necessary to feel pain, animals cannot feel pain.

ing within the discussions of the overall concept of vulnerability. Martha Fineman has defined vulnerability as the possibility of becoming dependent[39]. According to Fineman, a vulnerable subject may have episodic or permanent dependency on others, and the potential for dependency is universal[40]. Fineman believes that the current legal and social structures privilege individuals whose potential for vulnerability is not realised[41]. If applied to animals, it is easy to see that at least some animals are permanently dependent on humans. On the other hand, the majority of species do not depend on humans for their existence, as they live in the wild or in urban settings independently from humans. Arguing that only those animals who are vulnerable because of their dependency on humans for food and shelter are to be accorded fundamental rights might stretch the argument of vulnerability to a dead end. This line of thinking, if applied to Francione's abolitionist position, would mean that at the very moment when animals are freed and they lose their dependence on humans, they consequently are no longer vulnerable and, therefore, lose their fundamental rights. Figuratively speaking, an ape escaping from the zoo with the slogan "Freedom!" would not be able to claim protection under the fundamental rights umbrella, since the ape is not dependent any longer and, consequently, not vulnerable. This leads to the argument that the doctrine of vulnerability, if applied to animals for arguing for their fundamental rights, must include some more basic elements than just material dependency for existence, as the latter can easily change.

Martha Fineman has contrasted the typical association of vulnerability with victimhood, deprivation, dependency or pathology to an understanding of vulnerability that reaches beyond the equal protection model[42]. For Fineman, vulnerability is different from dependency. Both are universal, but vulnerability is a constant, while inevitable dependency is episodic and sporadic.

Building on the vulnerability concept of Martha Fineman, Ani Satz has argued that the theory of animals as vulnerable subjects is based on three premises. First, animal capacities for suffering are morally relevant. Second, she calls it 'speciesist' to privilege human over non-human suffering. Third, since humans and non-humans are universally vulnerable to suffering, their most basic capabilities must be treated equally[43]. Satz has been critical of all approaches advanced by legal scholars which address the dearth of protections for domestic animals[44]. She writes that these proposals "cannot overcome deeply entrenched inequalities in current law that result from legal gerrymandering or the hierarchy problem of human rights or interests being privileged over those of animals".[45] If Satz is right, then the only possibility to overcome these inequalities is to recognise that animals have fundamental rights, as this would eliminate the hierarchy problem. The same fundamental rights cannot have more weight towards a certain category of right-holders in comparison with other categories.

The author finds it established that the proposition that animals can be viewed as a distinct vulnerable group cannot be excluded on the basis of the criteria frequently used for determining the main characteristics of a vulnerable group (ability for suffering, need to be taken care of). The research needs to focus further on establishing whether there may be some common features in the scholarly understanding of the concept of vulnerability which may preclude identifying animals

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[39] Martha Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition,* 20 Yale J.L. and Feminism 1 (2008), at 9 – 10.

[40] Ibid.

[41] Ibid, at 13 - 14

[42] Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition,* 2o Yale J.L. and Feminism 1, 2008 – 2009, at 8 - 9

[43] Ani B. Satz, *Animals as vulnerable subjects: beyond interest-convergence, hierarchy, and property,* Animal Law, vol 16:2, 2009, 1 - 5014

[44] Such as changing the legal status of animals from property to persons, or altering the allowable uses of animals regardless their classification as property.

[45] Satz, 36 - 37

as a vulnerable group[46].

The research question that needs also methodological focus is, thus, whether there is something in the various concepts of vulnerability which may preclude considering animals a distinct vulnerable group.

The author wishes to outline two distinct concepts: the capabilities approach and the idea of the progressive development of fundamental rights.

Martha Nussbaum has introduced **the capabilities approach** to justice for animals, which calls to find out which capabilities humans and animals share. The capabilities approach, according to Nussbaum, is based on the idea of a basic social minimum focusing on human capabilities, of what people are actually able to do and to be – in a way informed by an intuitive idea of a life that is worthy of the dignity of the human being.[47] When applied to animals, this approach focuses on the questions of what animals are capable of doing and which rights need to be protected in order to protect their existence. As such, it seems that the capabilities approach does not exclude the gradual expansion of fundamental rights to animals. Martha Nussbaum herself is an advocate of the approach of giving animals the protection of some fundamental rights. Within this debate, Martha Nussbaum has argued that the most appropriate method to distinguish between species is the so-called "species norm", with a view to which species have opportunities to flourish.

Amartya Sen has developed the capabilities approach from a somewhat different perspective than Martha Nussbaum, avoiding the idea that certain universally accepted principles need to be advanced through any set of capabilities, such as the principle of human dignity. He defines the capabilities approach as enabling certain outcomes achievable through human rights law, which depend on an individual's biology and other limitations.[48]

Satz writes about the Equal Protection of Animals (the EPA approach), which combines vulnerability and capability theory and the principle of equal protection[49]. Satz is, of course, aware of the possible criticism to this paradigmatic change proposition, leading her to conclude that the realisation of the EPA approach creates a presumption against animal use[50], possibly challenging the idea of animals as consumption for food[51]. Satz does not, surprisingly, argue for a differentiated application of the EPA approach, where domestic animals would have the entitlement to equal protection and others not.

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[46] A dilemma may, of course, emerge if we imagine that international law would indeed recognise some animals (great apes, the dolphins, the whales, the pets) as having certain unalienable fundamental rights, such as the right to life. Notwithstanding that it might effectively lead to the abolition of whaling rights, situations may also emerge when the rights of an animal as part of a vulnerable group need to be balanced against other rights. Vulnerability *per se* is a criterion which gives the subject relatively more weight than to another subject with no such pre-condition. What if great apes were extended fundamental rights, such as the right to life, and in a zoo a grown-up suddenly appeared in the cage of the great ape? Today most zoos would not hesitate to shoot the great ape, if there was reason to believe that the person's life may be in danger. But if this great ape had a fundamental right to life, then strictly taken in a balancing exercise this ape's rights would have more weight than the right to life of a grown-up man, who by his own fault appeared in his cage. Would the zookeepers refrain from intervention then?

[47] Martha Nussbaum, W*omen and Development. The Capabilities Approach,* Cambridge University Press 2000, p 5

[48] Amartya Sen, *Capability and Well-Being,* in: *The Quality of Life* 31 (Martha Nussbaum and Amartya Sen, editors, Clarendon Press 1993), at 318

[49] Satz, 40

[50] Ibid

[51] The EPA approach calls for the realisation of rights among all animals to have necessary food and hydration, maintain bodily integrity, be sheltered, exercise and engage in natural behaviours of movement, and experience companionship

A novel aspect in the concept of vulnerability seems to be its gradual expansion, for example, Martha Fineman has written that vulnerability "presents opportunities for innovation and growth, creativity, and fulfilment. It makes us reach to others, form relationships, and build institutions.[52]" Here is yet another similarity with animals and also with the capabilities approach.

We may, perhaps surprisingly, find the endorsement of the capabilities approach also from European "blue-sky" constitutional rights research. When writing about the justification of human rights, Robert Alexy has listed one among the eight justifications an explicative justification, which consists of an analysis of the discursive practice of asserting, asking and arguing[53]. According to Alexy, this explicative argument leads only to freedom and equality as capabilities or possibilities[54]. For the purposes of this article, this opens an approach that once capabilities are instrumental in the construction of fundamental rights, it is not dependent on who the holder of these capabilities is. This then means that the capabilities approach *per se* does not exclude the view that animals are holders of fundamental rights.

Another legal concept is the one of the **progressive development of human rights**[55], which argues that human rights have gradually been expanded to encompass different vulnerable groups, which originally did not receive the benefit of such rights. In the event of a progressive rights development, who are the actors that are best positioned to decide on the scope and nature of a new rights[56]? Are these international courts, national or political institutions or civil society organisations? The answer seems to be that there is a variety of factors. Fundamentally, the context of the progressive development of human rights also touches the issue of whether the global society is currently witnessing the emergence of new human rights, or whether they are just a reflection of the need to highlight some specific aspect of a particular right? If the latter is correct, then we need to say that progressive development in the context of animals is indicative of the process by which certain existing rights are extended beyond the threshold of humans.

Both of these approaches lead to conclude that vulnerable groups have been gradually extended the protection of various fundamental rights. If animals can be viewed as a vulnerable group, then perhaps this logic is also applicable towards them. However, none of these approaches distinctly make the latter argument.

CONCLUSION

When reviewing the article before commencing on the conclusion part, the author noticed something which had remained somewhat hidden when writing. This is the frequency of the term 'paradigm' in various settings. Martha Fineman uses the 'paradigm' language when writing about the vulnerability approach in addressing material and social inequalities. Anne Peters refers to the need for paradigmatic changes at the global level on the question of why animal rights need to be protected, leading to a revolutionary change. The Equal Protection of Animals approach, if realised to the full, inevitably will lead to a presumption against all animal use, which Satz refers to as a paradigmatic change. Helen Nissenbaum's contextual integrity theory, which is applicable to all people and societies, means a paradigmatic change in the way we understand what privacy is. This implies that the notion of privacy is not species-dependent, but context-dependent, opening the door

[52] Martha Fineman, "Elderly" as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility, *The Elder Law Journal* 2012, p 126

[53] Robert Alexy, "The Existence of Human Rights", in: *Archives for Philosophy of Law and Social Philosophy*, supplementary volume 136 (2013), 13 - 18

[54] *Ibid.*

[55] David Kennedy, The International Human Rights Movement: Part of the Problem? *Harvard Human Rights Journal* (2002),

[56] Alan Boyle, Human Rights or Environmental Rights? A Reassessment. *Fordham Environmental Law Review* (2007), 471 - 511

for fundamental rights protection of animals. Tomasz Pietrzykowski and Aleksandra Lis have formulated a non-personal subjects approach, which, if realised, again means a paradigmatic change of our understanding of fundamental rights – that there are hierarchies within the fundamental rights system based on the subject of the rights holder. Therefore, one conclusion from this paradigm 'language' is that the current theoretical and legal approaches to animals and fundamental rights are neither satisfactory to the scholarly, nor to the stakeholder community. When a critical mass of informed colleagues continues to write about the need for a paradigmatic change, then this change will eventually happen, yet it is not possible to ascertain what will be the main characteristics of the new paradigm in reference to animals and fundamental rights.

The author has demonstrated in the article, on the one hand, a consensual agreement with the proposition that animals deserve more protection, yet, on the other hand, there is a lack of consensus on the question of exactly why and how. The question of justifiability is crucial for the discussion to go one way or another: if there is a reasonable justification for why animals should have fundamental rights, this will sooner or later also be recognised in global human rights law. If there is no such justification, then animal welfare legislation will be the ceiling of legal protection, unless some circumstances should change substantially.

Within the search of a proper doctrinal basis for arguing whether (some) animals should be given (some) fundamental rights, the concept of vulnerability has escaped comprehensive sociological and legal analysis. This approach is primarily originating from feminist studies. There are no studies focusing on the question of how the general population would react to the question of granting animals fundamental rights. Such a study would need to have an aspect of dynamics – e.g. whether the attitudes are changing over time. It also seems that most scholars are avoiding the question of vulnerability of animals – this is not a deliberate decision, but the question of vulnerability simply remains outside of their focus. However, there are some authors who consider that especially the question of vulnerability may hold an answer to the question of whether at some point in the future there may be a growing consensus on the need to extend some fundamental rights to animals. To put it differently, if the concept of animals as a vulnerable group cannot be advocated from both the sociological and legal perspective, then the possibility of extending some fundamental rights to animals may fail. In the view of the author, the task of legal and social scholars has a clear moral dimension here – to describe theoretically a more harmonious society, where different species co-exist without causing one another more than just minimal harm, and thereafter attempt to "translate" the theory into concrete normative protection.