PRAVNI ZAPISI, God. XIII, br. 2 (2022)
UDK 34:179.3
DOI 10.5937/pravzap0–40655

ORIGINAL SCIENTIFIC ARTICLE

*Mari-Ann Susi**

THE DIVIDE BETWEEN IDEALISM AND PRACTICALITY IN ANIMALS' FUNDAMENTAL RIGHTS RECOGNITION

Abstract: *Contemporary theoretical discourse views animals as a vulnerable group, and also recognizes their capability of mental suffering. The question why this recognition has not been translated into a global and universally accepted accordance of fundamental rights to certain groups of animals is relevant for animal rights protection, while at the same time it illustrates the divide between the idealistic and normative dimensions of law. It appears that humans have known for thousands of years that at least some animals are capable of mental suffering and constitute a vulnerable group. Changes in animal rights protection have led to some changes in legislation, but these are not fundamental and do not concern the strive toward universal recognition that animals have fundamental rights. This means that there must be some other, decisive factors that are needed to move forward from the stage of vulnerability recognition to the normative development stage.*

Key words: Animal rights, capabilities approach, vulnerability and equality, basic norm, progressive development approach, animals mental suffering, fundamental rights, is–ought problem.

1. Introduction

The animal rights discourse is frequently influenced by the background of the authors of the specific ideas – practice or academia, and whether they are pursuing immediate goals or are interested in wider aspects connected to animal law. Scholars cross-sectionally, including from the fields of sociology, law and politics, and the animal welfare communities and politically influential institutions, domestically and globally, agree on some important points. First, there is almost consensual agreement that the issue of animal well-being is a global concern, which necessitates normative and conceptual responses. Secondly, reliable evidence is available regarding the awareness of the civil society at large about the

* PhD Candidate (Sociology), Tallinn University; e-mail: nahkhiir@tlu.ee

issue of the need to protect animals.[1] It appears in the rhetorical perception that animals are a distinct group deserving protection. Yet such recognition is where the common path stops. Some who are more pragmatic and concerned with the immediate task of improving the situation of animals – at least the way how we understand this – proceed to use the existing legal and administrative framework. Others, who reflect on a more general level, get carried into discussions of vulnerability and capabilities, which at first sight remains distant from the immediacy of easing animal suffering, but may yield such results if structural changes in laws become reality. Then there is the judiciary, whose task is to implement current legislation and which may at least raise the issue of possible gaps in normative regulation.[2]

At a superficial glance, one could argue that the academic side presents more enduring questions and the activist side – more short-term goals related to living and death conditions. But at a closer look, the matter whether animals are or should be covered by fundamental rights protection emerges in both academic and practical discourses and actions. Rejection or acceptance of the proposition that animals are subjects of fundamental rights is, somewhat surprisingly, related to whether core philosophical values apply to animals or not, regardless of the format that the action or discussion takes. Both versions are possible in theoretical debates, activism, and judicial proceedings, *i.e.*, discussions about animal well-being are perfectly meaningful without resorting to the matter of values, since adding a moral dimension has the effect of diverting attention from immediacy. If the discussion or activity stays narrowly normative or

1 Several powerful global organizations have emerged with the goal of achieving 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 the scholarly discussion about the role of the civil society in fostering the understanding of the need to protect animals – Ascione, F. A., (ed.), 2010, *International Handbook of Animal Abuse and Cruelty: Theory, Research, and Application (New Directions in the Human-Animal Bond)*, West Lafayette, Purdue University Press.

2 It is not the aim of this article to provide insight into courts practices in the field of animal law. It may be sufficient here to note skepticism regarding whether courts are likely to become accelerators of pushing animal rights law in certain new directions. For example, Beaudry concludes that the approach of seeking to grant some animals legal personhood is a dead end. He has the view that such approach may succeed occasionally in individual court cases, but is not likely to overcome some theoretical barriers. The main barrier here is that legal personhood is inseparable from human beings and therefore cannot be extended to non-human beings. See: Beaudry, J.-S., 2016, From Autonomy to Habeas Corpus: Animal Rights Activists Take the Parameters of Legal Personhood to Court, *Global Journal of Animal Law*, 1, pp. 3–35.

practical, and philosophical categories are not applied, then animals are viewed from a more utilitarian perspective of creating good conditions for their breeding, and here the fundamental rights expansion proposition remains marginal or does not emerge at all. On the other hand, if these core values emerge in discourse and are analyzed regarding animals, such as equality and freedom, then the conclusion that fundamental rights are applicable to animals seems to prevail as inevitable. It may even be regarded as a *conditio sine qua non*. This assumption appears as time- and place-independent, so it should be repeated: the one who uses philosophical categories and fundamental values to analyze the status of animals in the world, will sooner or later face the inevitability of extending the fundamental rights cover to animals. This is only so, if the person believes in the universality of basic values, such as equality and freedom. It also appears that resorting to fundamental questions of law cannot be avoided when addressing animal rights, otherwise the analysis of any regulatory matters related to animals would stop without reaching the core questions. This article will test the necessity of adding moral and fundamental values aspect to the animal rights discourse, in two aspects: theoretical and normative-sociological. The first will be concerned with the concept of vulnerability, and the second will draw conclusions from the social and normative recognition of animals' capability to suffer.

In both of these aspects, as a starting point, the divide between Is and Ought will be explored. In the field of animal rights, this Is and Ought divide is related to what is possible in the real-world, against the idealistic aspects of animal rights protection. The aim is to explore more precisely the depth of the divide between what philosophy tells us from one side (the idealistic aspect, or Ought), and what is the normative and practice-dependent reality (the Is aspect). It is possible that the field of animal rights law can give some ground to reflect upon the Is and Ought issue in more general terms, especially in connection with the transition from one to the other. Two possibilities have been proposed to characterize the mutual dependency between the idealistic and the practical dimensions of law. The first claims that once certain elements are met, the Is can transfer to Ought, meaning that legal standards will reinforce certain behavior and values, which gain normative weight through repetition. Yet some argue that such transfer is not possible, represented by Ken Witkowski, who points to the different functions of these two spheres.[3] The second possi-

3 Witkowski, K., 1975, The "Is-Ought" Gap: Deduction or Justification? *Philosophy and Phenomenological Research*, pp. 233–245, (https://doi.org/10.2307/2107056, 15. 11. 2022). Ken Witkowski writes that empirical description cannot be transferred to standard-based prescription.

bility makes the opposite claim: standards can be transferred into behavior, meaning that Ought is transferred to Is.[4] Despite Alan Gewirth labelling the Is–Ought problem as one of the most fundamental ones in moral philosophy, a glance at animal law theory and practice leads to the conclusion that extension of fundamental rights toward new and vulnerable groups can only be one-directional: from Ought to Is. An opposite view, namely that Is can be transferred to Ought, would never yield fundamental rights recognition in animals, as long as such transfer is understood narrowly as reinforcement of socially widespread and desired behavior. This is because the majority of population, although now keen to preserve the environment and the habitat, would perhaps be willing to accept the idea of animals as fundamental rights holders, but remain unsure how they can turn this standard into practical behavior. Yet the transfer from Is to Ought can also have a different ramification, where socially condemnable behavior is expelled through the standards of Ought.

This article will argue, from an interdisciplinary point of view, that the Ought, as a non-legal concept, originates not from discussions between lawyers and politicians, but is rather rooted in social perception. One arrives at this position after rejecting the idea that the Ought in the field of animal law can be the result of transfer from Is. It is a matter of how people contemplate and understand certain fundamental issues, which then get translated into the Ought, and only thereafter can find a way to the Is. Yet, another sociological phenomenon also requires attention. It is related to the process and turning of the Ought into the Is – what are the driving social factors for narrowing the gap between the ideal and practical dimensions of law. For animal rights law, these two aspects can be formulated as follows. Firstly, the question how the Ought is formulated: the recognition of animals as sentient beings protected by fundamental rights is related to core values and is based on the moral perception held by society, which finds its formulation in the constitutional level normative instruments. And secondly, the question how the Ought it transferred into Is: the adoption of ordinary animal rights protection legislation based on the understanding of their fundamental rights is dominantly subject to social pressure. It would then appear – if both of these statements can be verified – that the element of social pressure plays a crucial role in both the conceptual and normative development of animals' fundamental rights.

This process is closely connected to the search of the fundamental value or norm for animal law in the Kelsenian sense, which as a logical consequence may lead to recognition of animals' fundamental rights. As

4 For context, see Gewirth, A., 1973, The 'Is-Ought' Problem Resolved, *Proceedings and Addresses of the American Philosophical Association*, Vol. 47, pp. 34–61 (https://doi.org/10.2307/3129900, 15. 11. 2022).

recapitulated by Joseph Raz, Kelsen's theory rests on the understanding that it is logically necessary that in every legal system there exists one basic norm.[5] Since animal rights law appears in a state of contestation and incremental development, the recourse to a possible basic norm seems unavoidable. As long as there is little or no consensus on the justifiability of a basic norm for animal rights law, even avoidance of this question has an implicit negation of the impossibility of such a separate basic norm. And if such a basic norm were to appear, the next matter of interest would be whether it is animal-law specific or follows the basic norms formulated in traditional human rights architecture, such as equality, freedom and dignity. The exploration of these paths would then also dwell on the possible common thread of the basic norm.

2. The Matter of Vulnerability

2.1. THEORIES AND QUESTIONS

2.1.1. Theoretical Approaches to Animal Vulnerability

There are three main theoretical approaches of why animals deserve legal protection, which at first glance appear diametrically opposite, and yet attention to fundamental moral questions is present in all. It may be for different reasons, but all either reject or accept, implicitly or explicitly, the notion of animals' vulnerability.

The welfarist position rejects the discussion of animals as rights holders for practical reasons, since such abstraction would not help the fight against unnecessary suffering.[6] The obligation to protect animals originates from moral obligations that humans have toward other beings, this approach claims. But our moral obligations are dominantly toward those who cannot take care of themselves, *i.e.*, who are vulnerable.

The second position says the contrary and is termed the "abolitionist" theory. It is based on the understanding that animals "deserve" a handful of concrete rights. Within this list, the prerogative not to be viewed as property stands out as the most influential. Through advocation by Gary Francione, it has had several practical consequences since the 1990s. For example, it follows that animals should not be subject to commercial han-

5 Raz, J., 1974, Kelsen's Theory of Basic the Norm, *The American Journal of Jurisprudence*, Vol. 19, No. 1, pp. 94–95.

6 Garner, R., A Defense of a Broad Animal Protectionism, in: Francione, G., Garner, R., (eds.), 2013, *The Animal Rights Debate: Abolition or Regulation?*, New York, Columbia University Press, p. 129.

dling.[7] Where is the matter of vulnerability in this case? It lies in the notion that animals themselves cannot abolish such commercial handling, since they are vulnerable. Someone else needs to do this on their behalf and for their benefit.

Then there is the "middle position", based on the understanding 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."[8] Although not explicitly stated, vulnerability is the element that directs our restraint in the choice of behavior toward animals.

2.1.2. Vulnerability and Equality

There are two issues touching on morally and philosophically fundamental matters. The first is that the concept of vulnerability can be viewed as a manifestation of the fundamental value of equality. It follows that if one group is equal to another, and the latter group enjoys the protection of fundamental rights, then the former group is to be extended the same fundamental rights. Otherwise, the notion of equality would lose its core meaning.

Yoriko Otomo addressed the question of how emerging patterns of economic interdependence influence representations of vulnerable or "underrepresented" groups, her focus being on women and animals.[9] Here, the starting premise of animals as a vulnerable group does not appear distinctly new. This is the theoretical direction, despite the reluctance of the dominant scholarly discourse to accept such approach. One can speculate what might be the outcome if a principal consensus on this matter were to be achieved by advocacy groups, human rights scientists, and policy-makers, *i.e.*, if the idea of vulnerability as the main building block for developing animal law were to emerge not only in abstract terms but also with practical implications. It would seem that such an approach would lead to far-reaching consequences in two aspects: firstly, it would find materialization in the normative framework of animal law, and secondly, it would affect societal perception of animals as entitled subjects for certain fundamental rights.

7 Francione, G., 1995, *Animals, Property, and the Law*, Philadelphia, Temple University Press.

8 Cochrane, A., 2012, *Animal Rights without Liberation: Applied Ethics and Human Obligations*, New York, Columbia University Press, p. 210.

9 Otomo, Y., Mussawir, E., 2012, *Law and the Question of the Animal: A Critical Jurisprudence*, Abingdon, New York, Routledge (Law, Justice and Ecology).

This speculation coincides with the opinions of Martha Fineman, who is currently among globally acclaimed proponents of the vulnerability approach in human rights law. She predicts that the acceptance of the vulnerability approach to specific societal issue could trigger a paradigmatic change, especially in how society perceives inequalities, in particular material and social inequalities.[10] Against this background, the possibility exists that in the search of a basic norm for animal rights law, the notion of equality could be capable of generating a critical mass of academic and popular support. Whether equality of animals can be justified will depend on its viability. A subsequent question would be to what extent the acceptance of the notion of equality of animals can be translated into normative structures leading to the recognition of their fundamental rights.[11]

2.1.3. Awareness of Rights

The second question to be asked is philosophical. It can be formulated as: is there a correlation between the awareness of the rights-holder of them/it having certain rights and the ability to enjoy the protection provided by these specific rights? It would be against the contemporary understanding of human rights to answer affirmatively. The negative answer, which appears correct on the basis of shared views, states that a rights holder is entitled to enjoy the rights without ever knowing about such entitlement. Some examples, such as individuals with mentally disabilities, the old and very young people, serve as illustrations. The feature of consciousness about the content of rights is therefore not the necessary condition for rights-subjecthood. The consequence of this stipulation for animal rights is clear – animals are not, and cannot be aware of rights, yet there is an obligation to recognize them as rights holders and protect these rights. Since there is no valid justification – at least in abstract – for the conditionality between enjoyment of rights and awareness of these rights, this should become the overarching pillar for the development and conceptualization of animal rights law.

10 Martha 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" – Fineman, M. A., 2008, The Vulnerable Subject: Anchoring Equality in the Human Condition, *Yale Journal of Law and Feminism*, Vol. 20, No. 1, p. 17.

11 When speaking of the fundamental rights of animals, the author in mind only has a limited number of fundamental rights, which are recognized 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 behavior, and the right not to be subject to fear and distress.

The main argument in this subdivision, once again, is that the matter of vulnerability is implicitly or explicitly in the background of any theoretical approach to animal law. Similarly, as the matter of vulnerability was at the background of any theories why women should be accorded the right to vote. This proposition will be tested against the main four prominent theoretical approaches to animal rights, as comprehensively discussed by Martha Nussbaum, when reviewing (with somewhat harsh criticism) the work of Steven M. Wise.[12] A short recourse to these approaches is necessary to deduce whether the ideas of vulnerability and equality can constitute the core elements in various approaches.

2.2. VULNERABILITY AND DIGNITY

2.2.1. Main Theoretical Approaches

Immanuel Kant famously held that dignity and human moral capacities are features that do not originate from the natural world. As the concept of vulnerability belongs to the natural world, stemming from the comparison of physical and mental capabilities of certain individual or groups against the majority or the "middle", then it would appear that for Kant there was no logical connection for arriving at the notion of dignity from first recognizing the vulnerability of a certain group. Nussbaum's critique is two-fold:[13] first, she holds that dignity is a feature of animality and not rationality, and thus there are no grounds to deny that animals can be characterized through dignity, and secondly, that the matter of dignity leads to thinking of self-sufficiency and not needing good fortune. It seems evident that Kant precluded attention to the issue of vulnerability through a rationality shield, and one can speculate that had he not applied this shield, rational thinking might have led to the acceptance of animals as having inherent dignity through the concept of vulnerability.

Utilitarian views, which exist in various versions such as consequentialism, sum-ranking and a substantive approach, yet with containment of satisfactions as their common characteristic, are replaceable.[14] Since there are no concrete standards to separate humans from animals, Nussbaum rhetorically asks "Is that an adequate way to think about respect for an individual, animal or human?"[15] Vulnerability and dignity seem to be the main cornerstones for advancing the critique of this position.

12 Nussbaum, M. C., 2001, Animal Rights: The Need for a Theoretical Basis, *Harvard Law Review*, Vol. 114, pp. 1506–1552.

13 *Ibid.*, p. 1528.

14 *Ibid.*, pp. 1529–1532.

15 *Ibid.*, p. 1532.

The rights-based views are presented, for example, by Tom Regan, who argues that all members of a moral community have great and intrinsic value. Since animals are part of this community, their rights are to be respected. This approach is based on the prohibition to subordinate the interests of creatures to the general social welfare. Nussbaum points out the difficulty of ethically evaluating the matter of differences between species and advances as the main concern that of looseness and vagueness of what rights mean in reality. For example, she writes: "Rights need to be incorporated into an ethical approach that spells out the basis for rights and what it means to secure one to someone."[16] My response would be that, if the vulnerability of a concrete group against the aggregate features of other groups can be shown, this constitutes a reason to consider this vulnerable group inherently having the condition of dignity, which in turn is a basis of extending fundamental rights.

Finally, there are Neo-Aristotelian views of capability and functioning. It is from these ideas that Nussbaum has developed her capabilities approach, *i.e.*, every living being has to be evaluated according to its cognitive and performance capabilities. Although Nussbaum does not directly address this matter, in my view, here lie the grounds for arguing equality between species, which is a stand-alone feature separated from capabilities. Thus, it appears that equality is a feature with a much higher level of abstractness and generality than capabilities, and the concept of vulnerability has a connecting function for those who are more vulnerable.

It is possible to show that the element of vulnerability is a meaningful tool for analyzing the main theoretical approaches to animal rights. Even approaches such as the legal personhood or nonpersonal subjecthood take vulnerability as a significant building block.

2.2.2. Contemporary Competing Views

The claim that animals should be accorded legal personhood is advanced by various third sector institutions. Different advocacy groups consider their primary goal to take steps toward achieving normative recognition of this concept.[17] Behind this activity lies of course the understanding of animals as a vulnerable group that is unable to protect the interests of its members in front of the legal establishment, including the

16 *Ibid.*, p. 1535.

17 For example, the US-based organization 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 right, to 'persons', who possess such fundamental rights as bodily integrity and bodily liberty" (http://www.nonhumanrightsproject.org, 11. 15. 2022).

courts. Yet the issue of vulnerability, albeit philosophically present, does not appear in the arsenal of argumentation usually put forward by these entities. Instead, the concept of the social contract has been expanded to all living creature. As Christine Korsgaard expressed this, "we 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."[18] Here, Korsgaard does not suggest the reason for such a demand. Therefore, I suggest that this reason can be the recognition of animal vulnerability. For the legal personhood advocates, were they to agree to such reasoning, is that the consequence has to be the change of the focus of their cause. Here they would need to redirect their attention and initiate a fight – even if on a conceptual level – for animals' fundamental rights recognition instead.

There is a new category of the nonpersonal subjects of law approach. The ambition is to avoid the dead end associated with the legal personhood concept. This doctrine is advanced, for example, by Polish scholars Tomasz Pietrzykowski and Aleksandra Lis, who express the following. They write "The recognition of animals as nonpersonal 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 a nonpersonal 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."[19] It can be considered a highly pragmatic approach, where vulnerability is the starting point, but the goal is empowerment of animals with fundamental rights considered too unrealistic.

Within the concept of vulnerability, there is a justification for why animals can be viewed as such distinct group. It is based on the feature of vulnerability as dependency on others, as stated by Martha Fineman.[20]

18 Korsgaard, C., 2004, Fellow Creatures: Kantian Ethics and Our Duties to Animals, *Tanner Lectures on Human Values,* 24, pp. 100–101.

19 Lis, A., Pietrzykowski, T., 2015, Animals as Objects of Ritual Slaughter: Polish Law after the Battle over Exceptionless Mandatory Stunning, *Global Journal of Animal Law,* 2, p. 13.

20 Fineman, M., 2008, pp. 9–10.

There are two distinguishable forms of vulnerability, as Fineman suggests: the first is episodic or permanent, which in principle can be reverted, and the second is universal dependency, where the possibility to overcome dependency does not exist.[21] Yet, in Fineman's view, contemporary normative and social structures privilege those individuals whose potential for vulnerability is not realized.[22] When taking this view and applying it to animals, one cannot but notice that at least some animals are permanently dependent upon humans for their existence.

This is contrasted by the holistic perspective, according to which the majority of animals do not need humans for their existence, since their habitat is in the wild. It is even possible to realize independent animal existence in urban settings. Against this background a proposition can be made that only those animals that permanently depend for their well-being upon humans should be accorded with fundamental rights. This view seems incorrect, because, to take Francione's abolitionist position, if the consequence seems to be that as soon as animals are freed from their dependency on humans they no longer are vulnerable, and then they would lose the claim to fundamental rights. Francione's seminal proposed image of an ape escaping from the zoo and carrying the slogan "Freedom at last!" would at the same time escape its vulnerability. All of the above points to the one fundamental question – are there social or normative elements of more general nature than vulnerability, which constitute the basis of animal law architecture?

Perhaps this view is yet another building block amidst the calls for substantial revision of the basic architecture of animal rights law. It must start from scholarship. In this context, I would propose that scholarship needs to point to a base norm for animal rights legislation, which in turn would generate a chain of fundamental rights,[23] gradually extendable to

21 *Ibid.*

22 *Ibid.*, pp. 13–14.

23 A short recourse to the origin of advancing the claim that animals should have fundamental rights may be in order here. 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 behavior; freedom from fear and distress. (Comparable to the "four freedoms" formulated by Franklin D. Roosevelt in 1941: freedoms of speech and expression, freedom of worship, freedom from want, freedom from fear). The main concept of these five freedoms is not that animals can have rights, but it is the idea that animals should not be subject to unnecessary suffering. Yet, one can confuse these freedoms with rights due to the closeness in meaning. The difference between the terms "freedom" and "right" is not of substance. It is more a linguistic expression of how to ask the question whether animals have rights. Let me note that among these freedoms the distinct freedom to "live" (an animal's right to life) is not listed.

animals. The next logical question is then whether the current or emerging theoretical debates contain any indications of what could constitute such basic norm.

2.3. THE BASIC NORM FOR ANIMAL RIGHTS LAW?

2.3.1. Arguments for a New Animal Rights Law Paradigm

Several viewpoints have been presented in the search of new paradigm of animal law, or for justifying the necessity to articulate basic norm of animal law. Anne Peters writes about the need for a revolution in our thinking about animal law, which would mean paradigm of change.[24] Her argument is based on the intuitionistic reflection that humans become increasingly aware[25] that something is fundamentally wrong in conceptualizing the whole matter of animal protection. Then there is the view of Martha Fineman, regarding the necessity to reach beyond the animal protection model, which would mean adding something new to the features of deprivation, dependency and victimhood.[26] Here, dependency is a different concept from vulnerability, as the first is sporadic and episodic, and the second appears as a constant. This approach is put forward by Ani Satz through criticism of current scientific approaches, which is focusing on the dearth in the protection of domestic animals.[27] Specifically, she has identified several problematic areas in the current discourse needing more attention, such as the 'speciesism' in privileging human suffering over non-human suffering, and the reluctance to treat the basic capabilities of

It follows that animal protection is not a result of them having rights, but it is a result of humans recognizing the moral duty of protection. This recognition can have economic or ethical reasons. The ethical reason, without a doubt, is to avoid or minimize unnecessary suffering. From here, an abstract question with practical implications follows: is the protection of animals in the contemporary a result of them having rights, or, on the contrary, is it because the animal welfare approach enables people to protect their own rights better? This question can also be explored through media research. Since traditional and social media is often keen to focus on animal cruelty, is it indeed concerned with the treatment of animals for their sake, or is it because violence against animals has an aspect of general violence level in society?

24 Peters, A., 2015, *Animal Law: Reform or Revolution*, Zurich, Schulthess Juristiche Medien AG, 1st edition, pp. 25–26.

25 A far-reaching question of principle is also whether extending certain rights to certain animals would weaken the general level of fundamental rights protection around the world. Because if the circle of fundamental rights grows, soon all rights will be fundamental, and the term would lose its meaning.

26 Fineman, M., 2008, pp. 8–9.

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

humans and non-humans equally.[28] Her main point is that the various proposals to develop animal law "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".[29] My response is, taking Satz' criticism and considering it justified, that this hierarchy problem can be avoided once the fundamental rights of animals are recognized. The avoidance originates from the understanding of equal weight of the same absolute rights among themselves, and of the relative rights among themselves. The opposing view that the fundamental right to life of an animal weighs less than the fundamental right to life of a human being, would upset the current human rights architecture.

2.3.2. The Capabilities Approach

I suggest that the basic norm for animals rights law can be "discovered" through the capabilities approach and the progressive development concept of human rights law. The capabilities approach originates from the intuitionistic perception that a life worth living is inherently dignified. Although every life is different, it is possible to generalize a social minimum regarding what people actually do and can do.[30] This means that human rights law should consider an aspect of responding to human capabilities on one side, and retain the practice-independent view, on the other. How can the capabilities approach be applied to animals? This appears through the question of what are the behavioral limits of animals, and which rights need to be protected to empower this behavior. In abstract, the capabilities approach does not rule out that animals' concrete rights can be based on fundamental rights. Indeed, one could argue that it is possible to accord to animals only fundamental rights, since only these rights have an aspect of separation from right-holder's subjective knowledge about these rights. Such a view is shared by Nussbaum, with the reservation that a "species norm" should be distinguished for animals. Yet Nussbaum does not spell out specifically what are the features of such "species norm". If this were to be done, it could serve the function of Kelsen's *Grundnorm*.

The capabilities approach has several forms, all of which illustrate the discontent with the current state of affairs in animal law normativity and

28 Satz, A. B., 2009, Animals as Vulnerable Subjects: Beyond Interest-Convergence, Hierarchy, and Property, *Animal Law*, Vol. 16, No. 2, pp. 65–122.

29 Satz, A. B., 2008, pp. 36–37.

30 Nussbaum, M. C., 2000, *Women and Development. The Capabilities Approach*, Cambridge, Cambridge University Press, p. 5.

search for the most appropriate theoretical and practical model. For example, Amartya Sen is critical of the idea that concrete sets of capabilities are needed to channel certain universally accepted human rights principles into normative regulation.[31] Another model combines vulnerability and the capabilities approach with the equal protection principle. This is the Equal Protection of Animals (the EPA approach).[32] This approach has been critically reviewed by Satz through the paradigmatic change proposition,[33] where the conclusion is that, if the goals of the EPA approach were to be realized, then animals' consumption for food would need to stop.[34] Here there is no differentiated application of the EPA approach to domestic and wild animals. However, the capabilities approach to animals has still not led to specific normative conclusions. It appears as an instrument to build social acceptance of animals, and from there indirectly as a guide in the search for animal law basic norm(s). When Fineman writes that vulnerability "presents opportunities for innovation and growth, creativity, and fulfilment. It makes us reach out to others, form relationships, and build institutions,"[35] she perhaps indirectly points to the understanding that a basic norm originates not from legal thinking.

Theoretical verification of the importance of the concept of vulnerability for human rights law can also be implicitly found in European constitutional rights research. Just one illustration will be given: explicative justification stands out among Robert Alexy's eight justifications of fundamental rights. This is the practice of asking, arguing and asserting views.[36] One feature of the explicative argument is that in the search for basic norms it only leads to freedom and equality, which are viewed as possibilities or capabilities.[37] There are no conditions attached. It follows that if capabilities are instrumental in the construction of fundamental rights, it becomes a stand-alone concept that does not limit those who are holders of the capabilities. Consequently, animals holding capabilities can

31 Sen, A., Capability and Well-Being, in: Nussbaum, M., Sen, A., (eds.), 1993, *The Quality of Life*, Clarendon Press, p. 318.

32 Satz, A. B., 2008, pp. 36–37.

33 *Ibid*.

34 The so-called EPA approach asks for the realization of rights for all animals. These rights are access to necessary food and hydration, possibility to maintain bodily integrity and have shelter, the ability to exercise and engage in natural behaviors or movements, and to have conditions for experiencing companionship.

35 Fineman, M., 2012, "Elderly" as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility, *The Elder Law Journal*, 20, p. 126.

36 Alexy, R., 2012, Law, Morality, and the Existence of Human Rights, *Ratio Juris*, 25, pp. 2–14.

37 *Ibid*.

also be fundamental rights holders. It does not immediately lead to specification of what the basic norm for animal rights law is, but it speaks to the possibility of such norm.

2.3.3. The Progressive Development Approach

This approach suggests human rights develop gradually and extend to more and more groups.[38] Rights expansion usually takes the direction of encompassing new groups identified as vulnerable. Here it is of interest who exactly and on what basis decides on the extension of fundamental rights to new groups.[39] There are multiple actors, starting from the pressure from civil society and special interest groups, and ending with the political establishment and courts finally agreeing on rights expansion. The question here is whether the progressive development of rights has limits, or whether it is, taken in abstract, an ongoing and continuous process where there are no standards of limitation. Extension of fundamental rights to animals takes as an assumption that such progressive development can extend beyond humans.

The conclusion from the above is that social science theory is currently still exploring whether there is a specific basic norm that can become the fundamental value for constructing the entire animal rights legislation. If this is to be a fundamental value, like dignity or equality, then through the approaches of vulnerability and capabilities, fundamental rights inevitably enter the animal rights architecture. If contestations of whether a basic norm for animal rights is justifiable, and what exactly is its nature, are to continue, the fundamental rights extension to animals will not find a definite conclusion. The next question in this context will be, what happens next, even if there is to emerge a common understanding about animals' dignity and being subjects of fundamental rights?

2.4. SOME CONCLUDING OBSERVATIONS

To recapitulate, the matter of vulnerability has been shown to constitute a generic element in expanding the fundamental rights protection toward certain underrepresented groups. Vulnerable groups advocacy highlights the importance of separating one's ability to stand up for one's rights as a subject, from the objectively existing entitlement to enjoy the protection offered by fundamental rights. If to accord to animals the elements

38 Kennedy, D., 2002, The International Human Rights Movement: Part of the Problem? *Harvard Human Rights Journal*, Vol. 15, pp. 101–125.

39 Boyle, A., 2007, Human Rights or Environmental Rights? A Reassessment. *Fordham Environmental Law Review*, 18, pp. 471–511.

that characterize vulnerable groups, then the logical consequence is that they should be subject to the protection of some fundamental rights. This conclusion appears inevitable. It follows that recognition of vulnerability is one of the conditions for the development of fundamental rights. Contemporary scholarship shows that vulnerability is a wide concept and is to be separated from humans, *i.e.*, not only humans can be attributed the status of vulnerable, as it constitutes an objectively measurable epistemic criterion. Also, other living organisms viewed from the prism of how the surrounding environment impacts their existence can be viewed as vulnerable. From here a question emerges: if knowledge about vulnerability is a pre-condition for expanding fundamental rights toward these vulnerable groups, why is it that in some instances the rights are expanded and in other instances they are not?

3. Animals' Mental Suffering

As the matter of vulnerability belongs more to the sphere of pure social theory, with roots in empirical evidence of capabilities, this section will focus on one normative-sociological aspect of animal rights. This is the matter of animals' mental suffering. I seek to find a common thread, as promised at the beginning of this article, that just as the issue of vulnerability leads to exploration of fundamental values, so does the issue of mental suffering. This section has three building blocks, each logically sequenced after the previous. Together, these blocks point to fundamental values that are connected with mental suffering, and then it is a matter of pure rationality that fundamental values find their practicality in fundamental rights. The building blocks of related questions are: first, is there evidence that animals are capable of mental suffering, secondly, what have been the normative and social responses to the recognition of the capability to suffer, and finally, is recognizing animals as fundamental rights holders justifiable from the logic of international human rights development.

3.1. CAPABILITY OF MENTAL SUFFERING

3.1.1. Evidence of Animals' Mental Suffering

It seems impossible to deny that animals feel physical pain.[40] Pharmaceutical research, conducted via peripheral and central analgesics on

40 For a discussion about the ability of animals to feel physical pain see Sapontzis, S. F., 1984, Predation, *Ethics and Animals*, Vol. 5, No. 2, pp. 27–38; Kirkwood, J. K., Sainsbury. A. W., 1996, Ethics of Interventions for the Welfare of Free-Living Wild

experimental animals, as shown by Michele Panzera, has confirmed pain perception by animals.[41] In addition to physical pain, fear of predators, *i.e.*, fear for one's life, can lead to long-term psychological trauma.[42] Brian Tomasik formulated the view that, due to intense suffering and emotional stress, most animals have lives that are not worth living.[43] Such psychological and emotional suffering can lead to "abnormal behavior".[44] The possibility to suffer from various psychological disorders was shown by Marc Bekoff.[45] Behavioral clusters similar to PTSD and depression have been diagnosed in chimpanzees by Hope Ferdowsian and others.[46] As such, this evidence also serves to strengthen Nussbaum's capabilities theory, which is directly connected to animal's mental suffering. Here is how Nussbaum has tied suffering into her approach: "Human beings have a lot of evidence that many types of animals are person-like – capable of intelligence and planning, capable of emotion and responsiveness, capable of awareness of another animal's feelings, capable of recognizing one another and members of other species as individuals, capable of joy, humor, and delight."[47]

3.1.2. Scope of the Capability of Mental Suffering

This evidence leads to the question of scope, *i.e.*, whether all animal species have the ability to experience mental suffering. Separation of animals on the basis of the ability to suffer has been proposed by some. For instance, Peter Singer writes that individual capabilities of animals are directly related to their ability to experience pain and suffering.[48] The opposite position does not take a stand on the scope of the ability to experience mental suffering, but considers this element unimportant within

Animals, *Animal Welfare* 5, pp. 235–243; Cowen, T., 2003, Policing Nature, *Environmental Ethics*, Vol. 25, No. 2, pp. 169–182; Nussbaum, M. C., 2006, *Frontiers of Justice: Disability, Nationality, Species Membership*, Cambridge, Harvard University Press; Sozmen, B. I., 2013, Harm in the Wild: Facing Non-Human Suffering in Nature, *Ethical Theory and Moral Practice*, Vol. 16, No. 5, pp. 1075–1088.

41 Panzera, M., 2013, Sickness and Abnormal Behaviors as Indicators of Animal Suffering, *Relations: Beyond Anthropocentrism*, Vol. 1, No. 1, p. 23. Panzera lists elements of possible mental suffering of animals as well: thirst, hunger, weakness, debility, breathlessness, nausea, sickness, pain, distress, fear, anxiety, helplessness, boredom.

42 Tomasik, B., 2015, The Importance of Wild-Animal Suffering, *Relations: Beyond Anthropocentrism*, Vol. 3, No. 2, p. 136.

43 *Ibid.,* p. 139.

44 Panzera, M., 2013, p. 28.

45 Bekoff, M., 2007, *The Emotional Lives of Animals*, New World Library.

46 Ferdowsian, H. R. *et al.*, 2011, Signs of Mood and Anxiety Disorders in Chimpanzees, (https://doi.org/10.1371/journal.pone.0019855, 15. 11. 2022).

47 Nussbaum, M. C., 2001, p. 1507.

48 Singer, P., 1990, Ethics and Animals, *Behavioral & Brain Science*, Vol. 13, p. 46.

the discussion of vulnerability. It logically follows that all animals are vulnerable, but at the same time not all vulnerable animals have the ability of mental suffering.[49] Francione seems to share this view. Look at the following statement: "The theory of animal rights maintains that at least some nonhumans possess rights that function in a manner substantially similar to human rights. Animal rights ensure that relevant animal interests are absolutely protected and may not be sacrificed even if it would benefit humans to do so, or if the animals whose interests are at stake are exploited 'humanely' and without 'unnecessary' suffering."[50] Here we see a clear statement that all animals deserve to have their fundamental rights recognized, without the capability threshold for mental suffering. It follows that, if one speaks of the general goal of extending fundamental rights to all animals, it is not necessary to bring the element of suffering into animals' rights discourse. It could divert the focus.

3.2. NORMATIVE AND SOCIAL RESPONSES TO ANIMALS' MENTAL SUFFERING

3.2.1. Normative Responses to Animals' Mental Suffering

The normative response has been the development of the concept of "unnecessary" suffering, which by definition leads to the conclusion that if some suffering is unnecessary, there must also be some suffering which can be termed necessary. The social responses cover a broad spectrum of possibilities from moral condemnation to veganism. The concept of unnecessary suffering is clearly built on the acceptance that animals can suffer. It now intends to introduce a moral dimension to legitimize suffering caused to animals for the purposes of maintaining mankind's regular way of life, where animals have a significant and irreplaceable role.

Some examples are in order, to illustrate how the concept of unnecessary suffering has become a normative normality. The 2012–2015 EU strategy for animal welfare is built upon the idea of avoiding unnecessary suffering. It has the goal of the keeping of farm animals under conditions that do not subject them to unavoidable pain or suffering.[51] The European Union new animal welfare regulation is based on recognizing

49 For example, Christopher Stone argues that the inherent value of nonhumans could be recognized and protected by guardians just like the rights (basic rights and non-basic rights) of children or the mentally disabled. (Stone, C. D., 1972, Should Trees Have Standing? – Toward Legal Rights for Natural Objects, 45, *Southern California Law Review*, pp. 464–467)

50 Francione, G. L., 1996, Animal Rights and Animal Welfare, *Rutgers Law Review*, Vol. 48, No. 2, p. 398.

51 The strategy does not differentiate mental suffering.

the five freedoms of animal welfare.[52] Among these are the freedom from fear and distress, *i.e.*, the freedom to be kept in conditions and experience treatment that averts mental suffering. The European Convention on the Protection of Animals kept for Farming Purposes[53] imposed an obligation on countries to avoid unnecessary suffering of animals.[54] As is common with international legal instruments, the statements remain general and contain little background argumentation. For example, the explanatory report on the Convention remains vague on the matter of suffering, since it does not address at all the choices for the terminology. It does not clarify exactly when suffering becomes "unnecessary", and whether this threshold has variations due to the species' economic value.[55]

The EU Directive on the protection of animals used for scientific purposes[56] uses frequently the expressions of suffering and distress, and often these terms are used in the context of avoiding unnecessary suffering. The European Convention for the Protection of Pet Animals[57] includes the term "mental suffering", which is specified to mean that killing and reduction in numbers of animals should be undertaken with the overall goal of minimum mental suffering. The EU Regulation on the protection of animals at the time of killing[58] does not, however, use the expression "mental suffering". It does, however, set out in Article 3 the general requirement for killing and related operations, which is explained as "Animals shall be spared any avoidable pain, distress or suffering during their killing and related operations".

These few examples can lead to two main conclusions. First, contemporary animal rights law gives normative meaning to animals' capability for mental suffering, which is seen as a general feature of animals. It seems that the law does not differentiate between mental suffering and

52 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 behavior; freedom from fear and distress.

53 The European Convention for the protection of animals kept for farming purposes, *OJL* 323, 17 November 1978.

54 *Ibid.,* reference to "unnecessary" suffering is in three articles – 4, 6, and 7.

55 Paragraph 11 of the explanatory report merely states that "The underlying idea is to avoid any unnecessary suffering or injury and to secure conditions that shall be in conformity with physiological and ethological needs of the individual animals."

56 The EU Directive on the protection of animals used for scientific purposes 2010/63/EU of 22 September 2010.

57 The European Convention for the Protection of Pet Animals of 12 November 1987, *ETS*, No. 125. This is the Council of Europe instrument, adopted in Strasbourg on 13 November 1987.

58 The EU Regulation on the protection of animals at the time of killing No. 1099/2009 of 24 September 2009.

experiencing distress. Second, all normative instruments have a "disclaimer", which means that qualification under certain conditions causing pain and suffering remains lawful. This is when suffering can be considered "unavoidable" or "necessary".

Not all instruments are devoid of reasons why causing mental suffering needs to be minimized. Take for example the following statements: "there is scientific evidence of their /animals/ ability to experience pain, suffering, distress and lasting harm",[59] or "Killing animals may induce pain, distress, fear or other forms of suffering to the animals even under the best available technical conditions".[60]

These examples do not originate from fundamental rights policy documents, but their goal is to promote the well-being of humans. Against this background it is necessary to mention the position of Michael Allen Fox who has generalized on the "unnecessary suffering" approaches[61] and concludes that "the notions of necessary and unnecessary suffering are empty of meaning and no significant difference exists between them".[62] Fox claims that the idea of "unnecessary suffering" involves a type of cost-benefit analysis. All of the costs "are assigned to one class of sentient beings, and all of the benefits accrue to another. However, one looks at it, this seems to be a model of injustice."[63] Fox puts forward a position rooted in the moral dimension as follows "none of the suffering of nonhuman animals at the hands of humans is necessary, all of it is unnecessary. And if animals' lives have value independent of their interests to others, all of their suffering is morally unjustified."[64]

Against this background I put forward the thesis that the concept of unnecessary suffering is a filter to revert the discussion about animals suffering from entering into the field of fundamental values and rights.

3.2.2. Public Opinion About Animals' Mental Suffering

Legislative developments are often the result of the influence of public opinion and pressure from interest groups. It is well known from the history of human rights that various groups that had previously not been covered by the protection of human rights, were successful in achieving

59 EU Directive 2919/63/EU, preamble paragraph (8).

60 EU regulation No. 1099/2009, preamble paragraph (2).

61 Fox, M. A., 1997, On the "Necessary Suffering" of Nonhuman Animals, *Animal Law*, 3, pp. 25–30.

62 *Ibid*., p. 25.

63 *Ibid*., p. 29.

64 *Ibid*., p. 30.

the protection through social activity – for example women's suffrage.[65] Can the same pattern be observed in the reasons for the European Union legislation regarding animals' well-being? A short recourse to statistics may be in order here. In November 2006, the European Commission released the study *Attitudes of EU Citizens Towards Animal Welfare*. It was shown that more than 34% of the individuals questioned felt that animal welfare was of the highest possible importance (representing a score of 10 out of 10 points).[66] *Special Eurobarometer 225 Social values, Science and Technology* indicates that in 2005 about 82% of the European Union citizens agreed to uphold the duty to protect the animals, whatever the cost may be.[67] Similar studies have been conducted in other parts of the world. For example, as reported by Park and Singer, in the United States about 64% of individuals responding to a 2008 Gallup survey favored strict laws governing the treatment of farm animals.[68] In China, a 2005 poll by the International Fund for Animal Welfare found that 90% of respondents believed that people have a moral duty to minimize animal suffering. Overall, 77% favored legislation for achieving this.[69] Measuring attitudes of Europeans toward Animal Welfare in November 2015–2016[70], Special Eurobarometer had the goal to find out how Europeans in general understood the importance of animal welfare.

If these figures tell us something additional, then it is that responses depend on the question asked. The questions were based on a welfarist approach, from which a logical chain can be made to legislative initiatives. What if the questions were asking about social attitudes extending to animals' fundamental rights? Even if the majority of respondents had given an affirmative reply, it is not likely that any changes would have occurred on the constitutional level legislation. This reflection is indicative of the main hypothesis of this article – there is a divide between the ideal and practical dimensions of animal rights law. In the event that the ideal

65 Balkin, J. M., 2005, How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure, *Suffolk Law Review*, Vol. 39, No. 27, p. 49.

66 Eurobarometer, 2006, *Attitudes of EU Citizens Towards Animal Welfare*, (https://europa.eu/eurobarometer/surveys/browse/all;search=animals, 15. 11. 2022).

67 Eurobarometer, 2014, *Special Eurobarometer 225: Social Values, Science and Technology*, (https://europa.eu/eurobarometer/surveys/browse/all;search=animals, 15. 11. 2022), p. 26.

68 Park, M., Singer, P., 2012, The Globalization of Animal Welfare: More Food Does Not Require More Suffering, *Foreign Affairs*, 91, p. 129.

69 *Ibid.*

70 European Commission, Directorate-General for Health and Food Safety, 2016, *Attitudes of Europeans towards animal welfare: report*, (https://data.europa.eu/doi/10.2875/17980, 15. 11. 2022).

standards were to recognize animals as fundamental rights holders, this would not be translated (easily) into ordinary normative structures.

3.3. ROUTE TO RECOGNIZING ANIMALS AS FUNDAMENTAL RIGHTS HOLDERS

There are various theoretical approaches that can be used to "test" whether the extension of fundamental rights to animals would be in accordance with the logic of fundamental rights normative development. I will here limit myself to exploring this question on the basis of Philip Alston's seminal quality control (*appellation contrólée*) test.[71] When we ask whether the extension to animals of fundamental rights would pass Alston's criteria, then the following observations would seem obvious. One could say that fundamental rights recognition in animals:

1. reflects social values of fundamental importance, such as our moral duty to prevent suffering of those beings who have such capability;
2. is relevant throughout the world despite different value systems. It is so because animals' rights movements exist in the majority of countries, and such advocacy movements no longer are a matter of importing "European" views to the rest of the world – overall, there appears generally shared social view that animals need to be protected from being killed and tortured;
3. would clearly constitute an interpretation of the UN Charter obligation to avert killings and torture;
4. introduces a new aspect into the existing body of international fundamental rights law regarding the public obligations to avoid killings and torture;
5. would be a result of already a high degree of international consensus on the claim that at least those animals that are capable of mental suffering should be protected from (unnecessary) killings and torture;

71 Alston, P., 1984, Conjuring Up New Human Rights: A Proposal for Quality Control, *American Journal of International Law*, Vol. 78, No. 3, pp. 607–621. According to the presented criteria, a new human right is ready to be recognized by an international organ if the following conditions apply: the right reflects a fundamentally important social value; it is relevant throughout the world in different value systems; it is an interpretation of a UN Charter obligation; it introduces a new aspect into the existing body of international human rights law; there is already a high degree of international consensus about the claim; states have already a practice enforcing the right; and it is sufficiently precise to give raise to identifiable rights and corresponding obligations.

6. would coincide with the existing states' practice of enforcing the right of animals not to be killed and tortured, keeping in mind that this is accomplished through responses in national legal and judicial systems; and
7. is sufficiently precise to give raise to identifiable rights and corresponding obligations. This would assume the format of extending some fundamental rights to certain animals, together with corresponding obligations for legal responses.

It can be noted that the elements for recognizing animals as fundamental rights holders are in place. There is theoretical justification available for such recognition, based on the understanding that animals are capable of suffering. The capability to suffer, in conjunction with the concept of vulnerability, would be sufficient to lead to the articulation of fundamental rights in an ideal world. Yet it has not happened at the normative level. I suggest that two issues are of relevance, from the standpoint of establishing patterns how fundamental rights could develop in principle to cover animals. First, there is a phenomenon of avoidance to raise animal protection to the level of constitutionalism and fundamental rights protection, because opening the Pandora's box of such a discussion could lead to a "point of no return", meaning that the recognition of animals' fundamental rights would become inevitable. Concepts like unnecessary suffering are used to circumvent constitutional level discussions. Secondly, it appears that the recognition of animals as sentient beings is gradually appearing at the constitutional level of normative regulation, firstly evidenced through the emerging sporadic practice of various constitutional courts. Yet constitutions and constitutional judgments deal with the ideal dimension of law, and often there is a long road from constitutionally recognized principles and ideas to everyday reality.

Perhaps a hypothesis is in order to describe animal fundamental rights development. This hypothesis will state that animals' fundamental rights recognition develops in several stages. The first stage is conceptual and related to the contestations of accepting animal protection as a constitutional issue. The second stage starts after accepting animal protection as a constitutional issue, and is related to the channeling of this recognition into constitutional level instruments. The third stage would be the road back, *i.e.*, "translating" constitutionally accepted ideas into ordinary laws, but the difference from welfare legislation being that the new norms would have a constitutional basis.

Having stated this, I cannot but escape the notion that it is engagement in idealistic and wishful thinking of the "ought". A rational approach

says that engagement in moral and fundamental rights based discourse about animals will not lead to changes in the normative architecture, even if society would be willing to accept, in moral terms, that animals should not be subject to maltreatment and their basic rights be respected. But what is the value of theoretical justification of animals' fundamental rights, if it does not lead to practical solutions? How does theory help our good judgments by giving us additional opposition to the bad influence, Martha Nussbaum asks. Her response is that "it makes the good thoughts clearer and more explicit, so we can't delude ourselves into thinking, say, that colonial conquest is really just 'visiting'".[72] Saying this about animal rights is to note that although animals' fundamental rights are not recognized in international and domestic normative systems, it does not mean that their fundamental rights do not exist. Rights recognition is a lower general category than their existence. The next scholarly step now needs to be exploring whether such a discrepancy between idealism in acceptance and reality in enforcement of animals' fundamental rights has deep social and normative roots. This examination will not be undertaken here.

4. Conclusion

This article has shown that the matter of vulnerability is implicitly or explicitly in the background of any theoretical approach to animal law. Even approaches such as the legal personhood or nonpersonal subjecthood take vulnerability as a significant building block. Against this background it was asserted that social science theory is currently exploring whether there is a specific basic norm that can become the fundamental value for constructing the entire animal rights legislation. If this is a fundamental value, like dignity or equality, then through the approaches of vulnerability and capabilities, fundamental rights inevitably enter the animal rights architecture. If contestations of the justifiability of a basic norm for animal rights and its exact nature continue, the fundamental rights extension to animals will not find a definite conclusion.

It was also argued that all animals deserve to have their fundamental rights recognized without a threshold regarding the capability for mental suffering. If one speaks of the general goal of extending fundamental rights to all animals, it is not necessary to include the element of suffering into the animals' rights discourse, since it might divert the focus. The article puts forward the thesis that the concept of unnecessary suffering is a

72 Nussbaum, M. C., 2007, On Moral Progress: A Response to Richard Rorty, *University of Chicago Law Review*, Vol. 74, No. 3, p. 953.

filter to divert the discussion about animals suffering from entering into the field of fundamental values and rights.

There is a divide between the ideal and practical dimensions of animal rights law. In the event that the ideal standards were to recognize animals as fundamental rights holders, this would not be easily translated into ordinary normative structures. The article proposes the hypothesis that animals' fundamental rights recognition should develop in several stages. The first stage would be conceptual and related to the contestations against accepting animal protection as a constitutional issue. The second stage would start following the acceptance of animal protection as a constitutional issue, and it would address the channeling of this recognition into constitutional-level instruments. The third stage would be the road back, *i.e.*, "translating" constitutionally accepted ideas into ordinary laws, but the difference from welfare legislation being that the new norms would have a constitutional basis. Although animals' fundamental rights are not recognized in international and domestic normative systems, it does not mean that their fundamental rights do not exist. Rights recognition is a lower general category than their existence.

Yet, such formal recognition of animals as fundamental rights holders has not occurred, or at least there are many weighty forces contesting it. Such a divide between the ideal and normative dimensions of animal rights law has existed for centuries, perhaps as long as there has been recorded human history. It can be explained by different factors. From the perspective of theory of law, there is an absence of agreement on whether there is, and what can be considered a basic norm or "species" norm, which would then stand at the fundament of subsequent animals' rights normative development. From the standpoint of normativity, it has been shown that the recognition of animals as fundamental rights holders would not be counter to the logic of international human rights law development. The longevity of this divide between idealism and real-world animal rights law suggests that efforts to recognize animals as fundamental rights holders in law will also fail in the future. There may be exceptions regionally, due to court activism or "errors", and toward certain species. But this does not change the general picture.

Bibliography

1. Alexy, R., 2012, Law, Morality, and the Existence of Human Rights, *Ratio Juris*, 25.
2. Alston, P., 1984, Conjuring Up New Human Rights: A Proposal for Quality Control, *American Journal of International Law*, Vol. 78, No. 3.
3. Ascione, F. A. (ed.), 2010, *International Handbook of Animal Abuse and Cruelty: Theory, Research, and Application (New Directions in the Human-Animal Bond)*, West Lafayette, Purdue University Press.

4. Balkin, J. M., 2005, How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure, *Suffolk Law Review*, Vol. 39, No. 27.
5. Beaudry, J.-S., 2016, From Autonomy to Habeas Corpus: Animal Rights Activists Take the Parameters of Legal Personhood to Court, *Global Journal of Animal Law*, 1.
6. Bekoff, M., 2007, *The Emotional Lives of Animals*, New World Library.
7. Boyle, A., 2007, Human Rights or Environmental Rights? A Reassessment. *Fordham Environmental Law Review*, 18.
8. Cochrane, A., 2012, *Animal Rights without Liberation: Applied Ethics and Human Obligations*, New York, Columbia University Press.
9. Cowen, T., 2003, Policing Nature, *Environmental Ethics*, Vol. 25, No. 2.
10. Ferdowsian, H. R. *et al.*, 2011, Signs of Mood and Anxiety Disorders in Chimpanzees. *PLoS ONE* 6(6): e19855, (https://doi.org/10.1371/journal.pone.0019855, 15. 11. 2022).
11. Fineman, M., 2012, "Elderly" as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility, *The Elder Law Journal*, Vol. 20.
12. Fineman, M. A., 2008, The Vulnerable Subject: Anchoring Equality in the Human Condition*, Yale Journal of Law and Feminism*, Vol. 20, No. 1.
13. Fox, M. A., 1997, On the "Necessary Suffering" of Nonhuman Animals, *Animal Law*, 3.
14. Francione, G., 1995, *Animals, Property, and the Law*, Philadelphia, Temple University Press.
15. Francione, G. L., 1996, Animal Rights and Animal Welfare, *Rutgers Law Review*, Vol. 48, No. 2.
16. Garner, R., A Defense of a Broad Animal Protectionism, in: Francione, G., Garner, R., (eds.), 2013, *The Animal Rights Debate: Abolition or Regulation?*, New York, Columbia University Press.
17. Gewirth, A., 1973, The "Is–Ought" Problem Resolved, *Proceedings and Addresses of the American Philosophical Association*, Vol. 47, (https://doi.org/10.2307/3129900, 15. 11. 2022)
18. Ginsburgs, G., 1993, The Jurisdictional Scope of Soviet Criminal Law: Ideology and Policy Determinants, *Europe-Asia Studies*, Vol. 45, No. 1.
19. Kennedy, D., 2002, The International Human Rights Movement: Part of the Problem?, *Harvard Human Rights Journal*, Vol. 15.
20. Kirkwood, J. K., Sainsbury. A. W., 1996, Ethics of Interventions for the Welfare of Free-Living Wild Animals, *Animal Welfare.*
21. Korsgaard, C., 2004, Fellow Creatures; Kantian Ethics and Our Duties to Animals, *Tanner Lectures on Human Values*, 24.
22. Lis, A., Pietrzykowski, T., 2015, Animals as Objects of Ritual Slaughter: Polish Law after the Battle over Exceptionless Mandatory Stunning, *Global Journal of Animal Law*, 2.
23. Nussbaum, M. C., 2001, Animal Rights: The Need for a Theoretical Basis, *Harvard Law Review*, Vol. 114.

24. Nussbaum, M. C., 2006, *Frontiers of Justice: Disability, Nationality, Species Membership*, Cambridge: Harvard University Press.
25. Nussbaum, M. C., 2007, On Moral Progress: A Response to Richard Rorty, *University of Chicago Law Review*, Vol. 74, No. 3.
26. Nussbaum, M. C., 2000, *Women and Development. The Capabilities Approach*, Cambridge, Cambridge University Press.
27. Otomo, Y., Mussawir, E., 2012, *Law and the Question of the Animal: A Critical Jurisprudence*, Abingdon, New York, Routledge (Law, Justice and Ecology).
28. Panzera, M., 2013, Sickness and Abnormal Behaviors as Indicators of Animal Suffering, *Relations: Beyond Anthropocentrism*, Vol. 1, No. 1.
29. Park, M., Singer, P., 2012, The Globalization of Animal Welfare: More Food Does Not Require More Suffering, *Foreign Affairs*, Vol. 91.
30. Pedersen, N. K., 2009, Detailed Discussion of European Animal Welfare Laws 2003 to Present, *Michigan State University College of Law Publication* (https://www.animallaw.info/article/detailed-discussion-european-animal-welfare-laws-2003-present-explaining-downturn, 15. 11. 2022).
31. Peters, A., 2015, *Animal Law: Reform or Revolution*, Zurich, Schulthess Juristische Medien AG, 1st edition.
32. Raz, J., 1974, Kelsen's Theory of Basic the Norm, *The American Journal of Jurisprudence*, Vol. 19, No. 1.
33. Sapontzis, S. F., 1984, Predation, *Ethics and Animals*, Vol. 5, No. 2.
34. Satz, A. B., 2009, Animals as Vulnerable Subjects: Beyond Interest-Convergence, Hierarchy, and Property, *Animal Law*, Vol. 16, No. 2.
35. Sen, A., Capability and Well-Being, in: Nussbaum, M., Sen, A., (eds.), 1993, *The Quality of Life*, New York, Clarendon Press.
36. Singer, P., 1990, Ethics and Animals, *Behavioral & Brain Science*, Vol. 13.
37. Sozmen, B. I., 2013, Harm in the Wild: Facing Non-Human Suffering in Nature, *Ethical Theory and Moral Practice*, Vol. 16, No. 5.
38. Stone, C. D., 1972, Should Trees Have Standing? – Toward Legal Rights for Natural Objects, *Southern California Law Review*, Vol. 45.
39. Susi, M.-A., 2019, Animals' Mental Suffering Paradigm in Estonian Judicial and Media Environment, *Administrative Law Review*, Vol. 1.
40. Susi, M.-A., 2017, Empowering Animals with Fundamental Rights –The Vulnerability Question, *East-West Studies Journal*, Vol. 8, No. 47.
41. Tomasik, B., 2015, The Importance of Wild-Animal Suffering, *Relations: Beyond Anthropocentrism*, Vol. 3, No. 2.
42. Witkowski, K., 1975, The "Is–Ought" Gap: Deduction or Justification? *Philosophy and Phenomenological Research*, Vol. 36, No. 2, (https://doi.org/10.2307/2107056, 15. 11. 2022).
43. Ziemele, I., Spale, A., Jurcéna, L., 2020, The Constitutional Court of The Republic of Latvia, *The Max Planck Handbooks in European Public Law: Volume III: Constitutional Adjudication: Institutions,* (DOI: 10.1093/oso/9780198726418.003.0001).

Legislative Sources

1. The European Convention for the Protection of Pet Animals of 12 November 1987, *ETS*, No. 125.
2. The European Convention for the Protection of Animals Kept for Farming Purposes, *OJL* 323, 17 of November 1978.
3. The EU Directive on the protection of animals used for scientific purposes, 2010/63/EU of 22 September 2010.
4. The EU Regulation on the protection of animals at the time of killing, No. 1099/2009 of 24 September 2009.

Case Law

1. Estonian Supreme Court judgment from 01 March 2021 (case No. 4–20–2803).
2. Estonian Supreme Court judgment from 25 November 2020 (case No. 2–18–15284).
3. Latvian Constitutional Court judgment from 20 May 2002 (case No. 2002–01-03).

Internet Sources

1. Eurobarometer, 2006, *Attitudes of EU Citizens Towards Animal Welfare*, (https://europa.eu/eurobarometer/surveys/browse/all;search=animals, 15. 11. 2022).
2. European Commission, Directorate-General for Health and Food Safety, 2016, *Attitudes of Europeans towards animal welfare: report*, (https://data.europa.eu/doi/10.2875/17980).
3. Eurobarometer, 2014, *Special Eurobarometer 225: Social values, Science and Technology*, (https://europa.eu/eurobarometer/surveys/browse/all;search=animals, 15. 11. 2022).

PODELA IZMEĐU IDEALIZMA I PRAKTIČNOSTI U PRIZNAVANJU OSNOVNIH PRAVA ŽIVOTINJA

Mari-Ann Susi

APSTRAKT

Savremeni teorijski diskurs posmatra životinje kao ranjivu grupu, a prepoznaje i njihovu sposobnost za duševnu patnju. Pitanje zašto ovo priznanje nije pretočeno u globalnu i univerzalno prihvaćenu saglasnost o priznavanju osnovnih prava određenoj grupi životinja relevantno je za zaštitu prava životinja, ali istovremeno ilustruje podelu između idealističke i normativne dimenzije prava. Čini se da su ljudi hiljadama godina zna-

li da su barem neke životinje sposobne da pate i da predstavljaju ranjivu grupu. Promene u zaštiti prava životinja dovele su do nekih promena u zakonodavstvu, ali one nisu fundamentalne i ne tiču se težnje ka univerzalnom prihvatanju da životinje imaju osnovna prava. To znači da moraju da postoje neki drugi – odlučujući – faktori koji su potrebni da se od faze prepoznavanja ranjivosti pređe u fazu normativnog razvoja.

Ključne reči: prava životinja, pristup zasnovan na sposobnostima, ranjivost i jednakost, osnovna norma, progresivni razvojni pristup, psihička patnja životinja, osnovna prava, problem podele između jeste i treba.

Article History:

Received: 14 October 2022

Accepted: 25 November 2022