Tomasz Pietrzykowski

Foundations of Animal Law

Concepts – Principles – Dilemmas

UNIWERSYTET ŚLĄSKI
WYDAWNICTWO

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Table of Contents

CHAPTER 7
Dereification

CHAPTER 8
Killing

CHAPTER 9
Exploitation

CHAPTER 10
Harassment

CHAPTER 11
Execution

Principles

CHAPTER 12
Principles of Animal Law

CHAPTER 13
Principle of the Protection of Life

CHAPTER 14
Principle of Animal Welfare Protection

CHAPTER 15
Principle of Special Protection for Animals Closer to Humans

CHAPTER 16
Principle of Double Responsibility

CHAPTER 17
Principle of Relative Respect for the Economic and Cultural *Rationale* behind Animal Exploitation

Epilogue
Quaestiones pro futuro

List of Abbreviations

1928 Regulation – The Regulation of the President of the Republic of Poland of 22 March 1928 on the Protection of Animals (Journal of Laws 1928, no 36, item 332).

Directive 2010/63/EU – Directive 2010/63/EU of the European Parliament and of the Council of 22 September 2010 on the protection of animals used for scientific purposes (OJ L 276, 20.10.2010, p. 33–79).

PAPA – Polish Animal Protection Act of 21 August 1997 (Journal of Laws 2022, item 572).

PAPA-SP – Polish Act of 15 January 2015 on the Protection of Animals Used for Scientific or Educational Purposes (Journal of Laws 2021, item 1331, with later amendments).

Regulation 1/2005 – Council Regulation (EC) of 22 December 2004 on the protection of animals during transport and related operations and amending Directives 64/432/EEC and 93/119/EC and Regulation (EC) No 1255/97 (OJ L 3, 5.1.2005, p. 1–44).

Regulation 1099/2009 – Council Regulation (EC) No 1099/2009 of 24 September 2009 on the protection of animals at the time of killing (OJ L 303, 18.11.2009, p. 1–30).

TFEU – Treaty on the Functioning of the European Union, consolidated version (OJ C 326, 26.10.2012, p. 47–390).

Preface

The emergence and evolution of animal law belong to the most fascinating developments of contemporary legal thought and practice. Initially treated with considerable reserve and disregard, this area is now well on its way to the mainstream of legal science. Around the world, the body of literature is growing fast, legislation is developing, new academic courses and subjects are being offered, and lawyers-practitioners who specialise in animal law are beginning to make spectacular careers.

Many years ago, still as a teenager, I was organising local protests against animal abuse; at that time, I would not have believed that a new branch of law was going to be born before my eyes. That I have had a chance to watch it develop and to contribute a small share to its success is what I consider one of the most fortunate coincidences in my life. In addition, this experience has brought other benefits. It has involved developing scientific interests in a way that extended far beyond legal sciences or the formulation of laws, codes, and rulings. Most importantly, however, it has offered the opportunity to meet some of the greatest minds working in various fields of knowledge. It is hard to imagine a more valuable reward for the effort that goes into research work.

Some fragments of this book have emerged as a result of cooperation with and help I received from several people. I am particularly indebted to Dr Katarzyna Śmiłowska: our article "Kinds of harm" served as the basis for the chapter on suffering and its neurophysiological background, and her valuable, substantial comments on the entire manuscript, together with her patient assistance, helped me avoid a number of oversimplifications and inaccuracies.[1] I am also grateful to Dr Małgorzata Lubelska-Sazanów, with whom I worked on the project *Towards Basic Principles of European Animal Law*, and who contributed significantly to the comparative aspects of the chapters on animal law.

1 K. Śmiłowska and T. Pietrzykowski, "Kinds of harm: Animal law language from a scientific perspective," *Animals* 12/5 (2022), DOI: 10.3390/ani12050557.

I thank Dr Aleksandra Wilczyńska, who explored the concept of interest in law in her PhD dissertation, and whose remarks, suggestions, and advice in an important way improved the line of argument as developed here. The concept of non-personal subjecthood in law was inspired by and developed in cooperation with Professor Andrzej Elżanowski, a scholarly advocate of the animal rights movement, whose knowledge and ideas have long been an important support in my research queries. My thanks also go to Counsel Karolina Kuszlewicz, an expert in animal welfare regulations in Poland, for her valuable comments concerning some aspects of the interpretation and application of the Polish Animal Protection Act.

It would be impossible to enumerate all individuals whose ideas have influenced my way of thinking about animal law. Because of the pliability of this young branch of legal science, discussions contribute to the shaping of its intellectual paradigm and the emerging doctrine to a greater extent than they do in other fields of scholarship.

The focus of this book is primarily on the concepts, legal institutions, and principles of animal law. Although it takes Polish law as the point of reference, I aim at a possibly general perspective, going beyond regulations and other normative acts in force in Poland. This is why, wherever possible, I refrain from foregrounding the details of current local laws. My motivation in this respect was not only to avoid a trap aptly described by Julius von Kirchmann in his famous Berlin lecture: "with three corrective words from the legislature, entire libraries become wastepaper."[2] I was primarily guided by the firm conviction that the majority of dilemmas that are inseparable from the emerging animal law are, in fact, universal and coincide with discussions and questions that arise for legal orders in a large number of other European countries.

Animal legislation is at the stage where the foundations, concepts, and underlying axiological principles are taking shape, together with the system of institutions indispensable for any branch of legislation. These are the elements that are the focus of this work. The book does not aspire to provide solutions to individual legal problems, although such tips could be helpful in the practical application of animal law, the act on the protection of animals

2 The original quote reads: "[...] drei berichtigende Worte des Gesetzgebers, und ganze Bibliotheken werden zu Makulatur" (J. von Kirchmann, *Die Werthlosigkeit der Jurisprudenz als Wissenschaft* (Berlin: Springer, 1848)).

used for scientific or educational purposes, and other animal welfare regulations. Its intention is more modest but, at the same time, more fundamental. Far as I am from idolising the role of legal concepts, I have no doubt that, following J. L. Austin, making the meaning of the words we use precise is often a precondition for a thorough understanding of the phenomena we attempt to describe.[3] This appears especially relevant to animal law, where even the most basic concepts are far from being uniformly used.

Animal law, fast-developing but still modest in volume, needs a fundamental systematisation around its crucial institutions. This is why another important objective is to reflect on central legal constructions that allow for a more transparent arrangement of legal material, which also comprises a large number of local, technical and, to some extent, auxiliary regulations. From the conceptual point of view, institutions of animal law are still *in statu nascendi*. Hence, discussion on their shape goes beyond pure description and explanation. Rather, it contributes to their ultimate legal positivisation.[4]

There is nothing more important to an emerging area of legislation than identifying a set of fundamental principles that reflect its underlying axiology. The normative content of regulations is and should be perceived in their light; what is more, the axiology of a branch of legislation should be the primary determinant of its laws and their further development. Animal law is in a specific position here, as it is born directly out of ethical reflection and remains its immediate normative expression. Random intuitions and emotional reactions, which too often echo in the content of laws, call for intellectual reworking, clear explication, and rational ordering. While acknowledging values and bringing them to life is the starting point and the aim of every regulation, it is rationality that is its power and raison d'être (*ratio est anima legis*).

3 "When we examine what we should say when, what words we should use in what situations, we are looking again not merely at words (or 'meanings', whatever they may be) but also at the realities we use the words to talk about: we are using a sharpened awareness of words to sharpen our perception of, though not as the final arbiter of, the phenomena" (J. L. Austin, "A plea for excuses," *Proceedings of the Aristotelian Society*, New Series, Vol. 57 (1956–1957), pp. 1–30).

4 On the role of doctrinal legal considerations in the co-creation of the content of the studied institutions, see J. Leszczyński, *Pozytywizacja prawa w dyskursie dogmatycznym* (Kraków: Universitas, 2010).

The book closes with some remarks *pro futuro*: dilemmas that arise from the development of animal law and its current shape. They are set in a broader context of moral progress and the possible role of law in this process. If the view I present in the final part of the book is correct, the coming technological changes announce one of the greatest revolutions in the age-old relations between humans and the animals they exploit. This would mean that animal law and its philosophy have a pivotal role to play in one of the most radical turns our civilisation has seen. This is not to be ignored.

There is a limit to what can be said and embraced in a set of relatively short discussions on fairly diverse topics. I expect that many readers may feel less than gratified with the necessarily superficial treatment of a number of themes and problems addressed herein. However, the book is intended to serve as an invitation to discussion rather than a final word. I am also aware that – in the context of many other publications on animal law, in particular those that take the perspective of animal rights – my views may, to some readers, appear too ambivalent and indefinite. Others, attached to the rigour of legal thinking, may find some places dangerously close to a free wandering of thoughts and lacking a solid doctrinal foundation: regulations, orders, commentaries, and interpretive traditions. Well, to latter group, I can only respond with the words of Zbigniew Herbert:

I would like to describe a light
which is being born in me
but I know it does not resemble
any star
for it is not so bright
not so pure
and is uncertain
[...]
so is blurred
so is blurred
in me
what white-haired gentlemen
separated once and for all
and said
this is the subject
and this is the object

Zbigniew Herbert, "I would like to describe"
(trans. Czesław Miłosz and Peter Dale Scott)

Foundations

CHAPTER 1

Legal Philosophy and Animal Law

1. Law and the picture of the world

What is law? This is the fundamental concern and the central theme in the philosophy of law. The development of legal thought consists to a large extent in attempts to provide a satisfactory answer to this question. However, searching for the answer while considering more specific legal problems is neither necessary, nor possible, nor sensible. This is why we will confine ourselves to the statement that, irrespective of what law "in fact" is, or what other elements it embraces, it comprises norms expressed in legislative acts. Regulations introduced by the legislator, precedent judgments, and other norms that satisfy the validity criteria in a legal order are at least part of law in the sense in which this concept is used here.

These norms take the form of statements of duty made by bodies with appropriate competences. In this respect, law is expressed, in principle, in language; it takes the form of text. Applicable legal norms are, on the one hand, decisions which establish general or individual models of conduct, and on the other, the meanings of statements which express these decisions or inform about their content.[1]

Law as a body of texts cannot be divorced from the underlying social conventions. It is these conventions that form the cultural basis of a legal system, as they ultimately determine which statements are to be treated as applicable law. General linguistic and specific legal conventions also determine how the content of these statements is understood.[2]

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1 For more details about problems this situation entails, see M. Matczak, *Imperium tekstu. Prawo jako postulowanie i urzeczywistnianie świata możliwego* (Warszawa: Scholar, 2019), passim.

2 On this, see, in particular, B. Tamanaha, *A Realistic Theory of Law* (Cambridge: Cambridge University Press, 2017), passim.

The fact that the linguistic aspect of law is embedded in linguistic and non-linguistic social conventions has one more important consequence. Decisions that make law and interpret it are at least to some extent influenced by beliefs that form the picture of the world accepted by the decision-makers. These beliefs concern, on the one hand, facts and the reality they represent, and on the other, the hierarchy of values adopted by an individual, together with views that justify this hierarchy.

The picture of the world in which the normative content of a legal order is embedded is neither entirely uniform nor wholly individual. To a large extent, it emerges from the cultural context of a given place and time. Many of its elements are controversial, and the beliefs of lawmakers or interpreters reflect their different worldviews and political or axiological positions. Democratic procedures of lawmaking and legitimisation of the effects of law application are conducive to balancing such controversies and adjusting the differences. Consequently, the picture of the world that underlies law is the result of beliefs, values, and expectations of those who participate in its formation and operation.[3]

Beliefs that form the cultural basis of legislation have, or in time gain, the status of the obvious. This is why their formative influence on law and its operation and understanding is sometimes difficult to appreciate. This is especially so when one assumes the "internal" point of view of a participant in a legal order, whose individual, culturally determined understanding of reality is intertwined with objective characteristics of the world, including the legal order. In this case, it is very easy to mistake one for the other and identify one's own perception of law and the reality in which it is based with what they are like "in themselves."

The differences between these two aspects are much easier to notice for an external observer, especially one that looks at a legal order from a considerable temporal or cultural distance. In this case, the contingency and relativity of legal solutions embedded in a given cultural and social context may appear striking. Seen from a different standpoint, law and its operation often

3 An interesting and telling illustration of this process can be found in the famous fragment of the preamble to the Constitution of the Republic of Poland, which refers to "all citizens of the Republic, Both those who believe in God as the source of truth, justice, good and beauty, As well as those not sharing such faith but respecting those universal values as arising from other sources."

appear virtually incomprehensible, and its content and functioning are perceived as irrational or bizarre. From today's perspective, this is the impression produced, for instance, by some norms of the oldest legal codes of the East,[4] medieval rules of trial by ordeal as a method of resolving legal disputes,[5] or some solutions proposed by Confucianism.[6] Understanding their rationality, rooted in the underlying contingent picture of the world, sometimes requires a thorough study of their historical, cultural, and philosophical contexts.

2. Presuppositions of law

Lawmakers' beliefs concerning nature, humankind, values, and principles that govern nature and social life are sometimes expressed in law *expressis verbis*. However, more often, they take the form of tacit, or only partly articulated, assumptions that determine the way of making the law, its content, and its understanding. A special type of such assumptions are presuppositions, that is, assumptions which must be accepted for a given utterance to make sense. A statement and its negation have the same presuppositions. Both "The sun has already set" and "The sun has not set yet" rest on the same presuppositions, such as "the sun exists," "the sun sets at a certain time," and "the time flows."[7]

Normative statements, including laws introduced by legislators, are also underpinned by various presuppositions. Lawmakers' beliefs about the world form the foundation for the content of law; without this basis, their legislative

4 For example, "If the 'finger is pointed' at a man's wife about another man, but she is not caught sleeping with the other man, she shall jump into the river for her husband" (The Code of Hammurabi (trans. L. W. King), available at https://avalon.law.yale.edu/ancient/hamframe.asp) or "If a man bit and severed the nose of a man, one mina silver he shall weigh out" – quoted from R. Yaron, *The Laws of Eshnunna*, 2nd ed. (Jerusalem–Leiden: The Magness Press, The Hebrew University, E. J. Brill, 1969/1988), p. 69.

5 For example, the ordeal by cold or hot water or the ordeal by ingestion.

6 For example, the central role of *Li*, ritual that maintains the legal and social order (see, e.g., M. Stępień, *Spór konfucjanistów z legistami. W kręgu chińskiej kultury prawnej* (Kraków: Wydawnictwo Uniwersytetu Jagiellońskiego, 2013), passim; idem, *Chińskie marzenie o konstytucjonalizmie* (Kraków: Wydawnictwo Uniwersytetu Jagiellońskiego, 2015).

7 For more details about presuppositions, see Z. Łyda, "Presupozycje a dyskurs prawny," *Studia Prawnicze* 3 (1992).

activity would make no sense.[8] Of these beliefs, the most general ones shape the picture of the world in which legal norms are rooted.[9] Thus, the picture of the world assumed in a given legislation is created specifically by the most general and basic beliefs, often common to the entire legal order or its substantial part, and not unique to a regulation or an act. As R. Sarkowicz observes, these beliefs share a certain characteristic feature:

> [...] they are very rarely presented in the form of well-established general statements. More often than not, it is from individual presuppositions that general views are reconstructed, views that can later be systematised into sets of beliefs concerning the world, society, and the human being.[10]

For the understanding of the legal order, ontological and axiological presuppositions are the most significant. Ontological presuppositions spring from beliefs – accepted in a given culture and period of time – about reality, its structure, and its laws. In this sense, a legal norm stating that whoever kills a human being is punishable by imprisonment is based on ontological presuppositions that there exist humans, that humans are mortal, and that humans can be deprived of life by other humans. Moreover, the norm presupposes that its intended receivers enjoy and value freedom, which means that imprisonment produces discomfort (punishment), and that it is physically possible to deprive the offender of freedom.

More controversial presuppositions underlying this and other norms of criminal law (or, perhaps, all legal norms, *tout court*) involve the existence of free will. They are based on the belief that the intended receivers of regulations may act in various ways depending on what a norm prescribes. Sometimes, especially in the case of basic legal principles or general constitutional clauses, presuppositions may include broad and complex political, philosophical, or ethical doctrines.[11]

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8 R. Sarkowicz, *Poziomowa interpretacja tekstu prawnego* (Kraków: Wydawnictwo Uniwersytetu Jagiellońskiego, 1995), passim.

9 See T. Gizbert-Studnicki, "Język prawny a obraz świata," in M. Araszkiewicz, P. Banaś, W. Ciszewski, A. Dyrda, A. Grabowski, and K. Płeszka (eds.), *Pisma wybrane. Prawo. Język, normy, rozumowania* (Warszawa: Wolters Kluwer, 2019), pp. 52f.

10 Ibidem, p. 170.

11 As an example, one may consider the doctrine of the democratic state of law (Article 2 of the Constitution of the Republic of Poland), of equality before the law (Article 32), or of human

Even a *prima facie* simple and uncontroversial regulation, such as the one that prescribes that whoever kills a human being shall be imprisoned, rests on a number of axiological presuppositions. These include regarding human life as a value in law and appreciating its relation to the value of human freedom (since depriving an offender of freedom may be an appropriate punishment for killing another human). Additionally, it is not always possible to clearly distinguish between ontological and axiological presuppositions. For example, the above norm rests on further assumptions regarding when a human life begins and what criteria determine "human nature."[12]

The diversity of possible presuppositions and the extent to which the lawmakers' beliefs are entangled with the picture of the world that dominates at a given place and time can be noticed when we compare legal norms set in different cultural contexts or operating at various times. Many examples illustrate the different types of presuppositions that can be reconstructed on the basis of legal norms. These include the institution of slavery, the duty to equip the deceased with a coin or other objects useful in the afterlife, the Hindu protection of cows against slaughter and sale, the rules of the caste system, the widow's duty to wear the jaw of her late husband suspended from her neck (the Trobriand Islands), and the dependence of the punishment on the family relationship or rank of the offender (China). A contemporary and much less exotic example would be the pushback measures, applied on a wide scale in Poland and some other countries, prescribing that migrants should be forced back over the border after they are caught crossing it illegally (which sometimes means bringing them to death).

Taken together, the presuppositions underlying a legal order constitute its philosophical foundation. This basis consists of a net of concepts, beliefs, and values accepted by the legislator, which are usually rooted in the culturally dominant picture of the world. Some of them are so obvious that without an analysis and reconstruction, they may remain unarticulated or even unrecognised: invisible until, for some reason, they become problematised. They are, at least to some extent, contingent products of historical and cultural processes,

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dignity as a source of rights and freedoms (Article 30).

12 For more details, see T. Pietrzykowski, "Chimery i hybrydy. Podmiotowość prawna między dogmatem a konwencją," *Studia Prawnicze* 204/4 (2015), pp. 5–22.

and in the course of time, many of such "obvious truths" turn into equally obvious nonsense and evidence of moral barbarism of the times.

Typical examples of such contigent beliefs include the killing of newborns,[13] the treatment of women,[14] and the imposition of religion upon the people by force.[15] But this is the likely fate of many legal presuppositions accepted today. In recent years, Western legal culture has undergone major changes in the perception of family, marriage, and sexuality. Also, there are reasons to suppose that the 21st century will be the time of a major transformation in the presuppositions about the relationships between humans and other animals able to experience pain and other forms of suffering.[16]

These comments on the nature and role of presuppositions in the formation of the picture of the world that underlies law may be extended with two more remarks. Firstly, such tacit assumptions underpin not only the norms collected in codes and legal acts, but also court rulings and considerations of interpreters of legal texts. In many cases, argumentation presented in support of a legal statement or law-applying decision is of no value until a certain presupposition is accepted. This is most salient in the case of rulings and debates on controversial constitutional issues. However, the same applies to apparently more straightforward and mundane legal decisions.

Apart from ontological and axiological presuppositions, also normative presuppositions play an important role in legal discourse. Many laws, especially sanctioning laws, are based on the assumption that corresponding sanctioned norms apply. The obligation to punish a person who kills another person rests on the presupposition that the act committed by the offender is prohibited.

13 Plato had no moral objections to recommending that an unwanted infant, if brought to the world, should be abandoned (*Republic*, Book. V, 461 bc).

14 As late as in the 19th century, A. Schopenhauer made the following remark: "The mere idea of seeing women sitting on the judges' bench raises a smile" (A. Schopenhauer, *The Basis of Morality*, trans. A. B. Bullock (London: Swan Sonnenschein & Co, 1904), Chapter VI; available at: https://www.gutenberg.org/files/44929/44929-h/44929-h.htm, 4.04.2022).

15 In his chronicle, Thietmar reports with appreciation that under the rule of Bolesław I the Brave, "anyone found to have eaten meat after Septuagesima is severely punished, by having his teeth knocked out. The law of God, newly introduced in these regions, gains more strength from such acts of force that from any fast imposed by the bishops" (Book VIII, Chapter 2; available at: http://www.jassa.org/?p=10386, 4.04.2022).

16 For more detail, see T. Pietrzykowski, *Personhood Beyond Humanism: Animals, Chimeras, Autonomous Agents, and the Law* (Cham: Springer, 2018).

In this case, the presupposition is negative (concerns the prohibition of the act; hence, the commission of the act should be punished), but legal norms may also rest on positive presuppositions. This is the case when a norm specifies how an act should be performed (e.g., the drafting of the Last Will). Here, it is presupposed that the act is, in principle, allowed by the law. Otherwise, a regulation on how it should be performed would be nonsensical.

Normative presuppositions may form the content of other norms, logically or thematically correlated with the regulations that presuppose them. However, sometimes the presupposed norm is only tacitly assumed by the legislator. In this case, from the perspective of the interpretation of law, it is an implication that follows from the explicitly formulated norm. The interpreter may reconstruct the normative content presupposed by the legislator as applicable legal content (since it follows from the norm that is explicitly stated in law). As examples, one may consider the reconstruction both of sanctioned norms implied by penal provisions, and of norms that follow from general constitutional principles. Naturally, normative presuppositions are also an inseparable basis of legal statements made by law-applying bodies and other participants in legal discourse.

3. The philosophy of law and juridical humanism

Assumptions underlying the picture of the world that forms the basis for the content, understanding, and application thereof are, to use Ronald Dworkin's phrase, a silent prologue to any legal decision. All decisions of the lawmaker, courts, and other law-applying bodies rest on obvious, tacitly accepted premises concerning what the legal and non-legal reality is like and what values legitimise their actions. At least some of these assumptions remain unarticulated until they are problematised. This is why, uncovering them requires conscious reconstruction and search for relationships between legal statements and ontological, axiological, and normative beliefs that make such statements sensible.[17]

In this context, the philosophy of law may be understood in at least two ways. First, it may address the philosophical underpinning of the applicable law and the practice of law-making and application. Second, it may aim at the

17 See also T. Pietrzykowski, *Naturalism and the Frontiers of Legal Science* (Berlin: Peter Lang, 2021), pp. 183ff.

study of the philosophical problems that emerge as a result of the operation of a legal order. An important task for the philosophy of law in the second understanding should be a critical analysis of the positive philosophy of law, that is, an analysis of the philosophical assumptions on which a particular legal order and its function are based. It is essential that the picture of the world these assumptions express should be constantly confronted with the evolving scientific knowledge and its ethical implications. The fact that the picture of the world is perpetuated by normative decisions produces the risk of obsoleteness and the need of revision in accordance with the best, most recent knowledge of the world and rational ethical judgments that derive from it.

This need is especially evident when one considers the place of animals in the legal order. In this case, legal solutions are deeply embedded in the ontological assumptions about the nature of animals and the differences between animals and humans. These assumptions serve as a basis for axiological and normative beliefs that determine the shape of a large number of specific regulations and the general spirit of legislation with regard to the laws that concern humans and animals.

A prime example could be rules that specify when experimenting on animals is acceptable, as contrasted with rules on experimenting on human subjects. Although the legislator does not explicitly express the underlying fundamental axiological distinction, it is precisely this distinction that explains the existing legal differences. In the case of animals, experiments are in principle acceptable as long as they are designed to bring specific new knowledge or are justified by their prospective scientific, educational, or applied value (testing products or substances for safety).[18] In the case of human subjects, experiments are banned if no conscious and willing consent has been provided regardless of whether or not their prospective knowledge gains or scientific, educational, or applied benefits are greater than those of similar experiments on non-human animals.[19]

There is no doubt that this difference results from the axiological beliefs that underlie these regulations, beliefs that assign special value to humans.

18 See T. Pietrzykowski, "Etyka prowadzenia badań na zwierzętach," in J. Różyńska and W. Chańska (eds.), *Bioetyka* (Wolters Kluwer, 2013), pp. 453f.

19 Cf. M. Czarkowski, "Zasady prowadzenia badań naukowych z udziałem ludzi," in J. Różyńska and W. Chańska (eds.), *Bioetyka...*, pp. 439ff.

This value follows from their "inherent dignity," considered as a unique property of human beings. It determines their position in the order of values protected by law and prescribes basic normative rules concerning their treatment, very different from those which refer to animals, whose position in the order is "lower."

Such ontological and axiological assumptions underlying the differences in the treatment of humans and other animals can be referred to as juridical humanism (anthropocentrism).[20] For centuries, it has been an important part of the picture of the world that forms the basis for jurisdiction, and although its various elements have changed during that time, the very essence of the anthropocentric axiology of law still remains the unquestioned foundation for virtually all known legal orders.

Although the concept of humanism is far from unequivocal, I use it here following Józef Bocheński, for whom it is one of the "philosophical superstitions" haunting the contemporary world.[21] On this understanding, humanism is a belief that

> each human being, with no exception, is in significant and fundamental ways different from other creatures, in particular from animals. Human beings live in the natural world, but they do not belong to it. They are elevated above everything else, and in many cases, they are something sacred.[22]

According to Bocheński, humanism rests on three fundamental claims:

> First, that the human being is a superior creature, that is, richer, better, and more worthy than other creatures in the world. Second, that this superiority is not only relative or quantitative, but also fundamental and qualitative: the human being is not only more intelligent than an ape, but their intelligence is

20 See also T. Pietrzykowski, "Law, personhood, and the discontents of juridical humanism," in T. Pietrzykowski and B. Stancioli (eds.), *New Approaches to the Personhood in Law. Essays in Legal Philosophy* (Frankfurt a. M.: Peter Lang, 2016), pp. 12ff.; idem, *Personhood Beyond Humanism...*, pp. 27ff.

21 See A. Sulikowski, *Posthumanizm a prawoznawstwo* (Opole: Wydawnictwo Uniwersytetu Opolskiego, 2013), passim, especially pp. 8 and 50ff.

22 J. Bocheński, *Sto zabobonów. Krótki filozoficzny słownik zabobonów* (Kraków: Philed, 1994), p. 55.

> of a wholly different and superior nature. Third (at least for many humanists), that the human being is unique and one-of-a-kind; that they are elevated above nature, and while they live in the world, they do not belong to it – they are not part of nature. This is why the human being is often regarded by humanists as something sacred, as an embodiment of a sacred value.[23]

A legal order based on these assumptions is an institution that is subordinated to the good and interests of human beings. This humanistic streak in the nature of personhood in law was perhaps most succinctly expressed by the Roman jurist Hermogenianus, who wrote: *hominum causa omne ius constitutum sit* ('Every law is created for the sake of men').[24] It is worth noting that these words were included among the most important legal paroemias carved on the colonnade walls of the Supreme Court in Warsaw.

The humanistic axiology of law is manifest in the fundamental acts of international law (starting with the Universal Declaration of Human Rights) and in virtually all known constitutions and other state-level regulations. For example, the preamble to the Polish Constitution makes reference to the pursuit of the good of "the Human Family" and to the necessity to apply law with due respect for the inherent dignity of the human beings and their rights, which are the "unshakeable foundation" of the Republic of Poland. Similar considerations underlie the constitutional norm that recognises the inherent dignity of the human being as the source of all constitutional freedoms and rights.

The axiological foundations of law are expressed in the same humanistic spirit in one of the most important rulings of the Polish Constitutional Tribunal, where it is argued that a democratic legal state

> exists exclusively as a community of people, and only people can be *true* subjects of rights and duties established in a state of this kind [...]. For a democratic state under the rule of law, the dignity of the person and the interests they value most are the highest value.[25] [emphasis added – TP]

23 Idem, "Przeciw humanizmowi," in idem, *O sensie życia i inne eseje* (Kraków: Philed, 1995).

24 Digesta, 1.5.2.

25 Ruling of the Polish Constitutional Tribunal of 27 May 1997 (K 26/96).

The property of inherent and inalienable dignity of the person turns human interests (variously understood and specified) into the ultimate goal to be served by all normative regulations. The human being is thus the holder of subjective interests carried out by the law directly or indirectly.[26] The personhood of other entities (legal persons, such as companies, municipalities, or associations) is secondary in nature in that it offers a technical legal solution enabling a more effective pursuit of human interests. In this way, humans can use the tools of formal cooperation offered by law to form organised groups that operate according to clear principles of cooperation and co-responsibility. However, from the perspective of the axiology of the legal order, this is not tantamount to considering non-human entities as persons.

According to J. Bocheński, in the course of the last five centuries of scientific development – from the Copernican revolution to the recognition of the evolutionary origins of *homo sapiens* – this anthropocentric version of humanism has become "almost nonsensical" and, in the light of the present state of knowledge, must be regarded as "an offence to reason."[27] Today, this form of humanism plays the role of a quasi-religion and is the "possibly most widespread contemporary superstition"[28] shared by "the majority of preachers, philosophers, politicians, journalists," and, if one may add, lawmakers.

In the light of contemporary knowledge, this humanistic picture of the world is becoming increasingly and obviously anachronistic. The human being is not only a product of the same evolution of species as other animals; humans are also genetically related to other animals in a way that reveals the fundamental functional correspondence between their nervous system structures. All abilities that used to be regarded as unique to humans have now turned out to be merely more advanced in human beings, with their manifestations also observed and documented in non-human animals. Sentience (the ability to experience sensations, including pain and pleasure) is present at least in the vertebrates, and in all likelihood also in some invertebrates (e.g., in cephalopods). Various levels of the ability to experience emotions and reflective self-awareness can be found at the very least among mammals and birds, in some cases forming the basis for behaviours that used to be ascribed exclusively to

26 Ruling of the Polish Constitutional Tribunal of 30 September 2008 (K 44/07).

27 J. Bocheński, "Przeciw humanizmowi...," p. 56.

28 Ibidem.

humans (including the production and use of tools, the use of simple symbols for communication, and the formation of complex social relations and basic forms of culture and morality).

There is nothing surprising about these similarities. The human brain did not appear suddenly, as an instance of *creatio ex nihilo*, but is a continuation of a long evolution of species that gradually shaped the nervous structures responsible for behaviours and conscious experiences. This is why a number of the "old" subcortical structures of the human brain (e.g., the limbic system, responsible for emotional processes, and the reward system) are not radically different from similar structures in other mammals (e.g., rodents). In humans, sentient abilities produced by these structures combined with well-developed reflective self-awareness, which emerged as a result of a unique development of the neocortex.

Evolutionary, neuroanatomical, and psychological kinship between human and non-human animals directly falsifies the central dogmas of the humanistic picture of the world that forms the basis for legislature. It is one of the tasks for the philosophy of law to revise this picture and to identify these aspects of the legal order which have become, or are becoming, intellectually and ethically anachronic. For this revision to be possible, however, we need a thorough reconstruction and critique of current solutions provided by animal law, and of the assumptions that underlie these solutions. Further considerations proposed in this book are a small step in this direction.

CHAPTER 2

Personhood

1. Persons and subjects of law

The concept of personhood has been analysed and discussed from many different standpoints, involving philosophical, psychological, legal, and even theological perspectives. The last-mentioned stance gave rise to the classic definition of "person" formulated by Boethius in the 6th century CE. According to it, the person (*persona*) is *rationalis naturae individua substantia* ('individual substance of a rational nature').

This line of thought is continued in the modern, secularised understanding of the person, dominated by the Cartesian vision of the human being as a unity of substance and "spirit," the site of reason and consciousness. Because the human body is controlled by the immaterial *res cogitans*, humans are capable of conscious and reasonable being in the world. Their actions result from free will rather than are determined by external reasons. By contrast, animals are not equipped with this immaterial thinking substance (*res cogitans*), their existence is limited to the material substance that builds their organisms (*res extensa*). They are "natural automata," that is, highly complex organic machines, operating strictly on the basis of cause-and-effect relationships.

The Cartesian vision of a human being as "the Ghost in the Machine" sealed the fundamental, insurmountable, qualitative distinction between people and animals. It also provided support for the ethical concept of human dignity, a property that endows humans with a unique status of moral, and hence legal, subject. Dignity is ascribed to the human being as the only creature in nature which "is a thinking intelligent Being, that has reason and reflection, and can consider itself as itself, the same thinking thing in different times and places."[1]

1 J. Locke, "An essay concerning human understanding," in *The Clarendon Edition of the Works of John Locke*, ed. P. H. Nidditch (Oxford: Oxford University Press, 1975), 2.27.9.

Although the following centuries have brought mounting evidence of the abilities to experience emotions and plan the course of action, as well as of the awareness of the self in many animal species, their status as subjects continues to be markedly different from the "personhood" that is ascribed to humans. As proposed by Harry Frankfurt, being a person implies not only having "common" desires (first-order desires), but also having second-order desires, that is, desires which focus on other (first-order) desires. Thanks to second-order desires, common desires can be restrained or transformed into will that shapes behaviour. In other words, a person is a subject who is capable not only of desiring things but also of desiring that their actions follow from selected desires, and that other desires they have do not materialise in actions.

Such second order volition form the basis for self-control and distinguish persons from beings which are only able to have common desires and act on them on the spot and without reflection.[2]

2. Animals and sentience

The simple dichotomy between the two-level structure of the human mind and animals – beings that only have common, instinctual desires – is becoming increasingly difficult to reconcile with the developing knowledge of animal psychology. It turns out that a growing number of species have minds capable, to a varying extent, of virtually all functions associated with the complex mechanisms of human rationality. These include not only temporal planning, counting, building social relations, and communicating, but also establishing basic forms of culture and politics.

Some of these abilities are present not only in primates, the closest to humans in evolutionary terms, but also in some birds, dolphins, elephants, and many other species. In many cases, their behaviour places them on the borderline of personal capacities, especially in view of the fact that also in humans, these abilities are gradable and differ between individuals, as well as depending on the life stage, neurological condition, and other factors.

At the same time, there is no doubt that some types of experience, such as pain and basic emotional reactions, are produced in brain structures which did

2 H. Frankfurt, "Freedom of the will and the concept of a person," *The Journal of Philosophy* 68/1 (1971), pp. 5–20.

not evolve in humans, but which humans inherited from their evolutionary ancestors. Also, the evolution of the nervous system was not a simple chain of linearly developing structures and capabilities in successive species. On the contrary, its course resembles a complex tree with a large number of branches, which in effect produced a mosaic of abilities, developed in very different degrees and mutually interconnected.

According to up-to-date knowledge, the group of beings capable of conscious experience – in particular, of pain, fear, and other emotions – is very large. It includes at least vertebrates, that is, mammals, birds, amphibians, and reptiles. In all likelihood, these abilities have also developed in some invertebrates, especially in octopuses and other cephalopods. However, there is no solid evidence that they are present in all invertebrates, the majority of which have relatively little developed nervous structures, or in plants, fungi, and other similar living organisms, where such structures are absent.

This is not to say that such evidence will never appear. However, its discovery would result in a major scientific revolution, probably involving the abandonment of the present paradigm, which links conscious experience with the activity of complex structures in the nervous system (primarily in the brain).[3] At present, awareness seems to be the product of the activity of certain brain structures, and hence dependent on their presence. Thus, in the light of current knowledge, the dividing line apparently runs between vertebrates and invertebrates, with the exception of cephalopods, which, compared to other invertebrates, have an exceptionally complex and well-developed nervous system (although its structure and organisation are different than in vertebrates).[4]

Still, it should be borne in mind that the distinction between sentient and non-sentient animals is not necessarily clear-cut. The ability to subjectively experience stimuli and changes in the state of own body may be much more subtle and varied in nature than this simple juxtaposition suggests. This is also true of the distinction between sentience and reflective self-awareness

3 See, e.g., P. Churchland, *The Engine of Reason, the Seat of the Soul: A Philosophical Journey into the Brain* (Cambridge, MA: MIT Press, 1996); Ch. Koch, *The Quest for Consciousness: A Neurobiological Approach* (Roberts and Co, 2004); D. Dennett, *Consciousness Explained* (New York: Back Bay Books, 1992).

4 S. Shigeno, P. Andrews, G. Ponte, and G. Fiorito, "Cephalopod Brains: An Overview of Current Knowledge to Facilitate Comparison with Vertebrates," *Frontiers in Physiology* 9 (2018), pp. 952f.

characteristic of persons. Reflective self-awareness does not appear in *deus ex machina* fashion; rather, it emerges from the growing complexity of emotional experiences and intentional states. Not all people manifest the same ability to experience their own existence (their own self). It develops with age and may be limited or disappear as a result of various pathological processes, such as neurodegeneration. Some animals, in turn – especially well-developed individuals of such species as chimpanzees, other apes, dolphins, elephants, and birds – may have abilities that at least border on personhood.[5]

The body of knowledge on the diversity of forms of awareness and their occurrence in non-human vertebrates poses a radical challenge to one of the pillars of the picture of the world that provides a foundation for law-making. Drawing on the simple Cartesian dualism and its ethical implications that focus on human dignity, juridical humanism (anthropocentrism) is becoming an anachronism increasingly difficult to reconcile with current scientific knowledge. Although the withering dualistic vision of the human being is still sitting on the throne of juridical humanism, the overturn is only a matter of time. The status quo is now defended only by mental conservatism and the convenience of treating animals "the Cartesian way", that is, as nothing more than a source of food, clothing, service, entertainment, and as material for experiments.

This criticism does not mean denying the obvious uniqueness of human mind, with its abilities to create complex forms of self-awareness, communication, culture, technology, and abstract intellectual structures. What it does mean is that this uniqueness stemming from the position of humans as the only self-aware being in nature. On the contrary, the foundations for the abilities that are considered crucial for the moral value of the human being are in various degrees present in a large number of other species. In many animals, these capabilities are comparable to those present in at least some humans, in some cases exceeding them.

5 Among many examples of such abilities in animals, worth mentioning is the thirty-year research by I. Pepperberg on the parrot named Alex. Alex proved capable of using correctly more than 100 words and solving mathematical tasks (https://www.nature.com/news/2007/070910/full/news070910-4.html; https://www.nature.com/news/parrot-s-posthumous-paper-shows-his-mathematical-genius-1.10071), I. Pepperberg, *The Alex Studies. Cognitive and Communicative Skills of Grey Parrots* (Cambridge, MA: Harvard University Press, 2002).

The fact that the empirical foundations of juridical humanism are becoming outdated cannot, in the long term, be without effect on the axiological and ethical dimensions of the picture of the world underlying the legal order. This impact is now beginning to be visible. Still, so far, efforts have been made to accommodate the changes in such a way so that the core, the essence of juridical humanism, remains possibly intact. It seems, though, that the internal inconsistency is now approaching the tolerable limits and that in this respect, the law in the end of the 21st century will be radically different from what it was like at the beginning of this century.

3. Sentience and its ethical implications

The emergence of sentience is perhaps the most significant ethical breakthrough in the evolution of species.[6] It was in fact the starting point and the necessary condition for the emergence of the moral dimension of reality, since the capacity of subjective experience marks the beginning of subjective interests. The latter are related to the potentially better or worse quality of life. Sentience has evolved as a tool for avoiding whatever might threaten the organism's wellbeing and searching for whatever is conducive to its prosperity. Of course, it is not an unfailing mechanism, especially in changing environmental conditions. Still, it must be so effective as to enable survival and reproduction of species.

The search for positive (attracting) stimuli and avoidance of negative (aversive) ones lies at the core of sentience. Sentience gives rise to the subjective quality of life, which embraces the entirety of pleasant and unpleasant experiences. As a result, the life of sentient beings may be better or worse *for themselves*. The subjective quality of life is the point of reference for moral values – good and evil – which make no sense if they are separated from whatever is good or bad *for* a given subject.[7]

6 For more details, see Ch. Korsgaard, *Fellow Creatures. Our Duties to Other Animals* (Oxford–New York: Oxford University Press, 2018); A. Elżanowski, "Wartość życia podmiotowego z perspektywy nauki," *Przegląd Filozoficzny* (Nowa Seria) 71/3 (2018), pp. 81f.; idem, "O wartościach i ich ewolucyjnym pochodzeniu," in W. Ługowski and L. Kisiejew (eds.), *Filozofia przyrody – dziś* (Warszawa: IFIS PAN, 2011), pp. 182f.

7 Ch. Korsgaard, *Fellow Creatures...*, pp. 9f.

The subjective quality of life underlies values and moral judgments. Without it, all events in the universe would be morally neutral, since there would be no subject to perceive them as meaningful to itself.[8] It is sentience that makes events potentially better or worse for a being. Thus, it forms the basis for ascribing values to events and for perceiving them as good or bad.

The emergence of sentience in many animal species enabled further evolution of nervous structures. More complex states of consciousness, including reflective self-awareness and second-order volition, have become the biological basis for the cultural phenomenon of morality. The appearance of beings with properties of personal subjects is connected with the concurrence of sentience and additional abilities, now described as the "slow system" (analytical, reflective, conscious) of information processing in the brain.[9] Nevertheless, this system rests on, and is tightly connected with, automatic associative emotional processes comprising a parallel system of intuitive "fast brain."[10]

While moral judgments are pointless without sentience, there would be nobody to pass them without personhood. The latter is then the starting point for the development of conscious moral attitudes on the one hand, and ethics on the other, understood as a reflection on morality and reasons that may justify moral attitudes, especially in the case of moral dilemmas or controversies. For ethics, in turn, two dividing lines are important. One runs between non-sentient entities, including living organisms, and sentient beings, whose life can be subjectively better or worse. The other dividing line separates sentient beings from persons, so respectively, non-personal subjecthood from personhood.[11]

In both cases, the division is blurred, and the course of the line uncertain. Perhaps in both, we can speak of degrees and shades of subjectivity. Maybe we

8 Of course, there is always the possibility that they would be meaningful to God; the problem of the existence of God, however, is religious and metaphysical in nature, and thus beyond the realm of science.

9 Cf. D. Kahneman, *Thinking Fast and Slow* (New York: Farrar, Straus and Giroux, 2013); see also T. Pietrzykowski, "In our minds. Descriptive accounts of practical rationality," in J. Stelmach and W. Załuski (eds.), *Game Theory and the Law* (Kraków: Copernicus Center Press, 2011), pp. 215f.

10 On the significance of these processes for legal thinking, see T. Pietrzykowski, *Intuicja prawnicza. W stronę zewnętrznej integracji teorii prawa* (Warszawa: Difin, 2012).

11 For more detail, see A. Elżanowski and T. Pietrzykowski, "Zwierzęta jako nieosobowe podmioty prawa," *Forum Prawnicze* 15/1 (2013), pp. 18f.

still lack the means to uncover and understand them properly. Nevertheless, we have to rely on the best knowledge available until it is demonstrated to be incomplete or based on wrong assumptions. And the knowledge we have enables some hypotheses to be posed, cautious but empirically well-grounded.

In the light of these hypotheses, an overwhelming majority of vertebrates, including fish, have sentience, which is particularly well-developed in mammals and birds. With regard to invertebrates, there are solid empirical arguments for the presence of sentience in cephalopods, especially in octopuses. By contrast, for a vast majority of invertebrates, including insects (arthropods), there are no empirical data suggesting the presence of sentience (at least not in a form that could be detected by the same means as those applied to vertebrates). In all likelihood, rudimentary forms of sentience enable the most basic types of perception and reaction to stimuli, but not positive or negative experiences that result from these processes.

We know that complex forms of reflective self-awareness characteristic of personhood are present in humans with sufficiently developed cognitive abilities (with the exception of early developmental phases, advanced stages of neurodegeneration, and some other diseases). A markedly weaker, borderline form of personhood may also be characteristic of some other, rather few, animal species. These include, first of all, chimpanzees, followed by dolphins, elephants, and some birds. It is an open question to what extent these cognitive abilities vary among individual representatives of a species, and to what extent they are species-specific.

4. Non-personal subjects and law

The development of knowledge about the roots and nature of morality comes into conflict with the legal tradition of understanding subjecthood and personhood in law. This tradition grows out of the culturally conditioned anthropocentrism: the body of presuppositions that we have referred to as juridical humanism. According to this approach, law is an institution not only created by human beings, but also designed to serve human interests (*Hominum causa omne ius constitutum est*). From a historical point of view, it can also be seen that these interests were usually narrowly construed and limited to a relatively small group of people, such as the tribe, nation, class, gender, or race. Throughout centuries, only selected categories of human beings were

treated as "true" subjects of law whose interests were legally protected. Others, to a varying extent, were left beyond the scope of legal protection determined by the underlying axiology of the legal order.

It is against this background that the dichotomy emerged between subjects and objects of law. The former comprise persons; the latter, things. Its classic formulation can be found in the famous passage from Justinian's codification of Roman law: "The whole of the law observed by us relates either to persons or to things or to actions" (*Omne autem ius, quo utimur, vel ad personas pertinet vel ad res vel ad actiones*). This is the source of present-day concepts of law and jurisprudence. Within this framework, subjects of law comprise natural and legal persons. Only persons can have rights and duties towards objects or other persons. The ability to have one's own rights and duties is the condition, virtually the defining property, of personhood, beyond which no other form of legal subjecthood is possible.

Natural personhood applies to humans in recognition of their status as subjects and their capacity to have rights and duties. Legal personhood, in turn, enables appropriately organised and regulated cooperation of natural persons to more effectively pursue specific goals. In this way, people are able to act on behalf of a conventionally recognised legal entity holding rights and duties distinct from the rights and duties of natural persons that established it or act on its behalf.

Following Hans Kelsen, it is worth noting that the natural personhood of human beings is, in fact, another type of legal personhood.[12] Also in this case, it is the lawmaker that specifies the conditions of treating human beings as holders of "own" rights and duties, and actions that result in the acquisition, implementation, or violation of these rights and obligations. Human beings do not become "legal persons" of themselves. This status is conferred by the lawmaker's decision: who and when acquires natural personhood and what normative consequences follow from being a natural person. Of course, from the perspective of morality, each human being deserves to be treated by law as an individual subject, but whether or not this premise becomes reality depends on the lawmaker's decisions, as without them, moral claims may have no real legal basis.

12 H. Kelsen, *Reine Rechtslehre*, 2. Aufl. (Wien: Franz Steiner Verlag, 1960), pp. 176f.

The lawmaker's decisions concerning who can be granted the status of natural or legal persons usually result from the picture of the world accepted in a given legal culture. This picture determines whether every human being is treated as an individual deserving the status of natural person and what entities are ascribed what kinds of legal capacities. As long as these capacities are regarded as obvious and uncontroversial, they are relatively unobtrusive. They raise interest and provoke discussions mainly on these occasions when they lead to controversial normative decisions, such as those regarding the scope of protection of human embryos, recognition of same-sex marriages, or the moment from which legal protection of the human being no longer applies.[13]

It is also worth noting that although natural personhood and legal personhood are usually treated as symmetrical and equivalent legal concepts, in axiological terms, people and organisational entities differ radically as subjects of law. The personhood of human beings rests primarily on moral grounds, in particular, on human dignity as the moral reason for prohibiting the treatment of humans as objects. In contrast to the natural personhood of human beings, legal personhood rests on pragmatic rather than moral grounds. Enabling people who cooperate with each other to be treated as a distinct "person" – with own assets, duties, and liabilities – makes it easier for them to successfully pursue their goals. In view of this, granting legal personhood to such entities is secondary to the personhood of human beings, who, thanks to additional legal opportunities for organised cooperation, can pursue their needs and interests more effectively.

The natural personhood of human beings and the legal personhood of organisational entities need to be distinguished from a range of institutionally defined roles that law can assign to individual subjects. Under various regulations, subjects of law may become defendants, witnesses, experts, or attorneys (subjects of civil law); landlords, tenants, guarantors, or debtors (subjects in civil law relations); and taxpayers, entrepreneurs, or consumers.[14]

13 For more details on these problems, see T. Pietrzykowski, *Etyczne problemy prawa* (Warszawa: Wolters Kluwer, 2011), passim; idem, "Glosa do wyroku Trybunału Sprawiedliwości Unii Europejskiej z 18 grudnia 2014 r. w sprawie International Stem Cell Corporation vs. Comptroller General of Patents (C-364/13)," *Państwo i Prawo* 9 (2015), pp. 129f.

14 For more detail, see T. Pietrzykowski, *Personhood Beyond Humanism: Animals, Chimeras, Autonomous Agents, and the Law* (Cham: Springer, 2018), pp. 35f.

This vision of subjecthood – embracing natural persons and legal persons – leaves no room for treating animals as subjects. Arguments for the subject treatment of animals are moral rather than pragmatic in nature. They follow from the development of empirical knowledge and resulting changes in the rational picture of the world. They refer to knowledge about animal sentience and, in some cases, about animal capacities that at least approach complex, reflective self-awareness. Moral implications following from these discoveries are similar to those that define the personhood of human beings rather than to reasons for establishing entities with conventional legal personhood.

5. Law and the subjecthood of animals

Juridical humanism – a shaping factor for the picture of the world that underlies fundamental legal solutions and habits of thought – is a difficult barrier for scientific and ethical arguments. According to it, law is an order created for people and with their specific interests in mind. Sentience does not fit the construct of a natural person, identified with the capacity to have not only rights but also duties. For this reason, animals are not suitable candidates for natural persons in the traditional understanding of the term.

While some human beings may be incapable of exercising most of their rights or duties (this may be the case, for example, in the early stages of life, in certain diseases, or in a vegetative state), these are exceptions. As exceptions, they are sufficient to undermine the immanent, conceptual link between a person in law and properties which enable exercising one's rights and duties. However, they are not necessarily sufficient to justify extending the category of persons in the traditional legal understanding of the term to include animals, endowed, in principle, only with sentience.

At the same time, because of the ethical nature of arguments against treating animals as objects, animals do not fit well with the category of legal personhood. In fact, appeals for their legal empowerment focus on the recognition of their interests as distinct and legitimate. This recognition is not to make it easier for human beings to pursue their goals and plans; on the contrary, it is to constrain this pursuit because of the need to simultaneously protect and respect the interests of animals as non-human sentient beings. The problem cannot therefore be solved by proposing a separate type of legal personhood for animals.

Because of these difficulties, appeals for granting animals the status of subjects in a form of legal personhood (i.e., granting them the status of persons rather than things), have not been implemented in any legislation in the world. We still lack a conceptual framework that could offer an appropriate type of subjecthood for animals, consistent with the axiological and conceptual shape of the legal order. At the same time, the status of animals as objects, dominant in the past, has become impossible to maintain, since it is grossly inconsistent with knowledge about animal sentience and its obvious ethical implications.

As a result, developed legal orders face a paradox. Animals are no longer treated as objects of legal relations (that is, as things), but they have not been granted the status of subjects, with their own distinct rights. This situation, referred to as the dereification of animals (that is, exclusion from the category of objects), differs in important respects from legal personification.[15] It has relegated animals to a narrow space between two categories, subject and object, two seemingly complementary opposites.[16] This is also the case in Polish law, one of the first systems in Europe and in the world to introduce the dereification of animals.

Clearly, the legal situation where animals have been excluded from the category of objects, but their positive legal status has not been affirmed, is temporary in nature. In the long run, there is no doubt that it is merely a stage in the development or evolution of legislation, which must continue until animals are positively accommodated within the conceptual apparatus of law and legal sciences, in accordance with their empirically ascertained properties and ethical arguments that follow from them. This is why David Favre refers to dereification as the first transformation of the legal order for the sake of animals.[17] This change makes it necessary to look for a way to take the next step to clarify the legal situation of sentient subjects which do not fit the definition of objects but are not easily accommodated within the categories of natural or legal persons.

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15 E. Łętowska, "Dwa cywilnoprawne aspekty prawa zwierząt: dereifikacja i personifikacja," in A. Szpunar (ed.), *Studia z prawa prywatnego. Księga pamiątkowa ku czci Profesor Biruty Lewaszkiewicz-Petrykowskiej* (Łódź: Wydawnictwo Uniwersytetu Łódzkiego, 1997), pp. 71f.

16 See, e.g., K. Kuszlewicz, *Ustawa o ochronie zwierząt. Komentarz* (Warszawa: Wolters Kluwer, 2021), pp. 39, 44.

17 D. Favre, "Living property: A new status for animals within the legal system," *Marquette Law Review* 93 (2009–2010), p. 1027.

The most radical approaches call for the personification of animals by establishing a new type of personhood: non-human persons. This status should be connected with a set of inalienable subjective rights,[18] different in scope from the basic rights ascribed to human persons: they would only include the right not to be killed, imprisoned, or tortured.[19] What remains controversial in this approach to the personification of animals is the group of species to which this status would apply, and the potential gradation of personhood (connected with the gradation of subjective rights).[20]

Such proposals have a number of weaknesses that are difficult to overcome.[21] This is why, other possibilities of shaping the legal status of animals are being considered. Some of them aim at a revision of the concept of personhood in law and its relation to subjective rights. According to the standard approach, the status of person in law is regarded as a prerequisite for holding subjective rights. Personhood is in fact defined as the ability to hold them. Thus, an individual that lacks this ability cannot be regarded as one that has own subjective rights.[22] This perspective is increasingly often contested with-

18 T. Regan, *The Case for Animal Rights* (Berkeley–Los Angeles: University of California Press, 1983); G. L. Francione, *Animals as Persons. Essays on Abolition of Animal Exploitation* (New York: Columbia University Press, 2009).

19 Cf., e.g., P. Singer and P. Cavalieri (eds.), *The Great Ape Project. Equality Beyond Humanity* (New York: St. Martin's Press, 1993), pp. 304f.

20 Cf. S. Wise, *Drawing the Line. Science and the Case for Animal Rights* (New York: Basic Books, 2003).

21 For more detail, see T. Pietrzykowski, *Personhood Beyond Humanism...*, pp. 91f.

22 This kind of reasoning underlies a large number court decisions that reject the possibility of treating animals as bearers of rights (or as individuals who have the ability to hold them). In the Tommy the Chimpanzee case filed by the Nonhuman Rights Project, the New York court concluded that a chimpanzee "is not a 'person' entitled to the rights and protections afforded by the writ of habeas corpus" because "unlike human beings, chimpanzees can't bear any legal duties, submit to societal responsibilities, or be held legally accountable for their actions. [...] In our view, it is this incapability to bear any legal responsibilities and societal duties that renders it inappropriate to confer upon chimpanzees the legal rights – such as the fundamental right to liberty" (The People of the State of New York ex rel. the Nonhuman Rights Project, Inc., on behalf of Tommy v. P. Lavery, 518336, 4.12.2014; the text of this decision is available at: https://www.nonhumanrights.org/content/uploads/Appellate-Decision-in-Tommy-Case-12-4-14.pdf). In the statutory law culture, the Polish Supreme Court ruled that the victim of the crime of animal abuse "is, obviously, not the animal itself, because it is not a 'person' in the understanding of Article 49 para 1 of the Code of Criminal

in the theory of law. In particular, it is pointed out that this relation should be reversed, that is, that an individual should be treated as a subject of law if applicable laws ascribe certain rights to it (and so consider its interests as protected by independent laws). Arguments of this kind are based on the works of legal scholars who worked in very different traditions, such as Hans Kelsen, Leon Petrażycki, and Alf Ross.[23] Seen in this light, the status of subject would be the consequence of, rather than the condition for, rights assigned by law to a specific holder. This stance would also pave the way for distinguishing different types of subjects, depending on the scope and content of possessed rights.

This line of thinking also embraces an interesting proposal put forward by D. Favre: to treat animals as a new category of "living property." In his opinion, animals are *de lege lata* the fourth category of property, in addition to real estate, goods and chattels, and intellectual property.[24] At the same time, the law confers on them rights which are independent of the interests and rights of their owners. Thus, without ceasing to be property, animals are treated, to some extent, as subjects. Their status provides arguments for introducing a new category of personal property: living property, with own rights conferred by the law. In some respects, their situation resembles the legal status of many groups of people who in the past were treated as possessions, at the same time retaining some subjective rights.[25]

The most complex and sophisticated solution has been proposed by Finnish scholar Visa Kurki.[26] In his view, legal personhood should be construed as comprising many interrelated but distinct components: *incidents of legal personality*.[27] Such incidents can be passive or active. Passive incidents include, among others, the protection of basic interests (life, liberty, and corporal integrity), passive transactional capacity, that is the capacity to take the benefit or

Procedure" (Supreme Court ruling of 16 January 2014, V KK 370/13, OSNKW 2014, no 5, item 42).

23 Cf. H. Kelsen, *General Theory of Law and State* (Cambridge, MA: Harvard University Press, 1945), p. 93; L. Petrażycki, *O prawie, nauce i moralności. Pisma wybrane* (Warszawa: PWN, 1985), pp. 228, 240–241; A. Ross, *On Law and Justice* (London: Stevens & Sons, 1958), p. 182.

24 D. Favre, "Living property...," pp. 1025f.

25 For more detail, see T. Pietrzykowski, *Personhood Beyond Humanism...*, p. 22 and literature therein.

26 V. Kurki, *A Theory of Legal Personhood* (Oxford: Oxford University Press, 2019).

27 I use the terms "personhood" and "personality" interchangeably.

burden created through certain transactions, the capacity to be the owner, and the unsusceptibility to being owned. According to Kurki, procedural elements of personhood include the ability to represent oneself in court and to be the victim of a prohibited act (the aggrieved party) or a tort. Active incidents, in turn, comprise the ability to administer other incidents, for instance, by entering into contracts and bearing criminal, tort-law, or other legal responsibility (such as administrative or tax responsibility).[28]

Each of these incidents can be further analysed into more elementary components. It is important to note, however, that, taken together, they form a paradigmatic, model case of personhood. This type of personhood, in its most comprehensive version, is now granted by law to an adult human being with full mental capacity. Still, looking at the history of law and various contemporary regulations, one can see that personhood is sometimes constructed on the basis of various combinations of selected incidents.

At the same time, as Kurki argues, individual incidents of legal personality are sometimes attributed by law to beings which, in principle, do not have the status of natural or legal persons.[29] This shows that the boundary between a person – that is, a case of "true" personhood – and a non-person is not sharp and may be subject to gradation. Personhood comprises a large number of interconnected elements, but this does not mean that their holder is always and in every respect treated as a self-standing subject. For example, legal persons can at the same time be objects of legal relations (as in the case of an acquisition of a company), and an unborn child can only be a subject of criminal law in the sense of having the ability to be a victim of a prohibited act, or of civil law in the sense of having the ability to be a victim of a tort.[30]

28 Ibidem, pp. 91f.

29 An interesting example is the category of "defective" legal persons, discussed in Polish law for years, and the construct of "organisational entity without legal personality" – commonly used by the lawmaker – which can be attributed selected rights and duties (e.g., Art. 29 of the Polish Code of Administrative Law). This demonstrates that Polish law is well accustomed to the subject status of organisational entities which are not legal persons. At the same time, it cannot overcome the mental barrier regarding the subject status of beings other than natural persons.

30 The evolution of the legal status of the *nasciturus* in Polish law is also an interesting example of how the elements of "subject" treatment can change in various branches of law, such as constitutional, criminal, civil, administrative, and medical.

Thus, incidents of legal personality are, in fact, put together and attributed in a variety of ways to both natural and legal persons. This makes a powerful case against the dogmatic way of thinking – oversimplifying (if not distorting) reality – according to which natural and legal persons are the only possible forms of personhood in law and the defining condition for having any subjective rights.

6. Towards the non-personal subjecthood of animals

The collapse of the theoretical foundations for the present understanding of personhood in law offers an occasion for developing a theoretical construct that would grant animals the legal status suitable to their characteristics. On the one hand, sentience makes their life and moral status radically different from the situation of objects and non-sentient living creatures. On the other, it does not render them persons (with relatively few exceptions), whose behaviour and activity could be regulated as those of natural or legal persons in the present understanding of the terms.

The most promising solution appears to be developing a new type of subjecthood, namely, non-personal subjecthood. It should take into account both the gulf between an entity whose life has a subjective quality and objects (things), and the major differences between persons and non-personal subjects. Both divisions have powerful ethical implications, which should be properly reflected in the legal status of the entities concerned. This, I think, justifies the search for a separate category of non-personal subjects of law, which would aptly represent the empirical characteristics and ethical status of animals.[31]

This kind of non-personal subjecthood would only embrace relatively few, selected incidents of legal personality in the classic understanding of the term. In particular, it should include a possibly broad and flexible scope of legal protection of the most elementary individual interests of the subject and the ability to obtain direct judicial protection (by authorised representatives). Unsusceptibility to being owned is another possible element, which could be complemented by a new type of absolute legal relation (other than an *in rem*

31 It does not have to be limited to animals, though. For more details, see T. Pietrzykowski, *Personhood Beyond Humanism...*, passim.

legal relation, but one combining elements of ownership with guardianship and custody).

The concept of non-personal subjecthood of animals would certainly need a more comprehensive theoretical elaboration and appropriate changes in the normative system, including constitutional norms. Their aim would be to acknowledge the intrinsic legal value of the life and wellbeing of sentient animals, and, as a result, to impose on other subjects – the legislator, law-applying institutions, and other natural and legal persons – the obligation to take into account their basic interests in all decisions that significantly influence their life.

In contrast to personal subjects, non-personal subjecthood would in fact be associated with just one "strong" subjective right: the right to have one's basic interests taken into account in decisions that affect one's life. Of course, these interests would have to be weighed and limited against the rights and interests of other subjects. Still, they could not be ignored, and the process of weighing should be subject to independent judicial review (both at the level of legislation and at the level of law-applying subjects). For a method of assessment, one should turn to the principle of proportionality, well-known and long-established in law, applied in resolving conflicts of legal interests.

The idea of non-personal subjects of law appears to have some important advantages over both the present dereification of animals and the radical calls for their personification. It would significantly raise the importance of animal interests in legal decisions and clarify their legal status. It would turn animals into individual beings, whose own subjective interests count for the law and have to be, to some extent, taken into account both at the stage of lawmaking and at the stage of law application. At the same time, it would dismiss most important objections against the personification of animals, since non-personal subjecthood does not equate the status of animals with that of human beings. Nor does it presuppose mental capacities that animals, in principle, do not possess.

CHAPTER 3

Suffering

1. Legal terminology

An increasing number of the world's legal systems treat animals as beings capable of suffering and introduce regulations to protect them. Since 1997, Article 1 of the Polish Animal Protection Act (hereafter: PAPA) declares that "[t]he animal as a live creature, capable of experiencing suffering, is not a thing"; hence, the human being is obliged to provide it with respect, care, and protection. This regulation accepts the capacity to experience suffering (the presence of sentience) as a sufficient reason to exclude an entity that has this property from the category of things. However, the meaning of the term "suffering" as used here is not at all obvious or easy to reconstruct. The difficulties mount because the law makes use of other terms as well, such as "injury," "harm," "pain," and "distress."

In European law, constraints on animal experimentation apply to any form of exploitation of animals for scientific purposes which may lead to "pain, suffering, distress or lasting harm that is equivalent to or higher than an injection with a needle." According to the preamble to Directive 2010/63/EU, protection of animals used in experiments is necessary in view of the fact that "[n]ew scientific knowledge is available in respect of factors influencing animal welfare as well as the capacity of animals to sense and express pain, suffering, distress and lasting harm" (item 6).

Somewhat different terminology is used in Council Regulation (EC) No 1099/2009 on the protection of animals at the time of killing. Its preamble states that killing animals may induce "pain, distress, fear or other forms of suffering"; hence, all necessary measures should be taken "to avoid pain and minimise the stress and suffering" of animals during this process (item 2). According to an earlier document, the European convention for the protection of animals for slaughter of 1979, slaughter methods should "spare animals suffering and pain," and "fear, distress, suffering and pain" experienced during

slaughter may negatively affect the quality of meat. The European convention for the protection of animals kept for farming purposes, adopted in 1976, prescribes the avoidance of "unnecessary suffering or injury" of animals. A still different formulation can be found in Regulation (EC) No 1007/2009 on trade in seal products. It states that seals are "sentient beings that can experience pain, distress, fear and other forms of suffering." Thus, suffering is sometimes enumerated alongside pain or distress as their alternative; on other occasions, however, it refers to a specific form of suffering, other than fear, distress or injury.

According to another Polish law, punishment is inflicted on a person who "beats an animal in a particularly painful way, uses a sick animal for work, overloads it, or otherwise causes physical suffering to an animal." It is worth noting that the lawmaker assumes that there may be other, non-physical forms of suffering (an inference that follows from the prohibition of the *per non est* legal interpretation). However, many other laws refer only to "animal suffering." For instance, according to regulations on border sanitary control, the consignment of animals is prohibited if "the animals in the consignment are suffering or it is suspected that they are suffering." Similarly, industrial property law classifies a modification of the genetic identity of animals which "may cause them suffering without providing any substantial medical benefit to humans or animals" as a biotechnological invention that is contrary to public morality.

The legislation of other countries is similar in this respect. The British Animal Welfare Act refers only to suffering, much like the Polish Animal Protection Act.[1] In this case, however, it is treated as synonymous with distress (Art. 18). The law also provides, if in somewhat circular manner, a legal definition of suffering, explaining it as "physical or mental suffering" and demanding that "related expressions" should be understood in a similar way. In contrast to the British act, the American Welfare Act does not define suffering and more often refers to the concept of pain.[2] Like suffering, pain is often understood here as an alternative to distress (as in "limit animal pain and distress") or injury (as in "without causing suffering or injury"). In another

1 Animal Welfare Act (2006); available at https://www.legislation.gov.uk/ukpga/2006/45/contents.

2 Animal Welfare Act (1966); available at https://www.aphis.usda.gov/animal_welfare/downloads/AC_BlueBook_AWA_508_comp_version.pdf.

place, however, the act mentions injury not as an alternative but as a possible cause of suffering (e.g., referring to an animal "suffering from disease, emaciation, or injury").

In Germany, the animal protection act of 2004 consistently makes use of the phrase 'pain, suffering or harm' ("Schmerzen, Leiden oder Schäden").[3] In some places, the way in which it is implemented suggests that the lawmaker distinguishes between the three terms.[4] A similar phrase can be found in the Swiss act, but in this case, "harm" is often replaced by "anxiety" ("Schmerzen, Leiden oder Ängsten").[5] In the Netherlands, pain, injury, physical and physiological discomfort, fear, and chronic stress form an itemised list,[6] while the relatively recent Swedish Animal Welfare Act of 2018 refers, in principle, only to suffering, occasionally complementing it with "disease," "injury," or "discomfort," which it treats as alternatives to suffering.[7]

Even this brief survey of the terminology used in animal welfare law demonstrates that it lacks a stable, uniform and widely accepted system of concepts. It does not refer to any commonly adopted definitions of the key terms for animal experience.[8] On the contrary, one cannot help the impression that the meanings assigned to particular terms and the relations between them are largely inconsistent, if not random and arbitrary. In view of this, there is a need to work on regulatory rather than reporting definitions of these terms. Of particular importance is aligning them with the relatively precise terminology of broadly understood medical sciences (physiology, neurobiology, and psychology).

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3 Tierschutzgesetz (1972); available at https://www.gesetze-im-internet.de/tierschg/BJNR012770972.html.

4 See, e.g., §5 Section 1, §7a Section 2 item 5, §7a Section 6 item 2.

5 Tierschutzgesetz (2005); available at https://www.fedlex.admin.ch/eli/cc/2008/414/de.

6 Wet dieren (2011); available at https://wetten.overheid.nl/BWBR0030250/2013-01-01.

7 Djurskyddslag (2018); available at https://www.government.se/information-material/2020/03/animal-welfare-act-20181192/.

8 It would also be interesting to compare these expressions with the terms used in law relating to human experience. For instance, in the Rome Statute of the International Criminal Court, torture is defined as "intentional infliction of severe pain or suffering, whether physical or mental" (Art. 7 Section 2 item e). The European Union Regulation on clinical trials, in turn, demands that they should be designed to involve "as little pain, discomfort, fear and any other foreseeable risk as possible for the subjects" (Art. 28 Section 1 item e).

Only when these tasks are accomplished will it be possible to identify the "appropriate" understanding and use of these terms in legislation. It is to be expected that the results of this regulatory analysis may in many respects depart from the present, largely intuitive and common-sense understanding of these terms in various normative acts. To some extent, then, the process of clarification of these concepts should aim at improving legal language as it is used now by revealing its imprecisions and equivocations, if not errors in the terminology used by the lawmakers.

2. Pain and distress

The concepts and definitions of suffering, pain, and distress developed primarily in relation to human experience and the underlying neurophysiological and psychological processes. It was only as the Cartesian tradition of treating animals as "natural automata" began to collapse that they were adapted to the description of corresponding experiences and processes in non-human animals.

Classical definitions of pain usually combine an experiential element (an unpleasant sensory and emotional experience) with tissue damage. However, a verbal expression of pain is just one of the ways to manifest it, and the inability to communicate experiences does not preclude possibility of having experiences themselves.[9] The experience of pain – at least of weak or medium pain – does not have to give rise to any verbal or behavioural symptoms.

Pain is triggered by stimuli that cause tissue damage. It is one of the body's basic defence mechanisms against danger. Pain reactions are triggered by stimuli that impact sensory receptors: so-called pain receptors, or nociceptors.[10] Nociceptors are located in the skin, muscles, joints, and visceral organs. They can be activated by mechanical, thermal, or chemical stimuli. Depending on the type of pain, the signal travels along one of the two channels. Sharp, prickly, well-localised pain is transmitted by A∂ fibres, while diffuse, burning, or

9 K. J. Anand and K. D. Craig, "New perspectives on the definition of pain," *Pain* 67/1 (1996); A.C. Williams and K. D. Craig, "Updating the definition of pain," *Pain* 157/11 (2016), pp. 2420–2423.

10 W. D. Willis and K. N. Westlund, "Neuroanatomy of the pain system and of the pathways that modulate pain," *Journal of Clinical Neurophysiology* 14/1 (1997), pp. 2–31.

crushing pain, by C fibres.[11] Next, the signal is transferred to the brain through the posterior horns of the spinal cord. Once it gets there, it is processed mainly by the structures of the brainstem and diencephalon. These include the thalamus, periventricular grey matter, parabrachial nucleus, and reticular formation, as well as the structures of the limbic system: the hypothalamus, amygdala, and nucleus accumbens.

A signal generated by a pain stimulus travels to the brain along two pathways: the spinal-thalamic tract and spinal-reticular tract. These pathways are responsible for the conscious pain sensation and emotional arousal. Additionally, the signal travelling from nociceptors activates the autonomic nervous system, leading to an acceleration of the heart rate, an increase in blood pressure, hormonal changes, and the concentration of attention.[12]

Unlike pain, which is relatively well and uniformly understood, the notion of distress has not been defined in a way that is unequivocal and commonly accepted. In the classical understanding of the term, distress is a harmful condition in which adaptive and repair mechanisms fail, preventing the body from restoring physiological or psychological homeostasis. Thus, distress is a special, qualified form of stress produced by a strong or prolonged stress factor or an accumulation of stressors.[13]

A chronic or strong stress can transform into distress if it cannot be relieved. Take so-called learned helplessness.[14] When an animal is repeatedly prevented from avoiding unpleasant pain stimuli, after some time, it stops making further attempts to avoid them. It becomes passive and may show symptoms of distress, including some pathophysiological, psychological, and behavioural

11 F. Konietzny, E. R. Perl, D. Trevino, A. Light, and H. Hensel, "Sensory experiences in man evoked by intraneural electrical stimulation of intact cutaneous afferent fibers," *Experimental Brain Research* 42/2 (1981), pp. 219–222.

12 K. N. Westlund and A.D. Craig, "Association of spinal lamina I projections with brainstem catecholamine neurons in the monkey," *Experimental Brain Research* 110/2 (1996).

13 E. Carstens and G. P. Moberg, "Recognizing pain and distress in laboratory animals," *ILAR Journal* 41/2 (2000), pp. 62–71.

14 For more detail, see C. Peterson, S. F. Maier, and M. E. Seligman, *Learned Helplessness: A Theory for the Age of Personal Control* (New York: Oxford University Press, 1996).

changes. Research has shown that in humans, distress produced by "learned helplessness" may lead to depression.[15]

Distress not only disturbs the body's homeostasis but also produces conscious experience. It involves an intense negative affective-motivational experience triggered by a stress situation that cannot be quickly and effectively avoided. Seen in this light, distress can be a type of psychological pain, unconnected with the stimulation of nociceptors. Rather, it is caused by strong environmental stimuli that signal the risk of the organism's malfunction. So understood, distress is, of course, gradual, its mildest form being a temporary discomfort; its strongest form, permanent physiological and psychological dysfunction.

Distress is associated with one of the functions of the central nervous system, namely, maintaining, directly and indirectly, the body's homeostasis. Stress factors activate the hypothalamic-pituitary-adrenal axis (HPA), which results in the secretion of specific hormones (in particular, neuropeptides and glucocorticoids).[16] Some of them stimulate dopaminergic neurons that affect the prefrontal cortex. They take part in switching off the stress response when the state of emergency or other alarming circumstances disappear. The hippocampus also plays an important role in reducing stress, and hippocampal injury or atrophy may result in a longer activation time of HPA in psychological stress response.[17]

Chronic stress may lead to HPA disfunction and, consequently, to heart disease, stomach ulcers, sleep disorders, and psychiatric disorders (depression and anxiety). In animals, distress may incur serious biological costs, such as subclinical pathological changes (hypertension, decreased immunity, and others), or atypical behaviour, such as increased aggression.[18]

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15 S. F. Maier and M. E. Seligman, "Learned helplessness at fifty: Insights from neuroscience," *Psychological Review* 123/4 (2016).

16 G. P. Chrousos, "Stress and disorders of the stress system," *Nature reviews. Endocrinology* 5/7 (2009), pp. 374–381; G. P. Chrousos and P.W. Gold, "The concepts of stress and stress system disorders. Overview of physical and behavioral homeostasis," *JAMA* 267/9 (1992), pp. 1244–1252.

17 B. S. McEwen, "Physiology and neurobiology of stress and adaptation: central role of the brain," *Physiological Reviews* 87/3 (2007), pp. 873–904.

18 E. Carstens and G. P. Moberg, "Recognizing pain and distress in laboratory animals," *ILAR Journal* 41/2 (2000), pp. 62–71.

3. Suffering

The term suffering is definitely the most difficult one to define with a reasonable degree of precision. It is so much entangled in philosophy that it can hardly be captured within the framework of physiological or biomedical phenomena. Additionally, it is commonly used both in general language and legal discourse. In the everyday usage, suffering may actually refer to any negative experience. Its cause may be that one's physiological needs – signalled by hunger, thirst, rest, and sleep – or psychological ones, are not satisfied or taken care of, which results in frustration, boredom, loneliness, longing, fear, and melancholy. In the case of animals, the reasons are also varied, although their range is narrower.[19]

Suffering can therefore involve physical pain or emotional states that emerge at higher levels of the central nervous system. Thus, it could be understood as the broadest concept, encompassing pain, distress, and all other negative experiences whose intensity goes above the individual's threshold level (depending on the species and individual and environmental factors). In this sense of the word, one may speak of "suffering caused by pain," "suffering caused by hunger," "suffering caused by loneliness," etc.

In contrast to the majority of people, animals are, of course, unable to verbally report their experiences of pain, distress, or other forms of suffering. However, using observation, it is possible to empirically ascertain that they have such experiences. Observation focuses on certain behavioural patterns of animals and changes in selected physiological parameters. The same methods are used to identify suffering in humans if, for various reasons, they are unable to verbally express their experiences (e.g., newborns or persons who, *nomen omen*, suffer from dysfunctions that make them incapable of linguistic communication). They are also applied to identify insincerity in verbal reports of suffering.

The basic methods of measuring the levels of pain, distress, and suffering include various behavioural reactions (flight, vocalisations, aggression, characteristic body postures) and physiological reactions (increases in blood pressure, body temperature, breathing rate, and concentration of certain hormones, such

19 H. Baumgaertner, S. Mullan, and D.C.J. Main, "Assessment of unnecessary suffering in animals by veterinary experts," *Veterinary Record* 179/12 (2016), p. 307; for more detail, see also J. Webster, *Animal Welfare: Limping Towards Eden: A Practical Approach to Redressing the Problem of Our Dominion Over the Animals* (Oxford: Wiley-Blackwell, 2008), pp. 62f.

as adrenaline, prolactin, insulin, and glucocorticoids).[20] Distress can also manifest as autoaggressive behaviour, weight loss, atypical sexual behaviour, and digestive disorders. An increase in the levels of so-called stress hormones, in particular, cortisol, leads to an increase in the levels of glucose and substances involved in tissue repair processes. Hormonal changes that follow from an acute (sudden) stress stimulus are relatively easy to detect in blood tests, but they are much less suitable as indicators of prolonged stress. This is why they are used to complement observational data based on the behaviour of an animal in specific environmental conditions that can account for this behaviour.

Interestingly, attempts have been made to teach animals to express stress. In one experiment, pigs were trained to press one lever after receiving a stress stimulus (a dose of pentylenetetrazol, a fear-inducing drug), and another lever after receiving a neutral stimulus (saline). Next, they were treated with various stimuli, both fear-inducing and neutral ones. The experiment has shown that pigs can communicate fear. Hence, in principle it is possible to obtain virtually direct information about the detriment they experience in the subjective quality of life.[21]

Recent decades have brought an additional powerful tool to advance research on various experiences of pain, distress, and suffering: advanced neuroimaging techniques. These include mainly functional magnetic resonance imaging (fMRI), manganese-based contrast MRI, positron emission tomography (PET), and electroencephalography. Animals are often used as models in research on human reactions to pain and stress. The reason for this is the evolutionary kinship and fundamental similarities between the nervous system structures of humans and many other animal species, structures that are responsible for neurophysiological processes underlying pain experiences and basic emotional reactions. This, in turn, enables a relatively direct extrapolation of at least part of the data obtained from the stimulation of the animal's nervous system to humans and their likely experiences in similar situations.

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20 L. R. Soma, "Assessment of animal pain in experimental animals," *Laboratory Animal Science* 37 (1987), pp. 71–74; for more detail, see R. Kitchell and H. Erickson (eds.), *Animal Pain. Perception and Alleviation* (New York: Springer, 1983).

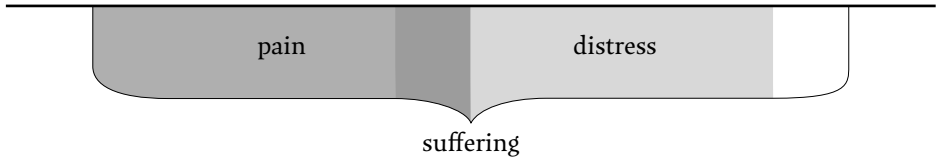
21 M. P. Carey and J. P. Fry, "Evaluation of animal welfare by the self-expression of an anxiety state," *Laboratory Animals* 29/4 (1995), pp. 370–379.

4. Harm and its kinds

Suffering should not be treated as an ephemeral, non-scientific category. As a term, it seems well suited to refer to any type of negative experience that can be operationally defined.[22] However, it can hardly be treated as a state alternative to pain and distress. The last two terms have distinct meanings, but their scopes partially overlap. Pain refers to conscious experience triggered by a signal travelling, in principle, from nociceptors. Distress, in turn, is an unpleasant sensation caused by the inability of the body to restore homeostasis. The two can concur (when produced by the same cause) or appear independently from each other. By contrast, suffering is not a distinct type of experience but a higher-order category, encompassing both pain and distress.

However, depending on the breadth of the definitions of pain and distress, the concepts may not cover the whole range of unpleasant negative experiences that appear in the nervous system. If the adopted definitions are not very broad, some such experiences may not be classified as pain or distress but constitute another category of suffering. This would justify the use of the term suffering alongside pain and distress, but not as one of three parallel same-order types of experience; rather, it would serve as a category grouping "all negative or unpleasant experiences, including those that do not result from pain or distress." On this understanding, suffering could result from pain, distress, or other factors (e.g., negative emotional reactions provoked by being frightened, incurring hunger or thirst, etc.).

The relationship between these concepts could be illustrated by the following diagram:



Source: author's own elaboration.

22 Cf. M. Dawkins, "The science of animal suffering," *Ethology* 114/10 (2008), pp. 934f.

Animal law also refers to other concepts, such as injury, damage, discomfort, apprehension, fear, and anxiety, but it would seem that they can be accommodated within the adopted understanding of pain, stress, distress, and suffering.

Injury or damage results in a break in the continuity of a tissue and so leads to the classic kind of pain: a reaction to a signal travelling from nociceptors.

According to the most common understanding, discomfort is a feeling of being uncomfortable, mentally or physically. In this sense, it is a type of stress. It may produce a negative experience (subjectively perceived as suffering) and – beyond a certain threshold level of intensity or duration – develop into distress, detrimental for the body.

Fear is one of the basic emotional reactions that arise automatically in response to a stimulus associated with danger. It emerges as a result of the activation of subcortical structures, such as amygdala, hypothalamus, the sympathetic nervous system, and the hypothalamic-pituitary-adrenal axis (HPA). The fear response leads to the mobilisation of the organism to escape or defend itself and forces immediate concentration of conscious attention on the stimulus that triggered the physiological response. Generally, fear causes aversion, so producing it – at least at a certain level of intensity – can be regarded as causing some kind of suffering.

Unlike fear, anxiety is not connected with a specific stimulus perceived as an immediate source of danger. In animals, the most commonly described type is separation anxiety, triggered by separation from the mother. Anxiety elicits both behavioural and physiological responses, as well as a negative emotional experience, reinforcing the detection and avoidance of stimuli or situations that may pose a threat. When anxiety becomes an emotional state that persists over time and is uncontrollable and disproportionate to the actual threat, it can develop into a pathological state. The physiological and behavioural reactions of the body that are then triggered are associated with an exaggerated perception of threats and become a type of distress, reducing the chances of successfully coping with the environment.

In contrast, the concept of harm – sometimes also used in legal language in the context of animal welfare protection – seems to have a broader meaning and is somewhat categorically different from the other notions. Harm to an animal can of course consist in causing suffering, whether resulting from pain (especially as a result of injury), distress, or other causes. However, it can also consist in merely making its situation worse, which, in turn, may produce such

experiences, increase the likelihood of their occurrence, or reduce the animal's capacity to experience positive sensations of a particular type.

Harm to an animal would therefore consist in causing its actual or potential suffering, or depriving it or reducing its chances of positive experience. It would thus constitute a loss in the present, possible, or expected quality of life: *damnum emergens* (actual harm in the form of negative experience) or *lucrum cessans* (loss of benefits in the form of positive experience, or a reduced chance to obtain them), to refer to civil law categories known from very different contexts.

CHAPTER 4

Interests

1. Needs, interests, and wants

The ability to experience suffering, pleasure, and other such sensations helps the organism to cope with its environment. The evolutionary origins of consciousness link subjective experiences to the needs and threats on which depended the survival of a species and its ability to reproduce successfully. Thus, the experience of pain and fear is, in principle, associated with circumstances that typically involve danger, and pleasure with circumstances that contribute to the chances of successfully spreading one's genetic material.

However, adaptive mechanisms are never perfect. They only evolve to the extent that is sufficient for evolutionary success. Thus, they have to prove effective on a reasonable number of occasions but need not be flawless in many other individual cases. Especially in rapidly changing environmental conditions, they often fail to keep up with the changes (a phenomenon called adaptive lag).[1] This tendency is particularly reinforced by human interventions in the environment.

Nevertheless, there is an evolutionary relationship between the type of experience and the well-being of an organism. Failure to satisfy the basic survival needs is, in principle, associated with suffering, while stimuli that serve to restore and maintain homeostasis are associated with positive experience. This applies in particular to securing conditions for a relatively safe existence, such as satisfying hunger, thirst, and the need for rest, shelter, and adequate temperature. Many species also show psychological needs, such as the ability to move freely, to explore and display other instinctive behavioural responses,

1 See, e.g., N. Li, N. van Vugt, and S. Colarelli, "The evolutionary mismatch hypothesis: Implications for psychological science," *Current Directions in Psychological Science* 27 (2018), pp. 38–44.

to participate in social relationships, and to experience stimuli that prevent monotony and boredom.[2]

Suffering and pleasure associated with needs satisfaction direct the actions of sentient organisms towards achieving what generally contributes to the preservation of their well-being and avoiding what may pose a threat to them.[3] At the same time, they give their life a subjective quality that depends on the balance and intensity of both types of experience. In this way, they give rise to interests on the side of the organisms to make this quality better rather than worse.

However, the concept of interest is vague, fuzzy, and, to some extent, ambiguous. It is also marked by a positive emotional tinge, implying some kind of a valuable or subjectively desirable state of affairs. Even a general look at interests and what it means to have them reveals significant differences in the understanding of the term.

Interest may be perceived as a state of affairs that is objectively favourable to its holder, although it does not have to be realised or desired. On this understanding, interests are not identified with actual goals, motives, or expectations of the holder. Rather, they are "potential explanations of desires without the need of a relevant belief."[4] Thus, what is at stake is not a question of conscious

2 Cf., e.g., P. Thagard, *The Brain and the Meaning of Life* (Princeton, NJ: Princeton University Press, 2010). The author argues that there are three such "vital psychological needs" that dominate in humans. These include: "competence as the people's need to feel effective in their activities," "autonomy as people's need to feel that their activities are self-chosen," and "relatedness as the need to feel a sense of closeness with others through attachments and feelings of security, belongingness and intimacy." They are realised through activities that belong to the broadly construed field of "work, play, and love" understood as main human aspirations.

3 As J. Bentham wrote in "An introduction to the principles of morals and legislation," "[n]ature has placed mankind under the governance of two sovereign masters, pain and pleasure. It is for them alone to point out what we ought to do, as well as to determine what we shall do. On the one hand the standard of right and wrong, on the other the chain of causes and effects, are fastened to their throne. They govern us in all we do, in all we say, in all we think: every effort we can make to throw off our subjection, will serve but to demonstrate and confirm it. In words a man may pretend to abjure their empire: but in reality he will remain subject to it all the while" (available at: https://www.econlib.org/library/Bentham/bnthPML.html?chapter_num=2#book-reader, 17.07.2022).

4 G. Thomson, "Fundamental needs," in S. Reader (ed.), *The Philosophy of Need* (Cambridge: Cambridge University Press, 2006), p. 182.

motives for action, but of objective reasons for such motives, regardless of whether they actually shape such motivations.[5]

This understanding of interest can be described as the "objective" approach. Actual motives arise from interests but are also influenced by various kinds of beliefs and emotions. This is why, in many cases, inconsistencies may appear between subjective aspirations and objective interests of a subject. A wrong belief as to whether a mushroom is edible can give rise to a situation where the desire to eat is at odds with interest in satisfying hunger; fear may cause flight reactions motivated by the desire to avoid danger, in fact aggravating the situation; and so on.

In the subjective approach, interest is identified with the subject's conscious idea or belief of what is beneficial to him or her. Potential beneficiaries are treated here as the ultimate judges of their own benefit, solely entitled to decide what kind of wants are subjectively valuable to them. Irrespective of others' judgement as to the "objective" value of certain actions for the subject, it is only the subject's choice that provides a measure of what is beneficial to them from their own subjective point of view.

Clearly, the different views of interests remain deeply entangled in different axiological and, to some extent, anthropological and philosophical-political assumptions. In many respects, subjective and objective approaches to interests can be combined in models that see them as complementary rather than competing. What is most important, however, is to realise that sentience is sufficient for having interests at least in the objective meaning of the term. The presence of needs, which translates into a subjective quality of life, means that anything that maximises an organism's quality of life becomes its objective interest. This interest does not depend at all on the extent to which the organism is capable of understanding the relationship between its own experiences and benefits or losses that are associated with the stimuli evoking these experiences.

Humans, with their complex reflexive self-consciousness, can also have interests in the subjective sense of the term. Such interests may or may not coincide with the objective benefit of their holders, understood in one way or another. It is a separate and highly debatable issue to what extent and in what circumstances subjective interests should be given priority over the objective good (interests) of the individual concerned.

5 Ibidem, p. 183.

Generally, the approach taken by the modern philosophy of law is that, in principle, adults with full mental capacity can and should decide for themselves as to what is their "real" interest even if their subjective understanding of their own good does not coincide with others' views of what is objectively "better" for them. This idea finds expression both in the classical Roman paroemia *volenti non fit iniuria* and in the more modern idea of human autonomy and the "harm principle," which limits interference in human decision-making (in its classic formulation by John Stuart Mill).[6]

2. Interests and moral duties

From an ethical point of view, however, having interests does not *eo ipso* entail that anyone is under the obligation to take them into account in their decisions and actions. What is needed are ethical reasons that justify such an obligation. An act is ethically reprehensible only if it involves unjustified ignoring of interests that an individual has a moral obligation to respect.

There are two key ethical theories that can provide a starting point for establishing a rationale for the human duty to take animal interests into account: consequentialism (of which utilitarian ethics is the most refined version) and deontology, of which Kantian ethics is the central version.[7]

From the perspective of utilitarianism, the chief, if not the only, moral imperative is to be guided by the principle of utility. It dictates the choice of a course of action that maximises positive and minimises negative consequences for all beings affected.

Formulated by the founder of utilitarianism Jeremy Bentham, the classical version of this principle has the form of the "felicific calculus." It serves to maximise the total pleasure and minimise the total suffering arising from one's actions. This requires taking into account all the foreseeable consequences of one's decisions and choosing the course of action whose consequences are optimal. Of course, this calculation takes into consideration all beings who are capable of experiencing pleasure and suffering and who may be affected by a given decision.

6 See. T. Pietrzykowski, *Etyczne problemy prawa* (Warszawa: Lexis Nexis, 2011), pp. 75f.; the *locus classicus* of the principle of harm is the essay "On Liberty" by John Stuart Mill (available at: https://www.econlib.org/library/Mill/mlLbty.html, 17.07.2022).

7 For more detail, see T. Pietrzykowski, *Etyczne problemy prawa...*, pp. 46f.

According to utilitarians, the felicific/hedonistic calculus makes it possible to determine which action is objectively morally right under a given set of circumstances: the one which, in the circumstances, contributes to the greatest "happiness" (or: felicity; a greater amount of pleasure compared to suffering) for the greatest number of sentient beings. A prerequisite for the accuracy of this kind of calculation is strict impartiality. Nobody's pleasure and suffering can count more than anyone else's. What matters is the intensity, duration, and probability of the experiences, and not who experiences them.[8]

However, some versions of utilitarian ethics question the possibility of reducing the utility calculus to a uniform pleasure–suffering scale.[9] This kind of non-hedonistic utilitarianism can take the form of preference or pluralistic utilitarianism. The former (preference utilitarianism) recognises that the object of the utilitarian calculus is not merely the sum of objective pleasure and suffering, but rather of all kinds of preferences of those affected by somebody's decisions. The latter (pluralistic utilitarianism) advocates a plurality of values in view of the fact that they cannot be reduced to pleasure and pain.[10] Positive and negative values are determined by objective biological and psychological needs of an individual, which may not only justify different courses of action, but even conflict with each other.

Without engaging in a debate between the proponents of different approaches, it can be noted that no form of utilitarian ethics, including its non-hedonistic versions, provides a rationale for the arbitrary exclusion from the felicific calculus of the interests (needs, experiences, and preferences) of any category of beings. Differences in the understanding of what exactly is to be maximised do not seem to affect the common requirement to be impartial in taking interests into account, irrespective of the type of being capable of having them.

Even preference utilitarianism, at first glance perhaps more compatible with the subjective understanding of interests, does not insist that the holder of preferences should be consciously and reflexively aware of them. An animal's

8 On the contemporary version of hedonistic utalitarianism, see P. Singer and K. De Lazari-Radek, *The Point of View of the Universe* (Oxford: Oxford University Press, 2014); cf. also idem, *Utilitarianism. A Very Short Introduction* (Oxford: Oxford University Press, 2017).

9 See. J. J. C. Smart, "An outline of the system of utilitarian ethics," in J. J. C. Smart and B. Williams (eds.), *Utilitarianism. For and Against* (Cambridge–New York: Cambridge University Press, 1973), pp. 12f.

10 P. Thagard, *The Brain and the Meaning of Life...*, p. 187.

preference for living in the wild rather than in a cage or a preference for a certain type of food need not be perceived by the animals themselves as a conscious choice, as is the case with humans. It is entirely sufficient for such preferences to be manifested in relevant behaviour.

Thus, based on modern utilitarian ethics, there is no ground for excluding the interests of non-human animals from a set of circumstances that humans have a moral obligation to take into account.

The case is somewhat different with deontological ethics. In its religious versions, animals are treated in a variety of ways. In contrast to some Far Eastern religions (especially Jainism and, to a lesser extent, Hinduism), the dominant strands of Christian ethics marginalise the moral significance of animal suffering. Animals are seen as beings not only deprived of the essential attribute of an immortal soul, but also given to humans for use, along with the whole earth. As *imago Dei*, the human being has a significantly higher position in the hierarchy of beings than animals. The value of the latter is, in principle, instrumental. Notwithstanding the various attempts to reinterpret Christian ethics so that it takes into account the interests of animals, Arthur Schopenhauer's remark remains profoundly true: the attitude of Christian morality towards animals split a gap in Western culture that has yet to be filled by legislation.[11]

In its classical formulation, the most influential secular version of deontological ethics – the one proposed by Immanuel Kant – also deprives animal interests of any moral significance. Duties only apply to subjects who are themselves capable of moral action, that is, to autonomous rational beings. Animals do not belong to this category. Hence, their interests have no moral significance and do not count as the source of intrinsic moral duties for beings that belong to this group.

As in the case of Christian deontology, attempts have also been made to reinterpret Kantianism and align it with respecting animal interests. The most famous attempt of this kind was made by one of the most prominent contemporary scholars of Kantian ethics, Christine Korsgaard.[12] In her view, Kant's

11 A. Schopenhauer, *On the Basis of Morality*, trans. A. Brodrick Bullock (1903), Chapter VI; available at: https://www.gutenberg.org/files/44929/44929-h/44929-h.htm (18.07.2022).

12 Ch. Korsgaard, *Fellow Creatures. Our Obligation to Other Animals* (Oxford: Oxford University Press, 2018); see also T. Pietrzykowski, "Kant, Korsgaard i podmiotowość moralna zwierząt," *Archiwum Filozofii Prawa i Filozofii Społecznej* 2 (2015); M. Adamska, "Imperatyw

argumentation fails to take into account two distinct senses in which a being can be an end in itself. The first refers to the capacity to have desires through which events can be subjectively good or bad. The being's own good is an absolute value for it, an end in itself. The second sense refers to the ability to prescribe duties for itself that follow from the categorical imperative, that is, duties that could at the same time be a universal law.

The human being is a moral subject in both these senses; animals, only in the former. The rational nature of humans turns them into legislators in the moral "realm of ends." Conscious desires, in turn, make animals the object of duties, and the content of such duties largely depends on whether similar desires also exist in humans. If the satisfaction of such desires in humans (based on the categorical imperative) is a fully legitimate object of moral legislation, so should be the case with corresponding desires in animals that are capable of having them. Animals cannot decide for themselves on the principles of how their desires should be satisfied, but humans who introduce such principles should take them into account in the same way as they do corresponding human desires.

As Korsgaard argues, people have made the life of animals and their ability to satisfy their own desires almost entirely dependent on humans. On the part of human communities, this has given rise to moral obligations towards animals, arising from their *de facto* dependence on humans. In other words, people have turned animals into co-citizens of the "kingdom of ends," although it is the human being that remains its sole moral lawgiver.

3. Interests and law

The concept of interest is commonly used in both language of the law and legal language. It usually remains undefined, although it is extensively discussed and interpreted in legal literature and used in judicial practice. Broadly speaking, in these contexts, interest is commonly understood as the need or possibility of obtaining benefits which are emanations of values relevant to the subject to whom interest is attributed.[13]

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kategoryczny w obronie praw zwierząt. Ekstensjonizm etyczny Christine Korsgaard," *Ethics in Progress* 9/1 (2018), pp. 140–173.

13 M. Zdyb, *Prawny interes jednostki w sferze materialnego prawa administracyjnego. Studium teoretyczno-prawne* (Lublin: Wydawnictwo UMCS, 1991), pp. 27–30.

It is also generally accepted that interests are, so to say, primary relative to law, and that law is a means of realisation and protection of interests. The content of law is an arena for clashing interests of various subjects, interests which are weighed and prioritised in the making, interpretation, and application of law. This role or, perhaps, nature of law has been emphasised by some theoretical legal approaches. These include, in particular, the so-called jurisprudence of interests initiated by Rudolf Ihering. Here, law is explicitly defined as interest guaranteed by state coercion.[14] Every legal norm provides a specific resolution of conflicting interests. In this perspective, law is a means of weighing interests and deciding how conflicts between them should be resolved (R. Pound).[15] The idea of the "weighing of interests" (*Abwägung*) as a fundamental method of resolving legal problems has been revived and bolstered in contemporary legal argumentation theory, the theory of fundamental rights, and modern constitutionalism.[16]

The tension between individual interests and the public interests of providing security, order, and a fair distribution of goods and burdens forms an axis for axiological conflicts that determine the shape of any legal order. As public interests take the form of subjective rights, especially constitutional fundamental rights, conflicts between them also play an increasingly important role.[17] The wide range of interests protected by norms lies at the heart of the traditional division between public law and private law, deeply rooted in Western legal culture. The former is to serve the interests of the community (state), while the latter is to serve the interests of individual subjects of law entering into equal relations with each other.[18]

The dogmatics of various branches of law distinguishes between legal interest and factual interest. The former is generally understood as a direct relationship between an event and the rights or duties of a subject of law. Thus, legal interest consists in the link between the occurrence of a certain event, on

14 For more detail, see K. Opałek, *Prawo podmiotowe* (Warszawa: PWN, 1957), pp. 229f.

15 R. Pound, *An Introduction to the Philosophy of Law* (Chelsea, MI: Yale University Press, 1954), pp. 46f.

16 See T. Benditt, "Law and the Balancing of Interests," *Social Theory and Practice* 3/3 (1975), pp. 321f.; H. Groszyk and A. Korybski, *Konflikt interesów a prawo* (Warszawa: PWN, 1990).

17 Cf., e.g., R. Alexy, *Theorie der Grundrechte* (Baden-Baden: Nomos, 1985).

18 J. Nowacki, *Prawo publiczne – prawo prywatne* (Katowice: Wydawnictwo Uniwersytetu Śląskiego, 1992), pp. 12f.

the one hand, and the acquisition of a right or the extinction of an obligation, on the other. In contrast, factual interest refers to the relationship between the occurrence of an event and the expectations or benefits of a subject, not reflected by his or her rights and obligations under the law. In other words, although certain legal effects are considered beneficial by the subject, there are no legal norms under which these effects give rise to the subject's rights or duties.

A number of approaches to factual interest refer to subjective awareness. Under these perspectives, factual interest is defined as a need its holder is aware of, manifesting itself in actions to obtain a desired state of affairs.[19] However, these approaches raise similar doubts and objections as theories of subjective rights referring to the will. Particularly problematic for them is the argument from marginal cases: in this light, infants (to say nothing of nasciturus or future generations) and profoundly handicapped or unconscious persons (e.g., as a result of a damage to the nervous system after an accident, neurodegeneration, or even anaesthesia) could not be ascribed any "real" interests, legal or factual.

To avoid this paradox, it would be necessary to identify interest not with a specific psychological fact (the subjects' actual perception of their advantage) but with a hypothetical desire they would have if they were capable of rationally assessing their situation and forming judgements on this basis. Thus, although it is generally not explicitly stated in legal literature, factual interest, too, may be understood in the objectivist or subjectivist way. It may consist in the maximisation of benefits (satisfying the subject's needs) regardless of the subject's ability to consciously choose them, or the realisation of a conscious volitional state.

By contrast, the concept of legal interest is by definition objective in nature. It is not determined by anyone's subjective beliefs or preferences: what matters is the objective state of the law (insofar as the content of the law can be determined objectively), that is, the content of applicable legal norms. In this case, it is the preference of the lawmaker rather than of the interest holder that is conclusive. This is because the former makes laws on the basis of his or her

19 For instance, H. Groszyk and A. Korybski understand interest as "a conscious need revealed in a particular social structure; this is based on the assumption that conscious behaviour of individuals or social groups is always underpinned by some conscious need of these subjects" (idem, "O pojęciu interesu w naukach prawnych. Przegląd wybranej problematyki z perspektywy teoretycznoprawnej," in A. Korybski, M. W. Kostyckij, and L. Leszczyński (eds.), *Pojęcie interesu w naukach prawnych, prawie stanowionym i orzecznictwie sądowym Polski i Ukrainy* (Lublin: Wydawnictwo UMCS, 2006), p. 20).

beliefs as to what constitutes the benefits of individual subjects and what extent of legal protection these benefits deserve. Thus, the extent to which legal interest is determined by its beneficiary is, generally speaking, relatively small. In fact, it is limited to the possibility of not exercising the rights to which the subject is entitled by the lawmaker.

4. Interests and legal protection of animals

Somewhat in the spirit of "the jurisprudence of interest," it is the type of legally-protected interest that lies at the heart of the distinction between humane animal protection and species protection of animals. In the case of the former, the object of protection is the interest of the animals themselves as individual beings endowed with sentience and therefore capable of having a higher or lower subjective quality of life. The core of this protection is the recognition of the ethical significance of their interests, so that humans, who in fact control animals' living conditions, cannot reduce their quality of life without justification. Animal welfare laws that grow out of such ethical reasons form the corpus of humane animal law.

By contrast, species protection legislation rests on a fundamentally different axiology. It is primarily concerned with the protection of nature, biodiversity, and, in particular, endangered species or species of special importance to the ecosystem and biological balance. In this case, the object of protection is, above all, the interest of the human being, whose existence and survival depend on stable ecological conditions and sustainable exploitation of natural resources, especially non-renewable ones. Thus, what is being protected is the collective interests of human beings, and more specifically, a special category of interests (specific from both ethical and legal perspectives) of those who will live in the future (future generations).[20] Provisions of this type of animal protection include both nature conservation law and international agreements and acts of European law concerning the protection of and trade in endangered species, as well as trade in animals which may pose a threat to other species.

20 For more detail, see, e.g., E. Wesley and F. Peterson, "Time preference, the environment and the interests of future generations," *Journal of Agricultural and Environmental Ethics* 6 (1993), pp. 107–126; N. H. Buchanan, "What do we owe future generations?" *George Washington Law Review* 77 (2009), pp. 1239f.

An analysis of the compelling and complex problems of the axiology of animal species protection is far beyond the scope of the present discussion. We will therefore confine ourselves to acknowledging and highlighting the fundamental difference between the interests protected in this approach and the regulations of humane animal protection. This difference has a direct bearing on the essential characteristics of the protection type. In the case of humane protection, only sentient animals – that is, those capable of having their own interests (and thus a life of a subjectively experienced quality) – are subject to protection. Their instrumental value for humans and their role in the ecosystem as a whole do not play an important role here.

The situation is, in a sense, reversed in species protection. In this case, whether a protected animal has sentience and own interests is of secondary importance. The aim and object of protection are different; the focus is on human interests, which are well-served by preserving a certain number of animals of a particular species. As a result, this protection extends not only to vertebrates, but also to invertebrates and other living organisms (including plants), as long as their survival is considered useful for the maintenance of adequate conditions for human life.

Given the type of interests that are subject to legal protection, it would seem reasonable to distinguish a third type of animal protection, referred to as utilitarian or veterinary. This type of protection is based on regulations aimed at safeguarding the health of animals used for economic purposes (in particular, for food). In this case, however, protection is afforded not because of the intrinsic value of their life and health, but because of the economic and health interests of people who exploit them. Here again, as in the case of species protection, what is at stake is ultimately the protection of human interests, while animals themselves are treated merely as objects of regulations which ensure that people can use animals in a possibly safe and profitable way.[21]

21 Solutions for this type of protection may provide an axiologically neutral means "for a good purpose" (from the perspective of the lawmaker), that is, human interests, but also "a good means for a good purpose" (if the ways of protection are valued positively in spite of the fact that they are introduced not because of any intrinsic value but because of the purpose they are to serve). On the types of the instrumental evaluation of law, see Z. Tobor, *Oceny instrumentalne i instrumentalne oceny przepisów prawa* (Katowice: Wydawnictwo Uniwersytetu Śląskiego, 1985).

CHAPTER 5

Morality

1. Public morality

Morality can be seen as the totality of beliefs and attitudes relating to what is right and wrong and how this should influence the course of action. According to a convenient terminological distinction, ethics, in turn, is an informed reflection on morality. Conceived in this way, ethics can be descriptive or normative. The former aims at a reconstruction and explanation – as accurate and close to reality as possible – of actual moral attitudes and beliefs. The latter focuses on postulates and reasons that justify the acceptance of some moral beliefs and the rejection of others.

These beliefs – and moral attitudes they give rise to – are inevitably individual in that they are rooted in ideas and patterns internalised by an individual in the form of "conscience." They are shaped by cultural factors, in particular, the social and family environment. Nevertheless, they are underpinned by the evolutionary inclinations of human nature, including the capacity to feel empathy and show limited altruism, a sense of group loyalty, and other emotional-motivational mechanisms. Individual cultures, religions, and ideologies transform these mechanisms into complex normative constructs legitimised by different kinds of opinions, beliefs, and ideas about the world.

The dependence of individual morality on the social environment is twofold. Firstly, the social environment exerts a significant influence on an individual's moral development; on the way in which natural emotional inclinations develop into a set of beliefs and habits that determine judgements and behaviour. Secondly, moral beliefs are marked by a special kind of universalisability. Moral judgements and norms are treated as valid always and for everyone, regardless of whether and to what extent others are aware of their moral duties or capable of living up to them. They involve a claim to universal validity.

For these reasons, the relationship between morality and law constitutes one of the most important and widely discussed problems in the philosophy

of law. The concept of "public morality" can be seen as one dimension of these discussions. It appears in the constitutional and statutory provisions of many states, as well as in legal literature, as one of the values that the legal order should protect. In this view, public morality comprises these moral norms and judgements held by members of a given community that should be regarded as a fundamental ethical reference point for this community's law.

The norms and judgements of public morality can be a criterion limiting the rights and freedoms of individuals. This is the role of public morality as invoked in many constitutions and human rights conventions. It refers to values – and moral norms and judgements based on them – that are not limited to private moral beliefs. These values not only form the common core of such beliefs, but also have a direct impact on how the coexistence of people in society is regulated.

Thus understood, public morality consists of a set of current, relatively widely shared, basic ethical principles and their normative implications. An important argument for the public character of particular values, norms, and moral judgements may be a direct reference to them in the law or an identifiable link between them and the shape of a given regulation.

This does not mean, however, that such moral norms only concern behaviour in the public sphere. They can also apply to an individual's behaviour in private, as long as it affects others' goods or interests and is subject to norms which are sufficiently rooted in the social consciousness.[1] Thus, public morality is a matter of social moral rules and not merely an individual's personal moral beliefs.[2]

At the same time, it is clear that, in a pluralistic society, not all moral rules should be part of public morality, especially in the sense in which this concept is used as a reference point for the law. Above all, public morality should not include rules regulating socially harmless behaviour, in particular, such that does not affect anyone other than the actor.[3] In accordance with the principle

1 K. Wojtyczek, *Granice ingerencji ustawodawczej w sferę praw człowieka w konstytucji RP* (Kraków: Zakamycze, 1999), p. 196; M. Wyrzykowski, "Granice wolności i praw obywatelskich – granice władzy," in M. Zubik (ed.), *Obywatel – jego wolności i prawa* (Warszawa: Wydawnictwo BRPO, 1998).

2 On the distinction between moral rules and moral beliefs, see N. Cooper, "Two concepts of morality," *Philosophy* 155/41 (Jan., 1966), p. 25.

3 Cf., e.g., W. Brzozowski, *Bezstronność światopoglądowa władz publicznych w Konstytucji RP* (Warszawa: Wolters Kluwer, 2011), pp. 163f., and the bibliography therein.

volenti non fit iniuria, the norms of legally relevant public morality should protect goods that are beyond the interests of the perpetrator.

2. Positive and critical social morality

An additional distinction of considerable importance to public morality is the one between positive and critical morality. It dates back to Jeremy Bentham, and its modern formulation was proposed by H. L. A. Hart.[4] Positive morality consists of moral beliefs and attitudes actually accepted and prevalent in a given social group. Critical morality of a social group, in turn, consists of "general moral principles used in the criticism of actual social institutions including positive morality."[5]

A similar juxtaposition also played an important role in the views of Ronald Dworkin.[6] He pointed out that legal solutions cannot rest on simplistic readings of the society's moral reactions; in particular, they cannot criminalise a behaviour just because it causes outrage or disgust in a sufficiently large number of citizens. Rather, the lawmaker should subject the reasons on which such reactions are founded to a thorough critical analysis. Only in this way is it possible to "determine which are prejudices or rationalizations, which presuppose general principles or theories vast parts of the population could not be supposed to accept, and so on."[7] It is only these moral beliefs and attitudes that successfully pass this critical examination that are suitable candidates for premises in legislative decisions.

Positive social morality consists of individual moral attitudes of members of a given community towards specific behaviours or phenomena, as well as their beliefs about the norms and values on which, in their opinion, society should be based. However, sets of such beliefs and attitudes are often internally

4 As H. L. A. Hart puts it, in juxtaposing the concepts of positive and critical morality, he does no more than "revive the terminology much favored by the Utilitarians of the previous century" (idem, *Law, Liberty and Morality* (London: Oxford University Press, 1963), p. 20).

5 Ibidem.

6 As S. Guest observes, this distinction between positive and critical morality "is present throughout Dworkin's writings" (idem, *Ronald Dworkin* 3rd ed. (Stanford, CA: Stanford University Press, 2013), p. 127).

7 R. Dworkin, "Lord Devlin and the enforcement of morals," *The Yale Law Journal* 75/6 (May, 1966), p. 1001.

inconsistent, with multiple contradictions and incongruities. They may also refer to false beliefs about facts, shaped by accidental observations or generalisations from personal experience. In many cases, they arise directly from stereotypes, prejudices, and other unconsidered spontaneous emotional reactions, conditioned by environment and contingent processes of socialisation.[8] Very rarely do they form a coherent, well-considered system in which moral judgements and decisions follow from a consistent set of basic principles and underlying values.

For these reasons, positive morality should not be equated with public morality as a point of reference for legal norms. It merely provides the raw material for critical ethical reflection. Only upon this reflection is it possible to establish the most coherent and best-founded set of moral principles and norms: the best possible interpretation of the raw material offered by positive social morality. The result of this interpretation is critical morality, which is by no means a simple reflection of the society's prevailing beliefs and attitudes towards specific behaviours or phenomena.

Thus, public morality can be seen as a rational reconstruction of positive morality; it frees the latter from internal contradictions, inconsistencies, randomness, and errors resulting from lack of self-reflection and incomplete knowledge of facts. In democratic and pluralistic societies, respect for tolerable differences between individual moral beliefs and attitudes must also be an indispensable component of public morality.

The limits within which such differences are and should be permissible are determined by the protection of others from harm that might be inflicted on them in the name of someone else's personal moral beliefs. However, as long as these limits are not transgressed, tolerance for acting in accordance with one's moral beliefs appears to be one of the key aspects of freedom of conscience in a pluralistic society.

Public morality is therefore neither anyone's individual morality nor a simple reflection of positive social morality of a given place and time. Nor, of course, is it an empty concept that can be filled with any content arbitrarily and without much thought. Public morality consists of a possibly coherent system of

8 "Positive morality when unpacked is a body of beliefs and patterns of behavior of the members of the group – but to a large extent accepted unreflectively on the basis of social mimics and enculturation" (S. Hampshire, "Public and private morality," in S. Hampshire (ed.), *Public and Private Morality* (Cambridge: Cambridge University Press, 1978), p. 30).

values and moral principles recognised in a given community, together with their normative consequences.

In order to reconstruct such values and principles, it is generally necessary to take into consideration basic legal acts, in particular, these of constitutional rank. This is because in a democratic social order, they not only have a direct normative value, but also constitute an important axiological declaration, indicating the basic values which social life should cherish. A similar role may also be played by non-constitutional acts: both signed and ratified acts of international law, as well as laws regulating a specific area of social relations.[9]

However, this does not mean that the law always accurately expresses the values and norms of public morality. Legal regulations, especially those of constitutional or international status, are by their very nature relatively rigid. They are not always able to take full account of the more changeable and fluid nature of public morality, which is subject to a constant evolution, though not always an obvious or easily perceptible one. The law must strive to keep up with such developments, and in some cases also stimulates and influences them. Therefore, it is natural and inevitable that there is a certain dissonance between the established, simplified form of public morality as expressed in the law, and the real and current state of social attitudes and beliefs that are its substance.

3. Public morality and animals

From the point of view of animal law, the fundamental question is whether and to what extent the life and welfare of animals falls within the set of values and principles of public morality. In its 2014 judgment, the Polish Constitutional Tribunal explicitly suggested that the answer was negative, although no convincing arguments (in fact, no arguments at all) were presented to support this decision.[10] It merely concluded that in the not-too-distant future, ongoing changes in society would "presumably" lead to human attitudes towards

9 This is why public morality is sometimes identified with constitutional morality (R. Thoreson, "The limits of moral limitation. Reconceptualizing 'morals' in human rights law," *Harvard International Law Journal* 59/1 (Winter 2018), p. 227).

10 Wyrok TK z 10.12.2014 r. K 52/13; available at: https://trybunal.gov.pl/postepowanie-i-orzeczenia/wyroki/art/7276-uboj-rytualny; English version: Judgment of 10 December 2014 Ref. No. K 52/13; available at: https://trybunal.gov.pl/en/hearings/judgments/art/9390-uboj-rytualny.

animals becoming part of public morality.[11] This view revealed a rather embarrassing level of ignorance about the problem on the part of the Constitutional Tribunal judges who signed the ruling. There is no doubt that public morality is historically variable, also with regard to how animals are viewed and treated. However, it is by no means true that this problem has never been and is not part of public morality.

In European ethical thought, the treatment of animals has for centuries been seen as an important moral problem. It was emphasised by many leading moral philosophers of virtually every era: from Pythagoras and Francis of Assisi to Jeremy Bentham and Arthur Schopenhauer. John Locke and Immanuel Kant also viewed the humane treatment of animals as a strictly moral issue (albeit one involving human duty, as it were, to oneself). From the perspective of contemporary ethical thought, the view that the treatment of animals by humans is not a morally significant problem can hardly be considered anything other than complete extravagance.

The importance attached to the protection of animal welfare in European societies is confirmed by Eurobarometer opinion polls (interestingly, the views expressed on this issue turn out to be virtually unrelated to political opinions and affiliations).[12] Similarly, according to US surveys, nearly one-third of citizens believe that animals deserve a similar level of protection as humans, while two-thirds are in favour of protecting their welfare while allowing their use by humans. Only a (very) small percentage of respondents (in the region of 3%) are of the opinion that animals do not deserve any protection.[13]

Also, a large number of public opinion polls carried out in Poland in recent years confirm moral opposition against the cruel treatment of animals, though combined with the acceptance of most of the existing practices of their exploitation by humans.[14] Still, it is worth noting that in the opinion of the

11 For more detail, see A. Lis and T. Pietrzykowski, "Animals as objects of ritual slaughter. Polish law after the battle over exceptionless mandatory stunning," *Global Journal of Animal Law* 2 (2015).

12 "Attitudes of EU Citizens Towards Animal Welfare," *Eurobarometer*, March 2007; available at: https://ec.europa.eu/commfrontoffice/publicopinion/archives/ebs/ebs_270_en.pdf.

13 R. Rifkin, "In U.S., more say animals should have same rights as people," 18.05.2015; available at: https://news.gallup.com/poll/183275/say-animals-rights-people.aspx.

14 See, among others, "Polacy a zwierzęta, Komunikat z badań CBOS," May 2006; available at: https://www.cbos.pl/SPISKOM.POL/2006/K_082_06.PDF.

overwhelming majority of surveyed Poles, the need to minimise the suffering of animals exploited by humans is an "important" or "very important" issue.[15]

Even stronger support comes from the current shape of humane animal law. Since Martin's Act of the early 19th century, its rapid development throughout Europe has been driven by moral opposition against the cruel treatment of animals. In the early 21st century, a growing number of countries constitutionalised animal protection, introduced legal dereification of animals, and implemented comprehensive regulations to protect their lives and well-being in relevant areas of human use.

The axiological and normative basis of these regulations can be regarded as a matter of a fairly obvious and stable ethical consensus. At the level of the European Union Treaty law, it is expressed in Article 13 TFEU (replacing the earlier Additional Protocol to the Treaty of Amsterdam). It refers to the recognition of animals as "sentient beings" and their welfare as a value to be respected in the development of the Union's policies.

In national law systems, provisions excluding animals from the category of things (dereification of animals) play a similar role. In Poland, this happens in Article 1 of the PAPA. Moreover, in many countries, the protection of animals has become a constitutional matter. In others, including Poland, it does not have a constitutional status, but the constitution prescribes the protection of the natural environment (of which animals are part) and other values, which indirectly point to the constitutional significance of the moral interests of animals.

Thus, there is no doubt that the values on which animal protection law is based fall within the scope of public morality. Their status is a different matter, as is their relationship with the values used as justification for the current practices of human exploitation of animals. To reconstruct them, one needs to take into account both the shape of current legal regulations and the changing standards of positive social morality. Finally, what is needed is a sound ethical argumentation based on current knowledge of animal sentience, the reality of breeding, entertainment, and experimental practices, and the goals and values pursued through these practices.

Interestingly, the public opinion polls referred to above reveal that the majority of the respondents have a fairly good knowledge of the facts concerning

15 Ibidem, p. 5.

the sentient and cognitive capacities of animals and understand at least their elementary ethical implications. Thus, at this level, the most typical flaws of positive morality do not occur, such as erroroneus or inaccurate knowledge of facts, superstitions, stereotypes, and prejudices (from which some representatives of the political and legal elites are not always immune). Still, such errors and inconsistencies may concern more specific issues, such as slaughter methods, breeding conditions, and the legitimacy of animal experiments. In these cases, incomplete knowledge of the facts may lead to the prevalence of attitudes that are difficult to rationally reconcile with the values and principles underpinning public morality (and largely shared by the respondents concerned).

4. The moral rights of animals

The association of animal protection with public morality merely means that animal welfare and life are a legitimate rationale for restricting human rights and freedoms. This applies in particular to the right of ownership of a sentient animal, as well as to economic and artistic freedom, religious practices, scientific research, and similar areas of activity. Such restrictions are subject to the general proportionality test, according to which they must provide a necessary and effective means of protecting animal welfare or life, and must not be excessive in relation to the need to protect them.

At the same time, the fact that the treatment of animals is viewed as a moral problem *par excellence* does not mean that animals are attributed any moral rights which could or should be transformed into subjective rights and legally protected. The question of whether animals have moral rights in relation to human beings echoes to some extent the disputes about the nature of moral duties. Indeed, it remains relatively uncontroversial that moral rights are the reverse of moral duties incumbent on other subjects. It would be unwise to claim that there are rights that are not reflected in the corresponding duties of those who should respect them.[16] It does not follow, however, that the obligation

16 The relation between moral rights and moral duties in the sense discussed above is to be distinguished from the often-debated claim that a subject with moral rights must also have moral duties. This is a very different claim, based on debatable ethical assumptions and closely related to some ethical theories (such as Kantianism or contractualism). In contrast, the relationship between the rights of one subject and the corresponding obligations on the part of other subjects is conceptual in nature and not particularly controversial. A right

to respect the interests of animals must be reflected in their subjective moral rights. Indeed, the fact that there cannot exist rights without duties does not mean that there cannot exist duties without rights.

The claim of the absence of moral rights as such is most forcefully stated by utilitarian ethics. According to Jeremy Bentham's famous formulation, the view that anyone has any inherent rights, primary to any norms from which they might be derived, is nothing but "nonsense upon stilts."[17] According to Bentham, there is only one moral obligation: to maximise the happiness of as many people (and, in fact, as many beings capable of experiencing pleasure and pain) as possible. Therefore, moral evaluation involves the utilitarian calculus: understanding the balance of pleasure and suffering on the part of all those who are affected by our decisions.

Imaginary moral rights – ones that are supposed to be respected regardless of the consequences – should not be allowed to interfere with the utilitarian calculus or distort its outcome. There is only one correct solution to every moral problem, and every distortion of the calculus makes it impossible to find that solution. Including "inviolable rights" in the calculation either adds nothing (if the final decision leads to an optimal balance of consequences anyway) or is harmful (if it results in decisions leading to suboptimal consequences).

Thus conceived, consequentialist ethics leaves no room for anyone's moral rights. This also applies (perhaps *a fortiori*) to animals. Every sentient being has interests in that it pursues subjective happiness and avoids suffering. These interests are included in the utilitarian calculus, and there is no reason why the interests of animals should be excluded from it or treated *a priori* as fundamentally less significant than corresponding human interests.[18] Thus, it can be said that, from the point of view of utilitarian ethics, animals, like humans, have no inherent moral rights. However, any being that is conscious and thus capable of having interests, including an animal that meets this

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not accompanied by anyone's obligation would be an empty concept at the least, if not a disguised *contradictio in adiecto*.

17 J. Bentham, "Anarchical fallacies," in S. Engelman (ed.), *The Selected Writings of Jeremy Bentham* (New Haven: Yale University Press, 2011), pp. 318f.

18 See in particular P. Singer, *Practical Ethics* (Cambridge: Cambridge University Press, 1979); for more detail, see also T. Pietrzykowski, *Spór o prawa zwierząt* (Katowice: Sonia Draga, 2007), pp. 80f.

condition, has a "moral right" to have its interests taken into account in decisions that may affect it.

Some other theories of morality also reject outright the category of moral rights. As an example, one may refer to the views of Leon Petrażycki, an eminent scholar of law and morality.[19] Approaching morality as a psychological phenomenon, Petrażycki defined moral duty precisely as a sense of unilateral obligation. It is not accompanied by the idea of anyone else being able to claim a specific behaviour as one's due.[20] In contrast, a legal experience is bilateral; it consists in the correlation of the sense of obligation with the right of a subject to whom the obligation is due. Petrażycki illustrated the one-sidedness of moral duties with the prescription to "turn the other cheek" or to give alms. In his view, then, morality consists in the experience of unilateral obligation, while rights belong to experiences of legal rather than moral nature. At the same time, Petrażycki saw no obstacles to rights being attributed to animals as well.[21]

Moral rights of animals were also rejected by Immanuel Kant. However, he did not deny moral rights as such (belonging to humans) or a human moral obligation to treat animals humanely. Still, in his opinion, it was an obligation humans had to themselves (to their "humanity"). It was not an obligation to animals because animals were incapable of holding any moral rights to reflect this kind of duty. According to Kant, moral rights can only belong to subjects who are themselves capable of moral behaviour. Animals do not belong to a "moral community" of this kind and so cannot be regarded as parties in moral relations that arise within it.

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19 See. L. Petrażycki, *O nauce, prawie i moralności. Wybór pism* (Warszawa: PWN, 1985).

20 "Our rights do not consist in our will or interest, but in a particular kind of obligation of other persons towards us, namely, in debts and other duties that other persons owe to us, in obligations on the basis of which what others are obliged to do is due to us from them [...] Such duties and debts of other persons – which are due to us as our rights, as claims on the basis of which what one is obliged to do is due to another – must be distinguished from obligations of a different kind, from obligations (e.g., to be perfect, to repay good for bad) which, in relation to others, are free and do not belong to them as their rights, and according to which what we are obliged to do does not appear to us as something we owe to others" (L. Petrażycki, *O pobudkach postępowania i o istocie moralności i prawa* (Warszawa: K. Wojnar i s-ka, 1936), pp. 30f.).

21 Still, no matter to whom they are attributed, they always exist solely as the content of the emotion of legal obligation, of which only a human being is capable (ibidem, pp. 54f.).

As mentioned earlier, Kant's exclusion of animals was challenged on the grounds of his own ethics by Christine Korsgaard. The view of animals as passive moral subjects is also supported by many other ethicists who refer to the concept of moral rights.[22] They treat animals like humans who do not have the capacity to fulfil their moral duties on their own, or even to consciously hold them. These cases include children in the early stages of life and adults who are heavily mentally handicapped, suffer from advanced neurodegenerative diseases, or are in a coma or a vegetative state. The extent to which they hold moral rights may be disputable in many respects. Still, the very possibility of attributing moral rights to them – despite their incapacity for moral behaviour and inability to fulfil their obligations – challenges the idea that animals cannot, in principle, hold such rights.[23]

From an ethical perspective, then, the notion of animal rights does not seem extravagant. Its arbitrary rejection arises primarily from explicit or tacit reliance on some form of species chauvinism inherent in the humanist worldview and the *a priori* assumption that the human being is essentially, qualitatively different morally from all other animals, and thus deserves moral privileges. These privileges are referred to as inherent human rights, rights to which humans are entitled by virtue of belonging to *Homo sapiens*. Being a member of *Homo sapiens* is supposed to entail a special dignity which distinguishes humans from all other creatures and is the source of all inherent rights humans hold. It is dignity that determines that only humans are entitled to moral rights, while other animals can merely be subject to a certain level of protection as long as such provisions do not overly conflict with the rights and interests of humans. This attitude could be called, in Robert Nozick's words, "utilitarianism for animals, Kantianism for people."[24]

Questioning, or at least problematising, the humanist worldview (this "superstition of humanism") fundamentally changes the ethical perspective. Animal rights become a concept that is no less legitimate than human rights. Of course, this perspective does not determine the extent to which the category

22 See, e.g., T. Regan, *The Case for Animal Rights* (Berkeley, CA: University of California Press, 1984).

23 On the argument from marginal cases, see in particular D. Dombrowski, *Babies and Beasts. The Argument from Marginal Cases* (Urbana: University of Illinois Press, 1997).

24 R. Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), pp. 43f.

of moral rights is legitimate in itself, nor does it determine specific rights attributed to individual creatures or the way of resolving conflicts between them. What it demonstrates, however, is that the current paradigm of moral rights – emanating from the unique and qualitatively special ethical status of human beings – is immanently linked to an anthropocentric worldview. In losing the support provided by this worldview, the paradigm loses its raison d'être. This, in turn, opens the way for a discussion on the legitimacy, status, and consequences of treating animals as subjects with their own rights, a discussion proceeding on the same terms as corresponding debates concerning human beings.

5. Interests, moral rights, and law

It is not the role of positive law to directly reflect all moral duties and rights. It is even more difficult to expect that moral rights of all kinds should *eo ipso* become "fundamental rights" guaranteed by legislation. However, recognising the ethical significance of animal interests and, even more so, treating these interests as moral rights – similar in nature to the fundamental human rights – cannot be ignored by legal norms.

In the current state of law, these interests are expressed in regulations prohibiting exceptionally cruel practices towards animals, as well as in general clauses prohibiting the unnecessary killing of animals or the infliction of unnecessary suffering. It would appear, though, that this formula for incorporating animal interests into law is gradually being exhausted. At the same time, the eclipse of juridical humanism seems to be opening the way towards a much broader and more systemic understanding of the place of animal interests in legal regulation.

Above all, law-making and law-applying institutions should be required to take animal interests into account in all decisions which may – directly or indirectly – have a significant impact on their holders. This includes both practices of animal use by humans and decisions concerning strictly human activities with important consequences for the situation of animals. These may involve, for example, ecology, urban planning, construction, administration, and similar issues. In all such matters, the interests of animals – whether farmed or free-living – must be carefully weighed against the conflicting interests of people concerned with a particular type of activity. Recognising the moral rights of animals does not necessarily imply immediate transformation of

the world into a utopian Arcadia, where the rights of all beings are respected and protected. It does, however, fundamentally change the range of goods and values to be taken into account in resolving conflicts that are the object of everyday law-making and law-applying decisions.

Dimensions

CHAPTER 6

The Systemic Nature of Law

1. The legal system and its elements

The nature of law as a system composed of variously understood and interrelated elements is one of the most controversial problems in legal theory. There is no general consensus on what should be regarded as constituent elements and what kind of relations turn such elements into a unified system.

Any system of statutory law consists of a multitude of separately introduced normative acts, which, in turn, consist of individual provisions. The illusion that the entire content of law can be reduced to a single, comprehensive code is a thing of the distant past. Although there is no shortage of normative acts called codes in modern legislation, they are generally not exhaustive even for their specific branches of law and coexist with many other "non-code" regulations. In addition, national legal orders are more or less directly influenced by international law and, in Europe, by a supranational legal order, such as the law of the European Union.

Normative acts are linked by formal ties, and their legal status is determined primarily by their origin: an institution with formal legislative competence and the competence to adopt laws in accordance with an appropriate procedure. The legal system is constituted by all such enacted and non-repealed normative acts, held together by the common source of legislative competence for all law-making institutions. This source is held to be the Constitution.[1]

1 I ignore here the disputes concerning the basis for the validity of the constitution or any other superior act in the structure of the legal system. These debates are crucial for the understanding of law, but they constitute a separate and largely self-standing topic. The most serious attempts to address this problem in contemporary philosophy of law include the concept of the "basic norm" introduced by H. Kelsen, the theory of legal consciousness shaped by a normative ideology (Scandinavian realism by Alf Ross), the rule of recognition as a consensual practice of legal officials (H. L. A. Hart), and theories treating legal order as a type of social convention (e.g., A. Marmor).

At the same time, normative acts are themselves composed of provisions that are often enacted and repealed individually, without affecting the legal status of the law or regulation in which they are contained. Some of the provisions have a direct content relationship with others. This situation occurs both within and between normative acts. Such links are at the heart of the concept of legal institutions, which are understood as sets of interrelated provisions that together regulate a particular type of social relation (e.g., property, tax, marriage or driving licence). At the same time, it is clear that provisions may be treated as components of legal institutions according to various criteria, that the same provision may be an element of more than one legal institution, and that the relationships between provisions and the institutions they form may be highly diverse.

The interrelation of provisions which together form a legal institution may be indicated by the lawmaker through their appropriate arrangement, in particular, through their placement in the same chapter or under a specific heading. However, the assignment of provisions to particular institutions is, to a large extent, also the task of legal science, which looks for relations between individual provisions and systematises them according to their interdependence.[2]

2. Law as a system of norms

Law is sometimes viewed not only as a system of normative acts or legal institutions created by the provisions they contain, but as a system of legal norms. Norms are here treated as ideal constructs, the elements of which are expressed in individual provisions (sometimes remote from one another). The task of interpreting law is precisely to find these elements and so to reconstruct the norm "encoded" through them by the lawmaker. On this perspective, the "true" constituents of a legal system are not provisions or normative acts, but norms which are reconstructed from provisions.

In such approaches, both the structure of a legal norm and its ontological status (the way it exists) are variously understood. In the so-called derivational theory of legal interpretation developed by Polish legal theorists (above all by L. Nowak, Z. Ziembiński, and M. Zieliński), legal norms are statements indicating

2 By recognising and, sometimes, creating such connections (also by providing an interpretation of a regulation), legal dogmatics in fact co-creates law, participating – as J. Leszczyński points out – in the process of its positivisation (idem, *Pozytywizacja prawa w dyskursie dogmatycznym* (Kraków: Universitas, 2010)).

who should behave in what way and in what circumstances. Elements of a norm conceived in this way may be scattered across a number of provisions specifying in what circumstances, to whom, and what behaviour is prescribed by law.

An indisputable advantage of the concept of norm as an ideal entity constructed from provisions is the emphasis on recognising and taking into account the content dependencies between individual rules – sometimes very remote ones – and the importance of this recognition for the correct interpretation and application of law. Its drawback, in turn, is the tendency to hypostasise such entities. As a result, it is argued that the attribute of validity applies in fact to norms rather than to rules or normative acts, and that such norms are literally retrieved (rather than created) by the interpreter, for it is the lawmaker who "encoded" them in individual provisions.

3. Legal institutions

The concept of legal institution is used in yet another sense, popularised primarily under the influence of the philosophical theory of institutional facts developed by John Searle.[3]

We speak of institutional facts when an additional cultural meaning is given to objects, persons, or events. This meaning is based on social rules that determine what and under what circumstances "counts" as such a fact. For instance, this is the case with money (certain pieces of paper or metal "count" as banknotes or coins), judges (certain people "count" as functionaries entitled to make binding decisions about the fate of others), and board meetings (a certain event – a meeting of a particular group of people – "counts" as having taken place). What, and under what conditions, results in the occurrence of a particular institutional fact is determined by relevant rules. These rules may be formally established and written down, or they may function informally, merely by virtue of custom (as is the case with, for instance, the status of a birthday person, a marriage proposal, and a social game).[4]

3 See J. Searle, *The Construction of Social Reality* (New York: Free Press, 1997); idem, *Making the Social World. The Structure of Human Civilisation* (Oxford–New York: Oxford University Press, 2010). On the relevance of Searle's theory to the philosophy of law, see T. Pietrzykowski, "John R. Searle i ontologia prawa," *Studia Prawnicze* 179–180/1–2 (2009), pp. 7f.

4 According to J. Searle, the emergence of rules creating institutional facts and their gradual increase in complexity – the development of successive planes or levels of institutional

The key to understanding the phenomenon of institutional facts is to recognise that they are not mere names, but sets of rules by which a given fact can come about in the first place. That a particular object is a "gun" does not constitute an institutional fact, but merely a name. The object is capable of firing, and thus of performing its function, regardless of whether it is recognised by others as a "gun." In the case of institutional facts, the situation is different. They are capable of performing their function not by virtue of their natural properties – of what they "really are" – but by virtue of being recognised as having a certain status or character. Unlike a gun, a judge who is not regarded by anyone as a judge is not capable of performing his or her office. In a similar vein, a piece of paper not recognised by anyone as a banknote is not "money."

The function of money is determined by social acceptance (recognition as money) and not by the physical properties of the object that is its physical substrate. A "vehicle" is not an institutional fact but a name (since a vehicle is capable of performing its function by virtue of its physical properties, not its recognition as a vehicle). In contrast, a "privileged vehicle" is an institutional fact, since it consists in social recognition of a given vehicle as being entitled to move according to different regulations. A vehicle that is not recognised by anyone as privileged cannot move according to privileged traffic rules and thus *is not* a privileged vehicle.

Institutional facts are created by rules that define who or what and under what circumstances or conditions counts as having a particular status (what *is* a privileged vehicle, who *is* a judge, and what *is* a board meeting). In addition, rules that constitute a given institutional fact also determine what kind of normative consequences follow from an object, person, or event having one status or another. These two types of rules are sometimes referred to as the institutive and consequential rules of an institutional fact. If these rules are legal in nature, the institutional fact they constitute is a legal fact.

The two types of rules that constitute an institutional fact are interrelated. One set of rules determines when a particular fact occurs (who or what counts as the holder of a particular status), while the other determines what follows from this fact, that is, on whom it imposes what kind of obligations. The fact

facts – is virtually the key to understanding human civilisation and the ontology of the social world. See idem, *Making the Social World...*, pp. 90f.

that, according to certain rules, a person counts as a judge creates obligations for other people (as well as for the person him- or herself). If a vehicle *is* privileged in traffic, certain normative consequences for other traffic participants (and for the driver of that vehicle) follow from this status.

A legal institution is therefore a totality of interrelated legal rules that enable the emergence and operation of a certain type of legal institutional facts.[5] It consists in a coupling of institutive and consequential rules: meeting the conditions specified by law leads to the acquisition of a certain status (the occurrence of an institutional fact), and this status, in turn, gives rise to normative consequences in the form of rights and obligations of legal subjects.[6]

Prime examples of legal institutions include citizenship (provisions defining who obtains or loses the status of "citizen of the Republic of Poland" and under what circumstances, as well as related provisions defining the rights and duties of a citizen) and the court judgment (provisions defining what event legally counts as "passing a judgment" and what legal consequences – and for whom – the fact of "passing a judgment" entails).

As we have seen, the legal system can be construed in multiple ways. It can be viewed as a collection of interrelated normative acts or provisions they contain. It can also be regarded as a set of legal norms reconstructed from such provisions. Finally, it can be understood as a set of legal institutions created by interrelated provisions comprising institutive and consequential rules of certain institutional facts.

These perspectives are by no means mutually exclusive, and each can contribute to a better understanding of the various properties of the legal order and serve different cognitive, interpretative, and systematising purposes. However, it is important to avoid the temptation to hypostasise theoretical constructs by treating them as objectively existing, or even ontologically primary, "structures" of the legal system. They constitute a more or less useful external schema by means of which law can be construed and described, rather than the objective, intrinsic nature of the legal system that is thus "revealed."

5 Cf. N. MacCormick, *Institutions of Law* (London–New York: Oxford University Press, 2007).

6 For more detail, see T. Pietrzykowski, "Instytucje prawne i sprzężenie reguł," *Przegląd Sądowy* 11–12 (2010), pp. 52f.

4. Animal law as part of the legal system

In Europe, the legislative activity of the European Union plays an increasingly important role in the shaping of humane animal protection. Since 2007, it has been underpinned by Article 13 of the Treaty on the Functioning of the European Union (TFEU). It provides that "the Union and the Member States shall, since animals are sentient beings, pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage."

Taking this imperative into account, the legislative bodies of the European Union have issued, among others, several regulations on the protection of animals, which are in force and directly applicable in each member state, including Poland. To the extent regulated by these documents, they replace earlier regulations of national law and preclude different regulation of this matter by the Polish legislator.

Two of these regulations play the most important role. EU Regulation 1/2005 concerns the transport of animals and lays down specific conditions under which it should take place. It is only left to the law of the member states to regulate issuing the required authorisations, licences, and certificates; holding inspections of animal transport; and sanctioning infringements of the transport rules.

EU Regulation 1099/2009, in turn, concerns the killing of animals. It lays down, among others, the restrictions and rules applicable to killing, the qualifications of personnel carrying out slaughter operations, and the methods allowed. It also imposes the obligation to stun the animal prior to slaughter, with only a few precisely defined exceptions. In Poland, its provisions largely replaced previous provisions of the PAPA. However, Article 33 *et seq.* of the PAPA to some extent complement the legal situation under Regulation 1099/2009.

On certain matters, Regulation 1099/2009 leaves it to national law to derogate from standards that are, in principle, common throughout the European Union. This is particularly controversial with regard to the obligation to stun animals prior to slaughter. Article 4(4) of the Regulation provides that one of the exceptions is the killing of an animal according to rules prescribed by religious rites. This refers to the so-called ritual slaughter practised by orthodox branches of Judaism and Islam, which requires that the animal be killed

by cutting its throat and bleeding it while it remains conscious during these operations. At the same time, Regulation 1099/2009 allows individual member states of the Union to make arrangements in their national laws to limit or remove this exception.[7]

The European Union has also established several other regulations relating to more specific aspects of ethical animal protection. These include the Seal Regulation prohibiting trade in seal products,[8] and the regulation prohibiting the placing on the market, import, and export of dog and cat fur.[9] Both were introduced because of moral objections to cruel practices by which these products were obtained: in seal hunting and the killing of dogs and cats for fur. The earlier Leghold Trap Regulation is also based on similar considerations. Moreover, it allows the import of pelts of certain animal species only on condition that the legislation of the country of origin of the imported pelts prohibits the use of such traps.[10]

No less important for the ethical protection of animals are several European Union directives relating, among others, to such areas of legal regulation as animal experimentation or standards for the keeping of farm animals. The provisions of the directives are not directly applicable and require transposition into the national legal order (issuing national legislation to achieve the objectives set by the directive). Among the most relevant ones is the already mentioned Directive 2010/63/EU on the protection of animals used for

7 Article 26(2) item (c).

8 Regulation (EC) No 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products (OJ L 286, 31.10.2009); Commission Regulation (EU) No 737/2010 of 10 August 2010 laying down detailed rules for the implementation of Regulation (EC) No 1007/2009 of the European Parliament and of the Council on trade in seal products (OJ L 216, 17.8.2010); Regulation (EU) 2015/1775 of the European Parliament and of the Council of 6 October 2015 amending Regulation (EC) No 1007/2009 on trade in seal products and repealing Commission Regulation (EU) No 737/2010 (L 262, 7.10.2015).

9 Regulation (EC) No 1523/2007 of the European Parliament and of the Council of 11 December 2007 banning the placing on the market and the import to, or export from, the Community of cat and dog fur, and products containing such fur (L 343, 27.12.2007).

10 Council Regulation (EEC) No 3254/91 of 4 November 1991 prohibiting the use of leghold traps in the Community and the introduction into the Community of pelts and manufactured goods of certain wild animal species originating in countries which catch them by means of leghold traps or trapping methods which do not meet international humane trapping standards (L 308, 9.11.1991).

scientific purposes. Other important directives on various aspects of the ethical protection of animals concern the protection of farm animals (1998)[11] and the introduction of minimum standards for the protection of calves (1991),[12] pigs (1991),[13] laying hens (1999),[14] and chickens kept for meat production (2007).[15]

Provisions of these directives include not only standards for space provided for livestock, but also prohibitions on such farming practices as tethering and mutilation, as well as conditions relating to temperature, lighting, feeding, watering, and other parameters. Although they have to some extent curtailed the most ruthless farming practices, the conditions resulting from these provisions are still very far from meeting the real needs of animals kept under industrial farming conditions.

In the national orders of the states of the European Union, animal law is usually formed by provisions of the general law on the protection of animals and sometimes by separate acts protecting animals used in scientific experiments. Of direct relevance are also general provisions of criminal codes setting out the principles of responsibility for harming animals, and provisions of civil codes, which often include clauses defining the legal status of animals. Constitutional and procedural administrative provisions related to the supervision of compliance with animal protection regulations also play a major role, as do procedures for responding to violations of these regulations.

In Poland, two normative acts form the core of Polish animal law: the 1997 Animal Protection Act (PAPA) and the 2015 Act on the Protection of Animals Used for Scientific or Educational Purposes (PAPA-SP). Until 2005, provisions now covered by the PAPA-SP were part of the PAPA, but in time, they were placed in a separate act. This change resulted from the need to transpose into

11 Council Directive 98/58/EC of 20 July 1998 concerning the protection of animals kept for farming purposes (L 221, 8.8.1998).

12 Council Directive 2008/119/EC of 18 December 2008 laying down minimum standards for the protection of calves (Codified version) (L 10, 15.1.2009).

13 Council Directive 2008/120/EC of 18 December 2008 laying down minimum standards for the protection of pigs (Codified version) (L 47, 18.2.2009).

14 Council Directive 1999/74/EC of 19 July 1999 laying down minimum standards for the protection of laying hens (L 203, 3.8.1999).

15 Council Directive 2007/43/EC of 28 June 2007 laying down minimum rules for the protection of chickens kept for meat production (L 182, 12.7.2007).

Polish law relevant EU acts regulating the principles of protection of animals used for scientific experiments.

However, a significant part of the regulations that set the real standards for animal welfare are to be found in implementing acts. It is these laws that to the greatest extent shape the conditions under which animals are exploited in everyday life. Particularly relevant in this respect are regulations issued on the basis of the provisions of the PAPA and PAPA-SP, which determine, among others, the conditions under which animals are kept for breeding and used for entertainment, as well as the training and qualification of personnel directly responsible for the way animals are handled. Local acts also play a major role here, in particular, annual programmes for the care of homeless animals and prevention of animal homelessness, which are introduced obligatorily by each municipality.[16]

5. The problem of the constitutional basis for animal law

The regulations and directives that make up the secondary law of the European Union have their legal and axiological basis in Article 13 of the TFEU. It directs the legislative bodies of the Union to lay down rules to protect the welfare of sentient animals. At the same time, it provides for the competence to adopt such regulations. In the constitutions of countries where animal protection has gained a constitutional status, such rules generally take the form of an obligation to lay down its detailed principles in acts and other sub-constitutional laws.

In many other countries, despite the lack of explicit mention of animal protection as one of the constitutional duties of the state, this obligation is derived from norms prescribing the protection of the environment or public

16 The legal basis for the obligation to introduce them is Article 11a of the PAPA. For an example of a programme of this kind, see https://bip.katowice.eu/Lists/Dokumenty/Attachments/111229/sesja%20VI-106-19.pdf. The status of such programmes as acts of local law is disputable and gives rise to discrepancies in judicial decisions. This is due to the deeply flawed criteria that the court-administrative practice has developed for "distinguishing" acts of local law from other resolutions of local government bodies, criteria that lead to blatant arbitrariness (for more detail, see T. Pietrzykowski, "O nadużyciach semantycznych przy definiowaniu aktów prawa miejscowego," in T. Pietrzykowski (ed.), *W kręgu teorii prawa i zagadnień prawa europejskiego* (Sosnowiec: Humanitas, 2007)).

morality.[17] For example, the Polish Constitution does not contain any provision concerning specifically the protection of animals; however, with regard to the species protection, its basis can be found in Article 5, according to which "the Republic of Poland [...] shall ensure the protection of the natural environment pursuant to the principles of sustainable development." As a special complement to this provision, Article 31 of the Constitution permits limitation of civil rights and freedoms due to the need to protect the environment.

In the case of the humane protection of animals, on the other hand, its constitutional underpinning can be found in ethical considerations, that is, in the protection of public morality as referred to in Article 31(3) of the Constitution. The wording of this provision leaves no doubt that the freedoms and rights of citizens may be subject to statutory restrictions on the grounds of the ethical protection of animals. This is most evidently a different concern of public morality than the protection of the "freedoms and rights of other persons." The fact that the lawmaker invokes public morality as a rationale for the restriction of civil liberties and rights – a rationale invoked separately from the protection of the freedoms and rights of others – leaves no doubt that ethical arguments are by no means limited to interpersonal relations. The latter would be sufficiently protected by the reference to the rights of other persons. Because of the prohibition of the *per non est* interpretation and synonymous interpretation, public morality cannot be equated with the rights and freedoms of other human beings.

If public morality includes other considerations as well, respect for the interests of non-human beings capable of suffering must be among them in the first place. This view of public morality is further supported by the clear wording and established understanding of animal law in the Polish legal order. It refers directly to ethical reasons (Article 1 of the PAPA), and this is how its nature is perceived.[18]

In addition, the preamble to the Polish Constitution points to the importance of "universal human values" as the basis for the legal and social order. In the light of the global development of humane animal protection laws, these values undoubtedly include the responsibility to minimise the suffering

17 See also idem, "Moralność publiczna a konstytucyjne podstawy ochrony zwierząt," *Studia Prawnicze* 217/1 (2019), pp. 5f.

18 Cf., e.g., W. Radecki, *Ustawa o ochronie zwierząt. Komentarz* (Warszawa: Difin, 2012), pp. 14f.

inflicted on animals by humans. This is borne out not only by the role and importance of ethical reflection on human duties towards animals, which forms an essential part of the ethical heritage of civilisation. This is also reflected in law: soft law, such as the famous Universal Declaration of Animal Rights adopted by UNESCO in 1978, international law (in particular, the successive conventions of the Council of Europe adopted in the second half of the 20th century), and, finally, the supranational legislation of the European Union.

CHAPTER 7

Dereification

1. The concept of dereification

The dereification of animals, their exclusion from the legal category of "things," has become widespread in European legislation over the last three decades. It is worth noting that in Poland, it took place as early as 1997, ahead of the vast majority of other European countries.[1] The term "dereification" (de-reification; from Latin *rei* 'things') was introduced into the legal language by Ewa Łętowska, and to date it has been used almost exclusively in Polish legal writings.[2] It was introduced with the intention to emphasise the fundamental difference between the personification of animals and their "de-reification." Personification consists in granting animals the status of subjects, which is combined with the capacity to hold subjective rights. Proposals to introduce various forms of personification of animals have been put forward in the literature, and practical attempts have been made to achieve judicial recognition of certain animals as holders of subjective rights. In Polish legal literature, it has been proposed to distinguish a non-personal type of subjects of law, so that the subjecthood of animals would not necessarily imply the status of "persons."[3]

1 The first countries to introduce legal dereification clauses for animals were Germany and Austria; with the introduction of the provision of Article 1 of the PAPA, Poland was ahead of France (2015), among others.

2 Also, in relatively few international publications by Polish authors who focus on this problem and refer to the achievements of Polish legal thought (e.g., T. Pietrzykowski, "Animal rights," in *The Cambridge Handbook of New Human Rights* (Cambridge: Cambridge University Press, 2020), pp. 243–252; A. Elżanowski and T. Pietrzykowski, "Životnyje kak ne-ličnostyje sub'ekty prava," *Chelovek* 5 (2017), pp. 25–37). Under this influence, the term is slowly beginning to appear in publications by international authors (e.g., D. Favre, *Animal Law: Welfare, Interests and Rights*, 3rd ed. (New York: Wolters Kluwer), 2020, pp. 106f.; S. Brels, "The evolution of the legal status of animals – from things to sentient beings"; available at: https://www.theconsciouslawyer.co.uk/the-evolution-of-the-legal-status-of-animals-from-things-to-sentient-beings/).

3 For the first time, the concept of non-personal subjects of law was proposed by A. Elżanowski and T. Pietrzykowski in "Animals as non-personal subjects of law" (*Legal Forum* 1 (2013),

Irrespective of the potential subjectification of animals, dereification is a fundamentally different legal institution. Above all, it is negative in nature; it does not confer any clearly defined legal status on animals, but merely excludes them from the category of movable things, to which they previously belonged.

It should be noted at the outset that there are doubts and disputes regarding the normative content of the rules setting the prerequisites for, the scope of, and – to an even greater extent – the normative consequences of dereification. Its reconstruction requires a careful interpretation of relevant provisions and the ability to overcome deeply rooted routines and habits of legal thinking. Although the dereification of animals is certainly not as revolutionary a step as animal personification would be, it still represents a major normative and mental breakthrough. Therefore, it is hardly surprising that the assimilation and implementation of the legal consequences of dereification continue to run into barriers of established habits of thought and dogmatic constructs of individual branches of law.

2. The dereification clause

The normative basis for the dereification of animals in the Polish legal order is provided by Article 1(1) of the PAPA, according to which "[t]he animal as a live creature, capable of suffering, is not a thing. The human being should respect, protect and provide care to it." However, this seemingly simple provision raises a number of interpretative difficulties of a fundamental nature. The first of these emerges with regard to its scope of application. What raises doubts here is the relation of the dereification of animals as expressed in Article 1 to Article 2 of the same document, according to which "the Act regulates the treatment of vertebrate animals." Does this mean that the legal dereification referred to in Article 1 covers all animals or just vertebrate animals, to which further provisions of the Act apply?

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pp. 18–27). It was later developed and expanded with the concept of the "right to be taken into account" in, among others, the following works: T. Pietrzykowski, "Problem of legal subjectivity of animals from the perspective of the philosophy of law," *Philosophical Review* 2 (2015), pp. 247–260; idem, "The idea of non-personal subjects of law," in V. Kurki and T. Pietrzykowski (eds.), *Legal Personhood: Animals, Artificial Intelligence and the Unborn* (Cham: Springer Nature, 2017), pp. 49–68; idem, *Personhood Beyond Humanism: Animals, Chimeras, Autonomous Agents and the Law* (Cham: Springer Nature, 2018), passim.

An important starting point for interpretation should be the assumption of rationality on the part of the lawmaker. It requires that, when interpreting provisions, one should seek an interpretation that is compatible with the best available empirical knowledge.[4]

The latter strongly supports the view that the ability to experience suffering (pain and other subjectively unpleasant sensations) requires a complex nervous system that, in principle, is only characteristic of vertebrate animals. Only with regard to very few invertebrate species is there solid evidence of their ability to demonstrate sentience. This is the case with some species of crustaceans and molluscs (especially cephalopods). In the current state of knowledge, there is no sufficient basis to attribute the capacity to experience suffering to other invertebrates.[5] These, incidentally, constitute the overwhelming majority of all animal species (about 97%).

The current PAPA-SP – following Directive 2010/63/EU, on which it is based – refers explicitly to such empirical-axiological reasons. It applies to vertebrates and cephalopods precisely because sufficient scientific evidence is available for these animal species to be considered capable of experiencing suffering and therefore in need of protection (PAPA-SP Article 2 Section 1 item 1; preamble to Directive 2010/63/EU, items 6–8).

It would be difficult to defend the position that in one law, the rational lawmaker refers explicitly to scientific arguments stating that the capacity to experience suffering is, in principle, characteristic of vertebrates, while in another law – contrary to these arguments – declares that all animals without exception are capable of suffering, including unicellular organisms. This would

4 Cf. J. Wróblewski, "Wybrane zagadnienia metodologiczne dogmatyki prawa," in J. Wróblewski (ed.), *Zagadnienia metodologiczne prawoznawstwa* (Wrocław–Warszawa: Zakład Narodowy im. Ossolińskich, 1982), pp. 135f.; L. Nowak, *Interpretacja prawnicza. Studium z metodologii prawoznawstwa* (Warszawa: PWN, 1973).

5 The discussion on the neural structures capable of causing pain sensations in invertebrate animals is by no means closed, and studies continue to emerge indicating that they exhibit evolutionary continuity in this respect. However, although there is nociception in invertebrates that triggers corresponding aversive reactions, in all likelihood, the lack of a suitably organised central unit prevents them from being processed into conscious sensations. See, e.g., M. Bekoff (ed.), *Encyclopedia of Animal Rights and Animal Welfare,* Vol. 2 (Santa Barbara, CA: Greenwood Press, 2010), pp. 397f.; cf. also R. Elwood, "Pain and suffering in invertebrates?" *ILAR Journal* 52/2 (2011), pp. 175–184.

not make sense if one assumes that the lawmaker was guided by scientific knowledge and consistency of legal solutions in two complementary laws.

Another, much more important practical question that arises in connection with the institution of animal dereification is the scope and content of its legal consequences. In the first place, there is an important difference between the dereification clause of Article 1 of the PAPA and the majority of similar regulations introduced in other countries. There, the counterparts of this provision are generally introduced into the civil codes rather than in the form of provisions of a separate, general law on animal protection. Examples of this form of dereification include Germany, Austria, Switzerland, France, Portugal, the Netherlands, and the Czech Republic. By contrast, in Poland and in a number of other countries, dereification is carried out by a provision of a separate law. As a result, it is, one may say, horizontal and cross-sectoral in nature. There is no ground for limiting its scope and consequences to civil law and the private law relations regulated by it.[6] On the contrary, it precludes the treatment of animals as things in the entire legal order, including administrative law, criminal law, and other branches of public law. This seems of great significance, as its implications are much more far-reaching than if the dereification clause were to be placed in the Civil Code.

Irrespective of the fact that in the Polish legal order, dereification is not limited to private law relations but is of a broader, systemic nature, its most significant effects undoubtedly concern the situation of animals in the light of civil law. In particular, this relates to the issues of ownership, liability, and inheritance.

3. Dereification and private law

Setting aside other branches of law, the major practical effects of dereification concern the field of civil law. Dereification turns animals into a distinct type of object of private legal relations, alongside things and objects that are not things (such as energy or intangible goods).[7] This distinctiveness must be reflected in the content and nature of legal relations of which an animal is the object. In particular, this applies to the relationship equivalent to the right of

6 See also M. Goettel, *Sytuacja zwierzęcia...*, p. 45.

7 M. Nazar, "Normatywna dereifikacja zwierząt – aspekty cywilnoprawne," in M. Mozgawa (ed.), *Prawna ochrona zwierząt* (Lublin: Verba, 2002), p. 134.

ownership, which determines the rights and obligations of a person who has the right to own an animal and use it within the limits set by law, the type of the animal (including, in particular, its capacity to experience suffering), and the socio-economic purpose of the right.

In the light of Article 1 of the PAPA, it is indisputable that as a result of dereification, vertebrate animals do not constitute an object of property as set out in the Civil Code. Despite initial hesitation, this position finds clear support among representatives of the civil law doctrine in Poland. The principles for the application of property rules to animals are determined primarily by the PAPA, which states that, due to the capacity of vertebrate animals to experience suffering, humans owe them respect, care, and protection.

Ownership rights include the right to use and dispose of property to the exclusion of others. At the same time, the owner is restricted by legal regulations and the principles of comity, as well as by the socio-economic purpose of the right of ownership. The fundamental differences between ownership and the corresponding right to own an animal concern both main aspects of ownership: the right to use an animal and the right to dispose of it.[8] There is no doubt that the use of an animal by the "owner" must take into account both laws (most importantly, the PAPA) and the principles of social comity.

The duties of the "owner" of an animal include all elements that make up the concept of humane treatment of animals. In particular, they include enabling the animal to satisfy its species-specific and individual needs. For this reason, rather than of the "owner" of an animal, it may be more appropriate to speak of its legal or *de facto* guardian or custodian, and to refer to the corresponding right as "custody of the animal" rather than ownership or possession.

At the same time, the nature of the right of custody ("ownership" of an animal) puts in a slightly different light the doubts and difficulties arising when legal institutions closely linked to the right of ownership of things are applied to animals. Of particular relevance in this context are: the deprivation of ownership (the administrative "expropriation" of a person who inhumanely treats an animal), divestment through abandonment, the acquisition of ownership of an animal that does not "belong" to anyone, and the warranty for defects of an acquired animal.

8 A different and very conservative position is taken by M. Goettel, who observes that the difference between the right of ownership of a thing and its animal counterpart "is of little theoretical or practical significance. Indeed, the subject's right to an animal is a right identical in nature and content to the right of ownership" (*Sytuacja zwierzęcia...*, p. 690).

According to the PAPA, if an animal is treated in a way that bears the hallmarks of abuse, it may be "temporarily taken away" by a decision of the competent mayor (of a commune, municipality, town, or city) and "transferred free of charge" to an entity that will provide care for it. In order to properly determine the legal nature of this institution, it is essential to look at it through the prism of the fundamental differences between the right of ownership of things and its animal counterpart. The essence of the latter includes the obligation of a person exercising lawful authority over an animal to ensure humane treatment of the animal, due care, and protection. A breach of this duty justifies depriving the animal keeper of the right to own the animal, use it, and exercise authority over it.

Deprivation of an animal is therefore not a case of expropriation and is not subject to the same strong protection as the deprivation of ownership over things. This is because, unlike a thing, an animal has its own interests, and respecting them is the subject of legal protection also with regard to the person with the right to the animal concerned. This significantly weakens the legal position of the guardian compared to the owner of a thing. Therefore, it cannot be assumed that, despite the deprivation of an animal, its former keeper retains the right to it and is able to, for instance, dispose of the animal or exercise other "ownership" rights.

In the light of the dereification of animals, both the deprivation and forfeiture of an animal must be seen primarily in terms of individual prevention and only secondarily, or peripherally, as a kind of repression or deterrence. The aim is to protect the welfare of a particular animal or group of animals from inhumane treatment by those under whose authority they are placed.

The essence of this legal institution is to prevent the possibility of further harm to an animal by a person who has been proved incapable of humane treatment of animals by the way in which he or she actually discharged the duty of care. It is therefore the interest of the animal that must be considered first and foremost, rather than the situation of the perpetrator or the legal relationship between him or her and other subjects. Also, deprivation of an animal cannot have a repressive function or serve as an instrument of "retribution" for the distress caused to the animal.

The legal problems of animal abandonment should also be viewed from this perspective. In the literature to date, doubts have been raised, among others, as to the legal consequences of abandoning an animal – in particular,

the possibility of divesting oneself of the "ownership" of an animal by abandonment – as well as of the acquisition of a "nobody's" animal. However, bearing in mind the differences between the legal relationships of custody of an animal and ownership of things, there can be no doubt that the "owner" cannot legally relieve him- or herself of his or her duties towards an animal by abandoning it. Abandonment is a form of animal abuse. In consequence, it cannot be assumed that the commission of a prohibited act may have legal consequences favourable to the perpetrator: a legal exemption from duties towards the mistreated animal (*nemo ex suo delicto meliorem suam conditionem facere potest*). By abandoning an animal, the previous "owner" does not legally relinquish his or her duties towards the animal or responsibility for it. His or her obligations can only be terminated once corresponding obligations emerge on the part of another entity that acquires the right to exercise custody over the same animal.

Possible decisions on the legal status of an abandoned animal should be made with a view to the animal's interests. On some occasions, it may be in the animal's interest to assume that the finder's duty is to immediately surrender the animal to a shelter that performs tasks related to providing care for homeless animals on behalf of a given municipality. In other cases, it may be in the animal's interest to assume that the finder has acquired the right to take care of the animal (in place of the previous "owner") regardless of the time limits set out in the legislation on the ownership of things. In any case, however, the finder should inform the shelter, so as to enable the previous keeper to find the animal.

The situation of abandoned animals is similar to that of stray or runaway animals. However, unlike the perpetrator of abandonment, the previous keeper of an animal that has strayed or run away against his or her will may demand the return of the animal, unless this is against the animal's interests.

In view of the different nature of the right of custody compared to the right of ownership, there must also be significant legal differences in the contractual relationships of which animals are objects. In particular, contracts for the "sale," "donation," or "safekeeping" of an animal are merely similar to those concerning things, and their content must take into account the interests of the animal as a creature capable of suffering. The legal regime for such obligations must therefore consider the welfare of the animal, even when the parties have not expressly provided for it in the contract. This difference is made clear by the linguistic practice developed in legal relations, where contracts concluded

between shelters and persons acquiring the right to care for homeless animals for a fee are usually referred to as "adoption contracts."

With regard to a donation contract, these considerations can and should be of great relevance, too, in particular when interpreting and applying the cancellation provisions. When assessing the admissibility of cancellation, the interest of the animal must be considered first and foremost, not as an additional but an important criterion for the admissibility of cancellation. Similarly, the possibility to exercise the right of retention on the part of the animal keeper – that is, making the surrender of the animal to its "owner" conditional on the reimbursement of the costs incurred for the animal – should be assessed first and foremost from the perspective of the animal's welfare and only secondarily from the perspective of the economic interests of the parties of the civil law relationship.

Also, contracts concluded by "animal hotels" are sometimes referred to not as storage contracts, but as "custody contracts." There is no doubt that the provisions on storage are of primary importance in determining their legal content. However, this linguistic practice seems to reflect well what the nature of an animal as a creature capable of suffering entails for the content of this type of legal relationship. Unlike in the case of the storage of property, the obligations of the temporary custodian to provide for the animal's needs and ensure proper treatment are necessarily among the most important provisions of the contract for the temporary care of the animal. These arise irrespective of the express will of the parties and the interests of the principal; much like *naturalia negotii*, they are binding on the contractor by virtue of the dereification clause and specific provisions of animal protection law.

Finally, it is worth noting that the effects of dereification should be viewed in a similar way in family and inheritance law. In the event of divorce, the court's decision on a jointly acquired right to an animal is qualitatively different from other elements of the decision on the division of joint property. When deciding which of the spouses will be granted the right, the court should first take into account the interests of the animal, applying, if necessary, a cautious analogy to the rules on custody of minor children. Such considerations must take precedence over the origin of the funds for which the animal was acquired and the moment when it was acquired. The same considerations should apply in the division of inheritance, so that decisions on the right to custody of an animal included in the inheritance might take into account its interests to the greatest possible extent.

4. Dereification and criminal law and procedure

In current discussion and practice, the most important question concerns the impact of dereification on the status of an animal victim of a crime. So far, criminal law has assumed that only a natural or legal person can be a crime victim, that is, a victim within the meaning of the Code of Criminal Procedure. At the same time, under the PAPA, in cases of crimes against animals, social organisations are entitled to exercise the rights of the victim. However, it is assumed that they exercise these rights not on behalf of a wronged animal (as an animal cannot have the legal status of a victim), but on behalf of the "true" victim, that is, its human "owner." The question of whether this understanding sufficiently takes into account the dereification of animals as laid down in the PAPA is one of the key issues related to the real legal effects of the Act.

This question reflects very well the relationship between the interpretation and application of law, on the one hand, and the worldview it presupposes, on the other. No doubt, allowing a different interpretation of the victim provisions from that so far adopted in criminal law would require a revision of the thoroughly anthropocentric paradigm of thinking about its institutions. However, are there not sufficient grounds for this of both strictly interpretative and axiological-legal nature?

The conservative position first refers to the literal wording of the provision, according to which a victim can be "a natural or legal person whose legal interest has been directly violated or threatened by an offence." Therefore, as the Supreme Court argues,

> a domestic or farm animal should be viewed as an object of property or possession in all its forms (self-contained, dependent). And since the law protects property and undisturbed possession, one must assume that in the case of animal cruelty, the wronged party is first and foremost the owner or possessor of the animal.[9]

This reasoning must provoke far-reaching objections, since it lacks any reference to the normative effects of dereification. It seems as if Article 1 of the PAPA did not provide a natural and inherent interpretative context for the reading of the relevant provisions of the Code of Criminal Procedure. In its

9 The Polish Supreme Court judgment of 16 January 2014 (V KK 370/13).

typical fashion, the conservative position thus reduces dereification to an insignificant declaration that has no impact on other provisions regulating the status and treatment of animals.

Still, in Polish law, unlike in many others, dereification refers to the entire legal order and not only to civil law. It is not a mere ornament devoid of normative significance, but a fundamental provision of the Act that changes the status of animals. Hence, its legal implications must be taken into account in the interpretation and application of all other provisions for which this fundamental change in animal status may be relevant.

The understanding of such provisions should be maximally "aligned" with the legal perception of animals resulting from the PAPA. The normative scope of the concept of victim and the legal consequences arising from this status must take into account the impact of dereification on the shape of this institution: the fact that, according to Polish law, a vertebrate animal is no longer a thing but has become "a live creature, capable of suffering," to which the human being owes respect, care, and protection.

This axiological solution is consistent with the rather obvious and common observation that the perpetrators of crimes against the life and welfare of animals are very often (if not generally) their "owners," and with the fact that the PAPA protects all vertebrates, regardless of whether they have "owners" whose interests could be affected by the offence. At the same time, it does not protect invertebrate animals (considered in all likelihood to lack sentience), even if their killing or abuse may negatively affect the emotional or economic interests of their "owners."

The point of the PAPA provisions is therefore not the protection of the owner's interests. The essential normative novelty is that a social organisation is allowed to represent the interests of a wronged de-reified animal. Ignoring the impact of this key element of the systemic context on other provisions can hardly be seen as anything other than a serious error of interpretation.

This error stems, in my view, above all from a certain intellectual and mental inertia, whereby the interpretative framework is determined by the picture of the world rooted in the normative assumptions of a given branch of law. The PAPA, in turn, requires a serious revision of this picture and, along with it, of certain implicit assumptions (so far treated as truisms). These assumptions organise, so to say, the understanding of particular concepts and provisions and, consequently, the perception of the legal institutions they create.

The extent to which Polish legal culture has become bogged down in this anthropocentric view of the world is illustrated by comparing the rhetoric of the conservative position with the judicial arguments presented in high-profile Argentine rulings on the legal situation of great apes kept in zoos. In one of them, the Federal Criminal Court of Appeals in Buenos Aires, in a 2014 judgment, stated, among other things:

> [...] based on a dynamic rather than a static interpretation of the law, it is necessary to recognize the animal as a subject of rights, because non-human beings (animals) are entitled to rights, and therefore their protection is required by the corresponding jurisprudence.[10]

This view was later upheld in another ruling in the same case issued in 2015 by the Court of the Autonomous City of Buenos Aires, with an additional reference to the fact that Argentine law allows social organisations to exercise the procedural rights of animals as victims of crime.[11]

A year later, a similar case was decided by the Argentine court in Mendoza, concerning another animal (the chimpanzee Cecilia). The ruling included the following paragraphs, which are worth quoting in full:

> It is undeniable that great apes, like the chimpanzee, are sentient beings and therefore they have non-human rights. Such category in no way distorts the concept put forward by the doctrine. A chimpanzee is not a thing, he is not an object that can [be] disposed of like a car or a building. Great apes are legal persons, with legal capacity but incompetent to act as it is corroborated by the evidence in this case that chimpanzees reach the intellectual capacity of a 4 year old child.

10 The complete text of the ruling in Spanish and English is available at: https://www.nonhumanrights.org/blog/copy-of-argentine-court-ruling/.

11 "Para ello, aludiremos en primer lugar a los antecedentes del derecho argentino vigentes, por ejemplo, el art. 1° de la ley 14.346 (de septiembre de 1954) que establece que 'Será reprimido con prisión de quince días a un año, el que infligiere malos tratos o hiciere víctima de actos de crueldad a los animales' destacando en el texto la utilización de la palabra 'víctima' en relación a los malos tratos que a un animal pueden serle infligidos – únicamente – por personas humanas ya que el destinatario." The complete text of the ruling is available at: http://intimateape.blogspot.com/2015/10/read-judges-decision-that-orangutan.html.

> Great apes are legal persons and owners of the inherent rights of sentient beings. This affirmation seems contrary to the applicable positive laws. But this is only an appearance that comes out only in certain doctrine sectors that are not aware of the clear incoherence of our legal system that states that animals are things while it also protects them from animal cruelty, legislating for this even within criminal law. Legislation about animal cruelty means that there is a strong presumption that animals "feel" such cruelty and that suffering must be avoided, and in case it happens, it must be punished by criminal law.[12]

Comparing this argumentation with the tone in which Polish jurisprudence and literature formulate their predominantly conservative positions, one cannot help the reflection that if the spirit of history – as W. F. Hegel argued – moves through the world, turning various civilisations and cultures into the engines of human progress at various points in history, then in recent decades, it must have moved from our part of the world to South America.

5. Dereification and administrative law

In administrative law, dereification operates much more indirectly. It primarily gives rise to obligations for administrative bodies to properly exercise their powers that directly or indirectly affect significant interests of vertebrate animals.

Under administrative law, there are two key forms of action that implement animal law: administrative decisions and normative activity of public administrative bodies.

In Polish law, the most important decisions protecting animals from suffering include: impounding an abused animal; granting consent to the use of an animal for scientific or educational purposes; issuing permits, licences, and certificates related to the transport of animals, approving scenarios and programmes involving animals used for entertainment, and imposing administrative penalties for certain breaches of the provisions on the use of animals for scientific and educational purposes. Important types of normative action by the administration, in turn, include the municipal programme for the care

12 The complete text of the ruling (translated from Spanish by by attorney Ana María Hernández) is available at: https://www.nonhumanrights.org/blog/cecilia-chimpanzee-legal-person/.

of homeless animals and prevention of animal homelessness and certain types of regulations of the National Ethical Committee for Animal Experiments. By far the most important, however, are implementing acts to the provisions of animal law, issued by relevant ministers.

The primary effect of dereification in this area of law application is the obligation to treat the life and welfare of each animal as a legally protected good. Under the terms of applicable regulations, this good is often assigned an inferior rank compared to other goods. These may include the economic interests of food producers and other manufacturers, scientific progress and product safety, and even freedom of form of entertainment, sports, and religious worship rooted in a particular culture. Still, for their use to be considered legal, animals should be treated as creatures capable of suffering in all activities of the administrative bodies responsible for the supervision and regulation of animal exploitation.

The regulation of animal exploitation both by the PAPA and by administrative decisions and other rules based on the Act involve the necessary weighing of conflicting values and legal goods. Reasons related to animal life and welfare in principle modify the extent to which subjects of law can exercise their rights; it is only in the case of evident disproportion between the considered arguments that the exercise of the rights is excluded altogether.

Confirmation of this position can be found in judicial case law. It presents the view, variously formulated, that the dereification of animals should be an important determinant of the way in which administrative cases are resolved and an important factor in the interpretation of provisions which guide relevant decisions. Particularly noteworthy is the established line of rulings of the Voivodship Administrative Court in Poznań, which aptly argues that

> the fundamental objective and, at the same time, the interpretative directive to be taken into account when interpreting the 1997 Animal Protection Act is contained in Article 1(1) thereof. Every animal has the right to expect from humans due understanding, treatment that is in accordance with socially accepted norms, and even respect. Any legal measures taken in relation to animals should take into account their welfare and, above all, their right to live.[13]

13 Judgment of the Voivodship Administrative Court in Poznań of 29 August 2018 (IV SA/Po 332/18); judgment of 6 June 2013 (V SA/Po 165/13).

The role of Article 1 of the PAPA is viewed in a similar way by the Supreme Administrative Court:

> [...] the formula of the dereification of an animal contains an injunction to the adjudicating body to consider in each case of the application of civil law provisions to animals whether the provisions coming into play need to be re-interpreted in view of the fact that the object of, for example, sale is an animal, that is, a live creature. However, this does not contradict the rule that in cases not regulated by the 1997 Animal Protection Act, provisions related to things should apply to animals.[14]

Furthermore, in other rulings, the Supreme Administrative Court emphasises the link between the dereification of an animal and the obligation to make legal decisions that take into account the fact that an animal is not a thing, but a live creature capable of suffering. As the Court puts it:

> [...] ownership of an animal first and foremost creates an obligation, and the scope and content of one's rights to an animal are modified by the need to treat it humanely. In relation to animals, the human being should exhibit behaviour that is directed to living beings capable of certain feelings (e.g., suffering) and not to objects.[15]

Also, the rulings of other administrative courts express the belief that the value of animal life and welfare expressed in Article 1 of the PAPA must be realised in all decisions taken on the basis of the other norms of the Act. This position is very clearly formulated by the Voivodship Administrative Court in Szczecin:

> [...] it must be emphasised that the provisions of the Animal Protection Act must be interpreted taking into account the objective of the legislator. This purpose is set out in Article 1 of the Act, which states that an animal, as a live creature capable of suffering, is not an object and that humans owe it respect,

14 Judgment of the Supreme Administrative Court of 3 November 2011 (II OSK 1628/11).

15 Judgment of the Supreme Administrative Court of 28 January 2020 (II OSK 659/18); likewise, judgment of the Supreme Administrative Court of 22 June 2020 (II OSK 118/20).

> protection, and care. This provision confirms that every animal has the right to expect from humans due understanding, treatment that is in accordance with socially accepted norms, and even respect. Any legal measures taken in relation to animals should take into account their welfare and, above all, their right to live.

It can only be added that, in view of the system-wide nature and effect of dereification, its consequent obligation – that any legal measures taken in relation to animals should take into account the value of their life and welfare – applies to all administrative decisions and regulations affecting the situation and protection of animals.

CHAPTER 8

Killing

1. Animal life as a legally protected good

Legislations of some countries contain provisions explicitly indicating the legal significance of animal life. As an example, one may consider Article 1 of the German Animal Welfare Act, where the purpose of the Act is defined as the protection of "the life and welfare of animals."[1] Dutch law refers to the recognition of the "intrinsic value of the animal."[2] Swiss law, in turn, protects the "dignity" of each animal (and indeed of each living being).[3]

In the Polish legal system, as in the vast majority of European countries, such protection is evidenced above all by provisions restricting the freedom to kill animals. They are based on the assumption that the life of an animal is not legally valueless but is a good deserving at least some legal protection. For this reason, through specific legal regulations, the lawmaker determines under which circumstances and conditions the killing of an animal is morally acceptable and thus legally permissible.

The legal value of an animal's life is determined by the provisions of the PAPA and the PAPA-SP, which set out the prerequisites and conditions for the legal killing of an animal. Their catalogue is so broad that it includes mass killing of huge numbers of animals, killing in an extremely cruel manner, and killing for entirely trivial reasons. An example of the first category would be the large-scale industrial slaughtering of farm animals used for meat, leather, and fur production. An example of the second is the so-called ritual slaughter of animals by immobilising them, cutting their throats, and waiting for them

1 "Zweck dieses Gesetzes ist es, aus der Verantvortung des Menschen für das Tier als Mitgeschöpf, dessen Leben und Wohlbefinden zu schützen" (art. 1 Tierschutzgesetz von 24.07.1972).

2 "De intrinsieke waarde van het dier wordt erkend" (art. 1.3.1 Wet dieren van 19.05.2011).

3 "Zweck dieses Gesetzes ist es, die Würde und das Wohlergehen des Tieres zu schützen" (art. 1 Tierschutzgesetz vom 16.12.2005).

to bleed to death without making them unconscious first. Finally, an example of the third is the killing of animals in hunting events organised for entertainment. This demonstrates that, *de lege lata,* an animal's life has only received very weak legal protection and that in the hierarchy of legal values, the value of animal life has been placed relatively low by the lawmaker.

In Polish law, the recognition of animal life as a legally protected value is also manifested in the provisions of the PAPA-SP. Following EU legislation, they are based on the 3Rs principle: Replace, Reduce, and Refine. The requirements of replacement and reduction mean that one should aim to minimise the number of animals killed for scientific and educational purposes. At the same time, both in the PAPA-SP and Directive 63/2010, on which it is based, the practice of killing animals for harvesting their organs and tissues is exempted from the rigour of this principle. This could imply that the real object of protection in the PAPA-SP is not the life of the animal but its welfare threatened by experimental procedures. However, what speaks against this conclusion is that the Act also provides for an injunction to actively develop the practice of sharing animal organs and tissues obtained. This is intended to reduce the number of animals killed for their biological material. In sum, despite the fact that, in principle, the killing of animals is permitted for this purpose, it would be difficult to defend the view that animal life has no value for the lawmaker and that the killing of an animal is a legally indifferent act.

It is worth noting that under the former Polish law – the 1928 Regulation of the President of the Republic of Poland – there were no provisions restricting the permissibility of killing animals at all. It was not until 1997 that the PAPA introduced a ban on the "unjustified or inhumane" killing of animals. At the same time, the reasons justifying the killing of an animal included: (i) economic necessity, (ii) humane reasons, (iii) sanitary necessity, (iv) excessive aggressiveness of the animal, and (v) scientific needs. In its original formulation, the PAPA also contained what can be considered a prototype of the current 3Rs principle. The Act stated that the use of animals in scientific research was possible only if the research objectives could not have been achieved "in another way because of the lack of appropriate alternative methods," and that in designing the experiment, the person(s) responsible should first "use international information in a given field of science in order to prevent unnecessary repetition of experiments" (Art. 28(1) of the PAPA).

2. A relative ban on animal killing

Polish law, like most European legal systems, contains a relative prohibition on the killing of animals, subject to many exceptions. In its current wording, the PAPA prohibits the killing of animals except in specific enumerated circumstances. Exceptions from the prohibition include: (i) slaughtering and killing of livestock, (ii) fishing, (iii) necessity of immediate killing for humane reasons, (iv) sanitary emergency and killing and slaughtering of farmed animals that pose an epidemic hazard, (v) killing of animals that pose a direct threat to humans or other animals, (vi) hunting and reduction of wild game, (vii) euthanising blind litters, (viii) permitted instances of killing animals of protected species, and (ix) killing of animals of alien species that pose a threat to native species or habitats.

The current formulation of Article 6 of the PAPA may raise a number of doubts. These relate in particular to the scope of individual exceptions, their mutual separability, as well as the legitimacy of at least some of them. However, the construction adopted by the lawmaker definitely clarifies the axiological dimension of the legal protection of animal life. On its basis, there is no doubt that animal life is a legally significant value that can only be limited by regulations of statutory rank.

Apart from the PAPA, the killing of animals is also a matter of concern of other legal provisions. Regulation 1099/2009 is of particular relevance here. It is directly effective in the EU member states and takes precedence over national law. Thus, its provisions have, so to say, superseded earlier regulations of the PAPA on the killing of farm animals, a matter now covered by Regulation 1099/2009. This refers, in particular, to Article 34 of the PAPA and the implementing provisions contained in the Regulation of the Minister of Agriculture and Rural Development, which defined, among others, the conditions and methods of slaughtering and killing of livestock.[4]

The standards contained in Regulation 1099/2009 require, among others, that animals should be spared any avoidable pain, distress, or suffering at the time of killing. Furthermore, the killing of an animal should be preceded by

4 Regulation of the Minister of Agriculture and Rural Development of 9 September 2004 on the qualifications of persons entitled to professional slaughter as well as conditions and methods of slaughter and killing of animals (Journal of Laws 2019, item 423).

rendering it unconscious (stunning). However, the Regulation leaves it up to individual member states whether, by way of exception, they preserve the possibility of killing animals without stunning in cases where religious ritual considerations so require. In Poland, in 2014, the abolition and even restriction of this exception was declared by the Constitutional Tribunal as incompatible with the constitutional freedom of religious practice. This judgment must be considered as more than debatable; it contains argumentation that demonstrates compromising ignorance and astounding lack of moral standards of the majority of the judges involved in its delivery.[5]

The provisions of Regulation 1099/2009 are primarily concerned with the killing of farm animals and the reduction of populations of particular species. They do not apply to the killing of animals for scientific purposes, hunting, and cultural or sporting events; also, they do not cover poultry, rabbits, and hares slaughtered by their owners for domestic consumption. They apply to vertebrate animals, with the exclusion of reptiles and amphibians.

Separate regulations apply to experimental animals. Their source is the Directive 2010/63/EU, as well as national regulations issued on its basis. In the case of Poland, this is the PAPA-SP. As already mentioned, its provisions allow the killing of animals for harvesting their organs and tissues for research or educational purposes. In contrast to the use of live animals in scientific experiments, killing animals for their organs and tissues does not require the approval of an ethics committee. This regulation is intended to reduce animal suffering by designing experiments on the organs or tissues of previously killed animals rather than on live organisms. Nevertheless, the killing of animals for experimental purposes is subject to the PAPA-SP provisions on the acceptable methods and qualifications of persons carrying out the killing. The idea is that at the time of the killing, the pain, suffering, or distress of animals killed for organs and tissues must be kept to a minimum (Art. 16 of the PAPA-SP).

With regard to experiments carried out on live animals, the provisions of the PAPA-SP – following EU Directive 2010/63 – also express respect for the value of animal life. According to Article 6(1) of the Act, experimental procedures must be planned and carried out in such a way as to avoid the death of the animal as a result of the research. However, if the death is inevitable, efforts

5 See A. Lis and T. Pietrzykowski, "Animals as objects of ritual slaughter. Polish law after the battle over exceptionless mandatory stunning," *Global Journal of Animal Law* 2 (2016).

should be made to kill the animal as early as possible in order to minimise its suffering (upon reaching "humane endpoint").

Experimental animals that are not killed during the procedures should be cared for and, if necessary, provided veterinary care. They may be returned to the environment or given to new keepers (usually students or staff of the institutions where experiments were carried out). This is only permissible insofar as their state of health allows it, provided it is possible to ensure safe care conditions for animals of a given species. In this context, particular difficulties arise with regard to genetically modified animals. This is because they are regarded as a type of genetically modified organism (GMO), whose release to the environment is subject to very strict rules. These rules virtually preclude transferring genetically modified animals to any external care. As the number of genetically modified animals among all laboratory animals is increasing, in some countries already exceeding half of their total number, this problem is becoming serious and acute.[6]

Existing law makes it quite clear that the value of an animal's life is recognised by the lawmaker as a legal good. It requires that the number of animals killed should be kept to a minimum, especially where the killing is not strictly indispensable. This also applies to cases where the killing of animals for a specific purpose is, in principle, permitted by law. The way in which animals are put to death is not legally indifferent either. Law requires that the suffering preceding and accompanying the death of an animal should be minimised. In many cases, it also limits the choice of methods that can be used to kill an animal of a given species.

The value of an animal's life and the obligation to minimise the number of animals killed and the amount of suffering incurred in the process are also well reflected in another regulation of Polish law: the prohibition of "promoting or disseminating graphic scenes of killing, infliction of suffering, or other violence by human beings in which animals are victims, unless these scenes are intended to stigmatise cruelty towards animals." The lawmaker mentions "scenes of killing" separately, in addition to and independently of "infliction of suffering or other violence."

6 P. Ghosh, "Experiments with genetically modified animals increase," https://www.bbc.com/news/science-environment-10774409. In Poland, the number of genetically modified animals is much smaller, approaching 10,000 per year, which is no more than 7–8% of the total number of experimental animals (excluding those killed for organs and tissues).

The prohibition of killing, along with its accompanying exceptions, entails an important interpretative consequence: the application of the principle *exceptiones non sunt extendendae.* It requires that provisions establishing exceptions should not be subject to extended interpretation. They constitute a derogation from a general rule, and it is the rule that must be given the broadest possible interpretation. Thus, any doubts as to the meaning and scope of exceptions allowed by law should, in principle, be subject to *exceptiones non sunt extendendae.* If a choice has to be made between their broader and narrower interpretation, this principle justifies the preference for the narrower reading, unless there are sufficiently compelling reasons and arguments in favour of the opposite position. In any case, these must be significant enough to outweigh the lawmaker's general decision to protect animal life as a good deserving adequate legal protection.

Moreover, the exception to the prohibition on killing, interpreted in accordance with the principle *exceptiones non sunt extendendae*, does not give a *carte blanche* to arbitrarily inflict suffering on an animal in the process. On the contrary, compliance with the conditions for the legal killing of animals requires not only adhering to principles and limitations provided for in relevant specific provisions. It also requires particular care in respecting the general injunction not to inflict suffering and not to allow suffering to be inflicted on an animal if it can be avoided under the circumstances.

CHAPTER 9

Exploitation

1. The ethical problem of animal exploitation

Animal exploitation refers to the use of animals by humans for their own purposes, including keeping animals in captivity, killing them, transporting, training, and subjecting them to experiments. The diverse social practices of mass exploitation of animals are the fundamental source of ethical and, consequently, legal problems with the status of animals. Their core is what and on what terms the human being is allowed to do with an animal. Whether we approach these problems in terms of moral duties, interests, or rights of animals is only a matter of an appropriate conceptualisation of their status and its consequences. What is crucial is the content of human duties, or animal rights, and the extent and way in which they are reflected in legislation.

The ethical significance of these problems and the urgency with which they demand a solution result from two factors. Firstly, human societies have assumed practical control over the life and fate of vast numbers of animals. Animals have become *de facto* subjugated to humans, and whether and how they are able to live depends directly on human will. This dependence gives rise to moral obligations, since creatures with own interests and capable of suffering have become objects of the absolute power of humans, left at their mercy. Secondly, their use by humans has taken the form of organised and, in most cases, cruel mass exploitation. Billions of animals have been reduced to resources available for human purposes, with no regard for their interests and needs. The scale and cruelty of these practices are by no means decreasing. Every day of animal exploitation involves an unimaginable amount of suffering which is fully attributable to the absolute primacy accorded to human economic interests or respect for human long-standing customs, beliefs, and pastimes.

Thus posed, the ethical problem is the starting point and axiological basis of humane (ethical) animal legislation. It concerns taking into account – to the extent possible in given circumstances – moral considerations and arguments

related to the situation in which humans have placed a large number of animals. The legal implications of recognising vital interests of animals as morally significant and the economic, social, and political barriers to their implementation are at the heart of the philosophical and legal dispute about the shape of animal law.

Advocates of the view termed "abolitionism" believe that the only morally sustainable demand directed at legislation is for abolition of all animal exploitation.[1] The reason for this is that no animal exploitation can be justified. Half-measures not only fail to address the essence of the problem, but may give a false impression of alleviating it. In this way, they may, in fact, exacerbate the fate of animals. By lulling conscience with an illusion of improving animal life, they postpone the prospect of stopping human practices for which there is no moral basis and which result from people using their physical superiority to ruthlessly subjugate and oppress other species, according to human whimsies. Brute force, however, provides no moral justification. No humane treatment of animals can alleviate the fundamental issue of their enslavement by humans, who use them as tools for their own ends. This applies to every type of animal exploitation: from eating them, through experimenting on them, to keeping them as pets to add colour to human life.

From the perspective of abolitionism, every sentient animal is an individual with its own needs, interests, and goals. As a species, humans have no moral title to "rule" over other species. Therefore, the only ethically acceptable legal solution is the abolition of all exploitation of animals by human beings. What is needed is not only a ban on keeping animals in captivity and using or killing them in the interest of human beings and their needs. Animals should be legally personalised and their rights recognised; this should preclude their treatment as property or as an object of human trade.

Although abolitionist views vary in the degree of radicalism, their essential demand is the legal personification of animals. This is considered tantamount to granting animals fundamental rights. These, in turn, preclude any form of

1 The most famous radical representative of abolitionism is G. Francione, who promotes and develops abolitionist moral and legal ideas in successive works published over the last quarter of a century (see idem, *Rain Without Thunder. The Ideology of the Animal Rights Movement* (Philadelphia: Temple University Press, 1996); idem, *Animals as Persons. Essays on the Abolition of Animal Exploitation* (New York: Columbia University Press, 2008); G. Francione and A. Charlton, *Animal Rights. The Abolitionist Approach* (Exempla Press, 2015)).

animal exploitation, which, as a rule, requires keeping animals in captivity and sacrificing their basic interests for the benefit of humans. As Tom Reagan, one of the co-authors of the philosophical foundations of abolitionism, puts it, the aim is not to make animal cages bigger; the aim is to make them empty.[2] However, these proposals are, in fact, not only *de lege ferenda*, but also *de moralis ferenda*: they seem to call, first of all, for a thorough revision of the socially accepted moral beliefs underlying the current state of animal law.

This applies first and foremost to the key thesis of abolitionism, that is, the absence of any moral basis for the use of animals by humans for their own purposes, irrespective of the type and amount of suffering it brings for the animal. This is also true of the rejection of the moral legitimacy of law that limits the suffering inflicted on exploited animals, since such legislation merely offers a fake alibi to appease the conscience of people benefiting from animal exploitation. This kind of moral principlism can hardly be regarded as a position widely shared in any contemporary society. The demand for legislation based on such principles involves either imposing this moral perspective directly through law, or paving the way for a legal change by a thorough transformation of prevailing moral beliefs.

An ethical paradigm much more widespread among lawyers (and, above all, lawmakers) is the doctrine of animal welfare (welfarism). It considers the exploitation of animals as, in principle, acceptable provided that the suffering inflicted on animals is minimised to the greatest possible extent. It also assumes that improving the fate of animals is an evolutionary process, not only in terms of improving standards of animal treatment, but also in terms of the abandonment of animal exploitation practices that become easily replaceable. Thus, the main aim is to reduce the amount of suffering of exploited animals and limit the forms of exploitation in a way that does not demand from humans abandoning those interests which have so far been satisfied using animals.

This ethical paradigm provided the foundation for the development of animal law in the 19th and 20th centuries. It was oriented towards mitigating animal exploitation, and only sporadically – in very few legal solutions adopted in several countries – its complete abolition (examples of the latter concern

2 T. Regan, *Empty Cages. Facing the Challenge of Animal Rights* (Lanham–Boulder–New York–Toronto–Oxford: Rowman & Littlefield, 2004), p. 34

certain cruel sports involving animals, the use of animals for testing cosmetic products, the breeding of poultry for fatty livers, and the ritual slaughter of animals). The dereification of animals – a much less radical alternative to their personification – draws from this legal tradition. It attempts to reconcile the recognition of the moral and legal significance of the sentient capacities of animals with consent to their exploitation by humans.[3]

While the animal welfare approach is long-term and evolutionary, abolitionism can be described as revolutionary in nature. This is because it demands an improvement in the situation of animals though a one-off legal change that would result in a radical transformation of lifestyles and social habits that took hundreds of years to develop. In contrast, incremental change ties improvement of both, the fate of the animals and their legal situation, to technological progress, systematic education, and persistent reconciliation of the need for better protection of animal interests with the arduous reform of animal exploitation practices.

Law alone cannot, as if by magic, change the way in which people have thought about human-animal relations for generations. It is necessarily a reflection of the social conditions and beliefs of a particular time and place. And while it may play a role in stimulating their transformation, the change is certainly not a matter of an arbitrary decision by the lawmaker, made with no regard to social context. Therefore, according to the proponents of the welfare doctrine, abolitionist demands remain, at best, an abstract (if not utopian) ideal. They can and should guide real action, which, however, must be planned with social, economic, and political realities in mind. Otherwise, they will always belong to the realm of unattainable dreams, incapable of having any impact on the actual situation of large numbers of exploited animals.

3 Thus, the fundamental normative effect of dereification is the obligation to weigh the value of the life and welfare of animals, on the one hand, and the economic, social, and scientific values associated with their exploitation by humans, on the other. From this perspective, abolitionism is the demand to give absolute primacy to animal life and freedom over the interests and values achievable for humans through animal exploitation. It is, therefore, a certain reversal of the centuries-old practice of absolute primacy of human interests over animal life and welfare. It is also worth noting that, on the grounds of abolitionism, the status of animal welfare is much less clear, for there is no doubt that in some circumstances, the primacy of animal freedom may not have positive effects on animal welfare (as, for example, in the case of the threat of death by starvation or as a result of treatable diseases or wounds).

2. Exploitation of farm animals

The most important form of animal exploitation is the breeding and slaughter of animals for food and clothing. This practice involves by far the largest number of animals. It is estimated that there are more than ten times as many farm animals as experimental and domestic animals combined. Globally, more than 100 billion animals are slaughtered for food every year. In European Union, several million farm animals are killed every day. These figures do not include caught fish, which in Poland alone amount to several hundred thousand tonnes per year.

Apart from the sheer, unimaginable number of animals, the problem with this form of animal exploitation is the scale of the suffering inflicted on the animals under conditions of intensive industrial animal husbandry and the associated transport and slaughter practices. The living and death conditions of farm animals do not in the slightest degree correspond to the requirements of elementary welfare, ragardless of how one might understand the latter. For reasons of economic efficiency, farm animals are crowded, deprived of the possibility to satisfy their basic behavioural and psychological needs, and fed in a way that turns them into "living meat," with their interests counting only insofar as they directly translate into the quantity, quality, and price of the products obtained from them.[4]

The cruelty of intensive animal husbandry is well known and widely reported (although scrupulously concealed by the producers who profit from it). It is mitigated by existing laws to a very limited extent. Protection is hindered by effective lobbying by the meat-producing community with its enormous economic potential. As a result, laws continue to impose grotesquely low standards for handling farm animals. In addition, the enforcement of these standards raises very serious concerns.

It is in very few cases that some of the cruellest types of farming practices have triggered a direct legal response. These include a ban on the force-feeding of geese for fatty livers (*foie gras*) and efforts to limit extremely inhumane types of hen cage rearing and the housing of calves in individual pens for entire

4 See, e.g., B. Fischer, *Animal Ethics. A Contemporary Introduction* (New York–London: Routledge, 2021), pp. 82f.; cf. also J. Webster, *Animal Welfare. Limping Towards Eden* (Oxford: Blackwell, 2005), pp. 77f.

lives. The ritual slaughter of animals, carried out without stunning them first and resulting in unimaginable suffering, is also a matter of intense debate. It has been banned in several countries, and in Poland, the ban was in force (although not effectively enforced) from 2002 until the infamous 2014 ruling of the Constitutional Tribunal.

In fundamental respects, both in Poland and in other countries of the world, the cruelty of industrial animal breeding remains fully legal. This state of affairs is maintained by the meat industry's effective lobbying and the determination to keep the realities of modern breeding and slaughtering practices as far from public consciousness as possible. Paul McCartney summed it up with his famous bon mot: "If slaughterhouses had glass walls, we would all be vegetarian."

The lack of effective regulation that could substantially alleviate the suffering inflicted on farm animals does not mean that there is no regulation at all. On the contrary, the number and complexity of relevant rules are steadily increasing, but their impact on the actual standards of treating animals in breeding, transport, and slaughter is minimal. In any case, these standards remain very far from satisfactory.

The European Union currently has common minimum general standards for the keeping of farm animals,[5] separate regulations for several species (pigs, calves, laying hens, and meat chickens),[6] and laws defining conditions for the transport and killing of animals.[7] In addition, the EU has banned the import and marketing of seal products and dog and cat pelts.[8] On this basis, relevant

5 Council Directive 98/58/EC of 20 July 1998 concerning the protection of animals kept for farming purposes (OJ L 221, 08/08/1998).

6 Council Directive 2008/119/EC of 18 December 2008 laying down minimum standards for the protection of calves (OJ L 10, 15.1.2009); Council Directive 2008/120/EC of 18 December 2008 laying down minimum standards for the protection of pigs (OJ L 47, 18.2.2009); Council Directive 1999/74/EC of 19 July 1999 laying down minimum standards for the protection of laying hens (OJ L 203, 3.8.1999); Council Directive 2007/43/EC of 28 June 2007 laying down minimum rules for the protection of chickens kept for meat production (OJ L 182, 12.7.2007).

7 Council Regulation (EC) No 1/2005 of 22 December 2004 on the protection of animals during transport and related operations (OJ L 3, 5.1.2005); Council Regulation (EC) No 1099/2009 of 24 September 2009 on the protection of animals at the time of killing, (OJ L 303, 18.11.2009).

8 Regulation (EC) No 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products (OJ L 286, 31.10.2009); Regulation (EC) No 1523/2007

regulations for the protection of animals during breeding, rearing, transport, and slaughter are in force in individual member states, including Poland.[9]

The little impact that this intensive legislative activity has on the actual improvement of the living conditions of farm animals results from several factors. First and foremost, mass industrial livestock farming is extremely effective at neutralising legislative initiatives that could significantly damage its interests. Every single change that raises the level of animal welfare translates, by virtue of its scale, into huge expenditure, investment, and costs of meat production and consumption. This effect mobilises the resistance and vast resources of this community. It also makes it easy to appeal to consumers' interests and concerns about the economic availability of meat products to the less affluent.

The financial and organisational potential of the meat industry lobby also makes it possible to attract appropriate expert support. For appropriate remuneration, it is easy to find specialists ready to prepare commissioned expert opinions "proving" that the existing solutions perfectly fulfil all animal welfare requirements and that their change would violate constitutionally protected rights (economic freedom, acquired rights, etc.) and lead to the ruin of the Polish economy, collapse of exports, famine, and other disasters. These practices surface with every serious attempt to raise the standards of farm animals' treatment.[10]

The words of Upton Sinclair may serve as a perfect commentary on this pathology arising at the interface of business, politics, and science: "It is difficult

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of the European Parliament and of the Council of 11 December 2007 banning the placing on the market and the import to, or export from, the Community of cat and dog fur, and products containing such fur (OJ L 343, 27.12.2007).

9 Some of the acts of EU law have direct effect and do not require transposition into national legal systems (but only some supplementary technical and organisational regulations), while others require relevant normative acts of national law; in Poland, these are primarily the provisions of the PAPA and the regulations issued in its implementation.

10 Against the backdrop of this public controversy, there is also an increasing number of papers purporting to be scientific (and presented in a form that supports this impression), but written by authors who combine research activities with commercial consultancy to entrepreneurs and who express views that are in line with the interests of the industry with which they cooperate commercially as advisors, experts, or consultants. While in the international scientific community (especially in the fields of medicine and pharmacy) there are rigorous tools to eliminate such conflicts of interest, in many other cases, the lack of effective mechanisms means that readers of papers that pretend to be scientific may not be aware of the relationship between their authors and the interests of a particular industry or company.

to get a man to understand something, when his salary depends on his not understanding it."[11]

3. Exploitation of experimental animals

Another important, controversial, and emotive area of animal exploitation is the use of animals for scientific and educational purposes. The practice of vivisection dates back to the very beginnings of science. Its heyday came with the turbulent development of experimental science. In the 19th and 20th centuries, it took the form of a massive and systematic laboratory practice, known at every latitude. Today, more than 100 million animals a year are used for research purposes worldwide. These include primarily rodents; however, a multitude of other animal species are also used in experiments on a varying scale, not excluding dogs, cats, and great apes.

In Poland, according to official statistics, the number reaches several hundred thousand. Almost 150 research centres conduct animal experiments, including commercial laboratories, companies, and experimental institutes. It should be noted, however, that these statistics are subject to a very large margin of uncertainty. This is because such activities are not properly supervised and recorded in all countries. There are also no uniform rules for counting animals used for experimentation, and even small changes in the criteria for treating animals as experimental objects can result in huge fluctuations in the statistics.

The number of animals sacrificed for scientific purposes is undoubtedly incomparably smaller than the number of farm animals bred and killed for food or clothing. However, their situation is so specific that this area of animal exploitation attracts particular public and legislative attention. As a result, at least in Europe, it is perhaps the most closely and tightly regulated of all forms of human exploitation of animals. This seems due to two main factors:

Firstly, the extremely cruel vivisection practices that accompanied the development of many fields of science were an important object of public opposition and protest.[12] Their disclosure often not only appalled public opinion,

11 U. Sinclair, *I, Candidate for the Governor: And How I Got Licked* (Berkeley, CA: University of California Press, 1994), p. 109.

12 Particularly heated debates arose over the practice of vivisection, which included public presentations of dissections of live animals by the 19th-century French physiologists Franciose Magendie and his student Claude Bernard. These practices were subject to debate in

but also led to direct legal and legislative responses.[13] In different periods of time, the debate over the admissibility of vivisection functioned as a *pars pro toto* of the dispute over the legal situation of animals and the principles of their treatment in general.

Secondly, however, advances in science and the expected medical and pharmacological benefits continue to provide arguments that, in the eyes of the same public, fully justify even very painful and distressing ways of "sacrificing" animals to humans. As a result, vivisection remains almost fully legal, but subject to relatively strict and tight legal rationing (although the extent of this control varies considerably in different parts of the world). This is intended to stop unnecessary animal experiments and to limit both the number of animals used in experimentation and the degree of discomfort of experimental procedures applied to animals. Modern European law on the protection of experimental animals, the national laws of the EU member states based on it, and increasingly, legislation in other parts of the world refer to the so-called 3Rs principle. It was formulated in the mid-20th century to define the ethical framework for the permissibility of further animal experimentation.[14] It comprises, in essence, three interrelated principles. The first is the principle of *replacement*. It dictates that wherever possible, live animal experiments should be replaced by alternative methods (such as ones involving computer simulation or tissues taken from animals, cell cultures, etc.). Thus, the use of animals in an experiment can only be accepted if there is no alternative method to achieve the aim of the study in question.

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the British Parliament, and Bernard's wife and two daughters left him and became leaders of the French anti-vivisection movement.

13 The famous case of Silver Spring Monkeys – macaques subjected to ruthless neurological experiments in Maryland – not only became one of the most important animal law court cases in the US, but was the direct cause of the creation of PETA (People for the Ethical Treatment of Animals). In 2019, the scandal surrounding the cruel treatment of monkeys, dogs, and cats at the Laboratory of Pharmacology and Toxicology in Hamburg resulted in criminal prosecutions and the closure of this institution (soon to be reopened, though). For more detail, see S. Williams, "German lab faces criminal charges after undercover investigation" (https://www.the-scientist.com/news-opinion/german-lab-faces-criminal-charges-after-undercover-investigation-66579).

14 See W. Russell and R. Burch, *Principles of Humane Experimental Technique* (London: Meuthen, 1959).

The second of the 3Rs refers to the *reduction* principle. It demands that the number of animals used in an experiment should be as small as possible, limited to the absolute necessity. The third R stands for the *refinement* principle, which demands that the experiment should be designed in a way that limits the amount of suffering inflicted on the animal to an absolute minimum.

The legal solution based on the 3Rs principle provides for an obligation to respect the constituent requirements when planning and implementing animal experiments. This, however, should not be entrusted to the researchers themselves but is subject to independent ethical oversight. In Poland, it is carried out by ethics committees composed partly of representatives of experimental science and partly of persons representing other scientific disciplines and NGOs.

In addition to institutions designed to ensure respect for the 3Rs, existing regulations also include standards for the keeping of experimental animals and their killing (including killing animals during experiments in cases when keeping them alive would violate the principle of refinement). An indisputable achievement of European Union legislation is the strict restrictions imposed on the use of non-human primates in experiments and the virtual prohibition of experiments on great apes.

A ban on the use of animals for testing cosmetic products and substances used in their manufacture has been successively introduced in European law over the years. Directive 2010/63/EU also contains an important provision introducing an absolute ban on experimental procedures involving severe pain, suffering, or distress that is long-lasting and cannot be alleviated.[15] According to the European legislator,

> From an ethical standpoint, there should be an upper limit of pain, suffering and distress above which animals should not be subjected in scientific procedures. To that end, the performance of procedures that result in severe pain, suffering or distress, which is likely to be long-lasting and cannot be ameliorated, should be prohibited.[16]

Such experiments are therefore legally unacceptable, regardless of the possible scientific, economic, or social benefits that could be invoked to justify them. The transposition of Directive 2010/63/EU into the law of the member

15 Article 5(2) PAPA-SP; Article 15(2) Directive 2010/63/EU.

16 Recital 23 of Directive 2010/63/EU.

states makes this restriction and its axiological basis binding in Poland as well as in other EU countries.

The legal regulation of the use of animals for experimentation in Europe is relatively "progressive" compared to the legislation and practice in other areas of animal exploitation. However, the very acceptability of subjecting animals to experimentation remains highly debatable ethically. The real utility of such experiments is repeatedly being questioned, as the effects of transferring results obtained on animals to humans are increasingly called into doubt.[17]

The ethical discussion on this aspect of animal exploitation exposes the weakness of the arguments raised to justify it. In the light of both the course of the debate and the development of knowledge, all the reasons invoked for animal experimentation – Cartesian (the lack of sufficiently developed suffering capacities in experimental animals), Kantian (the inferior moral status of animals and their interests), and "utilitarian" (the benefits supposedly outweighing the suffering inflicted to achieve them) – are increasingly called into question.[18] The collapse of this argumentation demonstrates with glaring clarity the extent to which experimental practice is rooted in species chauvinism: without recourse to species chauvinism, it seems ethically indefensible.

4. Other forms of animal exploitation

Other fields of animal exploitation operate on a significantly smaller scale, which does not mean that they are less controversial or do not attract public attention. A prime example is the use of animals for work. This includes not only their use as a pulling force and a means of transport, but also, for instance, the use of search and rescue dogs, police dogs, and dolphins, horses, and dogs in psychotherapy. In many cases, this involves extremely poor living conditions and cruel treatment. Such practices are known from the past (e.g., horses working in underground mines) and not uncommon today.

17 See, e.g., P. Perel et al., "Comparison of treatment effects between animal research and clinical trials," *Systematic Review, British Medical Journal* 334 (2007), pp. 197f.; D. Heckham and D. Redelmaier, "Translation of medical evidence from animals to humans," *Journal of the American Medical Association* 296 (2006); P. Pound et al., "Where is the evidence that animal research benefits humans?" *British Medical Journal* 328 (2004), pp. 514f.

18 For more detail, see T. Pietrzykowski, "Etyka prowadzenia badań na zwierzętach," in W. Chańska and J. Różyńska (eds.), *Bioetyka* (Warszawa: Wolters Kluwer, 2012), pp. 453ff.

The fate of animals used for such purposes was an important stimulus for the first animal protection law, namely, the British Martin's Acts of 1822.[19] Today, the scale of this form of animal exploitation has significantly decreased. As a result, current animal law does not pay much attention to this group of animals. In the PAPA, their protection is directly regulated by only one provision: the use of animals for work is permissible as long as it does not pose an "unreasonable" risk to their life and health or inflict suffering on them. In addition, the provision prohibiting animal abuse enumerates some typical examples of harassment, including using animals that are sick, too young, or too old for the work, forcing animals to run too fast, overloading draught and pack animals, and using implements likely to cause injury or mutilation to the animals. Similar provisions can be found in the legislation of other European countries, in some cases, with more extensive regulations concerning, for example, working dogs.[20]

Some animals are used in uniformed services (police, armed forces, border guards, customs, etc.), as well as in rescue operations or as assistance to people with disabilities. The use of animals for military purposes is fortunately almost a thing of the past, although there are still dozens of dogs and horses "on duty" in the Polish army. However, in the history of the military – from the earliest times until the Second World War – a huge number of animals have been used and killed in operations. Monuments in London and Tokyo are a unique tribute to the millions of animals that have died in military service.

There is growing public opposition to the use of animals for hunting and in circuses, and these practices are being banned or restricted in successive countries. In the case of the exploitation of animals for artistic purposes, it should be assumed that freedom of artistic creation is not a sufficient reason to justify inflicting suffering on animals. It justifies the protection of artistic activities – including performances, exhibitions, and other such endeavours – which use live animals in a way that does not involve animal abuse or killing for artistic effect.

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19 For the text of the Martin's Act, see https://web.archive.org/web/20141030063347/http://www.animalrightshistory.org/animal-rights-law/romantic-legislation/1822-uk-act-ill-treatment-cattle.htm.

20 See Articles 69 and 74 of the Animal Protection Ordinance (AniPO) of 23 April 2008.

Chapter 10

Harassment

1. The rise of anti-cruelty legislation

The development of animal law began with prohibition of animal abuse, which remains at the core of animal legislation to this day. Initially, the scope of the prohibition was rather narrow. It mainly concerned only a small number of explicitly enumerated species and, first and foremost, acts committed in public. At that time, the need to prevent the horror of acts of public animal abuse was more important than the intrinsic moral value of the animal.[1]

Regarded as the starting point of humane animal law, the famous Martin's Act was entitled the Cruel Treatment of Cattle Act. It provided for the punishment of anyone who "shall wantonly and cruelly beat, abuse, or ill-treat" animals enumerated in the document.[2] Relatively soon, as early as 1835, it was expanded with further prohibitions to prevent "the great and needless Increase of the Sufferings of dumb Animals, and [...] the Demoralization of the People."[3] After several years, these provisions were replaced, too, with a much broader and more modern law against animal cruelty: An Act for the more effectual Prevention of Cruelty to Animals of 1849. Central to the Act in question was a provision prohibiting cruel beating, ill-treatment, overloading, abusing, and torturing of animals. It was also prohibited to cause or allow such acts against animals.[4]

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1 For more detail, see, e.g., Ł. Smaga, *Ochrona humanitarna zwierząt* (Białystok: Ekopress, 2010), p. 74.

2 The text of the Martin's Act is available at: https://en.wikisource.org/wiki/Martin%27s_Act_1822.

3 1835: 5 & 6 William 4 c.59: Cruelty to Animals Act; available at: http://statutes.org.uk/site/the-statutes/nineteenth-century/1835-5-6-william-4-c-59-cruelty-to-animals-act/.

4 "And be it enacted, that if any person shall from and after the passing of this act cruelly beat, ill-treat, over-drive, abuse, or torture, or cause or procure to be cruelly beaten, ill-treated, over-driven, abused, or tortured, any animal, every such offender shall for every such

In French law, legislation for the humane protection of animals began with the so-called Grammont Act of 1850. It prohibited the mistreatment of domestic animals only if it was of a "brutal and public" nature.[5] As early as 1859, however, this prohibition was extended to all acts of mistreatment of "domestic, tame or captive" animals, whether or not they occurred in public places. [6] A similar measure, although initially limited to cattle only, was in force in Sweden from 1857.[7] In Austria, "public or outrageous" mistreatment of animals was prohibited from 1846. A similar prohibition of "public or outrageous abuse or brutal mistreatment of an animal" was found in the German Penal Code of 1871.[8]

Until the end of the 19th century, animal law consisted of rather fragmentary regulations, often even single provisions, designed to prevent specific (and, generally, public) cruelty towards certain groups of animals. In the first decades of the 20th century, these began to be replaced on a wider scale by more comprehensive regulations. The most frequently cited example of the "second wave" of animal legislation is the Nazi *Reichstierschutzgesetz* of 1933. It should be borne in mind, however, that around this time, similar, more or less comprehensive laws were passed in many other countries (England, 1911; Belgium, 1929; Sweden, 1944). The first Polish law on the humane protection of animals – Regulation of 1928 – also belongs to this wave.

The 1928 Regulation was relatively broad and comprehensive, setting rules for the treatment of animals under various types of exploitation. Still,

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offence forfeit and pay a penalty not exceeding five pounds" (1849: 12 & 13 Victoria c.92: Cruelty to Animals Act); available at: http://statutes.org.uk/site/the-statutes/nineteenth-century/1849-12-13-victoria-c-92-cruelty-to-animals-act/.

5 "Seront punis d'une amende de cinq à quinze francs, et pourront l'être d'un à cinq jours de prison, ceux qui auront exercé publiquement et abusivement des mauvais traitements envers les animaux domestiques."

6 "Ceux qui auront exercé sans nécessité, publiquement ou non, de mauvais traitements envers un animal domestique ou apprivoisé ou tenu en captivité"; available at: https://www.legifrance.gouv.fr/.

7 For more detail, see H. Striwing, "Animal law and animal rights on the move in Sweden," *Animal Law* 8 (2001), pp. 93–106.

8 "Mit Geldstrafe bis zu funfzig Thalern oder mit Haft wird bestraft [...] wer öffentlich oder in Aergerniß erregender Weise Thiere boshaft quält oder roh mißhandelt" (§360 item 13, Strafgesetzbuch für das Deutsche Reich (1871); available at: https://de.wikisource.org/wiki/Strafgesetzbuch_für_das_Deutsche_Reich_(1871)#§._360.

also in this case, the central point was the prohibition of animal harassment. The standard expressed in Article 1 stated that "abuse of animals is prohibited." The term animals included "all domestic and tame animals and fowl, wild animals and birds, and fish, amphibians, insects, etc." Abuse was defined in the next article. It enumerated types of behaviour that the lawmaker considered as typical examples of animal abuse. The last item on the list, however, read as follows: "[...] in general, any infliction of suffering on an animal without a correspondingly important and justifiable need." This general clause extended the concept of abuse to include not only the acts expressly listed in the Regulation, but also all other acts of inflicting unjustified suffering on animals.

2. Contemporary legal institution of animal abuse

Despite the structural differences, the definition adopted in 1928 was, in fact, similar to the understanding adopted in the currently applicable PAPA. In both cases, abuse may refer to behaviour explicitly included in the list, or it may refer to an act of inflicting unnecessary (unjustified) suffering of a different kind. Still, the current provision of the PAPA additionally extends abuse to cases of omission, that is, "knowingly allowing pain or suffering to be inflicted on an animal" (Article 6(2) of the PAPA, *in fine*).

The current PAPA provides a two-step definition of abuse. Abuse refers to any act of "inflicting or knowingly allowing pain or suffering to be inflicted on an animal." This general definition is additionally supplemented by a list of behaviours towards an animal which "in particular" constitute animal abuse. Thus, inflicting suffering on an animal or knowingly allowing it to happen is no longer merely an example of animal abuse. It is a general definition of animal abuse, specific instances of which are behaviours listed by way of example.

This has important practical consequences. Meeting the definitional criteria of abuse requires establishing that the offender's conduct caused pain or other suffering to the animal. By contrast, when the offender's behaviour corresponds to one of the items enumerated as examples of abuse, it is no longer necessary to prove that it indeed caused pain or other type of suffering. This is because it has already been recognised as having this effect by the lawmaker, who qualified it as conduct which *ex lege* meets the general definition of animal abuse (and thus constitutes an act of "inflicting or knowingly allowing pain or suffering to be inflicted on an animal").

The provisions relating to animal abuse and liability for it create a legal institution in the sense referred to in Chapter 6 (section 3). The norms defining what behaviour counts legally as animal abuse are complemented by provisions setting out the normative consequences of this qualification. In Polish law, the consequential rules are twofold and are located in two different places in the PAPA. One type refers to administrative legal consequences. They consist in the possibility of taking the animal away from the perpetrator by an appropriate decision of the local authorities. Criminal legal consequences, in turn, are the same as in the case of the unlawful killing of an animal. Additionally, an obligatory legal consequence of any abuse is the forfeiture of the animal if the perpetrator is its "owner."

This latter provision reveals with clarity that flawed conceptual premises can lead to flawed, if not absurd, legal solutions. Making the forfeiture of an animal conditional on it being the "property" of the perpetrator is obviously intended to avoid imposing forfeiture of an animal in situations where the perpetrator has abused "someone else's" animal, against the will of the person who has a legal title to it and is obliged to take care of it. However, this solution suffers from two serious drawbacks.

Firstly, animals are not objects of property rights in the civil law sense, and criminal law norms, in principle, should not be subject to extended interpretation. Theoretically speaking, offenders could therefore defend themselves in any situation by arguing that their legal title to the animal is not, in the civil law sense, one of ownership. Forfeiture, in turn, can only be ordered against the owner. This argumentation would, of course, be consequential. This is the effect of the lawmaker's adamant adherence to the anachronistic terminology of the "ownership" of animals.

Secondly, and much more importantly, the essence of animal forfeiture is not the loss of ownership, but a prohibition imposed on the "owner" to continue to own and care for the animal which was the victim of his or her act, and which is subject to forfeiture. So understood, this legal remedy may be crucial to prevent further harm to an animal by a keeper without a legal title to it. There are many cases of *de facto* possession of animals. And it would often be difficult to consider such keepers as owners even if one assumed that the right of ownership in respect to animals still exists in the Polish legal system.

The crux of the matter in this case is not the kind of legal title that can be ascribed to a person who has power over an animal, but rather the legal effect

of depriving him or her of the legal and factual possibility of continuing to harm it. Thus, it concerns not only animal owners (if one assumes that this legal relationship still exists in Polish law), but all perpetrators who have a legal title to the harmed animal, and thus have the possibility to exercise authority over it and cause harm to it.

The second consequence of animal abuse in Polish law is the institution of taking the animal away by an administrative decision. The decision should be issued prior to the seizure of the animal from the perpetrator; however, in urgent cases, it may also follow it and sanction the seizure *ex post facto*.

However, a seizure is only temporary. The decision to take the animal away remains binding until the conclusion of the criminal proceedings for the abuse of the animal. If the proceedings do not result in the forfeiture of the animal, it is returned to the keeper.

CHAPTER 11

Execution

1. Supervision of compliance with animal law

The practical implementation of animal law is generally considered to be the Achilles heel of the current model of legal animal protection. This problem does not only apply to Poland. As Cass Sunstein aptly put it, contemporary laws designed to ensure humane treatment of animals "promise a great deal but deliver far too little."[1] This assessment fully corresponds to the reality of the functioning of these regulations in many European countries, including Poland. The practice of applying law shows that the existing solutions are by no means sufficient to ensure the effectiveness of animal welfare protection.

In Poland, a fundamental role in the enforcement of animal law has been placed in the hands of the Veterinary Inspection. It is a service under the supervision of the minister responsible for agriculture, and its primary objective is the protection of public health.[2]

In addition, the PAPA provides for the right of social organisations whose statutory purpose is animal protection to cooperate with the Veterinary Inspection in carrying out the supervision. The Veterinary Inspection is obliged to cooperate with such organisations.

Apart from the general task of supervising compliance with animal protection regulations, the Veterinary Inspection Act separately mentions the task of controlling animal experimentation activities. This control is also exercised with regard to the conditions under which experimental animals are kept, their record-keeping, and the experiments themselves.

In practice, the supervision by the Veterinary Inspection mainly concerns the breeding and slaughtering of farm animals and their transport, animal

1 C. Sunstein, "Can animals sue?" in M. Nussbaum and C. Sunstein (eds.), *Animal Rights. Current Debates and Future Directions* (Oxford–New York: Oxford University Press, 2004), p. 261.

2 Act of 29 January 2004 on Veterinary Inspection (Journal of Laws 2021, item 306).

shelters, events involving animals, and the keeping of experimental animals. In some cases of breaches of the law, the Inspection has the right to issue administrative decisions determining the legal consequences of these violations and sometimes initiating proceedings to impose an administrative financial penalty or other negative consequences on the offender.

A Veterinary Inspection officer who, in connection with his or her activities, acquires information which may indicate that a crime has been committed is legally obliged not only to immediately notify the public prosecutor or the police, but also to take necessary steps to prevent the destruction of traces and evidence. This applies in particular to information about behaviour that may qualify as animal abuse or unlawful killing. In contrast to the "social obligation" to notify law enforcement authorities, the obligation on Veterinary Inspection officers is strictly of a legal and formal nature. By failing to comply with it, they commit an offence of dereliction of duty and their behaviour may justify disciplinary or financial sanctions.

In the case of offences, the Veterinary Inspection has the capacities of the public prosecutor. This applies when in the course of its activities, including investigations, the Veterinary Inspection establishes that an offence has been committed and files a motion for a penalty to be imposed. In each such case, the Inspection is obliged to assess whether it is justified to make a motion for a penalty, for a fine on the offender by way of a penalty ticket, or for a milder reaction.

Under Polish law, the Veterinary Inspection has the capacity to impose fines directly. However, for reasons that are difficult to explain, this only applies to two types of offences: firstly, to the purchase and sale of pets at markets, fairs, and bazaars and dogs and cats outside their breeding places; and secondly, to the violation of the regulations on the breeding of broiler chickens by the owner of a poultry house.

2. Cooperation with NGOs

The provisions of the PAPA envisage that the Veterinary Inspection will cooperate with social organisations whose statutory objective is animal protection. According to these provisions, social organisations have the right to cooperate with the Inspection, while it is the obligation of the Inspection to demonstrate willingness to cooperate with the organisations concerned.

The public subjective right of such social organisations is thus accompanied by the correlative obligation of the Veterinary Inspection to cooperate with them within the scope of its statutory tasks and objectives in matters of supervision of compliance with the protection regulations and in other activities undertaken "in order to implement the provisions of the Act."

It must therefore be assumed that there is a presumption that social organisations whose statutory purpose is animal protection have a legal and factual interest in participating in proceedings and other activities undertaken by the Inspection as part of the supervision of compliance with animal protection regulations. According to the PAPA, the responsibility to demonstrate that this cooperation constitutes a violation of some important public or private interest and thus cannot be undertaken lies with the Veterinary Inspection. However, from the point of view of the provisions of the PAPA, such cases are rare exceptions, which the Inspection is obliged to duly justify.

The capacities of social organisations play a particularly important role in ensuring the effectiveness of animal protection regulations in cases of the temporary seizure of an animal victim of abuse.

The legal basis for the temporary seizure of an animal is the decision of the relevant mayor. It can be issued on the basis of information obtained from relevant services (police, municipal guards, etc.) or an authorised representative of a social organisation whose statutory objective is to protect animals. This information, provided it is sufficiently reliable, imposes an obligation on the municipal authorities to undertake appropriate administrative action.

The mere submission of a notification does not *eo ipso* give the organisation the status of a party to the ensuing proceedings, but the organisation may be granted admission under the rules on administrative procedure. In this way, it acquires the rights of a party. Refusal to admit an animal welfare organisation – in particular one that has made the notification prior to the initiation of the procedure – is exceptional and should be based on particularly compelling reasons against its participation.

The situation is different in the case of the so-called emergency procedure for taking an animal away from its keeper. It applies to urgent cases where the animal's stay with its current owner or carer threatens its life or health. In such circumstances, the decision of the municipal authority (the relevant mayor) is consequential, and the seizure of the animal can be carried out immediately. The intervention can be conducted by officers of relevant services (police or

municipal guards) or by authorised representatives of a social organisation whose statutory objective is to protect animals. In this case, the organisation becomes, by operation of law, a party to the proceedings, which should be commenced immediately after the emergency seizure of the animal. Since the proceedings concern the direct legal consequences of the action taken by the organisation, it has the status of a party to the proceedings.

In addition to the right to request admission to Veterinary Inspection proceedings and actions – and besides their role in proceedings and actions related to the temporary seizure of an animal – social organisations may also exercise the rights of the aggrieved party in criminal and misdemeanour proceedings. It is worth noting that the current scope of this involvement is significantly narrower than it used to be under the provisions of the 1928 Regulation.

The 1928 Regulation conferred upon the Minister of the Interior the power to authorise "associations whose aim is to protect animals" to cooperate with the state authorities in uncovering the offences provided for in the Regulation (that is, primarily animal abuse).

On the basis of this delegation, the Minister issued a relevant regulation authorising associations (enumerated in the appendix of the Regulation) to "participate in police investigations, that is, to be present at the investigation activities, to put questions to the persons examined with the consent of the investigator, to make proposals, which the investigator is obliged to take into account to the extent possible," and even to "carry out independent investigations in place of the police in cases where the police have not yet started an investigation or have transferred an investigation to the association."[3]

In the event of a "need to perform an action exceeding the delegate's powers," persons delegated by associations to cooperate in the investigations were obliged to refer the matter to the police, who, if the request was justified, performed the action (para. 4). The delegate was required to immediately notify the police of the initiation and completion of the investigation.

The Veterinary Inspection also plays the leading role in the enforcement of laws in the field of animal experimentation, where its duties include supervision of the conditions of housing and delivery of experimental animals. In addition, the Inspection supervises the experiments, and in this respect, it can and

3 Available at https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19310030017/O/D19310017.pdf.

should be assisted by experts. A list of experts is maintained by the minister responsible for science and higher education (Article 55 of the PAPA-SP).

In the context of the general mechanisms of animal law enforcement, a characteristic element of the solutions adopted in the PAPA-SP is the role of social expert bodies, such as independent ethics committees set up at the local level and supervised by the National Ethics Committee for Animal Experiments, operating under the minister responsible for science and higher education. These committees are mostly composed of representatives of the scientific community: experimental sciences, social sciences, and humanities. Each of them also includes representatives of social organisations whose statutory objective is the protection of animals. The primary task of the committees is the ethical oversight of scientific research involving animals, conducted from the perspective of standards set by substantive legal provisions.

These standards are also based on the previously described 3Rs principle: replacement, reduction, and refinement. In addition to the 3Rs, the current legal standards stemming from Directive 2010/63/EU and the PAPA-SP stipulate that animals may only be used for experimental purposes if the relation between the expected benefits of the experiment and its costs – understood as the sum of suffering and harm caused to the animals – is in favour of the expected benefits.

In Poland, the evaluation of experimental projects according to these criteria is carried out by independent ethics committees. The composition of the committees is diverse in order to balance the perspective of practising researchers, with expertise in the scientific and methodological aspects of the proposed study, and the ethical perspective of representatives of non-governmental social organisations.

The practical functioning of such committees is fraught with many difficulties and paradoxes; as a result, the effects of their activities are far from the assumptions on which they are based.[4] On the other hand, their operation and increasing entrenchment in the consciousness of the scientific community contribute to the ongoing evolution in the everyday standards of animal experimentation and to the elimination of at least some of the most cruel experiments of little scientific or social value. However, this process is not taking

4 See T. Pietrzykowski, "Ethical review of animal experimentation and the standards of procedural justice: A European perspective," *Journal of Bioethical Inquiry* 18/2 (2021).

place in an atmosphere of approval and understanding on the part of even the most prominent representatives of the experimental science community.[5]

The strongest points of the existing model of ethics committees in Poland include the participation of representatives of both social organisations and scientific communities, including social sciences and humanities (philosophers, lawyers, ethicists, sociologists, etc.). Furthermore, the committees are independent and function outside the structures of individual research institutions, which positively affects their ability to provide a relatively impartial and free assessment of the projects submitted for evaluation. This should be regarded as an important achievement of the system enforcing laws on experimental animal protection that has been developed in Poland for several decades.

3. (In)effectiveness of animal law enforcement mechanisms

The various mechanisms for enforcing animal protection laws do not create a system that ensures compliance with these regulations and effective detection and punishment of offenders. The competent authorities remain rather passive and, generally, regard compliance with animal protection laws as the lowest possible priority. This is confirmed by virtually all available data, reports, and studies, as well as daily experiences and observations that make up the overall picture of compliance with animal protection standards in various domains of animal exploitation.

Breaches of the obligation to treat animals humanely are widespread, whether in relation to pets, free-living animals, farm animals or experimental animals. Against this backdrop, the number of effective responses to such violations by relevant institutions appears downright grotesque. In absolute terms, the number of prosecutions, sanctions, and reactions from the public and from relevant authorities is on the rise. However, in the context of everyday practice affecting hundreds of millions of animals, these are exceptions. Systemic solutions to improve the detection and sanction of such violations are still in their infancy.

5 Cf. M. Gajewska et al., "Pięć lat trudnych doświadczeń z Ustawą o ochronie zwierząt wykorzystywanych do celów naukowych lub edukacyjnych z dnia 15 stycznia 2015 r.," *Nauka* 3 (2020), pp. 149–171; H. Kalamarz-Kubiak and T. Pietrzykowski, "Polemika z artykułem Pięć lat trudnych doświadczeń z Ustawą o ochronie zwierząt wykorzystywanych do celów naukowych lub edukacyjnych z dnia 15 stycznia 2015 r.," *Nauka* 1 (2021), pp. 159–164.

In Poland, there are several million dogs and cats alone, and more than half of Poles keep some kind of pet at home. The number of farm animals (excluding fish and birds) may reach 200 million. Meanwhile, according to police statistics, in the course of more than 20 years, the number of recorded crimes has risen from approximately 500 cases per year to just over 2,000, and the number of detected perpetrators does not exceed 1,300 per year. Clearly, these figures do not even represent the tip of the iceberg; indeed, they are a drop in the ocean of this type of crime, which is largely carried out with impunity and with very little risk of any legal repercussions or even proceedings following investigations.

In addition, only about 20% of the cases result in indictments. Approximately half of the charges brought are for the offence of unlawful killing of an animal, and the other half, for animal abuse. Cases of offences against animal protection laws are even less frequently detected and punished. It is also significant that more than 80% of the pending cases of violation of the PAPA concern domestic animals, although their number is negligible in comparison to the number of animals bred and killed for consumption and clothing. Of course, this does not mean that it is pets that are the most frequent victims of human cruel practices. This disproportion is primarily due to the fact that the cruel treatment of other animals is less likely to trigger any reaction, come to light, and be the grounds for appropriate legal action.

In recent years, the average severity of sentences imposed in the animal protection cases has slightly increased. Prison sentences are by far the predominant punishment; however, they are temporarily suspended in more than 80% of the cases. At the same time, other punitive measures – such as, for example, a ban on practising a profession or activity – are only rarely and reluctantly applied.[6] In addition, there is no system that would enable the practical enforcement of such restrictions or prohibitions.

The enforcement of laws on animals used for scientific purposes is even less effective. Statistics on the operation of ethics committees indicate that refusals to consent to a proposed animal experiment are still relatively rare. It can only be hoped that the very existence of a committee and the obligation to obtain its

6 See, e.g., *Jak Polacy znęcają się nad zwierzętami? Raport z monitoringu sądów, prokuratur i policji przygotowany przez Fundację Czarna Owca Pana Kota i Stowarzyszenie Ochrony Zwierząt Ekostraż* (Kraków–Wrocław, 2016).

consent for a planned project involving the use of animals has some preventive effect. The result may be that the projects requiring an approval are generally better prepared in terms of ensuring animal welfare (especially in terms of the implementation of the 3Rs principle) than they would be if no ethical review and oversight were required. Some confirmation of this assumption is afforded by the fact that most applications for consent are modified, sometimes several times, at the suggestion of the ethics committee. Furthermore, ethics committees often point out various shortcomings of the projects, which are sometimes corrected before the experiments are actually carried out. This, too, can affect the overall welfare protection level for animals subjected to experiments.

Nevertheless, the fact is that the percentage of negative decisions issued by ethics committees has remained negligible over the past several years. At the same time, criminal provisions for the protection of experimental animals have been highly ineffective. It was only with the introduction of administrative sanctions (in addition to criminal ones) that the violations started to trigger a repressive response. Since 2017, there have been detected cases of violation of the law by institutions involved in animal experimentation. Their number is not great; however, it is important that such investigations are initiated, and that some of them end with financial penalties imposed on the institutions where violations occurred.

Still, such proceedings concern, in principle, only standards for keeping experimental animals (although these often directly translate into animal wellbeing) or various formal and documentary requirements, not the way in which animals are used in the experiments, which is crucial for their welfare. Criminal provisions concerning such cases are virtually not applied in Poland, just as it was the case with corresponding provisions of prior law. Thus, one can see that while the enforcement of relevant European and national provisions on the welfare of experimental animals is slowly gaining ground, there are no mechanisms to ensure effective control of the protection of animal wellbeing during experiments.[7]

7 For more detail, see J. Knosała, *Zasada 3R w polskim prawodawstwie ochrony zwierząt* (unpublished PhD dissertation, available in the repository of the University of Silesia in Katowice), passim.

Principles

CHAPTER 12

Principles of Animal Law

1. Principles in law

Among regulations of individual branches of law, there is a relatively small number of fundamental principles that play a special role by ordering the complex and detailed material of the entirety of rules and relevant legal doctrine. The identification of the content of and mutual relations between legal principles, as well as between them and other regulations, is one of the main tasks of dogmatic-legal (doctrinal) reflection. The catalogue of legal principles, the attribution of the status of principles ("fundamental nature") to individual provisions, and the explanation of the relationship between the content of provisions and the underlying legal principles is at least as much the product of the interpretative discourse of legal science and the judicial application of law as it is of direct and conscious legislative activity.[1] The identification of legal principles guides thinking about a given field of legislation and the understanding and application of its norms.

In legal theory, it has become practice to distinguish between two senses of legal principle: descriptive and directive.[2] In the descriptive sense, the term is used to refer to the method or model adopted by law to regulate a particular field. On this understanding, principles help to describe the model according to which the lawmaker has shaped a given set of content-related legal regulations. So understood, principles reflect the content of provisions, providing an answer to the question about the model of regulation that corresponds to the content of provisions established by the lawmaker. In other words, they show which of the possible models has been chosen by the lawmaker and how it is reflected

1 For more detail, see S. Tkacz, *O zintegrowanej koncepcji zasad prawnych w polskim prawoznawstwie (od dogmatyki do teorii prawa)* (Toruń: Adam Marszałek, 2014).

2 S. Wronkowska, M. Zieliński, and Z. Ziembiński, *Zasady prawa. Zagadnienia podstawowe* (Warszawa: Wydawnictwo Prawnicze, 1974), pp. 28ff.

in the norms that regulate a particular legal issue. Examples of this sense of legal principle include the adversarial principle, which is one of the possible ways of shaping the judicial process, the principle of non-discrimination in employment, the principle of legalism, the principle of fault, and the principle of freedom of contract. In the descriptive sense of the term, the primary function of principles is to organise intellectually the entirety of a particular legal regulation, which often comprises a thicket of complex and detailed provisions, whose interrelationships and guiding ideas are not always easily discernible.

In the directive sense of the term, a legal principle is a binding rule "of fundamental nature," that is, one which is attributed a particular importance or superior role in relation to the rules of the whole or a part of the legal system. It may be expressed directly in a specific legal provision or be derived from a group of provisions perceived as expressing a common underlying idea or value.[3] Understood in this way, principles also include norms that are not expressed in legal text at all, but are recognised in practice and treated as part of formally binding law.[4] For this reason, legal principles can be seen as a bridge between the body of binding rules and the legal culture in which they are embedded.

Many legal principles function in the same form as descriptive and directive principles. In the former case, they are referred to in order to characterise briefly, or merely invoke, the content of a specific set of binding legal regulations. In the latter case, they are referred to as separate binding norms, independently determining the conduct and application of other content-related norms.

In practice, it is often not entirely clear whether a given principle is referred to in the descriptive or directive sense. In general, the way in which the lawmaker regulates a particular field reflects the intention to apply solutions that are as consistent as possible with the adopted model. The reconstruction of

3 For more detail, see J. Wróblewski, "Prawo obowiązujące a 'ogólne zasady prawa,'" *Zeszyty Naukowe Uniwersytetu Łódzkiego. Nauki Humanistyczno-Społeczne* I/42 (1965).

4 Problems of intertemporality can serve as a prime example of the role that principles understood in this way play in legal practice. At the same time, they demonstrate how difficult and fuzzy the distinction can be between principles reconstructed from detailed legal regulations and those that are strictly extra-legal ideas or values but are nevertheless treated as if they were binding rules of direct relevance to solving legal problems. For more details, see T. Pietrzykowski, *Podstawy prawa intertemporalnego. Zmiany przepisów a problemy stosowania prawa* (Warszawa: LexisNexis, 2011).

a principle which provides an accurate description of a particular field of legal regulation at the same time offers a normatively understood guideline on how to read the provisions of the field. It can be said that principles may be used to make descriptive statements about the legal order or to formulate and legitimise directives on the proper understanding and application of its norms.[5] The juxtaposition of the two approaches to the legal principle is thus rather theoretical or methodological in nature and serves to highlight the ambiguity of the term and potential misunderstandings related to its descriptive or directive use.

Thus, in general, legal principles are both a reflection of the content of provisions and a normative model serving their proper understanding and application. The fact that the lawmaker has shaped the norms of a particular field in accordance with a specific principle may reasonably be perceived as an intention or will to bring this specific model to reality through the practical operation of provisions based on it. The descriptive accuracy of the reconstruction of a legal principle on the basis of relevant provisions at the same time provides a justification for its normative force with regard to how these provisions are applied and in what way doubts concerning their normative consequences are resolved.

For this reason, legal principles should not be regarded merely as explanations or axiological legitimation of the content of individual provisions. They are at the same time important arguments which should be taken into account when deciding on matters regulated by provisions subordinate to them. This becomes particularly important in the case of ambiguous interpretations arising on the grounds of the provisions, collisions between them, and the need to resolve problems which are not directly regulated by any specific legal rules. It is on these occasions that the normative (if subsidiary) role of legal principles becomes most evident.[6]

According to M. Kordela, legal principles are normative forms of values; hence, the identification of a legal principle involves the identification of the value which the lawmaker intends to realise through a given directive.[7]

5 Cf. S. Tkacz, *O zintegrowanej koncepcji zasad...*, pp. 249f.

6 On the role of principles in "difficult cases" of law application, see, in particular, R. Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1978); idem, *A Matter of Principle* (Cambridge, MA: Harvard University Press, 1985).

7 M. Kordela, *Zasady prawa. Studium teoretycznoprawne* (Poznań: Wydawnictwo UAM, 2012), pp. 101f.

Principles are thus "the expression of the fundamental axiological choices" of the lawmaker.[8] The content of a principle is an injunction to realise a specific value (and not an injunction to behave in a particular way); its application is achieved through common legal norms (rules).[9] These may be rules established by the lawmaker, evidencing recognition of a specific general principle. Alternatively, rules may make a principle more specific and be formulated only at the stage of law application, either as a result of interpretation of provisions "in the light" of a given principle or as a result of an explicit reference to it in search for an appropriate legal solution to a problem not directly regulated by any legal rule. In this case, the principle legitimates a solution which results from an *ad hoc* legal rule indicating in what circumstances and for whom what kind of legal obligation or entitlement arises.[10]

2. Validity of legal principles

The question of the validity of legal principles is not particularly problematic insofar as they are identified with concrete legal provisions through which they are expressed. The validity of a principle is then identified with the formal criteria of the validity of a corresponding provision, to which the status of principle is ascribed. The matter becomes more complicated in the case of principles reconstructed from a number of individual provisions, that is, principles which are not explicitly expressed in any single provision of the applicable law.

In such cases, too, the validity of a legal principle may be derived from the validity of provisions from which it has been reconstructed. The condition for this, however, is the intellectual accuracy of the reconstruction of the content of the principle from the provisions through which it is expressed. This does not mean that, in terms of content, a principle cannot be broader (more general) than the provisions constituting its positive legal expression. On the contrary, it may be assumed – *ex hypothesi*, as it were – that a principle providing an axiological basis for detailed legal regulations expresses a general idea of

8 Ibidem, p. 276.

9 Ibidem, pp. 260f.

10 Ibidem; cf. also T. Gizbert-Studnicki, "Rec.: M. Kordela, *Zasady prawa. Studium teoretyczno-prawne,* Poznań 2012," *Państwo i Prawo* 3 (2014), pp. 117f.

a much broader nature than the scope of application and regulation of specific provisions based on it. Rather, the appropriateness of the reconstruction is assessed in terms of its consistency with all available legal material, both provisions implementing a given principle and other provisions and principles of law with which it must sufficiently harmonise.

The reconstruction of principles thus involves the identification of norms prescribing the pursuit of a certain value; this process is based on provisions that indicate that a given value has guided the lawmaker's decisions. The scope of a norm is, so to say, by definition broader than it follows from the provisions which are its partial manifestations. It is a result of interpretation: one that does not aim at determining the normative content of a single provision but at uncovering the norm underlying a greater number of legal regulations and forming their common axiological premise. Attributing binding legal force to a legal principle thus constructed does not appear more problematic or legally controversial than the method of extended interpretation, well-known for centuries, or application of analogy based on the principle: *Ubi eadem legis ratio, ibi eadem legis dispositio.*[11]

The most controversial issue is the status and criteria of validity of legal principles which are neither identified with specific provisions that express them, nor reconstructed as generalisations from individual provisions. Principles of this third kind are postulates addressed to the lawmaker and other subjects of law to respect what they propose for one (usually moral) reason or another. In the discussion that follows, I will not refer to principles (or postulates) understood in this way, limiting my remarks to those which find support in specific provisions of law.

At the same time, I am inclined to think that, in the case of strong axiological or functional justification, supported by the actual practice of law, principles of this third kind may be treated as part of a legal system even though they are not based on the same criteria of validity as legal provisions. In fact, it is not the case that all norms of a legal system must be based on the same criteria of validity. This depends on the actual social practice constituting the rule of recognition of a given system, that is, sufficiently consensual and stable

11 See J. Nowacki, *Analogia legis* (Warszawa: PWN, 1966).

attitudes and procedures in which its officials distinguish valid norms from those that do not have this status.[12]

In what follows, the focus will be on legal principles that can be reconstructed on the basis of actually existing normative material, that is, the content of applicable animal law. Considering this category of legal principles as valid norms is not particularly disputable and is supported by the accepted practice of the understanding and application of law.

3. Animal law and its principles

Both animal protection legislation and its interpretative discourse are still at a very early stage of development. It is therefore difficult to speak of any consensus on the existence, content, and understanding of a catalogue of their organising principles. In the context of animal law, principles still appear primarily in the sense of key moral postulates on which animal legislation should ultimately be based. In the sense typical of legal doctrine, they are much less frequently chosen the focus of attention, let alone reconstructed on the basis of a systematic analysis of applicable legal provisions. This situation is a classical illustration of the important (though often fuzzy) distinction between principles construed as the extra-legal *ethos* (invoked *de lege ferenda*) and principles understood as the binding *lex*.[13]

Examples of the "principles" of animal law – construed, in fact, as extra-legal ethical demands addressed to the lawmaker – include, for example, the so-called Five Freedoms: from hunger and thirst, from discomfort, from pain, injury or disease, from fear and distress, and to express normal behaviour. These are often cited as the guiding normative benchmarks to which the norms adopted in individual countries should be subordinate. At the same time, as acknowledged in the literature, "very few European lawmakers have passed laws that recognise and protect the five freedoms."[14] The famous Universal Dec-

12 For more detail, see T. Pietrzykowski, "Czym jest postpozytywizm prawniczy?" *Radca Prawny* 6 (2009), pp. 5–11.

13 Cf. J. Nowacki and Z. Tobor, *Wstęp do prawoznawstwa* (Warszawa: PWN, 1997).

14 M. Falaise, "Legal standards and animal welfare in European countries," in S. Hild and L. Schweitzer (eds.), *Animal Welfare. From Science to Law* (Paris: La Fondation Droit Animal, Éthique et Sciences, 2019), p. 71.

laration of Animal Rights of 1978[15] or the principle of "equality of all sentient beings" proclaimed by the abolitionist strand of animal liberation philosophy may serve as similar examples.[16]

In contrast to the prevailing tone of the discussion on animal law, in the following chapters we will focus on legal principles that are expressed in the current animal legislation. We are therefore concerned with principles that can be reconstructed on the basis of existing regulations, and not with principles understood as postulates, that is, ethical expectations that legislation should meet in order to become morally more acceptable. I will try to frame the existing provisions as expressions of certain guiding values considered by the lawmaker as worth pursuing and protecting.

It is increasingly difficult to understand and analyse the legal systems of EU member states, including Poland, in isolation from the European Union law, which interpenetrates them. This is particularly difficult in the case of animal law, where the normative and doctrinal outcomes of individual countries are rather modest. They are complemented by the relatively extensive regulation of the European Union, which, at least since the end of the previous century, has remained legislatively active with regard to various aspects of animal welfare protection. The EU law is therefore difficult to separate from an analysis of the normative material at the level of the member states, which in many respects is based on secondary European law.

A significant part of the relevant solutions, or even entire normative acts, of animal law in force in Poland and other European countries transpose or supplement directly applicable provisions of the European Union law. This applies, for example, to issues such as the killing of animals, transport, standards for keeping farm animals, the use of animals in scientific experiments, and standards for keeping experimental animals. This is why, in my view, it is difficult to speak of self-contained, autonomous principles of Polish animal law (or the law of other member states), independent of the EU law.

I do not view this state of affairs with disapproval. On the contrary, it is one of the important factors in changing the quality and aspirations of animal legislation for the better in most countries of the Union. There is no doubt

15 See http://www.esdaw.eu/unesco.html.

16 See, e.g., G. Francione, *Introduction to Animal Rights. Your Child or a Dog?* (Philadelphia: Temple University Press, 2000).

that the overall balance of the European Union's involvement in animal legislation is unequivocally positive. This is not only because it enforces a radical upgrading of standards in those member states which were relatively slow and reluctant to adopt solutions significantly improving the fate of animals. Above all, this is because, in virtually every member state, EU regulations have, in some respects, improved the existing state of legislation, even if in other respects, they have merely duplicated solutions already introduced in individual countries.

Poland is a prime example of this situation. Although in some (rather few) respects Polish law is still more progressive in terms of animal protection standards, in the vast majority of cases, European Union legislation has forced various types of changes to improve the quality of national regulations.

Furthermore, in my opinion, a comparative perspective on animal law in European countries supports the conclusion that, in view of the existing similarities and convergences, it is possible to speak of a European model of legal protection of animals. In spite of many differences with regard to details, animal law is largely based on similar principles, resolving analogous axiological conflicts in a similar way and often using similar legal institutions and normative constructions. This is by no means surprising given the mutual interdependencies and the fact that for at least a century, European lawmakers have drawn inspiration from one another with regard to the development and models of animal law.

First and foremost, however, the sources of this convergence are to be found in similar cultural conditions and processes. These include the parallel and mutually influential evolution of ethical attitudes towards animals. Based on the development of this area of legislation in Europe, it is possible to defend the view that the changes have proceeded in a similar way, although certainly not uniformly or simultaneously. A particularly telling testimony to the similarities and differences in the course of this evolution can be found in the successive conventions of the Council of Europe, adopted over the last half century and ratified (or not) at a different pace and with various reservations. Their current practical significance has considerably declined, mainly due to the fact that their role has been largely taken over by the secondary legislation of the European Union, with a much stronger and more direct normative influence on the legal orders of individual member states. Still, they remain an important

indication and testimony of the changes taking place in the mentality of European societies and, consequently, the common legal space of the continent.

For these reasons, I believe that if one can speak of a certain animal protection model characteristic of the European Union states, it consists above all in similar guiding principles. These, in turn, can be reconstructed on the basis of the applicable legislation of each country, which in each case is a combination of strictly national elements and elements derived from common EU law.

The extent to which these similarities and convergences make it possible to juxtapose the European model with legislation based in a fundamentally different cultural context – including animal laws developed and operating in Asian, Indian, and African countries – is a separate question.[17] A comparative study of this kind would require much more in-depth research into both the formulation and practice of individual legal solutions, and it cannot be ruled out that, in many respects, the European model is, in fact, a global model. In view of advanced globalisation processes – also with regard to legislative developments and growing mutual cultural influences – this would not be particularly surprising.

However, there is also ample reason to be sceptical about this conjecture. Some legal solutions in legal systems which are culturally distant from Europe remain, from a European perspective, very exotic. By way of example, Article 51A of the Indian Constitution requires citizens to "have compassion" for living creatures; the much-debated New Zealand law grants legal subjecthood to the Whanganui River; and the Ecuadorian Constitution grants constitutional rights to "nature or Pacha Mama."[18]

17 On the differences between European and other major legal traditions, cultures, and families, see, for example, R. David and J. Brierley, *Major Legal Systems of the World Today*, 2nd ed. (London: Stevens & Sons, 1978); M. A. Glendon, P. Carozza, and C. Picker, *Comparative Legal Traditions in a Nutshell*, 4th ed. (St. Paul: West Academic Publishing, 2016).

18 "Nature, or Pacha Mama, where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes" (Article 71 of the Ecuadorian Constitution).

CHAPTER 13

Principle of the Protection of Life

1. The value of animal life and the law

Given the variety of purposes for which animals are killed by humans on a daily basis and the scale of these practices, the legal status of animal life is by no means self-evident. At the same time, the legal grounding of a particular value in the form of a legal principle does not necessarily mean – and generally does not mean – that this principle is absolute and applies without exception. On the contrary, all legal principles (including the principle of the dignity of human person, sometimes regarded in doctrine as absolute and exceptionless) are, in fact, subject to various exceptions and inevitably weighed against other goods and values protected by law.

The principle of the protection of animal life receives a legal foundation primarily from the general dereification clause. It is the starting point and justification for substantive regulations on the protection of animal life arising from other legal acts. The dereification of vertebrate animals means that the lawmaker has granted them a legal status different from that of things. Its key normative consequence is the obligation to respect, protect, and care for vertebrate animals because of their capacity to experience suffering. The scope and detailed principles of this protection, in particular, the legal aspects of the significance of animal life, are regulated by further provisions. They leave no doubt that, because of its characteristics specified in the dereification clause, an animal cannot be legally deprived of life. The provisions limit the freedom to kill animals both in terms of the purpose of depriving an animal of life and the manner and circumstances in which this is legally permissible.

The counterpart of the dereification clause in the European Union law is Article 13 of the Treaty on the Functioning of the European Union. It incorporates the previously applicable Additional Protocol to the Treaty of Amsterdam of 1997. According to Article 13 of the TFEU, in formulating and implementing Union policies, both the Union and its member states "shall, since animals are sentient

beings, pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage."

From an axiological point of view, the most significant element of the Article is the explicit attribution of sentience to animals. From a practical point of view, no less important is balancing this specific form of dereification with an injunction to respect religious customs, traditions, and heritage of individual member states (typical of the Union). On the whole, at the level of both Polish and EU law, animals are treated as beings capable of sentience (suffering), and thus deserving an appropriate level of legal protection. From a comparative point of view, it can be added that similar solutions are also becoming the standard and are increasingly adopted in the European legal space.

However, neither Polish nor EU law contains norms that explicitly refer to animal life as a legally protected value. In contrast, in some European countries, regulations explicitly declare that animal life is subject to legal protection. An example may be Article 1 of the German Animal Welfare Act. It indicates that the aim of the Act is "to protect the lives and wellbeing of animals, based on the responsibility of human beings for their fellow creatures."[1] An analogous provision of the Austrian law has a similar wording.[2]

Apart from the few exceptions, the law of most European countries, just like Polish and EU law, makes no explicit mention of animal life as a legally protected value. Still, the value can be reconstructed on the basis of general axiological declarations contained in legal acts protecting animals, supplemented with an analysis of specific substantive legal solutions relating to the permissibility and legal consequences of killing an animal.

An example of this type of clause – lacking an explicit declaration on the protection of animal life but providing a direct ground for relevant substantive law regulations – can be found in Swiss law. Article 1 of the Swiss Animal Welfare Act refers to the dignity of animals as the object of protection, thus making more tangible the constitutional norm requiring the protection of the dignity of "living beings" (Article 120(2) of the Swiss Constitution).[3] Also of

1 § 1 German TierSchG v. 24.7.1972, BGBl. I 2006, p. 1206.

2 § 1 Austrian Tierschutzgesetz (A TierSchG) v. 27.5.2004, BGBl. I 2004, Nr. 118/2004.

3 "Der Bund erlässt Vorschriften über den Umgang mit Keim- und Erbgut von Tieren, Pflanzen und anderen Organismen. Er trägt dabei der Würde der Kreatur sowie der Sicherheit

interest in this context is the wording of Article 1(3) of the Dutch Act, which recognises the "intrinsic value of the animal" and defines it as "the inherent value of animals as sentient beings."[4] As a result, the intrinsic value of animals must be taken into account in law-making and decisions based on law, with due respect for other legitimate interests.

Bearing in mind provisions defining the normative consequences of dereification clauses, including restrictions on the killing of animals, I am of the opinion that even in those cases where dereification clauses do not explicitly refer to animal life, they should be interpreted as attributing a legal value to the life of animals as "sentient beings." The lawmaker's intended normative meaning and scope of concepts such as "dignity," "inherent value," and "capacity to experience suffering" are primarily evidenced by more specific norms, which the lawmaker considers to be an appropriate expansion of the declared status of animals.

A look at the content of such regulations demonstrates that dereification clauses are reflected in provisions stating that animal life is not legally irrelevant and is subject to more or less rigorous protection.

2. Prohibition on the killing of animals

The most unequivocal manifestation of the lawmaker's recognition of animal life as a legally protected value is the norm providing that the killing of animals is, in principle, prohibited. In Article 6 of the PAPA, the permissibility of killing an animal is limited to the exceptions enumerated in this provision. A violation of this prohibition is punishable by imprisonment.

At the same time, it is quite clear that the scope of exceptions allowing for the legal killing of animals is very wide. They include not only the slaughter and killing of farm animals, the killing of birds and mammals for pelts, fishing, hunting, sanitary and reduction hunting, and epidemic prevention measures, but also humanitarian necessity (so-called necessity of immediate killing) and euthanasia of blind litters. In addition, the possibility of killing animals used for scientific or education purposes is provided for by legislation on scientific

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von Mensch, Tier und Umwelt Rechnung und schützt die genetische Vielfalt der Tier- und Pflanzenarten" (Article 120(2) of the Constitution of Switzerland).

4 Wet dieren (2011).

experiments on animals, their organs, and animal tissues. These exceptions in fact cover almost all animal exploitation practices, virtually reducing the scope of the general rule to a prohibition of killing animals "without a reason." It *de facto* prohibits the killing of animals only if it proceeds from a trivial whim, sadism, and other similar motives of the potential perpetrator.

Notwithstanding this, the legal and axiological significance of the relative prohibition on killing animals cannot be underestimated. Importantly, this prohibition was not provided for in the 1928 Regulation (which only prohibited animal abuse). It was only in 2011 that a general prohibition on the killing of animals was introduced, "except" in the enumerated circumstances. This is an advancement in that it not only limits the circumstances in which animal killing is permitted by law but, first and foremost, makes it quite clear that animal life is a legally significant value and that its protection is only waived in exceptional cases. Further development of these regulations should lead to a gradual reduction of the list of exceptions and broadening of the scope of the general protection principle.

In most European countries, the dominant solution is based on a general clause prohibiting only the "unjustified," "unnecessary," or "unsubstantiated" killing of animals. Such provisions can be found, for example, in Austrian law,[5] Italian law,[6] Cypriot law,[7] Slovenian law,[8] and Portuguese law.[9] By contrast, apart from Poland, the model of a general prohibition with enumerated exceptions has also been introduced in Slovak,[10] Estonian,[11] and Lithuanian

5 § 6 A TierSchG v. 27.5.2004, BGBl. I 2004, Nr. 118/2004

6 Art. 544 bis Disposizioni concernenti il divieto di maltrattamento degli animali, nonche' di impiego degli stessi in combattimenti clandestini o competizioni non autorizzate of 20.7.2004, Legge 189 (2004).

7 According to the law of Cyprus, the killing of an animal for recreational purposes or other inadmissible purposes is prohibited, See Art. 5, sec. 2(b), Ο περί Προστασίας και Ευημερίας των Ζώων Νόμος του (1994), Αρ. 2885,10.6.94, N. 46 (I) / 1994.

8 Art. 3 Zakon o zaščiti živali, Uradni list RS, št. 38/13.

9 Art. 4.1.3. Disposizioni concernenti il divieto di maltrattamento degli animali, nonche' di impiego degli stessi in combattimenti clandestini o competizioni non autorizzate, O.G. of 31.7.2004, Law Nr. 178.

10 § 22(5) Zákon o veterinárnej starostlivosti of 12.12.2006 (2006), Zákon č. 39/2007 Z.z.

11 § 10 Loomakaitseseadus of 13.12.2000, RT I 2001, 3, 4.

legislation.[12] In a few cases, the list of exceptions is not closed, but exemplary, as in Hungarian law.[13]

3. Other provisions based on the recognition of the value of animal life

The axiological assumption of the legal significance of animal life is also manifest in other solutions of current animal law. However, their connection with the principle of the protection of animal life is not always as obvious and easy to demonstrate as in the case of general ideological declarations of lawmakers, dereification provisions, or provisions limiting the permissibility of killing animals. Still, the impact of the lawmaker's recognition of animal life as a legally protected value can also be seen in some provisions not explicitly or *prima facie* related to the killing of animals.

Such provisions include, for example, the prohibition on trapping homeless animals without providing them with a place in a shelter. In this way, the lawmaker rules out the practice of trapping animals only to have them killed (in order to "cleanse" an area of homeless animals). The rationale for this prohibition is undoubtedly the legal sensitivity to the lives of animals and the priority given to the value of animal life over considerations of order, cleanliness, and other reasons that might support the removal of homeless animals from areas inhabited by humans.

Similar reasoning applies to the prohibition of using animals for work or entertainment in a way that may endanger their lives. In this case, the life of animals is given primacy over the economic efficiency of the activity carried out using their labour and the habits, dispositions, and inconsideration of those who use animals for such purposes.

The assumption of the value of animal life can also be seen, although less clearly, in the provision stating that the manager of a hunting district may take measures to "prevent dogs from wandering in the circuit." These measures consist in instructing dog owners or trapping animals and delivering them to their owners or shelters. Although this provision is seemingly unrelated to the

12 Art. 4.1(3) Lietuvos Respublikos gyvūnų globos, laikymo ir naudojimo įstatymo pakeitimo įstatymas (2012)

13 § 11 Évi törvény az állatok védelméről és kíméletéről (1998), Law Nr. XXVIII.

protection of animal life, there is no doubt that it was introduced primarily to prohibit the killing of dogs by lessees of hunting grounds as part of the management of hunting districts. The principle of the protection of animal life is manifested in its wording, as it were, *a contrario*, in that which is not permitted by its content and thus is implicitly outlawed. The provision previously in force empowered the lessees of hunting grounds to "control feral dogs and cats." In its wake, there were repeated shocking cases of hunters shooting domestic animals, including those walking in the company of their keepers, provoking growing public outrage and opposition.

When looking for provisions geared towards the implementation of the principle of the protection of animal life, one cannot overlook the provisions on animal experimentation. Central to the provisions of Directive 2010/63/EU is the 3Rs principle (replacement, reduction, and refinement). An experimental procedure with a live animal is only allowed if no other research method can be used to achieve the intended (and legally permissible) objective, the number of animals has been reduced to the absolute minimum, and the methods have been selected in such a way so as to limit pain, suffering, distress, or other harm to the animal.

At least the first two requirements covered by this principle – that is, replacement and reduction – have their axiological justification in the protection of animal life. Indeed, the use of animals in experimental procedures often has a terminal effect, so aiming to substitute and limit their use means at the same time keeping to the minimum the number of animals killed for scientific purposes.

Wherever possible, it is therefore a legal obligation for animal experimenters to replace the use of animals by alternative methods (such as computer models, cell cultures, etc.), and where the use of animals is indispensable, their number should be limited to the minimum necessary to obtain reliable scientific results. The requirements of replacement and reduction also apply to the use of animals for educational purposes, where instructional videos, medical phantoms, and other technologies simulating physiological phenomena feature among the main alternative methods to avoid killing animals.

In addition, the EU institutions and its member states are obliged to promote the development of alternative research methods and organ and tissue exchange programmes. These obligations are also at least partly grounded in the intention to minimise the number of animals deprived of life as a result

of human scientific and educational activities. An important normative manifestation of the principle of the protection of life is also the provision that animals should be left alive at the end of an experiment and should only be killed if they suffer permanent injury, pain, suffering, or distress as a result of the experiment.

These provisions are thus based on the assumption of the axiological importance or at least relevance of animal life. The strictness of its protection is rather low; in the hierarchy of values adopted by the lawmaker, the protection of animal life is ranked lower than the protection of animal welfare (prevention of suffering). A particularly telling illustration of this situation is the fact that killing an animal to obtain its organs or tissues for scientific research is not included in the definition of an experimental procedure. As a result, killing an animal for this purpose does not require strict ethical oversight or formal approval. It also leaves animals so used outside the scope of the principles of replacement, reduction, and refinement. However, this follows from the lawmaker's intention to design the choice architecture for experiment planners in such a way that killing an animal before the experiment is preferred to killing it during or after the procedure. Thus, the intention is not merely to limit the protection of animal life, but to maximise the principle of protecting animal welfare (to minimise suffering), a problem discussed in more detail in later sections of this and the next chapter.

This interpretation is supported not only by the preamble to Directive 2010/63/EU (especially Recital 12, emphasising the intrinsic value of each animal),[14] but also by the already mentioned obligation of the member states to promote programmes for the sharing of tissues and organs of killed animals (Article 18). It is clearly motivated by the concern of the EU lawmaker to limit to the greatest possible extent the number of animals killed for organs or tissues. At the same time, if a live animal capable of experiencing suffering were to be subjected to a painful experiment, the lawmaker considers the painless

14 "(12) Animals have an intrinsic value which must be respected. There are also the ethical concerns of the general public as regards the use of animals in procedures. Therefore, animals should always be treated as sentient creatures and their use in procedures should be restricted to areas which may ultimately benefit human or animal health, or the environment. The use of animals for scientific or educational purposes should therefore only be considered where a non-animal alternative is unavailable. Use of animals for scientific procedures in other areas under the competence of the Union should be prohibited."

killing of the animal and experimentation on its organs or tissues to be the lesser evil.

This situation is not evidence of the failure of the EU and Polish lawmakers to recognise the principle of protecting animal life, but of the primacy they give to the principle of protecting welfare (preventing suffering) over the principle of protecting life (at the cost of exposing animals to pain, suffering, or distress). At the same time, with regard to certain categories of products, such as cosmetics, and in primary education, the use of animals for any experimental purposes (including killing them for the purpose of experimenting on their organs or tissues) has been completely banned by EU law.[15]

4. The scope and rank of the principle of the protection of animal life

In the light of current legislation, there can be little doubt that animal life is a legally protected value and that there are many legal solutions geared towards the implementation of the principle of its protection. With regard to European Union legislation, it can be said that the protection of animal life is one of the principles that provide cohesion to animal law and one of its axiological foundations. However, in the context of other potentially conflicting principles and legal norms, both the scope and the rank of this principle require some clarification.

First of all, the principle of the protection of animal life generally covers only vertebrates. This is understandable and justified given that, in the light of contemporary scientific knowledge, vertebrate animals must be recognised as beings capable of experiencing suffering (sentient). In the case of the overwhelming majority of invertebrate animals, the relatively low degree of complexity of their neural structures, as well as other amply available evidence and observations, make the sentience hypothesis unlikely. Still, knowledge is constantly evolving also in this area, and findings that may challenge this view are accumulating. For instance, based on Directive 2010/63/EU, the circle of animals protected because of "scientific evidence of their ability to

15 Regulation (EC) 1223/2009 of the European Parliament and of the Council of 30 November 2009 on cosmetic products (OJ L 342, 22.12.2009, p. 59).

experience pain, suffering, distress and lasting harm" has been expanded to include the cephalopods.[16]

At the same time, it is worth noting that in some countries, the group of animals whose lives are protected is restricted in various ways. France is a case in point. Here, the prohibition on killing animals without a justifiable reason applies only to pets.[17] Among non-European countries, a very well-known example is the US Animal Welfare Act, which excludes rodents – that is, the overwhelming majority of all animals used for experimental purposes (approximating 70–80%) – from its scope of protection.[18]

Irrespective of the range of animals subject to specific regulations, in many situations, the principle of the protection of animal life gives way to other values considered more important by the lawmaker. The value of animal life does not rank high in the hierarchy of legally protected values; consequently, the principle protecting it remains relatively weak. Under the current law, it is overruled by a number of values and interests related to animal exploitation practices (for economic purposes, entertainment, research, etc.). This ordering of potentially conflicting values is manifested not only in exceptions to the principle enumerated by the lawmaker, such as slaughter, fishing, and hunting, but also in situations where animals pose a threat to human life, health, or economy, that is, where their population requires reduction. Thus, the legal rank of the value of animal life gives way to considerations of human life, health, and economy.

Last but not least, in the light of current legislation, the principle of the protection of animal life also comes into conflict with the principle of the protection of animal welfare (a problem discussed in the next chapter). This concerns cases where an animal can only continue to live in pain and suffering, which may make it a moral obligation for humans to end its agony. On this basis, relevant provisions stipulate that conflicts between the protection of

16 Recital 8 of the preamble to Directive 2010/63/EU.

17 French law differs from the typical European model primarily in that it does not have a comprehensive animal protection law, and the provision protecting animal life (a ban on killing "without a justifiable reason") is contained in the Penal Code. However, additional regulations of the French Environment Code apply to experimental animals and wild animals.

18 P. Frasch, "Gaps in US animal welfare law for laboratory animals: Perspectives from an animal law attorney," *ILAR Journal* 57/3 (2016), pp. 285–292.

animal life and ensuring a sufficient quality of life (elementary welfare) should be resolved in favour of the latter.

It is worth noting that there is an obvious inversion in the way law perceives the relationship between the value of life and welfare in animals compared to similar problems arising in relation to the value of life and welfare (quality of life) in humans. In the latter case, the majority of legal solutions are based on the position of the absolute primacy of human life over welfare. In a relatively small number of countries, rather cautious exceptions to this model have been introduced. These mainly concern the so-called persistent (intensive) therapy, which prolongs the patient's life to a small extent at the cost of immense suffering, as well as, in strictly defined circumstances, solutions allowing euthanasia. The latter apply if – in the opinion of the patient (or the court if the patient is unable to express his or her will) – termination of life in the terminal phase of the disease is the only way to escape unavoidable suffering, which provides a rational justification for this decision.[19]

19 For more detail, see T. Pietrzykowski, *Etyczne problemy prawa* (Warszawa: LexisNexis, 2011), Chapter 7.

CHAPTER 14

Principle of Animal Welfare Protection

1. Animal welfare and animal dereification

Current animal legislation is based on the principle of protecting the welfare of animals to an even more obvious extent than on the principle of protecting animal life. It is perhaps the most unquestionable axiological foundation of the modern model of legal protection of animals. For this reason, it is often explicitly referred to as "animal welfare law," based on welfarism. This model is juxtaposed with legislation based on the assumption of the subjecthood of animals and protection of their subjective rights, which excludes all forms of exploitation and enslavement of animals by humans.[1]

The welfare of animals is a value protected by the lawmaker in parallel with animal life. Moreover, as already mentioned, collisions between these two values are unequivocally resolved in favour of the protection of animal welfare, as long as the continued life of the animal would entail a deterioration of the quality of life below an acceptable minimum. Furthermore, in many cases where law allows killing an animal, it still prescribes that certain welfare requirements should be met at the time of killing (such as "humane" killing or sparing the animal unnecessary pain or fear).

There is some overlap between the normative bases of the protection of animal welfare and that of the protection of animal life, but there are some important respects in which the normative solutions expressing these principles differ or are contradictory. As with the principle of the protection of animal life, discussed in the previous chapter, regulations that implement the principle of the protection of welfare include provisions with general axiological

1 The main representative of the view that the protection of animal welfare should be replaced by the protection of animals' subjective rights as the proper basis for this area of legislation is G. Francione. See, among other, *Rain Without Thunder. The Ideology of the Animal Rights Movement* (Philadelphia: Temple University Press, 1996); idem and R. Garner, *Animal Rights Debate. Abolition or Regulation?* (New York: Columbia University Press, 2010).

declarations of the lawmaker in relation to animals, provisions generally prohibiting the cruel treatment of animals, and specific regulations defining appropriate or minimum standards of treatment for different types of animals.

2. General dereification clauses

Provisions explicitly or implicitly stating animal welfare as a legally significant value include primarily those containing the lawmaker's general axiological or ideological declarations, in particular, dereification clauses. In the case of the PAPA, this is the provision declaring that humans owe "respect, care, and protection" to animals as creatures "capable of experiencing suffering." In this way, the lawmaker grants animals the right to be protected from suffering and thus to have their welfare protected. In contrast to the value of animal life, the value of animal welfare is thus explicitly, almost literally, declared in this provision. Indeed, it would be difficult to maintain that the protection of animals by virtue of their capacity to experience suffering does not include protection from suffering resulting from their exploitation by humans.

Unlike with the principle of the protection of animal life (the identification of which requires considering not only the dereification clause but also further substantive provisions), the principle of the protection of animal welfare is directly implied, as it were, by the content of the dereification clause. Even more explicitly, this value and the injunction to implement it are contained in the norms of European Union law applicable in the Polish legal order.

The aforementioned Article 13 of the TFEU refers explicitly to the obligation of the Union and the member states to pay full regard to "welfare requirements of animals." In the preamble to Regulation 1099/2009, animal welfare is explicitly referred to as a "Community value" (Recital 4). The preamble to Directive 2010/63/EU, in turn, explains that the provisions it lays down are based on advances in scientific knowledge with respect to factors influencing animal welfare, advances that make it necessary to raise the standards of animal welfare "in line with the latest scientific developments" (Recital 6).

In almost all European legislations, dereification clauses, or provisions stating the purpose of specific regulations on the handling of animals, refer explicitly to the value of animal welfare. In some cases, welfare is mentioned together with the life or dignity of the animal, as, for example, in Germany, Austria, Switzerland, Luxembourg, Norway, Bulgaria, and the Czech Republic.

In Swedish law, ensuring the welfare of animals is explicitly declared as an objective of the applicable animal legislation.[2] Similarly, in the Bulgarian Act, Article 1(2) defines the protection of animals as "protection of their life, health, and welfare."[3] The wording of Article 1(1) and (2) of the Finnish Act is similar, stating that its purpose is to protect animals from pain, suffering, and distress, and to promote their welfare and proper treatment by humans.[4] In the Austrian Act, as in the German Act, this objective is defined as "the protection of the life and welfare of animals proceeding from a sense of human responsibility for animals as fellow creatures."[5] Czech law declares that its aim is "the protection of animals as living creatures, capable of experiencing pain and suffering, against cruelty, harm, and killing without reason, caused by humans, including cases of negligence."[6] Similar regulations can also be found in general provisions or preambles in other European states.

In the Polish legal order, a strong normative justification for the principle of animal welfare protection is provided by Article 5 of the PAPA. It contains an injunction to treat each animal "humanely." At the same time, the Act contains a definition of humane treatment, according to which it means treatment

2 The purpose of this Act is to ensure good animal welfare and promote good animal wellbeing and respect for animals (Art. 1, Animal Welfare Act (2018:1192), Swedish Code of Statutes no: 2018:1192).

3 Animal protection shall comprise protection of animals' life, health, and good condition; protection from inhumane, cruel, and extremely cruel treatment; ensuring proper care and living conditions, adapted to their physiological and behavioural specifics (Art 1(2) Animal Protection Act, SG No. 13/8.02.2008).

4 The objective of this Act is to protect animals from distress, pain and suffering in the best possible way. 2. The objective of this Act is also to promote the welfare and good treatment of animals (Art. 1 Animal Welfare Act 247/1996).

5 Zweck dieses Gesetzes ist es, aus der Verantwortung des Menschen für das Tier als Mitgeschöpf dessen Leben und Wohlbefinden zu schützen. Niemand darf einem Tier ohne vernünftigen Grund Schmerzen, Leiden oder Schäden zufügen (Tierschutzgestez, 18. Mai 2006 (BGBl. I S. 1206, 1313); Ziel dieses Bundesgesetzes ist der Schutz des Lebens und des Wohlbefindens der Tiere aus der besonderen Verantwortung des Menschen für das Tier als Mitgeschöpf (§ 1 Tierschutzgesetz, Bundesgesetz über den Schutz der Tiere (Tierschutzgesetz – TSchG, BGBL, Nr 1188/2004).

6 Účelem zákona je chránit zvířata, jež jsou živými tvory schopnými pociťovat bolest a utrpení, před týráním, poškozováním jejich zdraví a jejich usmrcením bez důvodu, pokud byly způsobeny, byť i z nedbalosti, člověkem (Art 1(č). 246/1992 Sb., na ochranu zvířat proti týrání).

"which takes into account the needs of the animal and provides it with care and protection."

It is worth noting that the injunction to treat each animal humanely was introduced prior to the general relative prohibition to kill animals. This may reinforce the impression, expressed above, that the value of animal welfare has legal priority over the value of animal life. This is further confirmed by a number of other norms on the resolution of conflicts between these values. In other words, *de lege lata*, the lawmaker takes the view that, in the case of animals (as opposed to humans), it is better for the animal to be killed rather than to live if its survival inevitably involves intense or prolonged suffering.

The provision that "every animal shall be treated humanely" is a general clause that should be referred to in case of interpretative doubts or discretionary margins left by other provisions. It acts as a directive to interpret and apply law in a way that takes into account the injunction to "treat animals humanely." In essence, then, it expresses a principle prescribing that the value of animal welfare should be realised to the maximum extent possible. This means taking into account the species-related and individual needs of an animal and providing it with appropriate care and protection. Thus, it is a guiding norm for the interpretation and application of related provisions, and it can be expressed in the paroemia: *In dubio pro bonum animale.* It requires that doubts should be resolved in such a way as to maintain animal welfare to the greatest possible extent as long as this is compatible with other values, interests, and goods protected or pursued by law.

3. Anti-cruelty laws

Regulations prohibiting animal abuse play a key role in the implementation of the principle of animal welfare protection. They are the core of animal law and its historical starting point. They remain the essence of animal law in European countries to this day. Provisions prohibiting animal abuse and designed to prevent acts of cruelty to animals (anti-cruelty laws) are also a direct normative expression of the principle of protecting the welfare of each individual animal. It is worth noting that some countries have introduced regulations that go beyond the mere prohibition of harming an animal and the associated sanctions. An example is Section 13 of the Austrian Animal Welfare Act, according to

which the keeping of an animal by humans is only permitted insofar as it can be reasonably expected that its welfare will not be compromised.[1]

In the PAPA, the primary anti-cruelty law is the prohibition of animal abuse together with a broad definition of this term. It includes any act that involves inflicting or knowingly allowing pain or suffering to be inflicted on an animal. If committed with direct intent, it becomes a criminal offence. Importantly, it is sufficient that direct intent exists in relation to the causative act and not necessarily to the effect, that is, inflicting suffering on an animal.

Provisions with a similar function can be found in virtually all European legislations. They are usually part of animal protection acts, taking a form similar to that of the prohibition of animal abuse in Polish law, that is, a general prohibition accompanied by an open, exemplary catalogue of typical examples of behaviour qualified as animal abuse. Such regulations are included, for instance, in German,[2] Austrian,[3] and Bulgarian law.[4] In a small number of countries where a comprehensive animal protection act has not yet been enacted, relevant regulations are part of criminal codes. This is the case in Italy and France. In the vast majority of countries, however, such provisions are part of separate animal protection acts.

Immanently linked to the provisions prohibiting cruelty to animals are relevant criminal provisions containing norms that specify sanctions for this type of behaviour. In Poland, in addition to imprisonment, they provide for an obligation to order forfeiture of the animal (if the perpetrator is its owner) as well as for the power to apply such penal measures as a ban on owning animals, practising certain professions, or carrying out certain activities, and to order an amount of compensation to be paid to animal protection causes.

The solution offered by the legislation on the protection of experimental animals is a counterpart of the general principle of the protection of animal welfare. The use of animals for experimental purposes is only allowed if the animals are kept under conditions appropriate to their species and the testing methods used in procedures have been selected to eliminate or minimise

1 § 13 A TierSchG.

2 § 3 G TierSchG.

3 § 3 A TierSchG.

4 Art. 7 Закон за защита на животните (Bulgarian Animal Welfare Act) of 8.2.2008, J L of 8.02.2008, Law No. 13.

pain, suffering, distress, or possibility of lasting harm to the animals. This provision expresses the so-called refinement requirement of the 3Rs principle. The essence of this requirement is to ensure that, both during the experiment and with regard to the conditions in which the animals are kept, their welfare is maintained to the greatest extent possible under the factual and legal circumstances.

In addition, according to current European standards for animal experimentation, it is unacceptable to perform a procedure if it involves severe pain, suffering, or distress that is likely to be long-lasting and cannot be alleviated. This provision not only plays an important practical role, but also expresses a very important axiological decision of the lawmaker. As can be seen from the passage in the preamble to Directive 2010/63/EU, which explains its rationale: "From an ethical standpoint, there should be an upper limit of pain, suffering and distress above which animals should not be subjected in scientific procedures. To that end, the performance of procedures that result in severe pain, suffering or distress, which is likely to be long-lasting and cannot be ameliorated, should be prohibited" (Recital 23).

This is a clear departure from the treatment of animal suffering as an acceptable price for the achievement of various objectives, which, in principle, differentiates animal protection from the protection of human life and rights. In the latter case, these values are largely regarded as "priceless," that is, impossible to outweigh by even the noblest utilitarian arguments. In the case of animals, their life and welfare, while legally protected, are generally treated as values to be weighed against other values and legal goods that may require the "sacrifice" of animal life or welfare for their sake. However, Article 15(2) of Directive 2010/63/EU introduces an important exception to this principle by providing that such weighing is only possible within certain limits, beyond which no utilitarian reasons can justify extreme forms of suffering inflicted on an animal.

4. Regulations establishing standards for the treatment of animals

Another level of implementation of the principle of animal welfare protection is specific regulations providing standards for the treatment of animals in various areas of exploitation. These relate in particular to the conditions in which animals are bred, transported, slaughtered, and used for work, entertainment, and sports.

In their literal content, they are often almost technical in nature. They regulate the size and equipment of cages, temperature, lighting, feeding times and methods, and other parameters. In fact, they are concrete normative consequences of making animal welfare a legally significant value. In this sense, they implement the principle of protecting animal welfare.

Seen in this light, their role is strictly instrumental. They serve the purpose of defining actions necessary to provide animals with the level of welfare that the lawmaker currently considers compatible with other legally relevant values and interests (such as economic considerations, traditions, and the needs of various social groups).

Such provisions tend to be relatively complex and diverse. Some of them take the form of general clauses, leaving it to the addressees to further assess what level of animal welfare may be legally achievable under the circumstances. In addition to such general clauses, the law of many countries contains specific regulations whose *ratio legis* is the direct setting of relatively strict standards for the implementation of the animal welfare principle. As examples, one may refer to European regulations on broiler chickens and minimum conditions for the keeping of animals used for entertainment, exhibition, film, and sports purposes.

When animals are subjected to experiments, the use of anaesthesia or analgesics is mandatory. Experimental research units should set up animal welfare advisory bodies, as well as follow specific regulations for the keeping of animals in experimental research institutions. All such regulations address *prima facie* technical, organisational, or procedural issues. However, they are, in fact, instrumentally subordinated to the principle of animal welfare protection.[5]

It is worth noting that the current form of such standards – both those provided for in national legislation and those in force at the European level – is the product of several decades of efforts of many international institutions, such as the Council of Europe (with its successive conventions), the European

5 J. Nowacki once referred to such provisions as morally quasi-indifferent, as they belong to a group of regulations which do not concern actions directly covered by the scope of recognised moral norms; however, when "one looks at this group of regulations as links in the chain of legal provisions, one can see their content-relatedness to one or another principle of the legal system – a principle not morally indifferent – and from this standpoint, such provisions are not morally indifferent" (J. Nowacki, *Problem moralnej indyferentności przepisów prawa pozytywnego*, in idem, *Studia z teorii prawa* (Kraków: Zakamycze, 2003), p. 193).

Commission, and the European Parliament. As a result, their content in the legislation of different European countries is largely harmonised.

5. Animal welfare and other legal values

The problem of a potential conflict of values embodied in simultaneously applicable legal principles is perhaps most evident in the case of provisions expressing the principle of animal welfare. It is, in a sense, inherent in the nature of legal principles and the role they play in the legal system. This role requires weighing up the significance of individual principles and their underlying values in specific circumstances and, in particular, searching for the possibility to reconcile the way and extent of their realisation on legally, ethically, and socially acceptable terms. This often means that only some or even none of the conflicting principles and values can be realised simultaneously to a fully satisfactory degree.

Such collisions may be resolved in two ways. This can be done by the lawmaker at the stage of drafting the provisions; such provisions are the result of weighing their relative significance in a way the lawmaker sees fit. In this case, principles are realised through provisions which specify the behaviour required by law, so the implementation of a principle is fully determined by the content of relevant provisions. They identify relatively precisely the extent to which a given value is to be realised, an extent which the lawmaker deemed appropriate and achievable in view of other values simultaneously realised by law. In other cases, however, the weighing of values necessary to resolve a conflict of legal principles must be carried out by law-applying institutions. This is the case when such collisions occur within the discretionary margin left to such institutions by law.

In the former scenario, debates over the appropriate balance between conflicting values and interests shift to the level of law-making and legislative discourse. A well-known example of this type of conflict between animal welfare on the one hand, and other values and legal principles protecting them, on the other, is the debate surrounding the planned ban on animal fur farming.

Introducing the ban would mean that the lawmaker gives precedence to the implementation of the animal welfare principle over the implementation of the principle of economic freedom. Rules setting minimum standards for the breeding, transport, and slaughter of animals are similar in nature. They set

(in a way that varies over time) the level of realisation of the animal welfare principle at the expense of other values and principles recognised in the legal order. The same mechanism can be seen in the debates over the prohibition or significant restriction on the freedom to hunt or the heated discussions over the prohibition or significant restriction on the ritual slaughter of animals (carried out without first stunning them).

When looking at such debates, it is important to see them as conflicts of legally grounded values and to avoid the demagogic interpretation of demands for change as merely "the destruction of agriculture" (ban on fur farming), "an attack on tradition" (ban on hunting), "a blow to Polish exports," "religious discrimination," or even "anti-Semitism" (ban on ritual slaughter). This rhetoric is based on the erroneous assumption that the side using it may claim the moral high ground, and that all demands coming from the opposite side are merely arbitrary, not based on any competing principles and values.

In fact, such debates represent a rather typical evolution of the legal order: a shift in the balance between conflicting values occurring as a consequence of changes in public morality and the social attitudes through which it is expressed. These transformations directly translate into the growing legal significance of the principle of animal welfare protection, entailing changes in the way of resolving conflicts with legal principles expressing different values, which have so far had a limiting effect on the position of the animal welfare principle.

Conflicts of principles may also be resolved at the level of law application. This applies to situations which fall within the discretionary margin or discretionary powers left to interpreters and courts. When seeking a resolution to such cases, it is necessary to take into account the principles of a given field of law (as well as the general legal principles relevant in a particular case). This is one of the main practical roles of legal principles: they guide decisions on matters in which other legal rules leave some degree of discretion (leeway).

This means that decisions made within the scope of discretion are not arbitrary; they must take into account the catalogue and hierarchy of values recognised by the lawmaker, as expressed in the general principles of a given branch of law and the legal system as a whole. In fact, the aptness of such decisions is assessed primarily from the point of view of these general principles and whatever can be reasonably justified on their grounds.

This applies not only to cases that fall within the discretionary margin left by legal rules, but to all cases where various solutions are *prima facie* possible

under the applicable law (also as a result of adopting one of the possible interpretations of a legal rule). In each such situation, the search for a legally accurate "right answer" requires a precise identification and meticulous weighing of the legal principles relevant to the case under consideration. In the context of animal law, the most important of these is the principle of the protection of animal welfare, which requires that this value be pursued to the fullest extent possible in view of the legal and factual circumstances of the case.

Restrictions on the implementation of the principle of animal welfare include primarily legal regulations prescribing or prohibiting certain actions or setting strict (and not merely minimum) standards for the treatment of animals. In addition, such restrictions may result from the need to simultaneously implement other legal principles, both those deriving from animal legislation (e.g., the principle of the protection of animal life) and others, such as the principle of economic freedom, freedom of religious practice, and freedom of scientific research.

The basic tool for resolving such conflicts is the so-called principle of proportionality.[6] According to it, the implementation of one principle may only be limited in favour of another principle that protects a legally grounded value. This should be done in a way that makes it possible for the principle whose implementation is limited to be realised to the maximum extent compatible with the realisation of the value which is given precedence in a given case. At the same time, it should be emphasised that the requirement of proportionality in resolving conflicts of principles should be observed both in the application of law and legislation (in particular in the enactment of sub-statutory rules and implementing provisions).

6 On the principle of proportionality, see, e.g., E. Evelyn (ed.), *Principle of Proportionality in the Laws of Europe* (Oxford: Hart Publishing, 1999). An extensive and insightful analysis of this principle from the point of view of legal theory and the philosophy of law has been carried out by P. Żak, *Zasada proporcjonalności i jej znaczenie w argumentacji Trybunału Konstytucyjnego* [The Principle of Proportionality and its Meaning in the Argumentation of the Constitutional Court] (Katowice, 2018; unpublished doctoral dissertation available at: http://integro.ciniba.edu.pl/integro/193006772087/zak-piotr/zasada-proporcjonalnosci-i-jej-znaczenie-w-argumentacji-trybunalu-konstytucyjnego?contrast=blackyellow).

CHAPTER 15

Principle of Special Protection for Animals Closer to Humans

1. Differentiation in the legal protection of animals

Current animal legislation is marked by a rather pronounced inequality in the treatment of animals. The level of protection is dependent not only on the species and the associated biological and psychological characteristics, but also on the type of exploitation to which individual animals are subjected. In fact, the latter determines to a large extent the type of animal-human relationship and the way in which it is perceived by humans.[1]

In many countries, the most common and typical manifestation of this differentiation is limiting legal protection to vertebrate animals and, in the field of animal experimentation, cephalopods. Thus, the lawmaker takes the view that humans owe a certain standard of legal protection only to selected animal species. The ethical foundation for this differentiation is the difference in the degree of development of neural structures. In the light of overwhelming scientific evidence, it enables the emergence of sentience in vertebrate animals, while in the vast majority of invertebrate species, the development of sentience is unlikely.

However, even among regulations on animals recognised as beings "capable of suffering," there are species-related differences leading to "privileges" that apply to selected animal groups. In this sense, all vertebrate animals are equal, but some are more equal than others. For cultural reasons, this kind of distinction applies especially to dogs and cats. In Polish law, the definition of animal abuse mentions dogs and cats in the examples provided – "the abandonment of an animal, *in particular* a dog or a cat [italics TP]," and the obligation to react appropriately when encountering "an abandoned dog or cat" – making no reference to any other animal species.

1 See K. Kuszlewicz, *Ustawa o ochronie zwierząt. Komentarz* (Warszawa: Wolters Kluwer, 2021), p. 52.

Polish law also provides for specific restrictions on breeding and marketing of dogs and cats. In the case of these two species, it prohibits their sale and purchase outside the place of breeding, as well as their breeding for commercial purposes. Dogs are additionally singled out in that they are among the three species (along with bulls and roosters) explicitly mentioned in the provision prohibiting the organisation of events which contain elements of cruelty ("in particular" fights of dogs, bulls, and roosters). Free-living cats, in turn, are covered by the duty of care in a way established by the municipal programme for the care of homeless animals and prevention of animal homelessness.

A similar distinction is made in EU law, which contains a regulation that absolutely prohibits the import and marketing within the European Union of dog and cat pelts and products made from them.[2] The preamble to this regulation explicitly declares that its enactment stems from the fact that "[i]n the perception of EU citizens, cats and dogs are considered to be pet animals and therefore it is not acceptable to use their fur or products containing such fur" (Recital 1).

Interestingly, as the preamble openly states, the extension of this prohibition to all cats (including free-living cats and not only domestic ones) is solely in connection with the fact that "it is scientifically impossible to differentiate fur of domestic cats from fur of other non-domestic cat subspecies." As a result, although the lawmaker believes that "only fur of species of domestic cats and dogs should be covered by this Regulation," the ban applies to "cat as *felis silvestris*, which includes also non-domestic cat subspecies" (Recital 2). In this case, then, singling out dogs and cats as species is, as it were, a necessity, since there is no practical possibility to single out only domestic individuals.

Dogs and cats are also subject to special regulation in terms of their use for scientific or educational purposes. In the case of animals of these two species, as well as non-human primates, individual records have to be maintained covering the course of their entire lives, so that their care, keeping, and treatment are adapted to their individual needs and characteristics.

In the case of animals used for scientific or educational purposes, singling out great apes is even more noteworthy. Their use for experimentation or training is, in principle, prohibited. This stems from the lawmaker's belief that the

2 Regulation (EC) No 1523/2007 of the European Parliament and of the Council of 11 December 2007 banning the placing on the market and the import to, or export from, the Community of cat and dog fur, and products containing such fur (OJ L 343).

use of great apes – the species closest to humans, with the most advanced social and behavioural skills – should only be permitted in research aimed at the preservation of these species or countering the most serious threats to human life or health, provided that no other species and no alternative method can be used to achieve the goals of the procedure (Recital 18 of Directive 2010/63/EU).

There are two reasons for this kind of privileging of selected species. The first is our special emotional relationship with certain animals, which have been treated for centuries as the closest companions of humans. Thus, the ethical grounding for their special treatment may be a close relationship with human beings.[3] The other reason is the close evolutionary affinity with humans, justifying the special protection of non-human primates, in particular great apes.[4]

The importance of such ethical or cultural considerations is evident not only in Polish or European law, but also in other culturally distant legal traditions. A telling example can be found in the provisions of the Indian Constitution, which, while mandating every citizen to "have compassion for living creatures" (Article 51A), makes special reference to cows, calves, and dairy cattle. In a separate provision, it provides that, while ensuring that agriculture and animal husbandry are based on modern and scientific principles, the state "shall, in particular, take steps for preserving and improving the breeds, and prohibiting the slaughter, of cows and calves and other milch and draught cattle" (Article 48).

2. Pets

Irrespective of this kind of preference for individual species, a much deeper and, one may say, systemic differentiation is associated with the different legal treatment of animals depending on the type of exploitation to which they are

3 For more detail, see, e.g., Ch. Overall (ed.), *Pets and People. The Ethics of Companion Animals* (New York: Oxford University Press, 2017).

4 An interesting ethical question, however, is to what extent this differentiation in the level of protection of similar interests of animals of different species can be regarded as discrimination against those "less close" to humans and therefore less protected. In many respects, this may count as another manifestation of species chauvinism, where the relationship with or resemblance to the human being acts as the criterion for respecting the interests of the animal concerned. Indeed, from the perspective of an ethics based on sentience – and the interests to avoid suffering and fulfil basic needs that follow from sentience – the criterion of relationship with or evolutionary affinity to humans is largely irrelevant.

subjected. Also, animals of the same species but kept as pets or experimental, farm, or entertainment animals are, in principle, subject to different legal regulations. These often vary considerably in the level of protection or welfare afforded to animals of the same species.

Dereification and the consequent prohibition of the inhumane treatment of animals – primarily in the form of a prohibition of animal abuse and arbitrary killing – provide a common basis for the treatment of all vertebrate animals. However, specific normative consequences defining the real level of their legal protection vary according to the type of exploitation. This differentiation concerns the protection of both life and welfare.

Under the current state of law, the life of pets is subject to relatively extensive legal protection. Pets can only be killed for humanitarian reasons (that is, to prevent their inevitable suffering) or in a state of necessity (to remove an individual that poses a direct threat to humans or other animals if there is no other way of neutralising the threat).

Pets are also subject to specific requirements concerning the conditions in which they are kept and the treatment they receive. These include far-reaching restrictions on tethering and a general clause stating that they have to be provided with appropriate living conditions. This situation seems to result not only from the special emotional relationship between humans and pets, mentioned above, but also from a much greater public interest in their fate, which follows from this relationship. Arguably, in the case of this group of animals, there is a much better and more widespread understanding of the problems associated with their inhumane treatment. Also significant is the lack of organised lobbying by communities interested in maintaining the lowest possible standards of animal life and welfare protection, a sharp contrast with industrial breeding and slaughter of farm animals and the use of animals for entertainment and research purposes.

Interesting problems arise at the interface between different legal regimes, such as the protection of pets and experimental animals. This is because, in many cases, animals of the same species may be subject to various levels of protection depending on whether or not they were born as laboratory animals, that is, in a breeding farm registered as a supplier of animals for scientific or educational purposes. Even dogs and cats, let alone hamsters, mice, and rabbits, can be used in painful experiments as long as they have the status of experimental rather than companion animals.

A similar example may be the already mentioned situation in Polish law, which permitted hunters to shoot dogs and cats "wandering" in a hunting district. The lobbying of the (politically highly influential) hunting community, which supported this solution, collided with strong public opposition. As a result, this provision was replaced by the current wording, mandating the trapping of dogs and cats rather than their killing. At the same time, killing free-living animals ("game") – with similarly developed sentience – for entertainment remains legal and still enjoys sufficient public and political approval to effectively resist calls for the humanisation of the treatment of free-living forest animals.

3. Animals used for scientific and educational purposes

In the case of experimental animals, the level of implementation of the principle of life protection under Directive 2010/63/EU and the secondary legislation in member states is quite different. In fact, they may be killed for the purpose of harvesting their organs or tissues almost without restriction (provided that suitably "humane" methods are used). It is also permissible to kill an animal if this is part of an experiment, in particular, if in this way, it is spared additional suffering. An experiment in which an animal is rendered unconscious and is not woken up falls into the lowest category of "severity." It is thus subject to a relatively less rigorous ethical assessment.

By contrast, the principle of welfare protection is implemented relatively strictly with regard to the housing of experimental animals. On the other hand, in many cases, the procedures themselves involve causing severe suffering to the animals, including suffering which, outside the experimental context, would undoubtedly qualify as abuse with particular cruelty.

Thus, with regard to animals used for scientific or educational purposes, the principle of animal welfare protection is only implemented to a limited extent. The basic instruments for its implementation are the requirements of the 3Rs principle: replacement, reduction, and refinement. In addition, experimental research units, as well as institutions breeding or supplying experimental animals, are required to establish internal advisory bodies responsible for ensuring that animal welfare standards are observed in the day-to-day practice of the institution.

For these reasons, the debate over the true usefulness of animal experiments for humans is of particular importance, including, above all, the advancement of knowledge and therapeutic possibilities. The controversy has a long history and still continues with unabated intensity. Although the arguments put forward so far have not brought a definitive resolution, one cannot claim that they have not advanced the discussion in a way that brings it closer to the point where such a resolution is possible. Particularly useful in this respect have been more or less extensive systematic meta-analyses, which retrospectively verify the actual usefulness of animal studies for their extension to humans.[5] The results of such studies indicate a growing scepticism about the real benefits of animal experimentation as a form of pre-clinical research to develop new therapies and drugs for humans.

Notwithstanding this, when drafting and adopting current Directive 2010/63/EU in 2010, the legislative institutions of the European Union examined very carefully the problem of the legitimacy of conducting further research with animals. As a result, they took the position that "the use of live animals continues to be necessary to protect human and animal health and the environment" (Recital 10). At the same time, they made it clear that the Directive was "an important step towards achieving the final goal of full replacement of procedures on live animals for scientific and educational purposes as soon as it is scientifically possible to do so." This solution was intended as a compromise between the part of scientific community that conduct this type of research and the voice of the public and experts, who question the need and usefulness of such procedures.

At the same time, it should be borne in mind that the scientific community that participated in the drafting of this Directive included a significant proportion of institutions and researchers personally involved in conducting such experiments (who had often built their careers and scientific authority on animal experimentation). They thus represent the voice of a *lobby* rather

5 Examples of such studies include P. Perel et al., "Comparison of treatment effects between animal research and clinical trials. Systematic review," *British Medical Journal* 335 (2007), pp. 197–200; D. Hackman and D. Redelmaier, "Translation of evidence from animals to humans," *Journal of the American Medical Association* 296 (2006), pp. 1731f.; P. Pound et al., "Where is the evidence that animal research benefit humans?," *British Medical Journal* 328 (2004), pp. 514–517; J. Bailey, "Non-human primates in medical research and drug development: A critical review," *Biogenic Amines* 19 (2005), pp. 235–255.

than an impartial arbiter, able to objectively assess whether and to what extent the benefits of their own research justify the suffering and ethical costs it entails. In addition, empirical research suggests that the level of sensitivity to animal harm of those conducting this type of research is lower than that of the general population, which may be related to a tendency to adopt views and judgements that reduce the ethical dissonance associated with involvement in animal experimentation (and partly to a barrier against engaging in such experiments in the case of those whose relatively high ethical sensitivity would prevent them from doing so).[6]

Although the Directive has settled this dispute in favour of the necessity and usefulness of animal testing, the discussion is not concluded. On the contrary, the lawmaker has made it clear that efforts should be made to replace animal testing with alternative methods as soon as possible and to work towards expansion of the catalogue of such alternative procedures. For this reason, the solutions adopted in Directive 2010/63/EU and national regulations based on it should be – as the preamble declares – "reviewed regularly in light of evolving science and animal-protection measures." At the same time, the number of studies and arguments challenging the value of animal experiments for the advancement of human therapy continues to increase.[7]

Most significant for the future development of the discussion is changing its focus, so far dominated by arguments referring primarily to examples of individual animal-based discoveries that later proved useful in the therapy of humans. From a methodological point of view, however, such arguments usually constitute anecdotal evidence that proves nothing. They do not demonstrate that the discovery could not have been made without the participation of animals or that it would not have been made earlier if a different type of research had been carried out instead of animal experiments (e.g., with the participation of volunteers). Nor do they juxtapose such achievements with cases (far more numerous) where the results of animal research proved not only inapplicable to humans, but also misleading. Not infrequently, this has

6 See A. Arluke, "Trapped in a guilt cage," *New Scientist* 134 (1992), pp. 33f.; idem, "The ethical socialization of animal researchers," *Lab Animal* 23/6 (1994), pp. 30–35; A. Elżanowski, "Moralność naukowców eksperymentujących na zwierzętach," *Przegląd Filozoficzny*, Nowa Seria, 94/2 (2015), pp. 287f.

7 See, e.g., R. Barker and A. Björklund, "Animal models of Parkinson's disease: Are they useful or not?" *Journal of Parkinson's Disease* 10/4 (2020), pp. 1335–1342.

resulted in wasted time and effort on the part of researchers and, last but not least, in the pointless suffering of animals used in such research.[8]

Thus, it is not to be expected that this discussion will come to an end soon. Rather, it could be hoped that it will continue according to the methodological standards of evidence-based analysis instead of being peppered with historical examples (on the one hand, of diabetes treatment or organ transplants, and on the other, of the thalidomide affair and other spectacular scientific errors arising from the belief in the translational utility of animal research).[9]

4. Farm animals

The standards for the protection of animal life and welfare are also implemented to a very limited extent in the case of rules for the handling of farm animals. These are expressed in Regulation 1099/2009 and in provisions defining specific conditions for the keeping of farm animals. In general, they are provided with a much lower level of welfare (that is, of humane treatment that takes into account the needs of the animal) than pets and experimental animals. Among others, cage farming of hens and chickens remains legal (although the requirement to use so-called enriched cages has been introduced).

The low level of welfare requirements applies in particular to animals raised for fur. However, they are only an illustrative example of the general situation in so-called industrial animal husbandry, where reasons of animal welfare play

8 A. Björklund (who defends the use of animals in Parkinson's disease research) describes the role of animal experimentation in the development of stroke therapy in this way: "The experience from the stroke field is particularly disheartening. This is even more disturbing since, in this clinical condition the animal models seem as perfect as they can be: the ischemic insults used in the animal experiments are identical to the ones seen in patients and should thus have a high level of predictability. Nevertheless, there are many cases where an intervention with a striking and convincing treatment effect in stroke models has failed when applied to patients. These failures have not only been extremely costly for the industry but they have also been discouraging and fostered a cynical attitude towards the need of animal models for the development of new therapies: If the models are misleading and lack predictability, we will do better without them" (ibidem, p. 1337). One sometimes gets the impression that researchers defending animal models notice their uselessness in every area of medicine except the one in which they themselves are involved, and in which they personally conduct such experiments.

9 Cf. also T. Pietrzykowski, "Etyka badań na zwierzętach," in J. Różyńska and W. Chańska (eds.), *Bioetyka* (Warszawa: Wolters Kluwer, 2013), pp. 453f.

a negligible role due to the primacy of economic efficiency and the pressure of business communities that profit hugely from this practice.

Provisions defining specific conditions for keeping animals of different species vary in the standards they set. In the case of several species, the standards have been harmonised at the European Union level (calves,[10] pigs,[11] laying hens,[12] and chickens reared for meat[13]). In other cases, harmonisation is rough and based on a few general clauses.[14]

It is worth noting that provisions of Polish law prohibit the fattening of geese and ducks for fatty livers and the housing of calves in individual pens.[15] Apart from these specific provisions, other animal species remain, in principle, covered only by general regulations prohibiting abuse and the provision of ensuring "appropriate" living conditions for farm animals. This situation of animals raised under industrial farming conditions is very far from whatever could be described as animal welfare.

Industrial animal farming is arguably this area of animal exploitation where both principles of the protection of animal life and the protection of welfare are realised to the smallest extent due to their collision with human interests. However, since we are talking about animals with comparably developed sentient capacities, there are no rational reasons or sufficient grounds for "appropriate" living conditions being so drastically worse in their case than in the case of other animals (including animals bred in small farms rather than in industrial conditions).

10 Council Directive 2008/119/EC of 18 December 2008 laying down minimum standards for the protection of calves (OJ L 10/7).

11 Council Directive 2001/88/EC of 23 October 2001 amending Directive 91/630/EEC laying down minimum standards for the protection of pigs (OJ L 316/01).

12 Council Directive 1999/74/EC of 19 July 1999 laying down minimum standards for the protection of laying hens (OJ L 203/99).

13 Council Directive 2007/43/EC of 28 June 2007 laying down minimum rules for the protection of chickens kept for meat production (OJ L 182/19).

14 Council Directive 98/58/EC of 20 July 1998 concerning the protection of animals kept for farming purposes (OJ L 221/98).

15 The provision that prohibits housing calves older than eight weeks in separate pens and the exclusion of its application to holdings with fewer than six calves overlap with the regulations of Directive 2008/119/EC.

The protection of the welfare of farm animals is also reflected in the regulations governing their transport. These are established by Regulation 1/2005, which applies specifically to farm animals. However, a large part of its provisions (apart from the general clause) do not apply to, among others, the transport of own animals by farmers using their own means of transport over relatively short distances, or to the transport of animals for non-commercial purposes. The transport of pets is standardised only in terms of health requirements and only for international transport. On the national scale, it is subject to general regulations prohibiting animal abuse.

5. Animals used for entertainment and free-living animals

Current law generally addresses the protection of the life and welfare of animals used for entertainment and sports in a rather limited way. Relatively the most comprehensive regulation concerns animals kept in zoos. The standards for their maintenance are, at a very elementary level, harmonised by a 1999 European Union directive.[16] However, the conditions set out in this regulation must be viewed with sharp criticism, both in terms of the implementation of the welfare principle and compliance with EU law.[17]

In addition to these provisions, animals used for entertainment and sports purposes are usually covered by fairly general regulations of national law, which prohibit putting their life and health at risk and causing suffering. In Poland, the assessment of compliance with this requirement is entrusted to the Chief Veterinary Officer, who approves programmes or scripts of performances and events with animals used for entertainment, show, film, sports, and special purposes.

With regard to the humane protection of free-living animals, legal regulations remain extremely modest both in EU law and in the national laws of member states. In Poland, they amount to general prohibitions on the abuse of all vertebrate animals as well as restrictions on their use for scientific or educational purposes. This leads to serious gaps in the practical implementation

16 Council Directive 1999/22/EC of 29 March 1999 relating to the keeping of wild animals in zoos (OJ L 94 of 1999).

17 For more detail, see T. Gardocka, A. Gruszczyńska, R. Maślak, and A. Sergiel (eds.), *Dobrostan zwierząt w ogrodach zoologicznych a standardy prawne UE* (Warszawa: Elipsa, 2014), pp. 75f.

of the principles of the protection of the life and welfare of free-living animals. This is particularly the case with legal solutions to their inevitable contacts with humans in urban areas (car accidents of forest animals, destruction of bird nests occasioned by construction projects, extermination of wild boars, etc.).

A special case of deficiency in the implementation of the principles of the protection of the life and welfare of free-living animals is the regulation on hunting and so-called hunting management. Polish law allows intervention in the natural forest ecosystem in the form of feeding. This leads to an artificial overpopulation of a given species, which then needs to be "balanced" by shooting the surplus animals.[18] Both the hunting and killing of animals (generally first wounded and then, after pursuit, slaughtered) involve extremely inhumane treatment of hunted animals, leading to an escalation of stress, fear, and pain.

This shows that in the case of free-living animals, the implementation of the principles of the protection of life and welfare is at a grossly low level, even against the backdrop of the generally low level of implementation in other areas of animal exploitation. The killing of animals is in fact allowed for the pleasure of those who derive enjoyment and satisfaction from inflicting death. In addition, the way in which animals are killed in hunting can in no way be considered humane. In most cases, it is not a quick and painless death from one shot, but a result of a chase after a shot and terrified animal, associated with extreme forms of stress and pain. Hence, opinions that point to a profound axiological inconsistency between hunting regulations and the rest of current animal law are definitely justified.

18 Cf., e.g., Ł. Smaga, *Ochrona humanitarna zwierząt* (Białystok: Eko Press, 2010), p. 252.

CHAPTER 16

Principle of Double Responsibility

1. Individual liability for the animal

An interesting and not immediately obvious feature of legal regulations for the protection of animals is the way in which they distribute responsibility for the proper treatment of animals. They make it clear that this responsibility is borne by individual carers ("owners") of animals and, collectively, by the community or society which benefits from the practices of animal exploitation.[1] At the latter level, some obligations belong, in principle, to relevant state authorities and services. However, they are to a large extent shared with social organisations, professional (veterinary) authorities, expert bodies, and local administration.

In this area, civil society institutions play a role much broader in scope than in other, more typical areas of legal regulation. They act as a subsidiary regulator and perform important tasks in terms of advice, education, and the shaping of public policy on animal protection. This two-tier responsibility for how the protection of animal life and welfare is implemented not only marks the norms of Polish animal law, but is a typical feature of legislation at least at the European level.

Still, in the first place, law imposes duties and limitations on the person who has authority over an animal and controls its life (as its dependent or independent owner). The scope of this responsibility is, in principle, independent of legal title to the animal. Legal title is not required for such duties and limitations to arise and for the person to bear responsibility for compliance with them. It can be said that these duties "accompany" the animal with every change in its situation, that is, with every change of the *de facto* guardian.

1 This is explicitly stated in the title of Chapter II of the Peruvian law on the protection of animals: "Deberes de las Personas y del Estado" (ley nº 30407 De protección de los animales, capitulo II).

There are two types of individual responsibility. The first is liability for the way the animal is treated and, in particular, for any harm caused to the animal. This type of liability is primarily criminal and, to some extent, administrative. The second type of responsibility is civil liability for the animal. It is concerned with any damage caused by the animal to third parties. Liability for an animal can therefore be understood as responsibility for the proper treatment of the animal or for any damage caused by the animal to other persons (including their property and animals).

This distinction is additionally amplified by the difference between criminal and civil liability. Criminal liability is primarily based on norms criminalising the unlawful killing or abuse of an animal. In principle, this kind of liability is independent of legal title to the animal. The perpetrator may hold it (be the "owner"), act as a *de facto* guardian, or be a third party.

Of course, if the victim of the act is an animal belonging to someone else, the perpetrator may also be liable to that person for property damage (if any) and for the infringement of his or her personal rights, presumably in the form of damage to his or her emotional wellbeing, affected by the harm caused to an animal with which he or she has an emotional bond.

An interesting but less frequently discussed aspect of criminal liability for harm to an animal is the possible responsibility of an animal keeper for allowing a third party to harm an animal (by remaining passive despite knowing that the perpetrator intends to commit or commits an act of harm). This includes, first and foremost, liability for abuse in the form of knowingly allowing pain or suffering to be inflicted on an animal. However, such responsibility can be incurred primarily where the animal keeper acts with direct intent (*dolus directus*), that is, where he or she wants the animal to suffer or is indifferent to the fate of the animal in his or her care. In other words, it arises in cases where his or her passivity results from deliberate acquiescence to the animal being abused by someone else.

For this form of abuse to be committed, it is sufficient for the animal's guardian to be aware that the direct perpetrator at least intends to carry out an act of abuse (e.g., to hit or injure the animal, to keep it in inappropriate living conditions, to abandon it, etc.). Failure to make reasonable efforts to prevent this action by the direct offender may constitute a breach by the animal guardian of his or her duty to provide care and protection to the animal.

It is also clear that this kind of liability can only come into play if the passive accomplice is found guilty. It is not the case that every person has an individual duty of care towards every animal. This is why the offence of abuse committed by failing to protect an animal from abuse by another person can only be ascertained where the person concerned has a specific duty to take action, that is, where the person is legally obliged to provide care and protection to the animal. This includes, in particular, the "owner" of the animal or the person having custody of the animal under another legal title. Such liability may also apply to a public official who, in breach of his or her duty, neglects or wrongfully refuses to prevent another person from mistreating an animal.

Neglect can also be a form of abuse involving a failure to take other actions necessary to satisfy the needs of the animal dependent on the perpetrator, such as failure to provide food, water, or assistance. In this case, the offender wilfully allows the animal to suffer without the intermediary of another person taking action to harm the animal.

Again, for considering the offender's act as an omission, it must be possible to assign to him or her the obligation to provide the animal with care and protection. However, it is not the case that this obligation can only arise from legal title to the animal. Factual circumstances may be fully sufficient to recognise the perpetrator as a person who – *per facta concludentia*, so to speak – has created a situation of controlling the life of the animal, now dependent on him or her, and in this way has given rise to the associated obligation and liability for failure to comply with it.

In principle, a person who keeps or handles an animal also bears civil liability for damage caused by it. This refers to the actual keeper: one with legal title or the actual or temporary guardian of the animal. Generally, law also allows for civil liability for an animal despite the carer not having actual control over it (as with animals which have strayed or escaped, or have been entrusted to a person for whom the carer is responsible, e.g., a child or employee).

Civil liability for damage caused by an animal is therefore incumbent on its guardian (the person who "keeps" the animal), while criminal and civil liability for damage caused to an animal is universal and may be incurred by both the person who is in charge of the animal and a third party who causes harm to it against the will of its guardian. In the latter case, harm to the animal's welfare may at the same time cause damage to the tangible or intangible assets of the person with legal title to it or of another person who is emotionally connected to the animal.

2. Collective (social) responsibility

In addition to the individual responsibility for an animal on the part of its keeper (owner), current animal law also imposes a number of duties and tasks related to the protection of animal life and welfare on various types of public and social institutions. These go considerably beyond the duties of law enforcement that are incumbent on one authority or another in any area of legal regulation. Their scope and nature demonstrate that there is also a collective, shared responsibility for the protection of animal life and welfare, which provides the *ratio legis* for a number of norms and institutions specific to animal law.

As already discussed in more detail (Chapter 11), in Poland, the institution responsible for the enforcement of the provisions of animal law is the Veterinary Inspection. In addition, important tasks with regard to the drafting, application, and enforcement of animal law are entrusted to the authorities of local self-governments, in particular municipal authorities, as well as the ministers responsible for science, education, and agriculture. At the same time, administrative bodies are legally obliged to cooperate in these tasks with the medical-veterinary self-government, as well as other institutions and social organisations.

Similar obligations to cooperate with social organisations are also included in many other European laws, such as the Animal Welfare Act in Germany and in Portugal.[2] In many countries, law institutionalises this cooperation in a variety of ways. Most often, it does so by sanctioning the role of nationwide committees made up of representatives of social organisations or independent experts, whose task is to supervise and advise the state authorities in forming and carrying out public policy on animal protection (or its specific area). Such solutions exist, among others, in Latvia,[3] Austria,[4] Croatia,[5] and France.[6]

2 § 42 A TierSchG (2006, BGBl. I S. 1206); Art. 10 Protecção aos animais (Lei 92/1995; I Serie-A. No 211/95).

3 Sec. 9 Lietuvos Respublikos gyvūnų globos, laikymo ir naudojimo įstatymo pakeitimo įstatymas (Valstybės žinios, 2012-10-20, Nr. 122-6126).

4 § 42 A TierSchG (BGBl. I Nr. 118/2004).

5 § 70 Zakon o zaštiti životinja (Zakon, NN 102/2017-2342).

6 Art. R. 214–130 Décret n° 2013-118 du 1er février 2013 relatif à la protection des animaux utilisés à des fins scientifiques (JORF du 7.2.2013, texte Nr. 24, Law Nr. 0032).

In Poland – as in, for instance, Croatia or Greece – animal protection NGOs are involved in the implementation of animal protection tasks at the local level. In Poland, this cooperation takes the form of obligatory consultations concerning the annual plan for the care of homeless animals and prevention of animal homelessness as well as participation of representatives of social organisations in local ethics committees for animal experimentation.[7] However, by far the most significant and original solution that Polish law offers for such cooperation is the empowerment of social organisations to intervene and take an animal away. Social organisations may also exercise the rights of an aggrieved party in proceedings for crimes or offences affecting the life and welfare of animals.

A very important legal solution in the implementation of the principle of double responsibility for animal welfare is the institution of animal welfare advisory panels (animal welfare bodies). These must be established in every institution that uses animals for scientific or educational purposes. Their tasks include advising on animal welfare, finding new carers for animals, monitoring the welfare of animals in the establishment, conducting internal inspection, organising appropriate training, and proposing remedial action. Such activities are intended to contribute to building and reinforcing an internal "culture of care" for the welfare of animals in each institution where they are housed and used for scientific and educational purposes.

Although animal welfare bodies are internal expert panels, the effect of their activities in implementing the principles of the protection of animal life and welfare is subject to external scrutiny and supervision by ethics committees and relevant inspection services. In Poland, this task currently rests with the Veterinary Inspection. Representatives of social organisations sit on ethics committees, and the Veterinary Inspection is obliged to cooperate both with the committees and directly with social organisations. The ethics committees supervise the design of experimental procedures and verify their acceptability. The Veterinary Inspection is responsible for supervising the conditions in which animals are kept in the centre and the compliance of actual experimental procedures with the plan approved by the ethics committee.

7 In Poland, see Article.11a(7) of the PAPA and Article. 37 of the PAPA-SP. Cf. in Croatia, § 65 and § 70 Zakon o zaštiti životinja; in Greece, Article 9 § 2 Για τα δεσποζό μ ενα και τα αδέσποτα ζώα συντροφιάς και την Προστασία των ζώων από την εκ με τάλλευση ή τη χρησι μ οποίηση με κερδοσκοπικό σκοπό (Νόμος 4039/2012).

These legal solutions very clearly demonstrate the distribution of responsibility for protecting the life and welfare of experimental animals. On the one hand, it is incumbent on the institution that keeps and uses animals for experimental purposes. This institution has relatively strict duties with respect to the establishment and operation of animal welfare bodies and the appointment of persons to deal with matters related to the proper treatment of experimental animals. On the other hand, these activities are supervised by both public institutions and representatives of civil society, who participate in ethics committees and interact with the Veterinary Inspection and other relevant administrative and control services.

In addition, a characteristic feature of animal legislation – and a manifestation of the principle of the protection of animal life and welfare – is the obligation to set up national advisory bodies (national committees) to support the state institutions in their tasks of developing and applying legislation to ensure the most effective protection of animals.

With regard to the protection of experimental animals, this requirement arises from the provision of Article 49 of Directive 2010/63/EU. National committees are to "give advice to the competent authorities and animal-welfare bodies in order to promote the principles of replacement, reduction and refinement" (Recital 48 of the preamble). Under Polish law, this role is performed by the National Ethics Committee for Animal Experiments. As required by the above-cited provision of Directive 2010/63/EU, its counterparts exist in all EU member states, although their composition, names, and areas of competence vary.[8]

Laws of many countries additionally provide for the institution of national advisory council, whose tasks go well beyond the protection of animals used for scientific and educational purposes. Providing advice and support in relation to general animal protection policy, such councils have been established in, among others, the UK, Austria, Malta, Croatia, the Czech Republic, Norway, Denmark, Finland, the Netherlands, and Sweden.[9]

8 Basic information about national councils is available at: https://ec.europa.eu/environment/chemicals/lab_animals/nc_en.htm.

9 For more detail on the national committees, see, e.g., the website of the European Forum of Animal Welfare Councils: http://www.eurofawc.com.

3. Public education

Many provisions impose on public institutions specific public education tasks connected with the protection and proper treatment of animals. Under the PAPA, such duties lie primarily with the minister responsible for education, who should include problems of animal protection in the core curriculum of general education. This task, however, is carried out to a rather limited extent.

The core curriculum includes content such as understanding the feelings of animals – mentioned among skills that are part of emotional development – and knowledge of the principles of caring for pets, farm animals, and other animals. In addition, the ethics curriculum addresses such questions as why animals should not be treated cruelly and provides examples of proper treatment of animals.

Knowledge of animal protection regulations is also to be disseminated among farmers. This is the task of the regional government, carried out through agricultural advisory centres. The content of these programmes and the reports on their implementation show that they often include selected aspects of ethics, the formation of social attitudes, and the role played in this field by social organisations.

Certain educational tasks are also fulfilled by national committees, such as the Polish National Ethics Committee for Animal Experiments. These include preparing and presenting opinions, decisions, guidelines, and good practices to improve the standards of protection of the life and health of animals used for scientific and educational purposes. In addition, the national ethics committee is also required to disseminate knowledge about alternative methods and promote their use in research practice. In carrying out these tasks, the national committee has developed and set forth good practices concerning, for example, anaesthesia and analgesia for small animals, ways of performing euthanasia, and oncological procedures.

The educational and informational aspect of the responsibility of public institutions for animal protection standards is also emphasised in European legislation. References to the role of training and advisory activities and related responsibilities of relevant public institutions appear regularly in normative

acts and other documents of the European Union.[10] In a similar vein, educational and counselling tasks are also imposed on public institutions by a number of applicable acts in various European countries. According to the Austrian Animal Welfare Act, federal, regional, and local authorities are obliged to develop and deepen the understanding by the general public, especially young people, of the need for animal protection, and – to the extent permitted by budgetary considerations – to promote and support animal-friendly systems of animal husbandry and research with animals, as well as all other areas of animal protection.[11]

In contrast, Swiss law prescribes that various federal authorities promote education and training of persons who handle animals and "ensure that the public are informed about animal welfare issues."[12] Similar provisions of Bulgarian law stipulate that executive authorities and local authorities, together with NGOs, should develop and implement educational programmes on the protection of animals and on the ways of their keeping, breeding, using, and marketing in accordance with the law.[13] Even more extensive obligations are imposed by Greek law, including the organisation of training seminars for persons who handle animals as well as lectures, seminars, and other similar events in kindergartens and schools in order to raise awareness of the duty to care for animals.[14]

Portuguese law also entrusts public authorities with the task to provide citizens with advice on reducing the unplanned breeding of dogs and cats and promoting their sterilisation when advisable, and to "encourage persons encountering stray or abandoned dogs or cats to notify relevant local services."[15]

10 See, e.g., Recitals 28 and 52 of Regulation (EC) No 1099/2009; Recital 14 of Regulation (EC) No 1/2005; cf. also Overview Report on Education Activities for Farm, Transport and Slaughterhouse Staff on Animal Welfare (DG(Sante) 2016-6001 – MR).

11 § 4 A TierSchG.

12 Art. 5 S TierSchG.

13 Art. 2 Закон за защита на животните (Bulgarian Animal Welfare Act) (2008).

14 Art. 18 Για τα δεσποζό μ ενα και τα αδέσποτα ζώα συντροφιάς και την Προστασία των ζώων από την εκ με τάλλευση ή τη χρησι μ οποίηση με κερδοσκοπικό σκοπό (Greek Animal Welfare Act), Nomos 15 of 2.2.2012, Law No. 4039.

15 Art. 6 Protecção aos animais, J. L. 211/1995, Law Nr. 92/95.

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Thus, in the light of animal law, we can speak of two main levels of responsibility for animals and their situation. One is the individual responsibility of a person exercising control (authority) over an animal. Civil and criminal liability may come into play here. Criminal liability for harm caused to an animal is also universal in nature, that is, it is borne by anyone who commits a criminal act towards an animal, regardless of whether and what kind of relationship exists between the offender and the animal.

The second level of responsibility for animals is the shared, collective responsibility for fulfilling the obligations imposed by law to ensure the proper treatment of animals. These are incumbent on a number of public institutions, which are obliged to cooperate to the greatest possible extent with social organisations, viewed as emanations of civil society. The scope of this responsibility is both to lay down and apply rules that give tangible expression to the statutory principles, and to contribute to public policy on the proper protection of the interests of animals by local and central authorities. An additional dimension of the community's responsibility for the situation of animals is the duty of public education both to disseminate knowledge about animal sentience and to develop attitudes that take this knowledge into account.

CHAPTER 17

Principle of Relative Respect for the Economic and Cultural *Rationale* behind Animal Exploitation

1. Values limiting the protection of animal life and welfare

At first sight, including respect for the economic and cultural rationale behind animal exploitation among the principles of animal law may seem surprising. However, the lawmaker's consideration of such arguments and values is clearly visible in the current provisions of animal law. This principle operates, as it were, in opposition to the principles of the protection of animal life and welfare, and its impact is strong enough to form the basis for far-reaching restrictions on the implementation of other principles of animal law. It is also the basis for a number of exceptions and exemptions from the principles of the protection of animal life and welfare under the current legislation.

It can be said that if the lawmaker had not sought to realise the principle under discussion and the values it protects, the protection of animal life and welfare would be absolute and unlimited. Still, it is obvious from the content of the applicable norms that the protection of animal life and welfare is subject to far-reaching restrictions. This demonstrates that the lawmaker also respects values that are, as it were, incompatible with the goods of animal life and welfare.

According to the lawmaker's understanding expressed in current law, there are values in the name of which further exploitation of animals is justified. In other words, they counterbalance the values of animal life and welfare recognised by the lawmaker as legal goods deserving protection. Both animal legislation and, to a large extent, its application are an area of competition between these opposing values and the legal principles that realise them. Neither side can be granted general, absolute primacy; in every case, the principles of the protection of animal life and welfare provide grounds for (at least) limiting the freedom and scope of the realisation of human interests and values which justify sanctioned forms of animal exploitation.

The principle of respect for the economic and cultural rationale behind the exploitation of animals manifests in current legislation in at least three ways. Firstly, it is reflected in *expressis verbis* references to aims, practices, and ways of treating animals which are permissible in spite of the fact that they inevitably involve various types of suffering inflicted on animals by humans. Secondly, it is present implicitly in applicable rules in the form of presuppositions, without acceptance of which the presence and content of the rules would be incomprehensible. Thirdly and finally, it is reflected in the way in which such presuppositions are accepted as legally and culturally self-evident, as a "natural" boundary to the understanding and application of the current provisions that protect the life and welfare of animals.

2. Direct references to values that limit animal protection

The first type of manifestation of this principle includes provisions which explicitly state exceptions or limitations to the implementation of other animal protection principles on the grounds of values that collide with them. Article 13 of the TFEU is a prime example of such a provision.

On the one hand, it prescribes that the Union and its member states "shall, since animals are sentient beings, pay full regard to the welfare requirements of animals." On the other hand, respect for these requirements is to be realised withing the framework of animal exploitation, in accordance with the needs of "the Union's agriculture, fisheries, transport, internal market, research and technological development and space policies." In addition, Article 13 of the TFEU makes it explicitly clear that the protection of animal welfare should be accompanied by respect for "the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage."

Similar references can be found in a number of other EU normative acts on animal protection. One such example is Recital 5 of the preamble to the Directive laying down minimum standards for the protection of pigs.[1] It declares that "[t]he keeping of pigs is an integral part of agriculture. It constitutes a source of revenue for part of the agricultural population." As a result, the provisions

1 Council Directive 2008/120/EC of 18 December 2008 laying down minimum standards for the protection of pigs (OJ L 47/5).

envisioned in the Directive are designed to maintain such welfare standards as are compatible with the realisation of economic and cultural values which the lawmaker associates with the use of pigs in agricultural practice.

Recital 9 of the preamble to the EU Directive laying down minimum standards for the protection of laying hens expresses this idea even more clearly.[2] It explicitly refers to the need for a balance between the various aspects to be taken into account, such as welfare and health, economic and social considerations, as well as environmental impact. A similar reference is made in the Directive laying down minimum rules for the protection of chickens kept for meat.[3]

In Polish legislation, an example of this type of regulation is the provision that excludes the prohibition on killing animals in the case of slaughter for the purpose of obtaining meat and pelts. In this way, the economic goal of obtaining and trading in meat and skins of animals serves as a rationale for maintaining the legality of animal killing, despite the fact that, at the same time, animal life has the status of a legally protected good, covered by a number of different provisions. An exception of the same kind extends to fishing in accordance with fishing and inland fishing regulations, including non-commercial amateur fishing, and to many other circumstances.

Direct references to established practices and methods of exploitation that do not constitute "inhumane" treatment of animals within the meaning of the Act also occur in the legislation of other European countries. A prominent example is Article 11 of the Irish Animal Health and Welfare Act, which provides that the use of animals for purposes covered by separate legislation, fishing, lawfully conducted hunting, and a hare cull is not an act of cruelty to animals.[4]

Another example from Polish law is the provision allowing the "acquisition" of animals for the purpose of preparing their carcasses and creating taxidermic collections. This requires the consent of the local authorities and has been restricted to specific purposes. However, the very fact that law allows the "harvesting" of animals for this purpose reflects the primacy of values which, in this case, the lawmaker places above the value of animal life.

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2 Council Directive 1999/74/EC of 19 July 1999 laying down minimum standards for the protection of laying hens (OJ L 203 03/08/1999, p. 0053–0057).

3 Council Directive 2007/43/EC of 28 June 2007 laying down minimum rules for the protection of chickens kept for meat production (OJ L 182, 12.7.2007, p. 19–28).

4 Animal Health and Welfare Act 2013 (ISB, No 15 of 2013).

Council Regulation (EC) 1099/2009 also includes a provision that is a telling manifestation of the principle under discussion. It establishes an exemption from the obligation to stun livestock before slaughter in order to respect religious beliefs and practices which may require animals to be killed while fully conscious (so-called ritual slaughter in Judaism and Islam). This exception is provided for in Article 4(4) of the Regulation. It states that "[i]n the case of animals subject to particular methods of slaughter prescribed by religious rites, the requirements of paragraph 1 [stunning; TP] shall not apply provided that the slaughter takes place in a slaughterhouse." Respect for religious beliefs and the resulting religious practices is thus considered by the European lawmaker as a sufficiently weighty reason to substantially limit the principle of the protection of animal welfare at slaughter.

3. Values justifying animal exploitation as presuppositions of animal legislation

In the principle under discussion, values that take the form of presuppositions of provisions for the animal protection play a much more important role than those explicitly referred to in legislation. They are not directly expressed in the text of the provisions, but without taking them into consideration, the content of the regulations would be difficult to explain rationally.

Such provisions include, for example, the PAPA provision stating that "whoever keeps livestock is obliged to provide the animals with care and proper housing." The protasis of this regulation ("whoever keeps livestock") is based on ontological presuppositions according to which there are entities that keep livestock and animals that qualify as "livestock" (kept, as it were, for breeding purposes).

The disposition of this norm is regulatory. By imposing certain obligations on the subjects, the provision presupposes the axiological and normative permissibility of "keeping livestock," provided that certain conditions are met. It is therefore based on a positive normative presupposition. Otherwise, it would be nonsense to specify a legally permissible course of action by those meeting the set conditions. This would imply that, according to the lawmaker, the keeping of livestock is forbidden and, at the same time, the person who keeps livestock is obliged to do so in the way provided for by the provisions laid down by the lawmaker.

Similar presuppositions underlie a number of other PAPA provisions. One of them, for example, is the regulation concerning pets. It stipulates that "whoever keeps a pet animal" is obliged to comply with various prescriptions and prohibitions provided for in this and subsequent provisions of the PAPA. Another example is the norm according to which the way and conditions of using animals for work must not pose an unreasonable risk to their life and health or inflict suffering on them. It is clear that this provision would make no sense if it were not based on a positive normative presupposition, that is, the *per se* permissibility of the use of animals by humans to perform work for them. The same conclusion applies to the use of animals for scientific or educational purposes, the transport of animals (including long-term and long-distance transport), etc.

An interesting presupposition can be found in the provision stating that only animals born and raised in captivity may be used for training and shows for entertainment purposes. A similar solution is provided for in the PAPA-SP, according to which, in principle, only animals that have been bred for research purposes can be used in scientific experiments.

These presuppositions are both normative and axiological in nature. They demonstrate that the lawmaker considers a certain type of animal use as acceptable. At the same time, in the lawmaker's judgment, it is preferable that animals of a certain type or origin should be used for a certain type of purpose. This means that the lawmaker approves of and allows the situation where animals are "born and bred in captivity" or bred strictly for the purpose of providing animals for scientific experiments. Irrespective of the extent to which the axiological and normative reasons recognised by the lawmaker are evident in the content of such provisions, there is no doubt that the presuppositions on which these provisions are based are complex and diverse in nature.

The economic and cultural reasons accepted by the lawmaker to justify the continuation of animal exploitation are also implicitly present in many other provisions of animal law. They can be seen in the presuppositions underlying regulations on, among others, the use of animals for sports purposes (such as, for example, horse-riding or pigeon racing) and the operation of zoos, the maintenance of which can only to a marginal extent be rationally justified on the grounds of the protection of nature, including endangered species.

4. Primacy of the protection of animal life and welfare

In addition to provisions based on respect for values opposed to the protection of animal life and welfare (such as personal freedom, freedom of economic activity, freedom of religious practice, and freedom of scientific research), one can identify provisions establishing exceptions to them, giving primacy to the life or welfare of animals. Thus, if restrictions on the implementation of the principles of the protection of the life and welfare of animals are treated as exceptions prioritising other values, these provisions constitute "exceptions to exceptions," in this way restoring the applicability of the general principles of the protection of animals.

An example of such a regulation in EU law is the ban on the import and marketing of dog and cat fur. It is clear that, under EU legislation, the principles of the protection of animal life and welfare suffer a far-reaching restriction in favour of the permissibility of further exploitation of animals for the purpose of using their skins. In this respect, other values take precedence over the values of animal life and welfare. The provisions of Regulation 1099/2009 are based exactly on this presupposition. Indeed, Article 1 of the Regulation stipulates that its provisions are intended to regulate "the killing of animals bred or kept for the production of food, wool, skin, fur or other products."

Although the principle of the protection of animal welfare may to a certain extent limit legitimate ways of treating animals in breeding, transport, and slaughter, it is clear that law is still based on the general primacy of values that justify the permissibility of the production of and trade in animal skins. However, in the case of dogs and cats, the EU lawmaker has derogated from the permission, giving priority to the principles of protecting the life and welfare of animals of these two species.

Article 1 of Regulation (EC) 1523/2007 declares that its purpose is "to ban the placing on the market and the import to, or export from, the Community of cat and dog fur, and products containing such fur in order to eliminate obstacles to the functioning of the internal market and to restore consumer confidence in the fact that the fur products which consumers buy do not contain cat and dog fur."[5]

5 Regulation (EC) No 1523/2007 of the European Parliament and of the Council of 11 December 2007 banning the placing on the market and the import to, or export from, the Community of cat and dog fur, and products containing such fur (OJ L 343, 27.12.2007).

Interestingly, the lawmaker explicitly acknowledges that in this case, the primacy of these values is due to the close relations of the animals of these two species with humans. Quite straightforwardly, this perspective is grounded in relational ethics, mentioned in the previous chapters, as it identifies the source of special ethical duties towards other beings with the relationships humans have with them.

This conclusion is reinforced by the declaration, contained in Recital 2, that the Regulation should only cover "fur of species of domestic cats and dogs." It is only because it is impossible to distinguish between skins of domestic and non-domestic cats that the lawmaker has extended special protection to all animals of this species, including those which are not in close contact with humans. The exception to the permissibility of the exploitation of animals for the purpose of leather production (and thus to the primacy of the values realised by this activity) is therefore due to the "closeness" of a certain group of animals to humans, understood as the ability and practice of establishing close and emotional bonds.

The ban on travelling menageries in Polish law can be interpreted in a similar way. It is an exception to the permissibility of using animals for entertainment and display in zoos and various exhibitions. This, in turn, is itself an exception to the principle of the protection of animal welfare, which is inevitably violated (albeit to varying degrees) by keeping and using animals for such purposes.

The ethical basis for this derogation, however, seems to be the trivial, superfluous purpose of this form of animal exploitation rather than a special relationship to the exploited animals. Thus, the similarity with the previous example lies in the nature of this provision as a derogation from the exception prioritising values opposed to the protection of animals. The point of contrast, in turn, is the axiological rationale that has led the lawmaker to restore the primacy of the principles of protecting the life and welfare of animals over the freedoms of people interested in certain types of animal exploitation.

Similar cases can be found in law on the use of animals for scientific purposes. It contains an absolute prohibition on experimental procedures on animals if they "result in severe pain, suffering or distress, which is likely to be long-lasting and cannot be ameliorated." This provision introduces an exception to the general acceptability of inflicting suffering on animals in the name of the freedom of scientific research, the pursuit of scientific progress, the quality

of education, and the safety of newly introduced products and substances. It is, therefore, an exception to the exception: it restores the general applicability of the principle of the protection of animal welfare, even in the case of procedures that could serve scientific or educational purposes.

In this case, the axiological justification is of yet another kind. It does not concern the special relationship between the animals and humans or the trivial purposes that underlie some forms of exploitation. Instead, it is founded on the belief that "[f]rom an ethical standpoint, there should be an upper limit of pain, suffering and distress above which animals should not be subjected in scientific procedures. To that end, the performance of procedures that result in severe pain, suffering or distress, which is likely to be long-lasting and cannot be ameliorated, should be prohibited" (Recital 23 to Directive 2010/63/EU). Thus, in this case, the rationale is the firm belief that inflicting extreme suffering on sentient animals cannot be justified even by the most noble of human goals and needs.

A certain combination of these considerations may underpin the axiological justification of another provision in Polish law. It prohibits the fattening of geese and ducks for fatty livers. In this way, the general acceptability of the exploitation of animals for food purposes and the consequent restrictions on the protection of animal life and welfare are derogated, resulting in the primacy of the protection of animal welfare over the economic interests, culinary preferences, and cultural habits which may be invoked to justify this method of animal husbandry. In this case, the rationale seems to combine the extreme suffering involved in this particular method of fattening geese and ducks and the trivial purpose of this form of animal exploitation.

Such regulations are the result of resolving axiological conflicts. They are perhaps the clearest illustration of a "boundary point" of the legal protection of animals and the realisation of the values of the protection of their life and welfare. They are historically and culturally variable and are subject to constant tension between opposing reasons and attitudes. They seem to necessarily evolve towards a gradual expansion of the principles of the protection of animal life and welfare, overcoming step by step the attachment to traditional practices and habits that ignore animal welfare (efforts to reflect in law as broadly as possible the values of animal protection are undoubtedly on the right side of history).

The process of overcoming traditional models is often accompanied by strong axiological and normative controversies; as a result, divergent legal solutions may coexist for a shorter or longer period of time. A prime illustration of this situation is the fattening of geese and ducks for *foie gras*, a problem (so far) resolved differently in Polish law and in France, where this practice has been recognised as a legally protected cultural and culinary heritage of France.[6]

A similar controversy and resulting normative differences also concern the organisation of animal fights. Polish legislation prohibits, among others, the organisation of bull, dog, and rooster fights. The lawmaker has unequivocally given primacy to the ethical reasons underlying the principles of the protection of animal life and welfare, especially in relation to bulls, dogs, and roosters. In contrast, in French law, the relevant criminal law provision prohibiting animal abuse includes an explicit exception, allowing bull- and rooster-fighting as long as it is organised as part of an uninterrupted local tradition.[7]

One of the best-known and most widely debated controversies of this kind concerns, of course, the status of the *corrida* under Spanish law. Catalonia permitted *corridas* in arenas where they were held on the date of entry into force of the previous animal law (i.e., in 1988).[8] Later, in 2010, bullfights were banned outright by the Catalan authorities. However, in 2016, this ban was declared unconstitutional by the Constitutional Court of Spain. The Court took the view that it was unacceptable for regional authorities to outlaw a practice that is part of Spanish cultural heritage.[9] Bullfights remain fully legal in Portugal.[10]

Such differences in approach between countries also apply to the so-called cropping, that is, clipping the tails and ears of dogs according to the aesthetic preferences of their keepers. Article 10 of the European Convention for the Protection of Pet Animals (1987) includes a prohibition of any surgery altering

6 Art. L654-27-1 Code rural et de la pêche maritime (FRA-2000-L-76436).

7 Code Penal 654-1 i 655-1 (FRA-1992-L-62828).

8 Art. 6.2 Ley de protección de los animals de 4.7.2003 (Ley 22/2003).

9 Cf. https://www.nytimes.com/2016/10/21/world/europe/spain-bullfighting-ban-catalan.htmll; on similar legal controversies in the Balearic Islands and in the Canary Islands, see https://www.bbc.com/news/world-europe-49291131; https://www.independent.co.uk/news/world/europe/bullfighting-ban-spain-ibiza-balearic-islands-catalonia-canary-constitutional-court-legal-illegal-a7857946.html.

10 Decreto-Lei 89/2014 Aprova o Regulamento do Espetáculo Tauromáquico (Diário da República no 111/2014).

the appearance of a pet undertaken for non-therapeutic purposes. However, a considerable number of countries have made a reservation to this prohibition, thus exempting their citizens from the obligation to apply it. This has been done, to varying degrees, by, among others, Germany, the Czech Republic, Latvia, Portugal, and Denmark.

No less controversial is the question of outlawing such cultural practices as ritual slaughter, fur farming, hunting, and dolphinariums. The issue of ritual slaughter remains controversial not only in Poland, and the number of countries where slaughter without prior stunning has been fully outlawed is still relatively small. These include Switzerland, Denmark, Sweden, Slovenia, and Belgium. In a number of other countries, a solution has been adopted by way of compromise, maintaining the permissibility of ritual slaughter provided that the animal is stunned immediately after cutting its throat (so-called post-cut stunning).

The problem of further permissibility of animal husbandry for fur production also remains debatable across European countries, with a steadily increasing number of states where this type of animal exploitation is banned or subject to far-reaching restrictions. In Europe, such regulations are already in force in Austria, Croatia, the UK, Slovenia, Macedonia, Serbia, Belgium, Luxembourg, the Czech Republic, the Netherlands, and Norway. Bans on the breeding and killing of animals for fur are met with fierce opposition and intense lobbying by the community that make profit from this form of exploitation, and economic and market arguments clash with ethical reasons with particular force here.[11] Nevertheless, advanced legislative work to outlaw the killing of animals for fur is already underway in France, Ireland, and Slovakia.[12] In Poland, successive proposals to ban the fur farming of at least some animal species have met with effective resistance from breeders; as a result, Poland belongs to the countries with the largest number of animals bred in reprehensible conditions and slaughtered for fur purposes.

Such collisions of animal welfare values with practices embedded in strong economic interests or cultural habits are sometimes of a local nature (as in the case of bullfighting or the Polish discussion on the permissibility

11 For more detail, see, e.g., A. Linzey, "The ethical case for European legislation against fur farming," *Animal Law* 147/13 (2006).

12 https://www.furfreealliance.com/fur-bans/.

of pre-Christmas trade in live carp). Still, they are manifestations of the same kind of clash of principles and values that is so characteristic of animal law. It is the clash between the lawmaker's recognition of animal life and welfare as goods to be protected by law, on the one hand, and the aspiration to respect the interests and expectations based in the values of one or another group, society, or community, on the other. The legal significance of these latter values is relative, just like that of the protection of animal life and welfare. This means that in the case of individual conflicts, the outcome of weighing their relevance against the value of animal life and welfare may vary, with neither side having *a priori* superiority over the opposing values.

These conflicts are usually resolved by the lawmaker, but often the conflicting values and principles must also be weighed up by the courts and other law-applying bodies. Awareness of and insight into the nature of such conflicts of values and principles that protect them is a prerequisite for rational acceptability of the resulting decisions, regardless of which principle is granted primacy in a given case. And conversely, the outcomes of inadequate understanding of such conflicts may translate into the intellectual shallowness of legal argumentation, a striking example of which is the 2014 ruling of the Polish Constitutional Tribunal on ritual slaughter.

Epilogue
Quaestiones pro futuro

1. Evolution, morality, and ethics

Science is a way of "disenchanting the world" (*Entzauberung der Welt*), to borrow Max Weber's famous expression. Thanks to science, morality is gradually being disenchanted, too. The origins and mechanisms of the formation of judgements, attitudes, and moral behaviour are increasingly becoming objects of convincing evolutionary, biological, neuropsychological, and sociological explanations. At the most elementary level, the substrate of morality is formed by adaptive inclinations. These have facilitated individual survival in social groups, where cooperative behaviour balances the egoistic drive to satisfy one's own needs to the greatest possible extent. Such inclinations include, above all, reciprocal and kin altruism, a certain level of empathising with others, emotional response mechanisms to aggression and harm, and a sense of loyalty to "own" group.

Such inclinations, and the resulting experiences and actions, are by no means unique to the human species. Nor did they emerge *deus ex machina*. They are present, to varying degrees, in many other species, which display similar behaviour triggered by kin or reciprocal altruism, empathy, or even anger evoked by the feeling of being treated "unfairly" (as demonstrated by F. de Waal's famous experiments on the reactions of capuchin monkeys to unequal rewards for equal merit).[1]

These discoveries have finally buried the vision of morality as a phenomenon produced and residing only within human culture, a counterpoise to the amoral, brute nature of the human being (veneer theory of morality).[2] In fact, both egoistic and altruistic inclinations are rooted in the toolkit of evolution and surface both in humans and many other species. In this sense, morality

1 F. de Waal, *Primates and Philosophers. How Morality Evolved* (Princeton–Oxford: Princeton University Press, 2006), pp. 45f.

2 Ibidem, pp. 6f.

did not appear out of nowhere, but evolved as a result of adaptations in the development of many successive species, contributing to more effective coping with problems of individual and group survival.

At the same time, in humans, it coincides with another adaptation: the unprecedented growth of the cortex. It underlies the uniquely developed forms of self-awareness, abstract thinking, and a complex system of communication through speech and writing. As a result, the conglomerate of egoistic and altruistic inclinations and the development of culture became the starting point for the production of diverse ideas and doctrines attributing a mysterious, supernatural origin to moral experiences.

The content and nature of intuitively experienced, and then culturally doctored, moral precepts have, in turn, become the objects of ethical reflection. It attempts not only to understand and explain such experiences, but also to critically analyse and evaluate them. In this way, ethics itself becomes a tool for refining intuitive moral experiences, turning them into postulates based on rationally formulated demands and patterns of action.[3] This kind of "reflexive" influence of ethics on morality, which is its object and cause, is one of the most striking examples of the cultural dimension of evolution acquired with the development of human civilisation.[4]

Thus, in the light of contemporary knowledge, a distinction needs to be made between "morality as a bio-cultural fact and ethics as a rational analysis and evaluation of morality."[5] The latter has become possible thanks to human ability to subject spontaneous moral experiences and reactions to conscious reflection. At the most elementary level, it consists in the conceptual and linguistic transformation of one's own emotions and moral inclinations into norms which serve as models for one's own behaviour and for the evaluation of the behaviour of others. At a more complex level, ethical reflection turns into the study of the sources and evolution of moral norms, and the critical evaluation

3 For more detail, see T. Pietrzykowski, "Roots of normativity. From neuroscience to legal theory," in J. Stelmach, M. Soniewicka, and W. Załuski (eds.), *Studies in the Philosophy of Law.* Vol. 4. *Legal Philosophy and the Challenges of Biosciences* (Kraków: Jagiellonian University Press, 2010), pp. 97f.

4 On gene-culture coevolution, see E. Wilson, *Consilience: The unity of knowledge* (New York: Vintage Books, 1998), pp. 138f.

5 A. Elżanowski, "Prawdziwie darwinowska etyka," *Lectiones & Acroases Philosophicae* 3 (2010), p. 47.

of the form they take in the course of spontaneous cultural development. Thus, rational ethical reflection requires the ability to develop criteria referring to facts, values, and reasoning, disengaged, at least in part, from the community's dominant moral beliefs produced by spontaneous cultural processes.

In the classic theory of individual moral development proposed by L. Kohlberg, this type of capacity is referred to as the post-conventional level of moral development of an individual.[6] According to this approach, only a small minority of individuals reach the stage of self-sufficient and autonomous reflection, independent of the dominant and culturally instilled conventional moral models. The vast majority of people remain at the conventional stage, where they effectively assimilate socially prevailing patterns by adopting them as their own view of "objectively true" morality.

2. Naturalistic fallacy and moralistic fallacy

In the light of advances in knowledge and analytical reflection on morality, it is possible to identify two types of errors that weigh down on ethical reflection. One is called the naturalistic fallacy and the other – its opposite – the moralistic fallacy.

The naturalistic fallacy consists in identifying phenomena occurring in nature with moral goodness. In practice, it takes the form of inferences in which moral duty is derived directly from whatever is there, from that which exists. Statements describing facts are sufficient premises for drawing conclusions about what ought to be done. In particular, the fact that certain types of behaviour or inclinations occur "naturally" justifies their ethical value. This error was first noted by David Hume, but the term was introduced by George Edward Moore, who described it in a slightly different way.[7] The mere existence of certain types of behaviour, or their appearing "naturally," is not a logically sufficient premise for the formulation of ought-conclusions. Moral goodness cannot be arbitrarily equated with empirically ascertainable facts. The fact that something "is" does not not *per se* entail any "ought". The justification of

6 L. Kohlberg and R. H. Hersh, "Moral development: A review of the theory," *Theory Into Practice* 16/2 (1977), pp. 53f.

7 For more detail, see T. Pietrzykowski, *Etyczne problemy prawa* (Warszawa: LexisNexis, 2011), pp. 34f.

"ought" requires an appeal to values, goals, or norms of a more fundamental nature, without which any set of facts will remain morally neutral.[8]

At the same time, rational ethics cannot ignore facts. Although no ought-conclusions can be drawn from mere facts, the best available empirical knowledge should be the starting point for any rational ethical judgement. This includes the knowledge that human beings and many animals of other species are subjects capable of experiencing suffering and pleasure. Thus, they have a subjective interest in leading a life of the highest possible quality, comprising the greatest possible number of positive experiences and the fewest number of negative ones. The task of naturalistically oriented, rational ethical reflection is to identify these subjects, to determine their interests, and to develop rules of conduct that enable a possibly unrestricted realisation of these interests and a reduction of collisions between them and the interests of other subjects.

On the other hand, the moralistic fallacy consists in regarding patterns of behaviour that occur naturally in a given culture as objectively moral.[9] The fact that humans have natural cooperative inclinations and that this propensity has given rise to various experiences and ideas does not provide evidence for the "moral truthfulness" of corresponding rules or judgments. On the contrary, irrespective of the biological basis of the propensity for unselfish behaviour and reactions, moral beliefs formed on their basis inevitably contain historically and culturally contingent elements. From the perspective of individuals shaped by a given cultural environment, they appear as objective moral facts sanctioned by the compulsion of conscience. The latter is a psychological reflection of the ways in which the cooperative and altruistic inclinations of human nature are transformed by a given time and culture into approved patterns of behaviour and beliefs that underpin them.

The moral systems or doctrines that have emerged in different cultures throughout history are thus expressions of human reactions and inclinations shaped by evolution. These propensities can become the basis of different (though not arbitrary or random) sets of norms and ideas that accompany and legitimise them. In this respect, the role of rational ethical reflection is twofold. On the descriptive plane, it involves explaining the phenomenon of morality, as well as the genesis, content, and operation of positive morality (individual

8 Cf. ibidem, pp. 40–44.

9 A. Elżanowski, "Prawdziwie darwinowska etyka...," pp. 47f.

and social). On the normative-critical plane, its task is to transform positive morality into critical morality. The latter should be the result of "filtering" positive morality through the prism of internal consistency, correspondence to facts, non-arbitrariness, and other such criteria.

Conceived in this way, ethics serves to remodel positive morality into less contingent and better justified critical morality. In this role, ethical reflection is a means of ethical progress and rationalisation of morality. Ethical progress is here understood in two ways. Firstly, it is an increase in the level of understanding and scientific explanation of the phenomenon of morality, its genesis, and the processes in which moral doctrines are produced in the cultural and historical development. Thus, it concerns the development of knowledge about the nature, origin, mechanisms, and limitations of positive morality, both individual and social. So understood, ethical progress is the joint work of philosophy, evolutionary biology, psychology, neuroscience, anthropology, sociology, and other disciplines.

Secondly, ethical progress is also, perhaps above all, a rationalisation of the content of moral judgements one adopts. This means, in particular, the development and dissemination of beliefs that allow for the gradual overcoming of the limitations and defects of spontaneously formed positive morality, both social and individual, leading to a gradual elimination of moral judgements and attitudes based on false beliefs about facts, superstitions, prejudices, or stereotypes. As a results, morality is gradually becoming more universal, thus overcoming its "tribal" nature. Peter Singer refers to this process as "expanding the moral circle."[10] It involves extending accepted moral principles to beings previously treated as "others," as alien, not belonging to "one's own group" and thus not deserving the same level of moral concern as those who belong to it (to one's family, tribe, nation, race, gender, species, etc.).

So understood, ethical progress means an increase in the extent to which moral beliefs and attitudes serve to reduce the suffering of human beings and other beings capable of experiencing it. Historically, the main drivers of this progress have been the most outstanding individuals: moral reformers capable of transcending thinking patterns imposed on them by the positive morality dominant in their environment. The most significant breakthrough

10 P. Singer, *Expanding the Circle. Ethics, Evolution and Moral Progress*, Rev. ed. (Princeton: Princeton University Press, 2011).

in the history of morality took place in what K. Jaspers calls the Axis Age (c. 800–300 BC). This period saw many such individuals in different parts of the world, including Zoroaster, Buddha, Confucius, Lao-Tse, Socrates, and the prophets of Israel. It is thanks to them that traditional tribal morality, based in evolutionary human inclinations, gave way to emerging ethical reflection of the more universalising kind.[11] This development can be seen in the formulation of the golden rule, which, in various traditions of thought, contains the message that one should treat (all) others the way one would like to be treated oneself.[12]

Later great reformers of morality subjected existing moral models to a thoroughgoing critique in the name of a "better ethics"; this group included such figures as Jesus Christ, thinkers of late antiquity – including Aristotle, Zeno of Citium, and Epicurus – and key figures of post-Enlightenment ethics, in particular, Immanuel Kant, Arthur Schopenhauer, and Jeremy Bentham. All of them contributed, in different ways, to the further transformation of archaic "tribal" morality – rooted in adaptive survival mechanisms of primitive hunter-gatherers – towards increasingly universal forms of ethical reflection.[13]

3. Law and ethical progress

Like morality, law is a historically variable phenomenon, rooted in human inclinations that are products of evolution.[14] The process of separating legal norms from positive social morality also occurred gradually, and for most of humanity's existence, this distinction would have been very difficult to make. It only began to become clearer with the increasing organisation of the state

11 "At the conceptual level, Axial Age ethics can be opposed [...] to other types of ethics which are arguably embedded in human nature (and constitute evolutionary ethics) and thereby can be regarded as preceding it" (W. Załuski, *Law and Evil. The Evolutionary Perspective* (Cheltenham–Northhampton, MA: Edward Elgar, 2018), pp. 54–55).

12 For more detail, see ibidem, pp. 55f.

13 In the case of humans, conditions of the so-called environment of evolutionary adaptedness prevailed for over 99 percent of the time of human existence as a species (see, e.g., J. Tooby and L. Cosmides, "The psychological foundations of culture," in J. Barkow, L. Cosmides, and J. Tooby (eds.), *The Adapted Mind* (New York: Oxford University Press, 1992), pp. 19–136).

14 W. Załuski, *Ewolucyjna filozofia prawa* (Warszawa: Wolters Kluwer, 2009), passim; T. Pietrzykowski, "The roots of normativity...," pp. 102f.

apparatus, the bureaucratisation of state institutions, and further formalisation of their operation.

Despite the historical emergence of law as a distinct normative order, its norms were, and still are, to a large extent determined by the moral beliefs prevalent in individual societies. This applies above all to the prohibitions and injunctions necessary to protect the biological survival of a community, such as the prohibition of killing others, taboos and prohibitions related to reproduction and childcare, and rules for the acquisition and use of limited goods. However, in the history of law, this "minimum content of natural law" (to use H. L. A. Hart's well-known term) has always merged with a broader set of norms concerning various spheres of life: worship, social hierarchy, and many others.[15] Therefore, law cannot be reduced to a simple reflection of the rudiments of "tribal" morality, no matter which phase of its development one takes into consideration. The evolution of law is always mediated by the culture and processes of social and political organisation of a given community.[16]

However, from the point of view of the relationship between ethical progress and law, two observations seem most relevant. First, this progress is a result of a transformation of social morality, initiated by the ethical reflection of intellectual elites. It is driven by the capacity of a small number of people for critical ethical reflection carried out at a post-conventional level of moral development. In favourable historical and cultural conditions, they are sometimes also able to initiate transformations in conventional, positive social morality. These, in turn, entail changes in legislation, since, from the perspective of advancing ethics, the so-far adopted solutions begin to appear backward or barbaric.

As B. Tamanaha notes, law has been a tool to protect domination and safeguard the interests of the socially dominant group since the dawn of states. Of course, the complexity of the historical development of states and their legal orders can hardly be crammed into a rigid and simplified framework of economic or class struggle. Still, it is true that thanks to an organised apparatus of coercion, enforcing obedience to authority and rules introduced by those who hold it, small minorities were able to oppress and exploit the vast majority of

15 B. Tamanaha, *A Realistic Theory of Law* (Cambridge–New York: Cambridge University Press, 2017), pp. 82f.

16 On the idea of law as a "reflection" of morality and culture and the arguments for a much more nuanced understanding of this relationship, see B. Tamanaha, *A General Jurisprudence of Law and Society* (Oxford: Oxford University Press, 2001), pp. 51f.

subordinated communities.[17] From a historical perspective, then, law shows a much closer relationship to social domination than to morality. At the same time – if somewhat incidentally – it proved to be an effective and handy tool for the protection of morality, especially insofar as it coincided with the beliefs and interests of people and communities in power.[18] Law-enforced morality also played an important role in legitimising existing social relations and the resulting privileges of those in power.

However, the development of law – insofar as it served to protect dominant moral standards – was also influenced by the transformation of moral norms brought about by rational ethical reflection. In particular, the Age of Enlightenment marked a turning point in which accumulating scientific and ethical discoveries began to penetrate the consciousness of wider social elites.[19] This triggered processes of humanisation and rationalisation of law, followed by profound transformations in the legislation of the 18th, 19th, and 20th centuries. Particularly telling examples of these changes include the abandonment of torture and witchcraft trials, controversies surrounding the death penalty and mutilation punishments, the abolition of slavery and serfdom relations, and gradual changes in family law and the treatment of prisoners, Jews, women, children, the disabled, persons of a different sexual orientation, and many other groups.[20]

H. Maine, a well-known legal scholar, described the historical process of the transformation of the law of early pre-state societies into modern law as a transition "from status to contract."[21] The legal situation of an individual was initially determined entirely by his or her status in society (dependent on birth, family relations, etc.); however, over time, it became increasingly dependent

17 See B. Tamanaha, *Realistic Theory of Law...*, p. 94

18 Ibidem, pp. 100, 104–105.

19 It is clear that an earlier stage in the same process involved the secularisation of Christian morality, which transformed into rational doctrines of natural law; at a still earlier stage, Christianity replaced tribal morality with the first version of a universalising "authentic" ethics (see W. Załuski, *Law and Evil...*, pp. 58, 74; cf. also N. Bobbio, *The Age of Rights*, trans. A. Cameron, Cambridge–Malden, MA: Polity, 1996, pp. 33f.).

20 For more detail, see W. Załuski, *Law and Evil,* pp. 78f.*;* cf. also, e.g., N. Bobbio, *The Age of Rights...*, pp. 44f.

21 H. Maine, *Ancient Law* (New York: Cosimo, 2005) (1861), passim, especially pp. 90f.

on the contractual relationships he or she freely entered into and modified.[22] According to B. Tamanaha, the next stage in this process was restriction of the contractual freedom by standardisation of the types of contracts,[23] as well as the protection of the weaker party from the imposition of grossly prejudicial conditions. Indeed, despite the formal freedom of contracts, they can in practice be effectively enforced by the pressure of situational and economic factors.

Of course, this process was not linear, without periods of regression, sharp decline, or acceleration. Nor did it run parallel or simultaneously in all parts of Europe and the world. This is why such well-known episodes as the tragedy of the Holocaust, the half-century of communist crimes, and the abandonment of moral freedoms as a result of more or less long-lasting conservative revolutions can hardly be seen as effective falsifying arguments. Instead, they highlight the discrepancy that may occur between law and the level of moral expectations of its time, expectations against which legal solutions appear as a frightening and repugnant aberration. For this reason, it is extremely rare for them to find candid defenders who, in order to justify them, would not stoop to concealing or denying facts, or shifting responsibility to some external factors (such as conspiracies, hidden forces, or historical determinism).

W. Załuski argues that these transformations can be viewed as a move away from law based on tribal morality towards an increasingly far-reaching implementation of norms based on authentic, universalising ethical reflection. Tribal morality is, as it were, a spontaneous cultural expression of the evolutionary nature of human beings, including their predisposition to favour members of own group, to discriminate against outsiders, and to seek domination, revenge, etc. Law growing out of such attitudes and moral patterns is built on similar foundations.

"Authentic" morality (as Załuski calls it) grows out of a critique of the limitations and peculiarities of tribal morality. Thus, it requires subjecting the latter to a critical, rational ethical reflection, which, in turn, leads to a rejection of the cultural expression of some human evolutionary predispositions. As a result,

22 Documents such as the French Declaration of the Rights of Man and of the Citizen, the American Declaration of Independence ("we hold these truths to be self-evident that all men were created equal and endowed [...] with some inalienable rights, among which are life, liberty and the pursuit of happiness"), the 1948 Universal Declaration of Human Rights, and many, many others stand as monuments to this process.

23 B. Tamanaha, *Realistic Theory of Law*..., p. 141.

authentic morality is constructed, as it were, "in opposition" to the spontaneous cultural expression of at least some human natural inclinations, although at the same time, it is based on elements of human evolutionary endowment. It reorients human attitudes and behaviour, exploiting in a different way the emotional and motivational mechanisms that make up human nature in the biological sense of the term. This kind of authentic morality is increasingly universalising and egalitarian, breaking down the limitations and barriers of tribal differentiation between members of one's own group and strangers, or "others" (whether in the sense of territory, family, race, sex, gender, or, last but not least, species).

The development of law in the last few centuries has further highlighted another difference between tribal morality and law. Modern states have had to reconcile themselves to at least a certain degree of diversity in the moral and world views of their citizens and residents. Religious tolerance – achieved with no small effort and illustrated by the famous reluctance of Sigismund Augustus to be "the king of human conscience" – became the prototype for the idea of the coexistence in one society of people with different moral outlooks.

In this perspective, the task of law is not to force everyone to follow the kind of morality represented by those in power or by the majority. Rather, it is to establish and enforce such rules of social coexistence that make it possible for people with different moral views to live peacefully together, without having to compete for influence on legislation in order to compel others to act in accordance with their own values and moral principles.

This idea took its most elaborate and refined form in the concept of liberal neutrality formulated by John Rawls.[24] Its starting point is the belief that a plurality of "comprehensive doctrines of the good life" is an immanent and indelible feature of a free society. It is not a temporary anomaly that can and should be overcome by restoring the monopoly of a single moral doctrine common to all.

In the light of moral pluralism, the role of the state is not to advance – by legal coercion – the doctrine followed by those who happen to be in power. Rather, the task of law and lawmakers is to show equal respect and concern for all citizens, regardless of which doctrine of the good life they support. This means that legislation should seek ways for people of different moral beliefs

24 J. Rawls, *Political Liberalism* (Columbia University Press, 1993), passim.

to coexist as peacefully and fairly as possible, rather than become a tool of one doctrine, used to fight or marginalise others.

This perspective also significantly affects public service ethics. Those who govern and make laws are ethically obliged to be guided in doing so by the principles of equal concern and respect for all citizens and doctrines they recognise rather than by the doctrine of the good life they personally support. This rule is well known with regard to the religious neutrality of the state and law. The role of lawmakers in a neutral state is not to use the power they have to impose their own religious views (or views hostile to any religion) on others.

Moral precepts recognised by such individuals in their private lives, rooted in their personal worldviews, do not extend to their public duties, in which they are obliged to make efforts to establish and implement principles of peaceful and fair coexistence of people of different worldviews and religions. A Catholic who does not attempt to influence legislation to coerce others into living in accordance with his or her religion is not disloyal to it; the same applies to an atheist who, in making law, does not seek to ban religious worship. As lawmakers, they are obliged to be guided by different reasons and principles than people making decisions that affect only their own lives.

A similar distinction also applies to the moral beliefs of individuals (or groups with which they identify). They are binding for them in their private lives and with reference to their private roles. By contrast, when acting as persons who decide on the shape of regulations that apply to all, they must first take into account the reasonable plurality of moral views, principles, and doctrines recognised by individual people and communities subject to their authority. The fundamental imperative of this social role, then, is to seek solutions that allow for fair accommodation of interests and peaceful coexistence of proponents of various beliefs, without imposing on them, to the extent possible, the necessity to conform to principles that contradict their own views.

The ability to understand the difference between the ethics of government and legislation, on the one hand, and one's personal morality and views on specific issues, on the other, is an essential component of the liberal philosophy of the state. As F. A. von Hayek remarks, it is perhaps the most significant difference between this approach and political conservatism. In his essay "Why I Am Not a Conservative," the Austrian Nobel laureate writes:

> When I say that the conservative lacks principles, I do not mean to suggest that he lacks moral conviction. The typical conservative is indeed usually a man of very strong moral convictions. What I mean is that he has no political principles which enable him to work with people whose moral values differ from his own for a political order in which both can obey their convictions. It is the recognition of such principles that permits the coexistence of different sets of values that makes it possible to build a peaceful society with a minimum of force. The acceptance of such principles means that we agree to tolerate much that we dislike. There are many values of the conservative which appeal to me more than those of the socialists; yet for a liberal the importance he personally attaches to specific goals is no sufficient justification for forcing others to serve them.[25]

In this light, one cannot help but notice that the mixture of liberalism and conservatism, so popular in recent decades, is grossly incoherent. In fact, one element of the name of this political ideology must be a mere negligible embellishment.

The development of law consists in a gradual shift away from the view that the legal order should be a simple reflection of the moral beliefs of those who decide on the content of its norms. This undermines the naïve vision of legal norms as personal moral principles of lawmakers transformed into universally binding provisions of the criminal code. An important additional determinant of ethical progress in law is the recognition of moral pluralism, the search for solutions to mitigate resulting conflicts, and the reluctance to force individuals to conform to moral doctrines they do not share.

At the same time, it must be borne in mind that such pluralism is only possible on the basis of certain common principles. These include respect for the elementary rights of the individual and possibly equal protection of the freedoms and rights of every citizen. It is not, in fact, possible for a society to function on the basis of total tolerance, embracing every imaginable moral belief. Conceived in this way, tolerance would annihilate itself. It is limited by the prohibition of harming others and violating, without appropriate justification, the sphere of their freedoms and rights.

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25 F. A. von Hayek, *The Constitution of Liberty: The Definitive Edition* (University of Chicago Press, 2011); excerpts available at: https://press.uchicago.edu/books/excerpt/2011/hayek_constitution.html.

The current stage of the ongoing ethical legal progress consists in expanding the circle of beings whose unjustifiable harm should be met with a legal reaction. In addition to all human beings, it should include all beings capable of experiencing suffering, regardless of the species they belong to. This does not necessarily mean equating their legal status and establishing the same mechanisms to protect their rights and interests. However, this does require taking their life and wellbeing into account as legally protected goods, and developing effective mechanisms for their legal protection.

The centuries-long ethical development of law which has brought us to this point was inspired by the ideas and discoveries of eminent thinkers, ethical reformers, and statesmen, who transferred new ideas to legal solutions. The principles underlying the present shape of the legal order are to a large extent the effect of overcoming many "natural" limitations and inclinations arising from spontaneously formed tribal moralities. The success of universalising ethics in the transformation of legal orders may be called, following Wojciech Załuski, "an anthropological miracle."[26]

Nevertheless, a legal order that implements such principles is relatively fragile. It is constantly exposed to outbursts of atavism, which in the crudest way exploit the evolutionary inclinations of human nature and the emotional-motivational mechanisms based on them. They are invoked by populisms of various kinds, formulating xenophobic moral and legal slogans that build on a variety of oppositions and variously defined "enemies" ("aliens" or "others," undeserving of moral concern). Ethical progress and the legislation and principles of the liberal-democratic political order are thus prone to periods of regression, downturn, and stagnation.

The most drastic examples of regression are, of course, totalitarianisms: fascist, Nazi, and communist, which cost the death and suffering of tens of millions of people. Seen in this perspective, Nazism was indeed one of the "revolutions of nihilism": a radical rejection of the achievements of universal ethics in favour of a return to the crudest form of tribal morality. It limited the scope of moral concern solely to one's own race and nation, proclaiming the apotheosis of their superiority and inherent right to rule over others. This is

26 W. Załuski, *Law and Evil...*, p. 78; M. Migalski describes contemporary liberal democracies in a similar way, as "non-human systems" built on a profound denial of human natural emotions and moral inclinations (*Nieludzki ustrój. Jak nauki biologiczne wyjaśniają kryzys demokracji liberalnej i wskazują sposoby jego obrony* (Łódź: Liberte!, 2020), passim).

no less evident in the moral and legal foundations of "real communism," whose core, from the very beginning, was the struggle against a class enemy undeserving of any moral concern or legal protection.[27] These historical episodes may have been to universal ethics what pagan reaction was to early Christianity.

Natural human inclinations and the emotional base that develops on their basis give tribal morality a certain gravity. It pulls the legal and social order in, as it were. This is why a legal order based on universalising ethical principles needs constant ethical reflection, whose cultural and educational impact can prevent regression and a renewed triumph of ideas that thrive on the crudest tribal mechanisms. Ethical progress does not happen by the force of historical determinism; it is driven by the intellectual effort of social elites which translate the achievements of scientific knowledge and rational ethical thought into social life.[28] It is a necessary, though not sufficient, condition for the maintenance of the civilisation achievements in the fields of ethics and legislation.

Still, further ethical and legal progress is much more likely than a permanent collapse of the achievements of the several-century-long reflection by the most eminent ethicists, lawyers, and politicians. This prediction is supported by long-term civilisation, cultural, and mental changes traced and summarised by S. Pinker.[29] At the same time, as N. Bobbio observes, the belief in further moral and legal progress, prevailing among intellectual and cultural elites, is a self-fulfilling prophecy.[30] Indeed, chances for further development depend to a large extent precisely on their beliefs and attitudes. Although many other factors and events may also be crucial to such development, its immediate source is the emergence of certain ethical ideas and their nurturing by key participants in social life and the culture in which it is embedded.

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27 For more detail, see, e.g., C. Cercel, *Towards a Jurisprudence of State Communism. Law and the Failure of Revolution* (New York: Routledge, 2019), p. 95. Particularly telling in this respect are the provisions of the 1918 Constitution of the Russian Soviet Federative Socialist Republic, which defines the supreme goals of the state and law as "merciless crushing of the exploiters," "proletariat's decisive struggle against its exploiters," etc.

28 See, e.g., M. Shermer, *The Moral Arc: How Science and Reason Lead Humanity Toward Truth, Justice and Freedom* (New York: Holt, 2015), passim.

29 S. Pinker, *The Better Angels of Our Nature: Why Violence Has Declined* (New York: Viking, 2011), passim; idem, *Enlightenment Now: The Case for Reason, Science, Humanism, and Progress* (New York: Viking, 2018).

30 N. Bobbio, *The Age of Rights...*, p. 45.

4. The impact of law on morality

Progress in law may be the result of ethical progress, but sometimes the reverse is the case. Changes in legal solutions may also entail changes in moral attitudes by stimulating the evolution of beliefs linked to the content of law and ethically approved models of social behaviour. Legal changes may thus be – at least within certain narrow limits – a conscious tool for influencing moral attitudes.

Questions about the conditions and strength of the potential influence of law on moral attitudes are by no means easily answered. The relationship between law and morality is generally described and analysed primarily in terms of the impact of morality on law, but much less so vice versa. Law is seen as a reflection of moral attitudes prevalent in society, attitudes which form and evolve according to their own dynamics. This is why they influence law rather than are themselves influenced by it.[31]

The circumspection in treating law as an instrument of moral transformation is linked to a fundamental difference in the way law and morality address acts that they regulate. Law is satisfied with imposing compliance of external behaviour with the models it establishes. The motives for the behaviour are, from a legal point of view, of secondary importance.[32] On the other hand, mere compliance with the norms, enforced by penalties for their violation, is quite different from morally expected behaviour, where the appropriate internal attitude and motives are of primary significance. As H. Prichard noted, if the obligation to behave in a certain way under the threat of penalty is capable of giving rise to any moral obligation, it is an obligation of resistance rather than conformist compliance.[33]

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31 See K. Bilz, and J. Nadler, "Law, psychology & morality," in D. Medin, L. Skitka, C. W. Bauman, and D. Bartels (eds.), *Moral Cognition and Decision Making: The Psychology of Learning and Motivation*, Vol. 50 (Amsterdam: Academic Press, 2009), pp. 101–131. On a broader understanding of the notion of law as a "mirror of society," see B. Tamanaha, *A General Jurisprudece of Law and Society*..., pp. 11f.

32 For more detail, see Z. Tobor, *Teoretyczne problemy legalności* (Katowice: Wydawnictwo Uniwersytetu Śląskiego, 1998), passim.

33 For more detail, see T. Pietrzykowski, *Etyczne problemy prawa* (Warszawa: LexisNexis, 2011), pp. 251f. and the bibliography therein.

The fundamental influence on the content of law of the moral attitudes prevailing in society – or, sometimes, smaller social or professional groups – is not to be doubted. In contrast, the impact of law on moral attitudes is much less pronounced and obvious.[34]

Research into the impact of law on moral attitudes was pioneered by Leon Petrażycki, the founder of the psychological theory of law. He believed that a sufficiently stable and uncontroversial positive law could, in time, develop into intuitive legal emotions, into one's own sense of the rightness of a given course of action, independent of its origin in an external legislative authority.[35]

Petrażycki's considerations were strongly integrated in his specific understanding of morality and law. Nevertheless, they also inspired followers of his social-legal ideas – in particular, Adam Podgórecki – to carry out empirical research to confirm this kind of relationship.[36] Indeed, it may develop in the case of legal prohibitions and injunctions whose violation entails a penalty; in certain circumstances, they may result in adaptation or adjustment of moral beliefs and attitudes. Much more questionable are the empirical data relating to the possible relationship between the legalisation of certain types of conduct and the neutralisation of their negative moral evaluation.[37]

Contemporary research points to two mechanisms of this kind of influence. One is the transformation of the "informational environment" capable of influencing the beliefs and moral attitudes of (at least some) individuals. As K. Bilz and J. Nadler conclude:

34 Cf. F. Schauer, *The Force of Law* (Cambridge, MA: Harvard University Press, 2015), pp. 71f. The limited impact that changes in law have on social attitudes and underlying moral beliefs is illustrated by the history of racial desegregation in the United States. After the abolition of slavery, in most Southern states, far-reaching discrimination against the African-American population – based on various types of Jim Crow laws – persisted for almost a century. It was further social changes and the civil rights movement of the second half of the 20th century that led to its gradual abolition (see G. N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago, IL: University of Chicago Press, 1999)).

35 See L. Petrażcyki, *Teoria prawa i państwa*, Vol. 1 (Warszawa: PWN, 1959), p. 120.

36 A. Podgórecki, "Normy prawne i normy moralne," in A. Podgórecki, J. Kurczewski, J. Kwaśniewski, and M. Łoś, *Poglądy społeczeństwa polskiego na prawo i moralność* (Warszawa: Książka i Wiedza, 1971), p. 42.

37 Cf. W. Lang, *Prawo i moralność* (Warszawa: PWN, 1989), pp. 277–278.

> [...] evidence strongly, even if imperfectly, suggests that policy makers can use the law as a tool to shape the moral cognitions of its citizens, by altering their informational environment.[38]

The impact of law would thus be indirect here. Its vehicle is the influence on the views held by a group of opinion leaders; these views are then perceived by the environment as social models (or, more precisely, as evidence of the presence of such socially acceptable models). In this way, a change in law would ultimately entail a gradual change in the perceptions of wider society as to what behaviour is morally acceptable or unacceptable.[39]

There is also another way in which law can modify the informational environment where individual attitudes and behaviours are formed. Certain outlawed types of conduct may "go underground." Even if the perpetrators continue to break law, and if law does not directly influence their moral judgement, in many cases, they will be less willing to discuss or disclose such activities in public. As a result, the perception of such practices by others may change. The fact that a given type of conduct is widespread may be taken to confirm that it fits within the socially accepted norm. Its disappearance (at least from a social perception perspective) may therefore be a sign of a change in its status. Its perception changes: it becomes a deviation of at least a questionable moral status or (at most) a tolerated eccentricity.

Examples of such processes are changes in attitudes towards smoking in the presence of others, corruption in certain environments, or some language practices (recognised as discriminatory). Stimulated by law, the transformation of the information environment, which shapes the perception of such practices, can significantly affect the perceived attractiveness of certain types of conduct as ways to signal one's identity, status, and moral attitudes.[40]

The influence of law on morality can also take place through the so-called expressive function of law. This term refers to the "official" signalling of the value of a given practice by prohibiting or prescribing it. Of course, legal norms

38 See K. Bilz and J. Nadler, "Law, psychology & morality...," p. 110.

39 Ibidem.

40 On the signalling role of communication, see G. Miller, *Virtue Signaling. Essays on Darwinian Politics and Free Speech* (Cambrian Moon, 2019), passim; cf. also E. Westra, "Virtue signalling and moral progress," *Philosophy & Public Affairs* 49/2 (February 2021), pp. 156f.

serve to directly influence human behaviour by penalising practices that do not comply with the obligations established by law. Nevertheless, the sole introduction of a prohibition or obligation carries a certain message: it signals how a particular activity is perceived by the lawmaker, and hence how it "should" be perceived by others.[41] It acts as a manifestation of the official evaluation of a particular type of conduct, which can, in certain circumstances, influence its assessment by the addressees of legal norms.[42]

Sometimes laws are enacted not so much to be obeyed and enforced, but to act as an ideological declaration by the lawmaker. In such cases, changes to the law are an attempt to stigmatise or destigmatise a given type of conduct.[43] This phenomenon is called symbolic legislation. Even if the causative power of this type of legislation is very limited, it may, especially in the long term, influence the processes of change in the social perception of practices stigmatised or approved by law.

An example of this type of influence is the decriminalisation of homosexual acts. In some countries, prohibitions on homosexual acts were dead. However, their presence was perceived, especially by homosexual people, as an attack on their dignity and respect owed by the state. The moral load carried by norms penalising homosexual behaviour, or preventing homosexual persons from entering into legal marriages, has been highlighted both in parliamentary debates and in the judgements of constitutional courts in countries where such legislative transformations have taken place. [44]

The influence of law on morality through the signalling of official moral judgements, as well as other changes in the informational environment where social attitudes and beliefs are formed, take place primarily at the level of unconscious, intuitive processes of responding to certain types of behaviour.[45] The main channel for this kind of influence is thus not reflective ethical

41 F. Schauer, *The Force of Law*..., pp. 145–146.

42 See, e.g., C. Sunstein, *How Change Happens* (Cambridge, MA: MIT Press, 2019), pp. 39f.

43 C. Sunstein refers to the lawmaker "making statements" by establishing or abolishing certain norms (ibidem, p. 43). This mode of influence of the lawmaking act may be an interesting example of the illocutionary force or the perlocutionary aspect of the speech act of legislating.

44 For more detail, see T. Pietrzykowski, *Etyczne problemy prawa*..., pp. 183f.

45 For a broader discussion of the nature of such interactions and their impact on the processes of interpretation and application of the law, see T. Pietrzykowski, *Intuicja prawnicza. W stronę zewnętrznej integracji teorii prawa* (Warszawa: Difin, 2012), passim.

reasoning, which plays a role in the processes of creating, applying, and interpreting law. To a much greater extent, it is a matter of forming, or stimulating the formation of, spontaneous reactions of disapproval or approval towards a specific type of conduct, reactions that often determine the actual shape of relevant legal regulations.

The ability of law to exert this kind of influence depends to a large extent on the respect and trust the lawmaker enjoys in society.[46] Another important factor is the stability of the regulation, which needs time to develop into an intuitively accepted norm.[47] Interestingly, it appears that in some cases – where the solution adopted by the lawmaker is socially controversial – this development is possible on the condition that the regulation is not being enforced too zealously.[48] Although attempts to immediately force widespread compliance with the regulation may slightly increase its effectiveness in the short run, this happens at the cost of fuelling resistance, controversy, and opposition. Growing discontent may significantly impede the process of internalising the rule and its gradual adoption as an intuitive moral stance.

Thanks to the ability to influence the transformation of attitudes, law is not only a vehicle of ethical values, but also a potential tool for conscious moral progress. The content of law is directly influenced by political, cultural, and intellectual elites, which form the natural environment for the emergence and development of progressive ethical ideas. This makes it easier for the latter to penetrate into law. However, this process requires favourable political conditions, as well as prudence, flexibility, and circumspection in the use of legal instruments. An obtrusive and intrusive use of legal solutions and sanctions in order to force a change in moral attitudes may easily have the opposite effect than intended: it may mobilise social resistance against new laws (not rarely also from some of those responsible for their enforcement).

Mechanisms determining the success of moral intervention by law reforms are a special case of the influence that active social innovators and determined minorities can have on the normative models prevalent in a given

46 K. Bilz and J. Nadler, "Law, psychology & morality...," p. 112.

47 L. Petrażycki, *O nauce, prawie i moralności. Pisma wybrane* (Warszawa: PWN, 1985), pp. 332f.

48 Cf. B. Tamanaha's remarks (in the context of the so-called legal transplants that he analyses) in *General Jurisprudence of Law and Society...*, p. 132.

social group.[49] In the light of social research on this phenomenon, the success of attempts to effect such a change depends on a number of factors. These include, in particular, the high prestige and social status of the innovators and the trust capital they have accumulated by respecting other prevailing models of behaviour.[50]

As S. Moscovici points out, the impact of an active minority depends less on its numbers than on its position in society, a strong sense of identity, and a clear idea of the necessary changes in the attitudes held by others.[51] In many cases, success may require challenging the prevailing orthodoxy by creating a sufficiently strong normative conflict. This helps problematise the hitherto prevailing beliefs, freeing individuals from the chains of conformity.[52]

All this can lead to an information cascade; as a result, a social norm, so far absolute and allowing no exceptions, appears – in the eyes of an increasing number of people – just one of equally legitimate options, turning in time into a marginal, anachronistic deviation.[53] The acceptance of the minority's beliefs by some key figures that do not belong to it may also be important for the success of this kind of ethical innovation. In this case, they may legitimise such beliefs in the eyes of those who do not identify with the minority in question.[54]

The success of a social innovation may also be facilitated by the "behavioural style" of the minority seeking to bring it about. This includes, first and foremost, repeated actions that systematically draw the attention of the majority to the minority's demands. In this respect, the consistency and uniformity

49 C. Sunstein refers to such innovators as "norm entrepreneurs" (in contrast to "norm-breakers"). Cf. idem, *How Change Happens...*, pp. 8f.

50 E. Hollander, "Conformity, status and idiosyncrasy credit," *Psychology Review* 65/2 (1958), pp. 117–121.

51 S. Moscovici and G. Mugny, "Minority influence," in P. Paulus (ed.), *Basic Group Processes* (New York–Berlin: Springer, 1983), p. 43.

52 Ibidem, p. 45.

53 On the formation and role of such cascades, see S. Bikhchandani, D. Hirshleifer, and I. Welch, "Learning from the behavior of others: Conformity, fads, and informational cascades," *Journal of Economic Perspectives* 12/3 (Summer 1998), pp. 151–170; S. Moscovici and G. Mugny use the term "snowball effect" (idem, "Minority influence...," pp. 60f.).

54 E. Mannix and M. Neale, "What differences make a difference? The promise and reality of diverse teams in organization," *Psychological Science in the Public Interest* 6/2 (2005), pp. 31f.

of the conveyed messages are very important.[55] The minority interested in the change must therefore minimise possible internal conflicts and differences of opinion, and familiarise others with the advocated solutions in a clear and systematic way.[56] In doing so, it should not cross the line and fall into radicalism and intransigence that could alienate the undecided majority. The most dangerous trap in such efforts is to give the impression that the proposed changes are merely an *idée fixe* of their fanatical supporters, rather than a legitimate alternative based on shared values, alternative which is also acceptable to others and does not demand full identification with the minority that supports it.[57]

5. Progress in animal law

Changes in attitudes towards animals are often cited among the most salient examples of moral progress. To a large extent, they are taking place precisely through legal innovations. They are the result of the activity of "norm entrepreneurs" and active and determined minorities, capable of influencing the elites who decide on the shape of legislation.

The birth of animal law – in the form of the famous Martin's Act of 1822 – perfectly illustrates this process. The Act was enacted thanks to the persistent efforts of Richard Martin, a lawyer, Member of Parliament, and one of the most colourful figures in the history of English politics.[58] Additionally, Martin enjoyed the respect and long-standing friendship of King George IV, which made his initiatives much more difficult to ignore. Still, Martin's initial efforts, like several earlier attempts to pass a similar bill in the English Parliament, were met with intransigent opposition and resistance.

These attitudes reflected not only a widespread disregard for animal welfare, but also an aversion, deep-seated in the mentality of the elites of the time, to any legal interference with the freedom to dispose of property.[59] Even

55 S. Moscovici and G. Mugny, "Minority influence...," pp. 46f.

56 Ibidem, p. 52

57 Ibidem, pp. 57f.

58 N. Phelps, *The Longest Struggle...*, p. 98.

59 It is pointed out that, in the context of English legislation, Martin's Act allowed legal interference in "private matters" a decade before this was done for wife and child abuse

during the parliamentary proceedings, Martin's demands were confronted with a "storm of laughter, ridicule, and outraged hostility." The debate, in turn, was permeated with taunts, ridicule, and general mockery reminiscent of the atmosphere of schoolyard banter.[60] Despite this, Martin was able to initiate a campaign of support for his bill from non-parliamentary circles and, with this help, bring the work to a successful conclusion.[61] Furthermore, immediately after the law came into force, he personally initiated a precedent-setting horse abuse trial based on the Act, resulting in the first ever conviction of the perpetrator of inhumane treatment of an animal.[62]

In successive waves of pro-animal legislation, too, the role of individuals committed to changing the treatment of animals cannot be underestimated. Interestingly, this stance is sometimes formed in isolation from other elements of their worldview, which may include abhorrent ethical views on issues other than animal protection. The most prominent example is, of course, the case of Adolf Hitler. He is well-known to have been an advocate and patron of German animal legislation of the 1930s, one of the most comprehensive and advanced regulations of the matter in the first half of the 20th century.

In Poland, too, ethical views on animals are formed largely independently of almost all worldview, political, or ethical differences. This is reflected in the parliamentary tradition of forming "circles of friends of animals," usually made up of members of opposing political camps, who encounter the fiercest opposition to proposed animal protection measures in their own communities and parties.

(I. Kreilkamp, "The ass got a verdict: Martin's Act and the founding of the society for the prevention of cruelty to animals," *BRANCH: Britain, Representation and Nineteenth-Century History* (http://www.branchcollective.org/?ps_articles=ivan-kreilkamp-the-ass-got-a-verdict-martins-act-and-the-founding-of-the-society-for-the-prevention-of-cruelty-to-animals-1822).

60 Ibidem.

61 For more detail, see V. Krawczyk and M. Hamilton-Bruce, "The origins of compassion for animals: Legal privileging of non-wild animals in Late Georgian Britain," *Journal of International Wildlife Law and Policy* 18/4 (2015), p. 332.

62 Ibidem, p. 333. In the Polish parliament, too, there was no shortage of jokes and sarcasm (why should law ban "shooting roe deer"?) or fiery appeals attacking the "neo-pagan" provision that an animal is not a thing, which is "contrary to Christian ethics and any ethics" (see, e.g., the transcript of the discussion at the 102nd meeting of the Senate on 19 June 1997 [in Polish]; http://ww2.senat.pl/k3/dok/sten/index.htm).

The history of animal legislation clearly confirms the role played in its evolution by individuals capable of overcoming the conservatism and pressure of the dominant patterns of thought of the time. No less pronounced was the role played by organised minority communities, which proved capable of inspiring the majority, reluctant or indifferent to their demands. In the case of animal legislation, this influence can be seen very clearly in the activities of the anti-vivisection movement.

In less than two centuries, the anti-vivisection movement has managed to bring about a radical transformation in ethical attitudes towards and legislation on animal experimentation in our part of the world. Visible signs of this change in contemporary law include extensive ethical oversight of experiments by independent ethics committees and the almost universal acceptance of the 3Rs principle, which limits both the number of animals used in such experiments and the amount of suffering inflicted on them.[63] Also, the long-standing efforts and campaigns for a ban on animal testing of cosmetic products have at last met with widespread approval.[64] Finally, the introduction into European legislation of an absolute ban on extremely painful experiments, irrespective of their potential utility, must be regarded as an axiological breakthrough.[65]

Thus, the history of animal legislation provides evidence – and one that is difficult to refute – of a gradual ethical progress at least partly stimulated by changes in law. Of course, it is difficult to weigh reliably and accurately (or distinguish, for that matter) the extent to which legislation has influenced moral attitudes, and the extent to which it has itself been influenced by moral progress taking place in the consciousness and attitudes of (at least a part of) society.

It is important to note, however, that moral progress can create the illusion of an end of history. Positive changes taking place in various areas (such as abolition of slavery, universal suffrage, women's equality, and prohibition of

63 For more detail, see T. Pietrzykowski, "Etyka prowadzenia doświadczeń na zwierzętach," in J. Różyńska and W. Chańska (eds.), *Bioetyka* (Warszawa: Wolters Kluwer, 2013), pp. 453f.

64 See Article 18 of Regulation (EC) No 1223/2009 of the European Parliament and of the Council of 30 November 2009 on cosmetic products OJ L 342, 22.12.2009.

65 "The performance of a procedure that involves severe pain, suffering, or distress which is likely to be long-lasting and cannot be alleviated is prohibited" (Article 5(2) PAPA-SP). Cf. also Article 15 of Directive 2010/63/EU.

torture) can give the impression that ignorance, superstition, and prejudice of the past have finally been overcome. The belief in the superiority of current ethical standards over the moral errors of past eras can provide a false sense of ethical complacency.

However, there is no question of any "end of history" in the moral and legal development of humankind. The current form of legal regulation can hardly be regarded as the peak of moral evolution or an ethically perfect solution. This is particularly true of animal law, which, it could be argued, is provisional and fragmentary in nature. Its further evolution therefore seems indispensable. This applies in particular to the legal status of animals, the methods of enforcing standards in this area, and the gradual constitutionalisation of the protection of animals, granting an appropriate status to the values underlying animal legislation.

In fact, even in the most advanced legal orders, the legal status of animals remains undefined. Under pressure of ethical concerns, animals have been excluded from the legal category of things. As a result, their status is defined negatively: they are neither legal persons (let alone, natural persons) nor things. They form a self-contained category, hardly fitting into the conceptual apparatus of jurisprudence. In the practice of law application, in spite of their formal dereification, they are reduced to a special kind of thing. There is no doubt that ultimately, the "de-reification" of animals will have to be complemented by a positive clarification of their legal status.

Arguably, in the long term, this will take the form of some kind of subjectification of animals with a sufficiently developed sentience. In many countries, continuous efforts have been made to bring about such a change in law. Among them, those by the US-based legal organisation the Nonhuman Rights Project (NHRP) have reverberated with particular force in recent years. The NhRP brings cases to the US courts to obtain a ruling that holding some animals in captivity (in most cases, individual chimpanzees) is illegal. Their actions are based on the principle of *habeas corpus*, which is a common law solution prohibiting detention without legal justification.[66]

66 On the individual trials – where *habeas corpus* was sought on behalf of the chimpanzees Hercules, Tommy, Kiko, and Leo – see https://www.nonhumanrights.org/litigation/. A similar attempt was made in 2007 in Austria on behalf of a chimpanzee named Hiasl, donated for experimental purposes (see A. Staker, "Should chimpanzees have standing? The case for

While these efforts have not yet ended in the expected ruling, they have gained significant support, both from a number of judges and other prominent legal practitioners appearing as *amici curie.* Other symptoms of upcoming changes are the rulings made in Argentina in recent years. In several such cases, the subject status of great apes has been confirmed, at least in the realm of rhetoric.[67] Although some rulings have used wording that sounds downright revolutionary, their practical implications and legal basis are much more modest and traditional.

The idea of the personification of animals as a next step in the development of animal law is controversial also among those who advocate a departure from the anthropocentric paradigm of the philosophy of law. I am a proponent of a new intermediate category: non-personal legal subjecthood.[68] It takes into account the fundamental ethical difference between things and beings capable of suffering, with interests in maximising their wellbeing. At the same time, it takes into account the equally fundamental difference between persons capable of consciously exercising their rights and subjects who are merely passive beneficiaries of legal protection granted to them by virtue of their morally relevant interests. This difference is by no means cancelled by the famous "argument

pursuing legal personhood for non-human animals," *Transnational Environmental Law* 6/3 (2017), pp. 485f.).

67 In the case of Sandra the orangutan, the court of first instance used the phrase "una persona non humana," arguing that "de conformidad con el precedente jurisprudencial mencionado, no se advierte impedimento jurídico alguno para concluir de igual manera en este expediente, es decir, que la orangutana Sandra es una persona no humana, y por ende, sujeto de derechos y consecuentes obligaciones hacia ella por parte de las personas humanas" (the full text of the ruling is available at: http://intimateape.blogspot.com/2015/10/read-judges-decision-that-orangutan.html). In a similar case of the chimpanzee Cecilia, the Argentine court expressed the view that: "Great apes are subjects of rights and are holders of those that are inherent in the status of sentient beings, and even though such assertion seems to be opposed to the guidelines of the current law, it is just in appearance. Such appearance is externalized in some doctrinal sectors that are not aware of the clear inconsistency of the legal system, which maintains that animals are things, and at the same time protect them against animal abuse, legislating to protect them against mistreatment" (quoted in *Acción de hábeas corpus presentada por la Asociación de Funcionarios y Abogados por los Derechos de los Animales (AFADA)*, available at: https://www.animallaw.info/case/afada-habeas-corpus-cecilia).

68 A. Elżanowski and T. Pietrzykowski, "Zwierzęta jako nieosobowe podmioty prawa," *Forum Prawnicze* 1/15 (2013), pp. 18f.

from marginal cases."[69] The personal subjecthood of infants, the profoundly disabled people, and comatose patients is a valid argument against idolising species differences and reducing legal status to an "inherent condition" derived from biological belonging. However, it does not invalidate the actual differences in the types of consciousness and the interests and capacities that develop on their basis, distinguishing typical representatives of various species.[70]

By its very nature, law must refer to general and possibly operative categories. This means that even *de facto* gradable differences have to be classified in a simplified way, ignoring some less fundamental differences within the categories.[71] It is difficult to design legal solutions based on individual and exceptional cases. This is why – based on the typical characteristics of humans and other animals – ethically just and rational legislation must take into account both the moral significance of the interests of sentient animals and the difference between their sentience and human consciousness. An arbitrary refusal to take seriously the subjective capacities of animals and the interests that follow from them is a glaring moral error. However, it would also be a mistake to ignore the essentially non-personal nature of animal subjecthood and grant them the legal status of persons, modelled on that of human beings, whose subjecthood is of a different nature.

Unlike persons (both natural and legal), who have a whole range of different types of subjective rights, non-personal legal subjecthood should involve only one such right: to have one's vital interests taken into account in all decisions that have a significant impact on one's situation. Such interests should be weighed against conflicting interests and reasons in such a way as to minimise the extent to which the interests of one party are infringed in the name of those of others. This obligation should be incumbent on the lawmaker who regulates the situation and protection of animals, as well as

69 D. Dombrowski, *Babies and Beasts. The Argument from Marginal Cases* (Urbana and Chicago: Ilinois University Press, 1997), passim.

70 See also Ch. Korsgaard, *Fellow Creatures. Our Obligations to Other Animals* (Oxford: Oxford University Press, 2018), pp. 79f.

71 On legal rules as "entrenched generalizations," necessarily of an overly broad or narrow scope in relation to some individual cases, see F. Schauer, *Playing by the Rules. Philosophical Examination of Rule-Based Decision Making in Law and in Life* (Oxford–New York: Clarendon Press, 1998), pp. 31f.

on any law-applying institution or person who is responsible for the practice of respecting (and weighing) the individual interests of animals affected by their decisions.[72]

The temporary nature of current animal law is also evident in its institutions and enforcement mechanisms. The view that they are profoundly flawed is supported by both research and reports from control institutions and citizen monitoring. In the long run, it seems impossible to maintain a situation where there are virtually no specialised institutions exercising effective supervision and conducting proceedings to enforce the obligations resulting from the legal protection of animals.

In the current model of law enforcement, these tasks are, in principle, the responsibility of institutions serving other purposes, which do not regard animal welfare as a sole, or even principal, goal of their activities. This model is increasingly out of step with societal needs and expectations. Although the first attempts to institutionalise the animal rights ombudsperson (commissioner for animal protection) in Switzerland were unsuccessful, such arrangements have been made in Austria (ombudspersons at the federal level),[73] Finland,[74] and Malta.[75]

The advantages and disadvantages of an independent animal protection inspection are also increasingly discussed, at least partly modelled on the British experience. These discussions are particularly relevant in view of the drawbacks of the current solutions applied in other countries, including Poland, where inspections intended to protect animal welfare are subordinate to ministries responsible for the most effective exploitation of animals (such as ministries of agriculture or science). This produces an inevitable and immanent conflict of interest, where animal protection generally falls victim to prioritised policies and objectives.

Further development of animal law enforcement mechanisms may take two directions, which are not mutually exclusive. The first could be called statist.

72 For more detail, see T. Pietrzykowski, *Personhood Beyond Humanism: Animals, Chimeras, Autonomous Agents and the Law* (Springer, 2018), passim.

73 See Bundesgesetz über den Schutz der Tiere, BGBl. I Nr 118/2004.

74 Article 38 of the 1996 Animal Welfare Act (Eläinsuojelulaki 247/1996, https://www.finlex.fi/fi/laki/ajantasa/1996/19960247).

75 https://www.maltatoday.com.mt/news/national/45943/malta_gets_its_first_commissioner_for_animal_welfare#.YCKH6C22xQL.

In this case, the main responsibility for monitoring compliance with law and prosecuting violations would rest on an animal protection ombudsperson or a network of regional (local) ombudspersons. They could work either as separate, relatively independent institutions acting through their respective offices, or as heads of animal protection inspectors' teams, operating on the level of central or local administration.[76]

The second possible direction is to transfer this responsibility to civil society actors, in particular, to social organisations (NGOs). This solution would, in a way, continue the tradition of pre-war Polish legislation, where social organisations could conduct independent investigations in cases of violation of animal law. Interestingly, this model of law enforcement is inscribed in the tradition of animal legislation virtually from its inception. Indeed, the Martin's Act of 1822 provided that proceedings for inhumane treatment of animals could be brought before the courts by any citizen.

It seems that a mixed model, in which statist and civic elements complement each other, would be most effective. Animal protection ombudspersons, in charge of inspectorates, would additionally be supported by social organisations with the power to bring cases before the courts or to initiate administrative proceedings. Such powers obviously create the possibility of abuse. They should therefore be reserved for organisations that are in some way certified, for example, along the lines of public benefit organisations.

Finally, the third area that provides ample evidence of the temporary nature of the current state of animal law is the gradual constitutionalisation of animal protection. So far, it has taken place in only several countries and in several federal constitutions.[77] The Indian Constitution of 1949 is unique in this respect. It contains an absolute prohibition of the killing of cows (Article 48) and enjoins citizens to "have compassion" for all living creatures (Article 51a).

In other cases, constitutions which include provisions of animal protection apply much more typical solutions. These generally consist in enumerating animals among the goods protected by law or prescribing that their protection

76 Cf also K. Kuszlewicz, *Ustawa o ochronie zwierząt. Komentarz* (Warszawa: Wolters Kluwer, 2021), p. 311.

77 An overview and analysis of constitutional arrangements in this regard is provided by O. LeBot, *Droit Constitunel de l'animal,* Independently published (Paris 2018), passim.

should be regulated by provisions of sub-constitutional rank. For example, the 1999 Swiss Constitution contains an injunction to respect the dignity of every living being (Article 120(2))[78] and provides that the federal legislature should regulate the protection of animals in detail (Article 80).[79] In the case of Germany (Article 20a of the Federal Constitution of 1949)[80] and Austria (§2 of the Constitutional Law of 2013, No 111),[81] provisions refer to the protection of animals as one of the duties of the state. A similar provision was also added to the Luxembourg Constitution in 2007.[82] The Slovenian Constitution, in turn, imposes an obligation on the lawmaker to establish norms protecting animals from cruel treatment (Article 72).[83]

Among European countries, the case of Serbia is worth noting. The 1990 Constitution contained a provision requiring the lawmaker to create, among others, a system for the protection and development of human environment and for the protection and care of animals and plants.[84] In 2006, this law was

78 Article 120(2): "Der Bund erlässt Vorschriften über den Umgang mit Keim- und Erbgut von Tieren, Pflanzen und anderen Organismen. Er trägt dabei der Würde der Kreatur sowie der Sicherheit von Mensch, Tier und Umwelt Rechnung und schützt die genetische Vielfalt der Tier- und Pflanzenarten."

79 Article 80: 1. "Der Bund erlässt Vorschriften über den Schutz der Tiere. 2: Er regelt insbesondere: a) die Tierhaltung und die Tierpflege; b) die Tierversuche und die Eingriffe am lebenden Tier; c) die Verwendung von Tieren; d) die Einfuhr von Tieren und tierischen Erzeugnissen; e) den Tierhandel und die Tiertransporte; f) das Töten von Tieren. 3. Für den Vollzug der Vorschriften sind die Kantone zuständig, soweit das Gesetz ihn nicht dem Bund vorbehält."

80 Article 20a GG: "Der Staat schützt auch in Verantwortung für die künftigen Generationen die natürlichen Lebensgrundlagen und die Tiere im Rahmen der verfassungsmäßigen Ordnung durch die Gesetzgebung und nach Maßgabe von Gesetz und Recht durch die vollziehende Gewalt und die Rechtsprechung."

81 §2. "Die Republik Österreich (Bund, Länder und Gemeinden) bekennt sich zum Tierschutz" (111. Bundesverfassungsgesetz: Nachhaltigkeit, Tierschutz, umfassender Umweltschutz, Sicherstellung der Wasser- und Lebensmittelversorgung und Forschung (GP XXIV IA 2316/A)).

82 Article 11 bis: "L'Etat garantit la protection de l'environnement humain et naturel, en œuvrant à l'établissement d'un équilibre durable entre la conservation de la nature, en particulier sa capacité de renouvellement, et la satisfaction des besoins des générations présentes et futures. Il promeut la protection et le bien-être des animaux."

83 The Constitution of Slovenia of 1991.

84 Article 72(5) of the Serbian Constitution of 1990.

replaced by the current Constitution of the Republic of Serbia (the so-called Mitrovdan Constitution), where this norm is no longer included. This is the only case, so far, of this kind of constitutional regression.

Outside Europe, constitutional provisions that prescribe the protection of animals "from cruelty" have been introduced into the Constitution of Egypt (Article 45) and the Constitution of Brazil (Article 225(1)(VII)). Some local constitutions adopted in federal systems also include interesting solutions. Article 13 of the Constitution of the City of Mexico recognises animals as sentient beings who deserve to be treated with dignity. It imposes on every citizen the duty "to respect the life and integrity of animals," and on the authorities to provide animals with adequate protection and promote a culture of care for animals.[85] Equally interesting is the wording of Article 9(6) of the Salzburg State Constitution. It provides for the respect and protection of animals as human's fellow creatures for whom human beings are responsible.[86]

In other constitutions, where no such references are made, the basis for animal protection is sought in norms prescribing the protection of the environment or public morality.[87] However, these provide very little constitutional grounding for the growing statutory and sub-statutory regulation of animal protection. This type of regulation in many respects interferes with fundamental constitutional rights, such as freedom to conduct business, property rights, and freedom of scientific research and religious practice. For this reason, the strengthening of its constitutional settlement seems almost inevitable in view of the changes taking place both in animal legislation itself and in the underlying ethical premises and attitudes.

85 Article 13 of the Constitution of the City of Mexico of 2016.

86 Article 9 of the Salzburg State Constitution of 1999: "Aufgabe des Landes ist es, für eine geordnete Gesamtentwicklung des Landes zu sorgen, die den wirtschaftlichen, sozialen, gesundheitlichen und kulturellen Bedürfnissen seiner Bevölkerung auch in Wahrnehmung der Verantwortung für künftige Generationen Rechnung trägt. In diesem Sinn sind Aufgaben und Zielsetzungen des staatlichen Handelns des Landes insbesondere: [...] die Achtung und der Schutz der Tiere als Mitgeschöpfe des Menschen aus seiner Verantwortung gegenüber den Lebewesen."

87 See also T. Pietrzykowski, "Moralność publiczna a konstytucyjne podstawy ochrony zwierząt," *Studia Prawnicze* 217/1 (2019), pp. 5f.

In Poland, too, the need for the constitutionalisation of animal protection is becoming increasingly apparent.[88] This could involve either supplementing Article 5 of the Constitution with a reference to the need for humane treatment of animals capable of suffering, or adding Article 74a providing for the obligation of public authorities to ensure the protection of the life and welfare of animals capable of suffering and take into account their interests when creating and applying law.[89] Supplementing the Constitution with such or similar provisions would be eminently justifiable and seems a matter of not too long a time.

6. A revolution to come?

It is by no means the case that the further evolution of animal law will inevitably proceed towards ever better legal standards for the treatment of animals. There is no historical determinism, no "spirit of history" that determines that the further course *must* lead to a systematic improvement in the fate of animals and corresponding legal changes. Nevertheless, this scenario seems very likely. What is the basis for this belief? I think it is supported by two main arguments.

The first is the development of animal legislation over the last two centuries. There is no indication that the scientific progress driving this development – and the related technical, social, educational, and cultural changes – will stop or reverse. There is, therefore, little compelling reason to suppose that the processes that have been taking place in this field (and gaining momentum) since at least the Enlightenment will slow down or be cancelled.

Secondly, another revolution in human-animal relations seems to be fast approaching, the most serious one since the invention of agriculture. This is

88 Ibidem, p. 21.

89 After the change, Article 5 could read as follows: "The Republic of Poland shall safeguard the independence and integrity of its territory and ensure the freedoms and rights of persons and citizens, the security of the citizens, safeguard the national heritage and shall ensure the protection of the natural environment pursuant to the principle of sustainable development and the need for humane treatment of animals capable of suffering." Article 74a, in turn, could read as follows: "Public authorities shall seek to protect the life and wellbeing of animals capable of suffering, taking into account their interests in the formulation and application of law."

the advent of *in vitro* meat production technology (so-called clean or cultured meat). The rate of development and commercialisation of this technology indicates that, in the next ten years or so, Winston Churchill's famous prediction is likely to come true: in 1932, he wrote about the "absurdity" of growing a whole chicken only to eat its selected parts.[90] It is almost certain that, in the not-too-distant future, this method of meat production will become a much cheaper and healthier alternative to meat obtained from live animals.[91]

Furthermore, the production of clean meat will greatly reduce the devastating environmental effect of mass livestock farming, which is known to bear a significant share of responsibility for anthropogenic climate change and many other impacts, contributing to environmental devastation. These include the use of vast amounts of potable water, the growing acreage of crops for the production of fodder, which is responsible for the increasingly dangerous global deforestation, and the significant contribution to methane emissions, the most dangerous of the greenhouse gases. It is also worth noting that globally, the demand for meat is growing rapidly, mainly due to the increase in the purchasing power of hundreds of millions of people in China and India. Meeting this demand using the current method of meat production seems virtually impossible, at least without catastrophic environmental and climate consequences.[92]

Still, there are some major issues standing in the way of cultured meat technology. In addition to economic reasons, these include the lingering concerns of a significant proportion of consumers about the "unnatural" origin of

90 Cited in T. Mayhall, "The meat of the matter," *Food and Drug Law Journal* 74/1 (2019), p. 151.

91 The first "burger" produced by multiplying animal muscle cells was presented in 2013; at that time, it cost around USD 300,000. At the end of 2020, first attempts were made to offer this type of product commercially. According to current projections, its cost will fall significantly by the end of this decade, reaching the level below the present cost of producing meat with traditional animal husbandry methods. There is no doubt that further technological development, as well as the achievement of economies of scale, will sooner or later lead to the cost of this type of production being many times lower than the cost of raising an animal for years to obtain meat. Of course, there are still major technological, economic, and psychological barriers, but overcoming them seems to be a matter of time. Cf., e.g., M. Gaydhan, U. Mahanta, Ch. Sharma, and M. Khandelwal, "Cultured meat: State of the art and future," *Biomanufacturing Reviews* 3/1 (2018), pp. 2f.

92 See, e.g., R. Iyer and G. Iyer, "Is cultured meat a viable alternative to conventional meat?" *Journal of Management & Public Policy* 11/2 (June 2020), pp. 19f.

this type of meat,[93] as well as still unresolved regulatory issues.[94] Nonetheless, the era of the mass industrial farming of animals used for consumption is expected to come to a close in the coming decades.[95] What does this mean for the prospects of further ethical and legal changes in the status and treatment of animals?

I am of the opinion that the importance of this upcoming technological and cultural revolution for further ethical progress and the development of animal law cannot be overestimated. The breeding, transport, and slaughter of animals for food is an essential part of their contemporary exploitation, involving the most cruel and objectifying practices. At the same time, it is the base of the most powerful economic and political lobby, capable of putting the brakes on legal initiatives that threaten its economic interests. Moreover, the massive scale and ruthless cruelty of industrial breeding has provided a kind of moral alibi for the continued use of animals for other purposes: entertainment, sports, and scientific research. Once the exploitation of animals for food purposes has ceased, they too may lose their moral grounding. For up to now they have remained in the shadow of the cruelty of the gigantic machine of industrial animal husbandry and slaughter.

If such a scenario comes to pass, there can be little doubt that, from the perspective of future generations, our current animal legislation – and the torment and slaughter of billions of animals it sanctions – will be seen as an essentially barbaric idea. The way in which human beings have so far satisfied their needs for food and clothing may become evidence of the, *nomen omen*, bestiality of the current phase of human civilisation. It will evoke reactions reminiscent of the disbelief with which our era recalls centuries of legislation based on a slave economy, state privileges, the exploitation of child labour, and the ruthless oppression of women.

Thanks to scientific and technological developments happening before our eyes, it is becoming possible to take the next important step in moral progress. It will bring an end to the era of "eternal Treblinka," which now continues to

93 For an overview of the existing research, see, e.g., M. Gaydhan, U. Mahanta, Ch. Sharma, and M. Khandelwal, "Cultured meat: State of the art and future...," pp. 6–8.

94 Cf. T. Mayhall, "The meat of the matter...," pp. 163f.

95 See B. Le, "Cleaning our hands of dirty factory farming. The future of meat production is almost here," *AQ: Australian Quarterly* 89/4, (Oct-Dec 2018), pp. 30f.; cf. also C. Mattick and B. Allenby, "The future of meat," *Issues in Science and Technology* 30/1 (Fall 2013), pp. 64f.

be regarded by law as an inescapable fate of millions more animals. If this happens, for the first time in the history of the world, there will be a real chance of introducing legal solutions in which animals (although far fewer than they are today) are treated with respect and ensured due protection as beings entitled to live side by side with human beings and who, together with humans, are managers of the world. Playing a role in this process will place the philosophy and theory of animal law among the key areas of legal reflection of the 21st century.

* * *

[...]
Sweep up the debris of decaying faiths;
Sweep down the cobwebs of worn-out beliefs,
And throw your soul wide open to the light
Of Reason and of Knowledge. Tune your ear
To all the wordless music of the stars
And to the voice of Nature, and your heart
Shall turn to truth and goodness as the plant
Turns to the sun. A thousand unseen hands
Reach down to help you to their peace-crowned heights,
And all the forces of the firmament
Shall fortify your strength. Be not afraid
To thrust aside half-truths and grasp the whole.

Ella Wheeler Wilcox "Progress"

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The book is an essay in general jurisprudence exploring the philosophical, ethical and doctrinal foundations of the emerging field of legal regulation – animal law. The book focuses on the critical exposition of the current legal framework of animal protection. A comparative approach allows to identify the basic concepts and principles that underpin legal regulations concerning animal protection of the contemporary legal systems. It provides a valuable presentation of what the present model of animal law really is highlighting the dilemmas faced by its further development. It gives the book a unique and original perspective based on a comprehensive examination of the relevant laws in Poland, Europe and elsewhere.

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