THE POTENTIAL OF THE CONCEPT OF DIGNITY FOR UK AND EU ANIMAL PROTECTION LAW

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DOCTOR OF PHILOSOPHY IN LAW

MICHAELMAS TERM 2021

ACKNOWLEDGEMENTS

I am most grateful to my dad Theo, my mom Lisette, my sister Floor, my brother Stijn, my partner Menelaos, my grandmother Oma, my aunt Paulien, my dogs Guus and Noor, my rabbits Bram, Flapoor, Snuffie and Bas, and of course the rest of my family and friends. Not only have they been a constant source of love and support, but the life lessons they have taught me inspired me to write this thesis in the first place. They further heavily shaped my normative outlook on the world and helped me develop into the person I am today. This thesis is therefore dedicated to them all.

My immense gratitude also goes to my thesis supervisors, Professor Charles Foster and Professor Jonathan Herring. They have always been warm and welcoming, generous with their time, swift in their responses, and they have provided me with a critical pair of eyes, without taking away my academic freedom. Their feedback has helped me improve my work immensely. Overall, they have made an unprecedented contribution to my academic and professional upbringing, and the lessons I have learnt from them will always stay with me, wherever my career will take me in the future.

My studies at Oxford were furthermore generously funded by various scholarship bodies, at MJur, MPhil and DPhil stage. My DPhil was funded by the Prins Bernhard Cultuurfonds. This thesis would not have seen the light of the day without the invaluable financial support of these organisations, for which I will always be grateful.

I would also like to extend my gratitude to my MPhil and DPhil examiners, Professor Rachel Taylor, Professor Imogen Goold, Professor Richard Ashcroft, Dr Daniel Bedford and Mike Radford, whose feedback immensely helped me improve my thesis. Various parts of this thesis were further presented at conferences and workshops in Oxford, Athens, Rotterdam, and Leeds. I have greatly benefited from the feedback provided and the fruitful

discussions I had in those places, as well as from the discussions held within the confines of the Oxford Animal Law Discussion Group. I am very grateful to my co-convenors at the Animal Law Discussion Group, Robyn Trigg and Suzanne Zaccour, and to all those who participated in those events. A special thanks goes to Professor Florian Windisch who has read and commented on earlier drafts of my work, especially as regards Swiss law.

Molenhoek, 16 July 2021

ABSTRACT

This thesis explores the potential of the concept of dignity for UK and EU animal protection law. The first part of the thesis analyses the existing legislation that aims to protect humans and animals in order to find out whether and how the concept of dignity has been used therein. It will be argued that, although dignity features prominently in the context of human rights law, it does not currently seem to play any explicit, self-standing role in the context of animal law. Instead, the latter laws are underpinned by arguments based on the perceived desirability of reducing suffering and promoting welfare in animals. The second part of the thesis therefore examines what the relevant animal laws would look like if dignity were to be used as an organising principle therein. Although many theories of dignity that were developed in the relevant literature offer valuable insights as regards to what dignity means or entails, it will be argued that the most complete account seems to have been developed by Charles Foster. It suggests that dignity is about thriving, which will be translated into a process of self-realisation. Dignity is therefore taken to be about being and developing into yourself. The adopted account will then be applied to three areas involving animals to see how they would be affected by it: biotechnology, human-animal sexual relations, and hunting. In all these areas, the enshrinement of dignity would seem to lead to an increase in protection. Overall, it will be concluded that the incorporation of the notion of dignity in UK/EU animal law seems to be a logical and promising next step in the evolution of animal law. It would result in more complete substantive legal protection for animals and render the relevant legal systems more internally coherent.

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AWA	Animal Welfare Act 2006
Birds Directive	Directive 2009/147/EC
CBD	Convention on Biological Diversity
CITES	Convention on the International Trade in Endangered Species of Wild Fauna and Flora
CJEU	Court of Justice of the European Union
CJIA	Criminal Justice and Immigration Act 2008
CMS	Convention on the Conservation of Migratory Species of Wild Animals
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EFSA	European Food Safety Authority
EGE	European Group on Ethics in Science and New Technologies
EU	European Union
EU Charter	EU Charter of Fundamental Rights
FACE	European Federation for Hunting and Conservation
FSVO	Federal Food Safety and Veterinary Office

GMA	Genetically modified or engineered animal
GMO	Genetically modified organism
Habitat Directive	Directive 92/43/EEC
HRA	Human Rights Act 1998
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
Martin's Act	Cruel Treatment of Cattle Act 1822
MEP	Member of the European Parliament
MP	Member of Parliament
Novel Foods Regulation	Regulation (EU) 2015/2283
OPA	Obscene Publications Act 1959
Pease's Act	Cruelty to Animals Act 1835
POA	Protection of Animals Act 1911
RSPCA	Royal Society for the Prevention of Cruelty to Animals
Seal Products Regulation	Regulation (EC) 1007/2009
SOA	Sexual Offences Act 2003
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

TSchG	Tierschutzgesetz
UDHR	Universal Declaration on Human Rights
UK	United Kingdom
US	United States
WCA	Wildlife and Countryside Act 1981
WTO	World Trade Organization
WWII	Second World War
ZLA	Zoo Licensing Act 1981

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CHAPTER ONE: INTRODUCTION

Dignity is a complex concept, with theological, philosophical and historical roots.[1] The word 'dignity' stems from Latin and understandings of the word have evolved since it was first used. Originally, it was used to denote the elevated status of certain individuals within society. Only persons of a certain rank or office, such as kings, priests and the nobility, or those who possessed exceptional qualities, such as courage, were considered to possess it.[2] Over time, dignity also started to appear in other contexts, in which it was extended to all human beings.[3] Among other things, it has been used in the Judaeo-Christian tradition to defend man's special status based on the *Imago Dei* (connotating man's likeness to God) and by philosopher Kant to defend the unique status of rational agents.[4] Dignity has also played an explicit role in the political arena. It has been connected to communitarian and

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1 Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 EJIL 655, 658. For a more elaborate overview of dignity's history, see also, among others, Michael Rosen, *Dignity: Its History and Meaning* (Harvard University Press 2012); Charles Foster, *Human Dignity in Bioethics and Law* (Hart Publishing 2011) 24-42; Catherine Dupré, *The Age of Dignity* (Hart Publishing 2015) 28-52; Paolo Becchi, 'Human Dignity in Europe: Introduction' in Paolo Becchi and Klaus Mathis (eds), *Handbook of Human Dignity in Europe* 1. For some different classifications of the concept, see also Doris Schroeder, 'Dignity: Two Riddles and Four Concepts' (2008) 17 CQHE 230; Adam Schulman, 'Bioethics and the Question of Human Dignity' in Edmund Pellegrino, Adam Schulman and Thomas Merill (eds), *Human Dignity and Bioethics* (University of Notre Dame Press 2009) 3; Marcus Düwell, 'Human Dignity: Concepts, Discussions, Philosophical Perspectives' in Marcus Düwell and others (eds), *The Cambridge Handbook of Human Dignity* (CUP 2014) 23.

2 Jeremy Waldron, 'Lecture 1: Dignity and Rank' in Meir Dan-Cohen (ed), *Jeremy Waldron: Dignity, Rank, & Rights* (OUP 2015) 13 argues that this status has gradually been extended to all human beings.

3 Writers tend to mention Cicero in this context, who argued in favour of a universalist conception of dignity that applies to all human beings instead of a selected few. Note how he specifically contrasted humans with animals.

4 This criterion also appears in the works of other authors, such as Griffin, who links dignity to normative agency: James Griffin, *On Human Rights* (OUP 2008) (as cited in Waldron (n 2) 20).

republican ideals from the Enlightenment,[5] specifically to the 1789 French Declaration of the Rights of Man and of the Citizen,[6] and it has served as a driving force in various more specific social and political movements, concerned with, for example, the abolition of slavery.[7] It is mostly since the Second World War (WWII) that dignity features prominently in the legal context as well. In fact, not only is the word "dignity" well represented in both national and international legal instruments: the notion of dignity is even said to constitute the very foundation of human rights.[8] Dignity has therefore steadily established its place in legal, philosophical, political, religious and societal contexts.

At the same time, there has been growing public concern for animals. Among other things, there is increased awareness of how humans mistreat them[9] combined with a better (scientific) understanding of their capabilities and needs. We now know, for example, that (certain categories of) animals can feel pain, distress and fear, and we are starting to appreciate 'the social relationships which animals form; the fact that many species mate for life; [and] and the fact that animals can die of grief'.[10] This has led to the adoption of animal

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5 Developed, for example, by Rousseau: Paolo Carozza, 'Human Dignity in Constitutional Adjudication' in Tom Ginsburg and Rosalind Dixon (eds), *Research Handbook in Comparative Constitutional Law* (Edward Elgar Publishing 2011) 459, 462.

6 Notably, see Dupré (n 1) 38-42.

7 McCrudden (n 1) 660-61.

8 See chapter 2 of this thesis.

9 Such knowledge has come to light and been disseminated through efforts of organisations such as PETA and works including, *inter alia*, Peter Singer, *Animal Liberation* (The Bodley Head 2015); Gail Eisnitz, *Slaughterhouse: The Shocking Story of Greed, Neglect, And Inhumane Treatment inside the US Meat Industry* (Prometheus Books 2006); Jonathan Safran Foer, *Eating Animals* (Penguin Books 2011); Melanie Joy, *Why We Love Dogs, Eat Pigs and Wear Cows* (Conari Press 2009); Philip Lymbery and Isabel Oakeshott, *Farmageddon: The True Cost of Cheap Meat* (Bloomsbury Publishing 2015); and Michael Pollan, *The Omnivore's Dilemma: The Search for a Perfect Meal in a Fast-Food World* (Bloomsbury Publishing 2011).

10 Lord Melchett, HL Deb 28 November 1985, vol 468, col 1019. In this connection, see also Pavel Poc MEP, Directive 2010/63/EU Deb 8 September 2010; Mike Radford, *Animal Welfare Law in Britain: Regulation and Responsibility*' (OUP 2001) 25ff; Lori Gruen, *Ethics and Animals: An Introduction* (CUP 2014) 114-17. See, however, also Charles Foster, 'Pod Casts' (2018) 467 Literary Review, citing Jason Colby, *Orca: How We Came to Know and Love the Ocean's Greatest Predator*

protection laws in many countries worldwide, governing the treatment of animals in, among other things, a farming, testing, transportation, pet and circus context. Unsurprisingly, concern for animals has therefore also gradually started to penetrate other areas of law, such as trade law and human rights law. For instance, the relevant World Trade Organization (WTO) bodies have decided in the context of EU Regulation 1007/2009,[11] which prohibits the placing on the market of seal products, that concern for animal welfare falls within the "public morals" exception, hence it may on occasions trump free trade.[12] The EU Court of Justice also recently decided in a milestone case that concern for animal suffering might justify a ban on religious slaughter.[13] Efforts are also being made to protect animals' interests more effectively by assigning them rights or acknowledging them as persons,[14] or by regulating their protection at an international or even a global level.[15]

This thesis aims to connect the abovementioned two trends. Specifically, it examines whether dignity has already been used to justify the existence of animal protection

(OUP 2018). Colby argues that the public concern about killer whales is a result of increased animal individuation.

11 Regulation (EC) 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products [2009] OJ L286/36.

12 Appellate Body Report, *European Communities–Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R and WT/DS401/AB/R (22 May 2014).

13 Case C-336/19 (Grand Chamber) *Centraal Israëlitisch Consistorie van België e.a. and Others* ECLI:EU:C:2020:1031. Concern for animals has also entered the case law of the European Court of Human Rights (ECtHR). For an overview of some ECtHR cases relating to animals, see Tom Sparks, 'Protection of Animals Through Human Rights: The Case-Law of the European Court of Human Rights' in Anne Peters (ed), *Studies in Global Animal Law* (Springer 2020) 153 and the separate opinion of judge Pinto de Albuquerque in *Herrmann v Germany* App No 9300/07 (ECtHR 26 June 2012).

14 See, for example, the American Nonhuman Rights Project, as founded by Professor Steven Wise. See also David Boyd, *The Rights of Nature* (ECW Press 2017).

15 On the regulation of animal protection at the international level, see Charlotte Blattner, 'Global Animal Law: Hope Beyond Illusion: The Potential and Potential Limits of International Law in Regulating Animal Matters' (2015) 3 Mid-Atlantic Journal on Law & Public Policy 10; Thomas Kelch, 'Towards Universal Principles for Global Animal Advocacy' (2016) 5 Transnational Environmental Law 81.

laws in the United Kingdom (UK) and in the European Union (EU) and to determine their content, and, if it has not, what these laws might look like if it had been. The first part of the thesis has a more descriptive nature: it analyses the existing legislation that aims to protect humans and animals in order to find out whether and how the concept of dignity has been used therein. The second part has a more normative character: it examines which account of dignity might be the most appropriate one to use for animals, and what the implications of incorporating this notion into the law would be for various areas of animals use and being. As mentioned, the focus will be on the UK and EU legal frameworks. It will be noted in this connection that following Brexit, EU law (including EU law relating to animals) was retained, with some exceptions. However, these rules may be subject to change in the future.[16] Furthermore, it should be noted that, as regards the different jurisdictions in the UK, this thesis will primarily focus on English law. The laws of the other jurisdictions will only be discussed where appropriate, for example, when the main pieces of legislation on animals are concerned or when there is a legal case which is of particular importance for the purposes of this thesis.

There is a good deal of academic writing on dignity. However, few authors have discussed the concept in relation to animals. It should further be noted that although there is a substantial amount of philosophical literature on animal ethics, there is almost no academic analysis of the existing legal framework regarding animals (not only in relation to dignity, but also more generally). This thesis aims to fill some of these gaps. It relies on various areas of law (notably, animal law, medical law, human rights law, and EU law) and draws on multiple academic disciplines where appropriate (such as philosophy, zoology,

[16] For some earlier reports on the expected effects of Brexit on UK animal law, see Wildlife and Countryside Link and UK Centre for Animal Law, 'Brexit: Getting the Best Deal for Animals' (January 2018) <https://www.alaw.org.uk/wp-content/uploads/Brexit-Getting-the-Best-Deal-for-Animals-Full-Report.pdf> accessed 3 May 2021; Oliver Wookey, 'The Effect of the Brexit on Animal Welfare in the United Kingdom' (2018) 9 Derecho Animal. Forum of Animal Law Studies 29.

and theology). The emphasis in this thesis will be on areas of animal use in which dignity may actually make a difference, so where there might be no welfare issue or in which a limitation of welfare might not necessarily be the only or most pressing moral problem. Furthermore, the thesis focuses on areas on which the relevant legislatures may realistically be willing to legislate. It is hoped that the legislative and policy proposals put forward in this thesis would, if implemented, serve to strengthen the legal protection of animals and enhance the internal consistency of the UK/EU legal orders.

Before proceeding to the substantive part of this thesis, a distinction will be made between a number of dignity-related questions that are typically (explicitly or implicitly) discussed in the relevant literature. This will clarify the discussion to follow. First, *what* is dignity? One would usually say that having dignity means having a certain moral status, or even the highest of all. Second, *who* has it? Writers on this topic tend to fall into one of two camps. There are those who assign dignity to creatures that have certain relevant characteristics such as sentience, consciousness or moral agency. Others would claim that there are class qualifications for possession of dignity. One could, for example, acquire dignity through potential and/or species membership. Third, *what kind of treatment* does dignity require? The answer to this question is usually tied to the second question. Creatures with dignity should, for example, not be made to suffer unnecessarily or not be used as a mere means to an end. Fourth, is dignity *inalienable or forfeitable*?[17] Those who attribute dignity based on a certain quality would have to accept that if the latter is lost then the being would lose dignity. However, if dignity reflects species membership then it is unlikely that dignity could be lost. In this thesis, I will refer to this aspect as the "nature of dignity". It will be

[17] On this, see also Nick Bostrom, 'Dignity and Enhancement' in Pellegrino, Schulman and Merill (n 1) 173; Doris Schroeder, 'Dignity: One, Two, Three, Four, Five, Still Counting' (2010) 19 CQHE 118; Paul Formosa and Catriona Mackenzie, 'Nussbaum, Kant, and the Capabilities Approach to Dignity' (2014) 17 Ethical Theory and Moral Practice 875, 877.

noted here that some authors have attempted to unify these two possibilities (that is, to unify dignity as something inalienable and as something aspirational). Killmister, for example, encourages us to look at dignity as a capacity instead.[18] It could then be understood as the potential inherent in a being (this grounds its status) which should be realised (this is the aspirational part). The fifth question concerns the question of *whose dignity an undignified act touches upon*. One might think about the inflictee, but also the inflictor's dignity may be affected or even the dignity of society as a whole. Those who argue that an undignifying act touches upon the "perpetrator's dignity" as well call this its *Janus-faced* aspect.[19]

Outline of Contents

There are eight chapters. *Chapter 2* provides a brief overview of the use of dignity in human rights law. Understanding the role dignity plays in this area helps us recognise the use of dignity in the relevant UK/EU animal laws and understand the role this concept could possibly play in the future laws on animals. It will be shown that the concept of dignity mostly appeared as a foundational value on the legal landscape in reaction to the horrors of WWII. However, when dignity re-emerged on the legal scene in the 1990's as a result of the rise of bioethics, it became clear that the legal and philosophical work necessary to make dignity a sufficiently hard-edged concept to work in the courts had not been done yet. The process of finding out what exactly dignity entails therefore remains ongoing. The EU and the

[18] Suzy Killmister, 'Dignity: Not Such a Useless Concept' (2010) 36 Journal of Medical Ethics 160, also discussed in Foster (n 1) 46-48.

[19] This term seems to have been coined by Mountfield and Singh, as cited in Baroness Hale, 'Dignity' (2009) 31 Journal of Social Welfare and Family Law 101, 106 and Foster (n 1) 15-16. See also Rosen (n 1) 157; Charles Foster, 'Veterinarians and the Best Interests of Animals' (*Practical Ethics*, 9 September 2016) <https://blog.practicalethics.ox.ac.uk/2016/09/veterinarians-and-the-best-interests-of-animals/> accessed 16 July 2021.

European Convention on Human Rights (ECHR) have by now already connected dignity to a concrete set of core rights, and there are extensive legal and philosophical debates about what dignity entails. In their search for a more precise meaning of dignity, legislatures and courts do not seem to have adhered to one particular theory of dignity. However, various legal authors that focus on dignity from a doctrinal point of view seem to be of the opinion that it means something along the lines of humanity. It therefore seems that the overall question to be answered is what it means to be human. It is for the purposes of this thesis particularly interesting to notice how dignity has not been used solely to protect autonomy, nor are only humans that meet the demands of rational agency or self-consciousness perceived to have dignity. The legislatures and courts seem open to applying it to beings that are not at a specific moment in possession of these characteristics and whom might in fact never be or have been. Notwithstanding all of this, there are legitimate questions as regards to whose perspective should be used when it comes to determining what it means to be human and, notably, as regards to where the debate on what exactly dignity entails should take place. Currently, judges are afforded an enormous amount of flexibility (and therefore power), which raises questions about the institutional legitimacy of the judiciary and which might potentially undermine the rule of law. The obvious solution to this would be, insofar as possible, to further define the concept of dignity (and lay down its requirements) in statute. This may be a worthwhile goal to pursue in the animal law context.

Chapter 3 then analyses the UK/EU legal landscape concerning animals. In doing so, it examines whether the concept of dignity has been used in any meaningful way to justify the relevant laws and to determine their content. For this purpose, it consecutively discusses the relevant historical developments, the current legislation relating to animal protection and the parliamentary debates that preceded the adoption of these laws. It will be shown that animal law has undergone a tremendous evolution. From seeing animals

merely as tools to be used to serve human interests, concern has arisen for animal suffering and, later on, for their welfare more generally. It will be argued, however, that there is little evidence that the legislators have (explicitly and consciously) used the notion of dignity in the context of animal law. The relevant laws do not use the word dignity, nor do they necessarily need this concept for them to be understood. Furthermore, although the legislators have invoked the word dignity in the parliamentary debates, their use therein was too loose for it to be meaningful, turned out not to be a genuine appeal to dignity as a concept after all, did not have any effect on the resulting legislation and/or the focus immediately shifted to welfare-based concerns. But nevertheless some limited signs of dignity-thinking are visible in areas where one might expect to find it, such as in the areas of bestiality, zoos, and circuses. A look into these areas, notably the last one, reveals that legislators and society at large seem susceptible to the idea that something that we do to animals can be wrong even when it does not necessarily affect their experiential welfare. Generally speaking, however, such thoughts are not (yet) actually reflected in the relevant laws. Instead, their primary focus stays on the experiential welfare interests of animals.

Chapter 4 then addresses the question of what dignity might have to add to the existing UK/EU animal laws and explores the different theories of dignity that have been developed in the relevant literature in order to find out which one of these might be the most appropriate or helpful one to use in this context. The main theories to be explored are the idea of dignity that results from the Imago Dei and the accounts developed by Kant, Nussbaum, Foster, and Balzer, Rippe and Schaber. It will be argued that the criteria currently used in UK/EU animal law are morally insufficient because they are not capable of recognising types of wrongs that do not negatively affect the experiential welfare of animals. The concept of dignity might be able to fill this gap. Although many theories of dignity that are discussed in the chapter offer valuable insights as regards the debate on what

dignity means and entails, Charles Foster's theory seems to be the most accurate one. It suggests that dignity is about thriving. It is about being human or being an animal. For the purposes of this thesis, this definition will be unified into that of "self-realisation": dignity is about being and developing into yourself, whereby the self is to be understood in a broad manner. It encompasses not only the attributes one has by reason of one's membership of a particular species but also one's unique individuality, and attention is to be paid to all possible aspects of one's being, including the physical, emotional, cognitive and relational ones. Animals should therefore not be reduced to one characteristic (such as sentience) but considered in their wholeness. However, the same dilemma arises here as the one that arose in the context of human rights law: who decides what it means to be and flourish as an animal? Should an objective or subjective standard be used and, notably, is this a matter for humans or animals themselves to decide on? In reply to the latter question, it is suggested that perhaps the most sensible approach would be to use a combination of both. As a bottom line, the debate on what it means to flourish as an animal and therefore the law more generally should be informed by our empirical knowledge on animal preferences, abilities, appearance, behaviour and functions, especially when this knowledge stems from thorough academic research. The more normative input regarding this question should consequently come from humans, who are as far as we know linguistically and cognitively more advanced than at least most types of animals. Just as it seems to be in the context of humans, it should be a public exercise to find out which characteristics of an animal are morally valuable and/or most determinative to its identity (the inward dimension), and what the appropriate relationship between humans and animals should be (the outward dimension). In relation to the outward dimension, criteria to consider include instrumentalisation, ridiculisation and mutilation. The chapters to follow will then apply the selected account of dignity to various areas of animal use and being.

Chapter 5 starts this task by addressing the area of biotechnology. This area has recently seen and continues to see many new developments, especially since the discovery of the relatively accessible and cost-efficient CRISPR-technology. Many such technological applications might not cause suffering (or even reduce the amount of it) but might still be considered morally objectionable. This situation therefore calls for a new concept to be introduced. Chapter 5 examines how the notion of dignity might fit in. It consecutively discusses the relevant legislation, the ethical implications, the definitional challenges and some practical ramifications. It will be shown that the applicable existing legislation does not seem to leave much space for (ethical) considerations other than food safety, environmental damage, and animal health and welfare. However, the question of whether and which biotechnological applications would give rise to such further ethical concerns, i.e. which techniques interfere with dignity, defined as self-realisation, turns out to be tremendously difficult to answer. First, because the answer may depend on when exactly the self starts. Notably, the question arises as to whether acts taking place before this moment can be said to interfere with the self. Second, because it is unclear which alterations, from a substantive point of view, actually interfere with one's process of self-realisation. Many authors focus on an animal's species-specific characteristics and functions. Although such a starting point seems to be an improvement over merely considering animals to be sentient beings, the unique element of each individual should not be forgotten. An alteration does not need to reach beyond the species boundaries in order for it to be able to interfere with an individual's self-realisation. At the same time, some alterations may also contribute in a positive way to a creature's self-realisation. Just as there is a tremendous diversity of beings, each individual also consists of different elements, and removing, adding or changing one feature may allow other elements to flourish. The difficulty lies in establishing which features are most determinative for the self. It will furthermore be argued that apart from

these ethical issues that focus on the animal itself, biotechnological applications also seem to affect *human* dignity. The practice of altering animals may reveal characteristics in humans which are generally not considered to be dignifying, and it may change the relationships humans have with themselves, with other human beings, and with other animals. In terms of ethical considerations, it will be concluded that, although there are clearly difficulties in determining which alterations are dignifying and which ones are not, it seems clear that at least some types of modifications are not dignifying according to any standards. The law needs to be equipped with tools to be able to adequately address such applications. In terms of how to define such tools in law, it will be argued that perhaps the most nuanced and workable solution would be to use a template similar to the one laid down in Swiss animal dignity laws. In addition to containing welfare-based criteria, it prohibits in principle the interference with animals' abilities or appearance and their humiliation and instrumentalisation. The chapter will then close by discussing some practical ramifications. It will be argued (1) that the relevant legal systems need to be internally coherent, in the sense that they need to focus on the creation, the distribution *and* the breeding of genetically modified or engineered animals (GMAs); (2) that there are sound reasons to implement legislation at supranational level; and (3) that the development of alternatives to animal use may be one of the most promising and effective ways to combat the large-scale development of GMAs.

Chapter 6 then proceeds by examining the dignitarian implications of sexual relations between humans and animals. The topic illustrates how dignity might play out in an area where humans face the limits of their empirical knowledge on animals and which, partially as a result of that, is almost exclusively characterised by normative aspects. Indeed, it will be argued that this area is marked by empirical, practical and normative challenges. We do not know of (all types of) animals precisely why they engage in sexual acts

and how they experience these acts. Humans also only have limited communication abilities, which prevents them from fully knowing whether an individual animal is or has been a consenting participant to the act. Furthermore, even if we were to ever know more about animals' sexual motivations, experiences and desires, this still does not necessarily tell us everything we need to know in terms of which sexual relationships are proper or improper. The determination of the propriety of a relationship is a normative area, which is to be explored by humans collectively. One interpretation of what a dignitarian approach in this field could look like will, however, be brought forward. In doing so, the main focus will be put on the idea of instrumentalisation, which does not seem dignifying for either human or animal involved, nor for society as a whole and for particular vulnerable groups within it. As aggravating factors, the potential negative emotional, relational and physical consequences, the potential infringement on sexual autonomy, and the link between bestiality and violence more generally will be highlighted. It will be argued that, especially insofar as an instrumentalising nature is a sufficient condition to declare a certain act undignifying, the justifications underlying the relevant laws are incomplete and their scope insufficiently broad. The only phenomenon that might potentially justify a criminal exception to a prohibition on sexual acts between humans and animals is that of zoophilia. Zoophiles claim to be sexually involved with animals in order to express their love and/or deepen their connection with them. From the human perspective, there might therefore be reasons to assume that such involvement could be dignifying, as they might be an expression of humans' relational nature (Foster has linked this social nature to human dignity). From the animal perspective, however, it seems unclear whether such zoophilic acts can be dignifying. We simply do not know enough about animals' motivations for sexual involvement and their experience of it to give any verdict on the matter, and there are complications in finding out whether they are or have truly consented. Therefore, a dilemma arises here. On one

hand, there is a danger of patronising humans (and potentially animals) by prohibiting all types of sexual involvement between them. On the other hand, animals are vulnerable subjects who cannot, in many cases, defend or protect themselves adequately, both during and after the act. In addition, there is another evidential problem here: perpetrators of bestiality might abuse any potential zoophilia exception to escape criminal liability. These facts seem to constitute good reasons not to make any criminal exception for acts of zoophilia. Incorporating dignity into animal law might therefore result in a legal prohibition on all types of sexual involvement between humans and animals, even where no physical or emotional harm to the animal is shown.

Chapter 7 then discusses the opposite scenario: it explores whether the incorporation of dignity might in some contexts also require a liberalisation of animal protection laws, that is, whether it could also result in animals receiving *less* legal protection. The chapter focuses on hunting and animal predation, as it may be wondered whether the nature of prey animals could perhaps be relied upon to justify their hunting.[20] It will be argued that forms of killing which are biologically necessary might indeed not be undignifying and that hunting might in those cases not necessarily be a less dignifying way of meat acquisition than buying farmed meat from the store. Although a final verdict on the latter matter depends on the precise living and dying circumstances at hand, some forms of living in the wild and dying at the hand of a hunter seem less detrimental to animal welfare than certain farming methods, and hunting (when done under certain circumstances) might also better respect animals' own innate abilities to escape predators than slaughterhouses do. Additionally, hunting might also fulfil certain needs in some human beings which they consider crucial to their self-realisation and which they claim cannot be achieved equally effectively

[20] After all, if dignity is about being yourself, and if one is a member of a prey species, is it then not actually dignifying for one to be hunted on?

in other ways. However, that being said, all forms of hunting which are not biologically necessary seem undignifying by default and should therefore be legally prohibited. From the animal perspective, this is so primarily because life is constitutive to its further development. From the human perspective, the reason can be found in the Janus-faced nature of dignity and in the dignifying quality of empathy. The arguments developed in the first half of the thesis will then be applied to the area of predation amongst wild animals. It will be argued that Fosterian dignity does not necessarily impose a burden on humans to actively intervene such acts of predation. In contrast to many animal liberalist theories, the notion of dignity can, due to its holistic nature, take into account the identity-changing nature of intervention. Resultantly, it is capable of consistently claiming that unnecessary suffering should be reduced in general whilst not necessarily being committed to fully condemning or intervening in wild animal predation either. Using the notion of dignity would therefore render the law internally consistent.

Chapter 8 then ties together the various arguments that were made throughout the thesis. It will be argued that despite some remaining conceptual, empirical and practical challenges, with regard to which further research is necessary, the concept of dignity is capable of covering an important gap in the existing legislation and therefore seems to be a promising and logical next step in the evolution of animal law. By incorporating this notion into animal laws, the relevant legal systems would seem capable of offering more complete substantive protection to animals and be rendered more internally coherent.

CHAPTER TWO: DIGNITY IN HUMAN RIGHTS LAW

The word dignity features prominently on the legal landscape. Among other things, it has a prime position in the Universal Declaration on Human Rights (UDHR); the United Nations Charter; the International Covenant on Economic, Social and Cultural Rights (ICESCR); the International Covenant on Civil and Political Rights (ICCPR); and the EU Charter of Fundamental Rights. Dignity is also included in the constitutions of 'nearly 160 countries'[21] and makes a regular appearance not only in the case law of jurisdictions whose legislation contains the word dignity, but also in the case law of jurisdictions in whose legislation this word is absent. This chapter provides a brief overview of the use of dignity in human rights law. Understanding the role of dignity in human rights law helps us recognise the use of dignity in the relevant UK/EU animal laws and understand the role this concept could possibly play in the future laws on animals. This chapter focuses primarily on the EU Charter of Fundamental Rights (EU Charter), the UK Human Rights Act 1998 (HRA), and the European Convention on Human Rights (ECHR). The first two are the principal acts concerned with human rights protection in the jurisdictions examined and therefore an obvious point of inquiry. The ECHR is strictly speaking not EU or UK law. However, the HRA is a direct implementation of it, and Article 52.3 of the EU Charter also prescribes that the jurisprudence of the European Court of Human Rights (ECtHR) should be followed insofar as the EU Charter rights correspond to the rights laid down in the ECHR. The ECHR is therefore included within the primary scope of this inquiry as well. It will be noted, however, that dignity is considered to be a universal[22] and largely judge-

[21] James May and Erin Daly, 'Why Dignity Rights Matter' (2019) 2 EHRLR 129, 131.

[22] Jackie Jones, 'Human Dignity in the EU Charter of Fundamental Rights and its Interpretation Before the European Court of Justice' (2012) 33 Liverpool Law Review 281, 284.

made concept,[23] and that the courts of different jurisdictions have a relatively close relationship when it comes to using and interpreting it (notably, they are inspired by one another's judgments).[24] The observations that appear in this chapter are therefore to some extent based on the practices and case law of other jurisdictions as well.

This chapter will show that the concept of dignity mostly appeared as a foundational value on the legal landscape in reaction to the horrors of WWII.[25] However, when dignity re-emerged on the legal scene in the 1990's as a result of the rise of bioethics, it became clear that the legal and philosophical work necessary to make dignity a sufficiently hard-edged concept to work in the courts had not been done yet. The process of finding out what exactly dignity entails therefore remains ongoing. The EU and the ECHR have by now already connected dignity to a concrete set of core rights, and there are extensive legal and philosophical debates about what dignity entails. In their search for a more precise meaning of dignity, legislatures and courts do not seem to have adhered to one particular theory of dignity. However, various legal authors that focus on dignity from a doctrinal point of view seem to be of the opinion that it means something along the lines of humanity. It therefore seems that the overall question to be answered is what it means to be human. It is for the

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23 As described below, the EU is somewhat of an exception to this, as its Charter of Fundamental Rights has explicitly connected dignity to a concrete set of rights. However, before the Charter entered into force, dignity also used to be a largely judge-made concept in the EU: Catherine Dupré, 'Human Dignity' in Steve Peers and others (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014) 3, 13-15.

24 Generally, see Catherine Dupré, *The Age of Dignity* (Hart Publishing 2015) 91-99 and Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 EJIL 655, 694-97. For some cases in which extensive use of comparative material on dignity was made, see Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609 (*Omega*) and *Vinter and Others v UK* App nos 66069/09, 130/10 and 3896/10 (ECtHR, 9 July 2013).

25 Although it is acknowledged here that much of the law of the ancient world, of the Middle Ages in the west, and of many ancient legal disciplines (such as ecclesiastical law) are rooted in dignity. The Stoics relied on dignity a good deal, and their thinking was hugely important in (eg) Roman law, which was itself very important in determining the modern law of many jurisdictions. I am grateful to Professor Charles Foster for this remark.

purposes of this thesis particularly interesting to notice how dignity protects interests other than autonomy as well and how it also applies to humans who lack rational agency or self-consciousness. The legislatures and courts seem open to applying it to beings that are not at a specific moment in possession of these characteristics and whom might in fact never be or have been. Notwithstanding all of this, there are legitimate questions as regards to whose perspective should be used when it comes to determining what it means to be human and, notably, as regards to where the debate on what exactly dignity entails should take place. Currently, judges are afforded an enormous amount of flexibility (and therefore power), which raises questions about the institutional legitimacy of the judiciary and which might potentially undermine the rule of law. The obvious solution to this would be, insofar as possible, to further define the concept of dignity in statute. This may indeed be a worthwhile goal to pursue in the animal law context.

2.1 History

Dignity already featured in the constitutions of some countries in the beginning of the twentieth century, such as in Mexico (1917), Weimar Germany (1919), Finland (1919), Portugal (1933) and Ireland (1937).[26] This was stimulated by 'the combination of the Enlightenment, republican, socialist/social democratic, and Catholic uses of dignity...with each being more or less influential in different countries'.[27] However, it was not until after WWII that dignity

[26] McCrudden (n 24) 664. Samuel Moyn, 'The Secret History of Constitutional Dignity' in Christopher McCrudden (ed), *Understanding Human Dignity* (OUP 2013) 95 points out how the Irish origins of this constitutional concept are of a religious nature.

[27] McCrudden (n 24) 664.

gained its prominent position on the legal landscape.[28] The events that had occurred during the war had horrified the world and much legislation that was drafted right afterwards was aimed at preventing a repetition of these horrors. The 'constitutional concept of human dignity took shape as a kind of manifesto for a new era of peace and democracy',[29] in which the total instrumentalisation and destruction of humans would belong to the past.[30] Dignity therefore had a symbolic function: it symbolised the 'never again' thought and served as what Dupré likes to call a 'temporal boundary' between the past, present and future.[31] This symbolic function is well-illustrated by the UDHR, which may well be the most prominent document in which dignity features. It was clear to the drafters what type of practices were morally unacceptable, but not yet which human rights theory underpinned these. Here, dignity stepped in. As McCrudden writes: 'Everyone could agree that human dignity was central, but not why or how'.[32] Dignity was therefore inserted as a placeholder concept, and thereby came to serve as justification for the newly adopted legislation.[33]

Dignity is indeed a symbolically powerful and flexible concept. Among other things, it is sensitive to differences between particular regions and cultures, non-ideological, humanistic, and both timeless and 'adaptable to changing ideas of what being human

28 ibid; Dupré (n 24) 53; Paolo Becchi, 'Human Dignity in Europe: Introduction' in Paolo Becchi and Klaus Mathis (eds), *Handbook of Human Dignity in Europe* (Springer 2019) 1, 7.

29 Dupré (n 24) 53.

30 This is, however, perceived to be a Western thought. In other countries, such as South-Africa, the drafters had different aims in mind when using dignity as a symbol for change, such as achieving equality after Apartheid. On this topic, see Laurie Ackermann, *Human Dignity: Lodestar for Equality in South Africa* (Juta Publishers 2012).

31 Dupré (n 24) 57-66.

32 McCrudden (n 24) 678.

33 ibid 675-78.

involves'.[34] However, with the passing of time, the problematic aspects of the word 'dignity' being included in the law also became visible. The absence of a concrete definition has led to a lack of clarity on its content, which has resulted in extensive legal and philosophical debates. This is especially so in the field of bioethics, which has recently seen many controversial technological developments related to topics such as cloning, genetic engineering, abortion, euthanasia, and so on[35] and which are to a large extent responsible for dignity emerging 'on the legal scene in the 1990s' again.[36] However, where the UDHR drafters agreed on the substantive content of the Declaration, many in the field of bioethics use dignity to justify completely opposing views. This forced lawyers, judges, and academics to develop more sophisticated views on 'what is a human' and how to treat it. It required them to be more philosophical. It was therefore only recently realised that the legal and philosophical work necessary to make dignity a sufficiently hard-edged concept to work in the courts had not been done. The process of finding out what exactly dignity entails is still ongoing.

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34 McCrudden (n 24) 677, citing David Weisstub, 'Honor, Dignity, and the Framing of Multiculturalist Values' in David Kretzmer and Eckart Klein (eds), *The Concept of Human Dignity in Human Rights Discourse* (Kluwer Law International 2002) 263.

35 For a detailed discussion of these topics, see Deryck Beyleveld and Roger Brownsword, *Human Dignity in bioethics and Biolaw* (OUP 2001); Edmund Pellegrino, Adam Schulman and Thomas Merrill (eds), *Human Dignity and Bioethics* (University of Notre Dame Press 2009); Charles Foster, *Human Dignity in Bioethics and Law* (OUP 2011). In relation to end of life decisions, also note the following judgment of the Indian Supreme Court, which elaborately discusses dignity: *Common Cause (A Regd. Society) v Union of India & Anr.* (2018) 5 SCC, paras 150-60; 70-114; 74-82. I am grateful to Professor Charles Foster for bringing this judgment to my attention.

36 Catherine Dupré, 'Unlocking Human Dignity: Towards a Theory for the 21st Century' (2009) 2 EHRLR 190, fn 36, as cited in Foster (n 35) 40.

2.2 Dignity as a Foundational Value

Dignity seems to serve currently as a foundational value in the jurisdictions examined. EU legislation explicitly confirms this in Article 2 of the Treaty on European Union (TEU) and in the preamble and the Explanatory Notes to the EU Charter.[37] The HRA and the ECHR are, in contrast, silent on the matter.[38, 39] This is especially surprising with regard to the ECHR, given the fact that dignity is prominently present (as a foundational value) in many, if not most, other international human rights documents. The reason behind the absence of dignity in the ECHR is unknown.[40] It has been suggested that 'the [ECHR] is a more practical, pragmatic, and mechanism-oriented text than that of the [UDHR]',[41] that 'dignity would be too wide a notion to be included in treaty language',[42] and that the explicit incorporation of dignity was 'deemed unnecessary, given the claim to ancestry in the UDHR

37 The Explanatory Notes explain that 'The dignity of the human person is not only a fundamental right in itself but constitutes the real basis of fundamental rights': Explanations Relating to the Charter of Fundamental Rights [2007] OJ C303/17. In *Omega* (n 24) para 34, which was decided before the Charter acquired binding legal effect with the entry into force of the Lisbon Treaty, the CJEU also decided that dignity was a general principle of law, thereby allowing it to be used as justification to derogate from the fundamental economic freedoms.

38 Daniel Bedford, 'Human Dignity in Great Britain and Northern Ireland' in Becchi and Mathis (n 28) 319, 321 largely attributes the absence of dignity as a formal concept in UK law to the fact that there was no 'need [for dignity] to be introduced as the foundation of a new constitutional order that signified a sharp rupture from a repressive past', as was the case in many European countries after WWII.

39 Benedict Douglas, 'Undignified Rights: The Importance of a Basis in Dignity for the Possession of Human Rights in the United Kingdom' (2015) Public Law 241 argues that dignity should be explicitly acknowledged or adopted as justification for human rights laws in the UK, either through the case law or directly in the text of the law (although note how Bedford (n 38) argues that this has to some extent already happened in the case law). Catherine Dupré, '"Human Dignity is Inviolable. It Must Be Respected and Protected": Retaining the EU Charter of Fundamental Rights after Brexit' (2018) 2 EHRLR 101 also argues that the rights laid down in the EU Charter, and especially (the inviolability of) dignity as enshrined in Article 1, should be codified in UK law after Brexit.

40 Note, however, how the word dignity appears in the preamble of Protocol 13 to the ECHR: 'the abolition of the death penalty is essential...for the full recognition of the inherent dignity of all human beings'.

41 Jean-Paul Costa, 'Human Dignity in the Jurisprudence of the European Court of Human Rights' in McCrudden (n 26) 393, 394.

42 Jochen Frowein, 'Human Dignity in International Law' in Kretzmer and Klein (n 34) 123.

which gives dignity a prominent position'.[43] Different authors, however, consider it very unlikely that the ECHR drafters had different philosophies about human rights in mind.[44] Indeed, the ECtHR case law confirms that dignity also serves as a foundational value therein. The ECtHR has emphasised on various occasions that 'the very essence of the Convention is respect for human dignity and human freedom'.[45] Similar statements in UK case law seem more rare,[46] but can also occasionally be found.[47] It should be noted that, on top of being a foundational value, dignity is also perceived to be enshrined as a right in Article 1 of the EU Charter.[48, 49]

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43 Douglas (n 38) 243.

44 Costa (n 41) 394; Dupré (n 24) 63-64; Antoine Buyse, 'The Role of Human Dignity in ECHR Case-Law' (*ECHR Blog*, 21 October 2016) <https://www.echrblog.com/2016/10/the-role-of-human-dignity-in-echr-case.html> accessed 16 July 2021.

45 *Goodwin v UK* App no 28957/95 (ECtHR, 11 July 2002) para 90; *SW v UK* App no 20166/92 (ECtHR, 22 November 1995) para 44; *Pretty v UK* App no 2346/02 (ECtHR, 29 April 2002) para 65; *Bouyid v Belgium* App no 23380/09 (ECtHR, 28 September 2015) para 89.

46 Douglas (n 38) 249-51. See also Sir James Munby, 'Why Do We Ignore Dignity? Some Comments' (2019) 2 EHRLR 119, which seeks to find reasons for the 'limited uses of dignity' in 'English judicial discourse'.

47 Notably, see *R (on the application of A) v East Sussex County Council (No 2)* EWHC 167 (Admin), [2003] 2 WLUK 559, para 86. See also *North West London Clinical Commissioning Group v GU* [2021] EWCOP 59, paras 63 and 81. Regarding the ECHR specifically, Lady Hale also confirmed in UK case law that dignity is its essence: *Ghaidan v Godin-Mendoza* [2004] UKHL 30, para 132.

48 Sebastian Heselhaus and Ralph Hemsley, 'Human Dignity and the European Convention on Human Rights' in Becchi and Mathis (n 28) 969, 976 write that the EU Charter is unique amongst international human rights treaties for enshrining dignity as a separate right.

49 Explanations Relating to the Charter of Fundamental Rights (n 37), 'Explanation on Article 1'; Dupré (n 23) 15, 19; Sebastian Heselhaus, 'Human Dignity in the EU' in Becchi and Mathis (n 28) 943, 951. The formulations used by various European authorities seem to confirm that a right to dignity exists in the EU: Case C-377/98 *Kingdom of the Netherlands v European Parliament and Council of the European Union* [2001] ECR I-7079; European Commission, 'Human Dignity' <https://ec.europa.eu/info/aid-development-cooperation-fundamental-rights/your-rights/your-rights-eu/know-your-rights/dignity/human-dignity_en> accessed 16 July 2021. On the interpretation and potential effects of Article 1 EU Charter, see also Jones (n 22) 286-87; Dupré (n 23) 19-20; Heselhaus (n 49) 951-53.

Dignity as a foundational value has several functions. It is said to provide 'the theoretical foundation for human rights';[50] to assist 'in the interpretation of human rights at the sub-constitutional level';[51] to be 'one of the values that every constitutional right is intended to realize';[52] to play 'a role in the limitations to constitutional rights and in determining the limits to such limitations';[53] and to play 'a primary interpretative role in those cases where the constitution does recognize a constitutional right to human dignity'.[54] The first of these seems especially significant, as dignity is therefore also considered to be the 'source of all...constitutional rights'.[55] The reason for also enshrining dignity as a right in EU law is said to be teleological in nature: 'alleged victims...should always be able to rely on dignity regardless of whether dignity is at stake as a right or as the basis of rights'.[56]

The situation of the jurisdictions examined somewhat contrasts with that of Germany, which has famously enshrined dignity as an absolute right.[57] This absoluteness has consequences for dignity's scope: as the right to dignity will take priority over any other

50 Aharon Barak, 'Human Dignity: The Constitutional Value and the Constitutional Right' in McCrudden (n 26) 361, 362.

51 ibid.

52 ibid.

53 ibid 362-63.

54 ibid 363.

55 Dupré (n 24) 71. Recall how the Explanatory Notes to the EU Charter also state that 'dignity constitutes the real basis of fundamental rights'.

56 Dupré (n 23) 15-16. Drawing on the difference between status dignity and dignity as a quality, Conor O'Mahony, 'There Is No Such Thing as a Right to Dignity' (2012) 10 International Journal of Constitutional Law 551, however, argues that to implement dignity both as a foundational value and as a right is confusing and eventually self-destructive, and that any right to dignity should therefore be removed.

57 Generally, see Dieter Grimm, 'Dignity in a Legal Context: Dignity as an Absolute Right' in McCrudden (n 26) 381, 386-91 and Barak (n 50) 369-70. Although it should be noted here that Article 1 EU Charter may also perhaps be interpreted as an absolute right to dignity.

right in case of a clash, it needs to be defined narrowly.[58] To be sure, the German right to dignity has not formally been given any concrete meaning.[59] However, it is thought to embrace Kant's object formula, which holds that rational agents should never be treated as mere means, but always as ends in themselves.[60] Resultantly, only the gravest violations are included in its scope.[61] This position can be explained in light of the country's history. The norm of dignity is specifically addressed towards 'all holders of public authority' or 'all state agents',[62] thereby aiming to prevent practices similar to those carried out by the Nazi's from happening again.[63]

2.3 Dignity's Meaning

Although the process of finding out what dignity means is still ongoing, McCrudden has argued that all legal documents worldwide that contain dignity seem to share a minimum core. He considers this core to consist of 'at least three elements'.[64] First, 'every human being possesses an intrinsic worth, merely by being human'.[65] Second, 'this intrinsic worth should be recognized and respected by others, and some forms of treatment by others are

58 Grimm (n 57) 389; Barak (n 50) 369-70.

59 Grimm (n 57) 382; Jackie Jones, '"Common Constitutional Traditions": Can the Meaning of Human Dignity under German Law Guide the European Court of Justice?' (2004) Public Law 167, 169.

60 Barak (n 50) 369-70. For Kant's influence on the German Basic Law, see also Jones (n 59) 177-80.

61 Grimm (n 57) 390.

62 ibid 382.

63 Barak (n 50) 369-70; Frowein (n 42) 123.

64 McCrudden (n 24) 679.

65 ibid.

inconsistent with, or required by, respect for this intrinsic worth'.[66] Third, 'recognizing the intrinsic worth of the individual requires that the state should be seen to exist for the sake of the individual human being, and not vice versa'.[67] These elements are, however, 'stated at a very high level of generality'.[68] EU law, instead, has been more explicit on dignity's meaning.

EU law is unique in the world because it is relatively explicit on what it means by dignity.[69] Not only has it, as we have seen, explicitly declared it to be its foundational value. The relevant authorities have also actually listed some of its characteristics and corollaries in Title I of the EU Charter.[70] It is 'inviolable' and contains the rights to 'life' and to 'the integrity of the person' and the prohibitions of 'torture and inhuman or degrading treatment or punishment' and of 'slavery and forced labour'.[71] The right to the integrity of the person deserves some further explanation. It means that 'everyone has the right to respect for his or her physical and mental integrity'.[72] In 'the fields of medicine and biology, the following must be respected in particular': 'the free and informed consent of the person concerned,

66 ibid.

67 ibid.

68 ibid. The elements brought forward by McCrudden seem to be 'uncontroversial amongst readers of the dignity literature': Foster (n 35) 94. Note, however, Paola Carozza, 'Human Dignity and Judicial Interpretation of Human Rights: A Reply' (2008) 19 EJIL 931, 936-99, which argues that there seems to be more consensus at a global level on dignity's substance than McCrudden himself suggests.

69 However, in *Omega* (n 24), which was decided before the Charter acquired binding legal effect, the CJEU left the individual Member States (in this case, Germany) substantial discretion as to how to interpret the notion of dignity within their own jurisdiction. On this topic, see also Jones (n 22) 291-93.

70 Dupré (n 24) 74 writes that none of the other constitutions that have enshrined human dignity has provided any definition of it. Heselhaus (n 49), however, points out how the EU (courts), when interpreting human dignity, need to be sensitive to the positions of the various Member States on the matter as well as to the interpretation given to dignity by the ECtHR.

71 See Articles 1 to 5 respectively.

72 Article 3(1).

according to the procedures laid down by law'; 'the prohibition of eugenic practices, in particular those aiming at the selection of persons'; 'the prohibition on making the human body and its parts as such a source of financial gain';[73] and 'the prohibition of the reproductive cloning of human beings'.[74] Dignity is furthermore mentioned in Articles 25 and 31 of the Charter. Article 25 enshrines the rights of the elderly and says that the EU 'recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life'. Article 31 concerns fair and just working conditions. The EU has therefore connected dignity to a very concrete set of rights and prohibitions.[75] It should be noted, however, that these rights and prohibitions are not necessarily all-encompassing for the protection of dignity. Since dignity is one of the founding values –and since it, according to the Explanatory Notes, even constitutes '*the* real basis of fundamental rights'[76]– dignity 'flows through all the articles of the Charter'.[77] It might therefore be argued that any other type of protection given by the EU serves to protect one's dignity as well.

Given that the texts of the HRA and the ECHR are silent on dignity's perceived foundational nature, it comes as no surprise that dignity has not been defined in these legal documents either. To be sure, this does not mean that the word dignity is not mentioned in the ECHR or in UK law at all. Notably, Protocol 13 to the ECHR mentions in its preamble that 'the abolition of the death penalty is essential...for the full recognition of the inherent

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73 On this topic, see also Case C-377/98 *Kingdom of the Netherlands v European Parliament and Council of the European Union* [2001] ECR I-7079.

74 Article 3(2).

75 For explicit references to dignity in secondary EU legislation, see Heselhaus (n 49) 947.

76 Emphasis added.

77 Jones (n 22) 284. See also Dupré (n 23) 7. David Feldman, 'Human Dignity as a Legal Value: Part I' (1999) Public Law 682, 690 also writes more generally, not necessarily in relation to the EU Charter, that 'there is arguably no human right which is unconnected to human dignity'.

dignity of all human beings'. The word dignity is also mentioned in, for example, section 1(2) of the UK Care Act 2014 and in the Code of Practice to the 1983 Mental Health Act. However, despite the lack of any formally-given meaning, many authors seem to agree that Articles 2, 3 and 4 of the ECHR constitute dignity's minimum core[78] (although Article 8 is sometimes taken to be included in this core as well).[79] It has in this connection been noted that the ECtHR has relied on the concept of dignity especially extensively when it comes to Article 3.[80] The ECtHR has, however, not limited itself to using dignity with regard to these core articles only. It has also mentioned the word dignity in relation to, for example, Articles 6[81] and 7.[82] This is unsurprising. After all, protecting dignity is said to be the 'very essence of the ECHR', and the other articles laid down therein therefore seem to be relevant to it as well.

The articles that are said to contain dignity's minimum core in both these jurisdictions have a lot of overlap in terms of substance.[83] First, the rights laid down in Title I of the EU Charter have a strong 'textual similarity with the ECHR core prohibitions'.[84] The

78 eg Dupré (n 24) 68; Buyse (n 44); Costa (n 41) 402. Note how some authors make a connection with the absolute nature of (some of) these rights (and of some of the rights laid down in Title I of the EU Charter): Heselhaus (n 49) 951-52, 954-62 and Heselhaus and Hemsley (n 48) 980-81, 89.

79 Bedford (n 38) 322.

80 McCrudden (n 24) 683; Costa (n 41) 396; Buyse (n 44). Louise Finer and John Wadham, 'Dignity, Ill-Treatment and Detention' (2019) 2 EHRLR 155, 158 writes that 'out of the 1,482 judgments dealing with art.3 cases in the [ECtHR], 852 mention[ed] dignity'. The ECtHR Grand Chamber has even admitted itself that there is a 'particularly strong link between the concepts of "degrading" treatment or punishment within the meaning of Article 3 of the Convention and respect for "dignity"': *Bouyid v Belgium* (n 45) para 90. For some key cases on human dignity under Article 3 see Daniel Bedford, 'Key Cases on Human Dignity Under Article 3 of the ECHR' (2019) 2 EHRLR 185.

81 eg *Bock v Germany* App no 11118/84 (ECtHR, 29 March 1989) para 48.

82 eg *SW v UK* (n 45); *CR v UK* App no 20190/92 (ECtHR, 22 November 1995) para 38.

83 On this topic, see also Heselhaus (n 49) 954-59.

84 Dupré (n 24) 75.

Explanatory Notes to the EU Charter reveal the reason behind this: Title I of the EU Charter is largely based on the relevant ECHR rights.[85] There are merely a few differences between them: Article 2 EU Charter 'explicitly mentions the abolition of the death penalty';[86] 'Article 3 'codifies the existence of "a right to respect for physical and mental integrity"';[87] and Article 5 adds the practice of human trafficking to the content of Article 4 ECHR.[88] Furthermore, human dignity occupies the 'prime position' in the EU Charter, whereas in the ECHR this position is taken by the right to life.[89] The overlap in protection that these two jurisdictions offer in relation to dignity is strengthened by Article 52(3) of the EU Charter, which we have seen prescribes that the ECtHR's jurisprudence should be followed insofar as the EU Charter rights correspond to the rights laid down in the ECHR.

The existing laws of many countries, and especially the concept of dignity laid down therein, are often said to be heavily influenced by Kant's theory.[90] In fact, he has been called the 'father of the modern concept of human dignity'.[91] Despite not explicitly

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85 Jones (n 22) 287-90 provides a detailed overview of the overlap between the core articles.

86 Dupré (n 24) 76, thereby 'acknowledging...Additional Protocols 6 and 13'.

87 ibid, as developed by the ECtHR and the 1997 Oviedo Convention on Human Rights and Biomedicine.

88 ibid. See also Dupré (n 38) 104.

89 ibid 76-77.

90 In this connection, see also George Fletcher, 'Human Dignity as a Constitutional Value' (1984) 22 University of Western Ontario Law Review 171.

91 Giovanni Bognetti, 'The Concept of Human Dignity in European and US Constitutionalism' in Georg Nolte (ed), *European and US Constitutionalism* (CUP 2005) 85, 89. Note, however, also James Whitman, 'Human Dignity in Europe and the United States: the Social Foundations' in Nolte (n 91) 108, 110-11, which argues that in continental Europe, human dignity 'has [instead] been formed by a pattern of *levelling up*, by an extension of formerly high-status treatment to all sectors of the population'. This "elevation theory" is also visible in Jeremy Waldron, *Dignity, Rank, and Rights* (OUP 2012) and Barak (n 50) 363. Jeremy Waldron, 'How Law Protects Dignity' (2012) 71 Cambridge Law Journal 200 applies this theory to the procedural aspects of the law. For a reply to this, see Julian Sempill, 'Law, Dignity and the Elusive Promise of a Third Way' (2018) 38 OJLS 217.

referring to Kant,[92] it has been argued that his interpretation of dignity was adopted by the judges of the German Constitutional Court after WWII,[93] and that it subsequently heavily influenced the concept of dignity in other countries.[94] However, at the same time, it is important to note that the existing laws in the jurisdictions examined do not fully reflect Kant's theory. As will be shown below, dignity is nowadays often used by judges to protect the very vulnerable in our society, many of which do not meet the requirement of rational agency.[95] Furthermore, prominent followers of Kant have equated his object-formula to a requirement to respect autonomy,[96] and although autonomy indeed plays a pivotal role in our existing laws, there are also legal cases (and pieces of legislation, for that matter) which have led to autonomy being trumped by other dignity interests.[97] It therefore seems that the legal frameworks in the jurisdictions examined do not currently follow any specific dignity theory. Indeed, McCrudden writes that 'there is little evidence that the legal [and judicial] use of the concept has been directly affected by recent philosophical/political theory analyses, or vice versa'.[98] Foster makes a similar observation, noting that 'the notion of dignity

92 Grimm (n 57) 384.

93 Dupré (n 24) 30. See also McCrudden (n 24) 665; Jones (n 59) 177; Heselhaus and Hemsley (n 48) 978.

94 eg regarding workers' rights in the EU: Dupré (n 24) 115-16. For a further elaboration on the German influence on the EU Charter, see also Dupré (n 23) 11-13.

95 See chapter 4.3 of this thesis.

96 Christine Korsgaard, 'Interacting with Animals: A Kantian Account' in Tom Beauchamp and Raymond Frey (eds), *The Oxford Handbook of Animal Ethics* (OUP 2011) 91, 109-110, for example, has turned Kant's object formula into a requirement of consent. Similarly, Kant himself wrote that 'autonomy is the ground of the dignity of human nature and of every rational nature'. See his Groundwork 1996a: 4:436, cited by Zachary Davis, 'Scheler and Human Dignity' in Marcus Düwell and others, *The Cambridge Handbook of Human Dignity* (CUP 2014) 269, 270.

97 Notably, see the prohibitions on (consensual) dwarf-throwing, peep shows, sado-masochistic acts and the commercial exploitation of games simulating acts of homocide, as discussed in section 2.5. In light of these observations, O'Mohany (n 56) 573 argues that autonomy should not be 'characterised as a facet of the concept of dignity itself', but as a 'secondary right flowing from human dignity'.

98 McCrudden (n 24) 663.

has not been given any very hard-edged substantive meaning in the national or international courts where it has been deployed' and that 'accordingly there is no substantive understanding of dignity that has been rendered unusable by the courts. All interpretations remain available as forensic tools'.[99] It is in this connection interesting to note, however, how various prominent legal writers that look at dignity from a doctrinal perspective seem to hold the opinion that dignity –at least the way in which it has been used and interpreted in Europe–[100] means something along the lines of 'humanity'. Barak, for example, writes that:

> Human dignity as a constitutional value is the humanity of each person as a human being; it is the freedom of choice of human beings and the autonomy of their will. It is their human identity. It is the freedom of each individual to write the story of his or her life. It is the freedom from humiliation and degradation. It is preventing anyone from turning into a means for the satisfaction of another's will. Human dignity functions within the bounds of society. It represents a holistic approach to the internal and emotional world of human beings, their social identity, and their relationships with others.[101]

This interpretation seems to correspond to the interpretation of a number of other legal authors, who regularly connect dignity to 'humanity',[102] 'human flourishing',[103] 'self-realisation'[104] or who argue more specifically that dignity is about 'being human'.[105] That it is a 'process of humanisation'.[106] Although the quest of what exactly dignity entails remains

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99 Foster (n 35) 85. See also Bedford (n 38) 323 and Barak (n 50) 364.

100 Neomi Rao, 'On the Use and Abuse of Dignity in Constitutional Law' (2008) 14 Columbia Journal of European Law 201 argues that human dignity, as currently used, has been interpreted to reflect European communitarian values.

101 Barak (n 50) 363.

102 Notably, see Dupré (n 24). See also *R (A, B, X and Y) v East Sussex County Council (No 2)* [2003] EWHC 167 (Admin), [2003] 2 WLUK 559, para 86; Catherine Dupré, 'Making Human Dignity Work' (2019) 2 EHRLR 115; May and Daly (n 21) 132.

103 Foster (n 35) 6; Carozza (n 68) 943; Rao (n 100) 219-20.

104 Rao (n 100) 221-22. This idea also seems to be inherent in Charles Foster's theory: Foster (n 35) 6.

105 Foster (n 35) 5; Munby (n 46) 124-125; Bedford (n 38) 326, 361.

106 Foster (n 35) 7.

ongoing, these formulations and arguments seem to indicate that the fundamental, underlying question to be answered is what it means to be a human being and to take full part in the 'human adventure'.[107] It has been argued in the relevant literature that the law has (and should) take(n) a holistic and multidimensional approach to this question: human beings should be considered in all their aspects. Not only are they, for example, rational agents. They are also 'embodied, emotional, relational, cognitive, and self-constituting subject[s]'.[108]

The question arises whose viewpoint should be adopted in answering this question of what it means to be human. Should an objective or subjective standard be used? This is a difficult issue. To 'adopt a particular individual's own judgment…is to risk putting in place an unmanageable and unworkable standard', whilst 'adopting an entirely court-centred view…seems patronizing'.[109] Note further how the more a subjective standard is used, the closer dignity is to collapsing into autonomy.[110] The case law, particularly in relation to Article 3 ECHR, suggests that the courts want to have it both ways. Both subjective and objective standards are used.[111] Objective standards prove to be particularly useful with

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107 ibid 5.

108 Bedford (n 38) 326, 338. See also Foster (35), which focuses on humans as relational and embodied beings, and Dupré (n 36), which argues that we should not only focus on rational agency but take a more holistic approach towards the human person.

109 McCrudden (n 24) 706-7.

110 I am grateful to Professor Jonathan Herring for this comment.

111 On one hand, 'it may well suffice that the victim is humiliated in his own eyes, even if not in the eyes of others' (eg *Bouyid* (n 45) para 87 and *Tyrer v UK* App no 5856/72 (ECtHR, 25 April 1978) para 32). On the other hand, some type of conduct breaches Article 3 'whatever the impact on the person in question' (*Bouyid* (n 45) para 101) or because of its 'objectively degrading nature' (*Svinarenko and Slyadnev v Russia* App nos 32541/08 and 43441/08 (ECtHR, 17 July 2014) para 138). See also *Keenan v UK* App no 27229/95 (ECtHR, 3 April 2001) and *MS v UK* App no 24527/08 (ECtHR, 3 August 2012), where an objective standard was used for 'people who do not have the capacity to feel or perceive…treatments as humiliating or degrading due to mental illness': Dupré (n 24) 159. See further *R (Burke) v General Medical Council* [2004] EWHC 1879 (Admin), [2005] QB 424, para 66 and Heselhaus and Hemsley (n 48) 982.

regard to people who are not capable of experiencing certain types of treatment as undignifying, or who are not capable of expressing their own views on dignity.[112] Furthermore, it is said that to use an objective standard on top of a subjective one means to also protect moral wrongs, rather than only forms of harm.[113] Such an objective standard, it has been suggested, can be justified with reference to humanity at large: 'attacks on human dignity can be seen as inimical to a collective human conscience, rather than purely as attacks on the interests or well-being of a particular person'.[114] This sounds somewhat akin to the Janus-faced type of arguments that were described in the previous chapter. It seems to indicate that certain conduct is considered by a large part of society to deny what it means to be human, and not to intervene would make humans collectively responsible as well. Hence, it would affect their collective dignity. Such argument seems to tie into Feldman's observation that human dignity can 'operate on three levels': the species level, the group level, and the individual level.[115]

112 See also Feldman (n 77) 685-86.

113 Natasa Mavronicola, 'Bouyid and Dignity's Role in Article 3 ECHR' (*Strasbourg Observers*, 8 October 2015) <https://strasbourgobservers.com/2015/10/08/bouyid-and-dignitys-role-in-article-3-echr/> accessed 16 July 2021; Bedford (n 80) 187-88. The latter also discusses the work of Tarunabh Khaitan on expressive wrongs: Tarunabh Khaitan, 'Dignity as an Expressive Norm: Neither Vacuous Nor a Panacea' (2011) 32 OJLS 1, 6-8. Expressive wrongs are 'concerned with what the meaning of the act expresses in regards to the value of the human person' and do therefore 'not depend on the victim suffering material harm'. The objective standard used in *Bouyid* has, however, been criticized. According to the argument, 'human dignity is being misused in order to "distort the jurisprudence of art.3" and render the protection "unworkably wide"': Bedford (n 80) 185-86, citing Stephen Riley, 'Commentary on Bouyid v Belgium' (10 November 2015) <https://www.echrblog.com/2015/11/commentary-on-bouyid-v-belgium.html> accessed 16 July 2021.

114 Mavronicola (n 113). On this topic, see also Kent Greenawalt, 'Dignity and Victimhood' (2000) 88 California Law Review 779, 785-87 and O'Mahony (n 56) 570.

115 Feldman (n 77) 683-85.

2.4 Who Are Supposed to Have Dignity?

According to the relevant laws (but evidently not to Kant), *all* humans are supposed to have dignity.[116] It is not confined to nationality[117] nor to humans that possess certain features such as self-consciousness.[118] Although there is no international consensus on whether foetuses also have dignity,[119] there are indications in the case law that some dignity-based protection may be offered before birth.[120] In terms of deceased persons, it should be noted that 'ECtHR case law does not extend human rights protection after death'[121] and that also the EU 'Charter contains no indication that dignity might extend after death'.[122] However, it has been argued that 'the CJEU might want to follow the common constitutional traditions of Member States (Art 52.4)',[123] some of which do in fact extend the protection of

116 The UDHR explicitly confirms this in Article 1. However, it can also be understood from, for example, the EU Charter's formulation. The rights and prohibitions laid down in the title 'Dignity' apply to 'everyone' and 'no one'. See also Munby (n 46) 119.

117 Dupré (n 56) 16.

118 Notably, see *Burke* (n 111) para 58, also cited in Foster (n 35) 102. See further Munby (n 46) 119 and Bedford (n 38) 335.

119 McCrudden (n 24) 708-10.

120 Notably, see *Vo v France* App no 53924/00 (ECtHR, 8 July 2004) para 84, also discussed in Costa (n 41) 397 and Dupré (n 56) 17. Note how this is a sensitive issue given its potential consequences for the regulation of abortion.

121 Dupré (n 56) 16, referring to *Akpinar and Altun v Turkey* App no 56760/00 (ECtHR, 27 February 2007) para 82.

122 ibid.

123 ibid.

dignity to people who are not alive anymore.[124] Furthermore, one might plausibly derive many of the restrictions on the post-mortem use of tissue from dignity.[125]

Under the EU Charter, dignity is currently 'an exclusively human quality'.[126] Therefore, it does not include 'non-human entities such as institutions, corporations or states'.[127] In fact, it has been argued in the relevant literature that dignity has been used in law to defend human exclusivity, i.e. to set humans apart from animals.[128] However, an alternative historical and teleological interpretation also seems possible. Although existing human rights law documents indeed seem to apply dignity only to humans, it should be borne in mind that dignity was not necessarily adopted in these laws to defend human *superiority*, but instead to defend human *equality*.[129] It entered human rights legislation mostly in reaction to the horrors of WWII, in order to make sure that all human beings would be treated in a humane manner in the future, regardless of their capabilities, appearance and/or any other inherent feature. It might therefore very well be that creatures other than humans are perceived to have dignity as well, even if this were to be in a different form and/or have a lower moral or legal status than human dignity.[130] Indeed, certain countries which have

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124 ibid. Amongst the countries which are understood to protect dignity after death are Israel and Germany: see McCrudden (n 24) 707-08 and Jones (n 59) 170-71. Munby (n 46) 119 also seems to argue that dignity should be extended 'beyond death'.

125 Although these might also be looked at as dignity considerations of the survivors. I am grateful to Professor Charles Foster for this remark.

126 Dupré (n 23) 16.

127 ibid; Heselhaus (n 49) 960. See in this connection also *UJ v Hungary* App no 23954/10 (ECtHR, 19 July 2011) para 22. This is, however, different in, for example, Hungary: McCrudden (n 24) 708.

128 Raffael Fasel, 'The Old "New" Dignitarianism' (2019) 25 Res Publica 531.

129 See in this connection also Becchi (n 28) 7-8, 16-17. This idea of equal worth is still prevalent in the case law and in the relevant literature more generally: see eg Bedford (n 38) 324-25; May and Daly (n 21); *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 447, para 132.

130 See in this connection also Marcus Düwell, 'Human Dignity: Concepts, Discussions, Philosophical Perspectives' in Düwell and others (n 96) 23, 35.

signed many or most international human rights law documents that aim to protect human dignity acknowledge that animals have dignity as well.[131]

2.5 Dignity's Roles

Dignity can and has taken up various roles as a legal concept. First, it is regularly *used to protect the interests of vulnerable people*.[132] Dupré writes that 'human dignity in the ECHR case-law has so far played a unique role in protecting some of the most vulnerable members of society against the worst possible types of mistreatments'.[133] Examples include persons detained by the state (especially those that are mentally ill); severely disabled people; vulnerable patients in hospitals; victims of crime and discrimination; asylum seekers; and school boys undergoing corporal punishment.[134] Second, dignity can be used *to indicate a certain gravity*. Judges can either use dignity to emphasise the seriousness or importance of (a violation of) a certain self-standing right, so in those cases where something

131 Swiss law, as will be seen in chapter 4 of this thesis, explicitly protects animal dignity and an Israeli judgment concerning alligator-man fights talks about animal dignity as well: 1648/96, *Let the Animals Live v Hamat Gader Spa Village Inc* (1997), cited in McCrudden (n 24) 708. See also *Ordonnantie tot wijziging van de wet van 14 augustus 1986 betreffende de bescherming en het welzijn der dieren houdende erkenning van het specifiek statuut voor het dier* [Brussels Hoofdstedelijk Gewest] *BS* 17 December 2018, 99411, cited in Eva Bernet Kempers, 'Animal Diginty and the Law: Potential, Problems and Possible Implications' (2020) 41 Liverpool Law Review 173, 184.

132 In connection to Article 3 ECHR specifically, Bedford (n 80) 185 argues that dignity is used 'to expand and broaden the scope of protection' of vulnerable people. This has 'led to criticisms that the dignity-vulnerability connection is being used to transform the Convention into a scheme of social rights'.

133 Dupré (n 38) 104.

134 On this topic and for some relevant examples, see Dupré (n 38) 104; Dupré (n 23) 5-6; Jones (n 22) 294-99; *R (Burke) v General Medical Council* [2004] EWHC 1879 (Admin) paras 67-72 (Munby J), also citing Baroness Hale of Richmond, 'What Can the Human Rights Act Do for my Mental Health?' (2004) Paul Sieghart Memorial Lecture. For some further elaboration on dignity and detention, see Finer and Wadham (n 80).

'especially infamous, outrageous, or disgraceful' happened.[135] It will be repeated in this connection that dignity is used especially often with regard to Article 3 ECHR.[136] Alternatively, judges can use dignity to indicate weight when there is a clash of incommensurable rights or values.[137] This function is said to be especially useful for legal systems that use a proportionality test.[138] The use of dignity to indicate a certain gravity strongly reminds of the German law, which only includes the gravest violations within the right/concept of dignity.[139] Dignity's third function is to *do the moral and legal work where no alternative concept could*. Some practices or situations are considered morally objectionable or desirable but cannot be adequately addressed by other existing concepts such as autonomy or welfare.[140] Here, dignity can do the 'heavy lifting'.[141] Amongst the commonly mentioned cases that have been said to have '*needed*'[142] dignity are the prohibitions on consensual

135 Costa (n 41) 402. He even goes as far as to argue that the concept of human dignity is reserved for the 'most fundamental, vital rights' and that to do otherwise would 'run the risk' of devaluing the concept of dignity.

136 See fn 80.

137 McCrudden (n 24) 714-19; Paolo Carozza, 'Human Dignity in Constitutional Adjudication' in Tom Ginsburg and Rosalind Dixon (eds), *Research Handbook in Comparative Constitutional Law* (Edward Elgar Publishing 2011) 459, 466.

138 McCrudden (n 24) 715-16.

139 Grimm (n 57) 390 furthermore writes that in Germany 'every [other] right has a dignity core, and this can become relevant when the principle of proportionality is applied. The closer the restriction of a right comes to its dignity core the higher the weight of the right in the balancing process'.

140 Notably, see Foster (n 35) 2-3; Munby (n 46) 123-27; Greenawalt (n 114), discussing Meir Dan-Cohen, 'Basic Values and the Victim's State of Mind' (2000) 88 California Law Review 759. See also Becchi (n 28) 20-25 and Bedford (n 38) 338-39. Dignity seems particularly useful in cases where no harm is caused, a function which will be elaborately discussed in chapter 4 to this thesis.

141 Munby (n 46) 123-27.

142 Foster (n 35) 95.

dwarf-throwing,[143] peep shows,[144] sado-masochistic acts,[145] and the 'commercial exploitation of games simulating acts of homocide'.[146] Importantly, it should be noted in this connection that dignity can, to the criticism of some authors,[147] be used to limit a being's autonomy. Authors have therefore also called dignity a 'two-edged sword'.[148]

Dignity can also be used to adjust the law to different times and places. It can do so in at least three ways. First, it can be used to *create new rights or prohibitions*.[149] Among other things, it has been used to create the rights to equality and religious freedom in Israel and the right to education in India.[150] It might, however, also be used to create rights or prohibitions with regard to situations that were not previously imaginable or thought technologically possible. Perhaps the most obvious area in relation to which there might be such a need is that of bioethics.[151] Dignity has already 'emerged as a key point of reference for

143 As discussed in, for example, Foster (n 35) 95-97; Beyleveld and Brownsword (n 35) 25-28, 33-34; McCrudden (n 24) 705-706; Carozza (n 137) 460; O'Mahony (n 56) 569-73; Michael Rosen, *Dignity: Its History and Meaning* (Harvard University Press 2012) 86-91.

144 ibid.

145 *R v Brown* [1994] 1 AC 212 and *Laskey, Jaggard and Brown v UK* (ECtHR, 19 February 1997), as discussed in Foster (n 35) 118-127, Bedford (n 38) 345-46 and Beyleveld and Brownsword (n 35) 35-36. This decision has recently been endorsed in *R v BM* [2018] EWCA Crim 560, cited in Charles Foster and Jonathan Herring, *Human Thriving and the Law* (Springer 2018) 4. In this connection, also note section 63(7)(b) of the Criminal Justice and Immigration Act 2008. For some problematic cases after *Brown*, see Louise Perry, 'A Fifty Shades of Grey Area over Violent Sex' (*Standpoint*, 25 April 2019) <https://standpointmag.co.uk/issues/may-2019/a-fifty-shades-of-grey-area-over-violent-sex/> accessed 16 July 2021.

146 *Omega* (n 24).

147 Feldman, 'Human Dignity as a Legal Value: Part I' (n 77) 699-702, for example, considers the restriction of autonomy through the use of dignity paternalistic.

148 ibid 685; Brownsword and Beyleveld (n 35) 25-27.

149 McCrudden (n 24) 721-22; Carozza (n 137) 466; May and Daly (n 21) 132-33; Dupré (n 23) 7; Oscar Schachter, 'Human Dignity as a Normative Concept' (1983) 77 AJIL 848, 853.

150 McCrudden (n 24) 721-22; Carozza (n 137) 466.

151 See also Jones (n 59) 171-71, 175-76.

the regulation of science and technology',[152] it is included within many relevant broadly signed international declarations on the matter,[153] and it might be used to further allow or prohibit new applications in the field. Second, dignity can be used to *extend existing rights to groups that were not previously included in the law*.[154] It has already been used 'in order to ensure a minimum standard of humanity' for refugees[155] and to include 'people who do not have the capacity to feel or perceive…treatments as humiliating or degrading due to mental illness' within the scope of Article 3 ECHR.[156] It might furthermore be used to protect future generations against the consequences of, for example, new technology and climate change.[157] Third, dignity can be used *to domesticate and contextualise human rights*.[158] It enables countries to accommodate, among other things, their own cultural, societal, financial and/or historical preferences or needs. McCrudden writes in this connection

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152 Audrey Chapman, 'Human Dignity, Bioethics, and Human Rights' (2011) 3 Amsterdam Law Forum 3, 9, citing Timothy Caulfield and Roger Brownsword, 'Human Dignity: A Guide to Policy Making in the Biotechnology Era?' (2006-7) Nature 72.

153 eg the Convention on Human Rights and Biomedicine (Oviedo Convention), the Additional Protocols to this Convention, and the UNESCO Universal Declaration on Bioethics and Human Rights.

154 Among others, see McCrudden (n 24) 721-22; Carozza (n 137) 466; Dupré (n 23) 7; Heselhaus (n 49) 953; Schachter (n 149) 853. Peter Laverack, 'The Indignity of Exclusion: LGBT Rights, Human Dignity and the Living Tree of Human Rights' (2019) 2 EHRLR 172 argues that the ECtHR should use the concept of dignity to guarantee the right to marry LGBT people. Jones (n 22) also argues that dignity should be used to further extend protection to certain groups, such as refugees. Perhaps note in this connection also Hannah Arendt's interpretation of dignity as 'the right to have rights', as discussed in Christoph Menke, 'Dignity as the Right to Have Rights: Human Dignity in Hannah Arendt' in Düwell and others (n 96) 332. See, however, also *Cheshire West and Chester Council v P* [2014] UKSC 19, as discussed in Bedford (n 38) 322. In this case, the majority extended the scope of Article 5 HRA to 'the living arrangements of disabled people...in order to protect their equal dignity' whilst the minority preferred to use a narrower 'textualist method of interpretation focused on the conventional meaning of the formal legal terms, without recourse to (equal) dignity as a deeper principle on which the rights are based'.

155 Jones (n 22) 294. See also Dupré (n 24) 110-12 and Dupré (n 38) 103.

156 Dupré (n 24) 159, citing *Keenan v UK* (n 111) and *MS v UK* (n 111). See also Dupré (n 102) 116.

157 Dupré (n 24) 147 discusses 'the genetic screening of *in vitro* embryos before their implementation in the womb and the destruction of those found to be "defective"' and 'men's unique ability to destroy the environment in which they live and which is ultimately necessary for their survival'.

158 The phrase is borrowed from McCrudden (n 24) 719-20.

that dignity 'enable[s] local context to be incorporated under the appearance of using a universal principle'.[159] Like the principle of subsidiarity, it 'gives us a conceptual tool to mediate the polarity of pluralism and the common good in the globalized world'.[160] It even seems in part to have been due to this last function that countries managed to unite after WWII in the first place. In any event, the three functions described in this paragraph not only seem useful in dealing with unforeseen circumstances, such as new bioethical developments or refugee crises. They have also proved helpful in enabling smooth political transitions, such as Hungary's transition from communism to a democracy.[161] Such transitions have further been helped by the fact that dignity can be '*invoked by courts to justify their reliance on legal sources that do not have an authoritative pedigree in positive law*'.[162] Notably, it is said to justify 'reliance on foreign norms and [to require] a particular justification for departing from foreign models in judicial decision-making'.[163]

2.6 The Institutional Legitimacy of the Judiciary and the Rule of Law

The combination of dignity's foundational status and its open, largely undefined nature has therefore provided especially judges a lot of flexibility. Among other things, it gives them relatively generous opportunities to create new rights or prohibitions, to extend existing rights to groups that were previously not included within the law, or, in the case of judicial

159 ibid 720.

160 Paolo Carozza, 'Subsidiarity as a Structural Principle of International Human Rights Law' (2003) 97 AJIL 38, at 1, cited in McCrudden (n 24) 719.

161 On dignity's role in this transition, see generally Catherine Dupré, *Importing the Law in Post-Communist Transitions: The Hungarian Constitutional Court and the Right to Human Dignity* (Hart Publishing 2003).

162 Carozza (n 137) 466.

163 Carozza (n 68) 933.

review, to even strike down legislation as adopted by democratically elected legislatures.[164] Such decisions might, however, have huge moral and financial implications for societies. The enormous powers that dignity affords judges therefore raise questions about the 'institutional legitimacy of the judiciary',[165] especially in jurisdictions that have not even explicitly enshrined dignity in the text of their law, as is the case with regard to the ECHR and the HRA. The flexibility that dignity provides to judges might be useful and not necessarily too problematic when it comes to areas on which widespread consensus exists.[166] However, the exceptional power granted to judges by dignity becomes more problematic when it comes to areas in which dignity seems to provide little normative guidance. Among other things, such areas seem to include certain bioethical topics, like euthanasia, assisted suicide, abortion and genetic modification. A danger exists that judges might use dignity in these sensitive areas as a 'smokescreen behind which substantive judgments are being made, but unarticulated as such'.[167] Undemocratically elected judges are enabled to consciously or subconsciously use, or perhaps even abuse, dignity in order to protect their own ideological preferences.[168] Not only might this, however, be said to be 'anti-democratic'.[169] It also makes the law and judicial practice unpredictable, thereby possibly undermining the rule

164 Michael Rosen, 'Dignity: The Case Against' in McCrudden (n 26) 143, 152-53.

165 Carozza (n 137) 466-67.

166 ibid 460, for example, mentions the 'prohibitions on genocide, slavery, torture, disappearance, and systematic racial discrimination'. The author also includes the UDHR provisions in dignity's minimum core: Carozza (n 68) 937. Perhaps note in this connection also Andrew Clapham, *Human Rights Obligations of Non-State Actors* (OUP 2006) 545-46, cited in McCrudden (n 24) 685-86.

167 McCrudden (n 24) 722. Note how this danger is obviously not limited to the use of dignity in courtrooms. Caulfield and Chapman have argued (with respect to bioethical innovations specifically, but the point can be taken more broadly) that when dignity is used in a vague manner, it can 'silence open debate and may serve to blur an understanding of the real policy concerns behind a given technological innovation or scientific development': Chapman (n 152) 10.

168 For criticisms of this kind, see also Feldman, 'Human Dignity as a Legal Value: Part I' (n 77) 697-99; Rosen (n 164) 152-53; Jones (n 59) 181-82. Note in this connection also fn 132 again.

169 McCrudden (n 24) 722.

of law.[170] Note how the rule of law issue seems more acute when it comes to dignity than in other domains where judicial discretion is in play, because of dignity's foundational status.[171] The practice of invoking dignity in areas that lack consensus might, moreover, be said to be especially problematic when it happens at a supranational level, such as at EU level, as differences amongst the different countries might be even more profound than differences that exist within one country.[172] In fact, such overuse might eventually even threaten –or at least contribute to the threatening of– the existence of such supra- or international cooperation altogether.[173] It is in this connection interesting to draw a comparison with the United States (US) legal system, in which dignity is rarely to be found. Although some authors contribute this absence to the more individualistic nature of the American system (as opposed to the European communitarian system),[174] it has also been suggested that the true reason can be found in the American judiciary's greater respect for and deference to the legislature.[175]

One obvious solution to address these criticisms, so to alleviate this tension between the legislature and the judiciary and to reduce the unpredictability of dignity as a legal

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170 ibid; Carozza (n 68) 940. Note in this connection also the Joint Partly Dissenting Opinion of Judges De Gaetano, Lemmens and Mahoney to *Bouyid* (n 45), para 4. The majority had pointed at various prominent Treaties, pieces of legislation and case law in which dignity appears. However, the dissenting judges 'wonder[ed] what practical purpose [was] served by [the majority's] observations, given that the majority [of these documents] provide[d] no indication of how the notion of human dignity is to be understood'. They continued: 'The observations are presented as though they intend to establish a doctrine, but in reality they do not offer the reader much by way of enlightenment'. This opinion is also discussed in Finer and Wadham (n 80).

171 One may therefore contend that all law is or should be underpinned by dignity, or that dignity-related questions are more fundamental than others.

172 Bognetti (n 91) 105-07.

173 ibid.

174 See in this connection Rao (n 100), who warns that adopting the European 'communitarian and democratic' conception of dignity in US law would 'weaken the American constitutional protections for individual rights'.

175 Bognetti (n 91) 99-103.

concept, would be to further define the concept of dignity in statute. Indeed, various authors have suggested that we should continue to exchange 'reasoned and substantive judgements across cultural and geographic divides about the meaning of human flourishing, what it requires of us in justice, and how it can be variously understood and protected'.[176] According to the argument, we should 'reflect more deeply, collectively, and comparatively on the breadth of human experience and the fulfilment of elemental human needs and desires'.[177] In other words, it has been argued in the relevant literature that humans should continue their collective search for a more precise understanding of human dignity's content.[178] A more precise definition (and subsequent explanatory criteria) would reduce the flexibility provided to judges, and thereby strengthen the democratic legitimacy and the rule of law.

What can the field of animal law learn from these discussions of the challenges of using dignity in the human rights context? The main lesson is that if dignity is to be incorporated into the law of animal protection, there are good reasons to seek to specify and articulate the account of dignity that is used. This is particularly so if the criminal law continues to be used (as it typically is)[179] as the main vehicle for animal protection law. Dignity, as currently used in the human rights context, seems to be too vague to be the basis of criminal sanctions unless there is clear specification of the ways in which dignity can be violated.

176 Carozza (n 68) 943.

177 ibid 944.

178 See also Dupré (n 24) 68: 'The definitions of humanity and dignity remain abstract and open, which may be understood as humanity becoming a constitutional project, namely, a self-aware open process of (re)construction, instead of its past destruction'.

179 To be sure, it should be noted here that this thesis does not intend to grapple with the complex issue of whether animals should be granted legal rights.

2.7 Conclusion

It can be concluded that dignity features prominently in the context of human rights law. It is said to constitute its very foundation, has by now been connected to a concrete set of core rights, and extensive legal and philosophical debates on the remaining content of dignity are ongoing. In their search for a more precise meaning of dignity, legislatures and courts do not seem to have adhered to one particular theory of dignity. However, various prominent legal authors who have carried out doctrinal examinations into the concept seem to agree that it means something along the lines of humanity. The ultimate question to be answered, it seems, is what it means to be human, whereby humans are looked at from a holistic perspective. In this connection, it will be emphasised how dignity has not been used solely to protect autonomy, and how humans that do not meet the demands of rational agency or self-consciousness are perceived to have dignity as well. The legislatures and courts seem open to applying it to beings that are not at a specific moment in possession of these characteristics and whom might in fact never be or have been. Notwithstanding, legitimate questions arise as to whose perspective should be used when it comes to determining what it means to be human and as to where the debate on what exactly dignity entails should take place. Judges currently have an enormous amount of flexibility (and therefore power), which raises questions about the institutional legitimacy of the judiciary and which might potentially undermine the rule of law. The obvious solution to this would be, insofar as possible, to further define dignity (and lay down its requirements) in statute. This may be a worthwhile goal to pursue in the animal law context, especially if the concept of animal dignity were to be incorporated into the existing body of criminal law on animal protection.

CHAPTER THREE: DIGNITY IN UK AND EU ANIMAL PROTECTION LAWS

The topic of animal protection regularly features on the political and legal agenda of the jurisdictions examined. This is especially so with regard to the UK.[180] Acts that recently came into force aim to strengthen the protection of service animals,[181] ban the practice of dealing in ivory,[182] make CCTV mandatory in slaughterhouses,[183] increase the maximum sentences for animal cruelty offences,[184] and regulate certain activities that involve animals, such as the keeping of animals for breeding or performance purposes.[185] Current legislative efforts are also directed at the preservation of hares[186] and the explicit recognition of animal sentience in UK law after Brexit.[187] The latter proposal includes the establishment of an expert committee on animal sentience to make sure that all relevant 'cross departmental

180 Although the topic certainly continues to be the subject matter of attention at EU level as well. See eg European Parliament, 'MEPs Endorse EU Citizens' Call for Gradual End to Caged Farming' (10 June 2021) <https://www.europarl.europa.eu/news/en/press-room/20210604IPR05532/meps-endorse-eu-citizens-call-for-gradual-end-to-caged-farming> accessed 16 July 2021.

181 See the Animal Welfare (Service Animals) Act 2019, also known as "Finn's Law". Shortly after the coming into force of this Act, Daniel O'Sullivan became the first person to be convicted and jailed under it. Among other sources, see Nicola Saulle, 'The Animal Welfare (Service Animals) Bill' (20 August 2019) <https://www.farleys.com/the-animal-welfare-service-animals-bill/> accessed 16 July 2021 and Jessica Carpani, 'Man Sent to Jail for Stabbing Police Dog in First Conviction Under New Law' (*The Telegraph,* 5 August 2019) <https://www.telegraph.co.uk/news/2019/08/05/criminal-convicted-first-time-finns-law-premeditated-knife-attack/> accessed 16 July 2021.

182 See the Ivory Act 2018. The lawfulness of this case was (unsuccessfully) challenged in the cases of *R. (on the application of Friends of Antique Cultural Treasures Ltd) v Secretary of State for Environment, Food and Rural Affairs* [2020] EWCA Civ 649 and *R. (on the application of Friends of Antique Cultural Treasures Ltd) v Secretary of State for the Environment, Food and Rural Affairs* [2019] EWHC 2951 (Admin).

183 See the Mandatory Use of Closed Circuit Television in Slaughterhouses (England) Regulations 2018.

184 See the Animal Welfare (Sentencing) Act 2021.

185 See the Animal Welfare (Licensing of Activities Involving Animals) Regulations 2018.

186 See the Hares Preservation Bill 2019-21.

187 See the Animal Welfare (Sentience) Bill 2021.

government policy considers animal sentience'.[188] Further plans, aims and ambitions of the Government which serve to protect animals can be found in the recently published Action Plan for Animal Welfare.[189] UK and EU animal law have therefore established themselves into substantial fields of law by now and they keep being expanded on a regular basis.

This chapter analyses the UK/EU legal landscape concerning animals and, in doing so, it examines whether the concept of dignity has been used in any meaningful way to justify the existence of the relevant laws and to determine their content. For this purpose, it consecutively discusses the relevant historical developments, the current legislation relating to animal protection and the parliamentary debates that preceded the adoption of these laws. It will be shown that animal law has undergone a tremendous evolution. From seeing animals merely as tools to be used to serve human interests, concern has arisen for animal suffering and, later on, for their welfare more generally. It will be argued, however, that there is little evidence that the legislators have (explicitly and consciously) used the notion of dignity in the context of animal law. The relevant laws do not use the word dignity, nor do they necessarily need this concept for them to be understood. Furthermore, although the legislators have on various occasions invoked the word dignity in the parliamentary debates, their uses therein were too loose to be meaningful, turned out not to be a genuine appeal to dignity as a concept after all, did not have any effect on the resulting legislation and/or the focus immediately shifted back to welfare-based concerns. Notwithstanding, it

188 Department for Environment, Food and Rural Affairs, 'Animals to Be Formally Recognised as Sentient Beings in Domestic Law' (13 May 2021) <https://www.gov.uk/government/news/animals-to-be-formally-recognised-as-sentient-beings-in-domestic-law> accessed 16 July 2021. A similar proposal was also included in the Labour Party's Animal Welfare Manifesto 2019: Labour Party, 'Labour's Animal Welfare Manifesto' <https://labour.org.uk/wp-content/uploads/2019/11/13073_19-ANIMAL-WELFARE-MANIFESTO-Update-2.pdf> accessed 16 July 2021, 4.

189 Department for Environment, Food and Rural Affairs, 'Our Action Plan for Animal Welfare' (12 May 2021) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/985332/Action_Plan_for_Animal_Welfare.pdf> accessed 16 July 2021.

turns out that some limited signs of dignity-thinking are visible in areas where one might expect to find it, such as in the areas of bestiality, zoos, and circuses. A look into these areas, notably the last one, reveals that legislators and society at large seem susceptible to the idea that something that we do to animals can be wrong even when it does not necessarily affect their experiential welfare. Generally speaking, however, such thoughts are not (yet) actually reflected in the relevant laws. Instead, their primary focus stays on the experiential welfare interests of animals.

3.1 History of Animal Law

The UK has a longstanding history of animal protection.[190] Its first piece of legislation that aimed to protect animals against cruelty was the Cruel Treatment of Cattle Act (Martin's Act).[191, 192] This Act received royal assent in 1822 and made it an offence 'for any person or persons (therefore including the owner) wantonly and cruelly to beat, abuse, or ill-treat any horse, mare, gelding, mule, ass, ox, cow, heifer, steer, sheep, or other cattle'.[193] Subsequent legislation, such as the 1835 Cruelty to Animals Act (Pease's Act) and the Prevention of Cruelty to Animals Act 1849, expanded the scope of animal protection. Among other things, they broadened the category of animals to which legislation was applicable,[194]

190 For an elaborate overview of the history of UK animal law, see Mike Radford, *Animal Welfare Law in Britain: Regulation and Responsibility* (OUP 2001). See further Julian Palmer, *Animal Law: A Concise Guide to the Law Relating to Animals* (Shaw & Sons Limited 2001).

191 It is often claimed that this was the first piece of animal protection legislation worldwide. See eg Department for Environment, Food & Rural Affairs (n 189) 3.

192 For any earlier attempts, see the 1800 and 1802 Bull-Baiting Bills and Erskine's 1809 Cruelty to Animals Bill: Radford (n 190) 33-38.

193 ibid 37.

194 For example, Pease's Act also included protection to bulls, dogs, other domestic animals, calves and lambs. Furthermore, the Wild Animals in Captivity Protection Act 1900 extended legal protection to

amended the type and severity of punishments,[195] included further types of prohibited conduct,[196] and extended the group of potential offenders.[197] Concern for (and legislation relating to) animals also spread to other areas, such as animal experiments[198] and the protection of wild animals[199] and animal health in general.[200] The 'existing anti-cruelty legislation applying to England, Wales, and Ireland' was subsequently 'consolidated, clarified, and extended by the Protection of Animals Act 1911' (POA).[201] This Act, which focused on reducing animal cruelty and which constituted the main basis of animal protection in the twentieth century, was eventually largely repealed and replaced by the Animal Welfare Act 2006 (AWA). The AWA is currently the main piece of animal legislation in the UK.[202] It has broadened the focus of animal legislation, by focusing on the broader notion of welfare, rather than on the more limited notion of cruelty.[203] The notion of animal welfare is not

non-domestic captive animals. Such animals are currently still included within the scope of animal protection law (section 2 AWA).

195 For example, Pease's Act introduced the possibility of imprisonment.

196 Pease's Act, for example, also included the practice of torture.

197 The Prevention of Cruelty to Animals Act 1849 extended liability 'beyond those who actually committed the offence to include third parties, such as employers and owners, who were responsible for encouraging or condoning it': Radford (n 190) 62.

198 See the Cruelty to Animals Act 1876. Experiments involving animals are currently regulated by the Animals (Scientific Procedures) Act 1986.

199 eg the Sea Birds Preservation Act 1869, the Hares Preservation Act 1892, and the Salmon Fishery Act 1861.

200 eg the Contagious Diseases (Animals) Act 1869.

201 Radford (n 190) 87.

202 Although there are many other pieces of legislation which also aim to protect animals, such as the Animals (Scientific Procedures) Act 1986. For a recent overview of the case law concerning the AWA, see Noël Sweeney, *A Practical Approach to Animal Welfare Law* (5m Publishing 2017).

203 Sweeney (n 202) 4. For a detailed description of the changes that the AWA made to the 1911 Act and the case law developed under it, see Sally Case, 'The Animal Welfare Act 2006' (2007) 169 The Criminal Lawyer 3. In the cases of *Gray v RSPCA* [2010] 5 WLUK 91 and *R (on the application of Gray) v Aylesbury Crown Court* [2013] EWHC 500 (Admin) para 28 it was also ruled that the old jurisprudence relating to the necessary state of mind regarding the previous offence of cruelty (which is now section 4 on unnecessary suffering) is no longer relevant.

defined in the UK legislation (or in EU law, for that matter).[204] However, the World Organisation for Animal Health (OIE), to which the UK and all EU Member States are a member, officially defines it as 'the physical and mental state of an animal in relation to the conditions in which it lives and dies'.[205]

To be sure, this concern for animals had not always been present in UK society. In contrast, animal abuse used to take place on a massive scale and was 'largely uncontested, being legitimated by theology, philosophy, science, and deep-seated social attitudes'.[206] The driving motivations behind society's change in attitude and the resulting legislation are complex. Among the factors that played a role were the greater understanding of 'animal physiology',[207] a 'reassessment of man's place in the world',[208] the 'development of a secular morality'[209] and 'concern for manner, mores, and social discipline'.[210] Interestingly, it has been argued that the relative importance of each of these factors has changed over time. Radford writes that by the outbreak of the First World War, the law 'focused on the outcome

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204 Although concrete criteria that are perceived to be relevant to it are laid down in the relevant laws of both jurisdictions, as shown below.

205 See Article 7.1.1. of the Terrestial Animal Health Code. For an overview of some different definitions of animal welfare used globally, see Marc Bracke (ed), 'Animal Welfare in a Global Perspective – A Survey of Foreign Agricultural Services and Case Studies on Poultry, Aquaculture and Wildlife' (Wageningen UR Livestock Research, May 2009) <https://edepot.wur.nl/49888> accessed 16 July 2021, 45.

206 Radford (n 190) 19.

207 ibid 59.

208 ibid. This was initiated by a 'greater understanding across the scientific spectrum'. Among other things, scientists 'established that the earth was not...the centre of the universe', they discovered 'hitherto unknown species in newly explored parts of the world', and 'knowledge increased about the habits and behaviour of individual species and their interrelationship with one another'. Humans started to realise 'that humans themselves might properly be regarded as animals' as well and 'the view that the world does not exist for man alone' became explicitly accepted. See pages 19-20.

209 ibid 59.

210 ibid 52-54. There was a 'desire to effect a change in the behaviour of the general population to reflect more closely that of the higher social orders'. Amongst the virtues to be acquired were those of 'kindness and compassion'.

of the alleged offence by reference to the effect it had on the animal, rather than being exclusively concerned with the behaviour and character of the accused'.[211] The focus therefore seems to have largely shifted from the humans involved towards the animals themselves.[212] The first half of the twentieth century saw a decline in interest in animal protection due to the (consequences of) the World Wars and the resulting shifting political priorities. The concern for animals resurfaced again in the 1960s and '70s.[213]

Of tremendous importance to the adoption and enforcement of UK animal law is the Royal Society for the Prevention of Cruelty to Animals (RSPCA). It was established in 1824 with the aim of securing 'the mitigation of animal suffering, and the promotion and expansion of the practice of humanity towards the inferior classes of animated beings'.[214] It aimed to achieve this goal by enforcing existing animal law (since the State used to take little part in prosecutions at the time) and by educating the public. The society's influence was majorly exacerbated by the support of Queen Victoria (and the related Royal patronage the Society received) and by the professional manner in which it acted, by adopting a 'Victorian model of the contemporary pressure group'.[215] Today, the Society is still as relevant as it used to be, among other things, by playing a major role in the undertaking of prosecutions.[216] In 2019, it secured '1,432 convictions relating to animal welfare offences, which

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211 The Prevention of Cruelty to Animals Act 1849 played an important role in this respect, because it introduced the test of unnecessary pain or suffering. For the first time, the law 'defined cruelty by reference to the effect on the individual animal rather than the attitude or conduct of the perpetrator'. See Radford (n 190) 63.

212 In this connection, see also *Gray v Crown Court Aylesbury* (n 203) para [31], in which a 'purely objective standard of care' was used for the interpretation of section 9 AWA. Sweeney (n 202) 16 writes that the 'offence did not relate to the defendant's state of mind, but to the animal's suffering'.

213 Radford (n 190) 131.

214 ibid 41.

215 ibid 81-82.

216 Naturally, all sorts of questions may arise in relation to this situation. Should not the State be the main prosecutor of animal-related offences? And what does the fact that it is not the State indicate?

meant [it] achieved a 93.7% success rate from all [its] cases'.[217] In 2018, its prosecuting powers were unsuccessfully challenged in the case of *Lamont-Perkins v RSPCA*.[218]

It will in this connection be noted, however, that the (RSPCA's) powers to effect structural change through the courts seem limited. When it comes to interpreting animal related offences, traditionally judges used to defer to industry made standards as long as these had not explicitly been prohibited by the law.[219] The case of *Roberts v Ruggiero* illustrates this well.[220] In this case, an attempt was made to ban the use of veal crates (since alternatives that caused less suffering were available). However, Stoker J stated that a magistrates' court was 'not the appropriate forum in which, nor [was] a criminal prosecution the appropriate method by which, the legality of the system of husbandry should be established'.[221] This position now seems to be enshrined in the AWA.[222] Although the approach used is understandable from a democratic point of view, it is likely to ultimately weaken the legal protection offered to animals, as legislators tend to represent and prioritise the

See in this connection also House of Commons, 'Animal Welfare in England: Domestic Pets: Third Report of Session 2016-2017' (November 2016) <https://publications.parliament.uk/pa/cm201617/cmselect/cmenvfru/117/117.pdf> accessed 16 July 2021, 24-30.

217 RSPCA, 'Prosecuting Animal Cruelty and Neglect' <https://www.rspca.org.uk/whatwedo/endcruelty/prosecution> accessed 16 July 2021. For the full details, see RSPCA, 'RSPCA Prosecutions Annual Report 2019' <https://view.pagetiger.com/bessstj/prosecutionreport2019> accessed 16 July 2021.

218 [2012] EWHC 1002 (Admin). On the RSPCA's history, status, role and approach, see generally Radford (n 190) chapters 3 and 4. On the more recent efforts of the RSPCA as prosecutor, see also Sweeney (n 202) 72-75.

219 Alan Bates, 'Detailed Discussion of the Offences of Cruelty to Domestic and Captive Animals (U.K.)' (Animal Legal and Historical Center 2002) <https://www.animallaw.info/article/detailed-discussion-offences-cruelty-domestic-and-captive-animals-uk> accessed 16 July 2021.

220 [1985] QBD 3 April 1985, cited in Bates (n 219).

221 ibid.

222 See sections 4(3)(b) and 9(3) AWA.

interests of their (democratically capable) human voters. Jessica Eisen speaks in this connection about the citizen-subject gap.[223]

Animal welfare mostly appeared as a legal concern at the EU level in 1991, when the Declaration on the Protection of Animals was appended to the Treaty of Maastricht.[224] It called upon the European authorities and the Member States 'to pay full regard to the welfare requirements of animals' when 'drafting and implementing Community legislation' on a number of topics.[225] This commitment became legally binding when it became a Protocol in 1997,[226] although the Court of Justice of the European Union (CJEU) subsequently decided in the case of *Jippes* that animal welfare was still not considered to be a general principle of EU law.[227] The Treaty of Lisbon ultimately transferred the animal welfare

223 Jessica Eisen, 'Animals in the Constitutional State' (2017) 15 International Journal of Constitutional Law 909, 928.

224 Although some pieces of legislation originating from before this date used to protect animal welfare as well. See, for instance, Council Directive 74/577/EEC of 18 November 1974 on stunning of animals before slaughter [1974] OJ L316/10. Note also Case 131/86 *United Kingdom of Great Britain and Northern Ireland v Council of the European Communities* [1988] ECR 905, para 17, in which the Court said that 'Efforts to achieve objectives of the common agricultural policy…cannot disregard requirements relating to the public interest such as…the protection of the health and life of humans and animals, requirements which the Community institutions must take into account in exercising their powers'. See Tara Camm and David Bowles, 'Animal Welfare and the Treaty of Rome – A Legal Analysis of The Protocol on Animal Welfare and Welfare Standards in the European Union' (2000) 12 Journal of Environmental Law 197, 199.

225 Declaration (No 24): 'The Conference calls upon the European Parliament, the Council and the Commission, as well as the Member States, when drafting and implementing Community legislation on the common agricultural policy, transport, the internal market and research, to pay full regard to the welfare requirements of animals'.

226 The Treaty of Amsterdam annexed Protocol No 33 to the European Communities Treaty. On the significance of this Protocol, see Camm and Bowles (n 224).

227 Case C-189/01 *H. Jippes, Afdeling Groningen van de Nederlandse Vereniging tot Bescherming van Dieren and Afdeling Assen en omstreken van de Nederlandse Vereniging tot Bescherming van Dieren v Minister van Landbouw, Natuurbeheer en Visserij* [2001] ECR I-5689. Instead, 'the protection of animals and their health was a requirement of public interest reinforced by the Protocol, the fulfilment of which depended on the proportionality of the measure'. See Diane Ryland and Angus Nurse, 'Advancing Animal Welfare in the EU Internal Market' (2013) 22 European Energy and Environmental Law Review 101, 103. On this interpretation and the consequences of this decision for animal welfare protection, see also Rasso Ludwig and Roderic O'Gorman, 'A Cock and Bull Story? – Problems with the Protection of Animal Welfare in EU Law and Some Proposed Solutions' (2008) 20 Journal of Environmental Law 363. For a more supportive view of the Court's Decision, see Eleanor Spaventa, 'Case C-189/01' (2002) 39 Common Market Law Review 1159.

commitment to Article 13 of the Treaty on the Functioning of the European Union (TFEU). This provision falls under Title II of the TFEU, which contains provisions that have general application, thereby putting the protection of animal welfare on par with interests such as combating discrimination and inequalities, the protection of the environment and consumer protection. Article 13 TFEU, as currently in force, reads as follows:

> In formulating and implementing the Union's agriculture, fisheries, transport, internal market, research and technological development and space policies, the Union and the Member States shall, since animals are sentient beings, pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage.

Even though the topic of animal welfare has therefore steadily won its place in the EU legal framework, it is very important to realise that the EU still only has limited legislative competence on the topic. Notably, there is no direct authority in the Treaties for the adoption of animal laws.[228] Consequently, an indirect basis needs to be utilised for this purpose. Among the bases that can and/or have been used in the past are Article 114 TFEU (harmonisation) and provisions that form part of what are known as the 'common agricultural policy'; 'the common commercial policy'; and the 'environmental policy'.[229] What is more, the EU authorities are only allowed to take into account the welfare requirements of animals when developing policies in certain areas–i.e. those mentioned in Article 13 TFEU. Furthermore, in doing so, they need to take into account the 'religious rites, cultural traditions and regional heritage'. As a result of this limited legislative competence, EU law is relatively fragmented. Legislation that is of relevance to animals can be found in a large

228 On the desirability of introducing a separate legislative competence for animal welfare, see Ludwig and O'Gorman (n 227) 382-386.

229 Ryland and Nurse (n 227) 104; Camm and Bowles (n 224) 198.

number of legal instruments (notably, directives and regulations) and is often concerned with a very specific topic.[230]

Nevertheless, despite this fragmentation, the EU system is still a relatively advanced legal system compared to other supra- and international legal instruments on animals. It lays down relatively concrete[231] and enforceable standards of animal welfare.[232] Furthermore, it requires the relevant authorities to take into account the requirements of animal welfare not only while formulating their policies, but also whilst implementing them ('including when translating directives into domestic legislation').[233] At the same time, however, it should be noted that EU law can and has also been used to *limit* the amount of animal protection. Its primary goal is to regulate the internal market and, similarly to WTO law, any obstacles to trade in the internal market are therefore in principle prohibited.[234] In theory, EU law offers Member States the possibility to derogate from this obligation based on, among other things, public morality, public policy or the protection of health and life of animals.[235] However, it has been argued in the relevant literature that the Court has

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230 Such as the transportation of farm animals or the welfare of broiler chickens: see Council Regulation (EC) 1/2005 of 22 December 2004 on the protection of animals during transport and related operations [2005] OJ L3/1 and Council Directive 2007/43/EC of 28 June 2007 laying down minimum rules for the protection of chickens kept for meat production [2007] OJ L182/19.

231 The Council of Europe Conventions, for example, are typically phrased in a too general a way in order for them to be effectively used in a legal context. On this matter, see Radford (n 190) 139-141 and, in particular, Case C-1/96 *The Queen v Minister of Agriculture, Fisheries and Food, ex parte Compassion in World Farming Ltd.* [1998] 2 CMLR 661, paras 31 and 36, in which the Court stated that the provisions concerned were 'for the most part characterized by imprecision' and concluded that it was 'clear from the very wording of those provisions that they were indicative only'.

232 Anne Peters, 'Global Animal Law: What It Is and Why We Need It' (2016) 5 Transnational Environmental Law 9, 14-15 writes that 'the piecemeal offering of international and regional law does not form a coherent and "thick" body of law. The provisions are fragmented, often qualified, often inconsistent, unenforceable, and moreover unknown to most lawyers, law enforcers and legal scholars alike'.

233 Camm and Bowles (n 224) 204.

234 On the effect of WTO law on animal welfare, see Radford (n 190) 132-138.

235 Article 36 TFEU.

interpreted this provision in a particularly narrow way, thereby leaving this provision ineffective in practice.[236]

3.2 Foundations and Scope of the Legal Frameworks

Existing UK/EU animal laws seem to be based on the presumption that (many types of) animals are sentient beings. These are beings that are 'capable of feeling pleasure and pain'[237] or 'capable of experiencing pain and suffering'.[238] As already discussed, the EU's main basis of animal protection can be found in Article 13 TFEU. The acknowledgement that at least some animals are sentient beings is central to this provision. This addition, which first appeared in the Protocol and which was later added to Article 13 TFEU by the Treaty of Lisbon,[239] officially elevated animals' legal status from mere 'tradable

236 Notably, see Ludwig and O'Gorman (n 227) and Radford (n 190) 148-51, citing Cases C-169/89 *Criminal proceedings against Gourmetterie Van den Burg* [1990] ECR I-2143 and C-5/94 *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte: Hedley Lomas (Ireland) Ltd.* [1996] ECR I-2553. See also Case C-162/97 *Criminal proceedings against Gunnar Nilsson, Per Olov Hagelgren and Solweig Arrborn* [1998] ECR I-7477, in which the protection of animals was also barred by harmonization measures.

237 European Commission, 'EU Animal Welfare Strategy 2012-2015' <http://ec.europea.eu/food/animals/docs/aw_brochure_strategy_en.pdf> accessed 16 July 2021, 1. It was not immediately clear what meaning the EU would give to sentience. It was initially thought that it was equated with the capacity for feeling pain. Later on, the Commission removed this uncertainty by stating that "sentient beings are beings that are capable of feeling pleasure and pain". See Thomas Kelch and Ross Buckley, *Globalization and Animal Law: Comparative Law, International Law and International Trade* (Kluwer Law International 2011) 86.

238 Explanatory Notes to the UK Animal Welfare Act 2006, para. 12. See also section 1(4) AWA. The Notes, however, do not form part of the Act and have not been endorsed by Parliament. In fact, it was recently under dispute how sentience should be defined, if at all. A recent written ministerial statement equated it to "pain and pleasure". Radford even suggested defining "animal" in more concrete terms instead, taking New Zealand's Animal Welfare Act 1999 as an appropriate model, thereby taking away the need to define sentience. See Secretary of State for Environment, Food and Rural Affairs, *Animal Welfare (Sentencing and Recognition of Sentience) Draft Bill* (Cmd 9554, 2017) (Draft Bill); Department for Environment, Food and Rural Affairs, *Animal Welfare (Sentencing and Recognition of Sentience) Draft Bill: Consultation Response* (August 2018) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/751990/sentience-consult-sum-resp.pdf> accessed 16 July 2021; Written evidence submitted by Mike Radford (AWB0014).

239 Treaty of Lisbon [2007] OJ C306/1, entered into force on 1 December 2009.

products'[240] to sentient beings. To be sure, there was already some EU legislation relating to animal welfare before this. However, 'welfare was largely seen as an intrinsic part of the agricultural production system; if an animal could grow in line with expected productivity levels, then its welfare was not in question'.[241] Thus, animal welfare was looked at from a commercial point of view. It should be noted, however, that it is disputed in the literature whether the official recognition of sentient beings has actually improved animal welfare substantially, beyond just having symbolic value.[242]

In contrast to its EU counterpart, UK legislation does not explicitly acknowledge that animals are sentient beings.[243] However, the Explanatory Notes to the AWA, which, it is recalled here, is the principal piece of animal legislation in the UK,[244] reveal that also UK law recognises animals as such. The AWA applies only to 'vertebrates other than man',[245] because, according to the Explanatory Notes, these are 'currently the only

240 Article 38 EEC.

241 Katy Sowery, 'Sentient Beings *and* Tradable Products: The Curious Constitutional Status of Animals under Union Law' (2018) 55 Common Market Law Review 55, 60-65.

242 ibid 82-85. Ryland and Nurse (n 227) 109, however, consider this recognition 'very significant': 'The fact that the promotion of animal welfare is incorporated in the "constitutional" provisions of the EU Treaties signifies the elevation of animal welfare as a priority issue in the EU....It is a milestone in the evolution of EU law and animal welfare that animals are no longer perceived in law solely as goods, the free movement of which is ensured in an internal market of twenty-seven Member states. They are recognised, expressly in a Treaty article, as sentient beings, and, as such, the EU's stated aim is to ensure that animals do not endure avoidable pain or suffering.'

243 See also Sweeney (n 202) 72.

244 This Act focuses mostly on England and Wales. The primary pieces of animal protection legislation in Northern Ireland are the Welfare of Animals Act (Northern Ireland) 2011 and the Animal Health and Welfare Act 2013. The primary piece of animal legislation in Scotland is the Animal Health and Welfare (Scotland) Act 2006. For the differences between the various acts, see Alice Collinson, 'Legal Protection of Animals in the UK' (2018) <https://www.animallaw.info/article/legal-protection-animals-uk> accessed 16 July 2021. Generally, it should be noted that Scotland has always tended to follow its own path regarding animal law, thereby adopting its own legislation on the matter. Radford (n 190) 63-64 writes that this position could perhaps 'be explained by Scotland's separate legal traditions, particularly the practice of developing the criminal law through the common (judge-made) law rather than statute'.

245 Section 1(1).

demonstrably sentient animals'.[246] The AWA could be extended to cover invertebrates in the future if the appropriate national authority were 'satisfied on the basis of scientific evidence that these too [were] capable of experiencing pain or suffering'.[247] Two comments are made here. First, the described legal situation may change in the foreseeable future. Legislators intend to explicitly recognise (certain types of) animals as sentient beings in domestic law as well now that the UK has left the EU (and the EU Treaties do therefore not apply to the UK anymore, including Article 13 TFEU). For this purpose, the Government recently introduced the Animal Welfare (Sentience) Bill.[248] Second, there is abundant evidence that some invertebrates are sentient as well.[249] Accordingly, the 2006 Act is wrong in some particulars.[250] Indeed, in response to an earlier Draft Bill that intended to explicitly recognise animal sentience in domestic law after Brexit,[251] the Government had received

246 Explanatory Notes to AWA (n 238), para. 12.

247 ibid; sections 1(3) and 1(4) AWA. Section 62(1) AWA states that the word 'suffering' is defined as 'physical or mental suffering and related expressions shall be construed accordingly'. The AWA does not define the word 'pain', but Sweeney (n 202) 9 argues that it should be defined so as to 'include all forms of physical ill-treatment and psychological pain'.

248 Note how this bill is not the first one that aims to serve this purpose. The matter had also been discussed during the parliamentary debates that preceded that adoption of the European Union (Withdrawal) Act 2018, and an earlier Bill on the matter had been introduced in 2017 already but failed to complete its passage through Parliament before the end of the session.

249 See, for example, Helen Proctor, 'Animal Sentience: Where are We and Where are We Heading?' (2012) 2 Animals 628. This issue has also been discussed in parliamentary debates: Animal Welfare Bill Deb 17 January 2006, cols 6-7, 8; Poc, Directive 2010/63/EU Deb 8 September 2010. In fact, some authors even argue that plants might be sentient: Florianne Koechlin, 'The Dignity of Plants' (2009) 4 Plant Signaling & Behaviour 78.

250 Indeed, the Animals (Scientific Procedures) Act 1986 also includes in its scope living cephalods. The reason for this can be found in their inclusion in the relevant EU directive, which in turn protects them because of their 'ability to experience pain, suffering, distress and lasting harm'. See written question (nr 221976) asked by Kerry McCarthy on 26 January 2015, answered on 29 January 2015, <http://www.parliament.uk/business/publications/written=questions-answers-statements/written-question/Commons/2015-01-26/221976/> accessed 12 January 2017 in combination with 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 [2010] OJ L276/33, recital 8.

251 Secretary of State for Environment, Food and Rural Affairs, *Animal Welfare (Sentencing and Recognition of Sentience) Draft Bill* (Cmd 9554, 2017). One of its two main purposes was to ensure that animals will 'not lose any recognition or protections once the UK leaves the EU'. See the Explanatory Notes to the Draft Bill, paras 2 and 5.

'scientific evidence covering the status of organisms such as octopus and cephalopods'.[252] Although the Bill concerned failed to complete its passage through Parliament before the end of the session, the matter has been raised again in the context of the Animal Welfare (Sentience) Bill 2021[253] and the Government also recently commissioned an independent review into it.[254] As a result, cephalopod molluscs and decapod crustaceans are now included within the scope of the draft bill as well.[255] It is therefore hoped that the existing legislation on animal protection (notably, the AWA) will soon be corrected too.[256] Nevertheless, the salient point for present purposes is that it seems clear that the UK legislature lays the basis of animal protection in their sentience as well. Both legal systems therefore protect the interests of (certain categories of) animals because they are sentient beings.

252 Environment, Food and Rural Affairs Committee, *Pre-Legislative Scrutiny of the draft Animal Welfare (Sentencing and Recognition of Sentience) Bill 2017: Government Response to the Committee's Second Report* (HC 984, 2018) 4. See also Radford (n 238) 7, which has submitted that, in addition to cephalopods, there is a 'growing scientific consensus that at least some molluscs and crustaceans are sentient'. Radford also advised to consider looking more into whether any animals in their embryonic or foetal form should be included.

253 Notably, see the various comments made in HL Deb 16 June 2021, vol 812, cols 1899-1948.

254 Philip Lewis, 'Animal Welfare (Sentience) Bill [HL]' (26 May 2021) <https://lordslibrary.parliament.uk/animal-welfare-sentience-bill-hl/> accessed 16 July 2021. For the report, see Jonathan Birch and others, 'Review of the Evidence of Sentience in Cephalopod Molluscs and Decapod Crustaceans' (London School of Economics, November 2021) <https://www.lse.ac.uk/News/News-Assets/PDFs/2021/Sentience-in-Cephalopod-Molluscs-and-Decapod-Crustaceans-Final-Report-November-2021.pdf> accessed 8 December 2021.

255 See section 5(1)(b) and (c).

256 Note in this connection also Labour's Animal Welfare Manifesto (n 188) 4, which lays down its ambition to 'Expand the definition of animal to include decapods, crustaceans...and cephalopods...in line with other countries including Norway, New Zealand and Switzerland'.

The content of animal laws was determined by the so-called "Five Freedoms".[257] This concept originates from the Brambell Report,[258] which stated that farm animals should have the freedom 'to stand up, lie down, turn around, groom themselves and stretch their limbs',[259] and has allegedly become a 'worldwide standard'.[260] Although the jurisdictions examined in this contribution use different formulations of the Five Freedoms, their content is very similar. The EU aims to protect animals from hunger and thirst;[261] discomfort;[262] pain, injury and disease;[263] fear and distress;[264] and it wants animals to 'express normal behaviour'. In order to express such behaviour, animals should have 'adequate space and

257 See Anne Lansink, 'The Use of Dignity in EU and UK Animal Protection Laws' (MPhil thesis, University of Oxford 2017) 47-50. It should, however, be noted that only animals for whom someone is responsible enjoy the protection of these freedoms. Cruelty offences laid down in UK law, in contrast, have a wider application.

258 Minister of Agriculture, Fisheries and Food and the Secretary of State for Scotland, *Report of the Technical Committee to Enquire into the Welfare of Animals kept under Intensive Livestock Husbandry Systems* (Cmd 2836, 1965).

259 ibid. The Farm Animal Welfare Council (FAWC) writes about this that: 'As a direct result of the Brambell Report, the Farm Animal Welfare Advisory Committee (FAWAC) was set up. This was disbanded at the same time that the [FAWC] was established by the British Government....One of these bodies started to list the provisions that should be made for farm animals in five categories, which also became known as the five Freedoms (despite the fact that not all the categories were actually freedoms). Records from the FAWAC are not readily available so the exact origin is not clear, and the earliest written reference we can find is the enclosed press notice...released by FAWC in December 1979. The concept was subsequently refined by FAWC so that it actually took the form of five freedoms. It has since been further updated'. See Farm Animal Welfare Council, 'Five Freedoms' <webarchive.nationalarchives.gov.uk/20121007104210/http:/www.fawc.org.uk/freedoms.htm> accessed 16 July 2021.

260 Anne Peters, 'Liberté, Égalité, Animalité: Human-Animal Comparisons in Law' (2016) 5 Transnational Environmental Law 25, 34.

261 Animals should have 'access to fresh water and a diet for full health and vigour'. See European Commission, Health & Consumer Protection, Directorate-General, 'Animal Welfare Factsheet' (March 2007) <http://ec.europa.eu/food/animals/docs/aw_efsa_opinions_factsheet_farmed03-2007_en.pdf> accessed 20 May 2020.

262 ibid: animals should have an 'appropriate environment with shelter and comfortable rest areas'.

263 ibid: by 'prevention or rapid treatment'.

264 ibid: animals should be held in conditions and receive treatment that 'avoid mental suffering'.

facilities' and 'company of [their] own kind'.[265] The UK law uses a positive formulation.[266] It aims to provide animals with a 'suitable environment' and a 'suitable diet', and it wants animals to be 'housed with, or apart from, other animals' and to 'exhibit normal behaviour patterns'. Additionally, it aims to protect them from 'pain, suffering, injury and disease'.[267] The use of the adjective "suitable" is interesting, as it acknowledges that what might be suitable for one animal might not be suitable for another. Thus, the legislature seems to acknowledge that different animals have different needs. The Five Freedoms are visible throughout both legal frameworks.[268] In order to make sure that these freedoms are secured, the legal frameworks have put both negative and positive obligations on human beings. Specifically, all human beings need to withhold themselves from causing an animal unnecessary suffering.[269] Additionally, a 'duty of care' is imposed on persons responsible for a

265 ibid.

266 Donald Broom, 'Animal Welfare in the European Union' (January 2017) <https://www.europarl.europa.eu/RegData/etudes/STUD/2017/583114/IPOL_STU(2017)583114_EN.pdf> accessed 16 July 2021, 15 writes that 'the rather general idea of freedoms is now replaced by the more scientific concept of needs [since the] freedoms are not precise enough to be used as a basis for assessment of the welfare of a particular animal'.

267 See eg section 9 AWA and British Veterinary Association, 'Animal Welfare' <http://www.bva.co.uk/News-campaigns-and-policy/Policy/Ethics-and-welfare/Animal-welfare/> accessed 18 February 2016.

268 Lansink (n 257) 49-50.

269 Section 4 AWA. This provision only applies to 'protected animals', as defined in sections 1 and 2. On the interpretation of this clause, see, among others, Sweeney (n 202) 13-18 and Collinson (n 244). The latter source discusses, among other things, the important cases of *Ford v Wiley* [1889] 5 WLUK 41; *RSPCA v Isaacs* [1993] 11 WLUK 167; *Roberts v Ruggiero* (n 220) and *R (on the application of Gray) v Aylesbury Crown Court* (n 203).

specific animal.[270] The relevant Codes of Practice provide detailed guidance on how such obligations could be fulfilled.[271]

The UK has a more extensive legal framework regarding animal protection than the EU. For example, there is no EU legislation which specifically addresses circuses, pets or strays.[272] This difference can be readily explained by the nature of the respective legal orders. The UK Parliament is in principle able to legislate on any issue it desires. The EU, however, only has limited competence and is bound by the principles of conferral, subsidiarity and proportionality.[273] It is argued here that the principle of conferral is crucial, as the powers that the Member States have conferred on the EU in relation to animals are limited. First, Article 13 TFEU shows us that the EU's powers are linked to animal sentience. Second, we have seen that the EU can only take into account animal welfare requirements when developing policies in certain areas. It is thus not empowered to create any self-standing policies on this topic,[274] nor is it empowered to take into account animal

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270 Notably, see section 9 AWA. The relevant person needs to take 'such steps as are reasonable in all circumstances to ensure that the needs of an animal for which he is responsible are met to the extent required by good practice'. These needs shall be taken to include the same things as were mentioned in the list of freedoms used by the UK. Responsibility is defined in section 3 AWA. In case a child owns an animal, both the child and the parent are liable: *Gray v RSPCA* (n 203).

271 There are, for example, Codes of Practice for the welfare of dogs, cats, horses, ponies, donkeys and their hybrids, and privately kept non-human primates. There are also Codes for various species of farm animals, such as turkeys, and for gamebirds that are reared for sporting purposes. On the legislative competence, the procedure to be followed and the legal status of such Codes of Practice, see Sweeney (n 202) 44-47.

272 Although various calls for more protection in these areas (and other areas, such as bestiality) have been made. See eg European Parliament Resolution of 4 July 2012 on the establishment of an EU legal framework for the protection of pets and stray animals (2012/2670 (RSP)) [2013] OJ C349E/71; European Parliament Committee of Petitions, 'Notice to Members' (30 June 2015) <http://www.europarl.europa.eu/meetdocs/2014_2019/documents/peti/cm/1067/1067578/1067578en.pdf> accessed 16 July 2021.

273 See Articles 5 (2), (3) and (4) TEU.

274 Animal protection may, however, also be pursued through routes such as environmental policy (Article 191 TFEU) or other harmonisation measures (Article 114 TFEU), although the purpose of these is not to protect the welfare of individual animals.

welfare requirements in areas other than those which are mentioned in Article 13 TFEU.[275] Notably, the environmental policy is omitted from this article, although there is 'no evidence that the omission was deliberate'.[276] Besides the principle of conferral, the subsidiarity principle is also very important. Individual countries (or even sub-national entities, such as regions) might be better able to make provisions for certain areas of animal protection. The European Commission has, for example, stated that the welfare of circus animals is a matter for the Member States.[277] Generally, it seems that the EU prefers individual countries to take measures regarding animal welfare, or at least them taking the initiative to do so.[278] This approach could also be explained by the EU's main function. It is not primarily concerned with animal welfare, but rather with the establishment and functioning of the internal market.[279] Yet another factor to which the limited amount of EU animal protection legislation can be ascribed is Article 13 TFEU's requirement to take into account the 'religious rites, cultural traditions and regional heritage' of the Member States.[280] There

275 Note how these areas have been amended through time. The Declaration and Protocol included the agricultural, transport, internal market and research policies, while Article 13 TFEU also includes fisheries and technological development and space policies.

276 Camm and Bowles (n 224) 202. Note how there are potential conflicts between the objective of environmental protection (which includes the conservation of nature and therefore also of certain animal species) and the protection of individual animals. On this topic, see Ludwig and O'Gorman (n 227) 381 and J Baird Callicot, 'Animal Liberation: A Triangular Affair' (1980) 2 Environmental Ethics 311.

277 Environment, Food, and Rural Affairs Committee, *Wild Animals in Circuses (fourth report)* (HC 553, 2013).

278 See Caroline Lucas MP, HC Deb 23 June 2011, vol 530, cols 565-66: 'When I was a member of the European Parliament, we did a great deal of work trying to make progress with animal welfare issues in the Parliament. Often, the advice was to go back to member states in the first instance and to rouse them to act. It is when a number of forward-thinking member states call strongly for action on something that we see progress on the EU position. There are clear precedents, not least in animal welfare policy, in which action by individual states has been the means by which animal welfare protection has been secured across the EU'.

279 On the EU internal market and animal protection laws see generally Sowery (n 241) and Ryland and Nurse (n 227).

280 This reference was included in order for the Protocol to be able to pass the unanimity hurdle. Geert Van Calster and Kurt Deketelaere, 'Amsterdam, the Intergovernmental Conference and Greening the EU Treaty' (1998) European Environmental Law Review 12, 19 writes that it 'covers bull-

are ‘obvious disparities in the views of the Northern, Southern, and Central and Eastern European countries on animal welfare’,[281] which further complicates things when it comes to reaching an agreement on proposed legislation.

3.3 The Use of Dignity in the Legislation on Animal Protection

The preceding discussion highlights the fact that animals are recognised as sentient beings and, accordingly, afforded protection based on the Five Freedoms. However, the question arises as to what extent dignity has been used to justify the existence of the relevant animal laws and to determine their content. There are at least four distinct ways in which dignity could feature: (1) the word could feature in the text of animal laws; (2) the word might not feature in the text of the law, but the law might be unclear and therefore need further explanation (e.g. through the prism of dignity); (3) the word dignity might appear in the parliamentary debates that preceded the adoption of animal laws; and (4) there could be signs of dignity-thinking in these debates (and in other types of preparatory documents) without legislators necessarily invoking the word as such. In other words, there are different *places* in which dignity might appear (notably, in the text of the law and in the parliamentary debates and other preparatory documents that preceded the adoption or revision of these laws) and different *ways* in which it might appear (namely, explicitly or implicitly).[282] It is

fighting and bull-hunting the streets of a popular resort, but also the swallowing of living fish together with a glass of “jenever”, and the throwing of living cats from belfry towers’.

281 Sowery (n 241) 87-88. See also Chris Hilson, ‘New Social Movements: The Role of Legal Opportunity’ (2002) 9 Journal of European Public Policy 238, 247, also cited in Ludwig and O’Gorman (n 227) 384.

282 To be sure, dignity might also explicitly (“the word”) or implicitly (“the notion”) appear in a third place, namely in the case law that followed the adoption of animal laws. However, as will be shown later in this chapter, the word dignity does not appear in the relevant animal laws at all. Therefore, any question of how this (absent) word should be construed or interpreted is obviously very unlikely to be the subject of any case law. This does, however, not mean that dignity type of thinking or arguments are necessarily absent from the case law as well. The limited number of cases where such

noted in advance here that the notion of dignity, in the context of this thesis, is perceived to connote something more than just the experiential welfare of animals. It embraces the idea that something can be morally wrong even if it might not necessarily negatively affect the experiential wellbeing of animals themselves (note the emphasis on the word experiential here, since the term well-being, when used on its own, can also be understood in a more objective sense, thereby encompassing things such as "doing the right", "living well", or "flourishing").

The first scenario of the ones set out in the previous paragraph does not appear to hold true: an examination of the relevant laws reveals that the word dignity does not feature in them. Instead, these laws possess terms and phrases that are included in (or closely related to) the Five Freedoms.[283] The second scenario does not necessarily seem to hold true

thoughts or arguments appear will therefore be discussed throughout the relevant parts of this (and the following) chapter(s).

283 This thesis has examined the following UK laws: Animal Welfare Act 2006; Animal Health and Welfare (Scotland) Act 2006; Welfare of Animals Act (Northern Ireland) 2011; Animal Health and Welfare Act 2013; Performing Animals (Regulation) Act 1925; Wild Animals in Circuses Act 2019; Cinematograph Films (Animals) Act 1937; Pet Animals Act 1951; Protection of Animals Act 1911; Animal Boarding Establishments Act 1963; Animals (Scientific Procedures) Act 1986; Zoo Licensing Act 1981; Animal Health Act 1981; Hunting Act 2004; Fur Farming (Prohibition) Act 2000; Wild Mammals (Protection) Act 1996; Riding Establishments Act 1970; Animals Cruel (Poisons) Act 1962; Wildlife and Countryside Act 1981; Dangerous Wild Animals Act 1976; Dangerous Dogs Act 1991; Protection of Badgers Act 1992; Welfare of Farmed Animals (England) Regulations 2007; Animal Welfare (Licensing of Activities Involving Animals) (England) Regulations 2018; Welfare of Racing Greyhounds Regulations 2010; Animal Welfare (Breeding of Dogs) (Wales) Regulations 2014; Welfare of Animals at the Time of Killing (Scotland) Regulations 2012; Animal Welfare (Electronic Collars) (Wales) Regulations 2010; Welfare of Animals (Transport) (England) Order 2006; Welfare of Animals at Markets Order 1990; Welfare of Animals at the Time of Killing (Wales) Regulations 2014. As regards the EU, animal dignity does not appear in primary EU law (TEU, TFEU and the Charter of Fundamental Rights of the EU). It also does not appear in the following secondary legislation concerning animal protection: Council Directive 98/58/EC of 20 July 1998 concerning the protection of animals kept for farming purposes [1998] OJ L221/23; Directive 2010/63/EU; Council Directive 2008/120/EC of 18 December 2008 laying down minimum standards for the protection of pigs [2009] OJ L47/5; Council Directive 2008/119/EC of 18 December 2008 laying down minimum standards for the protection of calves [2009] OJ L10/7; Council Directive 2007/43/EC; Council Directive 1999/74/EC of 19 July 1999 laying down minimum standards for the protection of laying hens [1999] OJ L203/53; Council Regulation (EC) 1099/2009 of 24 September 2009 on the protection of animals at the time of killing [2009] OJ L303/1; Council Regulation (EC) 1/2005; Regulation (EC) 1523/2007 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 [2007] OJ L343/1; Council Regulation (EC) 338/1997 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein [1997] OJ L61/1; Council Directive 1999/22/EC of 29 March 1999 relating to the keeping of wild animals in zoos [1999] OJ L94/24;

either. The relevant legal systems are clear on why they protect animals (because of their sentience); they regularly emphasise their aim to prevent unnecessary suffering and promote welfare;[284] and in order to achieve these goals, they have set out relatively concrete standards.[285] The only potentially ambiguous requirement, when looking at it as a self-standing criterion, concerns the one (included in the Five Freedoms and laid down in section 9 AWA) that demands that animals are given the freedom to show "normal behaviour".[286] What does this requirement entail, and notably, what purpose does it serve in the first place? Two interpretations are possible: (a) animals need to show normal behaviour because this is a good indicator of or even promotes good welfare[287] or (b) animals need to be able to "take part in the animal adventure" (which might be a separate argument from a welfare-based one and hence look like a dignity argument). However, when put in context, the ambiguity surrounding the "normal behaviour-requirement" seems to disappear. It is embedded in a legal system that protects animals because they are sentient (and only to the

Regulation (EU) 2016/429 of 9 March 2016 on transmissible animal diseases [2016] OJ L84/1. Furthermore, dignity does not appear in any of the proposals regarding cloning of animals.

284 For example, the provisions in the AWA are grouped into different sections, two main ones of which contain the following headings: 'Prevention of Harm' and 'Promotion of Welfare'.

285 See, for example, the Welfare of Farmed Animals (England) Regulations 2007 and Annex III to Directive 2010/63/EU.

286 The legal systems of countries that rely on the Five Freedoms are said to typically be vague on how the natural behaviour requirement is to be interpreted. See Frida Lundmark and others, 'Intentions and Values in Animal Welfare Legislation and Standards' (2014) 27 Journal of Agricultural and Environmental Ethics 991, 1002.

287 Abnormal behaviour could, for example, be an indicator of stress or discomfort in the animal, as is the case with tail biting in pigs. However, it might also be the case that animals need to show normal behaviour because being able to showcase species-specific traits simply causes the animal great joy (even if the absence of this opportunity does not necessarily make it suffer). This latter argument connects to Nussbaum's argument in favour of her capabilities theory. She argues that her theory provides a benefit over the utilitarian theory because it is capable of considering 'all the deprivation of valuable life activity that [animals] do not feel'. See Martha Nussbaum, 'Beyond "Compassion and Humanity": Justice for Nonhuman Animals' in Cass Sunstein and Martha Nussbaum (eds), *Animal Rights: Current Debates and New Directions* (OUP 2006) 299, 305.

extent that they are);[288] it is explicitly connected to the notion of welfare in the text of the law;[289] and the species-specific requirements laid down in lower legislation,[290] which are supposed to give effect to this requirement (and to the other requirements in section 9 AWA), can all be justified by reference to the notion of welfare. The relevant Codes of Practice also tend to emphasise that abnormal behaviour indicates that something is wrong with the animal's physical and/or mental health.[291] Furthermore, I have not been able to find any relevant case law in which the welfare-based interpretation of the natural behaviour requirement is contested either. Although there is therefore room to argue that this criterion, when taken in isolation, should be interpreted in an elaborate manner, the context in which it is put and the guidance provided in lower legislation do not necessarily seem to reflect such an intention.[292]

Neither the word nor the notion of dignity therefore seems to feature in any obvious, self-standing way in the text of UK/EU animal laws. Are they there in the Parliamentary debates and associated documents? That is the question with which the remainder of this

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288 It is recalled here that only those animals that are perceived to be sentient are included in the scope of animal legislation.

289 Notably, see the heading of sections 9 to 12 AWA, which is titled 'Promotion of Welfare'. Section 9, which codifies the five freedoms, is referenced as the 'duty of person responsible for animal to ensure welfare'.

290 Such as in the Welfare of Farmed Animals (England) Regulations 2007.

291 See, for example, Department for Environment, Food and Rural Affairs, 'Code of Practice for the Welfare of Privately Kept Non-Human Primates' (January 2010) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/218679/primate-cop.pdf> accessed 16 July 2021, 4; Department for Environment, Food and Rural Affairs, 'Code of Practice for the Welfare of Dogs' (December 2017) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/697953/pb13333-cop-dogs-091204.pdf> accessed 16 July 2021, 6, 8.

292 See in this connection also Frida Lundmark, 'Mind the Gaps! From Intentions to Practice in Animal Welfare Legislation and Private Standards' (doctoral thesis, 2016) <https://pub.epsilon.slu.se/13669/1/lundmark_f_160919.pdf> accessed 16 July 2021, 44, which argues that 'the initiators wanted natural behaviour to be perceived as a broad concept [but that] it was usually used as a rather narrow concept in the regulations. This concept mostly focused on the design of the animals' husbandry system and environment, and less on social structures, weaning, feed, mutilations or mating behaviours'.

chapter is concerned. It first analyses the use of the word dignity in the debates, after which it tries to locate dignity concepts in areas where one might expect to find them. To be sure, it should be noted that the results derived from an academic analysis of the parliamentary debates are unlikely to be used (or even admissible) in the relevant courts,[293] since the law is not 'ambiguous or obscure' and since it does not lead 'to an absurdity' either. However, carrying out such an analysis still constitutes a valuable exercise, since the debates might be able to provide us with some more empirical evidence on the legislature's (and/or legislators') position on animal dignity. Among other things, they could reveal whether the legislatures (and individual members of the relevant parliaments) actually hold the opinion that animals have dignity at all; what they take dignity to mean; and whether they have deliberately not invoked the word or concept of dignity in the legislation (or whether dignity was instead perhaps not even a conscious concern whilst making these laws at all). If it turns out that dignity is clearly invoked in the parliamentary debates, it might be less fanciful to see traces of it in the resulting legislation. On the other hand, if dignity has not (in any serious manner) been invoked in the debates, this would seem to constitute conclusive evidence that the concept has not been used to justify animal laws and to determine their content. It would confirm that the only concern of the legislature is to protect animals' experiential welfare interests.

293 In the case of *Pepper (Inspector of Taxes) v Hart* [1993] AC 593, 640 (Lord Browne-Wilkinson), the House of Lords decided that reliance on parliamentary material for legal purposes is only allowed where legislation is 'ambiguous or obscure, or leads to an absurdity', which does not seem to be the case here. The fact that the word dignity is not used in the legislation does not mean that the law is unclear or improper. In fact, as already mentioned in footnote 282, the question of what dignity could be taken to mean (i.e. of using the parliamentary material to determine the meaning of dignity) is very unlikely to come up in court at all, since the word 'dignity' does not appear in the primary legislation on animals.

3.4 Dignity Statements in the Parliamentary Debates

It turns out that the word dignity can indeed be found in the relevant debates. In fact, many EU and UK parliamentarians seem to hold the opinion that animals actually do have dignity. They have made quite a few references to animal dignity in the debates[294] and some of the statements made by Members of Parliament (hereafter: MPs) even suggest that the whole purpose of animal laws is to protect their dignity.[295] Moreover, no member of either parliament sought to deny that animals have dignity. It should, however, be mentioned at the outset that Members of the European Parliament (hereafter: MEPs) seem to use the word dignity much less than their UK colleagues.[296]

The legislators are, however, not clear on the meaning of dignity. First, there are unexplained contradictory statements and formulations in terms of the nature of dignity. Among other things, legislators talk about a 'duty to respect and protect one's dignity',[297] 'treating someone with dignity',[298] having a 'right to dignity',[299] 'preserving one's

294 See eg Lord Holmes of Richmond, HL Deb 1 March 2019, vol 796, col 376; Lord Gardiner of Kimble, HL Deb 27 March 2018, vol 790, col 131GC; Corbett, HC Deb 17 February 1986, vol 92, col 95; HC Deb 22 April 1988, vol 131, col 1149; HC Deb 18 May 1984, vol 60, col 636; Hancock, HC Deb 17 February 1986, vol 92, col 107; Graham, HC Deb 6 March 1981, vol 1000, col 550; McNamara, HC Deb 7 November 1979, vol 973, col 434; HC Deb 3 March 1995, vol 255, col 1327; Wardle, HC Deb 2 December 1992, vol 215, col 215W; Lord Houghton, HL Deb 15 June 1988, vol 498, col 329; Lord Bishop of Birmingham, HL Deb 16 January 1986, vol 469, col 1246; Kastler and Mikolasik, Directive 2010/63/EU Deb 8 September 2010; Ramos, Council Regulation 1/2005 Deb 30 March 2004.

295 HC Deb 14 May 1970, vol 801, cols 1560-1561; Animal Welfare Bill Deb 17 January 2006, col 137.

296 Therefore, when this thesis is silent on the EU's position about a certain aspect of dignity, it is because no relevant examples were found.

297 Lord Glenarthur, HL Deb 12 December 1985, vol 469, col 373.

298 McNamara, HC Deb 3 May 1983, vol 42, cols 21-22; Lord Bishop of Birmingham, HL 28 November 1985, vol 468, col 1017; William Price MP, HC Deb 14 December 1973, vol 866, col 837; The Earl of Shrewsbury, HL Deb 11 January 2017, vol 777, cols 2027-28; Lord Addington, HL Deb 5 July 2012, vol 738, col 849; Amess, HC Deb 13 December 2012, vol 555, col 514.

299 Hancock, HC Deb 17 February 1986, vol 92, col 102; Baker, HC Deb 11 March 1998, vol 308, col 529.

dignity',[300] 'having dignity',[301] 'giving dignity'[302] and 'denying dignity'.[303] The verbs 'preserve' and 'protect' imply that dignity is something that can be diminished or possibly even lost. The same is true for having a right to dignity. This type of argument could also be supported by the existence of laws to support dignity. After all, why would one need a law to protect dignity if it is something that cannot be lost or affronted? On the other hand, however, it has been suggested that dignity is inalienable.[304] This would also be in line with the EU's definition on human dignity as being inviolable.[305]

As regards the question of *who* has dignity, the debates contain three different answers: living beings,[306] sentient beings,[307] and beings that are created by God.[308] It should be noted, however, that the latter argument did not appear in the EU debates examined. Nevertheless, the three types of beings were sometimes mentioned separately, but they have also been mentioned almost interchangeably,[309] despite them being different things. For all

300 Sheldon, HC Deb 14 May 1970, vol 801, cols 1560-1561.

301 Graham, HC Deb 6 March 1981, vol 1000, col 550; McNamara, HC Deb 7 November 1979, vol 973, cols 433-34.

302 Lord Holmes, HL Deb 1 March 2019, vol 796, col 376.

303 McNamara, HC Deb 3 March 1995, vol 255, col 1327.

304 Notably, see Baroness Phillips, HL Deb 22 February 1977, vol 380, col 17.

305 Article 1 EU Charter.

306 Morley, HC Deb 15 May 2000, vol 350, col 41; Price, HC Deb 14 December 1973, vol 866, cols 836-37; Lord Glenarthur, HL Deb 12 December 1985, vol 469, col 373; Kastler, Directive 2010/63/EU Deb 8 September 2010.

307 Corbett, HL Deb 17 February 1986, vol 92, col 95; Baker, HC Deb 11 March 1998, vol 308, col 529. For an, admittedly, somewhat far-stretched link with regard to EU law, see the Opinion of the Committee on International Trade (23.3.2007) on Regulation 1523/2007, cited in Anne Lansink, *The Use of Dignity in EU and UK Animal Protection Laws* (MPhil thesis, University of Oxford 2017).

308 eg McNamara, HC Deb 3 May 1983, vol 42, cols 21-22. Note in this connection how not all MPs adhere to a religious meaning of dignity, to the same religious meaning, or to any religious view at all. See the discussion between Lord Bishop, Lord Melchett, and Lord Mishcon in HL Deb 28 November 1985, vol 468, col 1017.

309 eg Corbett, HL Deb 17 February 1986, vol 92, col 95.

three types an argument was made that for the very reason that they are the specific being they are, they deserve legal protection. However, only sentient beings are actually protected by the law. It is not clear from the debates whether MPs actually meant to refer to something else, such as the dignity of sentient beings, or whether different legislators hold different views on dignity.[310] Alternatively, many (if not all) MPs and MEPs might have no real view on dignity at all and merely invoke it for rhetorical use.

A further question is what kind of protection dignity entails. The debates contain two different views on this. First, some statements suggest that we should avoid suffering.[311] This is in line with the sentient beings recognition and the substantive legal protection that has been granted to animals. Second, UK legislators have specifically covered the issue of animals being used as a resource. Some of them think that it is incompatible with animal dignity to use animals as mere means to an end,[312] whereas others suggest that this is the whole purpose of an animal (as long as its use serves a legitimate purpose).[313] Nevertheless, the current legislation clearly allows the use of animals. It is unclear from the relevant parliamentary material whether this is so because the majority considers it to be compatible with animal dignity, or whether the majority does not think so, but has simply agreed with it for practical reasons or because they think that there is a morally more important issue that justifies the infringement of animal dignity.

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310 This latter option is unlikely. No MP protested against not including non-sentient animals within the ambit of the law or even raised the issue of which beings to include while talking about the scope of animal laws.

311 HC Deb 17 February 1986, vol 92, col 95 and potentially Wardle, HC Deb 2 December 1992, vol 215, col 215W.

312 Baker, HC Deb 11 March 1998, vol 308, col 529.

313 All of which were made by McNamara: HC Deb 3 May 1983, vol 42, cols 21-22; HC Deb 7 November 1979, vol 973, cols 433-34; HC Deb 3 March 1995, vol 255, col 1327; HC Deb 12 February 1986, vol 91, cols 966-68.

Two further observations are worthy of mention. First, the relevant debates show that many MPs/MEPs consider animal abuse not only to be an affront to animal dignity, but also (or perhaps even mostly) to be an affront to human dignity.[314] Second, MEPs are, compared to their UK counterparts, almost completely silent on the issue of animal dignity. This approach is interesting, given that EU law is so explicit on *human* dignity, but also understandable, since the powers of EU authorities in relation to animals are linked and arguably also limited to sentience. The EU is required to 'pay full regard to the welfare requirements of animals' while 'formulating and implementing' the Union's policies in certain areas, 'since animals are sentient beings'.[315] Relevant documents state that animals should be treated in such a way that they do not suffer unnecessarily,[316] and the EU's legal framework and debates indeed fully reflect this approach.[317] MEPs' silence on animal dignity may furthermore be a reflection of the fact that the EU is primarily an economic entity, concerned with the facilitation of trade. The concept of (animal) dignity might therefore be discussed only when there is a very obvious dignity objection to a proposed course.

314 O'Donovan, HC Deb 13 April 1934, vol 288, cols 679-680; Graham, HC Deb 6 March 1981, vol 1000, col 550; McNamara, HC Deb 3 March 1995, vol 255, col 1327; Lord Soper and Lord Collison, HL Deb 7 November 1975, vol 365, cols 1532, 2559-60; Wojciechowski and Kadenbach, Directive 2010/63/EU Deb 8 September 2010. Interestingly, Isabelle Veissier and others, 'European Approaches to Ensure Good Animal Welfare' (2008) 113 Applied Animal Behaviour Science 279, 280 argues that also the Council of Europe 'started to work on animal protection in the 1960s, with a belief that respect for animals was a common heritage of European countries closely linked to human dignity…'.

315 Article 13 TFEU.

316 See, for example, the Animal Welfare Factsheet (n 261).

317 The same is true for EU case law on animals, which tends to focus on their experiential welfare. For some recent cases, see, for instance, Case C-424/13 *Zuchtvieh-Export GmbH v Stadt Kempten* EU:C:2015:259; Case C-383/16 *Vion Livestock BV v Staatssecretaris van Economische Zaken* EU:C:2017:783.

3.4.1 A Closer Examination of Potential Dignity Statements

The analysis so far reveals a great deal of confusion. The word 'dignity' has not been used in UK/EU animal laws, nor do these laws necessarily need this concept for them to be understood. However, the word 'dignity' does occasionally appear in the parliamentary debates. Yet its meaning remains unclear. The question therefore arises: to what extent have the legislators *really* invoked this concept? In order to be able to answer this question, a closer look will be taken at examples from the debates in which it seemed that a genuine dignity argument was made. It was already briefly revealed above how dignity, for the purposes of this thesis, is taken to mean something more than just the absence of suffering (and the presence of positive emotions). It embraces the idea that something we do to animals can be wrong even if it might not necessarily negatively affect their experiential well-being. The examination that follows will therefore focus on examples from the debates which concern situations where no suffering is involved, or where it may not necessarily be the most pressing moral problem. This approach ties into my own preference of viewing dignity as a self-standing concept, i.e. one that is not reducible to another concept, such as autonomy or welfare. This is not because infringements of autonomy or welfare are unrelated to dignity. In contrast, there are many situations in which such violations would also seem to be an affront to someone's dignity. However, if one limits dignity's content to such situations, one does not need the concept of dignity at all, as it would not add anything to already existing concepts. As such, it might not be needed, and should perhaps better be avoided in order to circumvent the criticism that is mounted against this concept.[318]

[318] See also Federico Zuolo, 'Dignity and animals. Does it make sense to apply the concept of dignity to all sentient beings?' (2016) 19 Ethical Theory and Moral Practice 1117.

It turns out that in those few examples in which it seemed that a genuine dignity argument was made (rather than dignity being mentioned too loosely to be meaningful), dignity was not appealed to, the argument did not have any effect on the resulting legislation, and/or the focus immediately shifted to welfare-based concerns. A few statements illustrate this. The first one concerns the Fur Farming Prohibition Bill 2000. Morley MP said that the principal reason for introducing this bill was 'public morality'.[319] He stated that 'it is wrong to keep animals solely or primarily to slaughter for their fur. Fur farming is not consistent with a proper value and respect for animal life. Animals should not be destroyed or bred for destruction without a sufficient justification of public benefit.'[320] In a further elaboration of his argument, he talked about 'respect for the dignity of animal life…'.[321] He continued by saying that the Government 'share[d] the concern that many have for the welfare of farm mink',[322] but that it was 'not [the Government's] principal motivation for introducing the Bill'.[323] His statements therefore give the impression that something other than suffering motivated the Government to introduce this Bill. However, none of the other MPs participating in the debate agreed with Morley on the public morality justification or even repeated the dignity argument. As a matter of fact, all of them seemed (or even straightforwardly claimed) to vote for or against the Bill based on whether they thought there was a welfare issue or not.[324] Furthermore, the people who spoke in the debate

319 HC Deb 15 May 2000, vol 350, cols 40-41.

320 ibid.

321 ibid.

322 ibid.

323 ibid.

324 Gerry Steinberg MP, Maria Eagle MP, Angela Smith MP and arguably Steve Baker MP all voted in favour of the Bill but argued that it was an animal welfare issue rather than a public morality issue. Malcolm Moss MP said that he would have been in favour of the Bill had there been, according to him, a real animal welfare issue. James Gray MP and Patrick Nicholls MP both stated that 'the Bill is an animal welfare measure or it is nothing'.

even contested Morley's own intentions for introducing the Bill, accusing him of introducing it only to satisfy his party's funders. It therefore seems that no real dignity argument was made.

Another case where a (non-pain-related) dignity argument was made is the AWA. Hollobone MP suggested that giving animals away as a prize would be contrary to their dignity.[325] However, the AWA still permits this.[326] It only prohibits awarding animals as a prize to children under the age of 16 (provided that none of the exceptions mentioned in the Act is applicable).[327] But surely the age of the recipient has nothing to do with whether the animal's dignity is violated. Rather, it probably has to do with whether the child is in a position to take care of the animal, which, again, looks more like a welfare argument.[328]

Yet another dignity argument was made in the context of re-using animals in scientific procedures, while keeping them under anaesthetics in between two procedures. Lord Bishop of Birmingham said that 'this is really a matter concerned with the dignity of animals. It is offensive to their dignity to keep them in a kind of suspended animation before further procedures are carried out. There is an ethical point here, not just an irrational point.'[329] In the same debate Lord Houghton had said that there was a 'reaction of widespread public opinion and indignation' to an earlier published White Paper on the matter.[330]

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325 Animal Welfare Bill Deb 17 January 2006, col 137.

326 Section 11 AWA.

327 Before the entry into force of the AWA, the Pet Animals Act 1951 made it an offence to sell a pet animal to children under the age of 12. The age limit has therefore increased from 12 to 16 years.

328 Note how the provision is included in the section called 'Promotion of Welfare'. See also Select Committee on Environment, Food and Rural Affairs, 'Memorandum Submitted by Mike Radford' (14 December 2005) <https://publications.parliament.uk/pa/cm200506/cmselect/cmenvfru/683/683we22.htm> accessed 16 July 2021, paras 56-58.

329 HL Deb 16 January 1986, vol 469, col 1246.

330 ibid col 1243.

However, in a debate on this topic that took place three months later there was no discussion about animal dignity being assaulted. Rather, the discussion again concerned the amount of suffering. It was made clear by several members that '[i]t [was] not…the anaesthetic that [was] the vital point, but the severity of the initial procedure'.[331] They thought that there was only so much suffering that an animal should have to bear.[332] No one sought to deny this in the rest of the debate. Again, not dignity, but suffering was the main concern.

It was further suggested in the debates that using animals as mere means was not compatible with their dignity (although contrary statements were also made) and that all living and God-created beings should be protected because of their dignity. However, the resulting laws only protect beings that are sentient (and no protest was made against this)[333] and even those animals that fall within their ambit can be used as mere means (such as food animals). Consequently, it seems that in those cases where a seemingly genuine appeal to dignity was made, it was not a serious appeal to dignity, it did not have any effect on the resultant legislation, and/or the focus immediately shifted to welfare-based concerns.[334]

3.4.2 Interim Conclusion: No Substantial, Independent Role for Dignity in Animal Law

The next chapter will show that there is a relatively sophisticated suite of dignity uses in the literature. This stands in contrast to the UK/EU legislators' lay use of this concept. It

331 Corbett, HC Deb 21 April 1986, vol 96, col 106.

332 HC Deb 21 April 1986, vol 96, cols 108-109.

333 Which is unsurprising, since animals that are not capable of suffering do obviously not need legal protection against it.

334 To be sure, in those cases in which the apparent appeal to dignity did not lead to any relevant results in the resulting legislation, no negative remark or protest was made by the relevant MP either.

seems that when legislators are talking about animal dignity, they mean to say that animals have worth as well as the humans whom it is assumed have dignity. That they too have moral significance. In this context it is worth recalling that the field of animal advocacy is to a large extent dominated by people focusing on welfare.[335] They tend to focus on the subjective experiences of animals. I take it that two factors have played a substantial role in this: our increased awareness of animals' capabilities and our increased awareness of current practices relating to animals.[336] As views focusing on pain, suffering and pleasure seem to dominate the field of animal ethics and advocacy, it is not surprising that they have guided us in framing our current animal laws. The term 'dignity' carries an immense symbolic power with it and may therefore have been used by legislators in order to convince other legislators to press for more animal protection; to make welfare arguments sound more powerful. Moreover, in their lay use of dignity the MPs/MEPs acknowledge the impact of animal abuse on *human* dignity. Animals thus benefit from and ride along on the concept of human dignity. However, the legislators do not seem to have deliberately and expressly used the concept of dignity for animals themselves.

The conclusion that has been drawn so far, namely that dignity as a concept does not truly seem to play a substantial, explicit and self-standing role in justifying animal laws and in determining their content, also explains why this concept has not been defined in the relevant debates. Section 3.4 already discussed how the various "dignity-statements" that were made by legislators seemed to contradict one another. Additionally, I have not been able to locate a single debate in which the concept of animal dignity was seriously discussed or properly defined, nor did I find a debate in which an MP/MEP directly contested another

335 Many, if not most, of which are utilitarians: Lori Gruen, *Ethics and Animals: An Introduction* (CUP 2014) 34-36.

336 See the introduction to this thesis.

MP/MEP's dignity claim.[337] Arguing that the relevant legislators have used dignity as a placeholder concept, just like the UDHR drafters had done,[338] could have possibly provided an explanation for the different contradictory statements in the debates (which would then have resulted from different interpretations of the concept).[339, 340] However, the UDHR drafters recognised in the preamble that dignity lays the foundation for the rights laid down therein and explicitly agreed on using dignity as a placeholder concept. This stands in stark contrast with the legal position in UK/EU animal law. Dignity does not have a prominent place therein and I have not been able to find any such agreement regarding its use as a placeholder concept in the relevant parliamentary debates or in other preparatory documents either. The statement that dignity has not been used as a placeholder in these laws is also corroborated by the conclusions drawn above.

337 See, however, the debate between Lord Bishop of Birmingham, Lord Melchett, Viscount Massereene and Ferrard, HL Deb 28 November 1985, vol 468, cols 1002-51, in which they shortly discuss whether animals have rights or whether they merely have a moral worth as a result of which human beings have a moral duty to treat them with dignity and respect.

338 See chapter 2.1.

339 The different statements regarding whether animals should be used as a means or not could find their origins in, for example, the difference between a religious concept of dignity and the inherent value concept.

340 In fact, a creative reader might still be able to recognise traces of almost all the dignity theories that are discussed in the next chapter in the relevant material above. There are several reasons for this. First, the objective of the law is not always clear. We have seen that the law states on various occasions that animals should be able to show "normal behaviour". Does this requirement serve to avoid suffering or was it adopted because the animal should be able to take part in the animal adventure? This latter argument looks like a dignity argument. Second, there are so many different (or contradictory) statements in the parliamentary debates that one will always be able to find a statement which aligns with the theory one may want it to align with. Third, some ethical and dignity theories have considerable overlap with each other. Nussbaum's theory, for example, shares many similarities in terms of its content with theories that focus on animal sentience. Fourth, the dignity theories themselves may not always be very concrete, hence one could put forward different arguments on what exactly dignity entails. This is the case, for example, with Foster's theory and the inherent value theory.

3.5 Traces of Dignity in Areas in which One May Expect its Presence

Thus far the focus has been on the use of the word dignity and on the text of the law more generally. This section will instead examine whether traces of dignity can perhaps be found in areas where one may expect to find it, that is, areas in which there may not necessarily be a setback to experiential welfare or in which such may not necessarily be the most pressing moral problem. The results of this examination will either be able to confirm that dignity does indeed not play an independent role in the justification of animal laws, or otherwise expose the legislators' conception of dignity a bit more clearly (as they would be forced to better articulate it in these contexts). Three areas will be discussed: those of bestiality, zoos, and circuses.

3.5.1 Sexual Interaction between Humans and Animals

Sexual interaction between humans and animals may not always result in negative emotions in the animal, but at least some forms may nevertheless be thought to be incompatible with animal dignity, for example, because the animal might be used as a mere sexual instrument. Indeed, sexual intercourse between humans and animals has long been criminalised under UK law and it is still prohibited by section 69 of the Sexual Offences Act 2003 (no EU law on the matter currently exists).[341, 342] The offence is likely to at least partially originate from the Biblical injunctions against bestiality, which were undoubtedly prominent in the thinking of the early legislators.[343] The Bible prohibits bestiality, as it does 'not serve

341 Although calls have been made to adopt legislation on the topic at EU level as well: European Parliament Committee of Petitions, 'Notice to Members' (30 June 2015) <http://www.europarl.europa.eu/meetdocs/2014_2019/documents/peti/cm/1067/1067578/1067578en.pdf> accessed 16 July 2021.

342 For a full overview of the legislation and legislative history of this offence and a discussion of this topic, see chapter 6 of this thesis.

343 Bestiality was also connected with black magic and witchcraft. See Adolph Niemoeller, *Bestiality in Ancient and Modern Times* (Haldeman-Julius Publications 1946) and Cyril Greenland, 'Sex Law Reform in an International Perspective: England and Wales and Canada' (1983) 11 Bulletin of the

reproduction'.[344] Bestiality might furthermore be thought to confound the line that the Bible draws between species and offend the Imago Dei.[345] The heading under which the prohibition used to fall, namely that of 'unnatural offences', seems to confirm these thoughts. Perhaps in light of the secularisation, it was discussed in 2000 whether bestiality should stay an offence or 'whether it should be part of the law on the protection of animals'.[346] The independent review committee, which was endowed with the task of reviewing the Sexual Offences Act 1956, thought bestiality was 'an act that offended against the dignity of animals and of people' and thereby focused on 'the principle of free agreement to sexual activity', which was 'simply not possible with animals'.[347] However, it then went on to say that bestiality should (primarily) be prohibited because it reflected 'profoundly disturbed behaviour'. The committee focused on the perceived link between bestiality and other forms of sexual offending, abuse of children, and animal cruelty.[348] This also seems to be the position of the Government. The Parliamentary debates and the relevant white paper make clear that the criminal offence of bestiality does not serve to protect animals (for this, it was claimed, we already have animal cruelty laws), but to punish 'deviant behaviour'.[349]

American Academy of Psychiatry and the Law 309, cited in Hani Miletski, 'A History of Bestiality' in Andrea Beetz and Anthony Podberscek (eds), Bestiality and Zoophilia: Sexual Relations with Animals (Berg Publishers 2009) 1, 5.

344 Miletski (n 343) 5-6, citing Midas Dekkers, *Dearest Pet: On Bestiality* (Verso 1994) and Anil Aggrawal, 'References to the Paraphilias and Sexual Crimes in the Bible' (2009) 16 Journal of Forensic and Legal Medicine 109, 113.

345 I am grateful to Professor Charles Foster for this remark.

346 Home Office, *Setting the Boundaries: Reforming the Law on Sex Offences* (volume 1, July 2000) 126.

347 ibid 126. See also page 127, where the committee discusses the practice of necrophilia: 'our fundamental principle is that sexual activity should be mutually agreed – in this context, and that of bestiality, there is no possibility of mutual agreement'.

348 ibid 126.

349 See Lord Falconer, HL Deb 19 May 2003, vol 648, cols 575-76 and Home Office, *Protecting the Public, Strengthening Protection Against Sex Offenders and Reforming the Law on Sexual Offences* (Cm 5668, 2002) 33. Note, however, that this could be an implication of human dignity.

Therefore, although the responsible parties that were involved in the drafting and adoption of this provision briefly touched upon some concerns relating to the interests of animals, the offence seems to be mostly human-focused.

The law on animal pornography seems to reveal a similar picture. Section 63 of the Criminal Justice and Immigration Act 2008 (CJIA) prohibits the possession of extreme pornography, which includes an image that 'portrays, in an explicit and realistic way,…a person performing an act of intercourse or oral sex with an animal (whether dead or alive)'.[350] This provision prohibits the possession of material the publication of which already used to be illegal under the Obscene Publications Act 1959 (OPA).[351] The enforcement of this latter Act was impeded by the 'international nature of the Internet',[352] and the CJIA therefore aimed to bridge this gap by extending the offence to the mere possession of such material.[353] However, it should be noted that OPA, on which section 63 CJIA expands, considers material to be obscene 'if its effect…is, if taken as a whole, such as *to tend to deprave and corrupt persons* who are likely…to read, see or hear the matter contained or embodied in it'.[354] Therefore, yet again, the underlying purpose of these provisions seems

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350 See section 63(7)(d) of the CJIA 2008.

351 House of Commons Library, *The Criminal Justice and Immigration Bill* (Research Paper 07/65, 9 August 2007) <https://www.statewatch.org/media/documents/news/2007/aug/uk-crim-just-imm-bill-research-paper.pdf> accessed 16 July 2021, 50; Home Office, 'Consultation: On the Possession of Extreme Pornographic Material' (August 2005) <http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/30_08_05_porn_doc.pdf> accessed 16 July 2021; Home Office, 'Consultation on the Possession of Extreme Pornographic Material: Summary of Responses and Next Steps' (30 August 2006) <http://www.spannertrust.org/documents/Gvt-response-extreme-porn.pdf> accessed 16 July 2021. The word 'publish' is to be interpreted broadly so as to include, among other things, to distribute, circulate, sell, let on hire, give, lend, offer it for sale or for letting on hire, show, play, project or transmit. See section 1 OPA 1959. The Scottish equivalent of this provision is section 51 of the Civic Government (Scotland) Act 1982.

352 House of Commons Library, 'Research Paper 07/65: The Criminal Justice and Immigration Bill' (n 351) 50.

353 The possession of such material for gain already used to be criminalised under the Obscene Publications Act 1964.

354 See section 1(1) OPA (emphasis added).

to be to control the character of human beings, rather than to focus on the potential implications for animal dignity.[355] It therefore seems that, although animal dignity related concerns were briefly touched upon in the context of bestiality, legislation concerning sexual relations between humans and animals does not necessarily serve to protect animal dignity, or even the interests of animals more generally. Instead, they mostly seem to exist for human-related purposes.

3.5.2 Zoos

Collections of wild and exotic animals have been kept for centuries already. Originally, these served to demonstrate power and wealth. Later on, the purpose shifted to scientific study of the animals and to public entertainment.[356] Although modern zoos are still used for recreational purposes, it is commonly argued that their main justification can nowadays be found in the role they play in biodiversity conservation.[357] Zoos have transformed from

355 Although the following paragraph should be noted: 'Our proposals to strengthen controls on extreme pornographic material are therefore based on…a desire to protect those who participate in the creation of sexual material containing violence, cruelty or degradation, who may be the victims of crime in the making of the material, whether or not they notionally or genuinely consent to taking part'. This paragraph could potentially be interpreted as aiming to protect animals from degradation as well. See Home Office, 'Consultation on the Possession of Extreme Pornographic Material: Summary of Responses and Next Steps' (n 351) 11. One should further note that, yet again, the production, exhibition and distribution of films displaying (sexual) conduct that causes animal suffering could be captured under existing animal laws, such as the AWA and the Cinematograph Films (Animals) Act 1937. These laws serve to protect the interests of animals.

356 On these different purposes and the history of zoos more generally, see European Commission, 'EU Zoos Directive Good Practices Document' (July 2015) <https://ec.europa.eu/environment/nature/pdf/EU_Zoos_Directive_Good_Practices.pdf> accessed 16 July 2021 and Kali Grech, 'Detailed Discussion of the Laws Affecting Zoos' (Michigan State University College of Law Animal Legal & Historical Center 2004) <https://www.animallaw.info/article/detailed-discussion-laws-affecting-zoos> accessed 16 July 2021.

357 This is also the key focus of the EU Directive on Zoos: Council Directive 1999/22/EC. See in this connection also Irus Braverman, 'Looking at Zoos' (2011) 25 Cultural Studies 809; Irus Braverman, 'Conservation without Nature: The Trouble with In Situ versus Ex Situ Conservation' (2014) 51 Geoforum 47; Irus Braverman, *Zooland: The Institution of Captivity* (Stanford University Press 2012). For some different perspectives on zoos' role in conservation, see Robin McKie, 'Is It Time to Shut Down the Zoos?' (*The Guardian*, 2 February 2020) <https://www.theguardian.com/world/2020/feb/02/zoos-time-shut-down-conservation-education-wild-animals> accessed 16 July 2021.

'living museums' to 'modern conservation centres, where education, research and captive breeding and reintroduction programmes are undertaken'.[358] Various pieces of legislation currently apply to them. Notably, these include the Zoo Licensing Act 1981 (ZLA), Council Directive 1999/22/EC (which was implemented in the ZLA)[359] and the AWA. The first two of these have introduced a licensing system to make sure that, among other things, animal health and welfare,[360] public health and safety[361] and biodiversity conservation[362] are safeguarded.[363] The AWA, as we know, focuses on the welfare of the animals kept.

The standards used in zoos have changed enormously over time. Whereas in the past animals used to be presented as individuals in cages, modern zoos have made efforts to present them in their natural habitat demonstrating their natural behaviour instead.[364] The relevant laws seem to (have) contribute(d) to this development. A licence to keep a zoo may only be granted if the local authority is satisfied that, among other things, the conservation measures mentioned in the law will be 'implemented in a satisfactory manner' (the "conservation requirement")[365] and that 'standards of accommodation, staffing or

358 European Commission, 'EU Zoos Directive Good Practices' (n 356) 5.

359 The Explanatory Notes to the ZLA explain that 'The Act was amended by the [Zoo Licensing Act 1981 (Amendment) (England and Wales) Regulations 2002] to give effect to the provisions of Council Directive 1999/22/EC which were not already covered by it': Department for Environment, Food and Rural Affairs, 'Zoo Licensing Act 1981: Guide to the Act's Provisions' (2012) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/69595/zoo-licensing-act-guide.pdf> accessed 16 July 2021, 5.

360 Section 4(3) ZLA.

361 Section 4(2) ZLA.

362 Section 4(2A) ZLA in conjunction with section 1A ZLA. See also the preamble recitals to and Articles 1 and 3 of Directive 1999/22/EC.

363 The full (and exclusive) list of criteria to assess the application for a license can be found in section 4.

364 See also Braverman, *Zooland: The Institution of Captivity* (n 357) 5.

365 Section 4(2A) in conjunction with section 1A ZLA.

management are adequate for the proper care and wellbeing of the animals or any of them...' (the "welfare requirement").[366] The law explicitly elaborates on the conservation requirement. Among other things, it prescribes that animals should be accommodated 'under conditions which aim to satisfy the biological and conservation requirements of the species to which they belong'.[367] This entails 'providing each animal with an environment well adapted to meet the physical, psychological and social needs of the species to which it belongs'[368] and 'providing a high standard of animal husbandry with a developed programme of preventative and curative veterinary care and nutrition'.[369] In terms of overall purpose, the Explanatory Notes to the ZLA explain in their introduction that the 'Act aims to ensure that, where animals are kept in enclosures, they are provided with a suitable environment to provide an opportunity to express most normal behaviour'.[370]

However, the same question as was posed earlier in this chapter arises: do animals need to be presented in their natural state and show natural behaviour merely because this is perceived to improve their welfare and to contribute to the conservation of their species, or because of some deeper moral conviction that says, for instance, that animals should be allowed to be the type of beings that they are? Although these two might in practice result in largely the same type of protection, conceptually speaking they are distinct. The quest for signs that can only be interpreted as dignity-thinking therefore proceeds. The relevant

366 Section 4(3) ZLA. Note how a licence cannot be granted to persons who have been convicted of an animal-related offences in the past either: section 4(4) ZLA.

367 Section 1A(c) ZLA.

368 Section 1A(c)(i) ZLA.

369 Section 1A(c)(ii) ZLA. The Secretary of State Standards of Modern Zoo Practice further elaborate on the conditions to be met by zoos. They draw heavily on the Five Freedoms. See Department for Environment, Food and Rural Affairs, 'Secretary of State's Standards of Modern Zoo Practice' (25 October 2017) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/69596/standards-of-zoo-practice.pdf> accessed 16 July 2021.

370 Explanatory Notes (n 359) 5.

debates indeed contain some material that indicates that at least a number of MPs are also motivated (even if only subconsciously) by the latter conviction. They have expressed their 'ambivalent feelings' towards zoos. They mainly think it is repugnant to keep animals in captivity or under any restrictions.[371] Graham MP also said the following in parliamentary debates on the ZLA:

> We should not show animals in concrete boxes to our children in such conditions that they believe that that is how wild animals should be kept. That need not happen. It coarsens the minds of our children to see animals so wretched, undignified and demeaned. Such experiences for our children can be far from educational; indeed, they can be positively harmful. It is to eradicate that blot on our dignity and self-respect, in addition to our desire to improve the welfare of all animals, that I, on behalf of the Opposition, give the Bill a warm welcome.[372]

Lord Houghton also shared how 'Some aspects of zoological gardens always appall [him] because they are put there expressly for the entertainment of the public'. He illustrated this with the London Zoo's "chimps' tea party". According to him, 'animals should [not] be put through the indignity of being asked to behave like human beings just to entertain a public who cannot understand an animal if it behaves like an animal'.[373] According to Lord Houghton, humans 'always want to see an animal behave like a human being in order to be able to understand it [however] that is the last way in which one can understand an animal'. Indeed, Lord Craigton agreed with this, and replied that the London Zoo discontinued this practice as it 'thought it was an insult to the dignity of the animals concerned'.[374] So several members of both Houses admitted that they considered certain aspects of zoos to be morally wrong, and indeed suggested that they were incompatible with animal dignity.

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371 See eg Lord Melchett, HL Deb 29 June 1981, vol 422, col 29; Lord Beaumont of Whitley, ibid col 35; Lord Gibson-Watt, ibid col 52.

372 HC Deb 6 March 1981, vol 1000, col 550.

373 ibid col 44. Lord Craighton agreed with this in col 60.

374 Lord Craigton, HL Deb 29 June 1981, vol 422, col 60.

However, it is noted here that the existing legislation does not provide the relevant authorities with discretion to reject an application for (an extension of) a zoo licence on the basis of something other than the criteria laid down in section 4 ZLA (the relevant ones for our purposes are the conservation-based one, the welfare and cruelty-based ones, and the preservation of law and order one).[375] Although, for example, performances of the above-mentioned kind might be captured within any of these criteria (e.g. because they are perceived to undermine animal welfare or to be incompatible with the educational limb of the conservation requirement), no separate legal route exists to address them.[376] The reason behind this restraint or omission seems unclear. The relevant Lords might not have considered the matter important or widespread enough to legislate on. Alternatively, they might have thought that such performances could be sufficiently captured within the other criteria or have had faith that zoos would pick up on the matter themselves. Additionally, it will be noted that MEPs specifically, insofar as they had any awareness of such shows as well, lacked the legislative competence to actually interfere therein based solely on dignitarian reasons. Nevertheless, it can actually be concluded here that some dignity thinking seems visible in the area of zoos, even though it is not necessarily reflected in the law as an independent legal requirement.

3.5.3 Circuses

Although it is sometimes questioned whether they are fully capable of meeting the animals' needs, zoos fulfil various important functions, such as education and conservation, which

375 See section 4(7) and the Explanatory Notes (n 359) 8.

376 Note how the Animal Welfare (Licensing of Activities Involving Animals) (England) Regulations 2018 cannot help much further here either, since it focuses on animal welfare as well and since it excludes from its ambit 'any activity permitted under a licence for a zoo under the Zoo Licensing Act 1981' (Article 11(c) of Schedule 1).

might justify their existence.[377] However, this is not equally the case for circuses, a fact which the UK Government has readily admitted.[378] As was the case with bestiality, there is no EU law on the use of animals in circuses. The UK, in contrast, recently adopted new legislation on the matter. Specifically, the Wild Animals in Circuses Act 2019 makes it an offence to use a wild animal in a travelling circus in England.[379] Before this ban came into existence, such performances and exhibition were merely subject to a licensing requirement.[380] The newly adopted ban has a few important limitations. First, it applies only to wild animals. These are animals 'of a kind which [are] not commonly domesticated in Great Britain'.[381] This means that other types of animals, such as dogs, cats and horses, are still allowed to take part in circus acts. Second, it applies only to travelling circuses. Therefore, other types of performances or exhibition, such as birds of prey demonstrations, wild animals performing in summer galas, television and film production work, festive reindeer

377 See eg Lord Craigton, HL Deb 29 June 1981, vol 422, col 26; Fitzpatrick, HC Deb 3 September 2014, vol 585, cols 289-90; Quince, HC Deb 10 February 2016, vol 605, col 1583.

378 Secretary of State for Environment, Food and Rural Affairs, *Wild Animals in Circuses* (Cm 8538, 2013) 9. See also Harrison, HC Deb 6 March 2018, vol 637, col 204.

379 Scotland and Wales have adopted similar legislation: the Wild Animals in Travelling Circuses (Scotland) Act 2018 and the Wild Animals and Circuses (Wales) Act 2020. In 2019, the Welsh Government also published their draft Wild Animals in travelling Circuses (Wales) Bill. To be sure, circus owners are not obliged to abandon their wild animals. They could apply for a licence to keep these animals in their possession under, for example, the Dangerous Wild Animals Act 1976 and for a license under the 2018 Animal Welfare (Licensing of Activities Involving Animals) England Regulations in case they plan to rent out their animals for other type of performances, such as TV or film productions. This was confirmed by David Rutley MP, HC Deb 7 May 2019, vol 659, col 504.

380 The first Act to regulate such practices was the Performing Animals (Regulation) Act 1925, which the English Government replaced with the Animal Welfare (Licensing of Activities Involving Animals) England Regulations 2018. Additionally, the Welfare of Wild Animals in Travelling Circuses (England) Regulations 2012 were adopted as an interim measure to safeguard the welfare of wild animals in travelling circuses until a full ban were to be adopted. It should be noted that the Animal Welfare (Licensing of Activities Involving Animals) England Regulations 2018 still govern other types of performances and activities involving animals. Furthermore, the Performing Animals (Regulation) Act 1925 still applies to Wales.

381 See section 1(5).

displays and educational visits to schools involving small zoo animals, are not included within its ambit.[382]

The Wild Animals in Circuses Act has a turbulent history. The issue of using animals in circuses had already been controversial for a very long time, but the legal framework did not provide authorities with the opportunity to prevent such practices from happening. This is attested by the 1989 Scottish case of *Gerry Cottle's Circus Ltd v City of Edinburgh District Council,* in which the Court did not allow a district council to refuse a license to a circus company on the ground that it considered 'the whole concept of animals performing in circuses [to be] wrong'.[383] In more recent years, the acceptability of using (wild) animals in circuses had also been the subject matter of intense public and parliamentary debate in the UK. Among other things, there had been long-running campaigns on the topic,[384] the matter was discussed during the parliamentary debates that preceded the adoption of the AWA, and a public consultation had taken place.[385] In light of this, the (Labour) Government at the time committed itself to introducing a ban on using wild animals in

382 See, for instance, David Rutley MP, HC Deb 7 May 2019, vol 659, col 504; Lord Gardiner, HL Deb 3 July 2019, vol 798, cols 97GC-98GC; Lord Gardiner, HL Deb 17 July 2019, vol 799, col 242. This approach is similar to the Scottish arrangements. See House of Commons, 'Public Bill Committee: Wild Animals in Circuses (No. 2) Bill' <https://publications.parliament.uk/pa/cm201719/cmpublic/wildanimalsincircusesno2/PBC385_Wild%20Animals%20In%20Circuses_1st-3rd_Combined_22_05_2019_REV1.pdf> accessed 16 July 2021, 78.

383 *Gerry Cottle's Circus Ltd v City of Edinburgh District Council* [1989] 6 WLUK 196. Similarly, in 1991 the Plymouth City Council had wanted to ban the use of wild animals in visiting circuses but discovered that it did not have the power to do so. It did, however, have 'the power to ban animals in theatres, so it did'. See Luke Pollard, HC Deb 7 May 2019, vol 659, col 506-07.

384 For example, by the RSCPA, the Born Free Foundation, and Freedom for Animals. For one of their reports, see Born Free Foundation and RSPCA, 'It's Time Parliament Changed its Act: An Examination of the State of UK Circuses with Wild Animals' (2006).

385 For the responses to this consultation, see Department for Environment, Food and Rural Affairs, 'Initial Summary of Responses to the Defra Public Consultation Exercise on the Use of Wild Animals in Circuses' (March 2010) <https://webarchive.nationalarchives.gov.uk/20130403081440/http://archive.defra.gov.uk/foodfarm/farmanimal/welfare/documents/responses.pdf> accessed 16 July 2021.

circuses.[386] However, it should be noted that, initially, the focus was put on welfare issues. All of those who advocated for a ban 'focused on the difficulty of a circus environment providing for the complex welfare needs of animals'.[387] This is not to say that further ethical issues were not raised at all. For example, Russell MP asked the Minister whether he 'sincerely believe[d] that exotic animals being forced to dance and do tricks is natural' (a question which the Minister answered in the negative).[388] However, in those few instances where purely ethical issues were raised the focus tended to shift to welfare-based concerns again and/or it turned out that the MP concerned actually meant to talk about welfare. The focus in the debate shifted to ethical arguments only when the Government cited the Radford Report,[389] which had concluded that there 'appear[ed] to be little evidence to demonstrate that the welfare of animals kept in travelling circuses [was] any better or worse than that of animals kept in other captive environments'.[390] The Government feared that, should it proceed to ban the use of wild animals in circuses based on welfare grounds, it would

386 This ban was also included in the 2015 Labour Party Manifesto.

387 House of Commons Library, *Wild Animals in Circuses (No 2) Bill* (Briefing Paper 5992, 31 May 2019) <https://researchbriefings.files.parliament.uk/documents/SN05992/SN05992.pdf> accessed 16 July 2021, 5. For examples, see McIsaac, Animal Welfare Bill Deb 24 January 2006, col 222; Bradshaw, ibid col 236; Paide, HC Deb 19 May 2011, vol 528, col 498; Paice, HC Deb 8 June 2011, vol 529, col 85WH; Paice, HC Deb 23 June 2011, vol 530, col 584; Dowd, ibid col 557; Pritchard, ibid cols 548-85.

388 HC Deb 9 September 2010, vol 515, col 447. See further, for example, Fitzpatrick, HC Deb 23 June 2011, vol 530, col 554 and Paice, Animal Welfare Act Deb 24 January 2006 col 234.

389 Secretary of State for Environment, Food and Rural Affairs, *Wild Animals in Circuses* (n 378).

390 Department for Environment, Food and Rural Affairs, *Wild Animals in Travelling Circuses: The Report of the Chairman of the Circus Working Group* (2007) <https://webarchive.nationalarchives.gov.uk/20110318164910/http://www.defra.gov.uk/foodfarm/farmanimal/welfare/documents/circus-report.pdf> accessed 16 July 2021, para 5.1.3. However, in the legislative procedure that preceded the adoption of the Wild Animals in Circuses Act 2019 it became clear that this conclusion originated from the particularly narrow terms of reference of the inquiry. Notably, 'performance and training were specifically excluded'. Radford, who chaired the relevant Circus Working Group at the time, explained that 'The terms of reference were essentially narrowed to transport and housing'. What is more, 'the government provided no funding to undertake further research into the two issues which the Working Group was charged with considering. The assessment of the available evidence therefore amounted to little more than a literature review of a very limited topic. The lack of compelling relevant evidence was therefore unsurprising'. See Written evidence submitted by Mike Radford (WAC14) para 1.3 and HC Deb 21 May 2019, col 64.

breach EU law and the HRA on the ground that it would be disproportionate.[391] Therefore, it brought forward an ethical justification.[392] If one aims to protect animals because it is wrong to make them perform (thereby exposing them in a possibly demeaning way), a ban would be the only way to reach that goal.[393] Subsequent parliamentary debates strongly suggested (and sometimes explicitly indicated) that the various bills were still about animal welfare.[394]

The predominant justification for introducing a ban on using wild animals in circuses, however, completely changed in the debates that preceded the adoption of the Wild Animals in Circuses Act 2019.[395] Although some welfare concerns were still present,[396] it was made clear that the ban was introduced based 'primarily on ethics rather than welfare concerns'.[397] Rutley MP, when introducing the Bill, argued that:

> We need to consider the intrinsic value of wild animals. Modern society recognizes the intrinsic value of these animals. This concerns the respect of animals and their natural behaviour. Wild animals in a circus are trained for our entertainment and amusement. That sends the wrong message to audiences about the intrinsic value of those animals. We should appreciate wild animals behaving naturally, not in a comic or superficial setting. We need to look at the educational conservation benefits. The

391 See eg HC Deb 19 May 2011, vol 528, col 497; Paice, HC Deb 1 March 2012, vol 541, col 412; House of Commons Library, 'Wild Animals in Circuses' (n 387) 7.

392 This can be confirmed by HC Deb 5 July 2012, vol 547, cols 1057-58. And indeed, the draft Bill mentioned that 'we should feel duty-bound to recognise that wild animals have intrinsic value, and respect their inherent wildness and its implications for their treatment'. See Secretary of State for Environment, Food and Rural Affairs, *Wild Animals in Circuses* (n 378) 9.

393 See also Offord, HC Deb 23 June 2011, vol 530, col 560.

394 See eg Baroness Parminter, HL Deb 24 October 2012, vol 740, cols 40-41; Benyon, HC Deb 18 January 2013, vol 556, col 1213; Fitzpatrick, HC Deb 3 September 2014, vol 585, col 291; Chope, HC Deb 10 February 2016, vol 605, cols 1584-85.

395 Although one might of course wonder to what extent this changed justification was motivated by the aforementioned perceived legal obstacles.

396 See in this connection also Jim Fitzpatrick, HC Deb 7 May 2019, vol 659, col 513.

397 Rutley, HC Deb 7 May 2019, vol 659, col 499. See also, for example, Eustice, HC Deb 7 May 2019, vol 659, col 509 and Penning, HC 4 June 2019, vol 661, col 91. The same is true for the Scottish and Welsh Governments. See Coffey, HC Deb 7 May 2019, vol 659, col 521-22.

> practice of using wild animals in circus performances, unlike in zoos, does nothing to further our understanding or the conversation of wild animals. There is no greater benefit to humans or animals that justifies the use of wild animals in circuses. In short, it is an outdated practice that is no longer necessary to operate a circus or to enjoy the circus experience, *and it is demeaning to the wild animals involved*.[398]

He further argued that 'The role of wild animals in a circus, when they are used, is to provide an entertaining spectacle for our amusement, often as a way to demonstrate the skill or dominance of the trainer'[399] and that 'We want people to see animals *in a more dignified and natural setting*'.[400] Other members that took part in the relevant parliamentary debates agreed with this. Martin MP said that 'Even if all the animals performing in circuses in this country were healthy and happy, there is something fundamentally demeaning about using animals to do tricks for our entertainment and we should not be encouraging it'.[401] In a similar vein, Cameron MP argued that 'Forcing wild animals to travel in circuses and perform confusing and degrading tricks is an outdated practice which has no place in our modern, compassionate society'.[402] The relevant debates contain numerous similarly telling statements.[403]

Naturally, the adopted Act may still raise some concerns and further ethical questions. Notably, if it is indeed really the case that (certain type of) animal performances are

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398 HC Deb 7 May 2019, vol 659, col 501-02 (emphasis added). Similarly, when introducing the Bill into the House of Lords, Lord Gardiner said that: 'The…Bill has come at a time when we increasingly appreciate that the use of wild animals in circuses does nothing to advance either our understanding of animal behaviour or the conservation of wild animals. I believe that people wish to perceive wild animals in their natural state, expressing all the natural attributes of being wild, not performing tricks in the circus ring for our amusement'. See HL Deb 19 June 2019, vol 798, col 788.

399 ibid col 503.

400 ibid col 504 (emphasis added).

401 HC Deb 7 May 2019, vol 659, col 517.

402 ibid col 510.

403 Similar views are prevalent in the relevant literature as well. See, for example, Suzanne Laba Cataldi, 'Animals and the Concept of Dignity: Critical Reflections on a Circus Performance' (2002) 7 Ethics and the Environment 104.

morally reprehensible because they are demeaning and so on, should we then not also include animals that are commonly domesticated in Great Britain in its scope as well as performing animals that do not usually travel around for this purpose?[404] More generally, should the Government perhaps not take a more holistic approach to the matter? Interestingly, some MPs have taken this argument in the opposite direction, by making it a slippery slope type of argument. If we prohibit the use of wild animals in circuses, which practices will be next?[405] Will we eventually perhaps even move to animal rights legislation?[406] Notably, in doing so, a limited number of MPs focused on the absence of harm, and their perceived desirability of only criminalising behaviour that involves a degree of harm.[407] Lord Mancroft even took this line of argument to a whole different level, when he claimed that 'In [his] experience, when the Government rely on ethics as the basis for legislation, what they really mean is that they cannot come up with a sound reason that can withstand any close examination'.[408] Lord Trees also raised the concern that we may be attributing anthropomorphic feelings to animals when we say that a certain practice is demeaning to

404 This issue was also raised in the relevant debates, such as by George Eustice, HC Deb 7 May 2019, vol 659, col 509: 'Only a few years ago, there was a dancing raccoon on "Britain's Got Talent", the ITV show. Do we think that that is ethical? If it is not ethical to have a dancing raccoon in a circus, why is it ethical to have one on "Britain's Got Talent"?'; Baroness Jones, HL Deb 19 June 2019, vol 798, col 793-94; Lord Trees, HL Deb 19 June 2019, vol 798, col 796; Lord Mancroft, HL Deb 3 July 2019, vol 798, col 98GC. Andrew Rosindell, HC Deb 7 May 2019, vol 659, col 516 (and Baroness Bakewell, HL Deb 19 June 2019, vol 798, col 801) also warned the Government to 'look at the implications and precedent that legislation sets'.

405 Many members, for instance, wished to make sure that falconry events would not be included.

406 Lord Trees, HL Deb 17 July 2019, vol 799, col 240.

407 Notably, see Baroness Mallalieu's contributions in HL Deb 19 June 2019, vol 798. See also Lord Trees, HL Deb 17 July 2019, vol 799, col 240.

408 HL Deb 3 July 2019, vol 798, col 94GC.

an animal,[409] which he then immediately aimed to clarify by saying that 'What is really meant is that we are not comfortable with this and we do not like it'.[410]

However, even though there might therefore be scope to argue that the Act does not go far enough (or, in contrast, too far by criminalising behaviour that does potentially not involve any harm), the aforementioned parliamentary debates and legislative developments are tremendously significant. Although the relevant legislators have not necessarily used the word dignity in this connection (save from one time),[411] their supporting arguments certainly show the first substantial traces of dignity thinking in the UK legislative process (which then also actually resulted in newly adopted legislation).

3.6 Why is Dignity Only Rarely Raised in the Legal Sources?

One might, however, wonder at this point why dignity is so absent in the context of animal law. The lack of dignity appearances in animal law can be explained in light of the history of dignity. The previous chapter explained how dignity was inserted as a placeholder concept after WWII, and how its consequent use in the bioethical context confronted lawyers, judges and academics with the fact that the legal and philosophical work necessary to make 'dignity' a sufficiently hard-edged concept to work in the courts had not been done yet. The process of finding out what exactly dignity entails is still ongoing. The next chapter will reveal that I personally favour Charles Foster's account of dignity. This account suggests that dignity is about objective flourishing. It is about being human or being an animal. If

409 Baroness Mallalieu noticed this same trend as well: HL Deb 19 June 2019, vol 798, cols 790-91.

410 Lord Trees, HL Deb 19 June 2019, vol 798, col 797.

411 HC Deb 7 May 2019, vol 659, col 504: 'We want people to see animals in a more dignified and natural setting'.

this is indeed the most appropriate account of dignity, it is perhaps not surprising that it is not found in the legal sources, as legislators might be reluctant to say what flourishing means. Determining what animal flourishing means entails a whole discussion of the animal condition. It is not surprising that a question that vast is absent in debates and the law in general. The "welfare thought" was and still is way more prevalent in the field of animal ethics and might therefore have been used as a more concrete, broadly supported, and therefore convincing basis for animal protection.[412]

Furthermore, some might also feel that dignity can only be accorded to human beings (and that that distinguishes them from animals).[413] According to Dupré, '[the legal system] of human rights protection in Europe (and more generally in the West) rests on the assumption that, as human beings, we are born with the unique quality of dignity that distinguishes us from other beings (primarily animals), justifying and explaining the special protection of our rights' (although it will be repeated here that an alternative interpretation might also be possible: see chapter 2).[414] Fasel also argues that dignitarian and naturalist ideas are opposing sides of the same spectrum, in which dignity is specifically used to defend human exclusivity.[415] In a similar vein, Kymlicka points out that 'dignity is not the natural language of [animal rights] theory'.[416] Legislators might therefore have been careful not to use it in the context of animal protection, because it might not be in line with their

412 In this connection, see also Lundmark and others (n 286) 994: 'Previous research concludes that when it comes to what ethical views…animal welfare legislation is based upon, the utilitarian view is the most frequently used…'.

413 Gruen (n 335) 152 writes that 'traditionally, it is thought that only humans have dignity'.

414 Catherine Dupré, *The Age of Dignity* (Hart Publishing 2015) 28.

415 Raffael Fasel, 'The Old "New" Dignitarianism' (2018) Res Publica 531.

416 Will Kymlicka, 'Human Rights Without Human Supremacism' (2017) Canadian Journal of Philosophy 1, 8-9, cited in Fasel (n 415) 548.

own feelings regarding animals and/or because their voters might feel offended by the idea of acknowledging animal dignity.

3.7 Conclusion

The societal attitudes regarding animals in the UK and the EU, and the resulting legislation, have undergone a significant evolution during the past two centuries. From considering animals merely as tools to be used by human beings without any regard for their own interests, concern has arisen for the suffering of the animals involved, which later on expanded to the broader notion of welfare. However, this is where the evolution of animal law seems to have stopped. UK/EU animal laws still almost exclusively focus on the experiential interests of animals. Notably, the concept of dignity does not yet seem to play any explicit and self-standing role in their justification. The word "dignity" does not appear in the relevant legislation (which stands in stark contrast to the laws on human beings, especially with regard to the EU)[417] and the relevant legal systems do not necessarily need this concept for them to be understood. Additionally, in those instances where the word "dignity" was invoked in the parliamentary debates, it was used too loosely to be meaningful, it turned out not to be a genuine appeal to dignity, it did not have any effect on the resulting legislation and/or the focus immediately shifted to welfare-based concerns. However, a further look into areas where one might expect to find dignity type of arguments somewhat nuanced this conclusion. It revealed that legislators and society at large seem susceptible to the idea that something that we do to animals can be wrong even when it does not necessarily affect their experiential welfare. This is especially attested by the debates that preceded the

[417] It is recalled here that the EU is exceptionally expressive on the position and meaning to be accorded to human dignity.

adoption of the Wild Animals in Circuses Act 2019. Generally speaking, however, such type of dignity thoughts are not (yet) actually reflected in the relevant laws. Instead, their primary focus stays on the experiential welfare interests of animals.

A look at the relevant literature reveals that authors have raised a number of potential criticisms with regard to the existing animal legislation. To mention just a few, the AWA still allows the destruction of animals for any reason, no matter how trivial, as long as it is done in a humane and appropriate manner;[418] questions have arisen with regard to the process that precedes the decision of whether it is in an animal's interest to be "destructed";[419] and animal legislation is commonly criticised for its relatively low sentences.[420] With regard to EU law, authors criticise, for example, the relative discretion that Article 13 TFEU affords the relevant authorities. It says that 'full regard' needs to be taken of animal welfare, but it does not say what standard of animal welfare will be applied and how much weight their interests should carry in the relevant decision-making processes.[421] EU animal law has also been criticised for not offering protection to, or having in place more specific legislation with regard to, some widely-kept animal species.[422] However, despite this careful scrutinisation of the present animal laws, few commentators seem to be paying attention to the absence of dignity therein and to the benefits that this concept could

418 See sections 4(4) and 9(4) AWA. This position is likely to flow from the fact that UK law still considers animals as property rather than as rights-holders. In this connection, see also *Patchett v Macdougall* 1984 SLT 152, cited in Collinson (n 244), in which it was held that 'the painless killing of an animal…will not necessarily constitute suffering'.

419 Sweeney (n 202) 95-99. For example, he addresses the questions of who decides on this matter and what evidence the court relies on.

420 On animal offence sentencing in the UK, see Sweeney (n 202) chapter 6. The Animal Welfare (Sentencing) Act 2021 aims to address this matter.

421 Camm and Bowles (n 224) 201; Ludwig and O'Gorman (n 227) 381.

422 See Broom (n 266) Chapter 10 and Annex 1 for some more details on this and for some more types of criticism.

potentially offer them. The remainder of this thesis will therefore take up the task of carrying out a further exploration into this concept and its potential benefits, which would hopefully stimulate and contribute to the further evolvement of UK and EU animal law.

CHAPTER FOUR: A THEORETICAL FRAMEWORK FOR ANIMALS

Dignity is a highly criticised notion. Some argue that it is an empty concept or too vague to be useful. It has been 'called a "vacuous concept" bereft of any boundaries,[423] a subjective idea that varies "radically with the time, place, and beholder,"[424] an indistinct idea that "masks a great deal of disagreement and sheer confusion"',[425] and the 'shibboleth of all perplexed and empty-headed moralists'.[426] Other authors think that the concept of dignity is reducible to another concept, such as autonomy,[427] or criticise it for being too religious (although it should be noted that non-religious accounts of dignity certainly exist as well).[428] However, there are also authors who have more faith in dignity and who have provided a substantive account of it. This chapter explores these different accounts and

423 Mirko Bagaric and James Allan, 'The Vacuous Concept of Dignity' (2006) 5 Journal of Human Rights 257, 269.

424 Steven Pinker, 'The Stupidity of Dignity' (*The New Republic*, 28 May 2008) <https://newrepublic.com/article/64674/the-stupidity-dignity> accessed 16 July 2021. Others, however, consider this perfectly acceptable: Mary Neal, '"Not Gods but Animals": Human Dignity and Vulnerable Subjecthood' (2012) 33 Liverpool Law Review 177, 180-81.

425 Michael Rosen, *Dignity: Its History and Meaning* (Harvard University Press 2012) 67. These examples are cited from Jacob Weinrib, *Dimensions of Dignity: The Theory and Practice of Modern Constitutional Law* (CUP 2016) 4.

426 Arthur Bullock (translation and and intro), Arthur Schopennhauer, *The Basis of Morality* (Sonnenschein 1903) Pt II, Critique of Kant's Basis of Ethics, cited in Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 EJIL 655, 661, Charles Foster, *Human Dignity in Bioethics and Law* (Hart Publishing 2011) 58 and Rosen (n 425) 1.

427 Ruth Macklin, 'Dignity Is a Useless Concept' (2003) 327 British Medical Journal 1419; James Griffin, 'A Note on Measuring Well-Being' in Christopher Murray and others (eds), *Summary Measures of Population Health* (World Health Organization 2002) 129, 131, cited in Rosen (n 425) 5. Richard Ashcroft, 'Making Sense of Dignity' (2005) 31 Journal of Medical Ethics 679 argues that Deryck Beyleveld and Roger Brownsword also fall into this category, although they certainly do not think that dignity is useless.

428 Foster (n 426) 62, citing Patricia Churchland, 'Human Dignity from a Neurophilosophical Perspective' in Edmund Pellegrino, Adam Schulman and Thomas Merrill (eds), *Human Dignity and Bioethics* (University of Notre Dame Press 2009) 99-121.

examines which one of these might be the most appropriate or helpful one to use in the animal law context.

But how is this evaluation to take place? Not only is there no agreement on dignity's definition: there is also no agreement on the type of situations in which it is at stake or on what it entails in those situations where it is uncontroversially an issue. Some recourse to intuition therefore seems inevitable. More precisely, the various theories will be tested against some concrete situations in which my intuition tells me that dignity is at stake and in which I suspect the intuition of the majority of people will point in the same direction.[429] After having selected the account that is capable of covering all of the aforementioned situations, the remaining chapters of the thesis will examine what the full implications of the account in question are for other areas of animal use and being. At first sight, such an approach may seem odd in a society that seems to be guided by rationality. However, prominent research indicates that humans are not necessarily as rational as they think, and that their moral reasoning is actually underpinned by intuitions instead. It is claimed that we use our strategic reasoning to post-hoc justify our moral intuitions, rather than the other way around.[430] Another potentially problematic aspect of relying on intuitions could be the fact that the moral views of people from different cultural, geographic and social backgrounds sometimes differ. The same is true with regard to dignity,[431] and dignity has therefore been criticised for being capable of being used to 'try to justify the imposition of particular

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429 This approach was also used by Foster (n 426) and subscribed to by Paolo Carozza, 'Human Rights, Human Dignity, and Human Experience' in Christopher McCrudden (ed), *Understanding Human Dignity* (OUP 2013) 615, 622-24, 627-28.

430 Notably, see the works of Jonathan Haidt, eg *The Righteous Mind: Why Good People are Divided by Politics and Religion* (Penguin Books 2012) and Jonathan Haidt, 'The Emotional Dog and its Rational Tail: A Socialist Intuitionist Approach to Moral Judgment' (1995) 108 Psychological review 814.

431 Different cultures have different ideas about what is or what is not dignified behaviour and treatment.

religious or cultural beliefs on those who do not share these beliefs'.[432] However, although this is certainly a danger to be wary of, there is a fair amount of moral agreement among different cultures, and I will therefore aim to focus on examples from within this central ground of agreement.[433]

It will be argued that the criteria currently used in UK/EU animal protection laws are morally insufficient, because they are not capable of recognising types of wrongs that do not negatively affect the experiential welfare of animals. The concept of dignity might be able to fill this gap. Although many theories of dignity that are discussed in this chapter offer valuable insights as regards the debate on what dignity means or entails, Charles Foster's theory seems to be the most complete one. It suggests that dignity is about thriving. It is about being human or being an animal. For the purposes of this thesis, this definition will be unified into that of "self-realisation": dignity is about being and developing into yourself, whereby the self is to be understood in a broad manner. It encompasses both one's species membership and one's unique individuality, and attention is to be paid to all aspects of one's being, including the physical, emotional, cognitive and relational ones. Animals should therefore not be reduced to one characteristic (such as sentience) but considered in their wholeness. However, the same dilemma arises here as the one that arose in the context of human rights law: who decides what it means to flourish as an animal? Should an objective or subjective standard be used and, notably, is this a matter for humans or animals themselves to decide on? In reply to the latter question, it is suggested that perhaps the most

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[432] David Hollenbach, 'Human Dignity: Experience and History, Practical Reason, and Faith' in McCrudden (n 429) 123, 124-25, mentioning Lee Kwan Yew and Mahmood Mamdani for an 'Asian, Confucian' and an African perspective. Similarly, Pinker (n 424) has alerted us to the danger of dignity being used to impose, for example, a religious agenda.

[433] Thomas Smythe and Thomas Evans, 'Intuition as a Basic Source of Moral Knowledge' (2007) 35 Philosophia 233, 241-43, citing Marc Hauser, *Moral Minds* (Harper Collins 2006), provide evidence that there is a lot more uniformity among different cultures and religions regarding moral intuitions than people may suspect. See further Jonathan Haidt and Craig Joseph, 'Intuitive Ethics: How Innately Prepared Intuitions Generate Culturally Variable Virtues' (2004) 133 Daedalus 55.

sensible approach would be to use a combination of both. At a bottom line, the debate on what it means to flourish as an animal and therefore the law more generally should be informed by our empirical knowledge on animal preferences, abilities, appearance, behaviour and functions, especially when this knowledge stems from thorough academic research. Some additional normative input should consequently come from humans, who are as far as we know linguistically and cognitively more advanced than at least most types of animals. Humans will need to think about which characteristics of an animal are morally valuable and/or most determinative to its identity (the inward dimension) and what the appropriate relationship between humans and animals should be (the outward dimension). Amongst the criteria to be considered in relation to the outward dimension are instrumentalisation, ridiculisation and mutilation.

4.1 Welfare-Based Theories and the Promise of Dignity

The previous chapter revealed how the existing UK/EU animal laws are underpinned by the perceived desirability of reducing unnecessary suffering and promoting welfare. This welfare-based thought seems to have its roots in (the Benthamite version of) the utilitarian theory.[434] Over two centuries ago, Bentham famously stated that, in terms of morally relevant characteristics, 'The question is not, Can they *reason*? Nor Can they *talk*? But, Can they *suffer*?',[435] a line of thought which has been relied on by subsequent authors in the

[434] Martha Nussbaum, 'Beyond "Compassion and Humanity": Justice for Nonhuman Animals' in Cass Sunstein and Martha Nussbaum (eds), *Animal Rights: Current Debates and New Directions* (OUP 2006) 299, 302 also writes that the utilitarian theory has 'contributed more than any other ethical theory to the recognition of animal entitlements' and the resulting treatment of animals by human beings.

[435] Jeremy Bentham, *Introduction to the Principles of Morals and Legislation* (1789) ch 17.

field, most notably, by Peter Singer.[436] Utilitarianism, unlike other ethical schemes, subjugates the interests of the individual to the interests of the majority. This process involves two things. First, it involves an assumption about the correct *theory of value*. Its most classical version, as developed by Bentham and built upon by Singer, focuses on pain, suffering and pleasure. Mill nuanced and deepened the utilitarian theory, by adding 'an important rider to the utility principle', namely 'considerations of individual cultivation'.[437] In this connection, he introduced different levels of happiness. Not only the quantity of happiness matters, but also its quality.[438] Although utilitarians adhere to different theories of value, their more well-known accounts have in common that they focus on the experiential welfare of the individual. The second element of the utilitarian process involves a process for deciding in a particular case what is entailed by the application of that approach. The idea is to achieve the greatest good.[439] This element will be referred to as *the evaluative element*.

The evaluative element has been criticised for a number of reasons. It has been accused of reducing individuals to their instrumental worth,[440] although what seems to matter most in this connection might be the absence of a minimum threshold below which interests are not allowed to be used to serve the greater good anymore[441] (rather than the idea of

436 Peter Singer, *Animal Liberation* (The Bodley Head 2015) 7-8.

437 Anthony Clifford Grayling, *What is Good? The Search for the Best Way to Live* (Phoenix 2004) 177.

438 Generally, see Grayling (n 437) 171-80 and Raymond Frey, 'Utilitarianism and Animals' in Tom Beauchamp and Raymond Frey (eds), *The Oxford Handbook of Animal Ethics* (OUP 2011) 172, 173.

439 This consequential approach stands in contrast to a deontological one.

440 This criticism has been brought forward by authors that adhere to many different theories and is also likely to be recognised by Kantians, at least regarding the treatment of rational agents, as these are said to have "irreplaceable worth". See Nussbaum, 'The Capabilities Approach and Animal Entitlements' in Beauchamp and Frey (n 438) 228, 237; Tom Regan, *Defending Animal Rights* (University of Illinois Press 2006) 16-17; Lori Gruen, *Ethics and Animals: An Introduction* (CUP 2011) 36-37.

441 The consequences of such extreme sum-ranking can be horrendous and it is not supported by our current legal approach towards human beings either. Human rights serve exactly to protect our individual interests, some of which are even phrased in absolute terms in order to ensure that no countervailing (collective or individual) interests are used to justify infringements. See in this connection

sum-ranking as such).[442] Related to this is the argument that utilitarianism 'combines the idea of trade-offs with a doctrine of the quantitative commensurability of all values'.[443] It 'gives no interest or value qualitative precedence over any other',[444] thereby allowing an individual to be forced to incur severe harms in order to serve merely trivial interests of a large number of other people.[445] In reaction to these criticisms, authors have developed rights-based theories.[446]

However, it is not necessarily the evaluative element that will be the primary focal point of this thesis. Instead, the focus will be on the theories of value that are typically used under the utilitarian theory (and under animal rights-based theories, for that matter). A major problem with the abovementioned theories of value seems to be that they are incapable of recognising types of wrongs that do not necessarily cause harm.[447] Harm in this context connotes any setback to an individual's experiential welfare interests,[448] whereas wrong

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also Joseph Vining, 'Dignity as Perception: Recognition of the Human Individual and the Individual Animal in Legal Thought' in McCrudden (n 429) 573, 573-581.

442 In fact, sum-ranking might be inevitable in a world where different interests constantly clash. A good example of sum-ranking being used in the law may be the area of health care rationing. However, it should be noted that even there we see limits to what society is allowed to do. It is, for instance, not allowed for doctors to use organs of healthy people (without their consent) in order to save the lives of a number of other patients. Foster also outlines how the utilitarian calculus could be applied in the context of dignity: see Foster (n 426) and Charles Foster, 'Dignity and the Ownership and Use of Body Parts' (2014) 23 CQHE 417.

443 Jeremy Waldron, 'Rights in Conflict' (1989) 99 Ethics 503, 508-09.

444 ibid.

445 Although it should be acknowledged that the theory developed by Mill may be somewhat more sensitive to this matter.

446 See also Frey (n 438) 176. For differences between a rights-based approach and a utilitarian approach, see further Waldron (n 443).

447 Perhaps also note in this connection how individual acts may sometimes not be harmful (or beneficial) by themselves, but how the sum of such individual acts may nevertheless cause harm (or good). See Michael Almeida (ed), *Imperceptible Harms and Benefits* (Springer 2000).

448 This interpretation of the term "harm" is relatively narrow. For instance, it does in principle not include moral harms. On different interpretations of the word harm, see John Stanton-Ife, 'What is the Harm Principle For?' (2016) 10 Criminal Law and Philosophy 329, 346-52.

means an immoral act.[449] In terms of examples which are wrong but not necessarily harmful, Duff mentions 'a broken promise on which the promisee had not substantively relied, or exploitation that leaves the exploitee no worse off than they would otherwise have been'.[450] Similarly, Gardner illustrated by means of his "pure rape example" how rape is wrong in itself (due to its instrumentalising character), regardless of whether the victim or anyone has any awareness of it or not.[451] Herring also addressed the issue of wrongness to the dead, although he is right to point out that it is not always easy to identify the exact wrong.[452] Wrongness is a tremendously difficult topic, not least because of the major role played by intuitions.[453] However, what is clear is that some of the more common theories of value that have been developed in the context of the utilitarian theory (and of animal ethics theories more generally) are not capable of accommodating *any* of these moral concerns that do not constitute harm, due to them being limited to considering pain, suffering and happiness. They deem any treatment or portrayal which does not cause any suffering to the animal or to other humans or animals (and which does not impede their happiness) acceptable, whereas it should perhaps not always be so.[454]

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449 See also Antony Duff, 'Harms and Wrongs' (2001) 5 Buffalo Criminal Law Review 13, which refers to the works of Feinberg, and Kent Greenawalt, 'Dignity and Victimhood' (2000) 88 California Law Review 779.

450 Duff (n 449) 17.

451 John Gardner, 'The Wrongness of Rape' in John Gardner, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (OUP 2007) 1.

452 Jonathan Herring, 'Crimes Against the Dead' in Belinda Brooks-Gordon and others (eds), *Death Rites and Rights* (Hart Publishing 2007) 219.

453 For an overview of approaches towards intuition as a source of morality, see Smythe and Evans (n 433).

454 In this connection, see also Haidt's "harmless taboo violations", about 'people who do offensive things, but do them in such a way that nobody is harmed'. He focuses on stories of disgust and disrespect, while making sure that the 'actions [were] done in private so that nobody else is offended'. See Haidt, *The Righteous Mind* (n 430) 21-22.

A few concrete examples may be able to illustrate this.[455] Imagine a researcher genetically altering pigs in such a way that they lack any type of consciousness (or even heads altogether). These pigs would be able to live under what would otherwise be extremely poor living conditions without experiencing it as such, which would be very cost-efficient for the meat industry. Alternatively, consider the scenario in which a brothel routinely offers a sexually excited dog as a toy for its customers. The customers may use this dog as an alternative to a human prostitute or as an accessory to interpersonal sessions. One may furthermore imagine a vet who, whilst having an animal under anaesthesia for a health-related surgery and after having received consent from the owner, decides to remove the animal's ears and/or tail because it considers this to be more aesthetically pleasing. A last example concerns two boys who come across the body of a dead rabbit during their walk in the forest and decide to mutilate and play with it for their own enjoyment. After having cut off its ears and having attached them to their own to look more like rabbits themselves, they play a game of football with the rest of its body.

The animals in these different scenarios may not necessarily experience any pain or suffering. In fact, in some of these scenarios the contrary is true: the acts carried out therein reduce the amount of suffering or even actively provide the animal with pleasure. Nevertheless, the acts described feel intuitively wrong. Why is that so? One may reply that the acts have the potential to cause external or consequential harm. For example, they may stimulate aggression in the "perpetrators" towards other beings in the future or offend other

[455] See in this connection also Foster (n 426). Among other things, he discusses the situations in which boys play football with a human head (ibid 173-75) and where medical students cut off the ear of a patient who has given his/her body to be dissected by them and take the ear home for the purpose of using it as an ashtray (ibid 5-8). In my opinion, he accurately illustrates how there can be situations in which no concept other than dignity can do the work in explaining why a certain act is wrong.

humans when brought to light.[456] However, although these are certainly concerns to be taken seriously, it seems to me that there is a deeper, more fundamental problem here, one that relates to the animals themselves. Indeed, even though the acts may not necessarily negatively affect the animals' affective welfare, the animals are still, among other things, being mutilated, ridiculed and/or reduced to mere instruments. None of the animals described is provided with the opportunity to fully be itself and/or respected for what it actually is: an animal. To be sure, such treatment may not only be taken to reflect on animal dignity, but, importantly, also on human dignity.[457]

The examples mentioned above may sound extreme, relatively far removed from reality, and perhaps even so rare so as not to be worth addressing (although it is noted here that at least some of these are certainly not as hypothetical or rare as the average human may assume).[458] However, many people have ethical concerns about practices which may not necessarily touch upon the welfare interests of the individuals concerned, yet they consider them to be morally wrong.[459] Such ethical concerns seem to go beyond the mere fact that such practices may offend other human beings (or, as the case may be, cause humans fear that they may themselves be subjected to such practices in the future). Practices that spring to mind include cloning, embryo research, genetic modification, experiments with

456 One may in this connection also wonder why anyone would be offended by such practices in the first place if they were not to be considered morally wrong. Gardner (n 451) makes a similar argument in the context of rape.

457 Not everyone may, however, agree with this statement on human dignity. See Charles Camosy, 'No View From Nowhere: The Challenge of Grounding Dignity Without Theology' (2015) 41 Journal of Medical Ethics 938.

458 For more on this, see chapters 5 and 6.

459 See also the relevant academic literature on offence and the harm principle, such as Joel Feinberg, *The Moral Limits of the Criminal Law: Volume 2: Offense to Others* (OUP 1988) and Andrew Simester and Andrew von Hirsch, 'Rethinking the Offense Principle' (2002) 8 Legal Theory 269.

human tissue, the live skinning of a rabbit corpse on social media,[460] the display of a fatally wounded wolf in the news,[461] and the mutilation of a human corpse. This is not to say that all these practices are indeed undignifying. Ethical debates on them are ongoing and the precise boundaries are yet to be drawn. What seems clear, however, is that at least part of this grey area is morally wrong, and the fact remains that the more common theories of value that were developed in the context of utilitarianism (and animal ethics more generally) are not capable of addressing it due to their mere focus on experiential welfare interests. This gap in coverage seems morally problematic, and *a major task of this thesis will therefore be to find out whether dignity is better able to plug this gap in the legislative framework, and if so, where the precise moral boundaries lie*.[462]

This also means that there are good reasons not to further consider any theory that links dignity solely to sentience. Although neither Bentham nor Singer talk about dignity – instead, they make an argument about equality,[463] with Singer even being sceptical of the

460 As was planned by someone calling himself "Herman de Viller" but cancelled due to the public outrage it caused and the resultant dead threats he received. See, among other sources, AD, 'Slager onder vuur vanwege live villen konijn op facebook' (*AD*, 13 May 2017) <https://www.rtlnieuws.nl/nederland/slager-onder-vuur-vanwege-live-villen-konijn-op-facebook> accessed 23 April 2020; Marike Wouters, 'Villen van konijn live op Facebook, is dat oke?' (*Metro Nieuws*, May 2017) <https://www.metronieuws.nl/in-het-nieuws/het-gesprek/2017/05/villen-van-konijn-live-op-facebook-is-dat-oke> accessed 23 April 2020.

461 Bas Tijhaar, 'Die wolf was zo groot, en die tanden!' (*AD*, 13 November 2017) <https://www.ad.nl/binnenland/die-wolf-was-zo-groot-en-die-tanden~a8ab8000/> accessed 16 July 2021.

462 To be sure, it could be argued that dignity is the sort of notion that is in principle capable of being a candidate for a utilitarian theory of value. However, the accommodation of dignity in a utilitarian scheme may not be easy to reconcile with utilitarianism's traditional and narrow focus on experiential interests. Furthermore, there may be issues regarding the practicability of this. Dignity might be incapable of being given a sufficiently definite meaning to be the subject of a utilitarian evaluation or, alternatively, it could be the case that such a definite meaning is possible, but that the individual elements of the practical entailment of that definition are nonetheless incapable of sufficiently precise evaluation. Dignity might also be much harder to compare with other losses, especially when these other losses involve harm. I am grateful to Professors Jonathan Herring and Charles Foster for these remarks/formulations.

463 Singer (n 436) 8.

notion of dignity[464]– some subsequent authors have linked their sentience-based theory to dignity (albeit sometimes, it seems, in a rather loose manner).[465] However, since such proclaimed dignity theories use the same moral criteria as the utilitarian theories of value that were just outlined, they are subject to the same criticism.[466] What is more, even if one were to decide to solely focus on sentience in the law, there may be good reasons not to use the concept of dignity for this purpose. This is not because typically utilitarian concepts, such as suffering, are unrelated to dignity. On the contrary, there are many situations in which such violations would also seem to be an affront to someone's dignity.[467] However, if one limits dignity's content to situations which involve suffering (or which do not maximise pleasure), dignity would not add anything to the already existing utilitarian concepts. As such, the concept of dignity might not be needed, and perhaps should better be avoided in order to circumvent the criticism that is mounted against it.[468]

It can therefore be concluded that there may be valid reasons to look beyond welfare-based theories in the context of animal law and look into whether any theory of dignity

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464 See Charles Foster, 'Putting Dignity to Work' (2012) 379 The Lancet 2044 and Foster (n 426) 59, citing Peter Singer, *Applied Ethics* (OUP 1986) 228. One could in fact argue that even if Singer holds the opinion that dignity exists, he does not think that all human beings and animals possess it, regardless of whether they are sentient: Peter Singer, 'A Convenient Truth' (*The New York Times*, 26 January 2007) <https://www.nytimes.com/2007/01/26/opinion/26singer.html> accessed 16 July 2021.

465 eg Matti Hayry, 'Another Look at Dignity' (2004) 13 CQHE 7, 10-11, referring to Sharon Fraser and James Walters, 'Death – Whose Decision? Euthanasia and the Terminally Ill' (2000) 26 Journal of Medical Ethics 121 as an example.

466 See also Federico Zuolo, 'Dignity and Animals. Does it Make Sense to Apply the Concept of Dignity to All Sentient Beings?' (2016) 19 Ethical Theory and Moral Practice 1117, which argues that any conception of dignity must meet the two formal conceptions of non-redundancy and normative determinacy.

467 Although it could be argued that, in some situations, pain or suffering is actually dignifying. Daryl Pullman, 'Human Dignity and The Ethics and Aesthetics of Pain and Suffering' (2002) 23 Theoretical Medicine 75 argues that '[a]ppropriate "suffering with" another can help to maintain and restore the dignity of the relationships involved, even as it preserves and enhances the dignity of patient and caregiver alike'.

468 For some of these criticisms, see the introduction to this chapter.

would be able to offer a more appropriate (or, to be sure, a useful, additional) guiding principle for animal laws. Before proceeding to carry out this task, three remarks on the approach taken will be made. First, since the purpose of the remainder of this thesis is to find out what animal laws would look like if one were to use dignity as (one of) the guiding principle(s), only those theories that provide normative guidance will be considered.[469] Second, only those accounts of dignity which could potentially be applied to at least some types of animals as well, rather than only to humans, will be discussed.[470] Third, this chapter will draw, where appropriate, on the existing legal framework that regulates the treatment of human beings and on the moral and practical principles that underpin this framework. Not only would such an approach enhance the internal consistency of the law, but the relevant laws on human beings may also reflect the moral intuitions of the citizens in the jurisdictions examined in the thesis, thereby providing us with a moral compass.

469 Notably, this excludes Killmister's contribution on the nature of dignity: Suzy Killmister, 'Dignity: Not Such a Useless Concept' (2010) 36 Journal of Medical Ethics 160. Although this is certainly not to take away from the importance of her theory. Killmister helped elucidate the concept of dignity by explaining how dignity can be both inalienable and something that can be diminished or even lost, i.e. something that should be protected. In this sense, it justifies on the approach taken to see how the law should be shaped in order to protect dignity, without having to wonder whether it is something that could be protected at all. Another example concerns the contribution made by Mountfield and Singh, as cited in Baroness Hale, 'Dignity' (2009) 31 Journal of Social Welfare and Family Law 101, 106. The line of thought discussed in this contribution is, however, also clearly identifiable in the relevant parliamentary debates and supported by other, more substantive, dignity theories, such as Foster's theory, and will therefore nevertheless appear in this thesis' conclusions on what animal laws should look like.

470 Some authors specifically seek to develop an account of dignity that sets humans apart from all other creatures, and such accounts are not particularly useful for the purposes of this thesis. See eg George Kateb, *Human Dignity* (Harvard University Press 2014). Note, however, how if a being lacks the characteristics that allegedly make up human dignity does not necessarily mean that this being has no dignity at all. It might be argued that dignity admits of degrees, something which, for example, Michael Meyer, 'The Simple Dignity of Sentient Life: Speciesism and Human Dignity' (2001) 32 Journal of Social Philosophy 115 seems to do by distinguishing between human dignity and simple dignity.

4.2 The Influence of Religion

The first concept of dignity to be considered is that of divine dignity. Those that adhere to Christianity (or Judaism or Islam) believe that God created 'all that is, including space and time'.[471] In addition, man specifically is made in the image of God (also called *Imago Dei*). He resembles God, which confers dignity on him.[472] There is no clarity on what precisely makes humans resemble God. Authors have focused on different aspects, such as on rationality, relationality, consciousness and spiritual, linguistic and/or moral capacities.[473] Treating a being with dignity consequently requires one to 'act in a way that maximises [his/]her ability to express these god-attributes'[474] (although it is noted here that God, provided that s/he exists, may also be weak and vulnerable instead of strong and capable, and the question therefore arises what type of action human dignity would require in this scenario).[475]

There are three potential ways in which animals could fit into this theological framework. First, animals might have dignity because they are (living) creatures that have been created by God. This could confer a kind of basic dignity on them, whilst human beings have more dignity because they also bear a resemblance with God.[476] Second, some types of animals might bear a resemblance to God as well, for example, because they also possess

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471 Janet Soskice, 'Human Dignity and the Image of God' in McCrudden (n 429) 229, 229.

472 Foster (n 426) 28; Soskice (n 471) 231; David Gushee, 'A Christian Theological Account of Human Worth' in McCrudden (n 429) 275, 278; James Hanvey, 'Dignity, Person and *Imago Trinitatis*' in McCrudden (n 429) 209, 216.

473 See eg Soskice (n 471) 235; Hanvey (n 472) 220-21; Foster (n 426) 33-34; Gushee (n 472) 279. Although note how Gushee suggests that we focus on the responsibilities of humans rather than on their capacities, since a capabilities approach has proved problematic in contemporary bioethics.

474 Foster (n 426) 31. Similarly, Hanvey (n 472) 227 and Gushee (n 472) 277 argue that dignity requires a commitment to human flourishing, a 'striving for human excellence'.

475 See also Jonathan Herring, 'The Vulnerability of God and Humanity' (2018) 180 Law & Justice 5.

476 Notice in this connection also the distinction made by Soskice (n 471) 231 between the sanctity of life and the Image of God. See also Hanvey (n 472) 227.

a certain form of consciousness. Third, animals might not have dignity (or at least not all of them), but human beings might have a special responsibility towards them because of their God-likeness. It would then be human dignity in human dealing with animals that requires animal protection.

My main objection to relying on an explicitly religious notion of dignity as a foundation for animal law is that it seems to be inconsistent with the (predominantly) secular nature of the UK/EU societies and their laws on human beings.[477] Although consistency is not always key (or prevalent) in law,[478] the presence or absence of religious convictions goes to the root of individuals and their normative vision on the world. It seems to me that a conviction so fundamental –which, moreover, seems to have deliberately been abandoned from the law after atrocities committed in the context of war– should not be smuggled back into it through the back door of animal law. Indeed, Dupré has highlighted in this connection how:

> Historically, the rise of human dignity as a constitutional concept has paralleled the gradual fading away of God and (Christian) religion both as a legitimate source of political power and a judicial argument in human rights adjudication. In this sense, the 1948 Universal Declaration of Human Rights very deliberately broke the last ties with God or divine authority in placing the source of rights in men themselves, namely, in their dignity from birth.[479]

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477 It should, however, be noted that this is not the case in all European societies. Greece, for example, is sometimes described as not (yet) having been secularised and the society of Northern-Ireland is also still relatively influenced by religion. See Anthony Bradney, 'Religion and the Secular State in the United Kingdom' (International Center for Law and Religion Studies) <https://www.iclrs.org/content/blurb/files/United%20Kingdom.1.pdf> accessed 16 July 2021 for more information and nuances on the position of religion in the United Kingdom.

478 Many seem to think, for example, that the principles that underpin commercial law should not underpin family law. It is not hard to see some areas where certainty is crucial and others in which it is not.

479 Catherine Dupré, *The Age of Dignity* (Hart Publishing 2015) 19, citing Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (University of Pennsylvania Press 1999) and Glenn Hughes, 'The Concept of Dignity in the Universal Declaration of Human Rights' (2011) 39 Journal of Religious Ethics 1. See also Dupré (n 479) 169-70.

Authors have been quick to point out, however, how the notion of dignity itself is also said to have religious roots,[480] and argue that it was (and to some extent still is) just a cover-up of the religious "sacredness of life" approach.[481] This knowledge has brought some to argue that we should completely remove the concept of dignity from the law: 'arguments in support of human rights should avoid appealing to dignity because such appeals overlap with contestable religious claims about the sacredness of human persons. In secular or pluralistic contexts, appeals to metaphysical or even religious convictions about human sacredness as the basis of human rights are not helpful.'[482] It is argued here, however, that the fact that the concept of dignity (also) has its origins in theology does not necessarily need to constitute a reason to abandon it from the law altogether.[483] As long as the concept can also be supported by non-theological based reasoning (rather than making sense in theological terms only), its use in a secular society does not need to be problematic.[484] Indeed, dignity may be able to provide for a better normative basis than any other concept, and the task is therefore to appropriately define it instead.

Perhaps surprisingly, however, all of this is not to say that religious insights may not be helpful when it comes to interpreting dignity. People in the past have been trying to

480 See eg Gushee (n 472) 287-88 and Soskice (n 471) 240.

481 Gushee (n 472) 287-88.

482 Michael Ignatieff, *Human Rights as Politics and Idolatry* (Princeton University Press 2001) 53-55, as described by Hollenbach (n 432) 124-25.

483 Indeed, note how there are plenty of absolute assertions in the law which have precisely the same character as religious assertions, and which, as a matter of historical fact, have theological origins. The obvious example is Article 2 of the ECHR. I am grateful to Professor Charles Foster for this remark.

484 Note in this connection how it has been debated in the relevant literature whether the sanctity of life principle (and hence Article 2 of the ECHR) and the condemnation of homosexuality only make sense in religious terms: Emily Jackson, 'Secularism, Sanctity and the Wrongness of Killing' (2008) 3 BioSocieties 125; Nicholas Bamforth, *Patriarchal Religion, Sexuality, and Gender: A Critique of New Natural Law* (CUP 2011). I am grateful to Professor Jonathan Herring for bringing this to my attention.

answer questions that we nowadays are still aiming to answer, such as how to be a good human being and what does it mean to be human at all (questions which were often couched in the language of dignity). There may therefore be something to learn from religious insights about human beings in general and about (their) dignity. At the same time, however, there also lies a crucial point for animal law. Religious theories of dignity tend to focus on the *Imago Dei*, that is, they aim to find out what exactly God looks like and how humans should be or behave in order to resemble him to the greatest extent possible. Specifically, in carrying out this task, they seek to find how humans differ from other animals. A well-known effort was made by Leon Kass, who created a secular-looking list of *Imago Dei*-derived human characteristics.[485] Such a list may be helpful in characterising human beings, and hence also helpful in filling in some other dignity theories, such as the one developed by Foster (which will be discussed below).[486] However, since these characteristics are typically human, they are not very useful in the context of animals. In fact, here lies a danger of measuring animals by human standards. Nussbaum rightly notes that animals are 'not well understood if we start from the question how much like us they are'.[487]

Divine dignity will therefore not be adopted as the guiding theory in this thesis. It would not align with the secular nature of the societies that are the subject of this thesis and

485 Leon Kass, 'Defending Human Dignity' in Edmund Pellegrino, Adam Schulman and Thomas Merrill (eds), *Human Dignity and Bioethics* (University of Notre Dame Press 2009) 297. See also Foster (n 426).

486 Foster (n 426) 9, 30-31.

487 Martha Nussbaum, 'Working With and For Animals: Getting the Theoretical Framework Right' (2017) 94 Denver Law Review 609, preface. The only justification for taking such an approach would be if those typically human characteristics are of some higher worth and precisely the things that distinguish dignified creatures from those that do not have dignity. However, the arguments religious theories give for this statement –namely that they are God-like– seem insufficient to me. It is unclear whether God exists, and if so, what he looks like and what his moral status is (and thus what characteristics humans and possibly animals should emulate, if at all). God is a subject that is, at least at our current stage of development, impossible to investigate empirically (on this, see also Richard Ashcroft, 'Making Sense of Dignity' (2005) 31 Journal of Medical Ethics 679). This complete absence of knowledge or a decent methodological approach seems to be a dangerous basis to build such an important and extremely consequential hierarchy on.

pose the concomitant risk of creating societal conflicts by re-introducing an explicitly religious concept into our legal system.[488] Moreover, a religious account of dignity may not be the most helpful one for animals either.

4.3 Autonomy as an Element of Life

Whereas the utilitarian theory has been influential in the field of *animal protection* (or at least certain theories of value that were developed under the wings of it, notably, those of Bentham and Singer), Kant has been influential in the field of *dignity*. He encouraged people to think of dignity as a status rather than something that one can earn and lose through behaviour, position, or status.[489] This has been very important in our belief that dignity is something that all human beings share. In carrying out this task, Kant focused on humans' rational agency. Specifically, he regards dignity as the highest moral status, which is possessed by all (and only by) rational agents. Having a rational nature entails having certain capacities, including the capacity to set and pursue goals, the capacity to act autonomously, and the capacity to guide one's conduct by reason. Those with dignity 'must strive to make [their] individual choices worthy of this moral standing',[490] and others should never treat them as means to an end, but always as ends in themselves.[491]

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488 Given its highly sensitive nature and content.

489 Jeremy Waldron, *Dignity, Rank, & Rights* (OUP 2015) 4; David Walsh, 'Dignity as an Eschatological Concept' in McCrudden (n 429) 245, 249-50.

490 Thomas Hill, 'Kantian Perspectives on the Rational Basis of Human Dignity' in Marcus Düwell and others (eds), *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (CUP 2014) 215, 215.

491 Kant's theory was set out in the *Groundwork of the Metaphysics of Morals* and in *Metaphysics of Morals*, and described and discussed in, among other things, the following works: Oliver Sensen, 'Kant's Conception of Human Dignity' (2009) 100 Kant-Studien 309, cited in Foster (n 426) 37; Hill (n 490); Samuel Kersten, 'Kantian Dignity: A Critique' in Düwell and others (n 491) 222; James

Kant's focus on rational agency has, however, obvious implications for the applicability of his account to animals. Although some Kantians have argued that certain types of animals may possess the requisite characteristics in order to qualify as rational agents,[492] there is no indication that all (or even the majority of) types of animals possess these. Kant's account therefore seems to exclude most animal species. The same is true, however, for a number of human beings,[493] and the relevant legal frameworks have therefore not followed Kant on this matter.[494] In fact, the opposite may even be the case: dignity is nowadays often used to protect exactly those beings that are not necessarily rational, but which legislatures and judges still consider worthy of protection, such as young children or mentally incapacitated adults.[495]

The concept of autonomy, in its modern guise, is furthermore unable to deal with some of the situations in which dignity is generally thought to be violated. It is recognised here that the concept of autonomy plays a very important role in our laws, notably through the laws on consent.[496] In fact, autonomy features so prominently in the legal framework

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Rachels, 'Kantian Theory: The Idea of Human Dignity' <http://public.callutheran.edu/~chenxi/phil345_022.pdf> accessed 16 July 2021.

492 Paola Cavalieri and Peter Singer, *The Great Ape Project: Beyond Human Equality* (St. Martins 1993), cited in Meyer (n 470) 118.

493 This ties into the debate on the argument from marginal cases.

494 Many authors have criticised Kant's theory for not including some of the most vulnerable members of the human species. See eg Adam Schulman, 'Bioethics and the Question of Human Dignity' in Pellegrino and others (n 428) 3; Steven Malby, 'Human Dignity and Human Reproductive Cloning' (2002) 6 Health and Human Rights 102, 108; Audrey Chapman, 'Human Dignity, Bioethics, and Human Rights' (2011) 3 Amsterdam Law Forum 3.

495 For some recent UK cases, see *Ih (Observance of Muslim Practice)* [2017] EWCOP 9 and *Great Ormond Street Hospital for Children NHS Foundation Trust v Yates* [2017] EWHC 972 (Fam), affirmed [2017] EWCA Civ 410, [2017] EWHC 1909 (Fam). See in this connection also Neal (n 424). See further Reetta Mietola and Simo Vehmas, '"He Is, After All, a Young Man": Claiming Ordinary Lives for Young Adults with Profound Intellectual Disabilities' (2019) 21 Scandinavian Journal of Disability Research 120 on value outside rationality for people.

496 This is especially so in the field of medical law. See Jonathan Herring, *Medical Law and Ethics* (OUP 2014) 20-21, 148-220. Some notable cases in this context are *R (Burke) v General Medical Council* [2004] EWHC 1879 (Admin), [2005] 3 FCR 169, para [30] and *St George's Healthcare*

that Macklin has, according to many,[497] mistaken it for being interchangeable with dignity.[498] However, the second chapter of this thesis has already pointed out how dignity and autonomy occasionally clash as well. In those cases, dignity is sometimes used to limit a person's autonomy. Examples that were mentioned concern prohibitions on sadomasochist acts, dwarf-throwing, peep shows and the 'commercial exploitation of games simulating acts of homocide'.[499] Indeed, the famous case of *R v Brown*, for example, makes clear that it is possible for citizens to be criminally convicted for their participation in sadomasochistic acts even when all participants had given their full consent prior to the acts.[500] The abovementioned examples therefore suggest that the existing legal framework on humans acknowledges that the concept of dignity embraces more than just autonomy, and that autonomy does not always trump other dignity interests.

Nevertheless, although autonomy is apparently not necessarily always the ultimate value to be protected, Kant was right in noticing that most humans (and perhaps also some types of animals) are rational agents, and the substantial amount of support for his account of dignity attests to the fact that many consider their rationality to be an important element of human life. It seems to be something to be cherished and protected. Just like divine dignity theories were helpful in describing human beings for who they are, Kant also contributed in an important way to this characterisation. One may perhaps adopt and adapt that knowledge for animals that reason in a rather different way from us. Although many types

NHS Trust v S [1998] 3 All ER 673, both cited in Herring (n 496) 149. See also Foster (n 426) 108-09.

497 eg Killmister (n 469).

498 See Macklin (n 427).

499 Chapter 2.5.

500 *R v Brown* [1994] 1 AC 212; *Laskey, Jaggard and Brown v United Kingdom* App nos 21627/93; 21628/93 and 21974/93 (ECtHR, 19 February 1997).

of animals do not seem to be rational agents, they may possess their own type of autonomy, and there may be good reasons for us to respect this capability as well. Although not as sophisticated as the reasoning of most human beings, their type of reasoning is part of who they are and may therefore be important to their lives and dignity.

4.4 The Capabilities of Animals

There are also accounts of dignity which stand in contrast to the one developed by Kant, in the sense that they do not 'contrast the humanity of human beings with their animality',[501] but instead see 'the two as thoroughly unified'.[502] One of these has been developed by Martha Nussbaum.[503] She adheres to an Aristotelian notion of dignity, which holds that dignity is about flourishing. In developing her theory, Nussbaum relies on Sen's capabilities approach, which focuses on 'individuals' capability of achieving the kind of lives they have reason to value'.[504] The idea behind this approach is to enhance individual freedom by letting people decide how to live their own life. They are given access to those things that are necessary to continue their lives and to maintain their bodily health and integrity, and provided with a range of other options to choose from, such as different forms of intellectual, political, social and spiritual activities. It is then up to humans themselves whether and how they use these opportunities. However, since many, if not all, types of animals do

501 Martha Nussbaum, 'Beyond the Social Contract: Toward Global Justice' in *The Tanner Lectures on Human Values* (University of Utah Press 2004) 413, 450.

502 ibid. See also Rutger Claassen, 'Human Dignity in the Capability Approach' in Düwell and others n (490) 240, 244: 'Truly human functioning is animal through and through'.

503 Nussbaum (n 501). For her application of this theory to animals, see Nussbaum (n 434).

504 Thomas Wells, 'Sen's Capability Approach' in James Fieser and Bradley Dowden (eds), *Internet Encyclopedia of Philosophy* (2012). See also Claassen (n 502) 241.

not have 'the capacity to make rationally considered choices',[505] including the conscious choice of how to live their lives, Nussbaum has focused on promoting their natural abilities instead. Animals should be provided with the opportunity to develop and express these innate abilities. Nussbaum has established a concrete list of things that humans should at a very minimum be given access to,[506] and argues that this list is broadly applicable to animals as well.[507] For the sake of completeness, it is noted here that Nussbaum limits her theory to sentient beings[508] and that she argues that the interests of more complex beings should be prioritised. This is so not because they have 'differential worth per se, but because the type and degree of harm a creature can suffer varies with its form of life'.[509]

It has been argued in the relevant literature that Nussbaum's list of capabilities has been established in a somewhat arbitrary manner,[510] and it has been noted how the requirements on her list are almost identical to those advocated for by utilitarians who focus exclusively on welfare. In fact, Singer has even argued that Nussbaum does not really offer a distinct ethical approach: 'Nussbaum owes us...an account of which capabilities she thinks important and good, and *why*. Without such an account, the capabilities approach cannot

505 Anders Melin and David Kronlid, 'Should We Ascribe Capabilities to Sentient Animals? A Critical Analysis of the Extension of Nussbaum's Capabilities Approach' (2016) 3 De Ethica 53, 57.

506 This list includes life, bodily health, bodily integrity, senses, imagination, thought, emotions, practical reason, affiliation, being able to live with concern for and in relation to other species, play, and control over one's environment (both political and material). For the full list, including their explanation, see Nussbaum (n 503) 455-57.

507 Nussbaum (n 434) 314-17 provides detailed explanations on what the application of this list to animals would entail.

508 ibid 309.

509 ibid. Cf Sahar Ahktar, 'Animal Pain and Welfare: Can Pain Sometimes Be Worse for Them Than for Us?' in Beauchamp and Frey (n 438) 495.

510 See eg Elizabeth Loder Reed, 'Animal Dignity' (2016) 23 Animal Law 1, 30 and Caroline Harnacke, 'Disability and Capability: Exploring the Usefulness of Martha Nussbaum's Capabilities Approach for the UN Disability Rights Convention' (2013) 41 Journal of Law, Medicine and Ethics 768, 776-77.

be considered an independent approach to ethics'.[511] Nussbaum, for her part, suggests that her theory is capable of taking into account 'valuable things in an animal's life other than [suffering] and pleasure, such as free movement and physical achievement, and also altruistic sacrifice for kin and group'.[512] A further example concerns the 'grief of an animal for a dead child or parent, or the suffering of a human friend…, a sign of attachments that are intrinsically good'.[513] She also seems to introduce some moral evaluation of types of pleasures: there 'are also bad pleasures, including some of the pleasures of the circus audience– and it is unclear whether such pleasures should even count positively in the social calculus. Some pleasures of animals in harming other animals may also be bad in this way'.[514]

Indeed, it should be noted in this connection that, even though the paragraphs in which Nussbaum applies her theory show many similarities with the outcome of a typically utilitarian exercise, the starting point of her theory is different. Its purpose is not to achieve the highest level of happiness in animals. Rather, it is to let them flourish as the beings that they are. Some minor differences flowing from this different starting point are indeed visible in the application of her theory. For example, Nussbaum advocates banning the declawing of cats 'on the grounds that it prevents the cat from flourishing in its own characteristic

511 Peter Singer, 'A Response to Martha Nussbaum' (*The Tanner Lectures on Human Values*, 13 November 2002) <https://www.utilitarian.net/singer/by/20021113.htm> accessed 23 April 2020. See also Gruen (n 440) 39.

512 Nussbaum (n 434) 304. She also seems to suggest that her theory is better capable of recognising the individual worth of individuals. It can rule out 'extremely harsh [results]' towards certain beings, both at an individual and at a group level (pages 303-04). See also Nussbaum (n 440). It should, however, be noted that this claim seems of limited value, since her application of the capability 'life' indicates that she might be willing to give up the life of a being in order to satisfy the interests of others. Perhaps her minimum threshold therefore focuses more on the absence of extreme suffering whilst the being is alive.

513 ibid.

514 ibid.

way, even though it may be done in a painfree manner and cause no subsequent pain'.[515] Another area where Nussbaum's theory may be promising is the field of bioethics. Depending on how one would interpret her theory,[516] it could perhaps be utilised to object to biotechnological innovations which would diminish or remove a certain capability of an animal. After all, such biotechnological interferences would prevent an animal from (fully) developing or utilising its capabilities. Whereas typically utilitarian concepts would only focus on the total amount of happiness the invention would bring, Nussbaum's account may be more sensitive to the (seemingly morally problematic) fact that an animal's capacities are being thwarted. It should, however, be noted that an adherent of her theory would probably not object to the opposite situation, in which abilities would be *added* to a creature. As long as a being is given the opportunity to fulfil its existing capabilities, its dignity seems to be protected.

Nussbaum's focus on capabilities may therefore have some added value over typically utilitarian theories of value, especially in the context of bioethics. However, her focus on capabilities also seems to have a potentially problematic implication, as it seems to render her theory incapable of covering situations in which the capabilities of animals are unaffected, such as the situation in which an animal (corpse) is being mutilated,[517] or perhaps

515 ibid 315. Here may, however, lie a danger of assuming that all cats must be the same. A house cat may, for instance, be different from other cats.

516 This argument would only work if one were to focus on the capabilities that animals would have had based on their "primary" biological material (that is, before the intervention took place) instead of on the capabilities which an animal has at a specific moment in time.

517 It should be noted that Nussbaum argues that her list of capabilities is not exhaustive. She does not exclude the possibility that there may be other capabilities that are relevant to flourishing, and therefore to dignity. However, it is hard to see which capability could be used to address the situation, for example, with the rabbit corpse that was mentioned earlier in this chapter. Is it the capability of one's body to be intact? If this can be called a true capability at all, it is certainly questionable whether it is still present after one's death, as corpses usually decompose after a relatively short amount of time.

the situation in which a creature is being ridiculed.[518] Adherents of her theory would therefore have to accept that not all such type of situations would be included within the scope of morally reprehensible acts.

It can therefore be concluded that Nussbaum's theory constitutes a valuable addition to the literature. It looks beyond the experiential welfare interests of beings and encourages us to look at each creature for who it is. In doing so, it focuses on animals' own abilities, rather than on their likeness to human beings (or to other types of animals, for that matter). In this connection, it is worth noting that the list of capabilities, as devised by Nussbaum, might be helpful in answering the question of what is important to the lives and being of animals. Just like divine theories were able to provide a list of typically human characteristics, Nussbaum to some extent carries out this task for animals. However, Nussbaum's focus on abilities also brings a potentially problematic aspect, as it renders her theory incapable of addressing situations which may be undignifying but which do not affect an animal's capabilities (such as certain forms of ridiculing or mutilation). It is therefore worth examining the remaining dignity theories to find out whether any of these is better capable of dealing with this potential weakness in Nussbaum's theory.

518 It might, however, come as no surprise that Nussbaum's theory is not fully capable of covering all situations in which many might say dignity is at stake. It has been argued in the relevant literature that Nussbaum did not have dignity in mind at all when she developed her theory. Specifically, Claassen (n 502) 245-46 suspects that she used dignity in order to explain why her already established list of basic capabilities deserved respect at all, rather than using the concept of dignity to set out a list of capabilities. Consequently, it seems that Nussbaum was concerned with (the noble goal of) establishing a sound basis for animal (and human) protection, focusing on their well-being, instead of asking the question what the concept of dignity really means.

4.5 Swiss Animal Dignity Law: A Helpful Starting Point

Another theory of dignity was developed by Balzer, Rippe and Schaber.[519] It suggests that dignity should be seen as 'corresponding with the concept of inherent value',[520] and that animals should be ascribed inherent value ('dignity') because they have three characteristics.[521] First, 'they have a good of their own. Second, they pursue individual goals, have their own ends, strive to survive, adapt to their environment and reproduce. Third, they are organic entities, so they exist as individuals'.[522] The first characteristic, they argue, is the most important one.[523] To have an individual good means that '[t]hings can happen and be done to [something] which are good or bad for [it]'.[524] This can be understood in a subjectivist and in an objectivist way. According 'to the subjectivist view, things are good or bad

519 The authors provided the Swiss Government with an expert report on animal dignity: Philipp Balzer, Klaus Peter Rippe and Peter Schaber, *Was heisst Würde der Kreatur?: Expertenbericht* (Bundesamt für Umwelt, Wald und Landschaft 1997). For the English version, see Philipp Balzer, Klaus Peter Rippe and Peter Schaber, 'Two Concepts of Dignity for Humans and Non-Human Organisms in the Context of Genetic Engineering' (2000) 13 Journal of Agricultural and Environmental Ethics 7. See also Gieri Bolliger, 'Legal Protection of Animal Dignity in Switzerland: Status Quo and Future Perspective' (2016) 22 Animal Law 311, 338-43.

520 Robert Heeger, 'Dignity, Only for Humans? A Controversy' in Düwell and others (n 490) 541. Note how this formulation is not necessarily unique: see Nussbaum (n 440) 239-40; Paul Taylor, 'Are Humans Superior to Animals?' (1984) 6 Environmental Ethics 149; Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977) 238, cited in Foster (n 426) 57. Various legal systems, such as the Dutch one, recognise the intrinsic value of animals as well. The intrinsic value of animals has been recognised in the preamble of the Wet Dieren. The intrinsic value of nature has been recognised in Article 1.10 (lid 1 sub a) of the Wet Natuurbescherming. Note, however, how the recognition of intrinsic value in Dutch law does not significantly change the content of the legal protection (which mainly focuses on animal welfare, guided by the Five Freedoms). It was 'not meant to have any normative consequences' and was added to the law 'not as a second benchmark', but only to consolidate the message (already expressed by existing animal laws) that animals do not only have instrumental value. See *Kamerstukken II* 2007/08, 31389, nr. 3, p. 19-21.

521 Note how the authors define dignity differently for humans, something which has been criticised: Dunja Jaber, 'Human Dignity and the Dignity of Creatures' (2000) 13 Journal of Agricultural and Environmental Ethics 29. For other criticisms see also Robert Heeger, 'Genetic Engineering and the Dignity of Creatures' (2000) 13 Journal of Agricultural and Environmental Ethics 43.

522 Heeger (n 520) 543.

523 ibid.

524 Peter Schaber, 'Dignity Only for Humans? On the Dignity and Inherent Value of Non-Human Beings' in Düwell and others (n 490) 546, 547.

for non-human beings when they experience them as good or bad, respectively'.[525] According to the objectivist view, 'things are good and bad for non-human beings without being experienced by them as such'.[526] Thus, the subjectivist view links inherent value to sentient beings, whereas the objectivist view links it to all living beings. Considering the comments made under the first section of this chapter, we will proceed with the objectivist view only. According to the authors, beings with inherent value should be taken into account 'for their own sake'.[527]

The inherent value theory was developed in the context of bioethics, and the authors therefore proceed by focusing on 'species-specific functions'.[528] An animal's dignity is preserved when it can still perform the functions that a member of its species can normally perform. This definition may indeed cover some cases of genetic modification and also, for instance, some cases involving circus animals. However, like Nussbaum's theory, it does not seem capable of covering all the situations that were mentioned earlier in this chapter either, such as the ones involving certain types of mutilation and ridiculisation. In fact, the species-specific functions requirement may, in itself, not add much to Nussbaum's theory.

This somewhat underdeveloped nature of the inherent value theory seems to originate from the fact that it was tailored specifically for bioethical situations. The question

525 ibid 547-48.

526 ibid.

527 ibid 547.

528 For an explanation of this concept, see Balzer, Rippe and Schaber, 'Two Concepts of Dignity for Humans and Non-Human Organisms in the Context of Genetic Engineering' (n 519) 23-26. This requirement has been criticised by Alasdair Cochrane, *Animal Rights Without Liberation: Applied Ethics and Human Obligations* (Columbia University Press) 115. However, Cochrane does not seem to distinguish between the two versions of the inherent value theory. Even if his argument works with regard to the subjective view (which is questionable, as it has been argued in the relevant literature that dogs use their tails, among other things, to communicate their emotions to other animals and human beings and to keep their balance), it does not seem to work in relation to the objective view.

therefore arises whether its more basic and broader requirement –that of taking into account an animal's good– may be able to help us a bit further in other contexts of animal use and being. In this connection, it will be noted that the inherent value theory does not limit itself to a being's capabilities, like Nussbaum's theory did. Resultantly, it may be better able to cover seemingly undignifying situations in which the capabilities of an animal are unaffected (or perhaps, in contrast, exploited). However, we immediately run into a next problem here: in order to know precisely which situations fall under its scope, we need some sense of direction with respect to how to apply it in other contexts of animal use and being. What does it mean to pursue an animal's own good? Unfortunately, the theory does not seem to provide us with any such guidance. We therefore seem to be in need of either a more advanced set of criteria, or a definition that gives us a clearer steer in the right direction.

Swiss animal laws, against the backdrop of which Balzer, Rippe and Schaber's theory was developed,[529] indeed provides a broader set of criteria. Article 120(2) of the Federal Constitution[530] and Article 1 of the general federal animal-protection law, the Tierschutzgesetz (TSchG), protect the dignity of animals. This has been defined as the inherent worth or value of the animal that must be respected.[531] The relevant state authority, the Federal

529 Bolliger (n 519) 338-43. Some other reports that may have influenced Swiss animal dignity laws are: Ina Praetorius and Peter Saladin, *Die Würde der Kreatur: (Art. 24novies Abs. 3 BV)* (Bundesamt für Umwelt, Wald und Landschaft 1996); Gotthard Martin Teutsch, Antoine Goetschel and Elisabeth Müller, *Die "Würde der Kreatur": Erläuterungen zu einem neuen Verfassungsbegriff am Beispiel des Tieres* (Haupt 1995). I am grateful to Professor Florian Windisch for this observation.

530 Bundesverfassung [BV] [Constitution] Apr. 18, 1999, SR 101 (Switz.). See Bolliger (n 529) 323. Article 120 officially concerns the use of reproductive and genetic material.

531 Article 3 TSchG. See Margot Michel and Eveline Schneider Kayasseh, 'The Legal Situation of Animals in Switzerland: Two Steps Forward, One Step Back – Many Steps To Go' (2011) 7 Journal of Animal Law 1, 14.

Food Safety and Veterinary Office (FSVO), has stated that inherent good means that 'it is appropriate for an individual living being *to be able to lead a life typical of its species*'.[532]

Article 3 TSchG elaborates on the meaning of this latter sentence. It states that animal dignity is violated when a strain imposed on the animal cannot be justified by overriding interests. Strains are, in particular, the following things: pain; suffering; harm; anxiety; humiliation; major interference with an animal's appearance; major interference with an animal's abilities; and excessive instrumentalisation.[533] A few of these strains deserve further explanation. *Harm* is understood as an impairment of species-specific properties, functions and habits,[534] especially impairment of growth, reproductive capacity, adaptive capacity, mobility, and species-specific social behaviours. This includes the criterion of major interference with the abilities. A *major interference with the appearance* is caused if (a) the change leads to a loss of function and (b) it is permanent or irreversible, such as tail or ear docking. Something that does not fall in this category is coat trimming in a poodle. An animal is *humiliated* if it is 'perceived and treated in a way that completely disregards its moral status as a living being that should be respected for its own sake'.[535] Consciousness of the animal is not required. Humiliation is caused in the following situations: (a) mechanisation of the animal (the animal as a machine); (b) making fun of the animal; (c) portrayal of the animal as inanimate, objectification; and (d) measures associated with a

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532 Federal Food Safety and Veterinary Office FSVO (FSVO), 'Dignity of the Animal: Explanatory Notes on the "Weighing of Interests"' 2 (emphasis added). See also Bolliger (n 529) 335: 'due to inherent worth, a living being must be able to lead a life typical of its species and to pursue individual objectives'.

533 See Article 3(a) TSchG. See also FSVO (n 532) 2, 5-6 and Bolliger (n 529) 338-343 for more definitions and examples.

534 Article 8(1) Gentechnikgesets (GTG).

535 FSVO (n 532) 6.

complete loss of control (a cyborg is mentioned as example). *Excessive instrumentalisation* occurs when an animal's inherent good is 'completely disregarded'.[536]

The definition adopted in Swiss law covers a broad range of elements that were visible in other dignity theories, and in animal ethics theories more generally. It covers pain and suffering, which is reminiscent of the utilitarian theory; excessive instrumentalisation, which hints at Kant's theory; and interference with the abilities, which connects to Nussbaum's theory. The interesting, unique elements that have been added are the major interference with an animal's appearance and humiliation as defined in an objective way (and not just in a subjective manner, therefore consciousness is not required). These criteria, taken in conjunction with the interference with the abilities and the instrumentalisation criteria, appear to be helpful in covering moral ground that cannot be covered by welfare-based theories (and particularly, in covering some of the examples that were mentioned in the beginning of this chapter).

An important caveat is, however, warranted. The criteria laid down in Swiss law seem to be tailored for human-animal relations specifically. They dictate humans what not to actively do to animals, or what to protect them from when they are under their control. It is, however, not obvious that all these criteria also work in relation to contact among wild animals. Predation, for example, generally involves a substantial amount of suffering for the prey, yet it could be argued that it is part of leading a life typical of one's species. The criteria as laid down in Swiss animal law may therefore not necessarily be very helpful or accurate when it comes to issues of dignity raised in animal-animal interactions.

To be sure, the implementation of dignity in Swiss animal law may still suffer from some flaws. Swiss authors criticise it for, among other things, not including the right to

536 ibid.

life,[537] as well as for its sentience threshold. The latter is claimed to be arbitrary and results, according to the argument, in the law suffering from an inner contradiction.[538] Indeed, sentience will undoubtedly have implications for the kind of treatment that beings require, as a being that cannot suffer obviously does not need to be protected against any such condition. But requiring protection that goes beyond merely preventing unnecessary suffering and then limiting such protection to beings that can suffer seems somewhat paradoxical. Additionally, there are three further issues that might be relevant for dignity, but that do not seem to be readily available in the list of criteria in Swiss law that was set out above. These are the element of relationality; protection of animals after death;[539] and protection of elements of a being other than only species membership, such as unique individuality.[540] This means that we seem to be in need of an even broader account of dignity. Foster's theory might be able to provide us with such an account.

4.6 Dignity as Objective Thriving

Foster argues that dignity is about objective flourishing.[541] It is 'primarily about being, and only secondarily…about doing'.[542] Specifically, it is about being human: '[d]ignity-

537 Bolliger (n 529) 371-73; Vanessa Garritsen, 'Animal Welfare in Switzerland – Constitutional Aim, Social Commitment, And a Major Challenge' (2013) Global Journal of Animal Law 1, 10; Michel and Schneider Kayasseh (n 531) 15-16.

538 Bolliger (n 529) 369-70; Helena Röcklinsberg, *The Ethics of Consumption: The Citizen, The Market, and The Law* (Springer 2013) 280.

539 It is not clear whether Swiss law protects animals after death: Bolliger (n 529) 366-68.

540 In this context it may be referred to Articles 10-12 and 17-20 of the Swiss Animal Welfare Act. I am grateful to Professor Florian Windisch for bringing these articles to my attention.

541 Foster (n 426) 6. Like Nussbaum, he also adheres to an Aristotelian notion of dignity: Charles Foster, 'Human Dignity: A Response to Camosy and Huxtable' (2015) 41 Journal of Medical Ethics 940, 941.

542 Foster (n 426) 7.

enhancement is the process of humanisation'.[543] It is about taking part in the human adventure.[544] As his formulation indicates, Foster originally developed his theory for humans. However, it is applicable to animals as well. His formulation 'does not rely on any idea of dignity as a status that humans have as a result of membership of the species *Homo Sapiens*'.[545] He acknowledges that 'part of being myself is being a member of my species, but [that] my species is simply the only possible vehicle for my particular mode of *being*'.[546] For the purpose of his argument, it is 'the being that matters: not, essentially, the human being'.[547] This means that for animals, dignity is about being the type of animal they are: it is the process of animalisation. I propose to unify these two definitions into the following definition: self-realisation. The advantage of this definition is that it also explicitly allows to be taken into account the unique individuality of each being.[548] Species membership determines the type of being that you are, but even within the species there is a range of unique individuals, each of whom possesses certain species-specific characteristics to a more or lesser extent, and each of whom finds themselves in a unique net of relationships, including family, group and community membership. For the purposes of this thesis, dignity is then considered to be about being and developing into yourself.

But what exactly does it mean to best be human/animal, to flourish as yourself? Foster admits that he does not know the answer to this question. Controversially, he argues

543 ibid 6-7.

544 ibid 5.

545 ibid 7.

546 ibid.

547 ibid.

548 To be sure, this is not to add an additional element to his theory. Foster also argues that unique individuality is relevant to dignity: Foster (n 426) 6.

that this is an empirical question that can best be answered by, say, anthropologists rather than lawyers.[549] Nevertheless, he aims to contribute to the debate by making two observations which he thinks are relevant for human flourishing. First, humans 'are not human in a vacuum'.[550] They are 'embodied animals' that 'exist in a social, political and physical environment'.[551] What happens to their bodies 'affects all elements of them'.[552] This observation obviously also applies to animals, since they are embodied creatures too. Second, humans are social animals. Groups of human beings are qualitatively different and achieve more than individual humans. Therefore, 'the most accurate description of an individual will be in terms of the nexus of relationships in which she exists'.[553] This observation also seems to apply to at least some types of animals, namely those that have a social nature.

However, it seems that we might be running into a problem here. Even though Foster's account of dignity seems to be better able to encapsulate the various dimensions of dignity than the other accounts discussed in this chapter and more easily translatable to the animal context than some of these other theories, in its current form, it might not provide us with enough guidance to serve as a legal concept in the context of animal law. If dignity is going to function as a guiding principle in these laws, then some more concrete guidance seems necessary (not at the very least in order to protect the rule of law). In what follows, some suggestions on how to approach the matter will be made. To begin with, and in light of the examples brought forward in this chapter and the criteria developed in other dignity theories, I argue that animals should be considered in all their aspects, just like is done with

549 ibid 10-11.

550 ibid 12.

551 ibid.

552 ibid.

553 ibid.

regard to humans in human rights law. Many types of animals are complex, multi-faceted beings, who should not be reduced to one single characteristic (such as their sentience), but who should instead be considered in their wholeness. Among other things, account should be taken of their physical, cognitive, emotional and relational aspects (where applicable, of course). The self should therefore be understood as the composite of an individual's defining attributes.[554]

The question still remains, however, what exactly it then means to be and develop into yourself, to *flourish* as yourself. Importantly, the same dilemma arises as in the human context: who should determine what it means for an animal to be itself? It might in this connection not only be wondered whether a subjective or objective standard should be used, a question which arose in the human context as well (to be sure, the relevant courts there have used both). Difficulties also arise regarding the question of whether humans or animals themselves should decide on the matter. On one hand, it is animals themselves whose being we are deciding on, and who are the ones actually undergoing the experiencing of being an animal. However, they cannot fully communicate to us what they consider to be crucial to being themselves. In fact, it might be wondered whether they are even capable of forming any coherent thoughts on this. Humans, on the other hand, are as far as we know linguistically and cognitively better capable of forming and communicating views on the matter. However, imposing a human-made standard also carries the risk of anthropomorphising animals.

554 Although this statement should not be interpreted as being an (overly) individualistic approach. Indeed, it may be argued that for some animals, such as bees, it does not make much sense to talk about them as individuals as their whole purpose and essence seems to be communal. Indeed, it is especially in relation to such animals that it makes sense to describe them by placing them within their network of relationships.

Perhaps the most sensible approach would be to use a combination of both. As a bottom line, the debate on what it means to be an animal (and therefore the law) should be informed by our empirical knowledge on animal preferences, abilities, appearance, behaviour and functions, especially when this knowledge has been acquired through thorough academic research. This informs us on what animals (of a certain species) typically are like: what type of life or practices they prefer, what they are capable of, what they look like, how they behave and how they function as an individual and/or as a group. However, it will be noted that we might not always be able to acquire all the necessary empirical knowledge to make an informed decision about a certain topic (as will be attested by this thesis' chapter on sexual relations between humans and animals). What is more, such a normatively loaded question –"what does it mean to flourish as an animal?"– cannot be answered solely by reference to empirical knowledge.[555] This can also be illustrated with reference to women: if we look now (or even more so in the past) at empirically what did it mean to be a woman that would give a very restrictive understanding.[556] Some normative input therefore seems necessary too, which is something that can only be done by humans, who possess as far as we know more advanced cognitive and linguistic skills than at least most other animals. Just like it has been argued in the context of human rights that it is a public exercise to collectively find out over time what it means to be human, a debate on the normative aspects of what it means to flourish as an animal seems necessary too.

This normative debate would need to touch upon what I would like to call both the inward and outward dimensions of animal dignity. Regarding the inward dimension, it

555 See in this connection also Katie Sykes, 'The Appeal to Science and the Formation of Global Animal Law' (2016) 27 EJIL 497, 507, also citing Alva Noë, 'If You Have to Ask, You'll Never Know', *Cosmos and Culture* (National Public Radio science blog) (11 October 2013) <https://www.npr.org/sections/13.7/2013/10/11/232027296/if-you-gotta-ask-you-ain-t-never-gonna-know?t=1619963716347> accessed 16 July 2021.

556 I am grateful for Professor Jonathan Herring for this remark.

might be wondered whether all features and abilities of an animal are valuable and therefore worth protecting, including those that cause harm to other animals. Nussbaum warns in this connection against romanticising nature.[557] One relevant factor to take into account here may be whether the animal in question exhibits its true nature when exhibiting harmful behaviour or whether it is instead a sign of desperation.[558] Another aspect of the inward dimension concerns the situation in which we are forced to prioritise one (or several) characteristics of an animal. For example, is it more conducive to animal thriving to have its autonomy preserved (by living in the wild) or to be protected from the harms that typically occur in the wild (by living in captivity)?[559] We will therefore sometimes need to decide which of the animal's characteristics is most determinative to its flourishing. The outward dimension, on the other hand, refers to the question of what the proper relationship between humans and animals should be, which also ties into questions of respect. Is it morally right to use their capabilities for our own interests? Are there any objections to ridiculing or mutilating an animal, even when the animal does not experience it as such? Discussions on what type of human behaviour is compatible with animal dignity need to be held, helpful indicators of which might also be found in the theories of dignity that were discussed earlier in this chapter. Amongst the criteria to be considered are instrumentalisation, mutilation and humiliation.

557 Nussbaum (n 434) 310-11.

558 If we were to know that the cause of harmful behaviour would be desperation (eg because of boredom or a lack of access to readily available food), that would constitute a reason not to value the harmful behaviour but to solve the cause of desperation instead.

559 Chapter 7 will touch upon this question. A similar dilemma is faced in chapter 5, which discusses the question of whether a "disability" in a certain animal should be fixed.

4.6.1 Some Additional Notes on the Relational Element of Dignity

So how would all of this actually translate into law and policy? Naturally, that depends on the science on animals and on the outcome of the abovementioned normative exercise. However, the dignity theories discussed earlier in this chapter, notably the one developed by Nussbaum and the criteria laid down in Swiss law, might be able to provide us with some guidance, especially regarding contexts in which species membership plays a big role.[560] Relying in part on these other dignity theories might feel counterintuitive, but in fact the opposite is true. Although each of these theories is theoretically speaking slightly distinct, ultimately, they all seem to try to answer the same questions, namely "what does it mean to be human?" and "what does it mean to be an animal?", which are ultimately part of the broader and most fundamental of questions: "what does it mean to be me and what does it mean to be you?". There might therefore sometimes be good reasons to rely on more concrete criteria that were developed in the context of these other theories. However, one element seems to be underemphasised therein, whereas it features prominently in the works of Foster and other notable authors: the element of relationality. Some brief comments on this element and on how it might work in relation to animals will therefore be made here.

[560] Such as in the context of bioethics or performing animals, although other defining characteristics of an individual, such as its unique qualities, should not be overlooked in these contexts either.

Relationality features prominently in Foster's account of dignity,[561] and other academics[562] and judges[563] have acknowledged its importance as well.[564] Foster and Herring even advocate for a relational account of personhood: 'what generates moral status is not characteristics or abilities that we have ourselves, but rather our relationships with each other'.[565] According to the argument, it is especially 'relationships of care [that] deserve moral status. It is because we are profoundly vulnerable and interdependent that our relationships are key to our humanity and create moral status.[566] The authors argue that 'it is through our relationships that our human selves are made'[567] and that it is 'our relationships that give our life meaning and constitute our identity'.[568] Although Foster and Herring focus on humans in their work, they are 'not committed to a view that only humans can be persons':[569]

> We do not know if other animals can have (for example) the interest in the emotional well-being of others; a keenness to respond to emotions of others; a degree of empathy; a spontaneous impulse to share with others; a responsiveness to touch of the kind key to being a party to a caring relationships – although it seems very likely in, for instance (and at least) higher primates, elephants and cetaceans. If other animals

561 Recall in this connection Foster's second observation relating to human thriving.

562 eg Jonathan Herring, *Caring and the Law* (Hart Publishing 2013); Margaret Farley, 'A Feminist Version of Respect for Persons' (1993) 9 Journal of Feminist Studies in Religion 183, 187, 189, cited in Hollenbach (n 432) 129. Religious accounts of dignity also acknowledge its importance: Hollenbach (n 432) 253-54; Hanvey (n 472) 220-26.

563 See Munby J in *R (on the application of A) v East Sussex County Council (No 2)* [2003] EWHC 167 (Admin). See also Eckart Klein, 'Human Dignity in German Law' in David Kretzmer and Eckart Klein (eds), *The Concept of Human Dignity in Human Rights Discourse* (Martinus Nijhoff Publishers 2002) 145, 150.

564 The same is true for other legal sources: Dupré (n 479) 124-25.

565 Charles Foster and Jonathan Herring, *Identity, Personhood and the Law* (Springer 2017) 35.

566 ibid.

567 ibid 36.

568 ibid.

569 ibid 38.

do show these abilities then personhood could be granted on the basis of those relationships.[570]

There are several ways in which the law and/or the State more generally could protect the relational nature of beings (at least with regard to animals that are under human care, for example, because they are in captivity).[571] First, socially-natured animals should be enabled to establish meaningful relationships. They should be given the opportunity to enter into contact with other creatures, instead of being put in isolation. Note how this applies not only to mammals, such as rabbits, but how it may also apply to other types of animals, such as bees, who are highly communal in nature as well and in relation to whom it might even be questioned to what extent it makes sense to speak about them as individual selves to begin with.[572] Second, the existence and sustainability of these individual relationships need to be supported.[573] This could, for example, be done by offering financially needy pet owners financial support for medical treatments or by changing the policies of residential care homes so as to allow elderly people to take their companion animal with them.[574] Third, given the importance of relationships to individuals, it should be acknowledged that the most appropriate course of action might not always be to satisfy one's own interests. It might sometimes be justified to compromise these for the sake of the interests of an individual one cares for. Herring rightly argues that the right question to ask is not always necessarily 'what is best for me' but rather 'given the responsibilities that I owe to

570 ibid.

571 Note in this connection also Daniel Bedford, 'Human Dignity in Great Britain and Northern Ireland' in Paolo Becchi and Klaus Mathis (eds), *Handbook of Human Dignity in Europe* (Springer 2019) 319, 331-34.

572 I am grateful to Professor Jonathan Herring for this remark.

573 In this respect, see also Jonathan Herring, 'Compassion, Ethics of Care and Legal Rights' (2017) 13 International Journal of Law in Context 158.

574 See Marie Fox and Sue Westwood, 'Pets and Vulnerability: Older People, Companion Animals and Residential Care' (Animals and Vulnerability workshop, May 2017).

those in relationships with me and the responsibilities owed by others, what is the most appropriate course of action?'.[575] In addition, the relational element might also be understood at a more societal or global level. Specifically, it might be argued that there is a more general connection between creatures on this planet, and they (or at least some types of beings) seem to care about one another's well-being even in the absence of any personal connection. In light of this, it could be argued that the political climate should be shaped in a way that takes into account the interests of all animals, including wild and stray ones. This is equally pertinent for the debate on climate change.

Two caveats are, however, warranted. First, it is not evident that all types of animals have a social nature. The first three claims regarding relationality therefore only work with respect to socially-natured animals. In this connection, it should also be acknowledged that some animals may have a social nature only towards certain species (such as their own), and their relational nature should be protected accordingly. Second, not all relationships seem valuable. There might therefore be good reasons for the State not only to encourage and support the existence of valuable relationships, but also to interfere with abusive or non-healthy relationships.[576] Naturally, the question arises as to what precisely a healthy relationship is. With regards to care, Herring has defined four markers: meeting needs, respect, responsibility, and relationality.[577] These might be taken into account when evaluating a human-animal relationship, although it will be noted here that at least some types of

575 Jonathan Herring, *Medical Law and Ethics* (n 496) 203.

576 See also Jonathan Herring and Shazia Choudhry, 'Righting Domestic Violence' (2006) 20 International Journal of Law, Policy and the Family 95 for a similar argument in the context of human rights. The authors argue that rights to respect for private and family life can be seen as justifying state intervention, rather than being a barrier thereto. See further Foster and Herring (n 565) 40.

577 Herring (n 562). See also Jonathan Herring, 'Farewell Welfare?' (2005) 27 Journal of Social Welfare and Family Law 159, 166 and Jonathan Herring, 'Compassion, Ethics of Care, and Legal Rights' (n 573).

relationships between humans and animals might have a lesser degree of mutuality (e.g. when it comes to keeping a goldfish).

4.6.2 Transactional Model

Before closing things up, it will be noted that Foster argues that consideration should be given not only to the dignity interests of the supposed victim or beneficiary of a certain act, but also to the dignity interests of all other potential stakeholders. In this connection, he also acknowledges that an undignified act does not only affect the dignity of the creature towards whom the act is directed, but also that of the "perpetrator" (the so-called Janus-faced aspect) and of all the other creatures or entities that may directly or indirectly be involved, such as family members or the society at large.[578] Note how the society-focused argument seems to tie into the collective conscience argument that was made in the context of human rights law.[579] In any event, Foster argues that all these dignity interests should be put on the weighing scale, and his transactional model is therefore somewhat reminiscent of the utilitarian theory.[580] In this connection, Foster adheres to a Bayesian model. This means that an important factor to play a role in determining on how to balance the various dignity interests is the factor of proximity. The closer a being is involved in an act, the heavier his dignity interests should weigh.[581]

The complex question of how precisely and to what extent the interests of different beings and entities should be balanced falls, due to space constraints, outside the scope of

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578 Foster (n 426) 8. Although this argument has been disputed by Camosy (n 457).

579 Natasa Mavronicola, 'Bouyid and Dignity's Role in Article 3 ECHR' (*Strasbourg Observers*, 8 October 2015) <https://strasbourgobservers.com/2015/10/08/bouyid-and-dignitys-role-in-article-3-echr/> accessed 16 July 2021, cited in chapter 2.3 of this thesis.

580 It is repeated here that using utilitarian calculations may to a certain extent be inevitable in a world where interests constantly clash.

581 See Foster (n 442) for an application of the transactional model.

this thesis. However, it is recalled here that there are potential dangers inherent in what was termed the evaluative element of the utilitarian theory (that is, its balancing scheme), and therefore possibly also in adopting Foster's transactional model. Notably, there may be some absolute wrongs which cannot be morally justified regardless of the potential benefit to others. Whatever form of balancing is therefore eventually used, some form of restraint seems necessary. Nevertheless, Foster is right to notice that individuals do not live on an island. Whatever they do or happens to them instead affects the world around them as well. Consideration will therefore be given in the remainder of this thesis to the dignity interests of all creatures and entities involved in an act.

4.7 Conclusion

Although the notion of dignity is not without its critics, it has the potential to fill an important gap in the existing legal framework on animals. It is capable of covering situations which may not necessarily cause any harm to the animal concerned but which may nevertheless be considered morally wrong. There are many theories that have contributed to the development and progression of the concept of dignity, but the most accurate one for the purposes of this thesis seems to have been developed by Foster. Dignity will therefore for the remainder of this project be understood to be about being and developing into yourself. The selected theory has several advantages. It is capable of covering a broad range of scenarios in which no welfare issues are present; it looks at each creature for who it is, thereby not limiting itself to species membership either; it considers the effects an act may have on all actors that may directly or indirectly be involved or affected rather than merely focusing on the supposed victim or beneficiary; and, very importantly, it seems to cohere with the meaning that various legal authors give to human dignity, thereby enhancing the internal

consistency of the law. Foster's account of dignity also finds support in other academic literature concerning animal ethics. Lori Gruen, for instance, uses the notion of wild dignity:

> I think Anderson's instinct is right that dignity only comes into play when non-humans are part of a social world in which questions of dignity arise....Making other animals 'decent for human society' is precisely what it means to deny them their dignity. When we project our needs and tastes onto them, try to alter or change what they do, and when we prevent them from controlling their own lives, we deny them their Wild dignity. In contrast, we dignify the wildness of other animals when we respect their behaviours as meaningful to them and recognize that their lives are theirs to live.[582]

However, despite seeming to be the most accurate account of dignity, Foster's definition is rather open to further interpretation, which makes the task of applying it in a legal context challenging. Some suggestions on how to approach the matter have therefore been made. It has been argued that the self should be understood to encompasses not only the attributes one has by reason of one's membership of a particular species but also one's unique individuality. Furthermore, attention is to be paid to all possible aspects of one's being, including the physical, emotional, cognitive and relational ones. Animals should thus not be reduced to one characteristic (such as sentience) but considered in their wholeness. It has furthermore been suggested to use both the animal and the human perspective when it comes to determining what it means for an animal to be itself. As an absolute minimum, the relevant debate (and the law more generally) should be informed by our empirical

582 Gruen (n 440) 154-55. Rod Preece and Lorna Chamberlain, *Animal Welfare and Human Values* (Wilfrid Laurier University Press 1993) 206, cited in Gruen (n 440) 153 also write that 'what matters beyond any cruelty is that the animals are portrayed entirely as something other than what they are.…[T]hey are compelled to act in a manner totally destructive of respect'. See further Suzanne Laba Cataldi, 'Animals and the Concept of Dignity: Critical Reflections on a Circus Performance' (2002) 7 Ethics and the Environment 104. The type of arguments that were set out in these pieces of literature seem to overlap with a philosophical theory called perfectionism: 'According to the perfectionist, being able to realize significant species-specific potentials is an essential part of a good life. The key thing is not to *feel* well, but to *do* well. Underlying this approach, in the context of animals, is the common but also controversial assumption that animals have well-defined natures (the perfectionist uses these to define the criteria for living a successful life')'. See Thomas Hurka, *Perfectionism* (OUP 1996), cited in Peter Sandøe and others, ''The Blind Hens' Challenge: Does it Undermine the View that Only Welfare Matters in Our Dealings With Animals?' (2014) 23 Environmental Values 727, 737.

knowledge on animal preferences, abilities, appearances, behaviour and functions. Humans should consequently add some normative input, both in relation to what have been termed the inward and the outward dimensions. In the chapters that follow, I aim to make a start with the search of what exactly self-realisation means in the context of animals and what the law can do to help animals (and humans, for that matter) to develop into and be their own selves. The emphasis will be on areas of animal use and being in which dignity may actually make a difference[583] and which the relevant legislators may realistically be willing to legislate on. This enables one to understand the type of implications the incorporation of dignity into UK/EU animal law might have in the foreseeable future.

583 By this I mean areas in which suffering may not be present or where the presence of suffering may not necessarily be the most pressing moral problem.

CHAPTER FIVE: THE APPLICATION OF BIOTECHNOLOGY TO ANIMALS

The concept of dignity is a regular visitor in the field of bioethics. Many writers focus on the relevance of the concept to biotechnological applications that affect humans.[584] However, biotechnological techniques have been applied to animals as well. For example, in order to serve farming purposes, researchers have created "swine that pollute less, fend off disease, and produce more meat",[585] hornless dairy calves,[586] TB-resistant cows,[587] fast-growing salmon,[588] fly-resistant sheep[589] and 'more productive turkeys that have had their broody behaviour programmed out of their natures'.[590] Another context in which there is genetic manipulation of animals is that of (medical) research and healthcare. Animals can be modified so as to make them suitable as test models[591] or used to supply human beings

584 The same appears to be true for writers on intellectual property and bioethics: Tine Sommer, 'Patenting the Animal Kingdom? From Cross-Breeding to Genetic Make-Up and Biomedical Research' (2008) 39 International Review of Intellectual Property and Competition Law 139.

585 Kerry Grens, 'The Superpowers of Genetically Modified Pigs' (*The Scientist*, 1 August 2018) <https://www.the-scientist.com/notebook/the-superpowers-of-genetically-modified-pigs-64513> accessed 16 July 2021.

586 Daniel Carlson and others, 'Production of Hornless Dairy Cattle from Genome-Edited Cell Lines' (2016) 34 Nature Biotechnology 479; Jef Akst, 'Genetically Engineered Hornless Dairy Calves' (*The Scientist*, 10 May 2016) <https://www.the-scientist.com/the-nutshell/genetically-engineered-hornless-dairy-calves-33553> accessed 16 July 2021.

587 Haibo Wu and others, 'TALE Nickase-Mediated *SP110* Knockin Endows Cattle With Increased Resistance to Tuberculosis' (2015) 112 (13) PNAS 1530-1539; Jenny Rood, 'Engineering TB-Resistant Cows' (*The Scientist*, 3 March 2015) <https://www.the-scientist.com/the-nutshell/engineering-tb-resistant-cows-35837> accessed 16 July 2021.

588 This is called the AquAdvantage™ Atlantic Salmon and it has been granted access to the market of some countries already: Margaret Rosso Grossman, 'Genetically Engineered Animals in the United States: The AquAdvantage Salmon' (2016) 11 European Food and Feed Law Review 190.

589 Lyle Munro, 'Future Animal: Environmental and Animal Welfare Perspectives on the Genetic Engineering of Animals' (2001) 10 CQHE 314, 315.

590 ibid.

591 A famous example concerns the Oncomouse, which is a mouse that has been 'genetically modified so as to predispose [it] to cancer': Sommer (n 584) 141. See further Zhuchi Tu and others, 'CRISPR/Cas9: a Powerful Genetic Engineering Tool for Establishing Large Animal Models of Neurodegenerative Diseases' (2015) 10 Molecular Neurodegeneration 35.

with organs (xenotransplantation)[592] or other bodily materials.[593] There are also innovations that serve, perhaps, somewhat less-expected purposes. Researchers have created beagles that are more muscular, which 'are expected to have stronger running ability, which is good for hunting [and] police (military) applications'.[594] They have also developed silkworms that create fluorescent silks for fashion purposes,[595] fluorescent pet animals,[596] and micro pigs.[597] It is also possible to clone animals: in 1996, Dolly the cloned sheep was created and reproductive cloning has by now become a much more common practice, for example in the pet industry.[598]

The number of biotechnological innovations relating to animals will increase in the future and be used in an even broader variety of contexts. They may 'come to the aid of the

592 Carl Zimmer, 'Editing of Pig DNA May Lead to More Organs for People' (*The New York Times*, 15 October 2015) <https://www.nytimes.com/2015/10/20/science/editing-of-pig-dna-may-lead-to-more-organs-for-people.html?action=click&module=RelatedCoverage&pgtype=Article&region=Footer> accessed 16 July 2021.

593 Examples are silk-spinning goats and protein-producing sheep which can, among other things, be used to affect blood coagulation factors. See Tanya Lewis, '10 Times Scientists Genetically Modified Animals and Came Up with Some Weird Results' (*Business Insider*, 17 October 2015) <https://www.businessinsider.com/genetically-modified-animal-experiments-2015-10?international=true&r=US&IR=T#dolly-the-sheep-1> accessed 16 July 2021 and Sommer (n 584) 141 respectively.

594 Jef Akst, 'Genetically Engineered Dogs' (*The Scientist*, 21 October 2015) <https://www.the-scientist.com/the-nutshell/genetically-engineered-dogs-34636> accessed 16 July 2021.

595 Kate Yandell, 'Genetically Modified Fashion' (*The Scientist*, 20 June 2013) <https://www.the-scientist.com/the-nutshell/genetically-modified-fashion-39148> accessed 16 July 2021. Such may also be applied in a medical context: Tetsuya Lizuka and others, 'Colored Fluorescent Silk Made by Transgenic Silkworms' (2013) 23 Advanced Functional Materials 5232.

596 Like ANDi the rhesus monkey and Alba the rabbit. See Julian Savulescu, 'Genetically Modified Animals: Should There Be Limits to Engineering the Animal Kingdom?' in Tom Beauchamp and Raymond Frey (eds), *The Oxford Handbook of Animal Ethics* (OUP 2011) 641, 643. Another example concerns the GloFish.

597 David Cyranoski, 'Gene-Edited 'Micropigs' to be Sold as Pets at Chinese Institute' (2015) 526 Nature 18.

598 See eg Mark Zastrow, 'Inside the Cloning Factory that Creates 500 New Animals a Day' (*New Scientist*, 8 February 2016) <https://www.newscientist.com/article/2076681-inside-the-cloning-factory-that-cre ates-500-new-animals-a-day/> accessed 16 July 2021.

incompetent hunter in the form of animals bred to be less alert or less dangerous';[599] help combating 'genetic disease due to in-breeding of purebred pets';[600] and be used to prevent (or reverse) the extinction of certain species.[601] Things become even more extreme when researchers aim to remove an animal's ability to suffer altogether. Such a situation is not completely hypothetical anymore.[602] To make an even more drastic suggestion, one may perhaps even be able to create animals that enjoy feeling pain, living under cramped conditions, or even being eaten.[603] The possibilities are endless, and much easier to achieve due to the new CRISPR technology (which is both cheap and relatively easy to apply).[604] Genetic engineering of animals is therefore expected to increase even more in terms of scale. It is claimed that we are now 'at the dawn of the gene-editing age',[605] and we therefore need to address the question of how the law should deal with such developments.

599 Munro (n 589) 316.

600 See Sarah Polcz and Anna Lewis, 'A Menagerie of Moral Hazards: Regulating Genetically Modified Animals' (2018) 46 The Journal of Law, Medicine and Ethics 180, 181 and Andrew Rosenblum, 'A Biohacker's Plan to Upgrade Dalmatians Ends Up in the Doghouse' (*MIT Technology Review*, 1 February 2017) <https://www.technologyreview.com/s/603530/a-biohackers-plan-to-upgrade-dalmatians-ends-up-in-the-doghouse/> accessed 16 July 2021.

601 Carl Zimmer, 'Bringing Them Back to Life: The Revival of an Extinct Species Is No Longer a Fantasy' in Susan Armstrong and Richard Botzler (eds), *The Animal Ethics Reader* (Taylor & Francis 2017) 479. For some more (possible) applications, see also Alta Charo and Henry Greely, 'CRISPR Critters and CRISPR Cracks' (2015) 15 The American Journal of Bioethics 11 and Sara Reardon, 'Welcome to the CRISPR Zoo: Birds and Bees Are Just the Beginning for a Burgeoning Technology' (2016) 531 (593) Nature 160.

602 See Anne Lansink, 'Technological Innovation and Animal Law: Does Dignity Do the Trick?' (2019) 10 European Journal of Risk Regulation 80, 87-88.

603 This provocative question has been raised by various authors, such as Darryl Macer, 'Uncertainties About "Painless" Animals' (1989) 3 Bioethics 226, 234. It should be noted, however, that such situations are currently hypothetical and mostly used to test the boundaries of ethical theories.

604 The Netherlands Commission on Genetic Modification (COGEM), *CRISPR & Animals: Implications of Genome Editing for Policy and Society* (Policy Report CGM/180501-01, 2018) 13, 17; Polcz and Lewis (n 600) 1.

605 'CRISPR Everywhere' (2016) 531 (7593) Nature 155.

This chapter aims to address this question. The first section gives an outline of the relevant legislation. It shows that the applicable legislation is mostly concerned with the issues of food safety, environmental damage, and animal health and welfare. There does not seem to be much space for other ethical considerations. Section 2 then discusses whether applying biotechnological techniques to animals indeed gives rise to such further ethical concerns. Do such techniques interfere with dignity, which the previous chapter defined as self-realisation? It will be argued that this is a tremendously difficult question to answer. First, because the answer may depend on when exactly the self starts. Does it start before it even physically exists, at the moment of conceiving, during any other stage of pregnancy, at the moment of birth, or at an even later stage in life? And can acts taking place before this moment also be said to interfere with the self? Second, because it is unclear which alterations, from a substantive point of view, actually interfere with one's process of self-realisation. Many authors focus on an animal's species-specific characteristics and functions. Although such a starting point seems to be an improvement over merely considering animals to be sentient beings, the unique element of each individual should not be forgotten. An alteration does not need to reach beyond the species boundaries in order for it to be able to interfere with an individual's self-realisation. At the same time, some alterations may also contribute in a positive way to a creature's self-realisation. Just as there is a tremendous diversity of beings, each individual also consists of different elements, and removing, adding or changing one feature may allow other elements to flourish. The difficulty lies in establishing which features are most determinative for the self. Apart from these ethical issues that focus on the animal itself, biotechnological applications also seem to affect human dignity. The practice of altering animals may reveal characteristics in humans which are generally not considered to be dignifying and may change the relationships humans have with themselves, with other human beings, and with other animals. Section 2

concludes that, although there are clearly difficulties in determining which alterations are dignifying and which ones are not, at least some modifications do not seem dignifying according to any standards. The law needs to be equipped with tools to be able to adequately address such applications. The next section then discusses how such tools could be defined in the law. It will be argued that perhaps the most nuanced and workable solution would be to use a template similar to the one laid down in Swiss animal dignity laws. Section 4 then proceeds to discuss some practical ramifications. It will be argued (1) that the relevant legal systems need to be internally coherent, in the sense that they need to focus on the creation, the distribution *and* the breeding of genetically modified or engineered animals (hereafter called GMAs); (2) that there are sound reasons to implement legislation at supranational level; and (3) that the development of alternatives to animal use may be one of the most promising and effective ways to combat the large-scale development of GMAs.

5.1 The Relevant Legislation

There is a complex legal framework that applies to the modification of animals and to animals that have been created or modified by means of biotechnological innovations. This section aims to highlight some of the main pieces of UK/EU legislation that may be relevant. It distinguishes between three types of legislation: legislation which governs the creation of GMAs; legislation which regulates their access to the market and the environment in general; and general animal protection laws.

5.1.1 Creating or Modifying Animals by means of Biotechnology

The main acts regulating the creation of GMAs are Directive 2010/63/EU[606] and the Animals (Scientific Procedures) Act 1986 (hereafter: ASPA). They are based on the fact that (many types of) animals are sentient beings[607] and put great emphasis on the avoidance and reduction of suffering.[608] The evaluation of a proposed scientific project contains various steps,[609] of which two important ones are: (1) the undertaking of a harm-benefit analysis[610] and (2) an assessment of whether the proposed project accords with the principle of the "three R's": replacement, reduction, and refinement.[611] The principle of replacement is proclaimed to be the most important one of these: only where no non-animal alternative is available, the other two principles become relevant.[612] Ironically, this approach seems to contradict other legislation, which prescribes mandatory animal testing.[613] Nevertheless,

606 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 [2010] OJ L276/33.

607 Although see also preamble recital 12 of Directive 2010/63/EU. Interestingly, ASPA and Directive 2010/63/EU are broader in scope than other pieces of animal welfare legislation, such as the AWA, in the sense that they also apply to cephalods and mammals in their foetal form. The reason for this can be found in these creatures' ability or increased risk of experiencing pain, suffering, distress and lasting harm. See preamble recitals 8 and 9 and Article 1 (3) of Directive 2010/63/EU.

608 See eg Articles 6, 13, 14, 15 of Directive 2010/63/EU and the preamble recitals, such as recitals 6, 8, 9, 12, 13, and 14.

609 See Article 38 of Directive 2010/63/EU. See further preamble recitals 38 and 39. To be sure, the breeders, suppliers and users also need to have been granted authorisation in order to carry out the proposed project.

610 Article 38(2)(d) of Directive 2010/63/EU. See also section 5B(3)(d) ASPA.

611 Article 38(2)(b) of Directive 2010/63/EU. These principles are laid down in Article 4 of Directive 2010/63/EU and originate from William Russell and RL Burch, *The Principles of Humane Experimental Technique* (1959), cited by European Commission, 'Caring for Animals: Aiming for Better Science: Directive 2010/63/EU on Protection of Animals Used for Scientific Purposes' (31 January 2019) <http://ec.europa.eu/environment/chemicals/lab_animals/pdf/guidance/directive/en.pdf> accessed 16 July 2021 accessed 16 July 2021.

612 See preamble recital 11 and Article 4 (1) of Directive 2010/63/EU.

613 For example, with respect to medicinal products for human beings. See Robyn Trigg, 'Patents, Animal Experiments and Animal Sentience – Where Do We Currently Stand?' (2019) 14 Journal of Intellectual Property Law & Practice 206, 207.

the purposes for which animal testing is allowed are limited. For instance, EU law prohibits cosmetic testing,[614] and the UK does not allow experiments involving animals that serve 'alcohol and tobacco product development' and 'offensive weapon development'.[615] The UK Government also 'recently introduced a policy ban, albeit in a limited way, on [experiments involving] household products'.[616] By contrast, Article 5(b)(iii) of Directive 2010/63/EU considers scientific projects to have a legitimate aim if they focus on 'the welfare of animals and the improvement of the production conditions for animals reared for agricultural purposes'.[617] Many of the examples mentioned in the introduction to this chapter seem to fit squarely within this description, and the described "legitimate aim" therefore seems to confirm that the experiential welfare is regarded the most important interest of animals.

Directive 2010/63/EU and ASPA contain two important limitations in terms of scope. First, they do not apply to practices which are 'not likely to cause pain, suffering, distress or lasting harm equivalent to, or higher than, that caused by the introduction of a needle in accordance with good veterinary practice'.[618] This "suffering requirement" could be interpreted in two (non-mutually exclusive) ways, both of which seem to be supported by the text of the legislation. First, the procedure itself could cause pain etc, for example

614 Regulation (EC) 1223/2009 of the European Parliament and of the Council of 30 November 2009 on cosmetic products [2009] OJ L342/59. See further Case C-592/14 *European Federation for Cosmetic Ingredients v Secretary of State for Business, Innovation and Skills* [2016] 9 WLUK 380 and Yen-Lin Agnes Chiu, 'European Federation for Cosmetic Ingredients v Secretary of State for Business, Innovation and Skills: A Global Message Concerning Animal Tested Cosmetic Products' (2018) 43 European Law Review 934.

615 Wildlife and Countryside Link and UK Centre for Animal Law, 'Brexit: Getting the Best Deal for Animals' (January 2018) <https://www.alaw.org.uk/wp-content/uploads/Brexit-Getting-the-Best-Deal-for- Animals-Full-Report.pdf> accessed 16 July 2021, 42.

616 ibid.

617 See also section 5C(3)(b)(iii) ASPA.

618 Article 1(5)(f) of Directive 2010/63/EU and section 2(1) ASPA.

by administering certain substances or by carrying out a painful surgery. Second, the type of animal that is created through the procedure may experience pain, suffering, distress or lasting harm later in its life due to the procedure that was carried out. This second interpretation would be supported by Article 1(4) of Directive 2010/63/EU[619] and sections 2(2A) and 2(3A)(b) ASPA. Nevertheless, it is in any event clear that these instruments take pain, suffering, distress or lasting harm as a minimum requirement. If none of these harms is likely to (or, as put by UK law, "may") occur, the relevant legislation does not apply.

Second, the Directive applies only to animals that are 'used or intended to be used in procedures, or bred specifically so that their organs or tissues may be used for scientific purposes'.[620] It does not apply anymore once the relevant animals have, among other things, been 'returned to a suitable habitat or husbandry system'.[621] It is not entirely clear from the Directive whether it applies to the offspring of GMAs (provided that they will not be used for research purposes).[622] ASPA is more explicit. Section 2(3B) provides that 'The breeding of an animal is a regulated procedure if…the animal is bred from an animal whose genes have mutated or been modified or from a descendant of an animal whose genes have mutated or been modified'.[623] However, does this provision only include the first two

619 It provides that the Directive 'shall apply to animals used in procedures, which are at an earlier stage of development than that referred to in point (a) of paragraph 3, if the animal is to be allowed to live beyond that stage of development and, as a result of the procedures performed, is likely to experience pain, suffering, distress or lasting harm after it has reached that stage of development'.

620 Article 1(2). Article 3(1) of Directive 2010/63/EU lays down the definition of a procedure. Similarly, ASPA does not apply to procedures which do not have a qualifying purpose as laid down in section 2(1A).

621 Article 1(2) of Directive 2010/63/EU. There does, however, not seem to be an obvious equivalent of this provision in ASPA.

622 Although Article 3(1) seems to suggest that this may be the case. It provides that a 'procedure' 'includes any course of action intended, or liable, to result in the birth or hatching of an animal or the creation and maintenance of a *genetically modified animal line* in any such condition' (emphasis added).

623 It is further required that 'the animal is to be allowed to live until after it has attained the stage of its development when it is a protected animal' and that 'after the animal has attained that stage the

generations of offspring or also all the subsequent generations? What is more, the non-experimental breeding of animals for the purposes mentioned in section 2(8) ASPA are explicitly excluded from regulation under ASPA as well.[624] The applicability of the abovementioned legal instruments to GMAs' offspring would be relevant, as it is expected, at least regarding some types of GMAs, that it is mostly or perhaps even only their descendants that will actually be used, for example, in the food supply chain.[625]

The abovementioned pieces of legislation do not fully exclude further ethical considerations. Notably, when evaluating a scientific project, a 'harm-benefit analysis' needs to be carried out, for the purpose of assessing 'whether the harm to the animals in terms of suffering, pain and distress is justified by the expected outcome *taking into account ethical considerations*, and may ultimately benefit human beings, animals or the environment'.[626] However, even apart from the question of whether 'ethical considerations' can be interpreted so as to include non-suffering related ethical matters regarding the animals, the minimum requirement of negative experiential welfare remains untouched. This means that if no suffering, pain or distress is caused, further ethical problems are irrelevant as the Directive does not apply. A second reference to ethical considerations can be found in Annex V sub 2, to which Article 23(3) of Directive 2010/63/EU refers. It provides that the education and training of staff members which are to be involved in an experimental project with

animal may experience pain, suffering, distress or lasting harm of a level mentioned in subsection (1) by reason of the mutation or modification'. See further section 2(3C).

624 To be sure, it is not clear from the text of the provision whether the non-experimental breeding of pets is also excluded from ASPA, as this practice is not mentioned in subsection 8. However, the most natural interpretation would be to do so, given the fact that the purpose of ASPA is to regulate experimental and educational procedures and considering that other types of non-experimental practices are excluded in subsection 8 as well.

625 Ludivine Petetin, 'Precaution and Equivalence: The Critical Interplay in EU Biotech Foods' (2017) 42 European Law Review 831, 843.

626 Article 38(2)(d) of Directive 2010/63/EU (emphasis added). See also section 5B(3)(d) ASPA.

animals must pay attention to 'Ethics in relation to human-animal relationship, intrinsic value of life and arguments for and against the use of animals for scientific purposes'.[627] However, the fact that staff members possess knowledge on more general ethical matters regarding animals does not guarantee that the project in itself also meets those ethical requirements. What matters instead is whether those requirements are actually part of the list of criteria against which a project is to be assessed, which is not in any obvious manner the case.[628]

5.1.2 Access to the Market and the Environment

There are also laws which regulate the access of GMAs to the market and the environment in general. Perhaps the most prominent pieces of legislation are Directive 2001/18/EC,[629] which focuses on the release into the environment of genetically modified organisms (hereafter referred to as GMOs), and Regulation (EC) 1829/2003, which concerns genetically modified food and feed.[630] Importantly, however, these documents mostly focus on the effect GMOs have *on others*, that is, on humans and the environment in general. However, the relevant guidance documents issued by the European Food Safety Authority (EFSA)

627 Annex V sub 2, referred to in Article 23(3) of Directive 2010/63/EU.

628 Although it is repeated here that it is unclear whether they could fall under the 'ethical considerations' as mentioned in Article 38(2)(d) of Directive 2010/63/EU and section 5B(3)(d) ASPA.

629 Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms [2001] OJ L106/1. See also part VI of the Environmental Protection Act 1990 and the Genetically Modified Organisms (Deliberate Release) Regulations 2002/2443. Animals whose genomes have been edited are considered to be GMOs too: Case C-528/16 *Confédération paysanne and Others v Premier ministre and Ministre de l'agriculture, de l'agroalimentaire et de la forêt* ECLI:EU:C:2018:583. See in this connection also Article 19 of Directive 2010/63/EU on the release of ex test-animals, which may include genetically engineered ones.

630 Regulation (EC) 1829/2003 of the European Parliament and of the Council of 22 September 2003 on genetically modified food and feed [2003] OJ L268/1. See further the Genetically Modified Food (England) Regulations 2004/2335. On GMAs and food safety regulation, see generally Petetin (n 625).

also touch upon the health and welfare of the modified animals themselves.[631] Specifically, they make use of a comparative approach: 'The questions that must be considered are not only whether there is a change *per se*, but whether those changes affect an animal's health and welfare, for better or for worse, and whether those changes might lead to other requirements for housing, nutrition or in management'.[632] 'A comparison of the health and welfare between the comparator(s) and the GM animal *for their commercial lifetimes* should be made'.[633] The circumstances under which their non-modified counterparts usually live (such as industrial farming) do therefore seem to be part of the assessment.[634] If a specific type of GMAs shows 'serious adverse effects',[635] authorisation should in principle not be granted. However, the modification may nevertheless be allowed if the 'intended effect is so beneficial that it outweighs any small or possible negative effect'.[636]

Just like Directive 2010/63/EU and ASPA did, the legislation governing the access of GMAs to the market and the environment leaves space for further ethical considerations

631 European Food Safety Authority (EFSA), 'Guidance on the Risk Assessment of Food and Feed from Genetically Modified Animals and on Animal Health and Welfare Aspects' (2012) 10 (1) EFSA Journal 2501, 36-41; European Food Safety Authority, 'Guidance on the Environmental Risk Assessment of Genetically Modified Animals' (2013) 11 (5) EFSA Journal 3200, 46-47. Note how these guidance documents do not touch upon further 'ethical, moral or other societal issues beyond its scientific remit', as EFSA does not have a mandate to do so: European Food Safety Authority, 'Cloning' <https://www.efsa.europa.eu/en/topics/topic/cloning> accessed 16 July 2021. For EFSA's mandate, see Regulation (EC) 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety [2002] OJ L31/1.

632 EFSA, 'Guidance on the Risk Assessment of Food and Feed from Genetically Modified Animals' (n 631) 36.

633 ibid.

634 In this context, the following two comments are also noteworthy: 'Those making welfare assessments should consider the biological functioning of the species of animal in the environment in which it is placed' and 'Applicants should show that the GM animals' health and welfare is resilient to a range of different commercial farming systems likely to be encountered within the EU'. See EFSA, 'Guidance on the Risk Assessment of Food and Feed from Genetically Modified Animals' (n 631) 37, 38.

635 ibid 37.

636 ibid 38.

as well. Notably, Article 29 of Directive 2001/18 could be utilised by the Commission, on its own initiative or at the request of the European Parliament, the Council of the EU or a Member State, in order to 'consult any committee [the Commission] has created with a view to obtaining its advice on the ethical implications of biotechnology, such as the European Group on Ethics in Science and New Technologies [EGE], on ethical issues of a general nature'.[637] Depending on how this provision were to be interpreted, it could potentially allow the competent authority concerned to draw on this advice so as not to permit the said GMAs to be placed on the market. It could further be utilised by other competent authorities and/or the Commission itself so as to object to the placing on the market of the GMA concerned, in accordance with the procedures established under the Directive.

However, it remains to be seen what the practical effect of this provision will be. The Commission (and the other parties that were mentioned in the provision) seems to have a lot of discretion as to whether it will consult such committee at all,[638] and the substantive views of the committee members will obviously be determinative for the outcome of the advice.[639] At least equally important are the issues of the status accorded to the advice of

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637 See also Article 33 of Regulation 1829/2003, which contains a similar provision. See further Article 5(3)(g) of Regulation 1829/2003, although no prohibition of any sort is laid down in this provision: mere labelling is sufficient.

638 The language of the provision supports such reading. Article 33 of Regulation 1829/2003 uses the formulation of "may consult" and none of the two articles concerned seems to contain an obligation to consult such committee, neither in more general terms nor when a specific application for authorisation is assessed. However, it should in this connection be noted that Article 2 of Commission Decision (EU) 2016/835 of 25 May 2016 on the renewal of the mandate of the European Group on Ethics in Science and New Technologies [2016] OJ L140/21 provides that such advice can also be given 'on request by [the] chair [of EGE] with the agreement of the Commission services'.

639 EGE has recently released a new opinion on genome editing: European Group on Ethics in Science and New Technologies (European Commission), 'Opinion No 32: Ethics of Genome Editing' (19 March 2021) <https://op.europa.eu/en/web/eu-law-and-publications/publication-detail/-/publication/6d9879f7-8c55-11eb-b85c-01aa75ed71a1> accessed 16 July 2021. For some of its earlier opinions, see European Group on Ethics in Science and New Technologies (European Commission), 'Opinion No 23: Ethical Aspects of Animal Cloning for Food Supply' (16 January 2008) <https://op.europa.eu/en/publication-detail/-/publication/37ab868f-f414-42e7-b448-761879949403/language-en/format-PDF/source-77404396> accessed 16 July 2021 and European Group of Advisers on the Ethical Implications of Biotechnology (European Commission), 'Opinion

such a committee[640] and whether ethical considerations as raised by the committee members are allowed to be taken into account when the relevant authorities review a concrete application for authorisation. Article 29(3) provides in this connection that: 'The administrative procedures provided for in this Directive shall not be affected by paragraph 1'. The most natural interpretation to be accorded to the latter provision is that the Article 29 consultation would not affect the various deadlines provided for in the Directive for the authorisation of GMOs as products (or in products). However, it could also be taken to mean that the advice of such committee does not play a substantive role in the review of a specific, concrete application for authorisation. This latter reading would be supported by the fact that ethical issues concerning animals which do not involve suffering do not (in any obvious way) form part of the criteria against which an application is to be assessed. It may therefore be the case that the Directive ought to be amended if the ethical committee were to draw on non-suffering related issues regarding animals in its advice. In this connection, it is worth emphasising that there are currently no GMAs on the (food) market, nor have any applications been made.[641] This is, however, not equally the case for other countries,[642] and it may therefore only be a matter of time before the EFSA will be faced with such applications. The treatment of such applications may perhaps lead to more clarity on the above-mentioned issues.

No 7: Ethical Aspects of Genetic Modification of Animals' (21 May 1996) <https://ec.europa.eu/environment/chemicals/lab_animals/pdf/genetic_modification.pdf> accessed 16 July 2021.

640 The advice of EGE is not legally binding. However, it may nevertheless carry substantial weight in policy-making. See Aurora Plomer, 'The European Group on Ethics: Law, Politics and the Limits of Moral Integration in Europe' (2008) 14 European Law Journal 839, 841 and Helen Busby, Tamara Hervey and Alison Mohr, 'Ethical EU Law? The Influence of the European Group on Ethics in Science and New Technologies' (2008) 33 European Law Review 803.

641 European Food Safety Authority, 'Genetically Modified Animals' <https://www.efsa.europa.eu/en/topics/topic/genetically-modified-animals> accessed 16 July 2021.

642 See Grossman (n 588).

Cloned animals do not fall within the ambit of the abovementioned laws on GMOs, because they are not genetically modified. However, various proposals have been submitted in the past at EU level in order to ban the cloning of animals for food purposes and the bringing of such animals (and products deriving from them) on the market.[643] One of the main concerns underlying these proposals was the aversive effect of cloning techniques on animal welfare and health. None of the proposals has, however, been adopted. Therefore, until more specific legislation is adopted, all cloned animals fall under the Novel Foods Regulation.[644] This means they are subject to pre-market approval based on a food safety risk assessment. The legislative proposals that have so far been submitted are, however, limited to animals that serve food purposes. They do not constitute a more general framework for all types of cloned animals.[645]

Naturally, there are also other laws that regulate the access of GMAs to the market, such as legislation on labelling[646] and intellectual property laws.[647] Interestingly, the latter area also contains morality provisions.[648] More specifically, they allow inventions to be

643 European Commission, 'Proposal for a Directive of the European Parliament and of the Council on the Cloning of Animals of the Bovine, Porcine, Ovine, Caprine and Equine Species Kept and Reproduced for Farming Purposes' COM (2013) 892 final (Brussels, 18 December 2013) <https://ec.europa.eu/transparency/regdoc/rep/1/2013/EN/1-2013-892-EN-F1-1.Pdf> accessed 16 July 2021; European Commission, 'Proposal for a Council Directive on the Placing on the Market of Food from Animal Clones' COM (2013) 893 final (Brussels, 18 December 2013) <https://ec.europa.eu/transparency/regdoc/rep/1/2013/EN/1-2013-893-EN-F1-1.Pdf> accessed 16 July 2021.

644 See preamble recital 14 of Regulation (EU) 2015/2283 of the European Parliament and of the Council of 25 November 2015 on novel foods [2015] OJ L327/1. GMOs are excluded from this regulation.

645 This was also explicitly acknowledged in section 1.4 of proposal COM (2013) 892 (n 643).

646 Regulation (EC) 1830/2003 concerning the traceability and labeling of genetically modified organisms and the traceability of food and feed products produced from genetically modified organisms [2003] OJ L268/24. See also the Genetically Modified Organisms (Traceability and Labelling) (England) Regulations 2004/2412.

647 On animal biotechnology and intellectual property law, see Trigg (n 613) and Sommer (n 584).

648 eg Article 6 of Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions [1998] OJ L213/13; Article 53 (a) of the European Patent Convention; Article 27 (2) of the TRIPs Agreement.

considered unpatentable in case their commercial exploitation would be 'contrary to *ordre public* or morality'.[649] Interested parties have sought to exploit this provision in order to ban the patenting of the Oncomouse.[650] Among other things, they relied on 'the idea that evolution [is] being manipulated' and on 'the use of animals purely as a means to an end'.[651] However, these arguments did not achieve the desired result. The Board decided that it was not part of its tasks to assess the morality of a specific invention or its patenting,[652] nor did it consider it to be its task to consider the morality of patenting animals in general.[653] It further considered that there was no evidence that Oncomice would constitute a threat to evolution[654] or that the public considered the use of GMAs in medical research morally unacceptable.[655] Intellectual property lawyers have in this connection argued that the relevant authorities have adopted a narrow interpretation with respect to the morality provision. They seem hesitant to take a strong moral stand.[656] To some extent, this approach is understandable. Intellectual property lawyers warn that intellectual property law may not be suited to address issues such as 'animal welfare, escape into the environment and cloning

649 ibid. Article 6 of Directive 98/44/EC adds to this: 'On the basis of paragraph 1, the following, in particular, shall be considered unpatentable: (a) processes for cloning human beings; (b) processes for modifying the germ line genetic identity of human beings; (c) uses of human embryos for industrial or commercial purposes; (d) processes for modifying the genetic identity of animals which are likely to cause them suffering without any substantial medical benefit to man or animal, and also animals resulting from such processes'.

650 See Board of Appeal of the European Patent Office, Decision of 6 July 2004, T 315/03 (Oncomouse). The applicants relied on Article 53(a) of the European Patent Convention.

651 Sommer (n 584) 159.

652 Its only task is to assess whether the 'publication or exploitation' of the specific patent in question would be contrary to morality or "ordre public".

653 See section 4.2 of the decision.

654 See section 13.2.11 of the decision.

655 See sections 13.2.13 to 13.2.21 of the decision.

656 Trigg (n 613) 207.

techniques'.[657] Sommer writes that: 'If by granting patents in this area, the patent system is far ahead of the regulatory system, then public resistance will be directed towards patent law, ignoring the fact that patent law does not regulate commercial exploitation. Such concerns would thus be addressed to the wrong regulatory system'.[658]

5.1.3 General Animal Welfare Laws

Once GMAs have been brought on the market, the regular animal welfare laws apply. Exactly which piece of legislation applies depends on the area of application. In broad terms, the AWA is the leading act for animal welfare in the UK. We have seen that the AWA focuses on the experiential welfare of animals as well.[659] Nevertheless, it is important to realise that once animals have been genetically engineered or altered, there is not much animal laws can do anymore to undo the act. The value of general animal laws therefore lies in their ability to address the breeding of GMAs. Such breeding seems to fall outside the scope of market access laws and we have seen that it is not clear whether Directive 2010/63/EU and ASPA apply to all types and generations of offspring either. Animal laws could fill this gap by further regulating such practices if this turns out to be ethically necessary.

657 Sommer (n 584) 160.

658 ibid 160-61.

659 Note how the AWA already regulates, to a certain extent, the harmful intervention in animal abilities etc after birth. Section 7 namely proscribes the administration of a poisonous or injurious drug or substance. Noël Sweeney, *A Practical Approach to Animal Welfare Law* (5m Publishing 2017) 23 writes about this: 'It is primarily aimed at those taking advantage of animals by making them take drugs to run faster, fight harder or grow fatter. While it is aimed at curbing how the animal is affected by the substance, it would apply to anyone using a substance in horse racing, dog fighting, bestiality and pornography.'

5.1.4 Beyond Experiential Welfare

The many pieces of legislation that apply to GMAs seem to confirm the conclusions that were drawn in the third chapter of this thesis. Insofar as the interests of animals themselves are taken into account, the focus is on their welfare (and health). Yet again, it is their affective wellbeing that seems to matter. If one wished to object to the creation of (a certain type of) GMA because one considers it to be morally wrong, one may sometimes be able to rely on suffering-based criteria for this purpose.[660] It may be that the invention itself causes suffering to the animal, for example, because of flawed procedures or painful side-effects.[661] One may also argue that the overall industry in which the animal is embedded (such as industrial farming) causes the animal to suffer, and therefore employ suffering-based criteria to try eliminate the industry altogether. This would most likely lead to the disappearance of the GMAs concerned as well.

However, there may also be cases where neither the invention nor the overall industry causes any suffering (or where the invention even reduces the total amount of suffering). An 'industry may for example not cause any suffering due to its nature. This may be the case where pets are involved. Innovations one could think about in this context are micropigs and fluorescent animals'.[662] Another reason why an invention or the overall industry might not cause any suffering can be found in the abovementioned practice of removing the animal's ability to suffer altogether. Mere suffering-based criteria cannot help address

660 For a more elaborate explanation, see Lansink (n 602).

661 For some examples, see Elisabeth Ormandy, Julie Dale and Gilly Griffin, 'Genetic Engineering of Animals: Ethical Issues, Including Welfare Concerns' (2011) 52 The Canadian Veterinary Journal 544, 547-48. Veterinarian Michael Fox is also concerned about the suffering that genetic engineering might cause to animals. See Munro (n 589) 320.

662 Lansink (n 602) 87. This argument of course only holds true if the other conditions, such as the living circumstances of the pet, are not detrimental to the animal's welfare and if the fluorescent being, for instance, does not suffer from any other relevant side-effects such as being more prone to being found by predators.

such situations, and it is therefore especially in relation to these situations that a legal gap exists (insofar as the creation of such GMAs were to be found morally reprehensible in the first place, of course). To be sure, the creation, distribution and/or release of such GMAs may perhaps still be prevented by some of the abovementioned laws whose primary purpose is not to protect the animal itself. However, the (proposed) GMAs would in such case only be protected indirectly. They would only be protected if that were necessary for the protection of humans and/or the environment, and so on. As such, if such problems were not to arise or if we were to find a solution to these issues in the future, the (proposed) GMAs would not be protected anymore. Alternatively, the ethical provisions contained in laws which regulate the access of GMAs to the market could perhaps be utilised to this effect. However, these laws are limited to market access, and it remains to be seen what the practical effect of these ethical provisions will be.

5.2 The Ethical Aspects of GMAs

Many types of genetic engineering of animals are different in nature from those that are (expected to be) applied to human beings. While humans are likely to use biotechnology to *improve* themselves as beings (although people can reasonably disagree about the question of what it means to improve a human being and if this is possible through biotechnological innovations at all),[663] this is not by definition the case for their applications to animals. In the case of animals, biotechnology may be used to *diminish* their capabilities, for example, by taking away their consciousness or ability to feel pain. Disenhanced animals may be

663 See also Leon Kass, 'Ageless Bodies, Happy Souls: Biotechnology and the Pursuit of Perfection' (2003) 1 The New Atlantis 9, 12-14 on definitional issues relating to concepts such as enhancement. See Sarah Chan, 'Should We Enhance Animals?' (2009) 35 Journal of Medical Ethics 678, 679-80 for definitions of animal enhancement.

better able to serve human needs or to cope with environments that human beings forcibly put them into (such as industrial farms).

There have been discussions about the moral status of animals with enhanced capacities. Some authors argue that such animals should also be assigned more rights, or at least a higher level of protection.[664] It is interesting to think about how this would work the other way around. Should animals whose capacities have deliberately been diminished also be offered fewer legal protections because of their changed nature? With the rise of biotechnology such questions are inescapable. But even before answering them, it should be asked whether creating GMAs is morally acceptable in the first place.

5.2.1 The Start of the Self and Applicability to a GMA's Offspring and Cloned Animals

It has been argued in chapter 4 that dignity is about self-realisation. Whether a biotechnological innovation is dignifying therefore depends on the extent to which it contributes to or interferes with an individual's process of self-realisation. This process presupposes the existence of a self and a crucial question therefore seems to be when exactly the self starts. Does it start before it even physically exists (is there what some would call a soul?), at the moment of conceiving, during any stage of pregnancy, at birth, or at an even later stage in life?[665] The answer to this may affect whether a modification interferes with the self and hence with dignity. After all, how could one interfere with the self if it does not even exist

664 This argument could even be extended to robots or other machines. See Alasdair Cochrane, 'Evaluating "Bioethical Approaches" to Human Rights' (2012) 15 Ethical Theory and Moral Practice 309, 319, cited in Raffael Fasel, 'The Old "New" Dignitarianism' (2018) 25 Res Publica 531, 534.

665 Similar debates, which concern the issue of when personhood starts, are present in the context of abortion.

yet? [666] In fact, depending on the answer to when the self starts, one may even argue that the dignifying character of a biotechnological application depends on the specific technique that was used for the modification.[667]

There are two possible responses. First, one may reply that, although the self may not yet exist at the moment of modification, the groundwork for the future self is already in place. By manipulating its foundation, one also affects the future self.[668] To be sure, some people may argue that a non-identity problem arises here, since there is no existing person that has been harmed.[669] However, on the supposed set of facts this does not necessarily seem to be a worrying objection, since ones creates a creature that is in some way less (or differently) functional and therefore capable of less self-realisation *whatever self it has*.[670] Second, one could focus on the fact that the manipulator creates a self based on desired criteria.[671] The animal is not shaped by whatever external force, but humans instead decide what type of self will be created. In that sense, the development of the self is interfered with, because it is pre-engineered what exact self one will be. This second response would also be relevant for the offspring of GMAs, for cloned animals and perhaps even for animals which are created by means of the more traditional method of selective breeding.[672] Even

666 See also Clare Palmer, 'Animal Disenhancement and the Non-Identity Problem: A Response to Thompson' (2011) 5 Nanoethics 43.

667 For example, Savulescu (n 596) 641 describes (the processes of) three types of genetic modification.

668 However, it is questionable whether this type of argument would work for all techniques of bioethical engineering. See Palmer (n 666) 45.

669 On the non-identity problem, see Melinda Roberts, 'The Non-Identity Problem' in Edward Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Fall 2009) <http://plato.stanford.edu/archives/fall2009/en tries/nonidentity-problem/> accessed 16 July 2021.

670 I am grateful to Professors Jonathan Herring and Charles Foster for making these remarks.

671 This kind of argument is used in relation to parents too. See Jonathan Herring, 'Parental Responsibility, Hyper-Parenting and the Role of Technology' in Roger Brownsword, Eloise Scotford and Karen Yeung (eds), *The Oxford Handbook of Law, Regulation and Technology* (OUP 2017) 404.

672 The ethical parallels and differences between genetically engineered animals and animals which have been created by means of selective breeding are a regular topic of debate. See eg Elizabeth

though no direct modification takes place in either of these cases, researchers or breeders still pre-engineer a self, either by means of direct genetic interference (in the case of cloning) or by deliberately relying on earlier genetic adjustments (in the case of offspring). The question arises, however, whether one would not be stretching the boundaries too much with this latter type of reasoning. Is it really an argument about animal dignity? Admittedly, the argument may be too far-fetched, in which case a human dignity (and society) related argument may be the only possible argument to make.[673]

5.2.2 Practical Constraints

Biotechnological applications are surrounded by controversy. Partially, the reason for this lies in practical constraints. With respect to human enhancement, some worry about equal access to enhancement technologies,[674] the possibility of undermining or limiting children's agency,[675] and the possible threat to "ordinary" humans.[676] Note in this connection how enhancing animals may also be perceived to pose a threat to ordinary humans, as the differences between humans and animals become smaller and hence the possible moral

Loder Reed, 'Animal Dignity' (2016) 23 Animal Law 1, 59-60; Ormandy and others (n 661) 7; Kevin Smith, 'Animal Genetic Manipulation: A Utilitarian Response' in Armstrong and Botzler (n 601) 418, 420-21.

673 See also Paul Thompson, 'The Opposite of Human Enhancement: Nanotechnology and the Blind Chicken Problem' (2008) 2 Nanoethics 305. See section 5.2.5 of this thesis for the human dignity implications.

674 See eg Kelly Sorensen, 'Genetic enhancements and expectations' (2009) 35 Journal of Medical Ethics 433. Cf. Walter Veit, 'Cognitive Enhancement and the Threat of Inequality' (2018) 2 Journal of Cognitive Enhancement 404.

675 eg Jürgen Habermas, *The Future of Human Nature* (Blackwell 2003) 23, cited and discussed in Ori Lev, 'Will biomedical enhancements undermine solidarity, responsibility, equality and autonomy?' (2011) 25 Bioethics 177 and Nick Bostrom, 'In Defense of Posthuman Dignity' (2005) 19 Bioethics 202, 211. See also Allen Buchanan and others, *From Chance to Choice: Genetics and Justice* (CUP 2000), cited in Palmer (n 666) 45. Cf. Julian Savulescu, 'In Defence of Procreative Beneficence' (2007) 33 Journal of Medical Ethics 284.

676 Bostrom (n 675) 204. Although see Ingmar Persson and Julian Savulescu, 'Getting moral enhancement right: the desirability of moral bio-enhancement' (2013) 27 Bioethics 124. For an excellent overview of the main arguments relating to human enhancement and cloning, see Jonathan Herring, *Medical Law and Ethics* (OUP 2014) 399-402; 407-10.

justifications for treating them differently weaker.[677] Furthermore, the autonomy argument could perhaps also be made with regard to GMAs,[678] although it is likely that such animals would have served human purposes anyway, regardless of whether they were modified in order to serve these in more effective or efficient manners.[679]

Practical arguments directed at the application of biotechnology to animals specifically concern, among other things, potential environmental or ecological hazards,[680] species or herds' decreased ability to adapt to a changing environment due to their weakened genetic diversity,[681] and, obviously, potential unintended side-effects affecting animal welfare.[682] It has further been argued that 'Cloning endangered species, although useful as a last resort, may unwisely shift our efforts away from protecting the critical habitat necessary to sustain viable endangered species populations.'[683] Although some of these practical constraints may be addressed by either further improving technical procedures or by means of careful policymaking, they are genuine concerns which may directly or indirectly affect the nature and lives of beings on this planet. This may be especially the case when it concerns environmental damage, as this could have large-scaled and irreversible effects on certain

677 See also Jason Scott Robert and Francoise Baylis, 'Crossing Species Boundaries' in Armstrong and Botzler (n 601) 405 and David DeGrazia, 'Human-Animal Chimeras: Human Dignity, Moral Status, and Species Prejudice' (2007) 38 Metaphilosophy 309.

678 See also Palmer (n 666) 45.

679 Although the non-identity problem may arise here.

680 Jeffrey Burkhardt, 'The inevitability of Animal Biotechnology?' in Armstrong and Botzler (n 601) 425, 427-28. See also Bernard Rollin, 'On *Telos* and Genetic Engineering' in Armstrong and Botzler (n 601) 449, 455.

681 See eg Heather Landry, 'Challenging Evolution: How GMOs Can Influence Genetic Diversity' (*SITN*, 10 August 2015) <http://sitn.hms.harvard.edu/flash/2015/challenging-evolution-how-gmos-can-influence-genetic-diversity/> accessed 16 July 2021.

682 See Lansink (n 602) 86.

683 Andrew Perzigian, 'Brief Summary of Genetic Engineering and Animals' (Michigan State University College of Law, Animal Legal and Historical Center 2003) <https://www.animallaw.info/article/brief-summary-genetic-engineering-and-animals-0> accessed 16 July 2021.

types of species or even the world as a whole.[684] Indeed, existing legislation seeks to prevent such consequences. Directive 2001/18/EC and Regulation 1829/2003 focus on the risks GMAs pose to humans and the environment, and all pieces of legislation mentioned in section 5.1 contain clauses which aim to protect animal welfare and health.

5.2.3 The Animal Being and Behaving Like an Animal

However, the practice of genetic engineering may also give rise to further ethical concerns. Many authors who have written on the topic focus on the idea of an animal *being and behaving like an animal*. Specifically, they tend to use the notion of *telos*, as originally developed by Aristotle. This notion focuses on the 'unique set of traits and powers that make the animal what it is',[685] with Rollin adding that *teloi* should not be seen as 'fixed and immutable but as slices or snapshots of a dynamic process of evolution, genetically encoded and environmentally expressed'.[686] In other words, *telos* is 'roughly what is encoded in an animal's genetics, as expressed in its normal environment'.[687] Authors hold, however, different views on how to address the *telos*. Rollin argues that 'there is nothing *intrinsically* wrong with genetically engineering animals'.[688] One is merely obliged not to violate the interests that are constitutive of the telos, rather than proscribed to change the telos itself. Rollin argues: 'If the animals could be made happier or less miserable by changing their natures, I see no moral problem in doing so (unless, of course, the changes harm or endanger

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684 The force of such argument has been disputed though: Burkhardt (n 680) 427.

685 Bernard Rollin, 'Telos' in Christopher Wathes and others (eds), *Veterinary & Animal Ethics: Proceedings of the First International Conference on Veterinary and Animal Ethics* (Blackwell Publishing 2013) 75, 76.

686 ibid.

687 Bernard Rollin, '*Telos*, Conservation of Welfare, and Ethical Issues in Genetic Engineering of Animals' (2015) 19 Current Topics in Behavioral neuroscience 99, 100.

688 Rollin (n 687) 107. For an elaborate discussion, see Bernard Rollin, *The Frankenstein Syndrome: Ethical and Social Issues in the Genetic Engineering of Animals* (CUP 1995).

other animals, humans, or the environment). *Telos* is not sacred; what is sacred are the interests that follow from it.'[689]

Those who focus on the closely related concept of animal integrity approach the issue somewhat differently.[690] They, too, focus on the animal being an animal. However, according to them, it is not only the interests that flow from an animal's *telos* that matter but, above all, what matters is the *telos* itself. According to its classical definition, three things are important: (1) the 'wholeness and completeness of an animal',[691] by which is meant that one should not tamper 'with the characteristics that make an animal the type of animal it is'[692]; (2) an animal's 'species-specific balance',[693] which 'refers to the balance between different physiological processes or between different bodily structures'[694]; and (3) the 'ability [of animals] to maintain themselves independently in an environment suitable to the species',[695] which at the very least means that they should not be made 'incapable of surviving without human aid'.[696] Importantly, authors that adhere to an animal integrity view argue that those alterations which are made for the animal's 'own good' do not

689 Rollin (n 687) 107.

690 This concept was first defined by Bart Rutgers and Robert Heeger, 'Inherent Worth and Respect for Animal Integrity' in Marcel Dol and others (eds), *Recognizing the Intrinsic Value of Animals: Beyond Animal Welfare* (Van Gorcum 1999) 41. Kate Millar and David Morton, 'Animal Integrity in Modern Farming' in Soren Holm, Jennifer Gunning and Ian Kenway (eds), *Ethics, Law and Society* 19 argues that traces of this concept can be found in UK animal law, eg in section 6 AWA (the prohibition on tail docking).

691 Rutgers and Heeger (n 690) 50.

692 Rob de Vries, 'Genetic Engineering and the Integrity of Animals' (2006) 19 Journal of Agricultural and Environmental Ethics 469, 472.

693 Rutgers and Heeger (n 690) 50.

694 De Vries (n 692) 472.

695 Rutgers and Heeger (n 690) 50.

696 De Vries (n 692) 472.

constitute a violation of animal integrity.[697] This 'own good' seems to refer to 'the capacities and functions that animals of the species in question are generally able to practice'.[698] The theory of animal integrity seems to be stricter in its approach than Rollin's theory, as it does not just approve alterations for any purpose (in contrast to Rollin, who only requires that animal welfare be safeguarded).

A relatively similar view has been expressed by Balzer, Rippe and Schaber. They draw on their concept of dignity (as described in the previous chapter), which they specifically developed in order to address bioethical situations. Their account closely resembles the theory of animal integrity in terms of the criteria used, as it focuses on 'functions that are normally performed by the members of the species'.[699] However, the authors focus directly on such species-specific functions, thereby deliberately omitting any reference to the notion of *telos*. The reason for this is that *telos* is usually interpreted as the end goal or purpose of an animal, and invoking this concept may therefore prevent the approval of any human interaction with animals.[700]

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697 Bernice Bovenkerk, Frans Brom and Babs Van den Bergh, 'Brave New Birds: The Use of "Animal Integrity" in Animal Ethics' in Armstrong and Botzler (n 601) 456, 461.

698 See Rutgers and Heeger (n 690) 43-44: 'By "a good of their own' (or 'natural good'), we mean that animals have ends and purposes that are characteristic to them. They are oriented by themselves towards the development of species-characteristic abilities and the fulfillment of their needs. They strive to realize the patterns of behaviour specific to their species. They maintain the normal biological functions of their species by successfully adapting to their environment. They have some capacity for self-determination and self-renewal. It can be observed that it makes a difference to them whether or not their abilities can be manifested and it can meaningfully be stated that they are healthy or sick, that they are doing well (Von Wright, 1963; Taylor, 1986; Banner, 1995). This can further be clarified by stating that the own good of the animal refers to the capacities and functions that animals of the species in question are generally able to practice (Holland, 1990; Attfield, 1995)'.

699 Sara Elizabeth Gavrell Ortiz, 'Beyond Welfare: Animal Integrity, Animal Dignity and Genetic Engineering' (2004) 9 Ethics and the Environment 94, 111.

700 Philipp Balzer, Klaus Peter Rippe and Peter Schaber, 'Two Concepts of Dignity for Humans and Non-Human Organisms in the Context of Genetic Engineering' (2000) 13 Journal of Agricultural and Environmental Ethics 7, 20, 23, cited in Gavrell Ortiz (n 699) 111-112. Gavrell Ortiz (n 699) 110 argues that the concept of dignity is more promising than the concept of animal integrity, since it is also capable of including certain farming practices which do not affect the wholeness of the animal.

Although these theories are in principle conceptually distinct, they share a few important features. First, they seem to acknowledge that *animals are more than just sentient beings*. Notably, they are species members and this matters from a moral point of view.[701] Even though the various authors disagree on which aspect of the animal should take priority in a balancing exercise (its welfare, its functions, etc), they all seem to agree that tampering with species characteristics has ethical implications, even when it does not cause any suffering or even reduces the amount of it. It has been argued that this is true even for Rollin, who is an animal welfarist at heart.[702] At the same time, *none of the theories indicate that the subjective experiences of animals are irrelevant either*. In fact, all of them contain paragraphs suggesting that, at least on some occasions, the proposed alteration should nevertheless take place in order to safeguard animal welfare. Subjective experiences are likely to at least partially or occasionally be included within the category of 'animal's own good',[703] and also with regard to the mentioned account of animal dignity it has been argued that 'there are [arguably] cases where welfare concerns override respect for dignity'.[704] I agree with the literature on both of these points.

The abovementioned authors, and especially those who emphasise the species-specific functions, have been criticised for not 'really try[ing] to engage in a discussion regarding the plausibility at the core of their view: i.e. that something we do to an animal, or to produce an animal…may matter morally even though it does not matter to the animal itself

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701 The works of other authors also express such a view, such as Elizabeth Loder Reed (n 672) 59 and John Webster, 'Husbandry and Animal Welfare' in John Webster (ed), *Management and Welfare of Farm Animals: The UFAW Farm Handbook* (Wiley Blackwell 2011) 1 (the latter is cited in Peter Sandøe and others, ''The Blind Hens' Challenge: Does it Undermine the View that Only Welfare Matters in Our Dealings With Animals?' (2014) 23 Environmental Values 727, 729-30.

702 Bovenkerk and others (n 697) 456; Elizabeth Loder Reed (n 672) 58.

703 As mentioned in Bovenkerk and others (n 697) 461.

704 Gavrell Ortiz (n 699) 115.

(or to any other animals or involved humans)'.[705] A closer look at the literature reveals that *the authors' viewpoints seem to originate from their intuition*. The concept of animal integrity, for instance, is claimed to have 'been introduced to fill a gap between moral theory and moral experience'.[706] Similarly, with regard to human dignity, it has been argued that 'Tampering with human sentience and the characteristics that compose unique consciousness and personality breaches intuitive moral boundaries, even if it improves the experiences and functioning of the individual'.[707] Rollin also writes that the prospect of changing *telos* in order to make happier animals is 'undoubtedly jarring'.[708] Authors in this area therefore sought to develop their concepts with the purpose of justifying their already established moral intuitions.[709] It is worth noting that these intuitions seem to be widely shared. It is commonly argued in the relevant literature that there is agreement amongst many people that applying biotechnology to animals is morally wrong, or at least the most extreme applications,[710] even though people have difficulties in pointing out why exactly that would be so.[711] The adopted theory of dignity may be able to help explain this intuition: the self is in part constituted by one's species membership and the characteristics and

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705 Sandøe and others (n 701) 738.

706 Bovenkerk and others (n 697) 461.

707 Elizabeth Loder Reed (n 672) 58. See also page 60.

708 Rollin (n 680) 454.

709 Although it is recalled here that such an approach may be criticized by some. See eg Sandøe and others (n 701) 736. On intuition as a source of moral knowledge, see chapter 4 of this thesis.

710 Macer (n 603) 235. See also Paul Thompson, 'Ethics on the Frontiers of Livestock Science' in David Swain and others (eds), *Redesigning Animal Agriculture* (CABI 2007) 30, cited in Sandøe (n 701) 731, arguing that most people would consider it wrong to breed and use blind hens in egg production. To be sure, no such agreement exists with regard to human beings. John Rawls, for example, argues that 'eugenic policies are...not only permissible but required as a matter of justice': John Rawls, *A Theory of Justice* (Harvard University Press 1971), cited in Michael Sandel, 'The Case Against Perfection: What's Wrong with Designer Children, Bionic Athletes, and Genetic Engineering' (2004) 293 (3) The Atlantic Monthly 51.

711 Macer (n 603) 235.

functions that come with it. Tampering with these characteristics therefore seems to interfere with the process of self-realisation, and hence with dignity.

5.2.4 The Unique Individual

The literature's shifting focus from sentience to animals as a whole is a positive development. However, the accounts described above tend to focus heavily on species membership. Although such membership is definitely constitutive of one's self, we should be cautious not to forget about the other elements of a being, notably, about one's unique individual self. In this connection, it is worth noting that bioethical discussions often focus on extreme modifications. They focus on modifications which extend a being's characteristics beyond the species boundaries. Examples concern the removal of animal consciousness and the creation of animals that enjoy suffering. Indeed, such extreme type of cases may be valuable in testing the groundwork of ethical theories and give us insight into what we may at some point in the future need to be prepared for. However, biotechnological techniques may not only be applied to extend the normal range of a species' capacities, but also to modify characteristics of individuals within this normal range.[712] Even though such modifications do not turn an individual into a being that is completely different from the other beings of its species, it may still affect the dignity of that being as it may interfere with the individual self. What is more, by focusing so intensely on the characteristics of a species, the above-mentioned theories run the risk of regarding a fully functioning member of the species as

712 See in this connection also Guy Kahane and Julian Savulescu, 'Normal Human Variation: Refocussing the Enhancement Debate' (2015) 29 Bioethics 133.

the ideal.[713] Such an approach contravenes the message expressed by the disability rights lobby.

Foster has commented on the relationship between disability and dignity. Among other things, he argues that a '10-year-old achondroplastic child [should not] be treated so as to be of "normal" height and appearance'.[714] Indeed, although this child would still fit within the range of "normal" human beings, s/he would not be his/her unique individual self anymore.[715] In its most extreme form, this argument seems to prohibit any type of genetic engineering,[716] regardless of its nature or purpose. However, many people (including Foster himself, or at least so it seems[717]) may not be prepared to go this far. Indeed, the chosen dignity theory also leaves space for a more nuanced interpretation, which accepts that some enhancements may, in contrast, actually contribute to one's self-realisation. In this connection, it should be noted that not only is there an enormous diversity of creatures, but each individual creature, in turn, also consists of different elements. A dog called Lucy may, for example, be a carnivore, a hunter, a fervent runner, a social animal, a caring mother, and so on, but also carry the disease of hip dysplasia (HD) from a young age onwards. Although this HD may be perceived to be part of Lucy's identity, removing this physical barrier may enable other elements of her to be developed and to flourish (for example, her being the runner that she loves to be). The difficulty then is to determine which

713 This also seems to be confirmed by the fact that adherents of the animal integrity theory do not consider an act to constitute a violation of animal integrity if it is carried out for the animal's own good, which is to be interpreted as the animal's species-specific capacities and functions.

714 Foster (n 676) 152.

715 Note how this situation does not concern a correction to return P to a pre-existing condition (eg after an accident), but a "cure" for a disability.

716 And many, if not all, other types of medical treatment.

717 Foster (n 676) 152: 'There may be enhancements which allow one to be more fully oneself'. See further Charles Foster, 'Human Dignity: A Response to Camosy and Huxtable' (2015) 41 Journal of Medical Ethics 940.

of these elements would, overall, contribute more to the realisation of oneself.[718] This difficulty is exacerbated by the fact that disabilities themselves may also have instrumental value. They may be helpful in discovering or strengthening characteristics of oneself (and of others, for that matter) that may otherwise have been left undiscovered, such as one's creativity, perseverance, altruistic behaviour, and capacity to love and trust.

To be sure, these abovementioned arguments relate to what I would call "internal boundaries". That means they have to do with physical limitations inherent in a being. These are not to be confused with "external limitations", which are caused by the environment in which an animal is put by human beings (e.g. an industrial farm or a laboratory). Examples relating to external boundaries concern the removal of physical or emotional needs in an animal which, if they are not to be fulfilled (because the environment which humans put them in does not enable them to), cause aggression in the animal. Another example concerns the modification of an animal so as to make it a more suitable test model for animal experiments. Alterations which are prompted by external limitations seem to be fundamentally different from alterations which are made because of intrinsic limitations. The purpose of these is namely not to determine which element of the being should be highlighted in order to realise itself to the fullest extent: instead, they turn the animals into entirely different selves in order to better suit their environment (in which they were forcibly put), usually in order to serve human needs and desires.

The element of unique individuality is also relevant to the role of evolution. Proponents of enhancement theories sometimes argue that modifications realised by means of biotechnology would have nevertheless occurred in the future anyway due to the

718 In this connection, see also Sorensen (n 674), as cited in Herring (n 676) 408, who 'suggests that there is nothing wrong in "bringing out the best in people", but that what are objectionable are genetic interventions that "change the identity of the individual"'. Herring replied to this that the 'distinction is not clear: would producing a child who could run unusually fast be changing his or her identity?'.

evolutionary nature of animals. Biotechnological applications merely speed up this process. They are a matter of degree, not of kind. I want to draw attention to two points in relation to this.[719] First, although this argument may work for some types of modifications (such as disease resistance), other types are unlikely to ever occur naturally as they do not enable the animal to better adjust to its environment. Instead, they are applied in order to better serve human needs (for example, where rapid growth is achieved or where animal consciousness is removed). Second, the evolution argument only works at a species-level and not at the individual level. Perhaps the species will indeed be different in the future, but the specific individual in question would never be. S/he is different in nature from his/her future species-members and the modification would therefore interfere with *his/her* own process of self-realisation. In this connection, it will be highlighted that proponents further argue that it seems 'completely arbitrary' to 'say that the present genetic make-up is special', since 'genetic structures have changed continuously' throughout 'the history of evolution'.[720] It is recalled here that dignity is not about making the "best" version of a creature.[721] Instead, it is about being (the best version of) yourself.

5.2.5 Changing Moral Landscape and its Impact on Relationships

The abovementioned arguments mostly focused on the dignity of animals. However, applying biotechnology to animals may also have broader implications, notably, for human

719 For further criticism see eg H Verhoog, 'Defining Positive Welfare and Animal Integrity' (Proceedings of the Second NAHWOA Workshop, January 2000): 'it can be said that it looks very much like a naturalistic fallacy. Human beings also change during their lifetime, both physically and psychically. This does not hinder us in speaking about their physical integrity at any specific moment. Similarly in evolution. Evolution is a slow process, unlike the changes brought about by genetic engineering. More important, however, is the fact that we, as human beings, intentionally interfere in this process, and when the animals involved have a moral status (as in a biocentric theory) we must have good reasons for doing so, irrespective of the speed of evolutionary changes'.

720 Peter Sandøe, Nils Holtug and HB Simonsen, 'Ethical Limits to Domestication' (1996) 9 Journal of Agricultural and Environmental Ethics 114, 118.

721 In this connection, also remember the arguments made in relation to disability.

dignity. Us 'obtaining technical mastery over [the] nature [of beings on this earth]'[722] may affect who we are and transform the relationships we have with ourselves and with other beings. The effect of biotechnology on our characters and our moral landscape has been discussed by many authors.[723] Sandel criticises human beings' 'drive to mastery',[724] which he claims will 'transform three key features of our moral landscape: humility, responsibility, and solidarity'.[725] Thompson argues that 'the entire project [of creating blind chickens or mindless blobs] exhibits the vices of pride, or arrogance, of coldness, and of calculating venality'.[726] Loder Reed argues that '[a]ltering the core features of living beings for human purposes falls squarely within a virtue critique':[727] 'The importance of traits like humility, self-restraint, and gratitude are the subject of much ethics literature on the environment, as is the impact of vices like arrogance on environmental crises'.[728] Indeed, by altering beings for their own purposes humans show themselves unwilling to learn from and be changed by nature. The exhibited characteristics are generally speaking not considered dignifying[729]

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722 To use the words of Leon Kass, as cited in Bostrom (n 675) 205.

723 For an excellent overview, see also Foster (n 676) 139-43.

724 Sandel (n 710). This drive is also criticised from a religious corner. Stephen Clark argues that animal experimentation (including genetic manipulation) '"represents our single greatest sin: the intention always to control what's going on, to evade all penalties"'. See Munro (n 589) 319, citing Stephen Clark, *Animals and Their Moral Standing* (Routledge 1997).

725 Sandel (n 710).

726 Thompson (n 673) 314.

727 Loder Reed (n 672) 59.

728 ibid.

729 Although transhumanists may disagree. Bostrom (n 675) 213 writes that transhumanists 'insist that [human] dignity, in its modern sense, consists in what we are and what we have the potential to become, not in our pedigree or our causal origin. What we are is not a function solely of our DNA but also of our technological and social context. Human nature in this broader sense is dynamic, partially human-made, and improvable'. However, it should be noted here that many animals would, in contrast to human beings, be disenhanced rather than enhanced, and that the purpose of doing so is often to serve humans more effectively or efficiently rather than for the animal's own development.

and our ability to manipulate any being on earth may result in humans 'losing the capacity to relate to other animals, [humans'] own bodies and other human beings'.[730]

Biotechnological innovations, and our resulting 'self-understanding as "creator" or "designer"',[731] may also damage the human-animal relationship. They 'intensif[y] and increasingly imbalance' the 'present ambivalence and asymmetry' of this relationship.[732] Biotechnological applications would make animals even more dependent on and vulnerable to humans. What is more, the techniques would often be applied in order to serve human beings, and therefore serve to instrumentalise animals even further.[733] Animals would to an even larger extent be transformed into tools or machines for humans to use. In the next chapter it will be argued that the instrumentalisation of an animal does not seem dignifying for any of the actors involved, nor for society as a whole and for animals as a group within it.[734] It should further be noted that the technique of cloning in specific may also affect those human-animal relationships which are generally considered to be more value-laden or emotionally invested. Notably, cloning techniques may, especially when used to create a copy of one's pet, fail to capture the fact that a genetically identical individual cannot replace or secure the continuation of a pre-existing relationship.[735] This may lead to a

730 Traci Warkentin, 'Dis/Integrating Animals: Ethical Dimensions of the Genetic Engineering of animals for Human Consumption' in Armstrong and Botzler (n 601) 434, 444.

731 Silke Schicktanz, 'Ethical Considerations of the Human-Animal-Relationship under Conditions of Asymmetry and Ambivalence' (2006) 19 Journal of Agricultural and Environmental Ethics 7, 15.

732 ibid.

733 See also Andrew Linzey, *Animal Theology* (SCM Press 1994), cited in Munro (n 589) 319: 'genetic engineering is "animal slavery" and against the will of God'. It 'represents the concretization of the absolute claim that animals belong to us and exist for us'.

734 In this context, see also Loder Reed (n 672) 61.

735 See also Krista Hedinsdottir and others, 'Can Friends be Copied? Ethical Aspects of Cloning Dogs as Companion Animals' (2018) 31 Journal of Agricultural and Environmental Ethics 17.

devaluation of the pre-existing relationship and of relationships in general.[736] Furthermore, it should be realised that also in this context the newly created animal may actually be turned into an instrument, as the cloned animal is likely to be created in order to serve the owner's needs or grievous feelings. It is not really valued for whom it is, and perhaps not even given the opportunity to develop itself in the way it wishes, as its path and desired character-to-be are already sketched out by the owner.

An important caveat is, however, warranted. We should be careful not to assume the bad intentions of all parties involved. It may very well be that some involved parties, such as researchers and funders, contribute to the development of GMAs which are in and of themselves undignifying, but only do so for the purpose of alleviating animal suffering because they realise they are not in a position to make the practice or industry as a whole disappear. In such case, the act originates from the individual's empathy. Although the creation of the GMA may, on net account, still be undignifying, the act of the researcher or funder may, due to its intentions, very well be dignifying for him/herself.

5.2.6 Expansion of the Law's Toolbox

It can therefore be concluded that it is not easy to determine whether a specific biotechnological application is dignifying or not. The first question to answer is when exactly the self starts and whether the technique used is capable of interfering with this self at all. The following question focuses on which specific applications exactly contribute to or interfere with the process of self-realisation. A common focus-point of the literature revolves around the idea of an animal being an animal. Although this shifted focus is a positive development, inherent in the relevant theories is the trap of focusing solely on species membership,

736 ibid.

thereby neglecting other aspects of an individual. While a specific intervention may result in a perfectly normal species member, it may nevertheless interfere with the individual's process of self-realisation (and hence its dignity) by removing or altering its uniqueness. At the same time, the opposite is also true: some interventions may also allow an individual to realise itself further. An individual consists of a variety of elements and removing or altering one element may enable other elements to flourish. The difficulty lies in determining which of these elements is more constitutive of the self. This difficulty is exacerbated by the fact that diminished capabilities may also enable other aspects of an individual to be better developed, such as one's creativity or capacity to love and trust. One final factor to take into account when assessing the ethical aspects of GMAs relates to its impact on human dignity and relationships in general. The practice of altering animals may reveal characteristics in humans which are generally not considered to be dignifying, and it may change the relationship humans have with themselves, with other human beings, and with other animals. Most alterations are furthermore likely to be used in order to serve human purposes and therefore instrumentalise animals even further. This does not seem dignifying for any of the actors involved, nor for the society and animals as a group.

Although there may therefore be reasonable disagreement as regards to which specific alterations are dignifying and which ones are not, it seems clear that at least some alterations are not dignifying according to any standard. These would seem to include those applications which severely diminish an animal's capacities, such as when one removes a creature's consciousness, which may in fact largely result in the self vanishing altogether. It is recalled here that such undignifying acts may not cause, or may even reduce, animal suffering. The UK/EU legal orders, and their animal laws in specific, are not able to (adequately) address such acts due to their exclusive focus on affective welfare. The relevant

laws therefore need to be equipped with a more extensive toolbox in order to be able to adequately deal with biotechnological applications.

5.3 The Daunting Task of Finding an Appropriate Legal Definition

5.3.1 Legal Definitions

How should such an expanded toolbox look like then? The fact that many of the important issues identified above remain unsolved makes it tremendously difficult to find an appropriate legal definition or appropriate legal criteria. The most accurate option would be to use the more general term 'self-realisation', but such a legal definition would likely render the law unworkable due to its vagueness.[737] An obvious alternative would be to either ban or allow all applications, but perhaps a better and more nuanced solution would be to resort to a list of more concrete criteria against which applications could be tested. The most accurate template of criteria I have encountered so far seems to be the one provided by Swiss animal law.[738] In addition to the more commonly used criteria relating to suffering and welfare, it contains four unique criteria: it aims to protect animals from major interferences with their abilities, major interferences with their appearance, humiliation and excessive instrumentalisation.[739] Ideally, these criteria would need to be interpreted at an individual level and not merely assessed against the abilities and appearances that are typical of a

737 Which would be especially problematic insofar as criminal law would be involved, because of the nullum crimen, nulla poena sine lege certa principle.

738 For a more complete overview of Swiss law, see chapter 4 of this thesis. It should be noted though that, if one were to use these criteria, one would need to decide whether they should apply to (dis)enhancement techniques only or to all types of interactions between humans and animals, and draft the relevant provisions accordingly.

739 To be sure, the criterion 'interferences with the abilities' should not only include physical abilities, but also social and cognitive ones.

species member. The downside of such an approach would, however, be a practical one: traceability. It turns out to be tremendously difficult to recognise a GMA,[740] and this difficulty would only be exacerbated if a modification stayed within the normal range of abilities or appearance of a species.

A further look will be taken at how the criteria of (major) interferences with one's abilities or appearance are to be interpreted. Swiss law considers the following things to constitute 'harm',[741] which, according to the relevant Swiss authority, includes the 'major interference with the abilities':[742] an '[i]mpairment of species-specific properties, functions and habits', 'especially impairment of growth, reproductive capacity, adaptive capacity, mobility, and species-specific social behaviours'.[743] Although this seems to me to be a good starting point, there is no need to limit oneself to *species-specific* properties, functions and habits. What is more, this interpretation seems to focus mostly on *diminishing* the abilities of an animal. I wonder to what extent there is scope to include the *addition of abilities*. Imagine a chimpanzee with wings that enable it to fly or a dog with gills which enable it to stay underwater for a prolonged period of time. Such alterations do not need to entail a loss of function (the contrary is in fact true), whilst they may certainly transform the being into a different self. Perhaps the solution to this would be to interpret the word 'interferences' in a neutral sense, as in that it could be taken to mean both to "improve", to "diminish", to add and to remove properties, functions and habits.

740 COGEM (n 604) 56.

741 As mentioned in Article 3 of the Swiss Animal Welfare Act (TSchG).

742 Federal Food Safety and Veterinary Office FSVO (FSVO), 'Dignity of the Animal: Explanatory Notes on the "Weighing of Interests"' (1 May 2017) 5.

743 ibid.

Questions regarding the requirements that Swiss law attaches to interferences with the appearance arise as well. The change needs to lead 'to a loss of function'[744] and be 'permanent or irreversible'.[745] The second requirement seems to be a given for many bio-technological applications, but the first one could be subject to debate. Could a change in appearance really not affect the self when it does not lead to a loss of function? Imagine a purple dog with yellow spots and three tails. Surely, there seems to be room to argue that the self consists of more than merely one's functions (as also argued in chapter 4).[746] Additionally, it is unclear to me what the added value of 'interference with the appearance' as a separate criterion is if it requires a loss of function. Is this loss of function not exactly the purpose and scope of the other criterion, namely that of 'interference with the abilities'? It therefore seems to me that either the requirement of 'loss of function' needs to be omitted from the appearance criterion (if one holds the opinion that one's appearance is also constitutive of the self, as I do), or that the appearance criterion should be removed from the list of criteria altogether.

It should further be noted that the practice of cloning does not in any obvious way fall within the abovementioned criteria. There are, however, at least two ways in which the practice could perhaps still be brought within their ambit. First, acts of cloning could be included if they were to cause any pain or suffering to the cloned animal. The most likely cause for this would be a technically flawed procedure. Second, one could resort to the criterion of excessive instrumentalisation, since many types of cloned animals are likely to serve human purposes. However, the obvious question to arise is whether such

744 ibid 6.

745 ibid.

746 Note how the theory of animal integrity also focuses on the 'wholeness of an animal', a breach of which does not necessarily need to entail a loss of function.

instrumentalisation would actually be excessive.[747] Therefore, if the practice of cloning were indeed to be undignifying, and if one wanted to be completely certain that it would be included within the scope of animal laws, an additional provision would be needed.

Furthermore, the criteria as described above seem to put negative obligations on human beings. An interesting and, admittedly, somewhat provocative question is whether the development of bioethical techniques could also give rise to positive obligations.[748] It has been argued in this chapter that beings consist of various elements, and that it may occasionally be the case that the removal or alteration of a certain physical barrier would actually be dignifying for a creature as it would enable other elements of the individual to flourish. Could this conclusion justify the imposition of positive obligations on human beings? And if this were indeed the case, on whom should this obligation be put then: the state, the breeder, the future owner, or any other relevant person? Furthermore, the question arises as to whether the law would need to be amended for this to happen. The obligations of breeders, owners and other citizens are currently laid down in the AWA. Section 4 applies to all citizens, and criminalises not only acts that cause animal suffering, but also 'failures to act' that have such effect. However, positive obligations of a biotechnological nature would be extremely unlikely to meet the requirement of reasonability, especially when it concerns citizens that have no personal connection to the animal.[749] A more promising provision may be section 9, which puts a positive obligation on those who are responsible for an animal to 'take such steps as are reasonable in all the circumstances to ensure that the needs of an animal for which he is responsible are met to the extent required by

747 Of course, one may reasonably disagree on whether this requirement should be there in the first place.

748 On moral obligations to enhance animals, see Chan (n 663).

749 See section 4(3). Although the failure to act also applies to a person who is responsible for the animal: section 4(2).

good practice'.[750] Although this provision could perhaps be interpreted so as to include some types of biotechnological applications,[751] there are two potentially problematic aspects. First, section 1(2) AWA states that the Act does not apply to animals in a 'foetal or embryonic form'.[752] Many techniques of engineering would need to be applied before birth, whereas the animals are not yet protected by the AWA at that stage of development. Additionally, there is nothing in the text of the provision that indicates that the responsibility of an owner (which constitutes the positive obligation as set out in section 9 AWA) applies retrospectively, that is, before the owner acquired the animal.[753] Therefore, if one were to extend the scope of the AWA to any point before birth, it would probably only be the breeder on whom this positive obligation would rest. If one were to be of the opinion that such obligation should (also) be put on the future owner, it seems that the AWA would need to be amended.[754]

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750 These needs include the Five Freedoms as laid down in section 9(2). Furthermore, section 9(3) determines that '[t]he circumstances to which it is relevant to have regard when applying subsection (1) include, in particular (a) any lawful purpose for which the animal is kept, and (b) any lawful activity undertaken in relation to the animal'.

751 Obviously, such argument would only work in relation to an animal's (welfare) "needs".

752 Although section 1(3) states that: 'The appropriate national authority may...amend subsection (2) to extend the application of this Act to an animal from such earlier stage of its development as may be specified in the regulations'. Section 1(4) prescribes that this power 'may only be exercised if the appropriate national authority is satisfied, on the basis of scientific evidence, that animals of the kind concerned are capable of experiencing pain or suffering'. It is not clear from the text whether "the kind" only refers to the type of species, or also to the stage of development.

753 Section 3(3) states that 'For the purposes of this Act, a person who owns an animal shall always be regarded as being a person who is responsible for it', but the purpose of this provision seems to be to ensure that owners cannot abstain from their positive obligations by arguing that another person was responsible for the animal at the time of the criminal act. Indeed, a retrospective application may seem quite unreasonable, as the owner of an animal is generally not in a position to affect the animal's treatment whilst it is not under its ownership.

754 Although note in this connection section 12 AWA: 'The appropriate national authority may by regulations make such provision as the authority thinks fit for the purpose of promoting the welfare of animals for which a person is responsible, or the progeny of such animals'. Another provision that may be relevant in this context is section 5 AWA, which regulates mutilation, that is, any 'interference with the sensitive tissues or bone structure of the animal, otherwise than for the purpose of its medical treatment'.

5.3.2 Balancing Exercise

Does this mean that all biotechnological applications that fit within the aforementioned criteria would also actually be prohibited in practice? The answer to this question is unclear. It seems to me that the law should at least include an exception that relates to an animal's own good. By this I mean to say that applications which serve to remove what I have previously called "internal boundaries" in the animal should nevertheless be permitted. These are boundaries which, if removed, enable other identifying parts of the animal to thrive instead.[755] In contrast, those applications which merely serve trivial goals (that are external to the animal) should in my opinion be prohibited. These include applications that serve recreational or fashion purposes or which aim to create more physically appealing pets. One could either list in the law those practices that should be prohibited, or this could be done in a more general way by adding the words 'unnecessary' or 'unjustified' to the list of criteria.

Things become more difficult, however, when GMAs are created in order to serve goals (that are ultimately external to the animal) in contexts where the stakes are higher, such as in a medical or nutritional context. Healthcare improvements are often crucial to the survival or determinative to the quality of life of some members of the human (or animal) race. And although the use of animals for food consumption may be less crucial to human beings' quality of life and survival,[756] many people consider it to be a fundamental part of their lifestyle and do therefore not seem willing to give up on it (yet). The practice is therefore unlikely to disappear anytime soon. On the contrary, 'demand for factory-

755 Of course, this is provided that the newly enabled identifying parts of the animal are more constitutive to its self than the barrier that was removed, which is highly contingent on the circumstances at hand.

756 Although see in this connection the chapter on hunting, which points out how the question of whether it is biologically necessary for humans to consume meat remains unresolved.

farmed meat is increasing worldwide as developing economies grow more affluent'.[757] Biotechnological adjustments may enable humans to reach their goals in these contexts more effectively, efficiently and/or with less suffering for the animals involved.

Whether biotechnological applications should therefore ultimately be prohibited or not in contexts where the stakes are relatively high, and which are therefore less likely to disappear, seems to come down to a balancing exercise, the outcome of which largely depends on one's worldview. For instance, it depends on how one looks at the human-animal relationship, and specifically, at the justifiability of the existing hierarchy between humans and animals. It further depends on whether one adheres to a utilitarian theory or not (since, for example, having "production animals" grow to a bigger size or creating more predictable "animal models" for research purposes could reduce the numbers of animals involved[758]).[759] It also depends on the relative importance one accords to suffering. In this connection, it is also worth distinguishing between different groups within the field of animal ethics: abolitionists and welfarists. The first group adheres to an all-or-nothing view, which means that no concessions are to be made: only the full abolition of a certain (undignifying) practice suffices. The second group acknowledges that whereas this is indeed the final goal, in the meantime steps to improve animal welfare should be taken. Welfarists

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757 Jonathan Latimer, 'Why We Should Genetically "Disenhance" Animals Used in Factory Farms' (*Practical Ethics*, 6 March 2018) <http://blog.practicalethics.ox.ac.uk/2018/03/oxford-uehiro-prize-in-practical-ethics-why-we-should-genetically-disenhance-animals-used-in-factory-farms/> accessed 16 July 2021.

758 For a relatively similar and somewhat provocative matter, see Steven Davis, 'The Least Harm Principle May Require that Humans Consume a Diet Containing Large Herbivores, Not a Vegan Diet' in Armstrong and Botzler (n 601) 269.

759 To be sure, not all utilitarians consider all of the abovementioned criteria morally reprehensible. Such judgment depends on the theory of value adhered to. See eg Smith (n 672) 418.

may on some occasions prefer the alteration of animals,[760] whereas abolitionists would seem to outright reject any of the proposed undignifying applications. Nevertheless, regardless of the outcome of the abovementioned balancing exercise,[761] it is recalled here that animal laws are currently unable to address *any* undignifying modifications that do not involve (or even reduce) suffering. The law therefore at the very least needs a more extensive set of tools and the criteria laid down in Swiss law could perhaps provide a good template for that (albeit with some minor adjustments).

5.4 Supranational, All-Encompassing Legislation and the Importance of Finding Alternatives

5.4.1 Internally Coherent Legal System

Apart from the issue of how to formulate the criteria that would need to be laid down in the legislation, a few remarks of a practical nature need to be made. First, if one were to implement any (of the abovementioned) additional criteria, a sound and internally coherent legal system would need to be developed. This means that legislators should not only focus on implementing the chosen criteria in animal testing laws, but also on their implementation in other relevant laws in order to avoid any legal gaps or inconsistencies. Notably, regulation should focus on the creation of GMAs, their access to the market (which should ideally also include products deriving from GMAs and their feed),[762] their release into the

760 See Latimer (n 757) and Adam Shriver, 'Not Grass-Fed, but at Least Pain-Free' (*New York Times,* 18 February 2010) <https://www.nytimes.com/2010/02/19/opinion/19shriver.html?emc=eta1> accessed 16 July 2021.

761 Naturally, there could also be further reasons not to legally prohibit certain practices, such as that other, non-legal means may be more effective.

762 In this connection, see also European Parliament, 'Ban Not Just Animal Cloning, But Cloned Food, Feed and Imports Too, Say MEPs' <https://www.europarl.europa.eu/news/en/press-

environment, and their breeding.[763] The regulation of market access is especially important in light of the fact that most genetic engineering currently takes place outside the EU.[764] Furthermore, we have seen that regulating breeding separately may be important because it is not entirely clear whether all types and generations of offspring of GMAs are included within the ambit of the other relevant laws.[765]

5.4.2 Supranational Legislation and Barriers to Trade

If legislation on the matter is to be effective, it may also need to have a broader territorial scope than merely national legislation. Ideally, rules should be adopted at a global level. The reason for this is that '[t]he development of genome editing techniques in animals occurs mostly outside...Europe'[766] and GMAs are tremendously difficult to trace.[767] However, one should be aware that, if the adoption of global legislation were not feasible, for example due to political disagreements or because it would not be clear which organisation should adopt such rules,[768] various problems could arise with regard to the adoption of the

room/20150617IPR67269/ban-not-just-animal-cloning-but-cloned-food-feed-and-imports-too-say-meps> accessed 16 July 2021.

763 Similar advice regarding market access was given in the context of the EU proposals on animal cloning. See eg European Economic and Social Committee, 'Opinion of the European Economic and Social Committee on the "Proposal for a Directive of the European Parliament and of the Council on the Cloning of Animals of the Bovine, Porcine, Ovine, Caprine and Equine Species Kept and Reproduced for Farming Purposes' [2014] OJ C311/73, paras 1.1.7 and 1.2.4.

764 COGEM (n 604) 17. See in this connection also Case C-592/14 *European Federation for Cosmetic Ingredients v Secretary of State for Business, Innovation and Skills* [2016] 9 WLUK 380 and Yen-Lin Agnes Chiu (n 614) 938.

765 Note should be taken again at sections 2(3B) and 2(8) ASPA.

766 COGEM (n 604) 17.

767 ibid 56.

768 There seems to be a notable gap in global animal law. There are almost no legal instruments which focus on the interests of individual animals, and the few welfare provisions that do exist at global level are usually laid down in secondary law, which is typically not legally binding. Anne Peters writes that 'the piecemeal offering of international and regional law does not form a coherent and "thick" body of law. The provisions are fragmented, often qualified, often inconsistent, unenforceable, and moreover unknown to most lawyers, law enforcers and legal scholars alike'. See Anne

abovementioned rules at domestic level. Many biotechnological applications serve commercial purposes, and (products deriving from) GMAs are therefore likely to be brought on the market. If a Member State of the EU (prior to Brexit the UK) were to adopt stricter legislation in respect of such animals (and their resulting products) than other EU countries, this would create an obstacle to trade within the EU internal market.[769] This potential problem was also recognised in the Directive on animal testing.[770]

The EU could address this problem by regulating the creation of and trade in GMAs at EU level instead. There are at least two ways of doing this. First, existing EU legislation could be amended to this effect (notably, Directive 2010/63/EU, Directive 2001/18/EC and Regulation 1829/2003). Second, a new piece of EU legislation could be adopted. It should be noted, however, that the EU Treaties do not contain a legal basis that serves to directly protect the interests of individual animals (and the strongest legal protection, which is Article 13 TFEU, is limited to the narrower topic of animal welfare and to certain areas of animal use only). Therefore, a different legal basis (if any) would need to be utilised. Perhaps the most obvious route would be to adopt harmonisation measures on the basis of Article 114 TFEU. This provision could be utilised if the principal objective or consideration were to remove obstacles to the exercise of the fundamental economic freedoms (e.g., the free movement of goods) or appreciable distortions of competition in the internal

Peters, 'Global Animal Law: What It Is and Why We Need It' (2016) 5 Transnational Environmental Law 9, 14-15.

769 To be sure, the same could, in turn, also be true for the EU. EU legislation which aims to protect animals could, at least on some occasions, also be in violation of international law, such as WTO law. Such debate was held with regard to the EU seal products ban. See Peter Fitzgerald, '"Morality" May Not Be Enough to Justify the EU Seal Products Ban: Animal Welfare Meets International Trade Law' (2011) 14 Journal of International Wildlife Law & Policy 85.

770 See preamble recitals 1 and 7 and Article 2 of Directive 2010/63/EU. See also Wildlife and Countryside Link and UK Centre for Animal Law (n 615) 42.

market.[771] Other Treaty provisions that have been used in the past to adopt animal protection laws form part of what are known as the 'common agricultural policy'; 'the common commercial policy' and the 'environmental policy'.[772] One should, however, note that, given the nature of these provisions, the applicability of the legislation to be adopted may need to be limited to certain types of applications (e.g. only those that pose a risk to the environment or human health) or to applications in certain areas of animal use only (e.g. in a farming context). In case there would be no competence basis available in the EU Treaties, the Member States could perhaps have recourse to Article 352 TFEU to attain one of the objectives set out in the EU Treaties. This basis was also used for the cloning proposals.[773]

If the EU decided not to act (or if the Member States in favour of the proposal did not command the requisite majority in the Council), it would perhaps still be possible for a Member State (prior to Brexit the UK) to adopt domestic legislation to this effect. It would first have to be shown that the relevant field is not pre-empted by EU legislation.[774] Second, even if there is already existing EU legislation, it may perhaps allow the Member States to introduce more stringent measures and/or contain other safeguard clauses or clauses which allow for an exception to be made. A relevant example may be Article 26b of Directive 2001/18/EC, which allows Member States to demand that (part of) their territory will be

771 On using Article 114 TFEU for animal protection purposes, see Diane Ryland and Angus Nurse, 'Mainstreaming After Lisbon: Advancing Animal Welfare in the EU Internal Market' (2013) European Energy and Environmental Law Review 101, 113-114.

772 Ryland and Nurse (n 771) 104.

773 See section 3.1 of European Commission, 'Proposal for a Council Directive on the Placing on the Market of Food from Animal Clones' COM (2013) 893 (n 643) accessed 16 July 2021.

774 See in this connection, however, Rasso Ludwig and Roderic O'Gorman, 'A Cock and Bull Story? – Problems with the Protection of Animal Welfare in EU Law and Some Proposed Solutions' (2008) 20 Journal of Environmental Law 363, which argues that the Court has (or at least used to have) a tendency to consider the field pre-empted.

excluded from a specific authorisation.[775] Third, it may be possible to have recourse to Article 114(5) TFEU, which provides that: 'if, after the adoption of a harmonisation measure by the European Parliament and the Council, by the Council or by the Commission [such as Directive 2010/63/EU], a Member State deems it necessary to introduce national provisions based on new scientific evidence relating to the protection of the environment...on grounds of a problem specific to that Member State arising after the adoption of the harmonisation measure, it shall notify the Commission of the envisaged provisions as well as the grounds for introducing them.' Admittedly, having recourse to this provision may be somewhat more challenging, as it is questionable whether 'new scientific evidence' could be interpreted so as to include ethical problems too, as well as whether the ethical problem concerned only arose after the adoption of the harmonisation measure and was specific to the Member State concerned. Fourth, in the absence of EU legislation, Member States may perhaps still introduce the relevant measures into domestic law. However, in doing so, they would derogate from free movement of goods (Article 34 TFEU). This is only rendered legally possible by reliance on either one of the explicit grounds listed in Article 36 TFEU, notably, that of public morality, public policy or the protection of health and life of animals, or on one of the judicially-developed 'mandatory requirements'. Furthermore, Member States derogating from a fundamental economic freedom (*in casu*, the free movement of goods) would have to respect the principle of proportionality, as well as fundamental rights (e.g. those enshrined in the EU Charter of Fundamental Rights and/or protected as general principles of EU law).[776]

775 Note, however, how this provision does not seem to provide Member States with the option to enact domestic legislation. Rather, it allows them to have their territory excluded from a given authorisation on a case-to-case basis.

776 I am grateful to Dr Menelaos Markakis for his comments on this section.

5.4.3 The Value of Finding and Using Alternatives to Animal Use

The third remark relates to the promising nature of animal alternatives. We have seen that it is especially in relation to contexts where the interests at stake are relatively high (such as healthcare, medical experiments and farming) that people may be more willing to accept the modification of animals, even if such were to be undignifying. However, should proper alternatives to animal use in these contexts be available, then the creation of GMAs would, at least in many cases, not be necessary anymore. Besides having the potential to save the difficulties, manpower and costs involved in setting up and supervising an effective regulatory system regarding GMAs, it would have the benefit of dissolving the more ethical problems surrounding GMAs.[777] Directive 2010/63/EU already contains multiple provisions that aim to stimulate and regulate the development of alternatives to animal use in a research context.[778] Likewise, an increasing number of commercial companies is in the business of developing alternatives to meat. Supporting such developments (either financially or in any other way) could contribute significantly to a decline in the (future) development of undignifying GMAs. However, it would be important to also change the laws that require compulsory animal testing.[779] If alternatives to animals were to be available, but not exclusively used due to mandatory legal prescriptions, little to no progress could be expected.

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777 Such an approach would also be supported by other arguments, such as that animals may not be suitable test models for human diseases. See eg Aysha Akhtar, 'The Flaws and Human Harms of Animal Experimentation' (2015) 24 CQHE 407; Andrew Rowan, 'Ending the Use of Animals in Toxicity Testing and Risk Evaluation' (2015) 24 CQHE 448; David DeGrazia and Tom Beauchamp, 'Reassessing Animal Research Ethics' (2015) 24 CQHE 385.

778 See Chapter V of the Directive. The UK, however, has been accused of not having any 'clear legislative or government-led policy in this area': Wildlife and Countryside Link and UK Centre for Animal Law (n 615) 44.

779 In this connection, see Trigg (n 613).

5.5 Conclusion

Biotechnology is on the rise and existing laws do not seem capable of adequately dealing with its application to animals. Although it turns out to be tremendously difficult to determine which applications are dignifying and which ones are not, it seems that at least some of them are not morally defensible according to any standards. The law therefore needs to be equipped with a broader set of tools. Perhaps unsurprisingly, the criteria laid down in Swiss animal laws turn out to provide a relatively good template for UK/ EU animal laws in this area, although some minor alterations (also in terms of their interpretation) seem to be needed. Furthermore, three practical issues should be taken into account when developing (or amending) legislation in this area. These relate to the internal coherency of the relevant legal systems, the level on which legislation is to be implemented and the development of alternatives to animal use. Overall, it may be concluded that the concept of dignity indeed provides a promising alternative to existing criteria in this area of law.

CHAPTER SIX: SEXUAL INTERACTION BETWEEN HUMANS AND ANIMALS

Sexual relations between humans and animals have been 'part of the human race throughout history, in every place and culture in the world'.[780] Although not often brought to the fore in public debates due to them being a social taboo, such relations seem to be prevalent on a larger scale than many might assume.[781] The famous Kinsey report, published in 1948, investigated the scale on which they occurred in the United States. It concluded that eight percent of American males had engaged in animal contacts, with this percentage going up to even 40 to 50 percent of rural males.[782] A later study carried out by Hunt reported lower rates and has therefore been 'interpreted as a result of the decline in the nation's rural population, where access to animals for sexual activities are more abundant'.[783] The number of pets has, however, increased, and it is therefore assumed that sexual engagement with this type of animals has increased.[784] When it comes to sexual interaction between humans and animals, it is important to make a distinction between bestiality and zoophilia. Many

780 Hani Miletski, 'A History of Bestiality' in Andrea Beetz and Anthony Podberscek (eds), *Bestiality and Zoophilia: Sexual Relations with Animals* (Berg Publishers 2009) 1. This article gives a great overview of the history of bestiality. See also Midas Dekkers, *Dearest Pet: On Bestiality* (Verso Books 2000) and Carl Griffin, 'Animal Maiming, Intimacy and the Politics of Shared Life: The Bestial and the Beastly in Eighteenth- and Early Nineteenth-Century England' (2012) 37 Transactions of the Institute of British Geographers 301.

781 See also Helen Munro and Michael Thrusfield, '"Battered Pets:" Sexual Abuse' in Beetz and Podberscek (n 780) 71, who document a number of sexual abuse cases that were brought to the fore by UK veterinarians.

782 Alfred Kinsey, Wardell Pomeroy and Clyde Martin, *Sexual Behavior in the Human Male* (Saunders Company 1948). A later study investigated sexual relations between female humans and animals: Alfred Kinsey and others, *Sexual Behavior in the Human Female* (Saunders Company 1953).

783 John Navarro and Richard Tewksbury, 'Bestiality: An Overview and Analytic Discussion' (2015) 9 Sociology Compass 864, 865-66. See also Andrea Beetz, 'Bestiality and Zoophilia: Associations with Violence and Sex Offending' in Beetz and Podberscek (n 780) 46, 48.

784 Gieri Bolliger and Antoine Goetschel, 'Sexual Relations With Animals (Zoophilia): An Unrecognized Problem in Animal Welfare Legislation' in Beetz and Podberscek (n 780) 26; Navarro and Tewksbury (n 783) 864, 867. See also Mish Barber Way, 'Animal Urges: Women and Bestiality' (*VICE*, 7 August 2015) <https://www.vice.com/en/article/wjee49/animal-urges-women-and-bestiality> accessed 16 July 2021, which documents how thousands of people are active daily on Beast Forum, the biggest international zoophilia chatroom.

different definitions of them have been brought forward, but generally it seems accepted that in the case of zoophilia the sexual contact is underpinned by an individual's emotional involvement with or attraction to the animal. In the case of bestiality this emotional element is absent.[785]

This chapter examines the dignitarian implications of sexual relations between humans and animals. It will be argued that this area is marked by empirical, practical and normative challenges. We do not know of (all types of) animals precisely why they engage in sexual acts and how they experience these acts. Humans also only have limited communication abilities, which prevents them from fully knowing whether an individual animal is or has been a consenting participant to the act. Furthermore, even if we were to ever know more about animals' sexual motivations, experiences and desires, this still does not necessarily tell us everything we need to know in terms of which sexual relationships are proper or improper. The determination of the propriety of a relationship is a normative area, which is to be explored by humans collectively. One interpretation of what a dignitarian approach in this field could look like will, however, be brought forward. The main focus will be put on the idea of instrumentalisation, which does not seem dignifying for either human or animal involved, nor for society as a whole and for particular vulnerable groups within it. As aggravating factors, the potential negative emotional, relational and physical consequences, the potential infringement on sexual autonomy, and the link between bestiality and violence more generally will be highlighted. It will be argued that, especially insofar as an instrumentalising nature is a sufficient condition to declare a certain act undignifying, the justifications underlying the relevant laws are incomplete and their scope insufficiently

785 On the difference between bestiality and zoophilia, see Beetz, (n 783) 46, 56-57; Andrea Beetz, 'New Insights Into Bestiality and Zoophilia' in Beetz and Podberscek (n 780) 98, 99-103; Robin Mackenzie, 'Sexbots: Replacements for Sex Workers? Ethical Constraints on the Design of Sentient Beings for Utilitarian Purposes' (Workshop on Advances in Computer Entertainment, November 2014) 6.

broad. The only phenomenon that might potentially justify a criminal exception to a prohibition on sexual acts between humans and animals is that of zoophilia. Zoophiles claim to be sexually involved with animals in order to express their love and/or deepen their connection with them. From the human perspective, there might therefore be reasons to assume that such involvement could (at least under certain circumstances) be dignifying, as they might be an expression of humans' relational nature (something, which we have seen, Foster links to human dignity). From the animal perspective, however, it seems unclear whether such zoophilic acts can be dignifying. We simply do not know enough about animals' motivations for sexual involvement and their experience of it to give any verdict on the matter, and there are complications in finding out whether they are or have truly consented. Therefore, a dilemma arises here. On one hand, there is a danger of patronising humans (and potentially animals) by prohibiting all types of sexual involvement between them. On the other hand, animals are vulnerable subjects who cannot, in many cases, defend or protect themselves adequately, both during and after the act. In addition, there is another evidential problem here: perpetrators of bestiality might abuse any potential zoophilia exception to escape criminal liability. These facts seem to constitute good reasons not to make any criminal exception for acts of zoophilia. Incorporating dignity into animal law might therefore result in a legal prohibition on all types of sexual involvement between humans and animals, even where no physical or emotional harm to the animal is shown.

6.1 The Relevant Legislation

Some of the historical case law on animals gives the impression that the sexual element of human-animal relationships used to be regarded as pretty irrelevant. In 1789, Charles Pearce 'attempted to commit bestiality with [a cow belonging to the prosecutor], and

because she would not stand quiet, had, in a passionate manner, run a sharp-pointed stick quite through her body'.[786] The accused had 'declared that he should not have hurt her if she would have permitted him to have accomplished his desires'.[787] Instead of being prosecuted for disregarding the interests of the animal, the focus was put on the owner instead. It was necessary to prove that 'the maiming of the animal was done from some malicious motive towards the owner of it, and not merely from an angry and passionate disposition towards the beast itself, without any intention of thereby injuring the owner'.[788] Therefore, the accused was acquitted. The case was therefore really about property law.

By 1875, the law had already slightly evolved, in the sense that not only the interests of the owner were taken into account, but also the cruelty interests of the animal. This is not surprising, given the fact that by then the first animal cruelty laws had been enacted.[789] In *The Queen v Welch*, the accused had 'caused the death of [a] mare through injuries inflicted by inserting the handle of a fork into her vagina, and pushing it into her body'.[790] In this case, it was sufficient that the accused 'knew what he was doing would or might kill, main, or wound the mare, and nevertheless did what he did recklessly and not caring whether the mare was injured or not'.[791] It was not required anymore to prove that the accused was 'actuated by ill-will towards the owner of the mare, or spite towards the mare, or by any motive except the gratification of his own depraved taste'.[792] Animal cruelty had

786 *The King v Charles Pearce* (1789) 168 ER 365.

787 ibid.

788 ibid.

789 Chapter 3 explained that in 1822 the first piece of animal protection legislation was adopted: Martin's Act.

790 *The Queen v Welch* (1875) 1 QBD 23.

791 ibid.

792 ibid.

thus become an issue of public concern. Nevertheless, this case gives the impression that the sexual element of human-animal interactions was still regarded as being completely irrelevant.[793]

An examination of the relevant legislation reveals a different picture. Sexual acts with animals have since long been criminalised in the UK, although the severity of the maximum punishments has decreased. Buggery with an animal used to punishable by death.[794] The punishment was later changed to life imprisonment[795] and has ultimately been brought down to a maximum imprisonment of only two years.[796] The offence is likely to at least partially originate from the Biblical injunctions against bestiality, which were undoubtedly prominent in the thinking of the early legislators.[797] The Bible prohibits bestiality because it does 'not serve reproduction'.[798] Bestiality might furthermore be thought to confound the line that the Bible draws between species and offend the Imago Dei.[799] The heading under which the prohibition used to fall, namely that of 'unnatural offences', seems to confirm these thoughts. Perhaps in light of the secularisation, it was discussed in 2000 whether bestiality should stay an offence or 'whether it should be part of the law on the

793 Although the ignorance of the sexual element may also have something to do with the fact that there was no actual sexual intercourse with a penis between the human and the animal.

794 Bestiality became a capital crime in England in 1534: Miletski (n 780) 7. It was also punishable by death under Section XV of the Offences Against the Person Act 1828.

795 Section 61 of the Offences Against the Person Act 1861, which was later replaced by section 12 of the Sexual Offences Act 1956.

796 Section 69 of the Sexual Offences Act 2003.

797 Bestiality was also connected with black magic and witchcraft. See Adolph Niemoeller, *Bestiality in Ancient and Modern Times* (Haldeman-Julius Publications 1946) and Cyril Greenland, 'Sex Law Reform in an International Perspective: England and Wales and Canada' (1983) 11 Bulletin of the American Academy of Psychiatry and the Law 309, cited in Miletski (n 780) 5.

798 Miletski (n 780) 5-6, citing Midas Dekkers, *Dearest Pet: On Bestiality* (Verso 1994) and Anil Aggrawal, 'References to the Paraphilias and Sexual Crimes in the Bible' (2009) 16 Journal of Forensic and Legal Medicine 109, 113.

799 I am grateful to Professor Charles Foster for this remark.

protection of animals'.[800] The independent review committee, which was endowed with the task of reviewing the Sexual Offences Act 1956, thought bestiality was 'an act that offended against the dignity of animals and of people' and thereby focused on 'the principle of free agreement to sexual activity', which was 'simply not possible with animals'.[801] However, it then went on to say that bestiality should (primarily) be prohibited because it reflected 'profoundly disturbed behaviour'. The committee focused on the perceived link between bestiality and other forms of sexual offending, abuse of children, and animal cruelty.[802] This also seems to be the position of the Government. The Parliamentary debates and the relevant white paper make clear that the criminal offence of bestiality does not serve to protect animals (for this, it was claimed, we already have animal cruelty laws), but to punish 'deviant behaviour'.[803] Therefore, although the responsible parties that were involved in the drafting and adoption of this provision briefly touched upon some concerns relating to the interests of animals, the offence seems to be mostly human-focused.

We have seen that the law on animal pornography seems to reveal a similar picture. Section 63 of the Criminal Justice and Immigration Act 2008 (CJIA) prohibits the possession of extreme pornography, which includes an image that 'portrays, in an explicit and realistic way,…a person performing an act of intercourse or oral sex with an animal (whether dead or alive)'.[804] This provision prohibits the possession of material the

800 Home Office, *Setting the Boundaries: Reforming the Law on Sex Offences* (volume 1, July 2000) 126.

801 ibid 126. See also page 127, where the committee discusses the practice of necrophilia: 'our fundamental principle is that sexual activity should be mutually agreed–in this context, and that of bestiality, there is no possibility of mutual agreement'.

802 ibid 126.

803 See Lord Falconer, HL Deb 19 May 2003, vol 648, cols 575-76 and Home Office, *Protecting the Public, Strengthening Protection Against Sex Offenders and Reforming the Law on Sexual Offences* (Cm 5668, 2002) 33.

804 See section 63(7)(d) of the CJIA 2008.

publication of which already used to be illegal under the Obscene Publications Act 1959 (OPA).[805] The enforcement of this latter Act was impeded by the 'international nature of the Internet',[806] and the CJIA therefore aimed to bridge this gap by extending the offence to the mere possession of such material.[807] However, OPA, on which section 63 CJIA expands, considers material to be obscene 'if its effect…is, if taken as a whole, such as *to tend to deprave and corrupt persons* who are likely…to read, see or hear the matter contained or embodied in it'.[808] Therefore, also in relation to animal pornography the underlying purpose seems to be to control the character of human beings, rather than to focus on the potential implications for animal dignity.[809]

Sexual interaction between humans and animals is currently regulated in several ways. First, there is section 69 of the Sexual Offences Act 2003 (SOA).[810] It prohibits

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805 House of Commons Library, 'Research Paper 07/65: The Criminal Justice and Immigration Bill' (9 August 2007) <https://www.statewatch.org/media/documents/news/2007/aug/uk-crim-just-imm-bill-research-paper.pdf> accessed 16 July 2021, 50; Home Office, 'Consultation on the Possession of Extreme Pornographic Material: Summary of Responses and Next Steps' (30 August 2006) <http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/30_08_05_porn_doc.pdf> accessed 16 July 2021. The word 'publish' is to be interpreted broadly, so as to include, among other things, to distribute, circulate, sell, let on hire, give, lend, offer it for sale or for letting on hire, show, play, project or transmit. See section 1 OPA 1959. The Scottish equivalent of this provision is section 51 of the Civic Government (Scotland) Act 1982.

806 House of Commons Library, 'Research Paper 07/65: The Criminal Justice and Immigration Bill' (n 351) 50.

807 The possession of such material for financial gain already used to be criminalised under the Obscene Publications Act 1964.

808 See section 1(1) OPA (emphasis added).

809 Although the following paragraph should be noted: 'Our proposals to strengthen controls on extreme pornographic material are therefore based on...a desire to protect those who participate in the creation of sexual material containing violence, cruelty or degradation, who may be the victims of crime in the making of the material, whether or not they notionally or genuinely consent to taking part'. This paragraph could potentially be interpreted as aiming to protect animals from degradation as well. See Home Office, 'Consultation on the Possession of Extreme Pornographic Material: Summary of Responses and Next Steps' (n 351) 11. One should further note that, yet again, the production, exhibition and distribution of films displaying (sexual) conduct that causes animal suffering could be captured under existing animal laws, such as the AWA and the Cinematograph Films (Animals) Act 1937. These laws serve to protect the interests of animals.

810 The Northern Ireland equivalent can be found in section 73 of the Sexual Offences (Northern Ireland) Order 2008/1769.

sexual penetration between human beings and animals. Although we have seen that the main aim of the prohibition is not to protect animals, they do in practice benefit from it. It is important to note, however, that the prohibition is limited to penetration with a penis. Therefore, other types of sexual acts, such as oral sex or masturbation, are not included.[811] Furthermore, it seems that penetration with anything other than a penis is not included either. Second, there is the AWA. This act becomes relevant when any unnecessary suffering is inflicted on a protected animal (for example, through sexual acts). Third, there is section 63 of the CJIA (and, as we have just seen, the related OPA provision). According to this provision, it is an offence for a person to be in possession of an extreme pornographic image. Among other things, an image is extreme if 'it portrays, in an explicit and realistic way…a person performing an act of intercourse or oral sex with an animal (whether dead or alive)' and if 'a reasonable person looking at the image would think that any such person or animal was real'. Furthermore, the image needs to be 'grossly offensive, disgusting or otherwise of an obscene character'.[812] Unsurprisingly, this provision, notably its latter requirement, has been criticised for being too vague or subjective,[813] and it might raise questions as to whether it fulfills the requirement 'prescribed by law' as contained in Article 10 ECHR.[814] Naturally, insofar as criminal law is involved, there may also be an issue with

811 The same approach is taken with respect to necrophilia: only penetration is criminalised (although the offence is broader than section 69 SOA in the sense that it is not limited to penetration with a penis only). See section 70 SOA. Jonathan Herring, 'Crimes Against the Dead' in Belinda Brooks-Gordon and others (eds), *Death Rites and Rights* (Hart Publishing 2007) 219 is sceptical about this limitation.

812 Section 63 (5A) and (7)(d) CJII.

813 Myles Jackman, 'Tiger Porn Victim Bites Back: Crown Prosecution Service Asked to Review the "Extreme Pornography" Law' <http://mylesjackman.com/index.php/my-blog/105-tiger-porn-victim-bites-back> accessed 16 July 2021; Alexander Barbour, 'The State of Extreme Pornography Law in the UK' (2 December 2014) <http://www.keepcalmtalklaw.co.uk/the-state-of-extreme-pornography-law-in-the-uk/> accessed 16 July 2021.

814 Jackman (n 813); Barbour (n 813). See also The Earl of Onslow, HL Deb 22 January 2008, vol 698, col 159-160. *Müller and Others v Switzerland* App no 10737/84 (ECtHR, 24 May 1988) para 29, however, makes clear that criminal law provisions on obscenity are "allowed" to be a bit vaguer.

Article 7 ECHR. In this connection, it should be further noted that it is generally not prohibited to perform oral sex with animals, but that it is prohibited to possess an image of it, even if one did not participate in the act itself and merely downloaded it from the Internet. Fourth, the laws on property could be used. If the animal belongs to someone else and is "damaged" then, for example, the offence of criminal damage occurs.[815] Damage normally requires a reduction in the "usefulness or value" of an item or, in this case, the animal. This stands in sharp contrast to section 69 SOA, as the offence of criminal damage (and the laws of property in general) clearly focuses on physical and perhaps emotional harm to the animal. At the same time, it also stands in contrast to the AWA, as it focuses on the interests of the owner of the animal. The AWA, in contrast, focuses on the interests of the animal itself.

6.2 Distinguishing Proper Sexual Relationships from Improper Ones

Sexual acts between humans and animals come in several forms. Among other things, they can be carried out between two or more individuals, in private or in public (e.g. through sex shows or animal pornography), with or without force and in various "physical forms". Furthermore, such acts can take place for a variety of reasons, for example, in order to gain bodily satisfaction, for practicing purposes, to humiliate a being, to become a "real man", or to establish an intimate connection.[816] Although many types of sexual relations raise

815 One could also think about tort law-based claims such as trespass to goods or breach of bailment.

816 On the different forms and purposes, see, for example, Miletski (n 780) and Michael Roberts, 'The Unjustified Prohibition Against Bestiality: Why the Laws in Opposition Can Find No Support in the Harm Principle' (2010) 1 Journal of Animal & Environmental Law 176, 178-80. Note how the public display of sexual acts between humans and animals, even if only fictional, is controversial. In the case of *Müller and Others v Switzerland* (n 814) para 30, a painting displaying the act of bestiality was prohibited in order to protect public morals, which the ECtHR found to be a legitimate aim (although note how this case dates back to 1988, which means that religious concerns might have played a bigger role in relative terms). The same seems true with regard to the possession of animal pornography: see Frankie Mullin, 'I'm the Welsh Bus Driver Who Had His Life Ruined by 'Tiger

concerns, it seems difficult to identify what exactly distinguishes a proper relationship from an improper one. One element that seems to be condemned by a number of prominent authors is that of *instrumentalisation,* that is, when one uses another being merely as a tool to satisfy one's own interests.[817] This element is present in many of the abovementioned situations, for example, when a human uses an animal for practicing purposes or for bodily satisfaction. Various authors discuss the objectionable nature of using beings merely as a means to an end (although typically the discussions tend to focus on human victims). John Gardner has examined the wrongness of rape, and argues that such is wrong –even if the victim incurs no harm or lacks any awareness of the act due to unconsciousness– because of its instrumentalising character.[818] Additionally, Nussbaum examines the idea of objectification, which in her opinion involves at least seven notions:[819] instrumentality,[820] denial of autonomy, inertness,[821] fungibility,[822] violability,[823] ownership and denial of subjectivity.[824] She argues that the element of instrumentality is the only one that is always morally

Porn'' (*VICE*, 29 October 2014) <https://www.vice.com/en_us/article/ppmwaz/andrew-holland-tiger-porn-883> accessed 16 July 2021.

817 This element strongly reminds of Kant's object formula, and society's strong condemnation of it might originate from his theory. Note in this connection also Charles Foster, *Human Dignity in Bioethics and Law* (Hart Publishing 2011) 8, which argues that the 'naked girl on the hospital trolley' example mentioned in the book is undignifying because 'the boys are using the girl. It is classic Kantian instrumentalism. She is a thing, not a person: a means to the end of their gratification, not an end in herself. That enhances the flourishing neither of her, nor of the boys, nor of other girls they might see, nor of society at large'.

818 John Gardner, 'The Wrongness of Rape' in John Gardner, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (OUP 2007) 1, 15-16.

819 Martha Nussbaum, 'Objectification' (1995) 24 Philosophy & Public Affairs 249, 257.

820 ibid: by which she means treating the object as a tool for your own purposes.

821 ibid: by which she means treating 'the object as lacking in agency, and perhaps also in activity'.

822 ibid: by which she means interchangeability.

823 ibid: 'it is permissible to break up, smash, break into [it]'.

824 ibid: which entails having experiences and feelings.

problematic. The element of (excessive) instrumentalisation is also included in Swiss animal dignity law. Indeed, using an animal or human as a (sexual) tool does not necessarily seem to enhance its thriving: it does not seem particularly "animalising" or "humanizing". It should be noted in this connection that, given the Janus-faced nature of undignifying acts, such treatment not only seems to reflect upon the dignity of the animal, but above all, also on the dignity of the human being in question. S/he should respect other beings for what they are and treat them as such instead of using them as tools to satisfy his/her own interests.

If the instrumentalising character of a sexual act is indeed a sufficient condition for it to be undignifying, as some authors seem to suggest, then it seems that awareness by the animal of its instrumentalisation is not required, nor would it be necessary for the animal to experience the act as sexual in nature.[825] It would also seem to mean that it is not necessary that sexual instrumentalising behaviour involve penetration[826] or that the penetration is carried out with a penis.[827] In fact, it might, considering the phenomenon of animal pornography, even be argued that instrumentalising sexual behaviour need not entail any physical contact at all. What seems to matter most is the fact *that* the animal is used merely as a

825 See also Gardner (n 818) 3-8. This would seem to mean that formicophilia would be undignifing as well. On this, see Beetz (n 785) 101, citing John Money, *Lovemaps* (Irvington Publishers 1986) 76; Michael Roberts (n 816) 3.

826 Although this is certainly not to say that penetration cannot be relevant. It seems to have an "elevated status" in society (and perhaps phallocentrism too) and could therefore be considered an aggravating factor, even if only because the victim might consider it as such, which might influence the quality of its further life. On the elevated status of penetration and its relevance for the concept of instrumentalisation, see Gardner (n 818) 21-25. See further Michelle Madden Dempsey and Jonathan Herring, 'Why Sexual Penetration Requires Justification' (2007) 27 Oxford Journal of Legal Studies 467: perhaps the use of physical force, the increased risk of physical and psychological harm, and its negative social meaning contribute to its elevated status.

827 The practice of inserting objects into animals has also been highlighted by Munro and Thrusfield (n 781) 79. Their examples concern situations where the insertion caused injuries (otherwise the animals would not have been brought to the vet for examination), but surely such practices must also happen without causing physical harm.

tool in order to satisfy the interests of the human actor,[828] not necessarily the animal's knowledge or experience of it or the precise way in which it happens.

The question arises whether all of this renders the consent or will of the animal irrelevant (insofar as it is meaningful to speak about such thing at all).[829] To me, this does not seem to be the case. Indeed, the *presence* of an animal's willingness seems irrelevant as it does not remove the instrumentalising character of the act, and therefore does not obviate its undignifying character either.[830] Gardner argues, in relation to human sexual relations, that we should nevertheless not interfere with consensual sexual instrumentalisation because we need to respect the moral agency of human beings. We need to allow them to pursue 'particular kinds of options', 'including various sexual options, which may at first sight appear dehumanizing'.[831] Gardner goes on: 'The truth is that these options often *are* dehumanizing, and therefore to be avoided by the person who is confronted with them. But allowing people nevertheless to pursue them is, up to a point, rehumanizing, because it credits them with moral agency, without which credit their dehumanization is only compounded.'[832] However, it seems generally accepted that most types of animals do not possess moral agency. Therefore, this argument does not apply to them. Animal consent therefore seems irrelevant in cases of sexual instrumentalisation.

828 Or the interests of the person who has forced the human actor to carry out the sexual act.

829 To which we will get back in section 6.4.

830 Section 6.4 will discuss questions relating to how animal consent or willingness could be demonstrated and the various factors that might affect the genuineness of it.

831 Gardner (n 818) 20.

832 ibid.

In contrast, a *lack* of consent is relevant, as it seems to make the situation even less dignified.[833] There is the obvious argument relating to interference with sexual autonomy. Although most (if not all) animals are incapable of making *moral* judgments in relation to specific sexual acts, many types of animals are to a large extent capable of regulating their own sexual life.[834] It might therefore be argued that humans should respect this capability by at the very least not forcing themselves upon them. Bolliger and Goetschel write in this connection about sexual integrity, which they call an 'important aspect of the dignity of the animal'.[835] It 'includes unhindered sexual development and sensation, the protection from damaging decision-making by sexual exploitation of dependencies, and the protection from sexual harassment'.[836] They conclude that animal dignity is therefore injured by 'any zoophilic act which does not respect the intentions of the animal, and therefore is effected by using some form of force'.[837]

Apart from the affront to their sexual autonomy (and bodily integrity, for that matter), using animals for sexual purposes without their consent could also cause (further) harms. It can make their lives worse in a way that matters to them. They might perhaps not understand the sexual nature of the assault done to them, but it is not unthinkable that they experience the violence (if any) and domination as humiliating or threatening, which might

833 Note in this connection how dignity has also been 'drawn on heavily as a theoretical underpinning by judges in interpreting prohibitions against sexual harassment, both in Europe and the United States': Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 EJIL 655, 690.

834 Although rape is well recognised in some non-human species. I am grateful to Professor Charles Foster for this remark. The difference between humans and many animals is, however, that (most) human beings are moral agents. They are capable of making proper judgments and acting accordingly. Failing to do so affects their human dignity.

835 Bolliger and Goetschel (n 784) 39.

836 ibid.

837 ibid.

result in emotional distress. It may, for example, cause fear and trust issues, which could even damage their (ability to establish) relationships with other humans or animals, something which we have seen is important for the dignity of social animals. In this connection, it is also worth mentioning that 'an animal that has repeated sexual intercourse with a person can commit to this person to such a degree that it loses all interest in sexual interactions with others of its own kind'.[838] Repeatedly sexually instrumentalising an animal therefore also creates the risk of an animal not being able anymore to develop a dignified sexual relationship with other beings for the rest of its life.

Instumentalising animals for sexual purposes could also have effects that reach beyond the animal in question. First, there are concerns that bestiality might make humans more violent: a 'growing number of studies document the existence of a link between animal abuse and interpersonal violence'.[839] Although 'neither causal nor chronological relations between these two phenomena have been established for certain',[840] it should be mentioned that if a causal link exists, then there are additional stakeholders whose dignity interests should be considered: the potential future victims. Indeed, these seem to have been included in the purpose of section 69 SOA.[841] Second, legalising instrumentalising and non-consensual forms of sex might not necessarily promote the thriving of society as a whole either. It sends the message that –and thereby perhaps creates a culture in which– instrumentalisation and coercion are ethically acceptable, especially when suffering is absent.[842]

838 ibid.

839 Beetz (n 783) 51. On this topic, see also Fiona Becker and Lesley French, 'Making the Links: Child Abuse, Animal Cruelty and Domestic Violence' (2004) 13 Child Abuse Review 399, 401-02.

840 Beetz (n 783) 51. The UK Parliament has also picked up on this issue, but then more broadly in relation to (extreme) pornography: HL Deb 21 April 2008, vol 700, col 1359-1362.

841 See section 6.1 above.

842 This argument is especially valid in relation to the children in our society: we should provide them with a moral compass. See eg HL Deb 5 November 2015, vol 765, col 1767-1801.

This might be especially dangerous and disempowering for more vulnerable groups in society, such as animals and women.[843] The potentially damaging societal effects have indeed also been recognised by legislators.[844]

In addition, it should also be noted that certain forms of sexual behaviour pose some unique, additional challenges or contain aggravating factors. For example, a larger number of people might be involved in the act, with each playing their own role, e.g. when an animal is being commodified for sexual purposes or used in pornography.[845] In such cases there is also a seller/renter, a cameraman, a distributor and/or the humans who eventually watch the relevant pornographic material. All of these people contribute to the instrumentalisation of the animal and might therefore in turn have their own dignity be affected.[846] Sometimes it is also the case that the human participant does not participate voluntarily in

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843 Some feminists might find this comparison offensive, as they interpret it as lowering 'women to the status of animals'. However, even apart from the question of whether there are different statuses amongst the various beings, the focus of the argument here lies on the similarities with regard to structural problems, not on the similarities of the beings in question. See also Lori Gruen, *Ethics and Animals: An Introduction* (CUP 2011) 200-02.

844 eg HL Deb 30 June 2014, vol 754, col 1599 (Baroness Thornton). With regard to pornography, see HL Deb 5 November 2015, vol 765, col 1768 (Lord Bishop of Chester). However, with regard to gay pornography the opposite argument has been made: that it empowers gay men or women. Liberal feminists have also argued that 'pornography is a symbol of women's sexual liberty because women have the right to sexual freedom, including to commercialise it'. See Megi Margiyono, 'Possession of Extreme Pornography: Is it A Crime?' <http://www.academia.edu/3877679/Possession_of_Extreme_Pornography_Is_it_A_Crime> accessed 16 July 2021, 8, citing Brian McNair, *Striptease Culture: Sex, Media and Democratisation of Desire* (Routledge 1996) 87, 205-07. However, regardless of whether such arguments hold true, they rely on the fact that the humans in question are autonomous, moral agents, who can make conscious and informed decisions with regard to such practices. As this does not seem to be the case for (most types of) animals, this argument does not seem to apply to them.

845 Mish Barber Way (n 784) describes the Danish farm of Bodil Joensen, where sex tourists were allowed to visit and 'do [as] they pleased'. A relatively similar example concerns that of Parisian brothels, which 'were known to provide turkeys for their clients. As the men were about to experience orgasm through having intercourse with the turkey, they would break the bird's neck'. The physical reaction of the birds created 'pleasurable sensations' to the men: Miletski (n 780) 7.

846 Note in this connection how a large proportion of 'pornographic material [with animals does not seem to be] produced for zoophiles, rather it is for consumers who just want to see something extraordinary': Beetz (n 785) 117. Hence, there is not even fascination for the animal as a being in such cases, but it is exclusively considered a sex toy.

the sexual act.[847] Additionally, certain types of sexual acts also cause injury and/or even death to the animal before, during or after the act.[848] This can happen accidentally or due to recklessness, but it can also be done deliberately because the animals' reactions supposedly create 'pleasurable sensations'.[849] Last, there are concerns in relation to pornography in general. It might reduce the amount of actual intercourse between loving partners[850] (and affect family relationships more generally),[851] something which legislators consider important for human flourishing.[852] The instrumentalising nature of bestiality, especially when taken together with the potential negative emotional, relational and physical consequences, the potential infringement on sexual autonomy, and the link with violence more generally, might therefore constitute a sufficient reason to declare bestiality morally reprehensible and, hence, to make it unlawful.

6.3 Proposed Legal Amendments

Two main observations arise in reply to the discussion thus far. *First, the justifications underlying the existing legislation on animal sexuality seem to be incomplete*. The

847 See in this connection Linda Lovelace and Mike McGrady, *Ordeal* (Citadel Press 2006).

848 Note the Parisian brothel example in footnote 845. Beetz (n 783) 57-58 also describes how 'necrophilic tendencies have been revealed…: animals are killed in connection with sexual gratification, and the dead body is used for masturbation or is mutilated or dissected'.

849 Miletski (n 780) 7.

850 It is claimed that people are having less sexual intercourse these days and this is commonly put down to greater access to pornography on the Internet. I am grateful to Jonathan Herring for this remark.

851 HL Deb 5 November 2015, vol 765, cols 1777-1779, 1781, 1783-1784. However, the legislators also acknowledged that some couples claim that pornography has improved their relationship (col 1778). Furthermore, it was wondered whether it might also be the case that the causal link goes the other way around: that people start watching pornography because there is something wrong in their relationship (col 1790).

852 HL Deb 5 November 2015, vol 765, col 1768.

legislation on (the display of) sexual intercourse between humans and animals primarily focuses on the effects such behaviour has on human dignity. According to the argument, animals are already sufficiently protected by the AWA. However, the AWA can only be used when the sexual conduct causes harm to the animal, whilst animal dignity (in the sense suggested in earlier chapters) might also be compromised when an animal is instrumentalised in a non-harmful manner. Using an animal as a sexual tool might not necessarily promote (individual and collective) animal thriving, which should perhaps be acknowledged more explicitly by the legislators and courts.

In this connection, it might be instructive to have a look at the Court of Appeal's reasoning in the case of *R v Steven Thomas Boyd*.[853] The applicant and other men used to have sexual intercourse with the applicant's dog. 'The evidence established that the applicant had specifically trained his dog, a large creature, to have sexual intercourse with men. The applicant himself seems to have had diverse tastes in sexual practices and used a variety of drugs as stimulants in such activity.'[854] The applicant was given a sexual offences prevention order under section 104(1)(b) SOA 2003, and one of the terms contained a prohibition from owning or keeping a dog for a period of ten years. However, sexual prevention orders can only be given in order to protect 'the public or any particular members of the public'.[855] The applicant therefore submitted that the prohibition was unlawful: 'it did not protect a "member of the public", or indeed a human being'.[856] The Court responded to this as follows:

853 *R v Steven Thomas Boyd* [2013] EWCA Crim 2384.

854 ibid para 2.

855 Section 107(2) SOA 2003.

856 *Steven Thomas Boyd* (n 853) para 12.

> As to the third prohibition contained in the order, we agree with Miss Cheema's submission that it was an order intended to protect humans, not dogs. We therefore do not accept Miss Thorne's submission that the prohibition was unlawful because it did not protect a member of the public. As we have indicated, the evidence here showed that the applicant had specifically trained his dog to have sexual intercourse with men. Any such act would in itself be an offence contrary to section 69 of the Sexual Offences Act 2003. In the judgment of this court, such conduct by the use of a trained dog does give rise to an obvious risk of serious psychological injury. It also gives rise to an obvious risk of serious physical injury: the dog being trained to do the one act, but not, so far as the material before us suggests, trained not to do anything else. In our judgment, accordingly, the third prohibition contained in the order was properly made.[857]

The conclusion reached in this case seems to me to be the right one, but the underlying reasoning, although understandable from a legal point of view, seems flawed: it is not only the public that needs protection (although they, and the applicant himself, definitely seem to do). Most of all, it seems that the dog in question and any other dog need to be protected against further interference with their thriving. Training a dog to take part in sexual activities with various men, whilst the men (or at least the applicant) are under the influence of drugs, seems to be a substantial affront to animal dignity, and should be recognised as such.

Second, the relevant laws seem to be insufficiently broad in terms of their scope. If sexual instrumentalising behaviour is indeed undignifying, then certain legal amendments seem necessary. First, the requirement laid down in section 69 SOA that there needs to be penetration with a penis might need to be removed. In the previous paragraphs, it was argued that sexual acts not involving penetration (such as masturbation or oral sex) or involving penetration with any other type of object can be instrumentalising too. Therefore, there does not seem to be a need to limit the relevant provision to such type of conduct. Legislators would then, however, be presented with a definitional challenge: what act precisely should be criminalised? One alternative might be to criminalise 'fornication with an

857 ibid para 20.

animal', as is done, for example, in Dutch law.[858] The relevant Dutch Draft Bill initially used the formulation 'sexual acts',[859] but this was replaced by 'fornication' so as to exclude certain acts that legislators deemed undesirable to criminalise, such as artificial insemination.[860] The aim was merely to include sexual acts *which are incompatible with a social-ethical norm*.[861] When assessing this, account is taken of the spirit of the time and the circumstances of the case. Note, however, that the formulation as used in Dutch law carries its own risks. If social-ethical norms change in society over time, this could lead to a decline in animal protection, regardless of the rationality and justifiability of such changed norms.[862] Furthermore, it seems to prompt the difficult question of what exactly "sex" means.[863] One might imagine an adult man kissing and hugging a pet, including its intimate parts, as sexual but not a similar act carried out by a 3-year-old girl.[864] Similarly, with respect to human beings, there is a growing body of literature on patients with Alzheimer and their sexual relations, for example with their spouses. Is it the physical, emotional or

858 Article 254 Criminal Law Code (*Wetboek van Strafrecht*).

859 *Kamerstukken II* 2006/07, 31009, nr. 2.

860 *Kamerstukken II* 2007/08, 31009, nr. 7; *Kamerstukken II* 2007/08, nr. 8; *Kamerstukken II* 2007/08, nr. 9.

861 *Kamerstukken II* 2007/08, 31009, nr. 8, p. 3: 'handelingen met een seksuele strekking…die in strijd zijn met een sociaal-ethische norm'. It was argued that acts of breeding or petting and kissing an animal are not incompatible with a social-ethical norm, and therefore not criminal.

862 The Animal Party (Partij voor de Dieren) also raised this issue: *Kamerstukken II* 2007/08, 31009, nr. 7.

863 See for example Kathy Rudy, 'LGBTQ … Z?' (2012) 27 Hypatia 601. Mention of section 78 SOA (which defines 'sexual') should, however, be made.

864 In the human context, one could think about the difference between a digital penetration between lovers, which we may consider as being sexual in nature, and a similar act as part of a medical examination, which we would not consider as such. I am grateful to Professor Jonathan Herring for raising this point.

relational context which makes these sexual or consensual?[865] Similar questions arise in the animal context. In addition, the alternative formulation as laid down in Dutch law also brings to the fore the question of why only certain forms of instrumentalising sexual behaviour should be criminalised. Is it indeed morally justified not to also include, for example, acts of artificial insemination that take place in farms, zoos and public aquaria? Indeed, it has been suggested that animals should instead be protected against any interferences on their sexual integrity, regardless of the motivation of the underlying act.[866] If this were indeed to be the correct approach, then there might be an argument to opt for the term 'sexual acts' instead.

The second legal amendment relates to the provision concerning animal pornography, section 63 CJIA. By definition, all forms of animal pornography seem to be instrumentalising in nature: they exist, in principle, to be used for a human's own bodily satisfaction.[867] This fact might provide a reason to remove the requirement laid down in section 63 CJIA that the image in question needs to be 'grossly offensive, disgusting or otherwise of an obscene character'.[868] If instrumentalising sexual behaviour with animals is indeed undignifying, then removing this requirement would be more in line with animal dignity protection whilst at the same time it would also address the criticisms voiced regarding its vagueness.

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865 See further Jonathan Herring, *Older People in Law and Society* (OUP 2009) 145-46 and Jennifer Hagerty Lingler, 'Ethical Issues in Distinguishing Sexual Activity from Sexual Maltreatment among Women with Dementia' (2003) 15 Journal of Elder Abuse and Neglect 85.

866 *Kamerstukken II* 2007-08, 31009, nr. 10; *Kamerstukken II* 2007-08, 31009, nr. 14. Ouwehand MP argued that the only justifications for interfering with animal integrity should be to improve the welfare of the individual animal or that of the animal population.

867 The question arises whether exhibition of animal sexuality is also undignified when it is done for educational purposes. The element of instrumentalisation seems to be present, but its justification is different in nature.

868 Section 63 (5A) and (7)(d) CJIA.

The third legal amendment concerns the killing of an animal for sexual purposes. Most aggravating factors as described above can already be addressed by existing legislation.[869] For example, the selling or renting out of an animal could perhaps be prosecuted by using some form of secondary liability, such as aiding or procuring, and causing the animal physical or mental suffering before, during or after a sexual act obviously falls within the scope of the AWA.[870] However, killing an animal is currently lawful as long as it is done in an 'appropriate and humane manner'.[871] In the next chapter it will be argued that killing by definition seems to impede one's process of self-realisation, since according to conventional knowledge the self ceases to exist. A new provision therefore seems to be needed here, which ties into the broader debate over whether animal life should be protected by law.

A last remark will be made in relation to the level at which legislation should be adopted. At the moment, sexual acts between humans and animals are only regulated at a national level. It is argued here that this seems to make good legal and political sense, given that the EU is bound by the principles of conferral and subsidiarity and that its main goal is to regulate the internal market, not to act as an overarching, independent and sovereign nation. Unless there are signs that bestiality is or becomes a cross-border problem, for example, because animals are sold and transported across borders for this purpose, there does not seem to be any particular legal reason to adopt legislation at EU level too. The Member

869 Although the legislature might of course also decide to include certain types of behaviour as aggravating factors to the primary act, that is, section 69 SOA.

870 Section 4 (provided that the animal is a 'protected animal' as defined in sections 1 and 2). Note how section 62(1) AWA ensures that 'mental suffering' is included within the AWA's scope as well.

871 Sections 4(4) and 9(4) AWA 2006. Of course, other types of law, such as environmental law, may proscribe the killing of certain types of animals, but these laws serve a different purpose.

States seem sufficiently capable, or at least not less capable than the EU, of addressing the matter themselves.

6.4 Zoophilia

We have seen that it seems difficult to identify exactly what it is that makes a sexual relationship proper or improper. The arguments so far have been based primarily on the idea of instrumentalisation, something which a number of prominent authors condemn (either in a sexual context or more generally). A number of additional consequences and potential wrongs have been highlighted as well, and it has been argued that these factors altogether seem to constitute sufficient reasons to declare certain sexual acts morally impermissible. However, sexual acts or relationships do of course not always need to be morally reprehensible. In contrast, they can also be respectful and caring. Specifically, they can be an expression of the social or relational nature of human beings (and perhaps also of the animals).[872] Sexual acts are one of the most intimate acts one could perform, and they can enable one to bond with a person on a level not easily matched in any other way. It might therefore be that one (of perhaps a number of) important positive reason(s) for having sexual intercourse (or sexual relations more generally) may be found in the desire to establish

872 On sexual relations and humans' social nature see also Lord Parekh, HL Deb 5 November 2015, vol 765, col 1782: 'I think it is widely recognised…that sexuality is embedded in a structure of social relationships. Ideally, it should be enjoyed within a relationship and be motivated by mutual love and respect. Pornography comes into the picture when these two elements are missing, when sexuality is divorced or detached from a sustained relationship or not motivated by love and mutual respect.…It is a question of both parties seeing each other as sexual objects and in the process looking on the whole thing as an exercise in mutual exploitation.' However, it should be noted that some feminists might make the exact opposite argument. They claim that much of sex consists of rape, which could lead someone to argue that actually sexual relations show how anti-social humans are. I am grateful to Professor Jonathan Herring for making this remark.

(and sustain) a deep connection with another individual, by sharing a special and unique experience.[873]

The element of instrumentalisation played a prominent role in the condemnation of the sexual acts that were described in the previous sections. This element, however, seems to be absent in the case of zoophilia.[874] The latter phenomenon therefore presents us with a greater challenge. There are genuine reasons to believe that zoophilia qualifies as a sexual orientation.[875] A study carried out by Miletski found that some people 'have feelings of love and affection for their animals, have sexual fantasies about them, and admit that they are sexually attracted to animals–three components that describe sexual orientation'.[876] Interestingly, some participants mostly cared about their relationship with their animals, and their lust for them was only secondary. One of them stated: 'I define myself as a zoophile because my relationships with animals are about love and trust–sex is merely an expression of that love'.[877] Another one reads: '[w]hile I have lust for a large number of animals, it is the relationship formed with the animal that is the important part'.[878] Additionally, some reported that 'they would not allow other people to have sex with their animals, as they regarded their animals as mates' or because of their 'love and/or jealous feelings for their

873 See also Charles Foster and Jonathan Herring, *Identity, Personhood and the Law* (Springer 2017) 39: 'We would argue that our relationships are not necessarily based on intellectual interaction.…Relationships *can* be marked by intellectual connection, but they need not be: some of their deepest manifestations are not. Many people find sexual relations to be a particularly profound way to express a very deep connection, but sexual relationships need not express such a connection.'

874 See in this connection also Rudy (n 863) 606.

875 See also Mish Barber Way (n 784).

876 Hani Miletski, 'Is Zoophilia a Sexual Orientation? A Study' in Beetz and Potberscek (n 780) 82. See also Mish Barber Way (n 784) and Beetz (n 785) 99-103.

877 Miletski (n 876) 91.

878 ibid 93.

animals'.[879] Interestingly, 94% of the participants stated that 'they did not want to stop having sex with animals, mostly because zoophilia was *part of who they were*'.[880] It should further be noted that various participants preferred animals over human beings,[881] or only wanted to engage with animals: 'I am zoo exclusive and the very thought of having sex with a human disgusts me'.[882] Importantly, in the latter case, a prohibition on sexual relations with animals would not just prevent an individual from having a particular sexual life, but from having a sexual life at all, something which, in general, seems important for human thriving.[883]

Statements concerning the relational aspect of zoophilia can also be found elsewhere,[884] and they are important. I have argued that (1) in general, having a sexual life seems important for human thriving and that (2) an important positive reason for having sexual interaction might be to establish and sustain a deep, unique connection. If the human being indeed genuinely seeks this connection with the animal concerned, and if s/he has good reasons to believe that this desire is mutual,[885] then the sexual relation actually seems to be dignity enhancing, rather than dignity depriving. In such cases, the sexual act is an

879 ibid 90.

880 ibid 92 (emphasis added).

881 ibid 93.

882 ibid 93.

883 Although it will be emphasised here that this should not be interpreted as an argument that any type of sexual relationship is dignifying or should be lawful. There might nevertheless be reasons to proscribe certain sexual acts which the human participant involved claims are motivated by love, for example, in order to protect a vulnerable subject which might not even have any sexual desires or needs at all, or which might not be capable of giving well-informed and independent consent. Potential examples concern children and, as will be seen later in this chapter, also animals.

884 Mish Barber Way (n 784).

885 Of course, evidence problems arise: how can we know for sure whether the desire is mutual?

expression of the social nature of human beings, notably of their loving and caring capacities.

However, this argument mostly looks at the relationship concerned from a human perspective of course. Questions relating to the animal's perspective also arise. First, there is the obvious issue of animal consent. If the animal does *not* consent, the situation still does not seem to be dignifying. We then face harms similar to those mentioned above: infringements on sexual autonomy and bodily integrity, potential emotional (and perhaps even relational) damage and physical injuries, and damage to society as a whole, and to some subgroups in specific. In fact, if it is obvious to the initiator that the animal does not consent, then the genuineness of his/her desire to establish a connection can be questioned in the first place. How can one use non-consensual sex to establish or sustain a bond? Surely, in such a case the sexual act is more likely to destroy any bond than to strengthen it.

But what does dignity have to say about the situation in which the animal consents to, or even initiates, the act? The question then arises as to what extent its motivations for consenting are relevant.[886] Why do animals engage in sexual relations? Do they seek to establish a deep connection as well?[887] An important question relating to this is whether the desire for such a connection needs to be mutual in order for the sexual relationship to be dignifying. What if the animal merely uses the human being for sexual pleasure or domination reasons, or what if it simply does not care about the act at all? That is, what if it allows it to happen to it, as it is not aware of the sexual nature of the act and therefore

886 Questions may also arise as to what level of consent would suffice. In the context of sex and those with mental impairments, for example, some prefer a reference to themes such as exploitation and pleasure rather than an intellectual consent. I am grateful to Professor Jonathan Herring for making this remark.

887 Here lies a danger of humanising animals. See also Rudy (n 863) 606-07.

considers it to be irrelevant or meaningless? This ultimately brings us to the question of whether the dignifying character of the desire to establish a connection is intent-based or result-based. If it is the result that matters (thus, a deeper bond needs to be established), then the act might not be dignifying if the intentions of the human are not shared by the animal. On the other hand, if it is only the intent on the human's behalf that matters, then such acts might actually be dignifying, at least for the human in question.

But even apart from these theoretical issues, there is an important practical issue. How can we know whether an animal consents or not? This issue has received a great deal of attention in the literature[888] and might tie into the broader debate over consent in the law on sexual offences. In particular, this debate concerns the question as to whether consent must be outwardly demonstrated or whether it is a state of mind.[889] Some are convinced that (at least some types of) animals can consent. Lilknottyone said that 'if I had not seen a dog consent or even initiate sex, I too would think they are unwilling partners'.[890] Similarly, Peter Singer has given the example of a dog riding up against a human being, or even of an orangutan trying to rape (or at the very least initiate sexual intercourse with) a female human being.[891] Others, however, question whether animals can truly consent. They might be coerced because relationships between animals and their human sexual partners are often

888 See, for example, Beetz (n 783) 60-65; Piers Beirne, 'Peter Singer's "Heavy Petting" and The Politics of Animal Sexual Assault' (2001) Critical Criminology 43; Bolliger and Goetschel (n 784) 39-40.

889 For an overview of such arguments, see Rebecca Whisnant, 'Feminist Perspectives on Rape' (*Stanford Encyclopedia of Philosophy*, 21 June 2017) <https://plato.stanford.edu/entries/feminism-rape/> accessed 16 July 2021.

890 Mish Barber Way (n 784).

891 Peter Singer, 'Heavy Petting' (*Prospect Magazine*, 2001) <https://www.prospectmagazine.co.uk/magazine/heavypetting> accessed 16 July 2021. Singer's article has, however, caused huge outrage and has even been criticised by many of its followers. See, for example, Beirne (n 888) and Sarah Boxer, 'Think Tank; yes, but Did Anyone Ask The Animals' Opinion?' (*New York Times*, 9 June 2001) <https://www.nytimes.com/2001/06/09/books/think-tank-yes-but-did-anyone-ask-the-animals-opinion.html> accessed 16 July 2021.

characterised by unequal powers (especially in the case of domesticated animals and their owners).[892] And even if it is the case that animals are not always coerced due to this unequal relationship, Beirne argues that animals cannot communicate their consent in forms that humans can readily understand. That is, humans cannot be certain that the animal is 'conscious, fully informed, and positive in [its] desires'.[893] Those focusing on the absence of consent have been accused of having ulterior motives (namely, wanting to keep the status of human beings elevated above animals),[894] flowing from 'anxieties about our own animality'.[895] However, even if this were true, concerns relating to the existence of coercion (due to power structures or the lack of ability to communicate) are legitimate, and should be taken seriously.[896]

How should we therefore deal with cases of zoophilia? Bolliger and Goetschel suggest that we 'act on the assumption that the animal's consent is forced, either through an artificial fixation on a person or by use of other psychological methods'.[897] Perhaps we should. However, they seem to overlook the fact that this cannot be done without running the risk of negatively affecting human (and perhaps animal) dignity. They claim that 'it

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892 Carol Adams, 'Woman-battering and Harm to Animals' in Carol Adams and Josephine Donovan (eds), *Animals and Women: Feminist Theoretical Explorations* (Duke University Press 1995) 55, cited in Beirne (n 888) 50. Mish Barber Way (n 784) also acknowledges this 'power dynamic'.

893 Beirne (n 888) 50. Beetz (n 783) 63-64, however, questions whether animals can indeed not communicate their consent at all.

894 Neil Levy, 'What, If Anything, is Wrong with Bestiality?' (2003) 34 Journal of Social Philosophy, 444, 454-55, cited in Mackenzie (n 785) 6 argues that objections to sexual acts between human beings and animals are not based 'on factors of consent or cruelty but rather on an objection to humans lowering themselves, and inappropriately raising animals'. Bestiality threatens the 'culturally defined conditions of our sense of who we are…nothing less than the meaning of our humanity is here at stake'.

895 Rudy (n 863) 607, cited in Mackenzie (n 785) 6. Singer (n 891) makes a similar argument.

896 Note in this connection how some people also argue that there is less concern in cases of sexual relations between two people with similar mental impairments than in cases where one of the two has considerably more mental capabilities. I am grateful to Professor Herring for making this remark.

897 Bolliger and Goetschel (n 784) 40.

remains a fact that animals are first and foremost exploited to satisfy the sexual urges of people, and are degraded as sexual objects, even if the intercourse remains free of violence'. With respect, this conclusion seems unfair. Many zoophilics claim that it is the relationship with the animal that matters, and that the sex is only secondary to it: an expression of their love. If that is true, then such sexual acts might be crucial for the self-realisation of those persons. Additionally, Bolliger and Goetschel themselves also acknowledge that '[w]hether zoophilia in fact ever happens with mutual consent, that is, is wanted and appreciated by the animal, can only be speculated on'.[898] If such mutual consent and desire are indeed present, the prohibition might not only be a violation of human dignity, but also a violation of animal dignity. Therefore, by prohibiting all forms of sexual interaction between humans and animals we are not just erring on the side of caution. Instead, the prohibition could be a violation of dignity itself.

Considerations that could be taken into account when deciding how to go about regulating sexual acts with animals could be utilitarian in nature. Thus, one could look at the proportion of animals that are used as sexual objects and at the proportion of animals that are considered genuine sexual partners. However, more research would be needed on this. I am not aware of any existing statistics on this that can be generalised, and it should be noted that such statistics might be hard to collect due to the partial illegality of the act and the social taboo surrounding it.[899] Second, there are two practical evidential issues to

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898 ibid.

899 See also Beetz (n 785) 105 and Beetz (n 783) 57. In the latter article, Beetz affirms that at the time of her writing there was no information available 'on the prevalence rates of zoophilia as defined by the DSM-IV or the self-designated group'. Authors that have examined the phenomenon of bestiality have, however, touched upon percentages about the reasons for engaging in sexual acts with animals and the use of force. Nevertheless, the results cannot be generalised due to their small sample groups. See, for example, Hani Miletski, *Understanding Bestiality and Zoophilia* (Bethesda 2002) and Andrea Beetz, *Love, Violence, and Sexuality in Relationships between Humans and Animals* (Shaker Verlag 2002), cited in Beetz (n 785).

take into account if we were to legalise sexual acts between consenting animals and zoophiles. First, how could we assure ourselves that the animal concerned indeed genuinely consented?[900] Can animals consent at all,[901] and if so, how do we demonstrate at a later point in time that they had indeed consented (as we cannot communicate this properly with them)?[902] Second, how are we to distinguish between real zoophiles and those humans that use animals as mere sexual objects? Surely, the latter group might be inclined to use the zoophilia exception as an excuse to avoid a criminal conviction (or any other form of punishment, for that matter). Related to this is also the pressing question of what is worse: to force someone into an act that is not dignifying to him/her, or to deny someone the opportunity to flourish actively? Obviously the answer to this question should inform our decisions on the legality of sexual acts carried out with animals.

In conclusion, the case of zoophilia presents us with a great challenge. In contrast to bestiality, it seems that some acts of zoophilia might actually be dignifying. However, we are faced with some crucial theoretical and practical questions, many of which we do not yet have the answers to. A lot of these relate to the concept of animal consent. To what extent are the animal's motives for consenting relevant and how do we know (and prove) whether it consented at all? Antonio Haynes suggests that we adopt a 'contextual approach with coercion as a principal feature'.[903] He writes that under this 'totality-of-the-circumstances approach, a coercion-based theory would look at a wide range of factors, including

900 The issue of evidence problems has also been highlighted by Bolliger and Goetschel (n 784) 36-37, although they focus on cruelty inflicted upon animals in a sexual context.

901 This issue is also raised with underage offences where the law might take the view that there are fundamental objections to sex with those under the age of consent, even where the victims consent.

902 See also Beirne (n 888) 51.

903 Antonio Haynes, 'The Bestiality Proscription: In Search of A Rationale' (2014) 21 Animal Law Review 121, 148-49.

evolving knowledge about nonhuman's capabilities as well as the context of the sexual conduct'.[904] Indeed, from a theoretical point of view a contextual approach seems to be the most nuanced and appropriate one. However, the practical issues we currently face are serious, and a contextual approach might therefore be wholly unworkable. Although unsatisfactory from a theoretical point of view, there are good reasons to follow Bolliger and Goetschel's suggestion to act on the assumption that the animal's consent is forced. This would mean that section 69 SOA would stay as it is in the sense that it would, despite its potential violation of dignity in some cases, still not make an exemption for zoophiles. Proscribing all types of sexual engagement with animals would also be in line with the approach taken with respect to those lacking capacity.[905]

6.5 Conclusion

The area of sexual relations presents us with big empirical, practical and normative challenges. We do not know of (all types of) animals precisely why they engage in sexual acts and how they experience these acts. Humans also only have limited communication abilities, which prevents them from fully knowing whether an individual animal is or has been a consenting participant to the act. And even if we were to ever know more about animals' sexual motivations, experiences and desires, this still does not necessarily tell us everything in terms of which sexual relationships are proper or improper. The determination of the

904 ibid.

905 See Jonathan Herring, *Vulnerable Adults and the Law* (OUP 2016), notably chapter 7, and Victoria Butler-Cole, 'Capacity to Consent to Sexual Relations and the Mental Capacity Act 2005' (2017) 11 Advances in Mental Health and Intellectual Disabilities 40.

propriety of a relationship is a normative area, which is to be explored by humans collectively.

This chapter has brought forward a potential interpretation of what a dignity-based approach towards sexual relations between humans and animals could look like. It has focused primarily on the instrumentalising nature of acts of bestiality, something which is condemned by a number of prominent authors and which does not seem particularly dignifying to me either. Not for either human or animal involved, nor for society as a whole and for particular groups within it. It also has potential negative emotional, physical and relational consequences for the animal involved, it might infringe upon its sexual autonomy, and there seems to be a link with interpersonal and animal-focused violence more generally. In addition, certain forms of sexual behaviour pose additional or aggravating challenges. The instrumentalising nature of bestiality, especially when combined with the other consequential and/or aggravating factors, might constitute a sufficient reason to declare bestial acts morally reprehensible and therefore render them unlawful.

The existing legislation is already capable of covering many situations in which the animal is used as a sexual tool, especially when it also causes harm to the animal. However, especially insofar as an instrumentalising nature is a sufficient condition for behaviour to be undignifying, the justifications underpinning the relevant laws are incomplete and their scope insufficiently broad. Notably, there might be reasons to amend sections 63 SOA and 69 CJIA, and to adopt a provision that prohibits the killing of animals (either in relation to sexual acts only or more generally). It should be noted, however, that adopting instrumentalisation as a sufficient criterion has potentially far-reaching implications. Animals are currently instrumentalised on a massive scale, for example, in the meat, dairy, fur and leather industry, in medical and product-based experiments, and even (to some extent) in

the pet industry.[906] A case could therefore be made for prohibiting such practices in principle as well (which would then only be allowed if there were to exist a sufficient justification).

The one situation in which the element of instrumentalisation seems to be absent is that of zoophilia. Zoophiles claim to be sexually involved with animals in order to express their love and/or deepen their connection instead. From the human perspective, there might be reasons to assume that such involvement could be dignifying, as they might be an expression of humans' social nature. From the animal perspective, however, it seems unclear whether such acts can be dignifying. We simply do not know enough about animals' motivations for sexual involvement and their experience of it to give any verdict on the matter, and there are complications in finding out whether they are or have truly consented. Therefore, a dilemma arises here. On one hand, there is a danger of patronising humans (and potentially animals) by prohibiting all types of sexual involvement between them. On the other hand, animals are vulnerable subjects, who cannot, in many cases, defend or protect themselves adequately, both during and after the act. In addition, perpetrators of bestiality might abuse any potential zoophilia exception to escape criminal liability. These facts seem to constitute good reasons not to make any criminal exception for acts of zoophilia. Incorporating the notion of dignity into animal law might therefore render all types of sexual relations between humans and animals unlawful.

906 See in this connection also Gieri Bolliger, 'Legal Protection of Animal Dignity in Switzerland: Status Quo and Future Perspectives' (2016) 22 Animal Law 311, 340.

CHAPTER SEVEN: HUNTING AND PREDATION

In 2016, the European Federation for Hunting and Conservation (FACE) estimated that there were approximately 6.7 million hunters in Europe, who managed 65% of the European countryside. The European hunting sector was said to provide 'an economic output estimated at EUR 16 billion' and '102.581 jobs'.[907] Similarly substantial figures were revealed with regard to the UK. According to the same presentation, hunting contributed EUR 3.2 billion to the British economy and 'conservation measures by shooting provides',[908] which was spent EUR 295 million a year on, were worth approximately '3.9 million working days, [which is] equivalent to 16.000 full-time jobs'.[909] With regard to the number of animals that are killed by hunters every year, it seems that there are no statistics available.[910] However, it has been estimated that the 'number of deaths worldwide may be in the hundreds of millions, if not billions'.[911] Hunting therefore turns out to be a relatively largely practiced activity, which affects the lives of many animals and humans, and the economy more generally.

907 Michl Ebner, 'The Economic Value of Hunting in the EU' (*FACE*, 27 September 2016) <https://www.face.eu/sites/default/files/documents/english/economia_della_caccia_27_9_2016_en.pdf> accessed 16 July 2021.

908 ibid.

909 ibid.

910 Animal Ethics, 'Hunting' <https://www.animal-ethics.org/hunting/> accessed 16 July 2021. However, the Burns Report gives some insight into how many animals were killed during (certain types of) hunting around the year 2000 in England and Wales: Lord Burns and others, 'Report of Committee of Inquiry into Hunting with Dogs in England & Wales' (9 June 2000) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/265552/4763.pdf> accessed 16 July 2021.

911 Animal Ethics (n 910).

There are different reasons to hunt. Environmental philosopher Gary Varner identifies three main categories.[912] First, there is 'therapeutic hunting',[913] which is 'designed to secure the aggregate welfare of the target species across generations, the health and/or integrity of its ecosystem, or both'.[914] Second, there is 'subsistence hunting',[915] which means 'hunting for food or other essentials'.[916] Third there is 'sport hunting'.[917] This includes 'hunting aimed at maintaining religious or cultural traditions, re-enacting national or evolutionary history, practicing skills, competing with an animal's survival skills, or just securing a trophy'.[918] The practical reality, however, tends to be more mixed up than this clear categorisation, and many forms of hunting therefore contribute to the causes of various of these categories.[919]

The present chapter investigates the dignitarian implications of hunting and predation. The word hunting is given a broad connotation in this context. It includes all forms of activities in which humans chase a wild animal with the intention to kill it. Such could be

912 Gary Varner, 'Environmental Ethics, Hunting, and the Place of Animals' in Tom Beauchamp and Raymond Frey (eds), *The Oxford Handbook of Animal Ethics* (OUP 2011) 855. Other authors use similar distinctions. See eg Marti Kheel, 'The Killing Game: An Ecofeminist Critique of Hunting' in Susan Armstrong and Richard Botzler (eds), *The Animal Ethics Reader* (Routledge 2017) 505, 507.

913 Varner (n 912) 861.

914 ibid.

915 ibid.

916 ibid.

917 ibid.

918 ibid.

919 ibid. Consider, for example, the situation in which 'hunters work under the direction of wildlife managers'. Varner writes that 'the individual hunters may think of themselves as granted permits to engage in sport hunting, but insofar as the permit system is designed to ensure that specified numbers and categories of animals are culled from the herd, hunters are the means by which wildlife managers conduct a therapeutic hunt'. For an interesting investigation into the motives of hunters in Denmark and the public's perception of it, see Christian Gamborg, Christian Jensen and Peter Sandøe, 'Killing Animals for Recreation? A Quantitative Study of Hunters' Motives and Their Perceived Moral Relevance' (2018) 31 Society & Natural Resources 489.

done by using domestic animals, such as hounds, but also by means of material devices, such as guns. Examples of hunting as used in this chapter therefore include activities of hunting as they are commonly understood in Britain, i.e. 'hunting mammalian quarry and pest species with dogs',[920] but also (certain) acts of shooting,[921] fishing, and falconry.[922] Carrying out an investigation into the topics of hunting and predation is interesting for two reasons. First, it enables us to see what implications the incorporation of dignity could have for our interactions with wild animals. Second, it might offer a more complete overview of the different directions dignity arguments could take. The previous chapters examined whether implementing dignity into UK/EU animal law would require an expansion of the amount of animal protection. This chapter carries out the opposite task: it examines whether dignity might also provide us with reasons to liberalise legislation concerning animal protection. After all, if dignity is about being an animal, and if an animal belongs to a prey species, is it then not actually dignifying for it to be hunted on?

It will be argued that forms of killing which are biologically necessary might indeed not be undignifying and that hunting might in those cases not necessarily be a less dignifying way of meat acquisition than buying farmed meat from the store. Although a final verdict on the latter matter depends on the precise living and dying circumstances at hand, some forms of living in the wild and dying at the hand of a hunter seem less detrimental to animal welfare than certain farming methods, and hunting (when done under certain

920 European Federation for Hunting and Conservation, 'Hunting in the United Kingdom: Hunting at a Glance' (2010) <https://face.eu/sites/default/files/uk.en_.2010_0.pdf> accessed 16 July 2021, 1.

921 ibid: this is commonly understood to mean 'the use of firearms to shoot man-made targets or to shoot species of birds and mammals'.

922 Another form of hunting that would fall within this definition is internet hunting, whereby animals are shot using a combination of online webcams and remotely controlled firearms. This practice originated in the US but does not currently seem to take place (or at least not on a large scale): The Humane Society of the United States, 'Internet Hunting Fact Sheet' <https://www.humanesociety.org/resources/internet-hunting-fact-sheet> accessed 16 July 2021.

circumstances) might also better respect animals' own innate abilities to escape predators than slaughterhouses do. Additionally, hunting might also fulfil certain needs in some human beings which they consider crucial to their self-realisation and which they claim cannot be achieved equally effectively in other ways. However, that being said, all forms of hunting which are not biologically necessary seem undignifying by default and should therefore be legally prohibited. From the animal perspective, this is so primarily because life is constitutive to the animal's further development. From the human perspective, the reason can be found in the Janus-faced nature of dignity and in the dignifying quality of empathy. The arguments developed in the chapter so far will then be applied to the area of predation amongst wild animals. It will be argued that Fosterian dignity does not necessarily impose a burden on humans to actively intervene in such acts of predation. In contrast to many animal liberalist theories, the notion of dignity can, due to its holistic nature, take into account the identity-changing nature of intervention. Resultantly, it is capable of consistently claiming that unnecessary suffering should be reduced in general whilst not necessarily being committed to fully condemning or intervening in predation either. Using the notion of dignity would therefore render the law internally consistent.

7.1 The Relevant Legislation

Hunting is in principle legal in the jurisdictions examined. Animals do not possess a legal right to life, nor does the relevant legislation contain a general prohibition on acts of hunting or on killing animals more generally.[923] However, there are restrictions in terms of the

[923] In fact, sections 4(4) and 9(4) AWA specifically exclude from the AWA's scope the killing of an animal as long as it is done in an 'appropriate and humane manner'. Note, however, how the AWA would not have applied to many types of hunting in the first place, as most hunted animals do not qualify as a 'protected animal'. An animal is protected (section 2) if it is 'of a kind which is

species that can be hunted, the period during which one is allowed to hunt, the means to be used and the locations at which hunting is permitted. Two of the most prominent pieces of legislation that affect the practice of hunting in the UK/EU are the Wildlife and Countryside Act 1981 (WCA) and Directive 2009/147/EC (Birds Directive).[924] Among other things, they prescribe that wild birds and their nests and eggs are not intentionally to be killed, injured, taken, damaged or destroyed. There are exceptions to this prohibition. Article 7 of the Birds Directive makes provisions for species that may be hunted under national legislation and, accordingly, it is not an offence in the UK, among other things, to kill, take or injure (during the course of an attempt to kill) a bird as contained in Part I of Schedule 2 of the WCA.[925] Such needs to be done, however, in a manner that is compliant with the Act. That is, one can only hunt outside the close season.[926] Furthermore, one cannot just use any means for this purpose. Generally speaking, one cannot use, for example, a bow or an automatic weapon.[927] In addition to these bird-related provisions, the WCA also contains a list of non-bird species that cannot be killed, injured or taken either.[928] This list includes, among other things, different types of sharks, a variety of butterflies and turtles, and the red

commonly domesticated in the British Islands'; 'under the control of man whether on a permanent or temporary basis'; or 'not living in a wild state'.

924 Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds [2009] OJ L20/7.

925 See section 2 WCA.

926 Case C-435/92 *Association pour la Protection des Animaux Sauvages and others v Préfet de Maine-et-Loire and Préfet de Loire-Atlantique* [1994] 1 WLUK 473, which concerned the predecessor of the Birds Directive, decided that the closing dates of migratory birds and waterfowl must be fixed in such a way so as to offer complete protection of the species. Furthermore, see also Case C-38/99 *Commission of the European Communities v French Republic* [2000] 12 WLUK 191, in which the ECJ granted a declaration that France did not correctly implement the rules concerning the close season.

927 For a full overview of prohibited methods of killing or taking wild birds, see section 5 WCA. See in this connection also Article 8 of the Birds Directive.

928 See section 9 and Schedule 5. Exceptions to this can be found in section 10. Furthermore, the Act also contains provisions for these animals' shelter and protection and, more generally, on the hunting methods that are not to be used in order to kill or take these wild animals.

squirrel. Another act that has influenced the practice of hunting in the UK is the Hunting Act 2004. It proscribes the hunting of wild mammals with dogs[929] and the activity of hare coursing.[930] There is also more specific legislation in place with regard to certain other species, such as the Deer Act 1991 and the Protection of Badgers Act 1992. Hunters' activities are furthermore influenced by Directive 92/43/EEC (Habitat Directive).[931] This Directive has established the Natura 2000 network, which is a 'coherent European ecological network of special areas of conservation'.[932]

The jurisdictions examined also have legislation in place which affects the hunting of species that do not typically live (on a large scale) in their own territory. Specifically, this legislation proscribes the import of animal products originating from certain animal species or from animals that have been treated or killed in a certain manner. Such proscriptions tend to affect the demand on the market and therefore the hunting of the animal species that is the subject of legislation. One relevant example is Regulation (EC) 1007/2009 (Seal Products Regulation), which prohibits the placing on the market of seal products.[933] These include all products deriving or obtained from seals, such as meat, oil and skin, although it should be noted that some exceptions to this ban exist, notably for products deriving from

929 Exceptions to this proscription can be found in section 2 of the Act. For some case law on the matter before this Act came into force, see, for instance, *Barrington v Colbert* [1997] 11 WLUK 126.

930 See section 5 (the Scottish equivalent can be found in section 11G of the Wildlife and Countryside Act 1981). Hare coursing did not used to be prohibited in the past. See in this connection *Waters v Meakin* [1916] 2 KB 111; *Aplin v Porritt and Others* [1893] 2 QB 57; *Pitts v Millar* (1873-74) LR 9 QB 380.

931 Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora [1992] OJ L206/7.

932 Article 3.

933 Regulation (EC) 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products [2009] OJ L286/36.

seal hunting carried out by Inuit and other indigenous communities.[934] Another relevant example is the Ivory Act 2018, which prohibits (in principle) the dealing in ivory. The practice of hunting –both inside and outside of the territories of the UK/EU– is also affected by legislation that was adopted by other supra- and international bodies. Well-known examples include the Convention on the International Trade in Endangered Species of Wild Fauna and Flora (CITES); the Convention on the Conservation of Migratory Species of Wild Animals (CMS); the Convention on Biological Diversity (CBD); and the Convention on the Conservation of European Wildlife and Natural Habitat.[935]

Although hunting is therefore in principle legal in the UK/EU (when carried out in accordance with the rules above), the relevant case law indicates that there is no such thing as a right to hunt (at least not under the ECHR).[936] At the same time, the law protects the interests of landowners who are ethically opposed to hunting instead. They cannot be forced into compulsory memberships of hunting associations, nor can they be obliged to tolerate

934 The relevant exceptions (including their further details) can be found in Article 3 of the Regulation.

935 For a good overview of some of the main international wildlife instruments, see Simon Lyster, *International Wildlife Law: An Analysis of International Treaties concerned with the Conservation of Wildlife* (CUP 1985) and Michael Bowman, Peter Davies and Catherine Redgwell, *Lyster's International Wildlife Law* (CUP 2010). Note how international conventions tend to be directed at States rather than at individual citizens, which are then responsible for their further implementation into national law. A good example of an act that is the result of such implementation is the Ivory Act 2018. Another example concerns what are known as the EU Wildlife Trade Regulations, which include, among other things, Council Regulation (EC) 338/1997 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein [1997] OJ L61/1, and which implement the provisions of CITES. On some limitations and opportunities inherent in wildlife law, see Arie Trouwborst and others, 'International Wildlife Law: Understanding and Enhancing Its Role in Conservation' (2017) 67 BioScience 784.

936 Notably, see *Chassagnou and Others v France* App nos 25088/94, 28331/95 and 28443/95 (ECtHR, 29 April 1999) para 113; *Friend and Others v UK* App nos 16072/06 and 27809/08 (ECtHR, 24 November 2009) paras 43-44; *Adams v Scottish Ministers* [2004] SC 665.

hunting on their land,[937] regardless of whether they are offered financial compensation.[938] These latter privileges are, however, limited to landowners who are opposed to hunting based on ethical reasons. Those who want the exclusive right to their land for financial reasons do not qualify for them.[939] Likewise, local authorities do not seem to have the same freedom on this matter compared to private landowners either. In the case of *R v Somerset CC,* the Council tried to ban the hunting of deer by hounds on council owned land. However, the court ruled that the council members could not be guided in their decision by their personal ethical convictions. Instead, they were bound to act in accordance with the best interests of the local area.[940] Two further remarks are made in this context. First, although the interests of landowners who are ethically opposed to hunting are relatively well-protected, protests against hunting are not in receipt of particularly much legal protection.[941] This has, however, been interpreted as 'a hostility [of the ECtHR] to direct action as a form

937 See, for example, *Chassagnou and Others v France* (n 936) and *Herrmann v Germany* App no 9300/07 (ECtHR, 26 June 2012). Such would be contrary to the rights laid down in Article 11 of the ECHR and Article 1 of Protocol 1 thereto. In the case of *Chassagnou v France*, a violation of these articles taken in conjunction with Article 14 ECHR was also found on the ground that only small landowners were bound to these restrictions on their land. Furthermore, some judges expressed their view that such restrictions also constitute a violation of Article 9 ECHR. See, for example, the separate opinions of judge Fischbach in *Chassagnou v France* and judge Pinto de Albuquerque in *Herrmann v Germany*.

938 *Schneider v Luxembourg* App no 2113/04 (ECtHR, 10 July 2007) para 49 (only available in French, also cited in *Herrmann v Germany* (n 937) para 77).

939 *Chabauty v France* App no 57412/08 (ECtHR, 4 October 2012). The applicant argued that there had been a violation of Article 14 ECHR taken in conjunction with Article 1 of Protocol No 1 thereto. For another unsuccessful application to the ECtHR in which the applicant was not ethically opposed to hunting, see *Nilsson v Sweden* App no 11811/05 (ECtHR, 26 February 2008).

940 *R v Somerset CC Ex p Fewings* [1995] 1 WLR 1037.

941 See *Steel and Others v UK* App no 24838/94 (ECtHR, 23 September 1998); *Fitzwilliam Land Co v Cheesman* [2018] EWHC 3139 (QB); *Geert Drieman and Others v Norway* App no 33678/96 (ECtHR, 4 May 2000), some of which are also discussed in Tom Sparks, 'Protection of Animals Through Human Rights: The Case-Law of the European Court of Human Rights' in Anne Peters (ed), *Studies in Global Animal Law* (Springer 2020) 153. See, however, also *Hashman and Harrup v UK* App no 25594/94 (ECtHR, 25 November 1999), in which the Court found a violation of Article 10 ECHR because the orders given to the "hunt saboteurs" were not precise enough and therefore did not meet the requirement of being prescribed by law.

of protest', rather than as the Court's support for hunting.[942] Second, the protection offered in relation to hunting in human rights courts seems to serve primarily the interests of the humans involved. It is their beliefs and consciousness that are the primary subject of concern, not the welfare and lives of the animals themselves.[943]

This overview of some main pieces of legislation that affect hunting in the UK/EU[944] therefore reveals that legislation has been adopted at different levels (global, European, national and regional) and that it is relatively complex because it is fragmented and species-, time-, location-, and method-specific.[945] The legislation serves a variety of purposes. It aims to contribute to the prevention and reduction of animal suffering; to the conservation of certain animal species (thereby serving the larger goal of safeguarding biodiversity); [946] and to the protection of humans' views/beliefs on and interests in the matter. The first aim is particularly well-illustrated by the Hunting Act. The Court acknowledged in *DPP v Wright* that the purpose of this act was 'the composite one of preventing or reducing unnecessary suffering to wild animals overlaid with a moral viewpoint that causing suffering to animals for sport is unethical and should, so far as practical and proportionate,

942 Sparks (n 941) 158.

943 In this connection, see also Sparks (n 941) 162 and the separate opinion of judge Pinto de Albuquerque in *Herrmann v Germany* (n 937).

944 Which is by no means exhaustive. For example, there is also legislation with regard to fishing. Note how hunters would also need to take into account, when applicable, legislation regarding issues such as gun and food safety.

945 The Hunting Act 2004 in particular has therefore also been accused of being 'very selective': *R. (on the application of Countryside Alliance) v Attorney General* [2007] UKHL 52, para [41].

946 Although it should be noted that certain animal species used to (and still might) be protected because of their economic importance and/or in order to sustain sufficiently large populations to be able satisfy hunters' interests. See Bowman, Davies and Redgwell (n 935) Chapters 1 and 3; Kheel (n 912) 507; Lawrence Cahoone, 'Hunting as a Moral Good' (2009) 18 Environmental Values 67, 76-77.

be stopped'.[947] It narrowed down the act's scope accordingly.[948] A second example concerns the Seal Products Regulation.[949] It came into existence by using the harmonisation route, but at its core it is underpinned by animal welfare concerns.[950] It should be mentioned, however, that fish are to a large extent curiously and explicitly excepted from suffering-based protection (despite there being evidence that at least some types of them can feel pain).[951] The conservation aim is especially well-illustrated by the Natura 2000 network that was established by the Habitat Directive and by the relevant International Wildlife Conventions.[952]

These different purposes highlight how the interests of many individuals and groups are at stake when it comes to hunting. Notably, these include the interests of individual animals, animal species, individual human beings (on both opposite sides of the spectrum) and the Earth's population as a whole. Given this multitude of interests, it is unsurprising

947 *DPP v Wright* [2009] EWHC 105 (Admin) para 36. See also *Countryside Alliance* (n 945) paras [36], [37] and [40]; *Adams v Scottish Ministers* (n 936) para [47]. Interestingly, it seems that the hunting dogs themselves also need to be protected against injury: *Bandeira v RSPCA* [2000] 2 WLUK 971.

948 ibid para 37: the 'mere searching for an unidentified wild mammal for the purpose of stalking or flushing it' is not included. The difference between stalking/flushing on the one hand and hunting on the other (and the related evidence-based issues) has come up in recent case law: *Fitzwilliam Land Co v Cheesman* (n 941).

949 In terms of reducing animal suffering, also note how the various acts contain provisions for the lawful taking or killing of seriously disabled animals. See, for instance, sections 4(2) and 10(3) of the WCA; section 6(2) of the Deer Act 1991 and section 6(b) of the Protection of Badgers Act 1992.

950 Peter Fitzgerald, ''Morality' May Not Be Enough to Justify the EU Seal Products Ban: Animal Welfare Meets International Trade Law' (2011) 14 Journal of International Wildlife and Policy 85, 88-94. This is also visible in the text of the Regulation, eg in preamble recitals 4, 5, 6, 7 and 8.

951 Section 59 AWA excludes anything that 'occurs in the normal course of fishing' from its scope, which means that the general clause that aims to prevent unnecessary suffering, section 4, does not apply to such acts either. Recreational fishing and hunting activities more generally are also not included within the scope of Council Regulation (EC) 1099/2009 of 24 September 2009 on the protection of animals at the time of killing [2009] OJ L303/1: see Article 1(3)(a)(ii). Note in this connection also how acts of hunting are not included within section 8 AWA on animal fighting either: *RSPCA v McCormick* [2016] EWHC 928 (Admin).

952 Notably, see Article 2 of the Habitat Directive. The conservation purpose is also well-illustrated by various provisions of the Birds Directive, such as Articles 1(1), 2, 3, 4 and 7.

that hunting causes great public controversy. Various judges have acknowledged how it is an 'emotive and divisive subject',[953] and its controversy also seems to be illustrated by the turbulent history of the Hunting Act[954] and by the fact that the legitimacy of many of the abovementioned pieces of legislation has been contested in court, sometimes even on multiple occasions. Amongst the relatively heavily litigated pieces of legislation are the Hunting Act,[955] the EU Seal Products Regulation[956] and the Ivory Act 2018.[957] Arguments that underpin the relevant legislation, and which have been brought forward in the relevant legal cases and in the literature more generally,[958] seem to circle around three perspectives: the individual animal perspective; the human perspective; and the ecological perspective. The

953 *Countryside Alliance* (n 945) para [1] (Lord Bingham); *DPP v Wright* (n 947) para [4] (Sir Anthony May).

954 The parliamentary history of this act is neatly summarised in *R (Countryside Alliance) v Attorney General* [2005] EWHC 1677 (Admin) paras [12]-[21].

955 It has been accused of not having been passed in a lawful manner as well as of being incompatible with the applicants' ECHR rights and inconsistent with the EC Treaty. With regard to this first accusation, see *Jackson v Attorney General* [2005] UKHL 56. For a full coverage of this case and its constitutional implications, see Cosmo Graham, 'A Very British Affair – *Jackson v Attorney General*' (2006) 12 European Public Law 501. The applicants focused on the (arguably questionable) legal powers that the House of Commons had used. With regard to the second accusation, see the conjoined cases of *Countryside Alliance, Derwin and Friend v Attorney General*. Specifically, the applicants invoked Articles 8, 11 and 14 of, and Article 1 of the First Protocol to, the ECHR and focused on Articles 28 and 49 of the EC Treaty, which concern the free movement of goods and services. For the House of Lords and the ECtHR judgments, see *Countryside Alliance* (HoL) (n 945) and *Friend and Others* (ECtHR) (n 936). Aspects of these judgments will be discussed in more detail later in this chapter.

956 The content of this Regulation has been challenged both in front of the EU courts and in front of the WTO authorities. See Case T-18/10 *Inuit Tapiriit Kanatami and Others v European Parliament and Council of the European Union* ECLI:EU:T:2011:419; Case C-583/11 P *Inuit Tapiriit Kanatami and Others v European Parliament and Council of the European Union* ECLI:EU:C:2013:625; Case T-526/10 *Inuit Tapiriit Kanatami and Others v European Commission* ECLI:EU:T:2013:215; Case C-398/13 P *Inuit Tapiriit Kanatami and Others v European Commission* ECLI:EU:C:2015:535. For an elaborate discussion of the WTO procedures (and the arguments that were used therein), see Fitzgerald (n 950) and Katie Sykes, 'The Appeal to Science and the Formation of Global Animal Law' (2016) 27 EJIL 497.

957 See *R. (on the application of Friends of Antique Cultural Treasures Ltd) v Secretary of State for Environment, Food and Rural Affairs* [2020] EWCA Civ 649 and *R. (on the application of Friends of Antique Cultural Treasures Ltd) v Secretary of State for the Environment, Food and Rural Affairs* [2019] EWHC 2951 (Admin).

958 Although note in this connection how many legal cases regarding hunting legislation appear in front of the courts because of the parties' commercial interests in the matter.

next sections, which discuss the ethical implications of hunting, focus primarily on the perspectives of the individual animal and the individual human, because these are the most closely involved in an act of hunting.[959]

7.2 The Ethics of Causing Death to an Animal

The first question to ask when it comes to hunting is whether, all other aspects put aside, causing the death of an animal in order to satisfy another being's interests is or can ever be compatible with animal dignity. At first glance, the answer to this question seems simple: according to our current scientific understandings,[960] life is constitutive to one's process of self-realisation, and an act of killing therefore by definition seems to impede it. Among other things, there will be no further development of one's physical, cognitive and relational aspects anymore after death. The development of the self seems to stop at this point. Note how the death of an animal also has potential consequences for co-habituating animals. It might cause 'distress and confusion [to the] animals linked in sociality with the prey',[961] which might be especially severe when it comes to the loss of a parent animal or an alpha leader.[962]

959 Charles Foster, 'Dignity and the Ownership and Use of Body Parts' (2014) 23 CQHE 417 argues that an important factor to take into account when it comes to evaluating or assessing the different dignity interests is proximity.

960 It is acknowledged here that such understandings might be altered in the future, and that a certain part of the population holds the belief that there is some form of life or further development after death (i.e. the so-called soul travels on).

961 Roger King, 'Environmental Ethics and the Case for Hunting' (1991) 13 Environmental Ethics 59, 63.

962 Myanna Dellinger, 'Trophy Hunting Contracts: Unenforceable for Reasons of Public Policy' (2016) 41 Columbia Journal of Environmental Law 395, 408, 448.

However, a further look into the matter reveals that the answer to the abovementioned question might not be as straight-forward as it seems. Although life is constitutive to one's development and therefore relevant for animal dignity, animals are also embedded in an ecological system in which members of certain species need to consume members of other species for their own survival.[963] Biologically speaking, the latter animals function as food for others. Their nature as prey (read: food) seems to constitute a fundamental, identifying and inescapable part of their being. Foster writes about this as follows:

> [I]f the theology can be forgiven, [herbivorous animals] exist for two purposes: to unlock the energy of the sun that is trapped by plants, and to transmit that energy to others. As to the first purpose, the energy is sequestered inside the cellulose walls of plant cells: herbivore digestive systems can break down those cell walls and release the energy. As to the second purpose, the digestive systems allow the energy to be transmitted to the herbivore itself, and then on, up the food chain, to anything that eats the herbivore. These two purposes have made herbivores what they are: have conferred their shape, their speed, their cunning, and all other aspects of their behaviour, their anatomy, and their physiology. Deer have been shaped by wolves (and wolves by deer). If deer were not edible, they would not be the way they are. They would not be deer at all. To unwish the teeth and the hunger of wolves is to unwish deer. It is not so inaccurate to say that deer exist to be killed.[964]

This formulation of the ecological reality might bring one to argue that animals exist to be eaten. According to this argument, for the animals *not to be eaten* would be undignifying. Serving as food for other beings is the whole reason of their existence and therefore constitutes their ultimate form of self-realisation.[965] Although there might be room to make this kind of argument under the adopted dignity theory, to me it does not seem to be the most appropriate interpretation. Being a member of a prey species indeed seems to

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963 Note in this connection also Causey (n 975) 337: 'Few biologists would argue with the statement that the lives of all creatures are shaped and defined by their tropic relationships, i.e., the details of their feeding'.

964 Charles Foster, 'On Hunting' in Bernice Bovenkerk and Jozef Keulartz (eds), *Animals in Our Midst: The Challenges of Co-Existing with Animals in the Anthropocene* (Springer 2021) 469, 475.

965 See in this connection also David Schlosberg, *Defining Environmental Justice: Theories, Movements and Nature* (OUP 2007) 151-52, as cited in Elizabeth Cripps, 'Saving the Polar Bear, Saving the World: Can the Capabilities Approach do Justice to Humans, Animals *and* Ecosystems?' (2010) 16 Res Publica 1, 5.

constitute a fundamental and inescapable part of what prey animals are. Whilst animal liberalists tend to ignore this fact (to the disappointment of environmentalists),[966] such ignorance seems inappropriate under the chosen account of dignity. If dignity is about being and developing into who you are, taking into account all aspects of one's being, then something so fundamental to one's nature should probably not be completely overlooked. However, at the same time, reducing animals' selves to their prey nature seems too limited a view as well. They seem to consist of more than just being a prey. For instance, many members of prey species also form part of a community. They are also a mother, a sibling or just a valuable member of a herd. It seems to me that being a prey constitutes only one part of who they are; not the only and ultimate part. Being eaten by a predator does therefore not necessarily seem to constitute the ultimate, or even a necessary, part of a prey animal's self-realisation.

How is the practice of intentionally causing death to an animal to be approached then? The abovementioned elements seem to put us in a difficult position due to their internally conflicting nature. On one hand, life is constitutive to one's self-realisation, whereas on the other hand, being a prey seems to be inherent in the nature (and lives) of prey animals. It is argued here that insofar as the killing is a necessary part of the ecological reality in which animals are embedded, there is room to argue that the killing is at the very least not undignifying. However, two important remarks will be made in relation to this. First, it seems unclear to what extent humans form a necessary part of the food chain as well. There seems to be dispute over whether humans have a biological need for meat.[967]

966 J Baird Callicot, 'Animal Liberation: A Triangular Affair' (1980) 2 Environmental Ethics 311, 323; King (n 961) 65.

967 For some participants of this well-known debate, see Paul Veatch Moriarty and Mark Woods, 'Hunting ≠ Predation' (1997) 18 Environmental ethics 392, 401, who argue that there 'is nothing purely biological and non-cultural about eating anything, including meat' and James Swan, *In Defense of Hunting* (Harper Collins 1995) 9, cited in Luke (n 972) 33, who has 'tried a vegetarian diet for a year

A difficult question also arises as to how to interpret necessity: is merely survival sufficient, or do increasing life expectancy and physical health also count? What is more, the necessity might also depend on the circumstances at hand. A person might, for example, have a particular physical illness and a resulting biological need or a lack of access to alternative food sources. Second, it seems that many, if not most, cases of human hunting are carried out for different reasons, for example, for recreational purposes. The aforementioned ecological reality should not be used as an excuse for these forms of hunting. The fact that some types of animals necessarily serve as food for other animals to survive does not transform them into "machines à chaser"; into toys to be chased for fun and to then, as a convenient consequence, be consumed for food, clothing, decoration or whatsoever.[968] At least insofar as the killing of an animal is not a necessary part of another being's diet, it seems to me that the "life-is-constitutive-element" should prevail when it comes to animal dignity.

7.3 Life and Death in the Wild as Opposed to the Farm and the Slaughterhouse

The second aspect to be assessed concerns the method of killing. Insofar as the death of an animal is biologically necessary, is there anything morally problematic about the killing methods used during hunting? The term "killing methods" is to be understood in a broad sense in this context. It includes both the chase and the particular means used (such as a gun, a bow or hounds). Those who oppose the practice of hunting tend to focus on the harm it causes to individual animals. Apart from death itself (as discussed above), the chase and

and [claims that] it made him ill'. Luke (n 972) 34 also points out how 'recent anthropological theory' argues that 'humans have been foragers, not hunters, throughout most of our existence'.

968 The term "machine à chasser" was coined by Roger Scruton, 'Ethics and Welfare: The Case of Hunting' (2002) 77 Philosophy 543, 563.

the killing may cause the hunted animal fear, pain and suffering (although it will be noted here that this need not always be the case: sometimes the animal might be killed instantly, and some types of animals might also be incapable of feeling pain and/or of suffering).[969] Some authors use a rights-based approach to object to the causing of suffering and so on,[970] but not all of them necessarily do.[971] The perceived undesirability or moral ambivalence of causing animals suffering during the course of hunting is also acknowledged by some authors who are not in principle opposed to hunting.[972] Among other things, they focus on the inevitable fact that the kill of the hunter is not always –or perhaps even seldom– "clean".[973]

Others, however, challenge these welfare-based arguments by questioning whether hunting causes more suffering than other methods of killing. Notably, authors have drawn comparisons with the suffering caused in the livestock industry and with the suffering that wild animals have to endure during death in the wild (especially in case of overpopulation).[974] Causey writes that 'In terms of overall humaneness, a life of free confinement and

969 See in this connection also Patrick Bateson and Elizabeth Bradshaw, 'Physiological Effects of Hunting Red Deer (Cervus Elaphus)' (1997) 264 Biological Sciences 1707. I am grateful to Professor Charles Foster for bringing this report to my attention.

970 Perhaps the most well-known example in this respect is Tom Regan, *The Case for Animal Rights* (University of California Press 1983). Note, however, how some other authors have made the exact opposite argument, namely, that it is not morally wrong to kill animals during the course of hunting because, according to the argument, they are not persons and hence they have no moral right not to be killed. Notably, see Theodore Vitali, 'Sport Hunting: Moral or Immoral?' (1990) 12 Environmental Ethics 69.

971 For example, Jordan Curnutt, 'How to Argue for and Against Sport Hunting' (1996) 27 Journal of Social Philosophy 65 does not make any particular mention of rights whilst presenting his harm-based argument. See also Joy Williams, 'The Killing Game' (*Esquire*, 1 October 1990) <https://classic.esquire.com/article/1990/10/1/the-killing-game> accessed 16 July 2021, which focuses prominently on the harm hunting causes animals.

972 eg Robert Loftin, 'The Morality of Hunting' (1984) 6 Environmental Ethics 241, 245-46. See also Luke's interpretation of the American Sportman's Code: Brian Luke, 'A Critical Analysis of Hunter's Ethics' (1997) 19 Environmental Ethics 25, 32-33. Not everyone, however, supports this interpretation: Cahoone (n 946) 76.

973 Evelyn Pluhar, 'The Joy of Killing' (1991) 7 Between the Species 121, 121; Cahoone (n 946) 76; Loftin (n 972) 246.

974 However, it has been questioned whether as many animals die in the wild from overpopulation as some hunters make us believe (and therefore, whether ecological hunting indeed actually reduces

a quick death at the hands of a skilled sport hunter beat anything the livestock industry can offer and certainly beat most of the death scenes Mother Nature directs'.[975] Two things are noted here. First, regardless of the potential validity of these arguments, they only work on a group level, at which the non-identity problem arises.[976] This seems to be the case even when it comes to death in the wild, since hunters have been accused of killing a different type or category of animals (namely, the biggest and healthiest ones) than those who would die in nature from starvation, predation or disease (namely, the old, the weak and the sick).[977] Second, authors who challenge the suffering-based objections to hunting appear to focus not only on the moments before death (that is, the chase and the killing itself), but also on the lives that preceded the animals' deaths. Given their interconnectedness, the discussion to follow will consider both aspects as well.[978]

In any event, it is indeed an inescapable fact that at least some forms of hunting cause pain, fear and suffering to the animals involved. These conditions seem to matter morally. Welfare-based concerns feature prominently in most, if not all, animal ethics

animal suffering by "saving" the overpopulated animals from a painful death). See, for example, Pluhar (n 973) 121, citing Bruce Larson, 'The Animal's Agenda' (March 1987) 25, who argues that it is sometimes more appropriate to speak about undernourishment of members of the overpopulated species rather than about starvation. It has, furthermore, been suggested to solve suffering-based problems as a result of overpopulation by means of gene technology: Kyle Johannsen, 'Animal Rights and the Problem of r-Strategists' (2017) 20 Ethical Theory and Moral Practice 333.

975 Ann Causey, 'On the Morality of Hunting' (1989) 11 Environmental Ethics 327, 335, further referring to Aldo Leopold, *A Sand County Almanac* (Sierra Club Books 1970) 259 and Roger Caras, *Death as a Way of Life* (Little, Brown and Company 1970) 101-02. See also Cahoone (n 946) 81.

976 The non-identity problem was also discussed in chapter 5 of this thesis (on biotechnological applications).

977 Marti Kheel (n 912) 508; Loftin (n 972) 245. See also Vitali (n 970) 70, including his reply to this type of argument. Dellinger (n 962) 409 writes that such type of behaviour also leads to 'drastic evolutionary changes' by creating an 'unnatural selection'.

978 Although it is noted here that these two do not necessarily need to be interconnected: animals are also sometimes held captive throughout their lives and then released for hunting purposes. However, these animals tend to have (at least partially) lost their ability to flee and escape hunters' bullets due to their customisation to humans and their lack of experience.

theories, in the dignity theories discussed earlier in this thesis, and in existing UK/EU animal laws. Whether life in the wild and a subsequent death through hunting actually has worse effects on animals' experiential welfare than life on a farm and death in a slaughterhouse seems, however, highly contingent on the circumstances at hand. Animals on industrial farms have a totally different level of welfare compared to animals living on a small-scale, biological family farm. Animals in the wild might live a life characterised by relatively safe circumstances and a devoted, caring herd, but wild animals might also be rejected from their family after birth and face a life full of struggles for survival. In terms of dying, whilst certain slaughterhouses strictly adhere to the rules laid down in welfare-based legislation, other slaughterhouses do not. And death at the hand of a hunter can be quick and painless, but it might also involve an extensive flee followed by an incompetent shot resulting in a slow, excruciating dying process. Although the level of welfare experienced by animals during their lives and dying process therefore seems to matter in terms of animal dignity, it cannot necessarily be concluded that all forms of hunting (and life in the wild preceding it) affect animal welfare more negatively than the livestock industry.

That being said, it is argued here that in terms of animal dignity an element other than welfare might need to be factored in as well: authenticity. When it comes to life itself, life in the wild seems, at first instance, more authentic than life on a farm: it is the most natural form of taking part in the animal adventure. However, two caveats are necessary to mention. First, this argument may only apply to certain types of animals. Some (sub)species that have been kept and bred on farms for centuries have evolved in such a way that they would not be suited for life in the wild anymore. In fact, it may be argued that they have transformed into wholly different selves by now compared to their ancestors, as a result of which life on the farm might be more authentic to them. This is, of course, provided that the farm concerned offers opportunities to express species-specific behaviour and so on,

rather than locking them up as machines without fulfilling any needs beyond those necessary for mere survival. Second, the fact that life in the wild might be more authentic to at least some types of animals is not necessarily to say that it is also the most conducive to an animal's self-realisation. Living on a farm instead, being a controlled environment, might create opportunities for humans to fulfil other needs or capabilities of animals, which animals might not always have access to in the wild but which might nevertheless be important to their self-development. One may think about access to members of its kind[979] and to those things that are necessary for the animal's survival in the first place, such as access to food and medical help. Therefore, although a certain level of authenticity is necessary for an animal's self-realisation (something which does not seem possible on industrial farms), there might be discussion as regards to the most desirable degree of it.

The focus will here, however, shift to the killing itself. Dying in a slaughterhouse might or might not, as we have seen above, guarantee a better experiential welfare in animals than dying at the hands of a hunter. However, at the same time it takes away from the animal any opportunity to use its own abilities to escape death. Although some types of animals are indeed biologically predisposed to serve as food for others, at the same time they (or at least those that grew up in the wild) have also evolved themselves in a way that decreases, for themselves, the chance of being captured and eaten. Foster has highlighted in the citation above how animals' nature as a prey has shaped many aspects of them, including their anatomy, physiology and behaviour. These have, it seems, become identifying features of the animals. Hunting might do more justice to this aspect of the animals than slaughterhouses. Instead of rendering them as helpless pieces of meat, hunting allows

979 Recall in this connection the situation mentioned above in which an animal is rejected by its mother and subsequently does not form part of a herd anymore. The animal concerned might then not have any genuine opportunities anymore to bond with other animals.

animals to use their innate abilities to try escape death. It is argued here, however, that a necessary condition for this is that the animal indeed has a realistic chance of escape. If such does not exist, for example, because the animal is kept in a confined space, because the means used render it helpless (e.g. an automatic weapon) and/or because the animal grew up amongst humans and would therefore never tempt –or perhaps even lost its ability to– escape them, then no justice is done to their own innate abilities. In such case, the chase only risks adding unnecessary fear, pain and suffering instead.[980]

7.4 The Human Perspective: Human Instincts and Identity

The discussion thus far has focused on the animal perspective. The question arises, however, as to what extent the practice of hunting is compatible with human dignity. Humans themselves have put forward a number of reasons to justify their hunting (which are to some extent interconnected). First, it cultivates certain values, goods or perhaps even virtues in humans. Examples include intelligence, emotional discipline, patience, various physical skills, self-sufficiency, trophic responsibility and ecological expertise.[981] Some goods are also achieved at a group level. For instance, hunting can contribute to the establishment and development of interpersonal relationships.[982] Perhaps the most obvious reply to this

980 Note how the latter argument might also be supported from an evolutionary point of view. Note in this connection also *RSPCA v McCormick* (n 951): if the "means used" is a protected animal, like a hound, and the prey animal has no possibility of escape, then the act qualifies as animal fighting as prohibited by section 8 AWA.

981 For the first four qualities, see Vitali (n 970) 77. For the latter three, see Cahoone (n 946) 82-83.

982 This argument was also made in the case of *Friend and Others* (ECtHR) (n 936). Lord Hope (n 945) para [54] even suggested that this was what the whole case was about. However, the ECtHR (para 41) held that 'A broad construction of Article 8 does not mean…that it protects every activity a person might seek to engage in with other human beings in order to establish and develop such relationships. It will not, for example, protect interpersonal relations of such broad and indeterminate scope that there can be no conceivable direct link between the action or inaction of a State and a person's private life…. By the same token, it cannot be said that, because an activity allows an individual to establish and develop relationships, it falls within the scope of Article 8 such that any regulation of that activity will automatically amount to an interference with that individual's private

argument would be that (at least some of) these values could also be developed in other, less harmful manners.[983] Furthermore, the development of some of these qualities (such as patience and discipline) would be severely compromised (or even totally barred) by certain types of modern hunting, in which comfort, convenience and effectiveness take priority over the actual testing and further development of hunters' personal abilities.[984]

The first, mostly individually focused, argument connects to the second one, which is that hunting is a cultural activity.[985] The cultural value of hunting has indeed been acknowledged and respected by legislators with regard to indigenous communities, as is attested by the exceptions contained in the Seal Products Regulation.[986] However, the relevant courts have been less receptive to culture-based arguments in relation to non-indigenous communities. When the Hunting Act 2004 was under review in *Friend and Others v UK*, the ECtHR indeed accepted that 'the hunting of wild mammals with hounds had a long history in the United Kingdom; that hunting had developed its own traditions, rituals and culture; and, consequently, that it had become part of the fabric and heritage of those rural communities where it was practiced'.[987] It also accepted that hunting 'formed a core part'

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life'. The ECtHR eventually concluded in paragraph 42 that 'the interpersonal relations' the applicants relied on were 'too broad and indeterminate in scope'.

983 A point which was also made by Pluhar (n 973) 124-25 and acknowledged by Causey (n 975) 335-36.

984 Illustrative examples are 'game ranches featuring guaranteed hunts of exotic species in fenced areas' and 'open-reared birds that are released ahead of the hunters' (both cited in Loftin (n 972) 249). Note how the land ethic theory and authors advocating the 'primitivist' position do not seem to approve of (all) such types of modern hunting either: see Charles List, 'Is Hunting a Right Thing?' (1997) 18 Environmental Ethics 405, 414-15; Aldo Leopold, 'Wildlife in American Culture' (1943) 7 The Journal of Wildlife Management 1; and King (n 961) 72, referring to José Ortega y Gasset, *Meditations on Hunting* (Charles Scribner's Sons 1972).

985 Interestingly, Moriarty and Woods (n 967) have used a culture-based argument to show that hunting by humans is not a natural, instinctual activity. Cahoone (n 946) 72-73 replies to this that hunting is both cultural and natural: it is a 'cultural trophic practice'.

986 See Article 3 of the Regulation.

987 *Friend and Others* (ECtHR) (n 936) para 40.

of the lives of the individual applicants.[988] However, it nevertheless refused to include the abovementioned activities within the scope of Article 8 ECHR. First, because of their very public nature.[989] Second, and this is more crucial for the purposes of this thesis, because it did not recognise the hunting community as a distinct ethnic or national minority group deserving of legal protection[990] or consider 'the activity of hunting [to] represent a particular lifestyle...to be indispensable for personal or cultural identity'.[991] The ECtHR also explicitly accepted the goal of preventing unnecessary suffering to animals for sport as a legitimate justification for any potential infringements on human (including hunters') rights.[992] It is noted in this connection that some pro-hunting authors disapprove of forms of hunting which solely constitute cultural activities as well.[993]

The third argument states that hunting (and the hunter's desire to kill[994]) is instinctual. It is an innate part of what humans are and arguably connects them to their prehistoric origins.[995] It has even been suggested that for this very reason humans' desire to kill should

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988 ibid.

989 ibid para 43: hunting was therefore too far removed from the personal autonomy of the applicants.

990 ibid para 44.

991 Angus Nurse, 'Criminalising the Right to Hunt: European Law Perspectives on Anti-Hunting Legislation' (2017) 67 Crime Law Soc Change 383, 383-84. See also *Friend and Others* (ECtHR) (n 936) para 44.

992 *Friend and Others* (ECtHR) (n 936) para 50.

993 See eg Holmes Rolston, *Environmental Ethics: Duties to and Values in the Natural World* (Temple University Press 1988), cited in Moriarty and Woods (n 967) 392, who considers trophy hunting, hunting for recreational purposes and hunting for religious reasons as being purely cultural activities. He only approves of hunting 'done for the purpose of participating in a natural process'.

994 Many authors, such as Causey (n 975) 336-38, argue that it is the desire to kill that ultimately needs to be defended.

995 For an excellent overview of these arguments, see Luke (n 972) 33-34, discussing, among other things, the following works: Ortega (n 984); James Whisker, *The Right to Hunt* (North River Press 1981); Swan (n 967); Ted Nugent, *Blood Trails: The Truth about Bowhunting* (Ted Nugent 1991); Paul Shepard, *The Tender Carnivore and the Sacred Game* (Scribner's 1973).

be exempted from any moral evaluation.[996] Opponents of hunting have, however, fiercely disputed its alleged instinctual nature. They have pointed out how certain types of hunting 'can be explained easily without recourse to predatory instincts',[997] how 'the empirical evidence for the evolution of such instincts is shaky',[998] and how 'the occurrence of prehistoric hunting does not necessitate the evolution of predatory instincts'.[999] Furthermore, it should be noted that, even if this instinctual desire to kill animals exists, it clearly is not prevalent in all human beings, as is attested by the large number of humans who do not feel the need to hunt, or who even feel repulsed about the idea of hunting.[1000] In this connection, Luke rightly notes that human hunters (and humans in general, I would argue) 'are also disposed *against* killing and inflicting pain', resulting in humans not being '*natural* predators', but '*conflicted*' ones.[1001]

996 Causey (n 975) 338. To be sure, Causey does not argue that *acts* of hunting should be exempted as well, since a human's 'motives, acts and attitudes' are guided by reason, and 'matters of reason are legitimately subject to moral evaluation'. See pages 337-38.

997 ibid 34, citing Pluhar (n 973) 123. Note in this connection also how authors have connected this "instinct" to men's perceived masculinity: Kheel (n 912) 507.

998 Luke (n 972) 34. Note in this connection also how King (n 961) 69 has argued that human beings have lost the particular wild niche which they once had'.

999 ibid, citing Pluhar (n 973) 123 and Marc Bekoff and Dale Jamieson, 'Sport Hunting as an Instinct' (1991) 13 Environmental Ethics 375.

1000 See also Pluhar (n 973) 123. European statistics of 2018 show that the overwhelming majority of UK/EU citizens is not involved in hunting: Niall McCarthy, 'Hunting: Ireland Ahead of the Pack' (22 October 2019) <https://www.statista.com/chart/19732/number-of-hunters-per-1000-inhabitants/> accessed 16 July 2021. For some American statistics, see Pluhar (n 973) 123, Williams (n 971) 118 and Dellinger (n 962) 402.

1001 Luke (n 972) 35, also citing Daniel Dombrowski, 'Response: A Defence of Pluhar' (1991) 7 Between the Species 128, 130-31, which 'argues that moral concern for nonhuman animals is as likely to be part of our evolutionary heritage as the urge to kill'. See further Jennifer Everett, 'Environmental Ethics, Animal Welfarism, and the Problem of Predation: A Bambi Lover's Respect for Nature' (2001) 6 Ethics & The Environment 42, 61. Note in this connection how Causey (n 975) 339 considers reason to be 'the greatest danger to the existence of hunting'.

The last argument, which is sometimes connected to the abovementioned perceived instinctual nature of humans,[1002] holds that the incentive to hunt stems from humans' 'desire for an intimate connection with the natural world, and for the self-knowledge that is impossible without that connection'.[1003] Among other things, hunting can teach humans about their animality (including their mortality), about their otherness, and about relationships. Crucial to acquiring this self-knowledge seems to be the element of killing: alternatives such as wildlife photography and shooting animals with paint guns arguably do not suffice.[1004] Authors advocating this connection-to-nature point of view argue that hunting develops a kind of ecological humility in hunters, being the 'cure' for the humans' urge to dominate.[1005] Ecofeminists have, however, reached the opposite conclusion. They have interpreted the predominantly male-based composition of hunting communities, their heavy emphasis and insistence on killing and their erotic vocabulary as being symptomatic of a larger and more structural societal problem relating to male violence.[1006] In this connection, it is worth noting how authors have also suggested that a 'precondition of the hunting relation…is a process of objectification'.[1007] Especially illustrative is the following quote:

> In order to kill animals, hunters must first deaden their emotional sympathies toward the animal's pain. They must consider the animal as an object, as prey, rather than

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1002 Notably, see Ortega (n 984) and Shephard (n 995), as discussed in King (n 961) 71. However, for a more critical voice of our perceived instinctual nature as justification, see Foster, 'On Hunting' (n 964) 473-74.

1003 Foster, 'On Hunting' (n 964) 472.

1004 The cruciality of this element to hunting has been emphasised by many authors: Foster, 'On Hunting' (n 964) 472-73; Luke (n 972) 35; Causey (n 975) 332; Alastair Gunn, 'Environmental Ethics and Trophy Hunting' (2001) 6 Ethics & The Environment 68, 71.

1005 Foster, 'On Hunting' (n 964) 476-77, also discussing Ortega (n 984); Causey (n 975) 339.

1006 King (n 961) 80-83, discussing and relying on, among other things, the following works: Andree Collard and Joyce Contrucci, *The Rape of the Wild: Man's Violence against Animals and the Earth* (Indiana University Press 1989) and Mary Daly, *Gyn/Ecology: The MetaEthics of Radical Feminism* (Beacon Press 1978). See also Kheel (n 912) 509-11

1007 King (n 961) 83, citing Collard and Contrucci (n 1006).

> as a living being with a life of its own. The hunter necessarily abstracts the animal from the web of its living relationships, from the familial ties which link parent and offspring, from the pack or herd relations that constitute the animal's sociality, and from the predator-prey relations that sustain a healthy wild community. The hunter must learn not to care what happens to the young animals deprived of the experience, guidance, or protection of older animals; he must ignore the effects on the survivor of a mating pair. In addition, he must ignore the effects of his own hunting on the wild predators who are either deprived of prey or themselves hunted because they compete for the object of the hunter's sport. Seen in this way, the hunter, far from being "alert," must in fact be blind to much that is present in the lives of animals, regarding the animal as a social atom, an object, living in no essential relations to other individuals. Predation, for Ortega and Shepard, is not just the primary animal relation; it is the only one which they notice.[1008]

The problem with regard to mostly the last human-centred argument is that there is no sound way to empirically investigate its "validity". Does hunting indeed establish an intimate connection with nature and provide one with self-knowledge that is not to an equally large extent acquirable in other manners? This difficulty is exacerbated by the fact that each and every individual human being is different and might therefore require different activities or experiences to fully develop him/herself. This means that, although the desire to kill in order to acquire more self-knowledge has never occurred in myself, there is no easy way for me to show that hunting would not be necessary for the acquisition of (a sufficient level of) self-knowledge in other human beings either. These difficulties eventually lead to a non-constructive yes-or-no argument, which also highlights the challenges of applying the adopted account of dignity more generally. It therefore seems that, at least insofar as the killing is biologically necessary, there might also from a human perspective be room to argue that doing it by means of hunting is not less dignifying than acquiring farmed meat from the store. One additional observation, which was already raised in earlier paragraphs, will, however, be highlighted here. Even if certain predative instincts or desire to kill indeed exist in (certain) human beings, at the same time humans are also known to

[1008] ibid. See in this connection also Scruton (n 968) 563, which argues that by using an animal as a 'machine à chasser...we degrade ourselves, since we look on what deserves our respect as though it were a mere instrument of our pleasure'.

be (and prided on being) empathising creatures. They should therefore also be naturally disposed in principle *against* killing.[1009] Controversially, it is argued here that, insofar as the killing is not biologically necessary, humans' empathic nature should prevail over their desire to kill. In this connection, it might perhaps be interesting to highlight how feminist literature has interpreted hunters' desire to kill as stemming from their underdeveloped empathic skills, allegedly originating from oppressed childhood expectations.[1010] Furthermore, it is recalled here that a link seems to exist between cruelty to animals and interpersonal violence.[1011]

7.5 Reflections on Dignity and Hunting

When looking at the individual perspectives of the hunted animal and the human hunter, whom are the most closely involved in an act of hunting, the following can be concluded. Causing biologically necessary deaths might not be undignifying for either being involved. However, it seems unclear whether humans actually form a necessary part of the ecological food chain as well. There is dispute over whether they have a biological need for meat, and a difficult question also arises as to how to interpret necessity: is merely survival sufficient or do increasing life expectancy and physical health also count? Furthermore, the necessity might also depend on the circumstances at hand, for example, on one's particular physical condition and on one's access to alternative sources of food. In any event, insofar as the killing is biologically necessary, it is argued here that hunting might not be a less dignifying

1009 In this connection, see also fn 1001 again.

1010 Kheel (n 912) 510-12.

1011 As discussed in Chapter 6 of this thesis. Notably, see Fiona Becker and Lesley French, 'Making the Links: Child Abuse, Animal Cruelty and Domestic Violence' (2004) 13 Child Abuse Review 399, 401-02.

way of doing so than buying farmed meat. Although a final verdict on the matter depends on the precise living and dying circumstances at hand, some forms of living in the wild and dying at the hand of a hunter seem less detrimental to animal welfare than certain farming methods, and hunting (when done under certain circumstances) might also better respect animals' own innate abilities to escape predators than slaughterhouses do. Additionally, hunting might also fulfil needs in some human beings (such as acquiring self-knowledge and a connection with nature), which they consider to be crucial to their self-realisation and which they claim cannot be achieved equally effectively in other ways.

However, many, if not most, forms of hunting that take place in the UK/EU seem to serve wholly different purposes, such as recreation. Animals' ecological position should not be used as an excuse for such forms of hunting. The fact that the bodies of certain animals are (in some cases) necessary for other creatures' survival (and, perhaps, for their health more generally) does not transform these animals into toys or machines to be chased for fun or profit. Regardless of whether biologically necessary forms of hunting are undignifying or not, *all forms of hunting which are not biologically necessary seem undignifying by default.* From the animal perspective, this is so because life is constitutive to their further development. From the human perspective, this is so primarily because of the Janus-faced nature of dignity: treating another being in an undignifying manner also (or perhaps even primarily) reflects on one's own dignity. Furthermore, it has been argued in this chapter that humans' empathic nature should prevent them from unnecessarily harming other beings.

What does this mean for the law? It primarily means that incorporating the concept of dignity into animal law would not seem to provide hunters with the liberty to hunt as they please. In fact, quite the opposite is true. Many forms of hunting –or perhaps even most forms of killing more generally– are not biologically necessary and therefore

undignifying by default. They should therefore in principle be prohibited. One way in which this could be done is by merging, extending and inverting the existing hunting laws. Under the current legal scheme, hunting is legal unless stated otherwise. We could instead adopt the opposite approach: to ban all forms of hunting, unless stated otherwise. Naturally, rules laid down in existing hunting legislation which aim to conserve certain animal species for ecological reasons (see below); which protect animals at particularly vulnerable moments in their lives (such as during or right after birth or during migration); or which prohibit unnecessarily cruel killing methods may still remain in place. Another way in which the law could be amended is by adopting a more general prohibition on taking animal life without legitimate justification (such as biological necessity).[1012] This prohibition would then not be limited to killing by means of hunting only and could, for instance, be laid down in the AWA. Note, however, how this might require further amendments of the AWA. First, sections 4(4), 9(4) and 59 would need to be removed. The first two specifically exclude from the AWA's scope the killing of animals (as long as it is done in an 'appropriate and humane manner'), and the latter excludes from its scope 'anything which occurs in the normal course of fishing'. Furthermore, one may again consider including invertebrate animals in the AWA's scope as well (as discussed in chapter 3) and there are good reasons not to limit the proposed new provision to 'protected animals' only. An animal is currently 'protected' if it is 'of a kind which is commonly domesticated in the British Islands'; 'under the control of man whether on a permanent or temporary basis'; or 'not living in a wild

[1012] See in this connection also Bart Driessen, 'Fundamental Animal Rights in European Law' (2017) 23 European Public Law 547, 577, which argues that animals should be provided with 'the right not to be killed by humans without necessity or with excessive suffering'.

state'.[1013] Obviously, limiting the provision to protected animals only would still exclude many forms of hunting.

The suggested approaches have at least two advantages. First, they provide relatively easy and accessible ways to include in their scope all animals that qualify as selves, instead of only those for which more specific legislation currently exists. This would render the law less arbitrary. Second, they would force legislators to scrutinise the reasons for hunting (or killing more generally) more intensely, as they would have to actively consider the morality of the different types and/or the reasons for doing so. If the interpretation of dignity brought forward in this chapter were to be followed, for instance, then recreational hunting which does not serve any further, legitimate purpose would be rendered illegal.[1014]

7.6 Potential Justifications

The list of exceptions to the proposed hunting/killing ban might obviously include biologically necessary forms. However, forms of hunting which are in principle undignifying might also end up being tolerated in practice. Like most practices, when it comes to hunting, a range of different interests collide. These need to be balanced against one another. Potential interests to be considered are the protection of livestock[1015] and the health or balance of the Earth's or a regional or local ecosystem. The latter has received a lot of attention in the literature and will therefore be discussed here.

1013 Section 2 AWA.

1014 Note in this connection how the UK legislature has also prohibited the keeping of animals solely or primarily for slaughter for the value of their fur: Fur Farming (Prohibition) Act 2000.

1015 The Burns Report (n 910) para 31, for example, highlights how foxes are 'perceived as pests mainly because of predation on lambs and game birds'.

Those who argue that hunting can be justified on ecological grounds focus on its potential conservation benefits. They tend to rely on Leopold's land ethic, which prescribes that an act is 'right when it tends to preserve the integrity, stability and beauty of the biotic community'.[1016] Although different interpretations of the land ethic exist, including some that are more critical of (certain types of) hunting,[1017] they all have in common that they take the interests of or in the (healthy condition of the) ecosystem as their ultimate priority. This thought, which seems prevalent in the environmental ethics literature more generally, leads to obvious tensions with those who strictly adhere to an animal welfarist or rightist view.[1018] One may wonder, however, why ecosystems (and specific species within it)[1019] must be protected in the first place. International wildlife law is said to recognise that "nature" possesses three distinct types of value: instrumental value, inherent value and intrinsic value.[1020] Inherent value is possessed 'of itself, by virtue not of its utility, but of its mere

1016 Aldo Leopold, 'The Land Ethic' in Aldo Leopold, *A Sand County Almanac: With Essays on Conservation* (OUP 2001) 167, 189. Accordingly, authors argue that hunting should be judged by its 'effect upon ecological systems' or that the practice of hunting is right when it meets ethic, ecological and aesthetic standards. See List (n 984) 406, also citing J Baird Callicot, 'Animal Liberation: A Triangular Affair' in J Baird Callicot, *In Defense of the Land Ethic: Essays in Environmental Philosophy* (State University of New York Press 1989) 21.

1017 See eg King (n 961).

1018 One of the most prominent pieces of literature to highlight this tension is Callicot (n 966). Although see Varner (n 912), which argues that such views might, at least with regard to hunting, converge to a larger extent than sometimes claimed. See also Guillauma Futhazar, 'Biodiversity, Species Protection, and Animal Welfare Under International Law' in Anne Peters (ed), *Studies in Global Animal Law* (Springer 2020) 95, which suggests that implementing the concept of animal welfare into international biodiversity law could also, in certain ways, strengthen the effectiveness of the latter area.

1019 Notably, it is commonly emphasised that every species fulfils its own unique function in an ecosystem. A loss of the species would therefore also mean a loss of their function. More generally, biodiversity is said to play 'a vital role in the ecosystem by providing natural service such as "nutrient and water cycling, soil formation and retention, resistance against invasive species, plant pollination, climate regulation and pollution control."' See Dellinger (n 962) 410. See also Futhazar (n 1018) 98. Futhazar (n 1018) 101 further stresses that certain species have also specifically been protected for a number of other reasons, such as out of 'purely commercial interests'.

1020 'Chapter 3: The Philosophical Foundations of International Wildlife Law' in Bowman, Davies and Redgwell (n 935) 61.

existence',[1021] whilst an entity possesses intrinsic value 'of itself, *for itself*, regardless of the interests or utility of others'.[1022] There is no agreement yet on the complex philosophical question of which entities intrinsic value exactly resides in (such as in organic entities, genes, species and/or ecosystems). Similarly, it does not seem immediately obvious whether ecosystems may qualify as selves as well. However, their instrumental value is obvious and indisputably relevant. There is an immensely large number of beings ("selves") in the world who depend on them for their lives and existence. Acts and omissions which affect the environment are therefore also likely to affect the lives and dignity of these beings, and the protection of it therefore seems a legitimate factor to take into account.

The conservation argument is twofold.[1023] First, (certain types of) hunting may contribute to so-called therapeutic purposes, that is, they help protect or preserve healthy, sustainable population numbers of a certain species and/or a healthy ecosystem more generally. Although this statement might certainly hold true in some circumstances, it should be noted that it turns out to be tremendously difficult to determine the 'carrying capacity' of animals.[1024] Furthermore, this type of argument is rendered void of meaning in cases where predators are eliminated from their habitat in order to allow hunters to hunt on these prey animals instead,[1025] and in cases where prey animals are purposely bred to sustain an

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1021 ibid 62. The authors mention how nature, for example, is commonly valued for aesthetic reasons.

1022 ibid 63 (emphasis added). This means that such entities have 'a good of their own'. The authors argue that 'One approach widely accepted amongst contemporary environmental ethicists...grounds intrinsic value specifically in the property of *autopoiesis* (meaning self-production or self-renewal), a characteristic of all living things, and of living things exclusively'.

1023 See also, for example, Cahoone (n 946) 78.

1024 Varner (n 912) 863-65.

1025 Luke (n 972) 38, for example, mentions 'the killing of wolves in Alaska to generate greater numbers of elk and caribou for human hunters to pursue'.

overpopulation.[1026] Additionally, the conservation argument does not work in relation to animals who are not 'obligatory management species' either (i.e. who do not have a 'tendency to overshoot the carrying capacity of its range, and in a way that degrades the range's capacity to support future generations of it and other species').[1027] The question also arises whether the therapeutic purposes cannot (or perhaps should not) be achieved in alternative ways, for example, by means of contraception or by introducing natural predators of the overpopulated prey species.[1028]

The second type of conservation argument relates to the preservation of habitats. Collectively, hunters spend a lot of money on things such as hunting permits, and these contributions, taken in conjunction with the political power that hunters tend to exert, allow for habitats to stay into existence, rather than to be sold, destroyed and used for other, human-related purposes.[1029] These saved habitats consequently enable a multitude of other animals to continue living their lives. Philosopher Loftin therefore famously called the hunted animals 'martyrs', whose 'deaths should be seen as a sacrificial act in the best

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1026 On both of these situations, see also Kheel (n 912) 508. The Burns Report (n 910) paras 39-41 also highlights how 'high numbers [of hares] are often encouraged for shooting purposes'. Cahoone (n 946) 78 acknowledges that 'This criticism is partly correct' but argues that this 'speaks not to an end of hunting, but to a change in regulations'.

1027 Varner (n 912) 862. See in this connection also Loftin (n 972) 244-45 and Luke (n 1025) 38. The latter article mentions that 98% of the animals that were killed each year by Northern Americans at the time compromised species for which it had not even been suggested that there were overpopulation problems.

1028 On introducing predators instead of hunting and Leopold's land ethic, see King (n 961) 67-70. For potential objections to these alternative methods, see Gunn (n 1004) 78-79 and Loftin (n 972) 243. Also note how the consequences of introducing non-native predators are not always foreseeable. Such acts have had devastating implications for indigenous flora and fauna in multiple parts of the world, leading authorities to eventually hunt those non-native predators instead. Examples that could be mentioned are 'the introduction of rabbits in Australia, cats in New Zealand, and pythons in the Everglades': Dellinger (n 962) 408.

1029 See eg Aldo Leopold, 'Game and Wild Life Conservation' in Armstrong and Botzler (n 912) 491, 492 and Loftin (n 972) 248-49. Other authors, however, challenge the relative contribution of hunters to conservation, eg Pluhar (n 973) 126, fn 8 and Williams (n 971) 128, both of which are also cited in Luke (n 972) 37.

sense'.[1030] Not only do the financial contributions from hunters, however, enable habitats to stay into existence: they also provide human societies with an additional source of income,[1031] which seems especially substantial in relative terms and much-needed in poorer, developing countries.[1032] Nevertheless, the perceived conservation benefits of hunting beg the obvious question of whether there truly is no other way to preserve animal habitats and sustain local human populations rather than by selling out the lives of individual animals (and if this is not the case, it leads us to the related question of how this would reflect on our human societies and on human dignity at large).[1033]

In any event, exactly what the outcome of the balancing exercise (and therefore the content of hunting and/or animal protection laws) would look like largely depends on one's worldview. Among other things, it depends on whether one adheres to a utilitarian theory or not.[1034] Is it, for example, morally justified to let the ecological interests of everyone within an ecosystem outweigh the dignity interests of the relatively few hunted animals? Or should hunting be allowed if a vegetarian diet would eventually kill a larger number of

1030 Loftin (n 972) 248.

1031 As was already indicated in the introduction to this chapter.

1032 Gunn (n 1004) uses Zimbabwe as an example. Although the evidence for this claim seems (at least with regard to trophy hunting in certain developing countries) shaky: Dellinger (n 962) 411-15.

1033 Perhaps the most obvious alternative would be to collect (a higher amount of) tax money for this purpose. In this connection, see also Causey (n 975) 341 and Pluhar (n 973) 122, both of which are also cited in Luke (n 972) 37. Additionally, Curnutt (n 971) 73 poses the following question: 'Wouldn't the most direct and obvious way of preserving the integrity, stability, and beauty of nature be, not hunting, but stifling the human activities that lead to habitat loss in the first place?'. Curnutt (n 971) 73-77 also draws a comparison with (the moral acceptability of) hunting humans for ecological purposes.

1034 In this connection, also note Loftin's replaceability argument (Loftin (n 972) 248-49); Curnutt's reply to this (Curnutt (n 971) 70-77); King's indeterminacy argument (King (n 961) 63-64); and Causey's overview of further criticisms of taking a utilitarian approach towards hunting (Causey (n 975) 340-42).

animals instead?[1035] The outcome of a balancing exercise furthermore depends on how one looks at the human-animal relationship and, more specifically, at the justifiability of any hierarchy amongst these creatures. Do humans (and certain animals) have a higher moral value than (other types of) animals, and should the interests of these latter type of animals therefore (at least in certain circumstances) be sacrificed in order to serve those of humans (and higher-ranking animals)?

7.7 The Predation Problem

The preceding discussion on the dignitarian implications of hunting ties into what authors have called the predation problem. More generally, it has been argued that if humans were to protect the welfare interests of individual animals in a consistent manner, be it through the notion of rights or not, they would be forced to actively protect wild animals from suffering too.[1036] Animal liberalist positions supposedly give rise to positive obligations towards wild animals.[1037] Such obligations have been particularly elaborately discussed in the context of predation. According to the argument, a duty would rest upon human beings to intervene in the predator-prey relationship, for example, by eradicating or

1035 As argued by Cahoone (n 946) 78-82. This can also be due to the logistic demands of a person's location: Ted Kerasote, *Bloodties: Nature, Culture, and the Hunt* (Kodansha 1993) 232-33, cited in Luke (n 972) 33.

1036 A common reference point in the literature for this position is David Ritchie, *Natural Rights: A Criticism of Some Political and Ethical Conceptions* (Routledge 2002), an earlier version of which was elaborately discussed in Stephen Clark, 'The Rights of Wild Things' (1979) 22 Inquiry 171. For another prominent piece of work that makes a similar, but not necessarily rights-based, argument, see Mark Sagoff, 'Animal Liberation and Environmental Ethics: Bad Marriage, Quick Divorce' (1984) 22 Osgoode Hall Law Journal 297.

1037 One might in this connection also wonder to what extent humans might have a positive obligation to rescue injured or otherwise helpless wild animals. Bernice Bovenkerk and others, 'To Act or Not to Act? Sheltering Animals from the Wild: A Pluralistic Account of a Conflict between Animal and Environmental Ethics' (2003) 6 Ethics, Place and Environment 13 discusses the moral acceptability of such actions.

reprogramming predators (or prey, for that matter).[1038] Such could be done in an active, intense manner, such as by directly putting them to death or by means of sterilisation[1039] or genetic modification.[1040] However, less costly and invasive methods are also available: we could, for example, 'count negative impacts on carnivores as positive features of the human policy'.[1041] Traditionally, the predation problem used to be of a more hypothetical nature. However, various authors have pointed at the more recent technological developments and argued accordingly that the question to ask is not anymore whether we *can* intervene in nature, but whether we *should*.[1042] One potential reply would be to indeed accept such drastic consequences: to impose an obligation on humans to intervene in wild animal predation.[1043] However, many authors are unwilling to do so. Hence, they have offered a variety of replies.

Regan, whose rights theory features prominently in the predator discussion, focuses on the differences between moral agents and moral patients. Since predators are merely moral patients, he argues, an attack on their behalf does not amount to a rights violation.

1038 There is no unanimity on which course of action would be best. Ben Bramble, 'Painlessly Killing Predators' (2021) 38 Journal of Applied Philosophy 217, for example, prefers elimination over reprogramming.

1039 Eric Rakowski, *Equal Justice* (OUP 1991) 364, cited in Rainer Ebert and Tibor Machan, 'Innocent Threats and the Moral Problem of Carnivorous Animals' (2012) 29 Journal of Applied Philosophy 146, 152.

1040 David Pearce, 'Reprogramming Predators: The Case for High-Tech Jainism and a Pan-Species Welfare State' (*Hedweb*, 2009) <https://www.hedweb.com/abolitionist-project/reprogramming-predators.html> accessed 16 July 2021 sketches various manners in which predators and/or prey could be reprogrammed.

1041 Tyler Cowen, 'Policing Nature' (2003) 25 Environmental Ethics 169, 174. Notably, this could entail 'invest[ing] fewer resources in saving endangered carnivores' (see page 182).

1042 Pearce (n 1040); Catia Faria, 'Should We Intervene in Nature to Help Animals?' (*Practical Ethics*, 21 December 2014) <http://blog.practicalethics.ox.ac.uk/2014/12/should-we-intervene-in-nature-to-help-animals/> accessed 16 July 2021.

1043 A limited number of authors seems to hold the opinion that such course of action would not be theoretically absurd: Steve Sapontzis, 'Predation' (1984) 5 Ethics and Animals 27; Charles Fink, 'The Predation Argument' (2011) 13 Between the Species Article 3.

Hence, no positive duty to rescue prey exists under his theory.[1044] Replies to this line of argumentation are twofold. First, it has been asked whether it should really matter whether the attacker is a moral patient or agent. Analogies with "destructive" or otherwise danger-posing children and with a lethal free-falling boulder have been drawn.[1045] Regan replies to this that the fact that we do not owe the creature in question anything on the ground of justice does not mean that there are no other duties of assistance that might cover the situation at hand (e.g. a duty of beneficence).[1046] Second, Regan's argument has provocatively been extended to humans as victims of a predator attack: does this mean that we are not morally obliged to save, say, children from a predator attack either?[1047] This question is of course not necessarily restricted to a rights-based approach, and thereby ties into the more general discussion on why we would distinguish between humans and animals with regard to this topic. Many different approaches to this question have been taken, the most prominent or commonly used ones of which will be briefly outlined here.

Prey animals might, in contrast to human children, be better equipped to deal with predator attacks due to their species-specific competences and abilities;[1048] they might be 'the sort of creatures whose flourishing [is more generally] incompatible with widespread

1044 His position was set out in Regan (n 970) 285 and extensively discussed by other pieces of literature that focus on the predation problem, such as Ebert and Machan (n 1039) and Jozef Keulartz, 'Should the Lion Eat Straw Like the Ox? Animal Ethics and the Predation Problem (2016) 29 Journal of Agricultural and Environmental Ethics 813.

1045 Notably, see Dale Jamieson, 'Rights, Justice, and Duties to Provide Assistance: A Critique of Regan's Theory of Rights' (1990) 100 Ethics 349 and Sapontzis (n 1043) 27-28.

1046 Tom Regan, *Defending Animal Rights* (University of Illinois Press 2006) 50-52.

1047 On this argument, see also Fink (n 1043) 8-13.

1048 Notably, see Regan, whose position was set out in the preface to the second edition of Regan (n 970). Aaron Simmons, 'Animals, Predators, The Right to Life, and The Duty to Save Lives' (2009) 14 Ethics & The Environment 15, 20 argues that this approach is faulty because in contrast to children, 'most human *adults* are competent'.

human intervention';[1049] they might be members of a separate kind of autonomous and self-regulating community, whose sovereignty humans should respect;[1050] and/or wild animals (and their suffering and deaths) might not be in close enough '(emotional, spatial, or causal) proximity' to us.[1051] Some authors have used a broader perspective by focusing on the consequences for predators themselves (after all, they need to eat as well)[1052] or, to upscale the argument, on the potential 'disastrous ecological consequences' of human intervention.[1053] In this connection, the validity of the predation argument itself has been questioned by pointing out that it is by no means clear that the described intervention in wildlife would eventually reduce suffering in the wild.[1054] It should be noted that some of these earliest-mentioned replies have been met with cynicism[1055] and led to accusations of invoking

1049 Everett (n 1001) 54.

1050 Sue Donaldson and Will Kymlicka, 'Wild Animal Sovereignty' in Sue Donaldson and Will Kymlicka, *Zoopolis: A Political Theory of Animal Rights* (OUP 2011) 156. Note how the authors (pages 176-77) write that 'in the context of ecosystems, food cycles and predator-prey relationships are...defining features of the context within which wild animal communities exist; they frame the challenges to which wild animals must respond both individually and collectively...[If] paternalistic intervention takes place on a broad scale, it is almost certainly going to undermine the ability of wild animals to exercise the capacities and dispositions that evolved precisely in response to their environment. If we are to respect wild animals as members of their own kinds of communities, autonomous and self-regulating, then interference in the defining features of their form of community would mean an end to their independence, *to their ability to be the sorts of beings they are*' (emphasis added).

1051 Donaldson and Kymlicka (n 1050) 162, describing a '"concentric circles" model of positive duties' as visible in the works of various authors, such as Clare Palmer, *Animal Ethics in Context* (Columbia University Press 2010).

1052 Alasdair Cochrane, *Animal Rights without Liberation* (Columbia University Press 2012) 94, cited in Josh Milburn, 'Rabbits, Stoats and the Predator Problem: Why a Strong Animal Rights Position Need Not Call for Human Intervention to Protect Prey from Predators' (2015) 21 Res Publica 273, 281, argues that we should therefore choose the least-burdensome option. Bowman, Davies and Redgwell (n 935) 76, fn 78 also write how intervention 'would, without justification, merely privilege the interests of prey species over those of predators'.

1053 Simmons (n 1048) 22.

1054 Moriarty and Woods (n 967) 394. According to the authors, we 'do not know enough about predator-prey relationships and their role within a larger ecological context to accurately predict the results of such a massive intervention'. See also Peter Singer, 'Food for Thought' (*New York Review of Books*, June 1973) <www.nybooks.com/articles/1973/06/14/food-for-thought/> accessed 16 July 2021 and Everett (n 1001) 49.

1055 Simmons (n 1048) 21.

speciesism to the disadvantage of animals.[1056] In light of the to some authors unsatisfactory replies above, certain authors have turned specifically to the concept of rights again. It has been argued that, in light of the perceived undesirability of (large-scaled) intervention in animal predation, animals should not be assigned rights;[1057] that a different concept of rights should be used for them;[1058] or that Regan's account should be nuanced: a rights violation should only be said to have taken place insofar as (and to the degree that) a moral agent can be found.[1059]

What conclusions can be drawn from the discussion thus far? Crucially, the academic literature on the predation problem seems to share two important features with the literature on biotechnology. On one hand, no author seems to indicate that s/he is wholly insensitive to the suffering and death endured by prey animals. Suffering and death matter to the animals themselves, and hence they should matter morally. At the same time, however, there seems to be an almost unanimous denunciation of the suggested course of action, so in this case, of the positive obligation to intervene on a large scale in the predator-prey relationship. Authors seem to intuitively feel that such an obligation would be undesirable at best or even straightforwardly absurd. According, they go at great lengths in order to be

1056 Ebert and Machan (n 1039) 149.

1057 Carl Cohen, 'Do Animals Have Rights?' (1997) 7 Ethics and Behavior 91, 95.

1058 Ebert and Machan (n 1039). Cf. Steve Cooke, 'Animal Rights and the Predation Problem' (*Adventures in Philosophy*, 5 June 2012) <www.adventuresinphilosophy.wordpress.com/2012/06/05/animal-rights-and-the-predation-problem/> accessed 16 July 2021, which prefers to focus on 'the principle that harming is worse than allowing harm to occur'.

1059 Milburn (n 1052). Scenarios that could be thought of are the scenario in which a zookeeper places a prey into the cage of a predator, or when a parent leaves a child unwatched in the proximity of a predator. According to the argument, a rights violation would still take place in such cases (namely, on behalf of the moral agent) and hence a positive obligation would rest upon human beings to intervene. For another account that aims to rectify the rights position, see Julius Kapembwa, 'Predation Catch-22: Disentangling the Rights of Prey, Predators, and Rescuers' (2018) 31 Journal of Agricultural and Environmental Ethics 527.

able to fit such conclusion into their own theory.[1060] Undoubtedly, authors' intuitions will at least in part be driven by practical concerns, such as by potential feasibility problems and by the unforeseeable ecological consequences. However, the fact that the debate continues way beyond concerns of a more practical nature seems to suggest that there is some further, underlying stimulus to such intuitions. The notion of dignity might perhaps be able to account for those. This chapter already touched upon the ecological reality in which animals find themselves. Biologically speaking, certain types of animals serve as food for other types of animals. This fact has shaped many aspects of members of both species: their behaviour, their anatomy, their physiology. Naturally, it also shapes their daily reality: animals' lives are organised in a way that maximises their ability to catch prey or, the opposite, to escape death. Being a member of a predator/prey species therefore seems to constitute a fundamental and inescapable part of these animals' identities.[1061] Just how deeply this ecological reality is embedded into the bodies of animals is also illustrated by our domestic pets, many of whom have retained their predation tendencies even when they (and members of many of their preceding generations) were never put in a position where such tendencies were necessary for their own survival.[1062] To actively interfere in the process of wild animal predation would therefore not only mean to potentially reduce the total amount of animal suffering: *it would in many cases also result in us changing the nature and identity of these beings (or –in the case of eradication– in their deliberate non-existence altogether*).

1060 Certain authors, such as Milburn (n 1052) 274, are very explicit on this intuitive nature. The intuition that we should not intervene in nature is often called the 'laissez-fair' intuition, as introduced by Palmer (n 1051).

1061 Note how certain authors might even value the process of predation for its ecological benefits: Everett (n 1001) 59-60. See also Moriarty and Woods (n 967) 394-95.

1062 Consider, for example, domestic dogs that predate on wild rabbits or ducks during their walk or, vice versa, consider domestic rabbits that tend to experience fear in the presence of a (to them unknown) dog. Which leads us to the interesting (but in this chapter due to space limitations unexplored) question of what implications this fact has (or should have) for keeping or breeding domestic pets.

An identity can be affected in multiple ways, the exact manner of which depends on the method that is used. First, one may directly change the identity of an existing individual, for example, by inserting a substance that would cause different behaviour in the animal. This substance may remove the predative instinct in a predator or the ability to experience fear in the prey. In this connection, it is noted how Foster himself argues that it might be said that 'One could not have a vegetarian lion, not only because a lion that ate only vegetation would die, but because killing is so quintessentially part of a lion's constitution that to make it vegetarian would be to un-wish it'.[1063] He continues: 'A vegetarian lion would not be a dead lion; it would not be a lion at all'.[1064] Second, one may not change the identity of an existing individual as such, but instead prevent the individual from fully expressing and/or living in accordance with it. This might be the case, for example, when it comes to controlled captivity in separated wildlife areas so as to ensure that prey and predators are not within each other's reach. Predators might then be fed alternative vegetarian food-sources[1065] and, insofar as prey would have the tendency to overpopulate, a certain percentage of them could be fed contraceptives or be sterilised. Not only would predators, however, not genuinely chase for their own food anymore and would prey not (need to) use their abilities to escape their natural predators anymore. Animals would also likely be prevented from living in accordance with their identity in other ways, notably, by taking away a certain amount of their autonomy. They would not be able to live in and/or travel to self-selected places or habitats anymore, and they would only have a limited selection of potential herd members or mates. One might wonder to what extent these animals

1063 Foster, 'On Hunting' (n 964) 469-70.

1064 ibid 470.

1065 Milburn (n 1052) 282, for example, discusses the potential of 'knockout livestock' and 'genetically engineered anencephalic animals'. Sagoff (n 1036) 304 mentions 'textured soybean protein'. Insofar as such alternatives were not available, humans could perhaps painlessly kill prey animals instead.

would still fully and genuinely take part in the animal adventure at all. Such type of intervention might bring both prey and predators larger costs overall,[1066] and one may therefore wonder whether accepting the risk for an individual animal to fall victim to predation might perhaps be worth safeguarding the prey's (and predator's) autonomy and lifestyle in other respects.[1067] Third, active intervention is also likely to change the identity of future species members by changing the course of evolution. This seems true not only for predators, but also for prey animals, as their bodies and minds would in the long term adapt to their new reality. Therefore, if humans were to actively intervene in animal predation, one way or another, an identity-related sacrifice would need to be made.[1068]

When it comes to the dignity of predators specifically, it will also be noted that they distinguish themselves from human hunters in at least two ways. First, they tend to kill out of necessity, that is, for their own or their family or herd members' survival. It is recalled here that it was argued earlier in this chapter that biologically necessary forms of killing may not be undignifying for either participant involved. Second, predators cannot be blamed for their predative acts from a broader moral perspective either (as seemed to be the case when it came to biologically unnecessary killings carried out by humans).[1069] They typically lack the requisite cognitive capacities to make any type of moral judgment on the matter (such as whether, whom and how to kill). Predators are not moral agents and can

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1066 Another potential objection might be that prey would not be allowed to use their own skills to avoid being eaten by predators in case humans were –in the absence of any vegetarian alternative– to kill members of the prey species in a painless manner in order to serve them as food to predators. Note how this would also, to use the words of Bowman, Davies and Redgwell (n 935) 76, fn 78, 'subvert the processes by which natural selection, over time, shapes and refines the good of both kinds'.

1067 This autonomy-based argument is particularly visible in Donaldson and Kymlicka (n 1050). The notion of risk was also used by Cripps (n 965).

1068 This would even be the case if predators were to be eradicated: not only would these selves cease to exist, but the evolution of prey species would also be likely to be affected.

1069 Among other things, see also Fink (n 1043) 2-3.

therefore not be required to use any type of moral skills which they do not possess. It is simply not part of who they are.

The whole predation debate (and many animal liberalist theories in general) seems to rest upon the assumption that the avoidance or reduction of suffering (and the preservation of life) constitutes the ultimate moral exercise (together with the stimulation of positive welfare, of course). This puts authors in a challenging position when it comes to defending a non-interventionist strategy. However, we have seen that Fosterian dignity pursues a different final aim: the self-realisation of beings. The broader focus of this notion allows one to take into account a set of additional factors, among which is the identity-changing nature of (many types of) active intervention (signs of which were quite prominently visible in the relevant literature, despite not being spelled out as such).[1070] In other words, the used account of dignity is capable of accommodating both types of thoughts that seem prevalent in the relevant academic literature: the morally objectionable nature of causing suffering and taking life on the one hand, and the morally objectionable nature of changing creatures' identity on the other hand. It can therefore consistently claim that unnecessary suffering should be reduced in general whilst not necessarily being committed to fully condemning or intervening in animal predation either. Fosterian dignity might thus be able to offer a more holistic and, perhaps, more nuanced perspective to the predation debate, and its incorporation into UK/EU animal law would not necessarily render these laws internally inconsistent.

Note how this interpretation leaves unsolved whether an obligation rests upon humans to save fellow humans from a predator attack. On one hand, humans are also a natural prey to certain types of animals, such as large cats and crocodilians, and thereby form a

[1070] Notably, recall in this connection the literature mentioned in footnotes 1048 and 1049.

natural part of the food chain. On the other hand, authors argue that justifications for intervening in such circumstances exist, for example, based on family or community membership or a potential hierarchy between humans and animals. Two comments are made here. First, if any type of justification were to exist, it would need to be applied consistently. If certain types of animals possess the same relevant characteristics, they would need to be saved from predator attacks as well.[1071] Second, from a dignity perspective it might be added that being a predator might nowadays form less of a part of humans' identity than it does in the case of wild animals. The daily lives of most humans are not evolved around or preoccupied with this fact and, physically speaking, we might not be well-adapted anymore to deal with such attacks either. Additionally, intervention in (incidental) attacks on humans are very unlikely to change the course of human evolution either. Active intervention in a predator attack might therefore be less at odds with human identity than with prey animals' identity.

Furthermore, all sorts of interesting questions arise when acts of predation are human-induced or when they take place under human supervision. For example, one may wonder what implications dignity has for animal predation in captivity, for ecological culling by means of introducing natural predators, or for the keeping and lives of domestic pets that still possess predating tendencies. Space constraints preclude a full examination of these matters, but relevant questions to ask in this connection include "to what extent does it matter morally that a situation was human-induced?"[1072] and "to what extent does it matter whether a prey animal is given genuine opportunities to escape the predator by using its own capabilities?" (it was argued above that the latter indeed seems crucial when it comes

[1071] In this connection, see also Cowen (n 1041) 172.

[1072] In this connection, see also Milburn (n 1052) again.

to animal dignity).[1073] The scenarios mentioned are not hypothetical or rare, and would therefore need to be addressed if dignity were to be incorporated into UK/EU animal law.

7.8 Conclusion

The incorporation of dignity into UK/EU animal law may result in more extensive animal protection not only in the areas of biotechnology and sexual relations, but also in the context of hunting. Indeed, this chapter acknowledged that biologically necessary forms of killing might not be undignifying and that hunting might at least under certain circumstances not be a less dignifying way of killing than traditional farming methods. However, it seems unclear whether meat forms a necessary part of humans' diet, and many forms of hunting serve wholly different purposes in the first place. Insofar as killing is biologically unnecessary, it was argued, it seems undignifying by default. From the animal perspective this is so because life is constitutive to self-realisation. From the human perspective, the reason can be found in dignity's Janus-faced nature and in the dignifying character trait of empathy. If the interpretation of dignity brought forward in this chapter is indeed the correct one, then there is a good argument to introduce a more general legal prohibition in this context. One may decide to solely prohibit biologically unnecessary forms of hunting, but one might also adopt a more general prohibition on taking animal life without proper justification. The latter would seem to constitute a more consistent approach, but would perhaps also be more challenging to achieve from a political point of view given the wide array of areas in (and purposes for) which animal bodies are currently used.

1073 In this connection, see also *RSPCA v McCormick* (n 951).

The proposed legal amendments provide a relatively easy and accessible way to include all animals that qualify as selves, instead of only those for which specific legislation currently exists. This might render the law less arbitrary. Furthermore, they force legislators (or otherwise the courts) to scrutinise the reasons for hunting more intensively. Nevertheless, it should be noted that the suggested approaches may face serious enforcement issues. First, because there would most likely be way too many selves to protect, especially if invertebrates were to be included within the scope of the AWA as well (as suggested above given their ability to feel pain and so on). Second, because hunting laws are in general already relatively difficult to enforce due to the immensely large area and remote locations on which hunting tends to take place. Although the latter problem is not necessarily caused by the proposed approach, it is not solved by it either. Nevertheless, the enforcement-related challenges of the proposed legal systems do not necessarily need to constitute a reason not to adopt them in the first place. The proposed ban would send the message that the included forms of hunting are immoral (and illegal) and, hence, it might have a deterrent effect to carrying out such acts in the first place. Second, it would at least provide us with the legal means to intervene if we were to stumble upon any such immoral case of hunting.

It can therefore be concluded that dignity does not seem to provide hunters with reasons to liberalise existing hunting laws. Instead, it provides a reason to tighten them. At the same time, the used account of dignity does not necessarily impose a burden on humans to actively intervene in acts of wild animal predation either. In contrast to many animal liberalist theories, the notion of dignity can, due to its holistic nature, take into account the identity-changing nature of intervention. Resultantly, it is capable of consistently claiming that unnecessary suffering should be reduced in general whilst not necessarily being committed to fully condemning or intervening in predation either. Using the notion of dignity therefore renders the law internally consistent.

CHAPTER EIGHT: CONCLUSION

8.1 Moving Away from the Animal as a Single-Faceted Being

Existing UK/EU animal protection laws are primarily underpinned by arguments based on the perceived desirability of reducing suffering and promoting welfare in animals. It is discussed in the relevant literature how the notion of welfare is to be interpreted, with a particular focus on what can be done to improve animal welfare. This approach puts animals' positive experiences as the key issue.[1074] This leads to discussions on how the welfare of animals is to be assessed in the first place. The Welfare Quality project, for example, argues that the focus should be more on the state of the animal itself, rather than on 'the mere nature and quality of its living conditions, which may be assessed through the provision of certain resources'.[1075] Although these are worthwhile issues to consider, these discussions, and the criteria laid down in the relevant animal legislation, have in common that they tend to limit themselves to the experiential welfare interests of animals. The welfare-based approach that is currently used in the law is a substantial improvement over the legal situation roughly two centuries ago, when animals were considered mere commodities to be used by humans, with no consideration of their suffering. However, there are also situations in which the experiential welfare interests of animals may not be negatively affected, but which might still be considered morally wrong. The existing legislation does not address

1074 See, for example, David Mellor, 'Moving Beyond the "Five Freedoms" by Updating the "Five Provisions" and Introducing Aligned "Animal Welfare Aims"' (2016) 6 Animals 59.

1075 Katy Sowery, 'Sentient Beings *and* Tradable Products: The Curious Constitutional Status of Animals Under Union Law' (2018) 55 Common Market Law Review 55, 78. For a brief summary of the arguments that were developed as part of the project, see Unni Kjaernes and Linda Keeling, 'Principles and Criteria of Good Animal Welfare' (Welfare Quality Network) <http://www.welfarequality.net/media/1084/wq___factsheet_10_07_eng2.pdf> accessed 16 July 2021 and Raphaelle Botreau and others, 'Definition of Criteria for Overall Assessment of Animal Welfare' (2007) 16 Animal Welfare 225.

such situations and a new (or at the very least an additional) concept therefore seems to be needed. Dignity provides this.

However, dignity turns out to be a terribly difficult concept to define. This thesis has proceeded on the basis of Foster's account. It suggests that dignity is about objective flourishing, which I translated into self-realisation. Dignity has therefore been taken to be about being and developing into yourself, whereby the definition of the self is to be approached in a broad manner. It encompasses not only the attributes one has by reason of one's membership of a particular species but also one's unique individuality, and attention is to be paid to all possible aspects of one's being, including the physical, emotional, cognitive and relational ones. When it comes to actually figuring out what exactly dignity entails for animals, a combination of both the animal and the human perspectives should be used. The debate on what it means for an animal to be itself should in the first place be informed by our empirical knowledge on animal preferences, abilities, appearances, behaviour and functions, especially when this knowledge stems from thorough academic research. Some additional normative input should consequently come from humans. Among other things, they need to think about whether all characteristics of animals are indeed worth legally protecting and, notably, about which characteristic should take priority in cases where not all innate character traits can be simultaneously safeguarded (the inward dimension). Humans should furthermore consider what the human-animal relationship should look like (the outward dimension). The account of dignity used has a number of advantages, one of which is that it coheres with the meaning that various legal authors seem to have accorded to human dignity as laid down in human rights law, thereby enhancing the internal consistency of the law.

In essence, the dignity-based arguments advanced in this thesis are a plea to look at animals not merely as sentient beings, but to approach them in a more holistic manner

instead and to think more fundamentally about what it means to be an animal at all. Is this an easy thing to do? Absolutely not. The question "What does it mean for an animal to be itself?" or, to be even more precise, "what does it mean to be me and to be you?" is one of the most fundamental and difficult questions one could ask. One which is terribly abstract in nature and which seems to provide little guidance in and of itself. This thesis has aimed to demystify the question by providing some more concrete guidance on how to approach the matter, but some considerable scope for interpretation remains. Nevertheless, that does not mean that dignity, as defined in this thesis, is not an essential element of a satisfactory corpus of law relating to the treatment of animals.[1076] It is capable of filling an important gap in the existing legal framework, as it can cover moral ground which exclusively welfare-based accounts cannot. Furthermore, it is noted here that the uncertainty inherent in dignity has not been considered insurmountable in the human context either. Although it is certainly true that there are still ongoing discussions on what dignity entails in certain areas in the human context, such as when it comes to euthanasia and abortion, dignity has been used to justify the adoption of legislation in other areas (even though individual harm may not necessarily occur therein). For example, it has been used in EU law to justify the prohibitions on 'eugenic practices'; on 'making the human body and its parts as such a source of financial gain'; and on the 'reproductive cloning of human beings'.[1077] Enshrining the notion of dignity in the law therefore seems to be a logical and promising next step in the evolution of animal law.

1076 See also Eva Bernet Kempers, 'Animal Dignity and the Law: Potential, Problems and Possible Implications' (2020) 41 Liverpool Law Review 173.

1077 Article 3(2) EU Charter.

8.2 Potential Ways of Implementing Dignity into Animal Law

This thesis has examined the legal spheres of three areas of animal use to see how they might be affected by the incorporation of dignity. These areas concern biotechnology, sexual relations between humans and animals, and hunting. If the interpretation put forward in the relevant chapters is indeed the correct one, then animals would be better protected in all these areas. In the context of biotechnological applications, a template similar to the one laid down in Swiss law was proposed. This means including in the list of legal prohibitions not only welfare-based criteria, but also interferences with the abilities and the appearance of an animal and its humiliation or (excessive) instrumentalisation. I furthermore advocated the criminalisation of all forms of sexual interaction between humans and animals and argued that acts of hunting (or, insofar as politically feasible, acts of killing more generally) should in principle be prohibited.

If the account of dignity I have advocated were indeed to be incorporated into UK/EU animal law, then an investigation into the legal consequences for areas of animal use other than the three mentioned above would need to be carried out as well. Who should take up this task? It seems to me that it must be a common, multidisciplinary effort. A reasoned exchange should take place between, among other things, zoologists, philosophers, legal academics, legislators, courts and the public at large on the question of what it means for an animal to be itself and what the law could or should do to help. Given the fundamental nature of the question and the empirical, normative and practical difficulties faced, this is likely to be more of a long-term project, whereby the requirements flowing from dignity are gradually further refined. The question arises, however, how dignity should be grafted into animal law in the meantime, as the manner in which it is done affects the relative discretion afforded to the various parties. One option would be to follow a strategy similar to the one used in human rights law, that is, to lay down dignity (and

particularly, the definition that I have promoted) as a foundational value or as a separate provision in animal law more generally, for example, in the Animal Welfare Act 2006 (option A). This would create a moral general mandate for lawyers and judges to bring forward their own interpretation of animal dignity. However, this approach would invite criticisms similar to the ones voiced towards the use of dignity in human rights law, where concerns exist relating to the institutional legitimacy of the court and the rule of law. The approach used allows judges, who have not been democratically elected, to use or even abuse dignity to impose their own ideological views and renders the law relatively unpredictable for citizens. It may be argued that these democracy-related difficulties would be even further exacerbated in the animal context, considering the linguistic and cognitive limitations inherent in animals and humans.

Two alternative (and non-mutually exclusive) options are therefore available to legislators. First, they could lay down in the legislation more concrete criteria which they consider important to the thriving of animals (option B). This would reduce the discretion given to interpreters of the law. Second, they could (for the time being) limit the application of dignity to certain areas of animal use and being only (such as those examined in this thesis) until a full investigation into the other areas has been completed as well (option C). My own initial preference would be to follow option B, as it would seem to render the law considerably more workable and predictable than option A, whilst rendering it less arbitrary than option C. The list of criteria could be based on the elements discussed in this thesis and look, for example, as follows (with criteria being altered, added or refined in the future if this turned out to be necessary).[1078] In addition to using purely welfare-based criteria,

[1078] Note how the scope of the prohibitions and obligations that are included in this list (and the manner in which they are laid down in the legislation more generally) may be different in the jurisdictions examined due to their respective constitutional requirements.

legislators could in principle prohibit the interference with an animal's (1) abilities, (2) appearance, (3) relationships and (4) life (i.e. a prohibition on killing). We may also prohibit, insofar as humans manage to reach normative agreement on this, the (5) (excessive) instrumentalisation and the (6) humiliation of an animal. We may furthermore (7) put a positive obligation on those responsible for a particular animal to enable the thriving of that particular animal. Notably, the animals should be provided with the opportunity to actually use their abilities and be supported when it comes to creating and maintaining meaningful relationships (where appropriate). Furthermore, we will need to think about (8) what positive obligations we may want to put on the state (e.g. when it comes to making arrangements for allowing pets and their owners to stay together when the latter is admitted to a nursing home for health reasons). In any event, regardless of the manner in which dignity is implemented into the law, the work of the other relevant parties or individuals mentioned above, like zoologists, philosophers and (other) academics, could feed into the discussion either way. It could be relied on by legislators when creating or amending the relevant legislation (including when drafting species-specific Codes of Practices) and/or used by lawyers and judges to justify their arguments and judgments respectively.

If the account of dignity advocated in the thesis is indeed to form part of UK animal law, then it will need to be incorporated in primary legislation. The reason for this is that section 12 AWA, which allows the responsible national authority to make new animal-related provisions by regulation, is limited to animal welfare. The same seems true with regard to EU law. It is recalled here that there is no direct authority in the EU Treaties to adopt animal legislation, let alone based on non-welfare related ethical arguments. Article 13 TFEU merely requires that the relevant authorities take into account demands of animal welfare when adopting legislation in one of the areas mentioned therein. Therefore, if the

legislature were to adopt animal dignity-based legislation at EU level, amendments to the EU Treaties would be needed.

8.3 The Limits of Dignity's Practical Effect

At first sight, the proposals put forward in this thesis would seem to have dramatic effects on the existing legislation and thereby on the UK/EU societies in general. Consider, for example, the broader consequences of declaring instrumentalising behaviour involving animals (and their killing) undignifying. Animals are currently used in almost every aspect of humans' lives, such as for their food, clothing, entertainment, house/car decoration and product development. A case could be made for prohibiting many or perhaps even most of these practices. This could also have far-reaching impacts for animals themselves (at the very least at a group level). If it were to be decided that animal dignity entails veganism, for example, this may (to a very large extent) lead to the disappearance of animals such as cows altogether, as it may be thought that there would be no point in keeping them anymore.[1079] However, it is argued here that the practical effects of incorporating animal dignity into the law may be somewhat less dramatic than what may appear at first instance. There are three reasons for this.

First, the suggestions made above already indicated how the said interferences and so on should *in principle* be prohibited. This means that justifications for nevertheless not abiding by these rules potentially exist. One of these justifications may obviously relate to the animal's own good (although questions arise as to how this good is to be interpreted). Another one may relate to the protection of humans and other animals. Various chapters of

[1079] I am grateful to Professor Charles Foster for making this remark.

this thesis have already clarified how, just like in the human context, the interests of different beings clash inevitably and therefore need to be balanced against one another. When doing so, all sorts of other questions come into play, such as whether we should adhere to a deontological or a consequentialist view and, notably, whether there is any morally justifiable reason to maintain the existing hierarchy between humans and animals (and amongst animals themselves). An examination of these topics is beyond the scope of this thesis due to space constraints, but the answers to these questions obviously affect the eventual legal outcome. Therefore, although certain behaviour might in principle be perceived to be incompatible with animal dignity, it might nevertheless be justified on other grounds and resultantly be allowed in practice. It is argued here, however, that regardless of which method of balancing is used, at the very least a necessity and proportionality test should be included. Undignifying behaviour which is unnecessary or disproportionate should not be allowed to trump animal dignity.

Second, insofar as it were indeed to be found morally justified to keep using animals in certain contexts (for example, for meat consumption or medical experiments), dignity is likely to have substantial overlap in terms of content with the notion of welfare, especially when the latter is interpreted in a more elaborate manner. On many occasions, the two concepts seem to be two sides of the same coin. If an animal is prevented from expressing its normal, species-specific behaviour, for example, it may experience negative feelings as well (or at the very least, it is likely not as happy as it could possibly be). On the other hand, if the animal is given plenty of opportunities to flourish as the being that it is, chances are high that it also experiences a good level of welfare. Practices that would in principle seem

to be condemned by either concept concern, for instance, beak trimming,[1080] dehorning,[1081] placing (social) animals in close (isolated) confinement[1082] and forcing wild animals to perform unnatural tricks in circuses. Practices which are likely to be promoted instead by both concepts include grazing in cows, mud-wallowing in pigs, swimming in ducks, flying in birds, nesting in sows, and living in group-housing and being able to nurture one's young with regard to social animals (although it is noted here that a number of things mentioned in this list are still not legally mandatory, despite their perceived welfare benefits).[1083] The substantial overlap between the notions of welfare and dignity was also visible in the third chapter of this thesis, where it sometimes proved difficult to locate practical differences between the two concepts despite their conceptual distinction (e.g. in relation to zoos).

1080 Although this practice is currently legal, the 'aim is for routine beak trimming to stop as soon as reasonably possible': Department for Environment, Food & Rural Affairs, 'Code of Practice for the Welfare of Laying Hens and Pullets' (2018) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/732227/code-of-practice-welfare-of-laying-hens-pullets.pdf> accessed 16 July 2021, 25-26. See also Department for Environment, Food & Rural Affairs, 'Code of Practice for the Welfare of Meat Chickens and Meat Breeding Chickens' (2018) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/694013/meat-chicken-code-march2018.pdf> accessed 16 July 2021, 27-28, which states that 'Beak trimming of meat chickens is not recommended'.

1081 See in this connection Department for Environment, Food and Rural Affairs, 'Code of Recommendations for the Welfare of Livestock' (March 2003) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/69368/pb7949-cattle-code-030407.pdf> accessed 16 July 2021, 30-31. Note, however, how although dehorning is discouraged, it is not per se prohibited: see Schedule 1, paragraph 1 of the Mutilations (Permitted Procedures) England Regulations 2007/1100.

1082 The relevant legislation indeed prescribes the group housing of animals (when species type, gender and other relevant factors inherent in the animals permit this). See eg Article 3(4) of Council Directive 2008/120/EC of 18 December 2008 laying down minimum standards for the protection of pigs [2009] OJ L47/5. Furthermore, minimum space requirements are laid down in the legislation (for example, in the Welfare of Farmed Animals (England) Regulations 2007), although it is questioned here whether these are sufficient to actually safeguard an acceptable level of welfare (and the dignity) of the animals concerned. Note in this connection how hopefully some progress with regard to the living circumstances of pigs will soon be made: European Parliament, 'MEPs Endorse EU Citizens' Call for Gradual End to Caged Farming' (10 June 2021) <https://www.europarl.europa.eu/news/en/press-room/20210604IPR05532/meps-endorse-eu-citizens-call-for-gradual-end-to-caged-farming> accessed 16 July 2021.

1083 Notably, see the requirements laid down in the Welfare of Farmed Animals (England) Regulations 2007, the species-specific EU farming Directives, and the relevant Codes of Practice. In fact, it does not even seem to be required for (most) farmed animals to ever see natural daylight or be given access to outdoor space.

Therefore, although the two notions may clash in certain circumstances (such as in some bioethical contexts), in many other contexts they seem to be mutually reinforcing.

Third, humans may sometimes simply not be able to figure out what exactly it means for an animal to be itself in a certain context, for example, because they face limits in terms of what empirical knowledge can be acquired (as was the case when it came to zoophilia) or because they do not manage to agree on some of the more normative aspects of this question. In such cases, legislatures may decide to resort to more accessible criteria, such as welfare-based ones, or focus on the effect that certain behaviour might have on human dignity instead so as to render the law more workable.

It should furthermore be noted that, on some occasions, the law might not necessarily be the only or most effective vehicle to achieve dignifying results. An example was already provided in the bioethical context: stimulating the development of animal substitutes might be the most promising way to prevent the development and application of undignifying bioethical techniques. Another context in which one may sometimes imagine using alternative means concerns the humiliation of animals. Insofar as dressing up animals in clothes or publicly shaming them on the Internet, for instance, is considered to be undignifying, education might be a more effective and efficient means of prevention than law (enforcement). Criminal law might sometimes also simply be too heavy a means to achieve dignifying results. Exactly the same questions arise with human dignity too.[1084] It is therefore recommended that, where appropriate, alternative methods are used either in addition to or instead of the law.

[1084] I am grateful to Professor Jonathan Herring for making this remark.

8.4 Final Notes

Finally, I wish to emphasise that in arguing for a broader basis of animal laws, I do not intend to diminish the importance of animal suffering. That is prevalent on a massive scale and profoundly damages the quality of animals' lives. The prevention of suffering is also a prominent goal of most (if not all) accounts of dignity. Instead, the sole purpose of the arguments developed in this thesis is to make the case for a particular account of dignity to be grafted into the law. To urge relevant people, such as legislators, judges and academics, to look at animals in their wholeness and to give more fundamental thought and legal consideration to the relationship humans have with them. It is hoped that the arguments developed in this thesis stimulate a discussion in the field of animal law on the potential of dignity as an alternative or additional concept, and that the proposals brought forward would, if implemented, serve to strengthen the protection offered to animals in the jurisdictions examined and enhance the internal consistency of the law. Animals are fascinating, complex, multi-facetted beings, whose interests must be seen holistically and in the context of the wider web of biological, ethical and legal relationships in which they exist, and this fact deserves recognition in the law.

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