The open society and its animals

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"Personal superiority, whether racial or intellectual or moral or educational, can never establish a claim to political prerogatives, even if such superiority could be ascertained.

…

Even if it were an established fact, it should not create special political rights, though it might create special moral responsibilities for the superior persons."

Karl Popper

The Open Society and Its Enemies

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Introduction

This book finds its origin in an honest concern for both liberal democracies and animals. As such, it brings together the progressive aim of improving the political and legal position of animals and the conservative aim of sustaining the basic stability of open societies. At first glance, combining these two goals seems a rather paradoxical endeavour. Improving the political and legal position of non-human animals seems to hint at leaving behind as much as possible of the political systems that the world has known thus far, deeply impregnated with anthropocentrism (human-centeredness) as they are and considering that they have facilitated large-scale, systematic abuse of animals for centuries. On the other hand, preserving the basic stability of the established institutions that form the prerequisite for well-functioning open societies seems to hint at precisely the opposite: leaving them untouched. Releasing a revolutionary beast on these ancient institutions seems to put all at risk.

This book argues, however, that there is nothing paradoxical in bringing together these seeming strangers. Rather, it argues that they must engage with one another. It is time to start thinking about the proper relationship between the open society and its animals. This book asserts that the basic institutions of liberal democracies are worth preserving because they are the best way to sustain open societies and the peace, freedom, and respect for individuality and autonomy that they have to offer. However, the book also subscribes to the famous belief of the father of conservatism, Edmund Burke (1729–1797), that conservation sometimes requires reform, albeit prudent.[1] The political-legal frameworks of liberal democracies around the world currently fail to reflect the fact that many non-human animals have interests which make them morally, politically, and legally relevant entities. This book claims that liberal democracies cannot continue to ignore the scientific findings and moral progress with regard to non-human animals without losing credibility. Ultimately, it will be argued, this

[1] Edmund Burke, *Reflections on the Revolution in France* (Oxford: Oxford University Press, 2009/1790), 21–22, 248–249.

negligence of important scientific and moral insights may not only cause credibility problems, but may even raise legitimacy concerns and lead liberal democracies to undermine their own core values. From the perspective of this book, opening the political-legal gates to non-human animals is not necessarily a risky endeavour, but refusing to do so and thus facing the challenges that the modern perception of animals poses to the institutions of the open society *is*.

Current liberal democratic institutions still reflect the ancient anthropocentric conjecture that politics and law have nothing to do with non-human animals. Non-human animals are not recognized as entities that have independent political and legal significance, and their interests are merely contingently pursued, that is: to the extent that humans see fit. This harmful underlying conjecture that animals have no independent role to play in politics and law goes as far back as documented history, and it is deeply rooted in Western cultures and philosophy. It was only a few centuries ago that some of history's brightest minds initiated what could today be called the scientific and moral progression that finally began to nibble away at this ancient anthropocentric conjecture.

In 1789, philosopher and legal thinker Jeremy Bentham (1748–1832), in one famous footnote, called into question the validity of humankind's traditional moral disqualification of other animals, and in the same pen stroke suggested an alternative ethical standard which we now know would gain great support. He initiated what could be called the *interests revolution*. More precisely, Bentham pointed out that there is not necessarily a relationship between having certain complex mental capacities (reason and speech) and being of moral significance. Instead, relevant to moral considerability is *sentience*, the capacity to have subjective experiences, such as joy and suffering.[2] Bentham's suggestion would eventually turn out to be the spark that ignited an intense debate on the moral significance of non-human animals two centuries later. This debate would eventually lead most people to accept that other sentient animals are morally significant too,

[2] Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Mineola: Dover Publications Inc., 2007/1789), 310–311 (footnote 1).

because they also have interests, including, at minimum, an interest in not being made to suffer.[3]

Before this important moral insight could take hold and the common moral conception of sentient animals could drastically change, however, people's minds first had to be made ripe to the ideas that humans *are* animals, and that other animals, as well as humans, could have interests of their own and were not, to paraphrase philosopher René Descartes (1596–1650), mechanical bodies without a soul and feeling.[4] This unenviable task befell evolutionary biologist Charles R. Darwin (1809–1882) and his scientific successors. *The Origin of Species* was published in 1859, and it is no secret that this book shocked the highly religious society at that time and that Darwin was ridiculed.[5] The reason, as concisely expressed in one of Darwin's notebooks, was that "Man in his arrogance thinks himself a great work, worthy the interposition of a deity, more humble & I believe true [is] to consider him created from animals."[6]

The controversy intensified when, in 1871, Darwin published his subsequent work, *The Descent of Man*, in which he not only explicitly stated that the human species must have evolved from other animals—from an aquatic wormlike organism, in fact—but also straightforwardly called into question the uniqueness of humans.[7] The theory of evolution implies that humans are, from a biological perspective, no more special than other animals. Darwin illustrates this with regard to intelligence, which was commonly thought to be one of the unique capacities of humans that distinguished them from "the beasts": "There is no fundamental difference between man and the higher mammals in their mental faculties."[8] Instead, Darwin claimed, the mental difference between man and the higher animals is "certainly one of degree and not of kind."[9] Just like other capacities,

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[3] Peter Singer, *Animal Liberation* (New York: HarperCollins Publishers, 2009/1975).
[4] Cited in: Tom Regan, *The Case for Animal Rights* (Berkeley: University of California Press, 2004/1983), 5; Tom Sorell, *Descartes*, trans. Willemien de Leeuw (Rotterdam: Lemniscaat, 2001/1987), 98–104.
[5] Charles R. Darwin, *The Origin of Species* (London: J. M. Dent & Sons Ltd., 1971/1859).
[6] Charles R. Darwin, *Charles Darwin's Notebooks (1836–1844)*, eds. Paul H. Barrett, Peter J. Gautrey, Sandra Herbert, David Kohn and Sydney Smith (New York: Cambridge University Press, 1987), 300.
[7] Charles R. Darwin, *The Descent of Man* (Ware: Wordsworth Editions Limited, 2013/1871).
[8] Darwin, *The Descent of Man*, 29–30.
[9] Darwin, *The Descent of Man*, 80.

intelligence should not be viewed as a static given, but as a scale, a continuum. Each individual animal, humans included, can be pinned down somewhere on this scale, and there is no radical line that divides humans from all other animals. Darwin effectively challenged the idea of human categorical superiority, and essentially put "the beasts" in the same category as humans. Darwin's important insight was the starting point of a scientific era in which one scientific discovery after the other would emphasize our similarities with other animals, instead of our distinctiveness from them. Most importantly, due to this scientific progress, it is now considered a scientific fact that many non-human animals are sentient and that they thus have intrinsic interests.[10]

Combined, these important moral and scientific insights fundamentally changed the common-sense view of non-human animals into what it is today. Whereas Darwin and his scientific successors began to nibble away at the distinctiveness of humans from other animals (and do not seem to be done with that anytime soon), Bentham and his moral successors paved a parallel road, arguing that even if there are important scientific differences between humans and other animals, these are not relevant when it comes to how animals are to be treated. Relevant to ethics is the already discovered similarity between humans and other sentient animals: they all have interests.

The central purpose of this book is to investigate whether the fundamental structures of liberal democracies should reflect the fact that many non-human animals are individuals with interests, and whether this is possible without undermining or destabilizing their institutions. The book argues that the insight that many non-human animals have interests is not only relevant to their moral status but also to their political and legal status. The modern insight that sentient animals have interests challenges the ancient anthropocentric conjecture that politics and law have nothing to do with non-human animals, a conjecture that is still embodied in the institutions of our open societies. The book argues that these institutions are

[10] See for example: Philip Low, "The Cambridge Declaration on Consciousness," eds. Jaak Panksepp, Diana Reiss, David Edelman, Bruno Van Swinderen, Philip Low and Christof Koch, publicly proclaimed on July 7, 2012, at Churchill College, University of Cambridge, Cambridge (United Kingdom).

in need of an update that aligns them with modern scientific and moral insights. This also explains the obvious wink that the title of this book gives to Karl Popper's (1902–1994) famous *The Open Society and Its Enemies*. In that book, Popper straightforwardly defends the open society and stresses the importance of adjusting its institutions to new insights through piecemeal engineering.[11] The current book is also about the open society, but it suggests that Popper's open society was still closed to many of its most vulnerable members. It argues that the modern open society should have its institutions updated insofar as they still rely on the ancient anthropocentric conjecture for their justification, and that it should become more inclusive and open up to non-human animals. As such, the "enemies" of the enhanced type of open society envisioned in this book are not only Plato, Hegel, and Marx, as classically identified by Popper, but all philosophers who have, on arbitrary grounds, tried to preserve the fruits of the open society exclusively for humans.

In search of adequate reform, this book considers it imperative to respect certain typical liberal democratic features: liberal democracies typically enable popular control over governance by elections of a reasonable number of political competitors, they secure limitations on the exercise of power in accordance with prescriptions of the rule of law, they institutionalize the separation of powers and secure the independent position of the judiciary, they have checks and balances which prevent perilous centralizations of power and uncontrolled exercise of power, and they ensure the equal protection of individual rights. While working out how the ancient anthropocentric conjecture can be removed from the institutions that constitute liberal democracies, this book is devoted to leaving these distinctive features intact.

The book also aims to illustrate, however, that even though the principles that ground liberal democratic institutions have been anthropocentrically applied in the past, they are not essentially infected with anthropocentrism, and thus can be preserved. If interpreted in a modern sense, the equality principle, for example, need not necessarily have

[11] Karl Popper, *The Open Society and Its Enemies* (London: Routledge & Kegan Paul Ltd, 1999/1945).

"humanness" at its core, but individuals' interests, regardless of species. It will be illustrated that liberal democracies can be reconceived of as political orders that tend to give the highest priority to individuals and their interests and that their foundational principles allow for such a conception. Liberal democracies are, in other words, depicted as *interests weighing mechanisms*. A political position, in the sense that one's interests ought to be considered by the state, is then not merely owed to humans, but to all entities that have interests that can be affected by the state. Similarly, a legal position, in the sense that one is entitled to legal protection of one's independent interests, is not merely owed to humans, but to all entities that have fundamental interests that are vulnerable to being trampled upon in society, in the democratic process, or in the exercise of state power. This book thus argues that liberal democratic principles already have this focus on individuals' interests at their core, but have up to this day been arbitrarily applied only to humans. This exclusionary application of important political-legal principles is untenable in a world that widely recognizes that many non-human animals have interests too. Since interests play such a central role in the foundational principles of liberal democracies, it is alienating that the political-legal position of non-human animals has not fundamentally changed as a result of Darwinian and Benthamian insights.

Research question, methodology, and chapter outline

The main research question of this book is: *Should the fundamental structures of liberal democracies reflect the fact that many non-human animals are individuals with interests, and is this possible without undermining or destabilizing their institutions?* This question contains two different aspects, which will be addressed in a total of five chapters. The first two chapters focus on the first part of the research question and address whether the fact that many animals have interests should have consequences for the fundamental structures of liberal democracies, and if so, what criteria the new political-legal position of animals should meet. The subsequent three chapters focus on the second part of the research question and address whether this reform is possible without undermining or destabilizing liberal democratic institutions. As a whole, this book is an interdisciplinary project, and as such

it aims to make a contribution to political philosophy, legal philosophy, law, and constitutional theory. The research method used is one common in political and legal philosophy: existing ideas in the literature relevant to the research question at hand are discussed, interpreted, and analysed within the framework of the research question. Based on these analyses, I develop a vision regarding the reform of law and political institutions. Now follows a more detailed description of the separate chapters of this book.

The first chapter explores how classic democratic theory and principles, if non-arbitrarily interpreted, support the claim that sentient non-human animals have a right to be considered by the democratic state. It first discusses three possible arguments against enfranchising[12] animals in democracies, and whether they are convincing enough for an *a priori* dismissal of the case for political animal rights. Subsequently, it is conceded that non-human animals are not political agents, which means that they cannot meaningfully engage in political activities themselves. It is also argued, however, that it would be inaccurate to deduce from this mere fact that animals have no political rights at all. It is argued that sentient animals have a political right to have their interests considered by the state: the *consideration right*. This claim rests on the centrality of interests in a democracy, and as such is underpinned by several classic democratic principles which focus on interests. James Mill's idea of democracy as a type of governance that should attain an "identity of interests" between the governing and the governed, but also the principle of affected interests, strengthen the case for accepting sentient animals' right to have their interests considered in a democracy. It follows from this chapter that sentient non-human animals on the territory of a democratic state have a right to have their interests considered in the decision-making processes of that democratic state.

In the second chapter, what this interspecies democratic theory means for the normatively required position of non-human animals in liberal democracies is elucidated. In other words, if the purpose is to respect

[12] This book uses the term "enfranchising" in the broad sense, indicating some type of political or legal recognition of non-human animals in basic institutional structures, not in the narrow sense of extending voting rights to non-human animals, for obvious reasons.

animals' right to consideration, what criteria must be met? It is argued that liberal democracies must reserve an institutional place (*legitimacy requirement*) in which humans (*human assistance requirement*) are institutionally bound (*non-contingency requirement*) to consider the independent interests (*independence requirement*) of sentient non-human animals who reside on the territory of the state (*residency requirement*). Subsequently, the political-legal position of non-human animals in current liberal democracies is analysed and examined in the context of these enfranchisement criteria. The chapter concludes that there is currently too much discrepancy between norm and reality, and articulates the need to find institutional means of improving the political-legal position of non-human animals, for the sake of both animals and the open society itself. In anticipating institutional reform, the chapter also defends the methodology of looking into some models that have been proposed for the enfranchisement of future people.

The third chapter investigates whether the *political* institutions of liberal democracies can be adjusted so that they facilitate the required consideration of animals' interests. The chapter finds that there are considerable difficulties with politically enfranchising animals, which are almost all related to the fact that animals cannot act politically and thus cannot instruct and control hypothetical representatives. Several proposals aimed at working around this difficulty are considered but rejected on different grounds, mostly because their democratic costs are too high. After a recapitulation of the findings, the chapter concludes that it is not likely that a normatively defensible enfranchisement of animals can be achieved in the political institutions due to the fact that this seems to involve requiring mutually exclusive things of political institutions and due to the deeper nature of the political sphere, which seems to resist the type of enfranchisement sought in this book.

The fourth and fifth chapters investigate the two most obvious options of *legally* facilitating the required consideration of animals' interests. The fourth chapter focusses on the option of introducing a so-called state objective (policy principle) on animal welfare in the constitutions of liberal democracies. It first sets out the four most important effects such a provision

would have on both the legal system and on politics. Subsequently, it clarifies the differences between a state objective and legal rights, and conducts a case study on how the state objective on animal welfare in Switzerland currently functions. After that, the constitutional state objective's capacity to meet the enfranchisement criteria is assessed. It follows that the necessary discretionary room that a state objective typically allows for political acting is a crucial obstacle in meeting the enfranchisement criteria and that this cannot be remedied because discretion is a necessary feature of the state objective. It is argued, however, that despite this normative deficiency, the state objective may be an important intermediate model to keep in the back of our minds for piecemeal engineering, because it can only have positive effects on the position of animals in liberal democracies, without compromising on liberal democratic values.

In the fifth chapter, the option of assigning sentient animals fundamental legal rights is assessed. First, it is elucidated that, despite spectacular reports in the media and even in some scholarly work, non-human animals around the world have not yet been granted legal rights. Subsequently, it is defined what type of legal rights is considered and what the effects of these rights would be. Due to the fact that legal animal rights would have a significant impact on society and could have significant economic, democratic, and liberty costs, a robust, threefold justification for these rights is also given. It is argued that the interspecies democratic theory in this book is not the only ground for assigning animals legal rights; an interest-based account of rights also offers such a justification, as well as the fact that animal rights would significantly improve the legal systems in liberal democracies. Subsequently, it is investigated whether legal animal rights could meet the enfranchisement criteria. It follows that assigning animals rights would improve the legitimacy of liberal democracies considerably, that it would make the consideration of their most fundamental interests in liberal democratic institutions non-contingent, and that their interests would have to be considered independently as a result of their rights. Furthermore, it is argued that there are many ways in which humans could assist animals in the realisation of their rights, and that these

rights could be residency-dependent. The chapter concludes that the option of assigning fundamental legal rights to animals has good normative papers, since this institutional setup would bring all enfranchisement criteria into view, while also respecting liberal democratic principles and even improving liberal democracies.

In sum, *The Open Society and Its Animals* calls for a revaluation of classic liberal democratic principles and for their non-discriminatory application. The focus on individuals and their interests that is so characteristic of liberal democracies is a highly suitable foundation on which to build a political-legal status for sentient non-human animals. While the book normatively argues for legal animal rights, it also values care being taken when it comes to reform, and resists recklessly diving into revolutionary projects that may risk it all. Instead, it suggests that introducing constitutional state objectives in liberal democracies is an appropriate first step in the direction of giving animals their political-legal due. Because of their dynamic character and progressive demands, constitutional state objectives on animal welfare seem an attractive option of guiding liberal democracies gradually into a more animal-friendly future and preparing them for fundamental legal animal rights. The book maintains that, normatively speaking, it is only fundamental legal animal rights that can ultimately make liberal democracies live up to their full potential of being the most ingenious interest-weighing mechanisms in the history of animalkind.

1

The interspecies democratic theory

Introduction

"Animals whom we have made our slaves we do not like to consider our equals," Charles R. Darwin wrote in 1837.[13] Even centuries after his death, this observation is still striking. Although the conviction that non-human animals should be offered some kind of moral consideration has since become widespread, the actual treatment of non-human animals in current-day societies seems to reveal that this modern moral conviction is easier to subscribe to in theory than to put into practice. The omnipresent use and misuse of non-human animals in modern societies indicates that it is hard to relieve non-human animals—"our slaves," according to Darwin—of the burdens that we have placed on them. It is not surprising that we find it even harder to see "our slaves" as our *political* equals. What on earth could animals have to do with politics? They cannot talk, they cannot reflect on conceptions of the good life, and they certainly cannot vote, it is claimed. Why should there be any reason to consider them as our political equals then? Is politics not an excellent example of a business that should be exclusively reserved for intelligent and rational humans? Reserved for the *political animals*, as Aristotle already called humans in his book *Politics*?[14]

The human-centeredness that is woven into the institutions of the most successful political model of our time, democracy, has often been accepted unquestioningly. This is understandable, as these institutions developed and evolved at a time when the idea of human categorical superiority was at its heyday. People generally saw no reason to formally involve non-human animal interests in their democratic theories and

[13] Darwin, *Charles Darwin's Notebooks*, 228.
[14] Aristotle, *Politics*, trans. Ernest Barker, (Oxford: Oxford University Press, 1998), 10–11 (1253a2, 1253a7).

institutional frameworks, because until recently it was unclear that non-humans could even have interests, let alone politically relevant interests. It seems that leaving non-humans out of the political sphere was the only logical option given the knowledge at hand. With the scientific knowledge of today, however, we know that sentient animals have interests and that they can be harmed by political decisions. It therefore only seems fair to re-evaluate the anthropocentric character of today's democracies and the anthropocentric application of democratic principles. The realization that non-human animals have interests seems to beg the question whether an exclusively human political model can still be justified today. Should our modern understanding of sentient non-human animals lead us to assign them a formal political status, and is the human-centeredness of democracies a relic that should have been left behind in the pre-scientific era?

The main argument of this chapter is that, though undeniably politically incompetent, non-human animals are owed some form of political consideration of their interests. This claim rests on the fact that some non-human animals are entities with interests. In the context of classic democratic principles and democratic theory, the fact that sentient animals are entities with interests which can be harmed by political decisions means that they have a right to be considered. The purpose of this chapter is to demonstrate that uncontroversial democratic principles underpin this right, if only their blind spot for animals other than humans is removed.

The first section of this chapter notes that not everyone realizes that democratic theory is in need of an interspecies update. Many democratic theorists either ignore or do not realize that the current scientific understanding of animals puts the anthropocentric interpretations of classic democratic theories under pressure. The second section is dedicated to deliberate sceptics: three arguments that may undermine animals' claim to political rights are discussed and challenged. In the subsequent section, non-human animals are conceptualized as political patients. In other words, the Aristotelian contention that non-human animals are ultimately incapable of political acting is endorsed. This brings important challenges to the table, because the political position of political patients is a relatively grey area in

democratic theory. I will develop a theory to account for the position of political patients in general. It was previously unjustly and uncritically presumed that political patients cannot have political rights. I argue that political patients can have political rights, although not all of the rights that political agents enjoy. Political patients, such as children, are eligible for a passive political right, namely for what I call the *consideration right*. In what follows, it will be demonstrated that general democratic principles and important democratic outlooks support this theory. James Mill's classic view of democracy as a political model that enables the reflection of individuals' interests in state governance offers an outlook on democracy that supports the idea that political patients have a consideration right. Subsequently, it will be demonstrated that the view that some non-human animals are part of the political community (the demos) whose interests are eligible for political protection can also be underpinned from another perspective, namely by employing one of the central principles in democratic theory: the principle of affected interests. It is demonstrated that, since sentient animals are also affected by democratic state policy, they are also part of the demos. It will be concluded that there is sufficient support for the claim that sentient animals have a consideration right if we combine the fact that sentient animals have interests with classic democratic theory.

1.1 Cavalier agnosticism

Although evaluating non-human animals' place in political theory (more precisely democratic theory) has gained increasing attention in the literature in the last few years,[15] the majority of political theorists still appear to think that there is nothing odd going on when it comes to non-human animals'

[15] For example (in chronological order): Robert Garner, *The Political Theory of Animal Rights* (Manchester: Manchester University Press, 2005); Alasdair Cochrane, *An Introduction to Animals and Political Theory* (Basingstoke: Palgrave Macmillan, 2010); Sue Donaldson and Will Kymlicka, *Zoopolis: A Political Theory of Animal Rights* (Oxford: Oxford University Press, 2013/2011); Siobhan O'Sullivan, *Animals, Equality and Democracy* (Basingstoke: Palgrave Macmillan, 2011); Kimberly K. Smith, *Governing Animals: Animal Welfare and the Liberal State* (Oxford: Oxford University Press, 2012); Robert Garner, *A Theory of Justice for Animals: Animal Rights in a Nonideal World* (Oxford: Oxford University Press, 2013); Robert Garner and Siobhan O'Sullivan, eds., *The Political Turn in Animal Ethics* (London: Rowman & Littlefield, 2016); Alasdair Cochrane, *Sentientist Politics: A Theory of Global Inter-Species Justice* (Oxford: Oxford University Press, 2018).

position in democracies and democratic theory. The general trend in political theory still is that we can go about our normal businesses, despite the fact that the scientific and moral understanding of non-human animals has changed drastically recently.

This attitude many political theorists have is likely often caused by ignorance of the fact that the changed image of non-human animals may cause difficulties to an anthropocentric understanding of democratic theories. I label this attitude towards animals' role in political theory *cavalier agnosticism*, because theorists who have this attitude have simply never considered the option of involving non-humans in (their) political theory, or they regard the changed image of animals as trivial, not worthy of serious attention, or irrelevant to political theory. They often do not dedicate a single word in their works to the position of non-humans in democratic theory, or they write about it as if the democratic exclusion of non-humans is no important issue at all. The urgency of the altered view of non-human animals for political theory is just not felt or deliberately downplayed. This cavalier agnostic outlook is understandable, because it is best known to us. As stated before, for a long time, humans have not realized that ruling over non-human animals in an arbitrary way and without paying attention to their interests might be problematic—let alone inconsistent with democratic values. It is remarkable that, despite the steady rise of attention for non-human interests in ethics, many modern political theorists still hold this view today.

Illustrative in this regard is Hanna Fenichel Pitkin (1931–), a renowned political theorist specialised in the concept of representation. Pitkin, in her famous book on representation, divides the material world into (1) normal people, (2) children, (3) the insane, and (4) inanimate objects.[16] One can only wonder to which of these four categories non-human animals belong.[17] A similar disinterest in the political position of non-human animals is displayed by Bernard Crick (1929–2008), also a political theorist and

[16] Hanna Fenichel Pitkin, *The Concept of Representation* (Berkeley: University of California Press, 1972/1967).

[17] This also has consequences for the (non-)position of animals in Pitkin's theory. The consequences of Pitkin's ignorance with regard to non-human animals has been criticized by Kimberly K. Smith, in: Smith, *Governing Animals*, 103–109.

author of the entry on *Democracy* in the *A Very Short Introduction*-series of Oxford University Press. In this work, Crick depicts the societal call for animal rights as a "big small cause," just as unimportant and trivial as the call for banning genetically modified food or the call for saving whales, all of which he contrasts with serious and truly difficult questions of political theory, such as poverty and economic injustice.[18] By lumping the animal rights movement in with minor issues, and by not recognizing the animal rights movement as a serious and difficult political issue, Crick reveals that he either wishes to ignore or just does not realize the fundamental problem that the "big small cause" of animal rights might pose to democratic theory in general.

In a similar fashion, the political theorists Nadia Urbinati and Mark E. Warren portray the animal rights movement as a small issue not really of importance to democratic theory. In a paper on representation in, of all things, *contemporary* democratic theory, Urbinati and Warren equate representing animals with representing goods, as opposed to persons or beings. To them, animal representation is more similar to representing goods, such as "rainforests, community, spirituality, [and] safety," than to representing persons, such as women, persons with particular ethnic backgrounds, and children.[19] Again, democratic theorists prove to be unaware or ignorant of the consequences of the modern view of animals for democratic theory. Urbinati and Warren do not seem to realize that animals are actual beings with actual interests, and that not offering them a political chance to have their interests considered may have serious consequences, such as suffering and death, whereas the equated "rainforests, community, spirituality, [and] safety" are vague constructs without intrinsic interests that cannot be harmed by underrepresentation in any way.

Lastly, even John Rawls (1921–2002), considered to be the greatest political philosopher of our time by many, failed to include non-human animals within the purview of his theory, which has been criticized as a

[18] Bernard Crick, *Democracy: A Very Short Introduction* (Oxford: Oxford University Press, 2002), 111–112.
[19] Furthermore, representation of this kind is considered to be "issue-specific." Nadia Urbinati and Mark E. Warren, "The Concept of Representation in Contemporary Democratic Theory," *Annual Review of Political Science* 11 (2008): 403–404.

shortcoming of his work by the British political philosopher Robert Garner (1960–) and the Dutch moral philosopher Floris van den Berg (1973–).[20] Like many others, the political theorists mentioned here do not seem to realize, or wish to ignore the fact that the call for animal rights or political animal representation is not just another short-lived trend, but a movement that can form a real challenge to the way in which we understand democratic theory and democracies in the modern age. Apart from this cavalier agnosticism, however, there are, of course, also actual arguments opposing the idea of giving non-human animals political rights, to which we will now turn.

1.2 Opposing arguments

The idea that non-human animals are not part of the political community and that they have no claim to political rights is widely held but unfortunately not often explicitly underpinned. We can imagine, however, three possible types of arguments that may undermine or argue against assigning non-human animals political rights. These three types of arguments regard non-human animal interests.

The first type of argument claims that non-human animals have no interests. If substantiated well, this argument seems disastrous to non-human animals' claim to political rights. If animals have no interests, then obviously it is impossible to affect these interests with politics.[21] Distributing political rights among humans only would be completely logical. The second type of argument that may pose a problem to assigning non-human animals political rights claims that animals might have interests, but that we cannot know what these interests are. This argument would not directly affect non-human animals' *prima facie* claim to political rights, because one might still argue that all existent interests are to be weighed even if we do not know exactly what these interests are. Instead, this argument would mean that

[20] John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 2005/1971); Garner, *The Political Theory of Animal Rights*; Robert Garner, "Rawls, Animals and Justice: New Literature, Same Response," *Res Publica* 18, no. 2 (May 2012): 159–172; Garner, *A Theory of Justice for Animals*; Floris van den Berg, "Harming Others: Universal Subjectivism and the Expanding Moral Circle" (PhD diss., Leiden University, 2011); Floris van den Berg, *Philosophy for a Better World*, trans. Michiel Horn (Amherst: Prometheus Books, 2013).

[21] Similarly, Alasdair Cochrane explains how this argument, if correct, would be devastating to Peter Singer's moral theory. Cochrane, *An Introduction to Animals and Political Theory*, 35–37.

even though animals may have a claim to political rights, it is impossible to put flesh on the bones of these political rights. It would be impossible to design institutions that are meant to reflect non-human interests if we cannot know what these interests are. The last and third type of argument against giving non-human animals a political status claims that although animals admittedly have knowable interests, these interests are irrelevant to politics. Non-human animals' interests are, in other words, considered to be a-political. Possibly, non-human animals only have basic needs that have nothing to do with the intellectually complex issues that are central to politics.

Animals have no interests

The first type of argument against including non-human animals in the political sphere thus claims that non-human animals have no interests. On first appearance, it might seem rather unlikely that anyone would take the extreme view of denying that non-human animals have interests.[22] Is it not obvious that many animals have at least *some* interests? There have been philosophers who denied this, however, and since the arguments they have put forward in support of this view relate to how we define "interests," we need to elaborate a little on definitions of interests first.

In one of the clearest and most comprehensive accounts on this subject, political philosopher Alasdair Cochrane (1978–) explains how interests are generally and, to his idea, preferably conceptualized.[23] In the general account of interests, employed in not only utilitarian but almost all main ethical theories, interests are linked to sentience through the central ethical notion of well-being.[24] A being with sentience automatically has well-being, because his life will go better or worse for himself in accordance with his subjective experiences of, among other things, pain and pleasure. With well-being, in its turn, automatically comes the attribution of interests,

[22] Cochrane, *An Introduction to Animals and Political Theory*, 36.
[23] Alasdair Cochrane, *Animal Rights Without Liberation: Applied Ethics and Human Obligations* (New York: Columbia University Press, 2012), 24–38.
[24] Admittedly, well-being plays a more prominent role in utilitarian ethics than in the other main ethical theories, but it is also a central notion in other main ethical theories. "Well-being," in Alasdair Cochrane's terms, "is what gets our ethical juices flowing." Cochrane, *Animal Rights Without Liberation*, 25.

namely the interest in maintaining or improving one's level of well-being. In other words, because pain and pleasure afflict our well-being directly, we have an automatic interest in either avoiding or pursuing the activities that bring about these experiences. Interests are thus linked to sentience. Being sentient is a necessary and sufficient condition for having well-being, and consequently a sentient entity also has interests in improving or maintaining the level of that subjectively experienced well-being.[25]

Non-sentient entities, on the other hand, by definition do not have experiences or awareness capacities. They therefore do not have well-being but merely a *condition* that can either improve or deteriorate. Examples are plants and trees, whose conditions may improve, for example, after being watered. We do not say, however, that they have an interest in being watered, because as far as we know today, plants and trees feel no subjective or experienced relief when being watered. It is merely their condition that improves. Similarly, Van Gogh's *The Starry Night*'s condition may deteriorate after coming into contact with water, but we do not say that pouring water over a painting affects the painting's interests. In short, the conceptualization of interests as defended by Cochrane focusses on the subjective element: is an entity able to experience his or her own life? This concept of interests is widely accepted, conclusive, and in accordance with how the term is generally used, and will be the one employed throughout this book.

There are, however, also philosophers who have a rather eccentric view of what interests are. H.J. McCloskey (1925 –) and Raymond G. Frey (1941–2012) both add extra requirements to the general welfare account of interests. These more demanding definitions of interests lead both thinkers to the conviction that non-human animals do not have interests. On McCloskey's account, having an interest in something does not only mean

[25] Cochrane, *Animal Rights Without Liberation*, 24–28. Joel Feinberg puts it the other way around: "Without interests a creature can have no "good" of its own … Mere things are not loci of value in their own right, but rather their value consists entirely in their being objects of other beings' interests." Joel Feinberg, "The Rights of Animals and Unborn Generations," in *Philosophy and Environmental Crisis*, ed. William T. Blackstone (Athens: University of Georgia Press, 1974), 43–68 (citation on page 50).

that that something improves the well-being of a person, but also that that entity has to be *concerned* about it.[26] On Frey's account, the additional condition to the welfarist account of interests is that a person must also *desire* a good in order to have an interest in it.[27] Both thinkers claim that merely influencing the subjectively felt well-being of a person is not enough to constitute an interest in something, but that an additional *concern* about, or *desire* to get that thing is needed. Both also claim that non-human animals, with their limited mental capacities, cannot have such concerns about or desires to get certain things and that they hence do not have an interest in anything.

In defence of his more straightforward definition of interests, Cochrane took the effort of rebutting the claims of Frey and McCloskey. Cochrane's response is simple but convincing. His critique is twofold. First: adopting the exceptionally enriched definition of interests as proposed by McCloskey and Frey is objectionable because it leads to the unpalatable conclusions that, for example, a human baby has no interest in being vaccinated against measles and that smoking tobacco does not run contrary to a person's interests.[28] After all, a baby has no cognitive desire for, or concern about being vaccinated against measles, and many smokers desire and are concerned about getting tobacco, even though this obviously runs counter to their health interests. For this reason, Cochrane holds, the enriched concepts of interests as proposed by McCloskey and Frey have to be contested.

However, and here Cochrane's second point of critique comes to the fore, even if we *were* to adopt the exceptionally enriched definitions of interests, both Frey and McCloskey would still be wrong in claiming that non-human animals do not meet the requirements of their enriched

[26] Henry J. McCloskey, "Rights," *The Philosophical Quarterly* 15, no. 59 (April 1965): 115–127; Cochrane, *An Introduction to Animals and Political Theory*, 36; Cochrane, *Animal Rights Without Liberation*, 33–36.
[27] Raymond G. Frey, *Interests and Rights: The Case Against Animals* (Oxford: Clarendon Press, 1980), 82; Cochrane, *An Introduction to Animals and Political Theory*, 36; Cochrane, *Animal Rights Without Liberation*, 33–36.
[28] Cochrane, *Animal Rights Without Liberation*, 33–36.

definitions of interests.[29] As Cochrane points out, there is every reason to believe that sentient animals in fact often *do* desire and *are* concerned about the goods they have an interest in.[30] Dogs demonstrate that they are concerned about getting food when they beg for food, and rabbits show a desire to get out of their cage when they bite at the bars. A hog demonstrates concern about avoiding violence when he tries to flee from it, and a mother cow shows that she desires to be with her child when she continuously calls for him on a milk farm. The proof of sentient animals' desires for and concerns about getting something that is in their interest is everywhere, and categorically denying that non-human animals can have interests as conceptualized by McCloskey and Frey thus runs counter to common sense and everyday observations. Cochrane appropriately asserts that the burden of proof should thus be with Frey and McCloskey if they claim that the situation is otherwise.[31]

Animals' interests are unfathomable phenomena

The second argument against assigning non-human animals political rights is that we cannot know what their interests are. If such is the case, assigning them political rights is futile, because they cannot be effectuated in practice.

In order to be able to determine the interests of other animals, it seems required that we can acquire some information about what they feel and experience. But is it possible to ever know what other animals feel and experience? As a philosophical inquiry, it can be very interesting to extensively elaborate on that question. There seems to be something fundamentally mysterious and unknowable about other individuals' minds.[32] It seems impossible to know precisely what other animals feel, think, and experience. However, as moral philosopher Peter Singer (1946–)

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[29] Cochrane, *An Introduction to Animals and Political Theory*, 35–37; Cochrane, *Animal Rights Without Liberation*, 33–36.

[30] Similarly, Joel Feinberg points out, in response to McCloskey's contention that non-human animals do not have interests, that "many of the higher animals at least have appetites, conative urges, and rudimentary purposes, the integrated satisfaction of which constitutes their welfare or good." Feinberg, "The Rights of Animals and Unborn Generations," 50.

[31] Cochrane, *Animal Rights Without Liberation*, 34–35.

[32] Donaldson and Kymlicka, *Zoopolis*, 31.

has pointed out, this is also true of other humans.[33] We can never be one hundred percent sure about the inner world of other individuals, whether human or non-human animals. The experience of, e.g., pain is necessarily an individual experience. Only the experiencing subject himself can be absolutely certain that he is a sentient creature. It is impossible to achieve absolute certainty about the sentience of all other individuals, since we cannot feel or experience their subjective mental world for ourselves.

Obviously, however, we can register behaviour that most likely indicates sentience in other individuals, such as avoiding violence, and such behaviour can help us to determine what that individual's interests are. Furthermore, we can register certain brain activity, or measure certain physical reactions which may indicate stress, such as sudden perspiration, an increased heart rate, or pupil dilation. Scientific knowledge about an individual's physical composition and evolutionary background may also inform us about the likelihood that he has subjective experiences, and may help us in determining his interests. These sources allow us to determine the likelihood that other individuals have subjective experiences, and enables us to make a good estimation of their interests. Admittedly, determining the interests of non-human animals is generally probably somewhat harder than determining the interests of other humans.[34] It is also true that at times it might be hard to figure out what other animals' interests are precisely. This does not mean, however, that we cannot say anything at all about what their interests are. We can inform ourselves with scientific facts about the composition of other animals' bodies, observe their behaviour, study their brain activity, and measure their physical reactions. Combined, this information allows us to accurately estimate the interests of other animals. In conclusion, it is too strong an assertion to maintain that animal interests are unfathomable phenomena.

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[33] Singer, *Animal Liberation*, 10–15.

[34] The opposite is also sometimes argued: determining the interests of other animals is *easier* than determining those of humans, because "humans' needs may be more complicated than those of [other] animals, and humans often don't know themselves what they want, much less what's good for them." Smith, *Governing Animals*, 104.

Animals' interests are a-political

Now that we have established that sentient animals have interests and that it is, to a certain degree, possible to know what these interests are, for the purpose of this chapter it is also crucial to establish that these interests are relevant to politics. The third objection against assigning animals political rights could be that animals might have knowable interests but that these interests are irrelevant to politics.

This contention seems to be too blunt. It is true that politics is often about issues in which animals have no direct interests, such as pension funds and minimum wages. However, often politics is also about issues that do directly affect their interests, such as ocean contamination and ritual slaughter. In fact, the number of animals whose lives are affected by political decisions or a lack thereof is enormous, and oftentimes the qualitative impact on these animals' interests is substantial. If we decide to build a highway, animals are chased out of their natural habitat, and migratory routes are disrupted. If political inactivity allows us to consume more and more animal products, the animals whose bodies we consume are obviously affected by that decision. Of course, pets and the animals in zoos, research centres, and other sectors that involve animal use experience the consequences of our democratic rules first-hand every day. Both wild and domesticated animals are omnipresent in our society, and many democratic decisions thus automatically affect their interests. Although it is true that politics is sometimes about typically human affairs in which other animals have no interest, the fact that it is also about issues that animals do have an interest in makes their interests relevant to politics. It justifies the question of whether non-human animals ought to have their interests taken into account politically. The importance of the fact that many non-human animals can be affected by political choices must not be underestimated. As will become clear later on, this fact is vital to the claim that some animals have political rights.

1.3 Non-human animals as political patients

Now that we have discussed the most important arguments against political rights for animals, it is time to deal with arguably the most important other question that comes to mind when we start actually considering assigning political rights to non-human animals. Is Aristotle not right in implying that non-human animals are ultimately ineligible for political rights since they cannot comprehend, let alone exercise these rights?

Fortunately, today's thinking about the political roles of non-humans is not as pristine as it was in Aristotle's era. One important currently debated issue is, however, still related to the basic Aristotelian idea that non-human animals are ultimately unfit to engage in political business. The issue is this: are non-human animals merely *undergoers* of political action (what will be referred to here as "political patients") or are they also *doers* of political action (what will be referred to here as "political agents")?[35] "Political action" then may be defined as performing an action that is *distinctively* political and that is the product of political agency.[36] If political acting is an expression of political agency, does this not require various complex capacities, some of which are arguably typically human? As will become clear later on, the controversy concerning the Aristotelian contention ultimately revolves around how we define political agency.

The Political Animal Agents School

Those who maintain that animals are actually political agents, in other words *doers* of political action, obviously disagree with the Aristotelian idea that animals are unfit for politics. They maintain that non-human animals can act politically, and that, in fact, they oftentimes already act politically. Examples of animal behaviour that is interpreted as political acting are being

[35] The terms "political patient" and "political agent" are inspired by the well-known philosophical distinction between *moral* agents and *moral* patients, terms which relate to individuals' capacities to act morally and to be held morally responsible. Since the terms used here are to indicate individuals' capacity to act distinctively *political*, "political agent" and "political patient" seem only natural.
[36] Part of this definition ("distinctively political") is proposed by Angie Pepper in: Angie Pepper, "Political Agency in Humans and Other Animals," (paper presented at *Animal Agency: Langue, Politics, Culture Conference*, Amsterdam, May 13, 2016), 1.

present in the public realm and refusing to conform to social norms and arrangements in interactions with humans, e.g. by attacking humans. We can identify the political philosophers Sue Donaldson (1962–) and Will Kymlicka (1962–) as the best known defenders of this school of thought.[37] Let us call this school the "Political Animal Agents School," the "PAA School" for short, to indicate that the thinkers in this school maintain that many non-human animals are political agents. It is important to briefly discuss the main ideas of the PAA School, because these ideas have been quite influential in political animal theory so far.

In their book *Zoopolis* (2011), Donaldson and Kymlicka maintain that many non-human animals are political agents, or "political participants" and "agents of change" as they also call them.[38] Of course, Donaldson and Kymlicka explain, these animals are not *deliberate* agents in the sense that they reflect on their political acting, but they are political agents nonetheless.[39] Donaldson and Kymlicka thus do not accept the Aristotelian premise that animals have no political agency.[40] They come to this conclusion in two steps. First, they reject the classic "rationalistic" conceptualization of political agency and replace it with the much less demanding concept of "dependent agency."[41] The second step they take is interpreting various forms of animal behaviour in such a way that they fit this conceptualization of dependent agency.[42] Let us take a closer look at these two steps.

In the first step, Donaldson and Kymlicka reject the conventional meaning of political agency. That is to say, they reject the way in which the necessary capacities for being a political agent are typically interpreted.[43] These necessary capacities are: (I) the capacity to have and communicate a

[37] Donaldson and Kymlicka, *Zoopolis*. In this school also: Smith, *Governing Animals*; Eva Meijer, *Dierentalen* (Leusden: ISVW Uitgevers, 2016); Clemens Driessen, "Animal Deliberation," in *Political Animals and Animal Politics*, eds. Marcel Wissenburg and David Schlosberg (Basingstoke: Palgrave Macmillan, 2014), 90–104.
[38] Donaldson and Kymlicka, *Zoopolis*, 114.
[39] Donaldson and Kymlicka, *Zoopolis*, 112, 114.
[40] Donaldson and Kymlicka, *Zoopolis*, 58.
[41] Donaldson and Kymlicka, *Zoopolis*, 59–61, 103–105.
[42] Donaldson and Kymlicka, *Zoopolis*, 108–122.
[43] Donaldson and Kymlicka, *Zoopolis*, 103–105.

subjective good, (II) the capacity to comply with social norms, and (III) the capacity to participate in the co-authoring of laws.[44] Donaldson and Kymlicka claim that these capacities are generally interpreted in a "highly cognitivist way," which sets the bar unreasonably high.[45] That is: they maintain that it is unfair to require that, in order to be labelled a political agent, (I) individuals must reflectively endorse a conception of the good, (II) individuals must understand the reasons for social norms and comply with them for these reasons, and (III) individuals must be able to engage in public reason in order to be co-authors of the law.[46] Donaldson and Kymlicka opt to move away from this overly "rationalist idea" of political agency and to adopt a view of agency called "trust-based dependent agency" instead. In this perception of agency, it is not an innate ability as such, but something that must be socially enabled and thus "inheres in a relationship amongst citizens."[47] Donaldson and Kymlicka explain trust-based dependent agency as follows: "In this view, even the severely cognitively disabled [and domesticated animals] have the capacity for agency, but it is agency that is exercised in and through relations with particular others in whom they trust, and who have the skills and knowledge needed to recognize and assist the expression of agency."[48] When interpreted in such a way, the respective capacities needed for (political)[49] agency become much less demanding, namely: (I) the capacity to express a subjective good ("as revealed through various forms of behaviour and communication"), (II) the capacity to comply with social norms ("through the evolution of trusting relationships"), and (III) the capacity to participate in shaping terms of interaction (by e.g. "sheer presence" or "engaging in social relationships").[50] Domesticated animals have all these requisite capacities of political agency, or so Donaldson and Kymlicka claim.[51] This idea of dependent agency is

[44] Donaldson and Kymlicka, *Zoopolis*, 103.
[45] Donaldson and Kymlicka, *Zoopolis*, 103–105.
[46] Donaldson and Kymlicka, *Zoopolis*, 103–104.
[47] Donaldson and Kymlicka, *Zoopolis*, 60, 108.
[48] Donaldson and Kymlicka, *Zoopolis*, 60–61, 104–105.
[49] There is some linguistic vagueness in *Zoopolis*, in the sense that it is at times hard to determine whether Donaldson and Kymlicka are discussing *political* agency, relations, and norms or *moral* or *social* agency, relations, and norms.
[50] Donaldson and Kymlicka, *Zoopolis*, 104–105, 112–116.
[51] Donaldson and Kymlicka, *Zoopolis*, 60–61, 104–105.

meant to replace the classical concept of political agency: "the significance of this new model … [is] to change our conception of citizenship for everyone, regardless of dependency status and innate capacities. Rather than dividing the polity between those who are independent and those who are dependent—or into those who are agents and those who are patients—this new conception of citizenship recognizes that we are all interdependent, and experience varying forms and degrees of agency according to context, and over the life-course."[52] And indeed, as we will see below, this new concept of agency makes it very hard to distinguish expressions of political agency from passive forms of non-political behaviour.

The second step Donaldson and Kymlicka take is to interpret various forms of animal behaviour in such a way that they meet the criteria stated above. It is obvious that the threshold for political "trust-based dependent agency" is not very high. Donaldson and Kymlicka confirm this when they write that the limits of this type of agency cannot be determined in the abstract: "[the question of what] the outer limits of this potential scope for agency [are] … can only be answered by engaging in the process—expecting agency, looking for agency, and enabling agency."[53] Consequently, everyday animal behaviour is interpreted as a political act. Consider, for example, the following types of dog behaviour: choosing some type of dog food over another and expressing a preference for a certain type of walking trail while on a daily outing. Both types of dog behaviours are interpreted as expressions of political agency.[54] According to the PAA School, sometimes even the "sheer presence" of an animal may be qualified as a political act, more precisely: political participation. Donaldson and Kymlicka denounce the traditional conception of political participation, which they say typically indicates a responsibility to be informed, to participate in elections on the basis of this information, and thereby to shape the shared political

[52] Donaldson and Kymlicka, *Zoopolis*, 108.
[53] Donaldson and Kymlicka, *Zoopolis*, 110.
[54] Donaldson and Kymlicka, *Zoopolis*, 109–110. Although Donaldson and Kymlicka admit that these "dogly" expressions of preferences "may seem like trivial matters in the context of thinking about citizenship," they add that, in the life of a dog, these matters are "of enormous importance."

community.[55] This classical concept of political participation is turned down on the grounds that, again, there is too strong a "rationalist inflection at work" in it.[56] Instead, as noted, "sheer presence" and "engaging in social relationships" are already perceived to be forms of political participation.[57] Many other types of animal behaviour are interpreted as animals "negotiating the terms of coexistence with their human companions" or are taken to be a "catalyst for political deliberation" and thus an expression of political agency.

Because it is believed that non-human animals are able to shape the norms of our coexistence, the right way to go forward in political animal theory according to the PAA School is thought to be to listen to what animals try to tell us and to "enable" and "recognize" political animal agents in their "shaping of the rules of our shared world." We must, in other words, "start a conversation with other animals" about the rules of our co-existence.[58] We can, in this view, negotiate the terms of coexistence *with* animals, instead of unilaterally forcing rules on them.

Intention as a necessary requirement for political agency

The idea that many non-human animals already act politically is certainly thought-provoking, but it is not endorsed in this book. It is problematic for several reasons. The most important problem, as pointed out by political theorist Angie Pepper (1982 –), is that this particular school of thought stretches the definition of political agency too far.[59] Indeed, animals express their preferences often, and these may even be expressions of moral agency, but it is mistaken to interpret this kind of behaviour as the exercise of *political* agency. When we perceive expressions of preferences (such as the discussed food and walking trail preferences) as political acts, the problem is that, so Pepper writes, "virtually all interactions between beings with

[55] Donaldson and Kymlicka, *Zoopolis*, 112–116.
[56] Donaldson and Kymlicka, *Zoopolis*, 112–116.
[57] Donaldson and Kymlicka, *Zoopolis*, 112–116.
[58] Meijer, *Dierentalen*; Eva Meijer, "Political Animal Voices" (PhD diss., University of Amsterdam, 2017).
[59] Pepper, "Political Agency in Humans and Other Animals." See also: Cochrane, *Sentientist Politics*, 40–41.

preferences are going to count as exercises of political agency."[60] And indeed, such a broad definition of what it means to be acting politically leads to rather curious conclusions, such as worms being political agents,[61] and certain acts of resistance by animals, such as cows escaping from the slaughter house, being perceived as "political protest."[62] Such acts of resistance potentially influence the public opinion, serve as a catalyst for political deliberation, and possibly also indirectly change legal regulations, and thus the PAA School perceives these acts as political ones.[63] In the same line of reasoning, a famous (recently deceased) captive killer whale named Tilikum who killed three people, among which two of his caretakers, is portrayed as a "political murderer."[64] And similarly, stray dogs autonomously violating the prohibition on taking the subway in Moscow are perceived to be committing civil disobedience (yes, there is a prohibition for dogs on subway cars in Moscow, and yes, stray dogs autonomously take the subway nonetheless).[65]

It is an interesting thought that animals who break the (unwritten) rules regulating their suppression are protesting against their suppression. Indeed, we may fairly interpret a cow escaping from the slaughter house as not wanting to have anything to do with the noisy and bloody mess inside, and maybe killer whale Tilikum did indeed kill those people out of a frustration that was caused by his depressing and never-ending captivity. Admittedly, these acts of resistance by animals may influence the public opinion and hence indirectly influence the legal framework regulating their lives and the circumstances of their suppression. However, perceiving these acts of resistance as *political* acts of resistance for the sole reason that they can have political *consequences* is problematic. That seems to stretch the definition of political acting too far. In an alternative view on these matters,

[60] Pepper, "Political Agency in Humans and Other Animals," 13.
[61] Eva Meijer, "Worm Politics," in *Posthuman Dialogues in International Relations*, eds. Erika Cudworth, Stephen Hobden and Emilian Kavalski (Abingdon: Routledge, 2017), 128–142.
[62] Donaldson and Kymlicka, *Zoopolis*, 115–116.
[63] Donaldson and Kymlicka, *Zoopolis*, 112–116; Meijer, *Dierentalen*, 86–89.
[64] Meijer, *Dierentalen*, 88.
[65] "The acting of the dogs is comparable with the situation in which humans denounce a certain system or privileges of a certain group by breaking the rules," translation JV. Meijer, *Dierentalen*, 154–155.

the animals are just going about their daily life, trying to fulfil their private preferences, and it is only humans who attach political meaning to these acts.[66] On this account, animals are not actually challenging the rules that regulate their suppression, because, as Donaldson and Kymlicka themselves recognize, they are not *deliberately* trying to garner political effect. Pepper stresses that it is exactly this intention to affect political institutions that seems a requirement to defining an act as political.[67]

An example may demonstrate the importance of having the intention of affecting political institutions to the definition of political acting. Let us expand the example of the stray dogs taking the subway in Moscow a bit. Suppose that taking the subway is not only prohibited for dogs but also for humans with luggage of over twenty pounds. Now further suppose that James, an uninformed American (human) tourist in Moscow with a thirty-pound suitcase is, just like the stray dogs, not aware of the local rules regulating the use of the subway in Moscow. If James, heedless of the prohibition, takes the subway with his heavy suitcase nonetheless, is he committing a political act? Is he "negotiating the terms of coexistence," just like the law-breaking stray dogs are in the eyes of the PAA School? Or is this just a tourist following his preference to take the subway and thereby accidentally breaking the rules because he is not aware of them—and thus not acting politically at all? The crucial information here seems to be that the tourist is not aware of the rules and has no intention at all of bringing about political effect with regard to these rules. Since James is not even aware of the rules and thus not deliberately challenging them, it seems highly unlikely that he is committing a political act.

Pepper stresses the importance of having the intention of affecting political institutions by offering a different example. She describes the situation of someone who accidentally gets caught up in a protest march by crossing the street to his or her favourite hat store.[68] The "sheer presence" of this person in a protest march does not mean that his or her walk among the protesters is a political act. The crucial factor which distinguishes one walk

[66] Pepper, "Political Agency in Humans and Other Animals," 12–18.
[67] Pepper, "Political Agency in Humans and Other Animals."
[68] Pepper, "Political Agency in Humans and Other Animals," 5, 16.

among a protesting crowd from another is whether the person doing it has the intention of demonstrating against the respective cause. Since the persons in these examples do not seem to have any intention of affecting the political institutions with their behaviour, there does not seem to be any reason to call their behaviour political acting. This is not to deny that the non-political acts of the tourist in Moscow and the accidental "protestor" will not bring about political change. Indeed, the tourist's transgression may have a political *effect* if it becomes an everyday recurrence.[69] In the case of law-breaking James, the authorities in Moscow may consider the rule as unnecessarily impeding tourists and may decide to drop it if too many tourists violate it. Similarly, a (hypothetical) constant killing of caretakers by killer whales may have the political effect of having the acceptability of keeping killer whales in marine mammal parks discussed in national parliament. The same is true for the person who was looking for the hat store but got caught up in a protest march instead: the protest march may have political follow-up. These possible political consequences are, however, not deliberately intended by the tourist, the killer whale, or the shopper in the same way as, for example, voting for such political change would be. Since killer whales, dogs, and all other non-human animals typically are not aware of political and legal frameworks, it seems impossible that they are deliberately trying to affect political institutions with their behaviour. Perceiving their resistance against harmful practices as political resistance would stretch the definition of political acting too far.

Adopting the idea of political agency as proposed by Donaldson and Kymlicka would also have unacceptable consequences. It would unnecessarily blur the important distinction between actual political preferences, behaviour, institutions, rules, and representation on the one hand and all sorts of private behaviour on the other. The PAA School dislikes the "highly rationalist," "intellectualist," and "cognitivist" traditional interpretations of core political concepts and instead prefers to

[69] Pepper stresses the importance of distinguishing between an action being *relevant* to politics and an action being *political* on account of stemming from political agency. Pepper, "Political Agency in Humans and Other Animals," 4–5.

focus on the capacities the mentally disabled and non-human animals *do* have.[70] This seems to assume that these concepts have been rationalistically interpreted for no reason at all, but this is obviously not the case. Rationality is evidently intrinsically linked to political acting and shifting attention to capacities that non-human animals *do* have cannot change this fact. Just like focussing on the cooking abilities of people applying for law school makes no sense in selecting candidates, focussing on irrelevant capacities of animals makes no sense when it has to be determined who is capable enough to engage in shaping the future of a country. It is precisely reasonable and intellectual capacities which are necessary to engage in this cognitively complicated business.[71] Political agency, if it is to mean anything, is comprised of rationalistic and intellectualist standards. For all of these reasons, this book will not endorse the idea of political acting as described by the PAA School, but instead follows the definition of political acting as proposed by Pepper: political acts are only those acts that are intentionally aimed at affecting political institutions.[72] It is clear that no non-human animal acts in this particular way, and hence this book will not further deal with the call for recognition and enablement of perceived "political acts" of non-human animals.

1.4 Political patients and their consideration right

If non-human animals are by definition political patients, we now need to investigate whether this disqualifies them for political rights. Do non-human animals, in spite of their mere political "patiency,"[73] still have an

[70] Donaldson and Kymlicka, *Zoopolis*, 104.
[71] Donaldson and Kymlicka arguably realize this because at various points in the book they mention "enablers" and "collaborators" who would have to attend to the expressions of the domestic animals, "to fit them together into an account of ongoing preferences that constitutes a personalized idea of the good, and to work out how to realize this good under existing circumstances, and to bring this information into the political process." At the same time, however, they despise the idea of a political guardian, who takes care of the respective persons as clients or patients, on the grounds that this is too paternalistic. It is hard to see how these views are to be unified and what actual political representation would look like if not through genuine political guardians. It is also hard to understand why Donaldson and Kymlicka stress the importance of agency so much if, in the end, others will be responsible for the actual political representation of domesticated animals. Donaldson and Kymlicka, *Zoopolis*, 59–60, 104–105.
[72] Pepper, "Political Agency in Humans and Other Animals."
[73] *Political patiency* is used in this book as a term indicating the opposite of political agency. It hence indicates the characteristic of being *un*able to act with the intention of affecting political institutions.

independent claim to political rights, and if so, on what grounds? Traditional political theory has always presumed a strong link between political agency on the one hand and political rights on the other. In other words, once it is established that a certain person is able to act politically, it is only logical to give that person rights to co-engage in political affairs. This is considered fair under democratic norms, more precisely under the principle of political equality. Excluding a perfectly capable person from political influence is considered hardly justifiable and in conflict with that principle. In the same breath, however, it is also often taken to be implied that political patients, who lack the capability of understanding and doing political business, have no political rights.[74] Traditional democratic theory thus seems to conceptualize political agency as not only a sufficient, but also a *necessary* condition for political rights. The contention, endorsed here, that non-human animals are political patients thus seems to force us to conclude that non-human animals cannot have political rights. However, denying non-human animals all political rights because of their political patiency does not seem to be the only option. The traditionally accepted, but hardly explicitly substantiated idea that only political agency can lead to political rights can be contested. Instead, it will be argued here that political agency, though sufficient, is not a necessary condition for assigning an individual political rights.[75] It will be argued that animals have political rights, in spite of the fact that they are not political agents.

It is important to elaborate a little on what we mean by "political rights." To start with, it is helpful to split up political rights into two separate categories.[76] On the one hand, there are what we might call "active

[74] This is also signalized in: Donaldson and Kymlicka, *Zoopolis*, 57–61.

[75] Although Donaldson and Kymlicka argue that animals have agency, they also stress that agency is not a necessary requisite for having political rights (or "citizenship rights"). Donaldson and Kymlicka, *Zoopolis*, 57–61. See also: John D. May, "Defining Democracy: A Bid for Coherence and Consensus," *Political Studies* 26, no. 1 (March 1978): 1–14; Mark Rowlands, "Contractarianism and Animal Rights," *Journal of Applied Philosophy* 14, no. 3 (November 1997): 235–247; Mark Rowlands, *Animal Rights: A Philosophical Defence* (Basingstoke: Macmillan, 1998), 123.

[76] In a relatively unknown paper from 1978, John D. May makes a similar point, although he puts it slightly differently. The often uncritically accepted assumption that the groups forming, on the one hand, the people who are subjected to state policy (the "subject population"), and on the other, the people who are to participate in actual politics are exactly the same makes no sense, according to May. "We need to separate the task of identifying democracy's subject population from the task of determining what rights

political rights," which are rights that indeed require political agency on the part of the rights holder to make sense. These are rights that enable political participation, such as the right to vote and the right to politically represent others. The other category of political rights, which we may call "passive political rights," do not require political agency by the rights holder in order to make sense. This would include the political right to have one's interests considered by the political community's rulers. We may call this right the *consideration right*.

Children's consideration right in theory and practice

Many human political patients already enjoy the consideration right. The best example of political patients in possession of the consideration right are human children. Let us analyse their political-legal position in small steps to illustrate how the consideration right works in their case.

To start with, we can establish that human children up to a certain age are political patients. They lack the capacities of sophisticated reasoning and rational thinking that are essential for understanding politics and for political acting. For this reason, it is uncontroversial that children have no active political rights (for example, voting rights). They simply lack the capacities that are required for any form of political participation. At the same time, however, children are vulnerable to political decisions: they can be harmed or benefitted by the political decisions made by others. The fact that they have interests that can be affected by the political decisions of the rulers of the political community is reason to give them a consideration right. Without this right, children (and all other people incapable of engaging in the business of politics, such as the severely mentally disabled) would be at the mercy of political agents, because political agents are the ones who hold and exercise all political power. Put differently: the decisions that rule children's lives are necessarily made without their participation or consent, and without a consideration right, the people making these political decisions would have, in principle, unlimited power to harm children's

and powers need to be assigned to what persons," thus May. What is needed for being included in the "subject population," is merely being affected by acts of government. May, "Defining Democracy," 5–10.

interests. That is, however, not a situation we generally consider fair, nor democratic.

The fact that children can be harmed or benefitted by political decisions means that they have a right to have their interests considered in political deliberations. It is, in short, their sentience, the resulting fact that they have interests, and the cumulative fact that these interests can be harmed in political decision making that means that they have to be taken into consideration by political rulers. Because of the fact that they have politically relevant interests, children rightly do, and paintings such as *The Starry Night* do not have a right to be politically considered for their own sake. As such, the consideration right of children functions as a duty to the political agents in power. It imposes a duty on the ones in power to also give due and equal consideration to the interests of the children who have no active political rights. The basis for this is a view of democracy as a model of equal political consideration of all interests. If interests can be affected by political decisions (or the absence of them), then these interests should also be given equal consideration in the decision-making process, regardless of whether the possessors of these interests sit at the deliberation table themselves. In such a democracy, all people with politically relevant interests, hence also political patients, have a right to be politically considered, regardless of whether people can be partakers in active politics. The fact that political patients such as children cannot engage in the political game does not mean that political agents are free to do whatever they want with them. In short, a modern democracy should recognize political patients' consideration right.

So far, we have only contemplated on a theoretical right, but children's consideration right is also reflected in the current-day institutions of liberal democracies. We have, in other words, made institutional arrangements to force politicians to equally consider the basic interests of children, despite their physical absence in political institutions. Put yet differently, we have institutionally secured that even though children may not sit at the deliberation table, they (or: their interests) are also not up for grabs. Such constitutional embedding of the consideration right is crucial for

the political position of children, as it would be somewhat naïve to simply trust the people in power to give due attention to the interests of children.[77]

How does children's consideration right practically take form? The consideration right is not explicitly recognized as a legal right "to consideration," but it is more subtly woven into the constitutional structures of current-day liberal democracies by means of other legal rights that protect specific interests. Crucial for the political consideration of children's interests is the fact that they have fundamental legal rights that protect their most fundamental interests from being disproportionally harmed in society and in the democratic process. These rights are, of course, in part the basic human rights and civil rights that human adults have too, but children also have legal rights especially customized to their specific needs. These specific children's rights are, for example, laid down in the *Convention on the Rights of the Child* and sometimes also in local constitutions.[78] The *Convention on the Rights of the Child*, among other things, protects children against economic and sexual exploitation, forbids the imposing of capital punishment and life imprisonment without possibility of release on children under eighteen, and prescribes that children have access to education.[79] For children, in the

[77] Robert E. Goodin probably disagrees. His analysis is that children's interests are merely politically represented through the concept of encapsulated interests (meaning indirectly, through their parents' democratic rights). In my view, this is an inaccurate or at least incomplete analysis of children's political and legal position. This analysis fails to appreciate the fact that children's *rights* and the *political effects of these rights* are crucial for the political position of children. In liberal democracies, we do not simply "trust them [parents] to use it [the vote] to protect their children's interests as well as their own," and we do not simply "assume that parents speak and act on their [children's] behalf," when it comes to children's most elementary interests, as Goodin contends. Indeed, *in principle* we do trust that children's interests are safe in the hands of their parents, but there are limits to what parents can do to or decide on behalf of their children, and these limits are defined by the rights of children. Children's most elementary interests are too important to "assume" or "trust" that parents will adequately safeguard them. In liberal democracies, we safeguard their most important interests both legally and politically through fundamental legal children's rights, and if parents gravely violate their children's most important interests as protected by their rights, the state steps in and protects these children's elementary interests instead. Robert E. Goodin, "Enfranchising the Earth, and its Alternatives," *Political Studies* 44, no. 5 (1996): 843. Gregory S. Kavka and Virginia Warren have similar trusting expectations of the political representation of children by their parents: Gregory S. Kavka and Virginia Warren, "Political Representation for Future Generations," in *Environmental Philosophy*, eds. Robert Elliot and Arran Gare (Milton Keynes: Open University Press, 1983), 26–27.

[78] *The United Nations Convention on the Rights of the Child* is ratified by 196 countries, amongst which all members of the United Nations, notably except the United States of America.

[79] Articles 19, 28, 32, 34, 36 and 37 of *The United Nations Convention on the Rights of the Child*.

absence of a guaranteed "pure" democratic position, such rights are essential. Children's basic human rights, their civil rights, and their specific under-age rights ensure that the fundamental interests of children cannot be unreasonably disadvantaged in the political process in liberal democracies. These rights generally have two important effects on the political decision-making process.

First: children's rights limit the discretion of political decision making in the sense that politicians may not disproportionally infringe on their fundamental rights in anything they do. Politicians have the duty to respect the constitution and international conventions with all the rights laid down therein. Lawmakers and government officials are bound to respect these rights in everything they do, and so they are institutionally forced to give due regard to the basic interests of children as protected by their fundamental rights. Oftentimes, the judiciary checks their compliance with these rights in a constitutional court.[80]

The second effect these rights have on the political process is that they function as a catalyst for more specified child protection. The necessarily abstractly formulated rights as laid down in the children's rights convention, human rights conventions, and national constitutions function as political incentives to give substance to these rights. In practice, these rights are often enriched and supplemented by statutory law and regulations regarding child protection.

In sum, the political position of children could be characterized as follows. If it were not for their rights, children would be, in an institutional-political sense, fully dependent on the willingness of adults to bring their interests into the democratic debate. We have seen, however, that their consideration right is institutionalized through legal protection of their most fundamental interests.[81] These fundamental rights function as a big stick, and they have direct effects on the political process. Despite the absence of explicit child representation in parliament, the interests of children are,

[80] This is, of course, dependent on the national rules of the legal system and whether they allow for constitutional review by a constitutional court.

[81] Assigning political patients fundamental legal rights is not necessarily the only option for institutionalizing the consideration right. Other institutional designs may be possible, as long as they have the effect of ensuring political consideration of the political patient's interests.

through these rights, always virtually present in parliament. Put differently: the absence of children in political institutions that is dictated by their mental limitations is institutionally neutralized by safeguarding their basic interests through fundamental legal rights.

Importantly, it follows from the foregoing that certain political patients, namely children, already have a consideration right, both in theory and practice. This confirms that one need not necessarily be a political agent in order to have political rights. Although political patients may be denied active political rights on account of lacking political agency, they are nonetheless eligible for the consideration right. Non-human animals, as political patients, thus may also have this (theoretical) consideration right.

The identity of interests as a core characteristic of democracy

The consideration right tries to give an account of the proper political position of political patients. But before we can rush to the conclusion that non-human animals are equally eligible for the consideration right on account of being political patients with relevant interests, we must first deepen our understanding of this theory a little. For one, it was briefly mentioned that the claim that the ones in power have a duty to also give due and equal consideration to the interests of political patients is only convincing if we understand democracy as a political model that enables us to give equal political consideration to all interests. But is such an account of democracy convincing?

An interesting democratic theory in this regard is that of James Mill (1773–1836), father of the more famous philosopher John Stuart Mill (1806–1873).[82] In his essay "Government" (1825), father Mill investigates several modes of governance in search of the best one.[83] His contemplations on direct democracy and indirect (in other words representative) democracy are

[82] Janneke Vink, "De Democratische Rechtsstaat als Belangenweegschaal: Belangen als Grondslag voor een Politieke en Juridische Positie voor Dieren," in *De Toegang tot de Rechter de Lege Ferenda in Milieuaangelegenheden*, ed. Pierre Lefranc and Charlotte Ponchaut (Mechelen: Wolters Kluwer, 2017), 43–56.

[83] "Government" is part of: James Mill, *Essays on Government, Jurisprudence, Liberty of the Press, and Law of Nations* (London: J. Innes, 1825).

important to our cause of finding classical theoretical grounds for understanding democracy as a model that enables the equal consideration of interests.[84]

From his writings, it is clear that James Mill loved the basic idea of a direct democracy, in which the entire political community governs itself. Wary of any form of abuse of power, he thought that the power to govern over all people was safest in the hands of those people themselves.[85] He had, however, no illusions with regard to the practical feasibility of a direct democracy. He was fairly sure that such a mode of governance is practically impossible for two reasons. First, there is a great inconvenience in assembling the entire community every time the business of government requires performance. Direct democracy would consume all the time of the community members, and there would thus be no time left for other public and private life. Secondly, Mill thought that calm and effective deliberation were impossible in a direct democracy, because the assembly would be too numerous for that.[86]

These two problems of direct democracy render it rather useless as an actual form of governance, Mill thought, and this was unfortunate in his eyes, because direct democracy has one of the most important characteristics of a political model secured in its design: the reflection of peoples' interests in political governance. In a direct democracy, the interests of the governed and the governing necessarily coincide, because the community governs itself. This ensures that the interests of the community are fully reflected in government decisions and that there is no risk of foul play. Mill explains:

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[84] It must be noted that Mill used different terms for what we would now call direct and representative (or "indirect") democracy. For reasons of clarity, however, I will replace them with the now customary terms direct and representative democracy.

[85] Mill thought it a "law of nature, that a man, if able, will take from others any thing which they have and he desires." To suppose that a person in power will *not* take from every man what he pleases is, according to Mill, "to affirm that Government is unnecessary; and that human beings will abstain from injuring one another of their own accord." James Mill, "Government," in *Essays on Government, Jurisprudence, Liberty of the Press, and Law of Nations*, ed. James Mill (London: J. Innes, 1825), 8, 17.

[86] To the old Greeks, city states of about forty to fifty thousand citizens were already considered to be too numerous. Robert A. Dahl summarizes the Greek thought as follows: "Like an athlete who in growing fat loses his swiftness and agility and can no longer participate in the games, the enormity of our demos is ill-suited for democracy." Robert A. Dahl, *Democracy and Its Critics* (New Haven: Yale University Press, 1989), 16–19.

"The Community cannot have an interest opposite to its interest. To affirm this would be a contradiction in terms. The Community within itself, and with respect to itself, can have no sinister interest."[87] This coinciding of interests between the rulers and the ruled, also called *identity of interests*, guarantees policies that are (perceived to be) in the best interest of all, because what rulers would make policy that hurts their own interests? Mill considered this automatic identity of interests a highly attractive and important characteristic of direct democracy, a characteristic surely to be copied as much as possible into any other, semi-ideal mode of government.

The representative democracy was the next most appropriate candidate for a model of governance. Mill thought that in a representative democracy, too, attaining an identity of interests would be possible. But unlike in direct democracy, this coinciding of interests would not be inherent to its design, and thus attaining the identity of interests would require extra institutional mechanisms. Mill: "There can be no doubt, that if power is granted to a body of men, called representatives, they, like many other men, will use their power, not for the advantage of the community, but for their own advantage, if they can. The only question is, therefore, how can they be prevented? in other words, how are the interests of the Representatives to be identified with those of the community?"[88] Mill thought that making the community responsible for checking the individuals that represent them would do the job. Periodical general elections could be a mechanism that would bring about such a community check. "This is an old and approved method of identifying as nearly as possible the interests of those who rule with the interests of those who are ruled," Mill writes.[89] This community check would be crucial in avoiding abuse of power by the representatives.[90] Without it, Mill predicted, representatives "will follow *their* interest, and produce bad Government" (italics JV).[91] The door would be wide open to a "mischievous use of power"

[87] Mill, "Government," 7.
[88] Mill, "Government," 18.
[89] Mill, "Government," 18.
[90] Mill, "Government," 16–17.
[91] Mill, "Government," 17.

by the representatives, Mill thought.[92] Only with a community check such as periodical general elections would the communities' interests be safeguarded, because the valuable identity of interests would be artificially restored again. Representative democracy, the "grand discovery of modern times" according to Mill, would thus combine the principled rightness of direct democracy with practical feasibility.[93]

There are many things to say about this important early piece of democratic theory offered by Mill, but I will concentrate on only two aspects.

Firstly, by stressing the importance of the political community having the same interests as the ones in power, Mill implicitly paints a picture of democracy as a political model in which the consideration of all individuals' interests is the central trait. A democracy, in other words, in which some form of interests-representation for all members of the political community is a necessary requirement. "Bad government," in Mill's eyes, is a democracy in which the representatives only strive to safeguard their *own* interests, not (also) those of the rest of the political community. *Vice versa*, good government requires representatives to strive to safeguard the interests of the whole political community, and depending on where the boundaries of the "political community" are placed, this could include also the interests of non-human animals.[94]

It must be stressed here that James Mill, unlike his son John Stuart, had no explicit concern for the interests of non-human animals.[95] It seems admissible, however, to bend his theory in the modern interspecies direction a little bit for several reasons. Nothing in Mill's theory implies that it is only suitable for application to humans. On the contrary, the core theme around which his whole political theory spins are *interests*, which we now know are not only possessed by humans but by all sentient animals (John Stuart did

[92] Mill, "Government," 8, 17.
[93] Mill, "Government," 16.
[94] The boundaries of the political community will be explored in the upcoming subsections.
[95] John Stuart Mill, "Utilitarianism," in *Utilitarianism and Other Essays*, ed. Alan Ryan (Harmondsworth: Penguin Books, 2004), 283; John Stuart Mill, "Whewell on Moral Philosophy," in *Utilitarianism and Other Essays*, ed. Alan Ryan (Harmondsworth: Penguin Books, 2004), 253.

seem to realize this). Furthermore, Mill explicitly agreed with several other political philosophers that the ultimate goal of governance was to achieve the greatest happiness of the greatest number.[96] The happiness of a person, Mill maintained, "is determined by his pains and pleasures," and thus the business of government "is to increase to the utmost the pleasures, and diminish to the utmost the pains" which are produced by others.[97] Since not only humans but also other sentient animals can experience pains and pleasures, it seems only reasonable to include them too in Mills theory on governance. In 1861, John Stuart Mill implicitly made this correction to his father's theory when he wrote that the Greatest Happiness Principle indeed does not only seek the maximization of the enjoyments and minimization of the pains of humans, but also "so far as the nature of things admits, [those of] the whole sentient creation."[98] In short, an interspecies interpretation of James Mill's theory is thus possible, even more so with the knowledge of today, without perverting the very essence of it. Therefore, in Mill's essay on *Government*, we have found ourselves a theory of democracy with as a key feature the reflection of all (interspecies) interests in the basic democratic institutions.

The second remark on father Mill's democratic theory is that it has a certain flaw in it that we see more often in political theory, a serious flaw that has contributed to the undertheorizing about the political status of political patients in general. This flaw is that the theory seems to assume that *all* humans, without exceptions, are political agents. A rather pompous, but false view of the human being has been dominating political theory ever since this view became popular: the view of the human animal as the enlightened, reasonable, intelligible, and autonomous being *per se*. Mill's theory also seems to implicitly endorse this overly idealistic image of humans as perfect political agents *per se*. Mill maintains that *all* interests are

[96] Mill, "Government," 3–4.
[97] Mill, "Government," 4.
[98] An "existence exempt as far as possible from pain, and as rich as possible in enjoyments, both in point of quantity and quality" must, according to John Stuart Mill, not only be secured to the greatest extent possible to all mankind, but "so far as the nature of things admits, to the whole sentient creation." Mill, "Utilitarianism," 283. See also: Mill, "Whewell on Moral Philosophy," 253.

reflected in governance if all people have a right to vote for representatives. The unspoken premise here seems to be that every single person with interests has an ability to vote. To Mill, it is "very evident" that if the community were to vote for representatives, "the interest of the community and that of the choosing body would be the same."[99] Mill thus implicitly seems to assert that the political community consists of only intelligible political agents who are able to vote.

This assertion, however, clearly ignores the existence of political patients. Obviously, not all humans, let alone all sentient individuals, are political agents. We know that in reality many people are not (fully) reasonable, intelligible, and autonomous and that many humans are dependent creatures, incapable of political acting. Mill's theory, like many others, seems to ignore the fact that political patients exist. He simply seems to fail to consider the fact that there are also members of the political community who *have* interests but who are *not* able to vote for representatives, which is a significant inadequacy on his part. Mill does not seem to realize that his so wished-for identity of interests between the political community and the representatives is not at all achieved merely by granting voting rights, because not every individual in the political community is able to vote. If the reflection of interests in governance is fully dependent on voting, which it is in Mill's model, only the interests of those who can vote will have guaranteed reflection in governance. Even worse, according to Mill's own predictions, these people responsible for governance will probably make "mischievous use" of their power to rule over the whole community, including political patients. If the political representation of a community is solely based on voting, therefore, political patients are left extremely vulnerable, prey to the whims of political agents. If a true identity of interests between the political community and the political rulers is to be achieved, a political order cannot simply rely on general elections, but is in need of other mechanisms which can account for the reflection of the interests of political patients in governance as well.

[99] Mill, "Government," 21.

We must also consider a different possibility, however. Possibly, Mill did not, like many others, simply assume that all humans are political agents. It is possible that Mill did sufficiently consider the existence of political patients, but that he was convinced that the mechanism of voting was sufficient to ensure the representation of their interests in governance nonetheless. This is a plausible possibility, because James Mill was a known advocate of the now controversial idea of *encapsulated interests.* This concerns the idea that not every individual needs independent political rights, because their interests might already be encapsulated in the interests of others. Children's interests, for example, were considered to be encapsulated in the interests of their parents, and thus Mill considered it useless to secure the political reflection (or other protection) of children's interests independently. But also with regard to women, Mill was ruthless. It is unclear whether he thought women were even capable of political acting and thus whether they were even political agents, but there is no doubt that he thought it unnecessary for women to have political rights of their own. Mill argued that women do not need separate democratic rights, because their interests are automatically protected *through* their husbands or fathers, who already have full democratic rights. "Those individuals whose interests are indisputably included in those of other individuals, may be struck off [the list of the choosing body] without inconvenience," Mill wrote.[100] Apart from children, women thus were also perceived to be individuals whose interests were already included in other people's interests.

As pointed out by others, Mill makes some crucial mistakes here.[101] It seems highly unlikely that there even exists *one* individual whose whole set of interests is "indisputably included in those of other individuals." There is always a point at which interests necessarily clash—which is notably even implied in the reflections on human nature and society in the first part of James Mill's work.[102] It is therefore definitely false to maintain that *every* child's or woman's interest is already included in a parent's or a man's

[100] Mill, "Government," 21.
[101] For example (although without explicitly mentioning James Mill) in: Goodin, "Enfranchising the Earth," 841–843.
[102] Mill, "Government," 3–7.

interest. Moreover, even if there were people whose interests were wholly included in those of their "master," it would be naïve to expect that the "master" will weigh these interests on a par with his own interests—especially given the selfish nature of man as pictured by Mill.[103] Thirdly, it is also clearly a violation of the principle of political equality to give every man independent political rights and not a single woman. Even among men, there must be some interests already indisputably included in those of others. With regard to men, however, it apparently is not a reason to take away part of their political rights. In short, offering a person, whether child, woman, or man, no means to secure that his or her political interests are duly and independently regarded is to break with the principle of political equality and, strikingly so, with Mill's own view of what democracy entails.

The gap in Mill's theory with regard to the political rights of political patients does not mean that his whole democratic theory is useless. Even though Mill himself may have been wrong about *how* an identity of interests between the political community and the rulers can be achieved, his principled depiction and defence of democracy as a political model that *should* achieve such an identity of interests remains untouched and convincing.

It seems that liberal democracies of today have succeeded quite well in attaining an identity of interests for humans. Women, obviously, now have voting rights, and as illustrated above, for children the political consideration of their interests is secured through their fundamental legal rights. Liberal democracies seem to be quite successful, in other words, in institutionalizing the consideration right of all humans who make up their political community. The situation of non-human animals, however, is still under debate. To finish the argument that they, too, have a consideration right that ought to be institutionalized, it is important to investigate whether they are part of the political community. After all, only individuals

[103] Robert E. Goodin, *Reflective Democracy* (New York: Oxford University Press, 2003), 217. This is even true of husbands and wives. Steven M. Wise cites a remarkable letter that Abigail Adams wrote in 1776, in which she pleaded with her husband, John, to ensure that the new Continental Congress not place "unlimited power into the hands of Husbands. Remember that all Men would be tyrants if they could." Cited in: Steven M. Wise, *Rattling the Cage: Towards Legal Rights for Animals* (Cambridge: Perseus Books, 2000), 240.

constituting "the demos" of a democracy have a right to be politically considered. Whether non-human animals are among them will be examined in the upcoming subsections.

The demos

In the understanding of democracy as just pictured, the political rulers in representative democracies ought to take into consideration the interests of all the individuals of the political community. Crucially, the interests of those who may never attain representative power themselves, the political patients, must also be considered if they are part of the demos. But who constitutes the demos? Which political patients are part of the demos and thus qualify for the right to be politically considered? Once we have an answer to this, it will become clear whether non-human animals have a consideration right.

The question as to who constitutes the demos is one of the most essential ones in democratic theory. The problem it addresses is sometimes called "the boundary problem" or the "problem of inclusion": what are the boundaries of a political community, or in other words, who is to be included in the demos? It is a critical question because the answer determines who is a factor of political concern: who is to be democratically included and who is to be excluded.[104] It is all the more remarkable, therefore, that until recently there was a lack of constructive theorizing on this question in literature on democratic theory.

Robert A. Dahl (1915–2014), a renowned political theorist who has extensively looked into this subject, pointed out the lack of theorizing about the boundary problem in 1970. "How to decide who legitimately make up 'the people,'" he wrote, "is a problem almost totally neglected by all the great political philosophers who write about democracy."[105] A plausible reason for this theoretical void is given by Dahl himself. Possibly, political

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[104] Ludvig Beckman, *The Frontiers of Democracy: The Right to Vote and its Limits* (Basingstoke: Palgrave Macmillan, 2009); Dahl, *Democracy and Its Critics*.
[105] Robert A. Dahl, *After the Revolution? Authority in a Good Society* (New Haven: Yale University Press, 1970), 60.

philosophers felt like there was no reason to dive into the subject, because the world's "peoples" are already historically formed.[106] We have the democratic people of the United States of America, the people of Germany, the people of Norway, and many more. The boundaries of those democratic "peoples" are not created by principle, but by the historical development of nation states.[107] One might object, however, that the empirical existence of democratic peoples around the world does not relieve us from the obligation of examining the normative question of what constitutes a rightful democratic people. This normative question begs a principled answer, one that cannot be formulated by referring to historical developments, nor by the democratic process itself.[108] Fortunately, the initial scarcity of theorizing on the question of who constitutes the demos was only temporary. In fact, there has been a solid answer to that question for a while now, one which is relatively uncontroversial, and which faces few seriously competitive alternatives.[109] It is the idea that a democratic people is comprised of all individuals who have interests that are affected by the decisions of the government. Put differently: the normative boundaries of the demos are determined by the *principle of affected interests*.[110]

For some time now, the principle of affected interests has been implicitly and explicitly endorsed by many political theorists as the decisive answer to what the boundaries of a democratic people are: only those individuals affected by the collective decisions are part of the concept. But despite the countless references to this principle, the principle has always encountered problems. The same can be said about the principle of affected interests as a solution to the boundary problem as Winston Churchill (1874–1965) said about democracy as a form of government: it is the worst, except for all others.[111] In 2007, however, this tradition of uneasy endorsement of

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[106] Dahl, *Democracy and Its Critics*, 3–4.
[107] Also: Robert E. Goodin, "Enfranchising All Affected Interests, and Its Alternatives," *Philosophy & Public Affairs* 35, no. 1 (2007): 48.
[108] Also: Goodin, "Enfranchising All Affected Interests," 43–48.
[109] Beckman, *The Frontiers of Democracy*, 36.
[110] Dahl, *After the Revolution*, 64–67.
[111] Full citation: "All this idea of a group of super men and super-planners, such as we see before us, "playing the angel," as the French call it, and making the masses of the people do what they think is good

the principle of affected interests came to an end when the political philosopher Robert E. Goodin (1950–) published his paper "Enfranchising All Affected Interests, and Its Alternatives." In this paper, Goodin explicitly endorses the principle of affected interests, he explains why it is the best one around, and he effectively deals with the scarce alternatives to this principle and—in my view less effectively—with the practical objections against it. Goodin argues that the principle of affected interests goes hand in hand with the ultimate democratic goal of protecting the people's interests and that it is, like democracy itself, ultimately rooted in the equality principle. Fundamentally speaking, the principle of affected interests seems to be the most legitimate solution to the boundary problem.[112]

Quite some objections against the principle of affected interests have been raised, however. Most importantly, the inclusive nature of the principle causes practical problems. If truly everyone whose interests are affected by government decisions constitute the demos, does this not ultimately lead to the conclusion that there is only one demos, namely the whole world? After all, basically every local decision has effects on individuals somewhere else in the world, if not economically, then certainly environmentally. If the Swiss or German governments neglect tackling pollution of the Rhine within their territory, the effects of this are felt by individuals in the Netherlands, where the Rhine flows into the North Sea. If the Belgian government subsidizes Belgian producers of green energy, then producers of green energy elsewhere are affected by this decision; they now have to compete with subsidized rivals. From this point of view, the principle of affected interests causes the number of individuals comprising a people to increase dramatically, possibly to enclose the whole world.

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for them, without any check or correction, is a violation of democracy. Many forms of Government have been tried, and will be tried in this world of sin and woe. No one pretends that democracy is perfect or all-wise. Indeed, it has been said that democracy is the worst form of Government except all those other forms that have been tried from time to time; but there is the broad feeling in our country that the people should rule, continuously rule, and that public opinion, expressed by all constitutional means, should shape, guide, and control the actions of Ministers who are their servants and not their masters." Winston L. S. Churchill, "Speech in the House of Commons," published in *The Official Report: House of Commons*, 5th Series, vol. 444 (November 11, 1947), 206–207. See on reluctantly endorsing the principle of affected interests also: May, "Defining Democracy," 8.

[112] Goodin, "Enfranchising All Affected Interests," 40–68; Dahl, *After the Revolution*, 64.

To make it even worse, the principle of affected interests may lead a demos to expand not only to such an extent that it ignores nation states' borders but also that it ignores "borders" of time. It has been argued that the principle of affected interests may even demand incorporating in the demos people who will live in the future, on account that their interests are also affected by current political decisions.[113] In the context of global warming, for example, every dollar the United States of America fails to spend on slowing down global warming by spending it on e.g. building an oil pipeline instead, affects the interests of the future people living in Bangladesh, who will soon be flooded as a result of global warming. Even though there is reason for some reservations with regard to the idea that the principle of affected interests would require us to include future people as well in the concept of the demos (about which more in the next chapter), it is a fact that many interpret the principle as requiring the inclusion of basically everyone with interests, ignoring almost all boundaries of space and time. It may indeed, in Robert A. Dahl's words, unlock Pandora's Box.[114]

Let us, for the sake of argument, assume that the principle indeed requires us to include foreigners and future people. Even though the principle of affected interests then seems to lead us to a version of democracy as a "genuinely global, timeless democracy," Goodin remains convinced that the principle is the only legitimate way of establishing the demos.[115] He, however, simultaneously admits that if this fundamentally right solution to the boundary problem is to be practicable, then it needs adjustments. This, however, necessarily has the effect of compromising on the normative rightness of the principle—but it is the only option. We cannot be blind to the practical problems of the principle: a timeless global democracy is totally unrealistic. Pursuing an un-adapted version of the principle of affected interests would arguably require abandonment of the

[113] For example in: Andrew Dobson, "Representative Democracy and the Environment," in *Democracy and the Environment: Problems and Prospects*, eds. William M. Lafferty and James Meadowcroft (Cheltenham: Edward Elgar Publishing, 1996), 124–139; Kavka and Warren, "Political Representation for Future Generations," 21–39; Kristian S. Ekeli, "Giving a Voice to Posterity: Deliberative Democracy and Representation of Future People," *Journal of Agricultural and Environmental Ethics* 18, no. 5 (2005): 443.
[114] Dahl, *After the Revolution*, 67.
[115] Goodin, "Enfranchising All Affected Interests," 64.

system of sovereign nation states.[116] As this is not really an option, at least in the foreseeable future, the extreme consequences of an un-adapted version of the principle of affected interests must be mitigated, and this will hurt in the normative sense. Mitigating the extreme consequences of the principle is possible by adopting two additional demands for determining the demos.

Firstly, we may consider being an inhabitant of the democratic territory to be necessary in order to be part of the demos. In this way, the principle is maintainable in the real world of sovereign nation states. Secondly, we may consider only currently living entities eligible for being part of the demos. This also makes the principle more practical in the current world of currently living people. These extra criteria mean that, in practice, foreigners and future people will be excluded from the demos. Especially the first additional restricting criterion may be hard to account for in a principled, normative sense. After all, we have just established that the legitimate principle for constituting the demos is having interests that are affected by government decisions, and there is a good case to maintain that foreigners are on those grounds part of the demos. The defence of these two extra limiting criteria is thus primarily based on their ability to make the principle of affected interests work in the reality in which states only have jurisdiction on their own territory and in which future people do not exist. Without these additional criteria, the demos will simply be too big, and designing political institutions for this inter-time, worldwide, and someday possibly even interplanetary demos would simply be impossible. For now, therefore, we will consider the demos as being constituted of all individuals whose interests are affected by governmental decisions, with the addition that they must be inhabitants of the territory and currently alive.

[116] Kavka and Warren, "Political Representation for Future Generations," 32–33. Robert E. Goodin has proposed to introduce "international overlays" which, he claims, "would leave territorially defined states of the familiar sort in place." Goodin, "Enfranchising All Affected Interests," 64–68. See also Alasdair Cochrane's *Sentientist Politics*, in which he develops a cosmopolitan account of what interspecies justice should look like. Cochrane, *Sentientist Politics*.

Non-human animals and the demos

Now that we have a reasonably clear rule as to how the demos is constituted, the next step is to find out whether non-human animals are a part of it.

Interestingly, at one point, Goodin indicates that a consistent further reasoning along the lines of the principle of affected interests means that some consideration must also be given to the political position of other sentient animals. When exploring the extreme consequences that an un-remedied version of the principle of affected interests has, Goodin, in a footnote, remarks that "depending on one's views about the interests of other sentient beings or even ecosystems, perhaps we ought on those grounds enfranchise nature as well."[117] Strikingly, this idea is given no (further) thought in the main text of his paper, but it is relegated to a footnote. Just like Jeremy Bentham more than two centuries before, Goodin considers the implications of his theory for other sentient animals worthy of only a footnote. Although it must be said that Goodin had, by the time of the paper in question, already written a different paper on "nature's right to have her interests protected as anyone else's," it would, given the important implications, have added to the comprehensiveness and prudency of his latter paper if he had elaborated on what the principle of affected interests means for animals in the main text.[118]

Fortunately, this void was recently filled by political philosopher Robert Garner. In 2016, in an attempt to develop a better and less moralistic alternative to the citizenship-account of political rights for animals as developed by Donaldson and Kymlicka, Garner stressed the point that the enfranchisement of animals can be justified by the employment of the principle of affected interests.[119] He does so in two straightforward steps. First, Garner establishes, like we have at the beginning of this chapter, that many political decisions that are made have an impact on non-human animals. That is to say, the interests of animals are affected by the decisions

[117] Goodin, "Enfranchising All Affected Interests," 55 (footnote 32).
[118] Goodin, "Enfranchising the Earth," 835–849.
[119] Robert Garner, "Animals, Politics and Democracy," in *The Political Turn in Animal Ethics*, eds. Robert Garner and Siobhan O'Sullivan (London: Rowman & Littlefield, 2016), 103–117.

made in a democratic state. Secondly, from this fact it follows that animals, indeed, are members of the political community under the principle of affected interests. Garner thus connects the dots that Goodin foreshadowed in his footnote in 2007, but was reluctant to effectively connect. The two additional criteria added to the principle in order to make it operable in the real world, those of territory and current existence, are met by current animals who reside on the territory. It thus seems fair to conclude that, indeed, some non-human animals are part of the demos.

Animals vs. foreign people and future people

Even after Garner's argument that non-human animals are part of the demos, there are still two questions lingering uneasily beneath the surface that must be addressed. First, why should we arbitrarily exclude foreigners and future people from the demos, and not non-human animals? Second, if we agree to include animals in the demos, which animals should be included?

To start with the first question, it has been argued that including all individuals who meet the criterion of being affected by government decisions may be desirable in a normative sense, but is impossible in the real world. For this reason, we have accepted the addition of two practical criteria which make the principle of affected interests manageable in the real world, but which have the effect of arbitrarily excluding foreigners and future people. One may argue that, similarly, including non-human animals in the demos is highly impractical, and one may thus wonder why they should not also be excluded from the demos on this basis. Why not include future people and exclude non-human animals, or include foreigners (as is Goodin's prime concern) and exclude non-human animals?[120] Or why not exclude future people, foreigners, and non-human animals?

These seem to be fair questions. It is crucial to note here that having to choose between excluding several rightful groups from the demos is a

[120] Robert E. Goodin proposes putting a layer of "world government" on top of currently existing nation states and putting a layer of "international law" on top of currently existing states meant for claiming compensations for damages caused by foreign nations. Goodin, "Enfranchising All Affected Interests," 64–68.

non-ideal situation to begin with. Excluding people from the demos on practical grounds can hardly be justified in a normative sense, and as such, such exclusions will not be defended here as a matter of principle. There seems to be no "good" answers in this regard, since what we are doing here is an exercise of choosing between different evils in the first place. Having said that, the methodology of this book is to work with reality as it is today, and to not sketch a Utopian blueprint which is indifferent and irrelevant to the world as it is today. As such, this requires us to add some extra criteria to the principle of affected interests in determining the demos. The fact that we must choose between several non-ideal alternatives of exclusion need not paralyze us completely, however. Non-ideal as the three exclusions from the demos all are, some are still more acceptable than others.

There are some arguments that can be put forward in support of choosing the enfranchisement of non-human animals over that of future people and foreign people. One argument for doing so is that of the three entities considered, non-human animals' principled claim to be included in the demos seems to be the most persuasive. Future people's principled claim to be included in the demos is the least persuasive, because of their ambiguous ontological status. *Are* they even? And thus: "are" they even affected in the same sense as foreigners and non-human animals by governmental decisions?[121] In contrast, non-human animals' principled claim to be included in the demos seems to be the most persuasive. Of the three considered entities, current animals on the territory of the state seem generally to be the most affected by government decisions. Government decisions will generally hit the interests of current non-human animals on the territory of the state hard. Whereas the intensity of affectedness by government decisions generally wears off the further we go in space and time, this is not necessarily the case once we leave the domain of *Homo sapiens* and move into the direction of other sentient species. In other words, the fact that they are not humans does not automatically reduce their level of affectedness, whereas distance in time and place generally does reduce the level of affectedness. If affectedness is the feature that makes an individual

[121] Future people's alleged claim of being enfranchised on the grounds that they are affected by government decisions will be further discussed in chapter two, section four.

eligible to be included in the demos, it seems sensible that if we are forced to choose, we prefer the inclusion of intensely affected individuals over that of less intensely affected individuals.

Another argument in favour of preferring the inclusion of non-human animals in the demos over the inclusion of future people and foreigners is that non-human animals are the easiest of the three to enfranchise. In contrast to the other two entities, the enfranchisement of non-human animals will not necessarily raise unbridgeable practical objections. Including future people would lead to a demos growing into infinity, because it is impossible to know how long human life will continue to exist and until when our decisions will continue to affect these people's interests. Additionally, future people's interests are the hardest to determine, because our knowledge of the context in which they will live gets blurrier with every step further into the future. Different practical problems appear when we consider the actual enfranchisement of foreign people. It was suggested that in order to incorporate foreign people's interests, something like a worldwide democracy has to be established. Most likely, our currently existing nation states could not withstand such radical institutional change and would have to cease to exist.[122] The danger implied in such a global undertaking must not be underestimated, given the fragility of peace and given the possibility that people's solidarity with geographically distant others may have its limitations.[123]

Non-human animals' enfranchisement, on the other hand, perhaps may be established without too much hazardous change to local democracies, but rather by way of small and responsible institutional adaptations. Furthermore, the increasing moral solidarity with other sentient animals (evolutionary distant others, in other words) suggests that enfranchising them in existing democracies may not be an unreasonable stretch. The possibilities of such reform will be examined in the remainder of

[122] Kavka and Warren, "Political Representation for Future Generations," 32–33; Goodin, "Enfranchising All Affected Interests," 64–68.

[123] To be clear, the possible lack of solidarity with geographically distant others does not affect the geographically distant others' principled right to consideration, which is conditioned on the fact of being affected by political decisions. Such a lack of solidarity could, however, be an important *practical* hurdle to an actual enfranchisement of geographically distant others in political institutions.

this book. For the previously mentioned reasons, it seems sensible and acceptable to opt for including non-human animals in the demos, while excluding future and foreign individuals (among which are clearly also future and foreign animals).

Differentiating between animals

The second question that kept lingering beneath the surface is this: which non-human animals are part of the demos? Is it only chimpanzees, or also elephants, pigs, or maybe even mussels? The application of the principle of affected interests to the animal kingdom may give the impression that they, as a whole, are added to the democratic demos whose political consideration should be guaranteed. Is there is a principled way of distinguishing between this immense multitude of animals? Can we draw a line somewhere in the animal kingdom, preferably a line not as arbitrary as the previously all-too-easily-adopted human-exclusivity line? In answering this, we must find a balance between not stretching democracies unrealistically far on the one hand, and not excluding animals who are entitled to political consideration on the other.

Robert Garner has made a brief but interesting suggestion in this regard. As a method of limiting the immense demos that the principle of affected interests gives rise to, he considers introducing *sentience* as an additional limiting criterion.[124] Applying this criterion would have the effect of including many, though not all non-human animals in the demos, and would restrict the abundance of candidates for enfranchisement to an acceptable number. Garner points out the justifiability of making this restriction when he writes that "Limiting the all-affected principle in this way would seem justified since only sentient beings have the capacity to *be aware* of the affect collective decisions have on their interests" (italics JV).[125]

Indeed, if the basic function of a democracy is to weigh the interests of all who are affected by political decisions, then there is every reason to limit the number of individuals with a rightful claim to that consideration to

[124] Garner, "Animals, Politics and Democracy," 115–116.
[125] Garner, "Animals, Politics and Democracy," 116.

those who can be *aware* of the harms or goods that are inflicted by democratic decisions. Only sentient animals have this awareness. Non-sentient animals, along with trees, mountains, and *The Starry Night,* are not part of the demos, because as far as we know, they cannot experience any harm or good that is done to them by democratic decisions. There is thus no reason to give them independent consideration in democratic decision making. These entities have no subjective and intrinsic interests which can be affected by democratic governance, and so the preferred intercourse with these entities is rightfully discussed in the normal democratic debate in the same way as most other subjects in democracy are. The issue of whether or not to cut a certain tree down, for example, may be approached from several perspectives in the democratic debate. One position may be that the tree is of more economic value when it is converted into a cupboard. Another position may be that the tree is better left alone, a position that can be based in the ethical conviction that natural entities without sentience are also valuable. Both perspectives (and many more) deserve a fair chance of being considered in the democratic debate, but the tree itself has no intrinsic interests that are to be independently weighed in this process. As far as we know today, trees experience no pain or other subjectively felt damage when they are cut down. It is thus unjustifiable for trees to have democratic representation and thus to have the political ability to reduce the freedoms of those who can be harmed or pleased. It is important to note, obviously, that our scientific knowledge with regard to which entities are sentient and which are not increases, and this may affect our assessment of who is part of the demos, and thus entitled to a consideration right, and who is not. If scientists discover that, contrary to what was previously thought, certain organisms are sentient, this automatically increases our demos. Similarly, if scientists discover that, contrary to what was previously thought, certain animals which we thought were sentient appear not to be sentient at all, they are rightfully excluded from the demos. As the pool of sentient entities fluctuates, so must our demos and hence the pool of interests to be politically considered.

Robert Garner, however, is not fully satisfied with his own solution of introducing sentience as a restricting criteria on the demos. He signals one

weak point in making this move: it introduces a moral dimension ("only sentient animals") into the debate that should preferably remain democratic-theoretical.[126] I, however, disagree with Garner on this point, as the sentience-norm is, in my view, not so much newly introduced, but rather a norm that is already implied in the principle of affected interests.

Recall that this book employs Cochrane's concept of interests. From that perspective, the sentience-norm is already inherent to the concept of an interest. We have followed Cochrane in his argument that it is useless to talk of interests when it regards non-sentient entities such as plants and paintings. Joel Feinberg (1926–2004), Cochrane's probable source of inspiration, puts it like this: "an interest, however the concept is finally to be analysed, presupposes at least rudimentary cognitive equipment."[127] Interests *presuppose* cognitive awareness on the side of the entity that has them, and the interests-having entity is thus necessarily a sentient one. In other words, the capacity for having interests is something reserved only for sentient entities, because only they have the cognitive equipment necessary to even have interests. On this account, sentience is thus not an extra criterion that has to supplement the principle of affected interests, as Garner suggests, but it is already inherent in the principle, because only sentient entities have interests that can be affected. As such, limiting the demos to sentient creatures is not adding an extra moral criterion, but remains a democratic-theoretical norm because it is already implied in the principle of affected interests. What remains is informing ourselves about which animals are sentient and which are not. As far as science can tell us today, this means that chimpanzees, elephants, and pigs are part of the demos, and thus have a consideration right, whereas mussels, for now at least, will politically speaking remain on the side of other non-sentient entities, such as mountains and *The Starry Night*.

[126] Garner, "Animals, Politics and Democracy," 116.
[127] Feinberg, "The Rights of Animals and Unborn Generations," 52.

1.5 Conclusion

This chapter has illustrated how classic democratic theory, if non-arbitrarily interpreted, can support the idea that sentient, non-human animals have a right to be considered in the democratic state on account of having politically relevant interests.

First, three *a priori* arguments that could possibly undermine non-human animals' claim to political rights have been discussed and challenged. In response to these arguments, it was argued that many non-human animals have interests, that it is possible to estimate what these interests are, and that many of these interests are politically relevant. Subsequently, the overly enthusiastic claim of the Political Animal Agency School that animals are political agents was challenged on account of stretching the definition of political acting too far. In order to maintain a clear difference between the private and the political, political acting must be defined in a manner that makes political acts distinguishable from mere expressions of private preference. From this, it followed that non-human animals are incapable of political acting, because they cannot act in a way that is intentionally aimed at affecting political institutions.

In the remainder of the chapter it was argued that the dismissal of non-human animals as political agents need not necessarily mean that they cannot have political rights. It was argued that it has long been inaccurately assumed that one needs to be a political agent in order to have political rights. It seems more adequate, however, to distinguish between two separate types of political rights, and to also discern between what the necessary requirements for each of these types of rights are. For determining who ought to be assigned active political rights, namely those which allow a person to act politically, political agency is indeed a relevant characteristic and thus required. However, for determining whose interests are to be considered, in other words who ought to be assigned passive political rights, political agency is not relevant; what is relevant is whether individuals will be affected by the political decisions that are made. In order to demonstrate the sensibility of making this distinction and of conceptualizing a right that has been called the *consideration right*, the political-legal status of human children was assessed. Even though the fact that they cannot act politically

means that they need (and have) no active political rights, they nonetheless need (and have) a consideration right, because their interests are affected by political decisions that are made.

The cogency of the developed interspecies democratic theory was further strengthened by demonstrating that it finds resonance in classic theories and principles of democracy, because they essentially already focus on the importance of interests to democracy. James Mill's classic depiction of democracy as a political model that allows the people to have their interests reflected in governance offers interesting support for an interspecies theory of democracy, if only we update it with the modern knowledge that animals other than humans have interests too. In the same fashion, the principle of affected interests offers straightforward support for the claim that sentient animals are part of the demos whose interests the government must take into consideration.

It ultimately followed that currently living, sentient non-human animals on the territory of a democratic state have a right to have their interests considered in the decision-making processes of that state. This may seem a bold claim, especially in comparison with the current position of non-human animals in democratic societies, but this chapter has demonstrated that it is a valid claim, and that it rests not on contestable ethical arguments, but on the classical principles that underpin democracies already. In spite of the fact that, as Darwin noted, we have indeed made animals our slaves, we should consider beginning to view them as our political equals. Not in the sense that we ought to fill out ballots together, but in the sense that they, like us, live under the yoke of a democratic government that affects their lives continuously, and that they, like us, have certain interests they do not wish to be trampled upon by that same government or by other individuals.

2

Animals in liberal democracies in theory and practice

Introduction

In 2006, the Netherlands became the first country in the world to have representatives of a political party primarily focussed on animal rights and animal welfare in the national parliament: the *Partij voor de Dieren* (Party for the Animals). Four years later, this political party held two seats in the House of Representatives (out of 150), and one in the Senate (out of 75). In that same year, Niko Koffeman (1958–), senator for the Party for the Animals, got the Dutch prime minister, Mark Rutte (1967–), to make a remarkable statement. The occasion was the Parliamentary Debate on the Speech from the Throne in the Dutch Senate: an annual meeting of the government and the Senate in which the prime minister, on behalf of the government, defends the policy plans of the government. In the present case, the government's plan to create five hundred positions for so-called "animal cops" was discussed; these are policemen specially appointed to tackle animal suffering and abuse.[128] Senator Koffeman was curious about which animals would benefit from these plans, especially given the fact that the government would simultaneously be taking millions away from two agencies responsible for the enforcement of animal welfare rules in the animal industries (the NVWA and the AID).[129] As a representative of the animal advocacy party, Koffeman looked at these plans from the perspective of *all* abused animals in the Netherlands, including those in the industries. He challenged Prime Minister Rutte to clarify whether the intent of

[128] "Vrijheid en verantwoordelijkheid" (coalition agreement VVD-CDA), September 30, 2010, 14, 40–41.
[129] NVWA stands for *Nederlandse Voedsel- en Warenautoriteit (Netherlands Food and Consumer Product Safety Authority)*; AID stands for *Algemene Inspectiedienst (General Inspection Service)*.

introducing animal cops was only to combat abuse of fluffy pet animals, such as cats and dogs, or whether the animal cops would also be burdened with tackling the harder and more systematic and ingrained types of animal abuse in the industries. Koffeman: "What are these animal cops going to do? What will they mean for the bio-industry? Because as you are introducing the animal cops, you are also cutting the resources of the NVWA and the AID [agencies responsible for enforcing animal welfare rules] by nineteen million euros. That is obviously odd. If you want to tackle animal suffering, of which five hundred million animals are victims, you should not say: we are only going to pay attention to small animals, the dogs and cats. What are you going to do and when?" Koffeman did not succeed in persuading Rutte to discuss the important problem of arbitrary discrimination between different types of animals on mere grounds of fluffiness and economic usefulness. Instead, Rutte concisely answered: "I am prime minister of all animals." After this historic statement, the discussion in the Senate lost its serious tone ("Are you also prime minister of the animals who snap at the boss?" a Green Party senator asked), and the discussion soon diverged from the topic.[130]

The idea that the prime minister of a liberal democracy is the leader of all the animals on the state's territory is a provoking thought. Although Rutte's statement was more likely a jocular way of evading Koffeman's serious question about whether the animal cops would leave the most intense forms of animal abuse untouched, his statement is a nice starting point for elaborating on the question of what it really means to involve other animals in democratic deliberations and institutions. We could, for the purpose of this chapter, take Rutte's statement quite literally, even though to him it was probably only a convenient joke. The statement that a prime minister is prime minister of all animals seems to embody the idea that not only humans, but other animals also make up the "people" of a liberal democratic state. This idea, at least when it comes to sentient animals on the territory, was endorsed in the previous chapter. But what consequences should it have for the actual institutions of liberal democracies if we agree

[130] *Handelingen I* 2010/11, (10), 36, 59–60 (translations JV).

that some non-human animals are also part of the demos? How can we reflect this thought in these institutions? If some non-human animals indeed have a consideration right, in which part of the institutional framework of a liberal democracy can this right be implemented? Must it be incorporated in the professional duties of the head of government, as Rutte's statement could be taken to imply? Is he indeed not only prime minister of all Dutch humans, but prime minister of all Dutch animals?

The principled case for a consideration right for animals has been established in the previous chapter, and the purpose of this chapter is to obtain a clearer view of the normative goals of animal enfranchisement and of the current possibilities for animal enfranchisement in liberal democracies. For obvious reasons, the term "enfranchisement" is used here (and throughout this book) in the broad sense of indicating some type of political or legal recognition of non-human animals in basic institutional structures, not in the narrow sense of extending voting rights to non-human animals. In order to achieve the goals of this chapter, both the normative theory concerning animals' consideration right and the current position of animals in liberal democracies will be analysed. The first section sets out which requirements for institutional enfranchisement follow from the interspecies democratic theory that was put forth in the previous chapter and that supports animals' consideration right. These criteria will be labelled *enfranchisement criteria.* The second section investigates what the current basic political-legal position of non-human animals in liberal democracies generally is, and identifies three promising developments in the area of animal law and politics. The third section investigates whether the current position of animals in liberal democracies is sufficient in light of the enfranchisement criteria. The fourth section discusses to what extend existing theories and ideas concerning the enfranchisement of future people can be useful resources in elaborating on the options for animal enfranchisement. The last section summarizes and brings together the different findings of this chapter.

2.1 Enfranchisement criteria

From the interspecies democratic theory that was set out in the previous chapter, some normative requirements for institutionalizing the consideration right naturally follow. In this section, these requirements for institutional reform that immediately follow from the theory of the previous chapter are defined. The institutionalization of the consideration right must be in line with these demands in order for it not to undermine the very democratic principles that underpin this right. The sum of these criteria will function as the normative framework for animal enfranchisement in the remainder of this book.

The legitimacy criterion

The most significant consequence of the interspecies democratic theory put forth in the previous chapter is that it necessarily alters the way in which we understand political legitimacy.

It is as good as impossible to offer a fully comprehensive account of all different conceptions of political legitimacy in political theory here, but a relatively neutral description of political legitimacy is that it is a standard that refers to the justification and acceptability of a political system. However, in order to say anything meaningful about legitimacy, we are required to give some content to what it means for a political system to be "justifiable" and "acceptable." This section focusses on one particular type of political legitimacy, namely democratic legitimacy, for obvious reasons. Democratic legitimacy, however, is also subject to many different interpretations, of which I will employ the one that places the least normative requirements on a democracy: procedural democratic legitimacy. Choosing this most marginal explanation of democratic legitimacy carries the least risk of raising the suspicion that unnecessary ethical demands are being smuggled in. Yet, even this marginal version of democratic legitimacy will be sufficient to show that democratic legitimacy requires giving non-human animals a political status. Put differently: if indeed the demos comprises not only humans but also other sentient animals, then these other

sentient animals also necessarily become part of the definition of democratic legitimacy—even in the most minimalistic version of the concept.

The procedural account of democratic legitimacy is based on a certain perception of democracy. In the procedural account of democracy, democracy is identified with a sound democratic process. The emphasis is thus on the decision-making process, not on the content of the decisions that result from it (which is central in the more demanding concept of *substantive* democratic legitimacy). In the legitimacy concept based on the procedural account of democracy, democracies are thus considered legitimate ("acceptable" and "justifiable") insofar as their most basic procedures and institutions are realized and complied with. The obvious next question then is: what procedures and institutions must be realized? In this case, the only requirement for legitimacy is having basic democratic institutions and procedures in place that are consistent with the absolute minimal criteria for even qualifying as "democratic": reflecting the political equality of every member of the demos. Democratic institutions are therefore considered legitimate insofar as they embody the most minimalistic idea of democracy: offering all members of the demos some sort of political consideration on an equal level.[131]

It was argued in the previous chapter that a non-anthropocentric understanding of democracy leads to the conclusion that the demos also includes sentient non-human animals who reside on the territory of the democratic state. It will be clear by now that this expansion of the demos necessarily has an impact on our understanding of democratic legitimacy. If basic democratic structures are to enable the equal political consideration of all members of the demos in order to be legitimate in the most minimal sense of the term, then the animal-inclusive understanding of the demos means that these democratic structures must also reserve a place for non-human animals in order to qualify as legitimate.

[131] The roots of this understanding of democratic legitimacy can be traced back to John Locke, who argued that political authority stems from the individuals themselves, who, together and in equal proportions, ultimately form the demos. John Locke, *Second Treatise of Government and A Letter Concerning Toleration*, ed. Mark Goldie (Oxford: Oxford University Press, 2016/1689).

In sum, by merely employing even the least demanding conceptual version of democratic legitimacy, non-human animals will have to be incorporated in it, and as a result democratic institutions will need to consider them in order to qualify as democratically legitimate. Put the other way around, a democracy is illegitimate if it offers sentient non-human animals no formal role at all in its basic democratic institutions. Such would create a democratic deficit. Reserving a place for non-human animals in the basic democratic structures is thus the first requirement for animal enfranchisement.

The non-contingency criterion

The second normative requirement for animal enfranchisement that follows from the interspecies democratic theory set out in the previous chapter is that the consideration of animals' interests may not be contingent in the sense that it is fully dependent on the willingness of humans to do this, but must be institutionally secured instead.

It has been argued that sentient non-human animals have the intrinsic democratic right to have their interests taken into account on account of having politically relevant interests. That right is, in other words, not derived from humans. The intrinsic character of this consideration right means that animals have the right of having their interests taken into account for their own sakes, regardless of humans' readiness to do so. In implementing this consideration right, it is thus important to not make the actual consideration of animals' interests fully dependent on human goodwill, but instead employ or develop some sort of institutional mechanism that obliges humans in relevant political and legal positions to take sufficient account of the interests of other sentient animals.

Institutional securement is necessary due to the fact that it would be irresponsibly naïve to make the protection of the interests of those who are already politically oppressed (non-human animals) completely dependent on the goodwill and generosity of the political oppressors (humans). An analogy with the position of children clarifies this. We have seen that children, just like sentient animals, have an independent and inherent consideration right. In their case, it is evident that it would be unacceptably

naïve to make the consideration of their basic interests fully dependent on the generosity of adults. The wisdom that great philosophers and history itself have taught us time and again is that some people are inclined to use the power they have for their own purposes and at the expense of those who have less power or no power at all.[132] Making the consideration of children's or animals' interests dependent on the goodwill of human adults is thus not only in conflict with the intrinsic nature of the consideration right but also simply not sufficient. In an institutional sense, more is required than a non-committal possibility for humans to take non-human interests into account whenever they feel like it. An institutional constellation in which the consideration of non-human animals' interests is fully contingent on humans' generosity does not only violate their consideration right and is thus an injustice with regard to non-human animals; it is also an affront to the democratic principles in which the consideration right of animals is rooted.

In a work addressing the contingency of the relationship between democracy and animal protection, Robert Garner introduced two concepts which may be helpful in this context.[133] The current situation in liberal democracies[134] is characterized by Garner as *strong anthropocentrism*: the interests of animals are only considered to the extent to which humans want them to be considered.[135] This leads to a situation in which the prevention or ending of disproportional infringements on animals' interests is contingent upon enough humans wanting this. This contingent relationship between democracy and animal protection can only be justified if we assume that the ancient anthropocentric theory of democracy in which only human preferences count is valid.[136] I have argued, however, that it is not. Moving from an anthropocentric democratic theory to a non-discriminative,

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[132] For example in: Mill, "Government," 8, 17; John Stuart Mill, "Considerations on Representative Government," in *Collected Works of John Stuart Mill (Vol. XIX): Essays on Politics and Society (Part II)*, ed. John M. Robson (Toronto: University of Toronto Press, 1977/1861), 505.
[133] Garner, "Animals, Politics and Democracy," 103–117.
[134] More about the protection of animals in current liberal democracies follows in section two of this chapter.
[135] Garner, "Animals, Politics and Democracy," 103, 111–112.
[136] Garner, "Animals, Politics and Democracy," 111.

interspecies democratic theory suggests that we also move away from strong anthropocentrism and give non-contingent consideration to animal interests instead. Given the obvious fact that the interests of animals must necessarily be identified and articulated by humans, however, the only realistic alternative is an institutional constellation in which what Garner calls *weak anthropocentrism* dominates.[137] In such an institutional constellation, there is human "representation of animal interests irrespective of the wishes of any particular human electorate," even if these interests clash with important human interests.[138] This weak anthropocentrism as described by Garner converges with the non-contingency criterion in the sense that the non-contingency criterion favours a weak anthropocentric institutional setting in which animal interests can be made to count, irrespective of corresponding (human) public support.

In short, we can side with Garner in his suggestion that abandoning anthropocentric democratic theories also requires abandoning the strong anthropocentrism that currently defines democracy's relationship with the consideration of animals' interests. A democratic theory which perceives sentient non-human animals as members of the demos calls for institutional means that secure the inclusion of their interests in democratic calculations. It requires, in other words, a situation in which the consideration of their interests is no longer dependent on human clemency but in which it is institutionally safeguarded.

The independence criterion

The earlier discussed circumstance that the interests of non-human animals do not necessarily converge with those of humans brings the third normative requirement into view. The distinctiveness of non-human animals' interests means that their interests must be regarded and institutionalized as an independent factor in liberal democratic considerations. This is the third normative requirement for institutionalizing the consideration right.

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[137] More about the necessary human assistance in putting flesh to the bones of the consideration right of animals follows later in this section.

[138] Garner, "Animals, Politics and Democracy," 111–112.

An opposing view on this matter is the previously discussed idea of encapsulated interests as advocated by James Mill. It was argued, however, that the concept of encapsulated interests is flawed to begin with, so also in the context of non-human animal interests representation. Recall that Mill argued that no separate representation for women was needed because he thought women's interests were indisputably included in those of their fathers and husbands. In other words, women's interests would not be regarded as an independent factor in democratic considerations if it were up to James Mill. Similarly, with regard to non-human animals, one may argue that no independent institutional protection of their interests is needed because their interests are indisputably included in those of humans. This contention is obviously mistaken, however, because human and non-human interests very often do not converge at all, but in fact clash in the most horrible ways. After all, humans and other animals kill and eat one another, to name one of the many conflicts of interest between the two. Therefore, it is clearly not true that the one's interests are automatically represented through the other's political enfranchisement, and both entities thus need independent representation of their interests.

One may object, however, that there are some interests that humans and many other animals (especially mammals) share, such as the basic interests in having access to breathable air and clean drinking water. However, this true fact is no reason to deny non-human animals an independent political position to defend the totality of their interests, for they still have many interests that are not shared by humans (such as not ending up as a steak). Again, the analogy with women's political position clarifies this point. Women and men also have overlapping basic interests, but this is not a sufficient reason for denying women the institutional possibility to defend the totality of their interests, for they also have interests that men do not share (such as the interest in gaining voting rights in earlier times, the interest in paid maternity leave, the interest in having access to routine breast cancer screenings, etc.). Similarly, the fact that there are some overlapping basic interests between non-human and human animals is no reason to deny either of them an independent position in the liberal democratic framework. The fact that non-human animals also have interests

that conflict with those of humans makes independent political recognition and consideration of their interests indispensable.

A yet different objection may be that a James Millian way of representing non-human animals' interests is the only viable option. If non-human animals are incapable of defending their own interests politically, then is a Millian form of representation not the only option? If that were the case, the independence requirement would have to be discarded on account of being impossible to meet in practice. This seems to be the position of Robert E. Goodin. In spite of the fact that Goodin seems to realize that offering representation through the concept of encapsulated interests is *generally* reprehensible ("we baulk at those examples [of encapsulated interests of slaves and Pre-Edwardian wives]," and "there is something deeply wrong with [such] social arrangements"), Goodin proposes to reintroduce this "deeply wrong" form of representation for natural entities, among which we must also count non-human animals.[139] Even though it is a form of representation which, in Goodin's own words, "we have historically learned to loathe,"[140] reviving this type of representation is justifiable according to Goodin, because he considers it to be the only viable option of bringing natural entities' interests into the political sphere. Goodin assumes that the only alternatives to politically ignoring non-human interests are (I) defective enfranchisement through the Millian notion of encapsulated interests, or (II) requiring non-human entities to politically pursue their own interests. Since the second option is obviously impossible in reality, Goodin opts for the first option of encapsulated interests.

Goodin's conviction that no alternative methods of enfranchisement exist is too hasty and not solidly underpinned, however, for he does not investigate whether there are any alternatives. He just assumes that "there is simply no other way in which nature's interests can find political representation except through being politically incorporated within the interests of sympathetic humans."[141] It seems more prudent, however, to carefully explore all possible alternative ways of enfranchising non-human

[139] Goodin, "Enfranchising the Earth," 841–844.
[140] Goodin, "Enfranchising the Earth," 841.
[141] Goodin, "Enfranchising the Earth," 844.

animals, or maybe even develop new mechanisms, before we decide to breathe life back into a form of representation that is "deeply wrong" and which "we have historically learned to loathe." Before we have explored such alternatives, it is too soon to revive the concept of encapsulated interests and hence too soon to decide that the normatively legitimate requirement of independent consideration is too demanding to be met in practice. Until it is certain that animal interests cannot be offered an independent political position, we must uphold the independence requirement and not unnecessarily lower our legitimate normative standards. For now, the normative standard remains that we ought to find a way to regard non-human animal interests as an independent factor to be taken into account in our liberal democratic weighing processes.

A different question that immediately arises is the following: if animals' interests are to be inserted as an independent factor in liberal democratic considerations, probably by means of representatives, does this imply that these representatives have to *exclusively* represent non-human animal interests? In other words, does the fact that animals' interests are a factor that must be independently considered mean that the people representing these interests cannot simultaneously represent humans?

This demand does not necessarily follow from the normative theory from the previous chapter. To say that animals' interests deserve independent liberal democratic consideration is not to say that representation of humans and non-human animals can only be done by two different (groups of) people. It is theoretically possible that a person is capable of weighing the both independent and often conflicting interests of humans and non-human animals against one another.[142] Just like it is not necessarily impossible for a male representative to take women's interests into account as an independent factor in his democratic considerations, it similarly is not necessarily impossible for a human representative to weigh

[142] Of a different opinion about institutional protection of succeeding generations is Benedek Jávor, who writes that it is a "theoretical impossibility that the same institution could represent both [present generations' interests and those of future generations], since in many cases it is exactly the present generation which is in conflict with the future citizens." Benedek Jávor, "Institutional Protection of Succeeding Generations: Ombudsman for Future Generations in Hungary," in *Handbook of Intergenerational Justice*, ed. Joerg Chet Tremmel (Cheltenham: Edward Elgar, 2006), 288–290.

both human and non-human animals' interests against one another as independent factors. It is true, however, that bringing such a dual attitude into practice would require a relatively high level of integrity on the side of the representative. One must be able to put oneself in the shoes of someone else of a different gender or species and even be prepared to rule in favour of the other person if a fair weighing of the respective interests and preferences leads to such an outcome. From a cynical point of view, which is very often the most advisable view in political philosophy, one may argue that it is highly unlikely that a person would act in such an objective way. Bias in favour of one's own species or gender may easily obscure the ability to visualize the interests of others; it may prevent a person from giving them due and independent regard and from weighing them on a par with other interests. The fact that it is extremely hard to fairly represent the independent interests of different (groups of) individuals simultaneously must be kept in mind when considering the simultaneous representation of humans and other animals by the same person as an institutional option. However, this signalled risk does not necessarily lead to having to relinquish the very idea of such simultaneous representation of human and non-human animals' interests by one and the same representative altogether. It may be possible to "nudge" representatives into the required objectivity of weighing all interests equally and independently by designing the institutional frameworks in such a way that speciesist incentives are minimized, or by selecting the representative on having a certain incorruptible character. Whether this would be possible and useful are questions of institutional design, and as such they will be more extensively discussed in the upcoming chapters. The provisional normative position for now is that introducing separate human and non-human representatives is not an implicit condition to the third requirement of considering the interests of non-human animals as an independent factor.

The human assistance criterion

A fourth requirement for animal enfranchisement follows from the observation that non-human animals are political patients. Since non-human animals are incapable of defending their own interests in an institutional

context, the only realistic option of institutionalizing the consideration right of non-human animals is to make humans responsible for respecting this right. The politically capable, so human political agents, must be burdened with the task of giving due regard to non-human animals' interests in an institutional context.

Crucially, a democracy governed only by humans is not necessarily illegitimate, just like a democracy governed only by adults is not necessarily illegitimate. It is only illegitimate if no due consideration is given to the interests of the rest of the demos (such as children and other sentient animals). A democracy governed merely by human adults is thus perfectly legitimate if they make an effort to also consider other sentient animals' and children's interests. As implied in Garner's reflections on weak anthropocentrism, a certain amount of anthropocentrism in involving animals' interests in a democracy cannot be removed, nor is that desirable.[143] Even in an ideal, full-fledged interspecies democracy, humans will have to continue to be the political mediators in the sense that they will be responsible for identifying and articulating the interests of other animals.

Representing non-human animals is a difficult matter, however. Offering a sincere representation of non-human animals calls upon the finest political and psychological qualities of human agents. Even apart from any (subliminal) species biases, representing animals other than humans is in itself a highly complicated matter. In contrast with the views of political theorist Kimberly K. Smith (1966–), I do not consider representing non-human animals to be "no more mysterious than the business of representing human beings."[144] Politically or legally representing non-human animals is a unique pursuit and in crucial ways more complicated than representing other humans. Smith maintains that the representation of animals certainly does not require "supernatural powers," and that, of course, is a truism, but Smith's contention that it is "*no more* mysterious" (italics JV) than representing humans may be a bit too optimistic.[145] After all, when attempting to represent somebody, it is generally easier to imagine yourself

[143] Garner, "Animals, Politics and Democracy," 111–112.
[144] Smith, *Governing Animals*, 102.
[145] Smith, *Governing Animals*, 102–103.

as another human than as an animal of another species. Additionally, humans share a highly complex language, which allows us to communicate our multifaceted feelings, needs, and preferences to one another. Unfortunately, we cannot (yet) communicate in such highly complex ways with other animals.[146] To the contrary, communicating with them is difficult in most cases. In determining the right content of representation of non-human animals, we thus have to count on mostly incomplete information about their bodies and minds. Furthermore, psychological prejudice for others who are socially and evolutionary similar to ourselves could cause an unwarranted bias in favour of humans, which may further impede our ability to provide sincere representation and equal consideration of other animals' interests. Other circumstances, which are typical to representation of political patients in general, hinder offering acceptable representation even more: whereas most humans can offer (preliminary and subsequent) guidance on the representation wished for (e.g. by voting or by corresponding with politicians), non-human animals are incapable of doing so.

All these handicaps concerning the representation of other animals and their possible remedies will be discussed more extensively in the next chapter. For the purpose of this subsection, it suffices to establish that humans must be the ones providing representation of non-human animals' interests and that this is generally much harder than representing other human beings. Furthermore, it is important to stress that these difficulties in representing other animals obviously do not affect the *prima facie* right that sentient animals have to political consideration. In other words, if we agree that non-human animal interests deserve political consideration, it is our solemn duty to represent their interests to the best of our abilities, and we, as political agents, will have to find ways to make their consideration right work in practice.

[146] See on this subject also: Meijer, *Dierentalen* and Meijer, "Political Animal Voices."

The residency criterion

The fifth and last requirement for institutionalizing the consideration right of animals is related to the practical necessity that there must be a limit on the number of sentient animals who have this right. It was elucidated before that, since an inter-time and worldwide liberal democracy is, at least in the foreseeable future, practically impossible, certain limitations on who counts as a member of the demos must be established. The limits suggested were current existence and residency on the territory of the state, which are here translated into the fifth requirement for institutional reform. Only sentient individuals currently living and residing on the territory of the democratic state have a consideration right in that particular state.

At first glance, residency seems a highly impractical standard for identifying which non-human animals have a consideration right in a certain liberal democracy. It is an understatement to say that animals do not necessarily stay within the borders of one specific state. Transnational animal migration is a normal, everyday occurrence. The fictitious lines that we have drawn on the map of the world which indicate the borders of states run straight through the territories of wild animals and straight through many animals' migration routes. In which state are the interests of the whales, birds, elephants, and many more animals who travel large parts of the earth to be considered? It seems the requirement of residency confronts us with quite some challenges.

In the case of human residents, who obviously also cross many state borders, we have circumvented this problem by attributing birthright citizenship. With birthright citizenship, an individual human becomes a citizen of a particular state, in relation to which that human has corresponding political rights. In this way, the challenges related to residency-based consideration rights can be circumvented. This citizenship system has many benefits, of which the most important is that it enables us to easily determine which state is related to which human being. However, in the case of non-human animals, this system seems impracticable. It seems hardly possible to determine the existence of every single sentient animal in the world, let alone attribute them citizenship of specific states based on

birth rights. The static citizenship model used for humans thus seems not readily applicable to non-human animals.

It is, however, possible to conceive of a different solution, one we may label *dynamic citizenship*.[147] This solution respects the basic idea of offering a consideration right to the individual animals residing in a certain state, and it also takes into account animals' habit of crossing human-invented borders. The alternative I propose is that we take residency quite literally, and opt for a construction in which the presence of a sentient animal on the territory of a certain state *activates* that state's duty to take political notice of the interests of this animal. Put differently, solely with their presence, non-human animals trigger their own political and legal status. With the proposed dynamic citizenship structure, the consideration right of a sentient animal comes into existence in a certain liberal democratic state the moment the animal enters the sovereign territory of that state. To be clear, territory comprises all the space over which the state has jurisdiction: the territorial land, the territorial airspace, and the territorial waters of the state. The consideration right is thus valid as long as a sentient animal resides on the territorial land or in the territorial water or air of the state. This residency-activating option for the consideration right seems to be the only option which respects the fact that animals do not necessarily respect state borders, but also the fact that states only have jurisdiction over their own territory. Liberal democracies are only able to effectively and undisputedly come to animals' (political and legal) aid if they are on the territory of the state. It would thus be unreasonable to commit states to taking political and legal account of the interests of animals who are not on their territory. The dynamic citizenship structure as proposed here does not commit states to such impossible duties.

Practically, this means that non-human animals travelling across different states will activate liberal democracies' duties to respect their interests one after the other, like tiles lighting up when someone walks over

[147] See for other interesting alternatives to birthright citizenship also: Rainer Bauböck, "Stakeholder Citizenship: An Idea Whose Time Has Come?" in *Delivering Citizenship: The Transatlantic Council on Migration*, eds. Bertelsmann Stiftung, European Policy Centre, Migration Policy Institute (Gütersloh: Verlag Bertelsmann Stiftung, 2008), 31–48; Ayelet Shachar, *The Birthright Lottery: Citizenship and Global Inequality* (Cambridge: Harvard University Press, 2009).

them. Accordingly, sentient animals will have a consideration right in any liberal democracy they pass through, if those states have incorporated dynamic citizenship for non-human animals, that is. Animals who reside in a certain state their whole life will enjoy the consideration right throughout their lives in that particular state, whereas animals passing through several states enjoy the consideration right in one state one moment and in another state the next.

An example could make this theoretical concept more concrete. Take for instance the red knot, a shorebird with an extensive cross-state migration route. When migrating, the red knot will enjoy the consideration right in the consecutive states of his flight. As the knots successively visit Norway, the Netherlands, Belgium, France, Spain, and Portugal, these countries each have the duty to take the interests of the shorebirds into consideration during the time these birds reside on their territory. In the period of residency, the political and/or legal institutions of these liberal democracies must take the interests of the red knots into account, on account of them residing on their territory.

In short, the dynamic citizenship model as proposed here makes it possible to circumvent the challenges posed by the fact that animals do not respect borders and that we can hardly assign them static citizenship, while respecting the reality that states only have effective control over their own territory. This makes it possible to sustain the residency requirement as a fifth normative requirement for institutionalizing the consideration right, without demanding the impossible.

In sum, this section has defined five requirements for animal enfranchisement that follow from the interspecies democratic theory in the previous chapter. Taken together, these five requirements seem to prescribe the normatively preferred status of sentient non-human animals in liberal democracies as follows. Liberal democracies must reserve an institutional place (*legitimacy criterion*) in which humans (*human assistance criterion*) are institutionally bound (*non-contingency criterion*) to consider the independent interests (*independence criterion*) of sentient non-human animals who reside

on the territory of the state (*residency criterion*). These requirements function as a lodestar for the remainder of this book.

2.2 The current position of animals in liberal democracies

Now that the normative framework has been clarified, it is time to analyse the current position of non-human animals against this background. To this end, this section first sets out the basic outlines of the current political and legal status of animals in liberal democracies. Subsequently, this section identifies three promising developments in the area of animal law and politics that may improve the actual protection of animals' interests in liberal democracies in the nearby future.

Basic outlines

In analysing the political and legal status of non-human animals in liberal democracies, it suffices to look into the extent to which humans are institutionally committed to taking non-human interests into account in the execution of their political and legal roles, since non-human animals themselves have no means of pursuing their own interests in such contexts. Furthermore, due to the many differences between liberal democracies around the world, this subsection can only be an adequate overview of animals' general position in liberal democracies if it merely discusses the most *basic* outlines of animals' positions in liberal democracies. Therefore, in what follows only the most basic outlines of commitment to animal welfare by humans in key liberal democratic positions will be analysed.

When we analyse the institutional structures under which legislative branches in liberal democracies function, it is immediately clear that non-human animal interests have no *formal* role to play in legislative deliberations, nor is there any formal commitment to address the interests of non-human animals in the resulting legislation. In principle, the exclusively human electorate elects exclusively human representatives, and these representatives are in no way institutionally bound to pay heed to the interests of non-human animals (that is, with the exception of a small number of states which have a state objective on animal welfare in their

constitution, the normative acceptability of which will be separately discussed in chapter four). That there are generally no formal inducements, let alone obligations to address animal interests in legislative deliberations does not mean, however, that it is impossible for members of the legislative branch to do so. Animal interests can play a role in legislative deliberations if the electorate wishes it and if it instructs its representatives accordingly. This is obviously not merely a theoretical option. The actual existence of such goodwill to take animal interests into account is illustrated by the fact that liberal democracies commonly have animal welfare legislation and by the fact that some liberal democratic states have elected parliamentary representatives of political animal advocacy parties, who have as one of their main aims to defend animal welfare interests in legislative deliberations. The significance of these features for the political status of non-human animals will be discussed further below.

Non-human animal interests also have no formal role in executive deliberations or actions. The head of government or state in liberal democracies has no formal responsibilities towards non-human animals, and thus a "prime minister of all animals" or a "president of all animals" for now remains a fictional narrative that has not (yet) found reflection in the institutional outlines of liberal democracies. Not in the execution of governmental policy, nor when employing discretionary powers, nor in the deliberation that precedes this are members of the executive branch institutionally obliged or even stimulated to take the interests of non-human animals into consideration (again with the exception of states that have a constitutional state objective on animal welfare, which will be discussed in chapter four). However, there are no institutional obstacles which actively prevent members of the executive branch from paying heed to animal interests. Thus, in the executive context too, the structures of liberal democracies are generally permissive with regard to animal interests in the sense that they allow for considering them, but do not stimulate or require it.

The position of non-human animals in the legal institutional structures and the law itself is more complex. We could say that generally, however, the interests of non-human animals have no meaningful role in the legal context

of current liberal democracies, to which animal welfare legislation is an important exception.

Most importantly, non-human animals are legally designated as objects instead of subjects—just like human slaves used to be before their legal liberation. This categorization as legal objects has two important implications. The first implication of their status as objects is that non-human animals cannot have rights of their own, such as the right not to be enslaved or the right to life.[148] Their lack of rights in turn means that in legal conflicts of interests, non-human animals will almost always lose out, for their interests carry little legal weight, whereas humans' most important interests carry enormous legal weight because they are protected by fundamental legal rights. Even if they would want to, judges are not allowed to weigh the interests of humans (as protected through fundamental legal rights) and the interests of non-human animals on a par: they are legally bound to give preference to the interests of humans because these enjoy the highest level of legal protection. The fact that non-human animals are perceived as legal objects and their lack of rights thus put animals fundamentally on the legal side-line.

The second implication of being legally categorized as an object is that non-human animals can be the objects of humans' property rights. This means that humans with a property right over other animals (such as a farmer over his cattle, a pet owner over his pet, etc.) are, in principle, allowed to do anything they want with these animals. As is the case with other legal objects over which humans can have property rights (such as books, stocks, and, in a darker time of some states that now qualify as liberal, human slaves), owners can—in principle—sell, rent, use, enslave, and kill their legal property. This is because a property right, as concisely expressed in Dutch law, "is the most comprehensive right that a person can have to a thing."[149] Obviously, being object of such a powerful right makes the object itself (the slave, or the non-human animal) legally highly vulnerable. This is the reason why many scholars have argued that it is

[148] See also: Wise, *Rattling the Cage*.
[149] Article 5:1 (1) Burgerlijk Wetboek (The Civil Code of the Netherlands).

imperative to remove non-human animals from the property status if their interests are ever to be taken seriously.[150] It must be pointed out however, that even though property rights are the most comprehensive rights a person can possibly have to a thing, they are not absolute. Statutory law, as well as conflicting fundamental legal rights, can limit the ways in which the rights bearer may use his property. Just like an owner's property right to a baseball bat is limited by statutory law to the bat not being used to beat people up, so are the property rights to animals also limited by statutory law. Most laws limiting property rights for the benefit of animals' welfare are *animal welfare laws*. These laws can prohibit or prescribe certain ways of interacting with "animated property," such as prescribing a certain amount of moving space for farm animals or prohibiting the docking of pig tails without stunning. Furthermore, property rights of humans are obviously also limited by criminal law prescriptions. According to most liberal democratic countries' penal legislation, humans are prohibited to abuse (pet) animals, which also limits the property rights humans have over other animals. Such animal welfare laws and criminal laws thus limit the ways in which humans may interact with animals for the benefit of the animals' welfare, and they are omnipresent in liberal democracies around the world.

Important to add in this context, however, is that these laws that ought to protect the interests of animals are much less effective in practice than might be imagined. Political theorist Siobhan O'Sullivan (1974–) has pointed out that in Western legal jurisdictions, both animal welfare laws as well as criminal law prohibitions regarding animal cruelty systematically discriminate between different animals on the grounds of both species membership and their (economic) usefulness to humans.[151] Many animals,

[150] Gary L. Francione, *Animals, Property and the Law* (Philadelphia: Temple University Press, 1995); Wise, *Rattling the Cage*. Differing: Garner, *The Political Theory of Animal Rights*, 43–55; David Favre, "A New Property Status for Animals: Equitable Self-ownership," in *Animal Rights: Current Debates and New Directions*, eds. Cass R. Sunstein and Martha C. Nussbaum (New York: Oxford University Press, 2004), 234–250; Cass R. Sunstein, "Introduction: What are animal rights?" in *Animal Rights: Current Debates and New Directions*, eds. Cass R. Sunstein and Martha C. Nussbaum (New York: Oxford University Press, 2004), 3–15; Smith, *Governing Animals*; Cochrane, *Animal Rights Without Liberation*, 148–153.

[151] O'Sullivan, *Animals, Equality and Democracy*. Such legislation is sometimes discriminative in design, other times in its application.

whether because they are of an unpopular species or because of their economic profitability, or both, are thus excluded from such legal protection. Crucially, the legal prescriptions which should unambiguously protect animals against harm generally do not affect the industries in which animal abuse is ubiquitous and even part of the business model.[152] Given the intensity and scale of the harm inflicted on animals in these industries, this significantly reduces the usefulness of such legislation to aggregative animal welfare.

The effectiveness of these laws in protecting animal welfare is also significantly compromised by the fact that non-human animals have no legal standing.[153] This is yet another important element of animals' poor legal position, since, as Alexia Staker accurately puts it: "standing operates as a gateway to the legal system."[154] The fact that non-human animals have no legal standing means that they themselves, through human legal representatives, cannot bring proceedings to court to ask for the execution of laws protecting some of their interests. In other words, non-human animals, nor any hypothetical legal representatives can request judicial review of the compliance with animal welfare laws due to the fact that they are not accorded legal standing. In most liberal democratic jurisdictions, the right to bring a case to court is reserved for "individuals" or "persons" with an interest protected by relevant statutory law. And even though the protected interests in animal welfare laws are those of the animals themselves, they still are generally denied standing. This is because the legal terms "individual" and "person" are generally interpreted in an anthropocentric way, comprising human individuals and even human-lead corporations and associations, but not individual non-human animals.[155] As a consequence, non-human animals and their hypothetical legal representatives are not able to bring a case concerning animal welfare to court. This situation renders

[152] O'Sullivan, *Animals, Equality and Democracy*. See also: Smith, *Governing Animals*, 87–94.
[153] A classic work about the lack of standing for non-human entities is: Christopher D. Stone, *Should Trees Have Standing? Law, Morality and the Environment* (New York: Oxford University Press, 2010/1972).
[154] Alexia Staker, "Should Chimpanzees Have Standing? The Case for Pursuing Legal Personhood for Non-Human Animals," *Transnational Environmental Law* 6, no. 3 (2017): 487.
[155] Joan E. Schaffner, *An Introduction to Animals and the Law* (Basingstoke: Palgrave Macmillan, 2011), 82–84.

judicial review of compliance with animal welfare rules a marginal phenomenon.

In some liberal democratic countries, however, standing is sometimes offered to animal welfare organizations. Under strict circumstances, they can get access to the courts of law if they are able to convincingly demonstrate that the case they want to press in court is necessary to defend their officially proclaimed interests or goals as an organization (these interests and goals are usually listed in their statutes). Such organizations must, in other words, illustrate that a particular instance of non-human animal harm *also* harms human interests, because only the latter are eligible for being defended in court. Wanting to protect the welfare of animals can be one of those human interests on the basis of which organizations are sometimes accorded legal standing. In many cases, however, even animal welfare organizations are unable to bring animal welfare claims before a court of law, because overly formalistic standing requirements or an inadequate formulation of the organizations' statutes prevents them from being accorded legal standing.[156] In some countries, this leads to the curious situation that some animal protection laws are uniquely immune to judicial review.[157] In sum, apart from some indirect legal constructs that only work in some countries and in a limited number of specific cases, liberal democracies lack institutional structures which generally facilitate judicial review of rules that protect non-human animals.

Promising developments

On first glance, it seems that the current political and legal position of non-human animals in liberal democracies is generally quite meagre. There are, however, three important developments in some liberal democratic states which may possibly improve the position of non-human animals in the nearby future. It may be fruitful to investigate whether these developments

[156] Shigehiko Ito, "Beyond Standing: A Search for a New Solution in Animal Welfare," *Santa Clara Law Review* 46, no. 2 (2006): 377–418.
[157] Mariann Sullivan, "Consistently Inconsistent: The Constitution and Animals," *Animal Law* 19, no. 2 (Spring 2013): 219.

can indeed enrich the current status of non-human animals in liberal democracies and make it more meaningful.

A new legal status as "animated objects"

In addition to what has been said about the legal position of non-human animals, a recent development in the law of several liberal democracies needs to be addressed in order to provide a complete analysis of non-human animals' legal status in liberal democracies. This is the development that some liberal democratic states, such as the Netherlands and France, have tried to give legal expression to the obvious fact that non-human animals are quite different from all other entities which are legally categorized as objects, such as books and baseball bats. These jurisdictions have done so by either negatively declaring that "animals are not things," as in Dutch law, or by positively recognizing that "animals are living beings endowed with sentience," as in French law.[158] Do these developments mark a fundamental shift in the legal landscape, one that liberates non-human animals from the sphere of legal objects and all its effects of making them legally inferior?

It must be pointed out that the precise meaning of the new legal status for non-human animals in jurisdictions which have undergone the respective transformation will remain a grey area for some time to come. At best, these developments may be interpreted as reflecting an increasing legal awareness that sentient beings are fundamentally different from inanimate objects and as creating a new legal status for them somewhere between a legal object and a legal person. The creation of such a new "animated object" status can then be seen as a hopeful enterprise which, by breaking with the traditional dichotomy between legal objects and subjects, could clear the way for further future improvements in the legal position of non-human animals. In a more sceptical interpretation of these developments, however, these new legal declarations can be understood as an attempt to soothe societies' increasing unease with the categorisation of non-human animals as objects, without actually bringing about changes that have legal significance.

[158] Article 3:2a (1) Burgerlijk Wetboek (The Civil Code of the Netherlands) and article 515-14 Code Civil (The Civil code of France).

The creation of a new status between object and subject may then be seen as reaffirming the legal demarcation line between humans and other animals and as a way of circumventing the more radical change of assigning non-human animals real legal personhood.

Although the full legal significance of these recent changes in the law will only become clear as time proceeds, it is possible to say something about the preliminary significance of these developments. First of all, it cannot be ruled out that the legal changes that declare non-human animals to be animated objects will function as aggregators for gradually improving the legal position of non-human animals in the future, but their current value seems to be mainly symbolic.[159] What is certain is that these developments do not have the effect of dragging non-human animals into the category of legal subjects, nor do they comprise a fundamental shift in the legal understanding of non-human animals as entities with which humans can do what they want, apart from some legal exceptions. It is also clear that these developments do not assign non-human animals rights, nor do they require that animal interests are weighed on equal footing with human interests. These are all legal privileges still exclusively reserved for humans. The new legal declarations do not even bring about a fundamental reform of the basic structures and functions of property law, something their formulation seems to quite deceptively suggest.[160] Scepticism is further fed by the fact that the respective legislation in the countries in question determines that provisions applying to legal "things" still also apply to animated objects (non-human animals). For instance, in Dutch law, immediately following the celebrated phrase that "animals are not things," is the sobering addition that "provisions relating to things are applicable to animals," with some reservations.[161] In French law, the phrase that "animals

[159] Jean-Marc Neumann, "The Legal Status of Animals in the French Civil Code: The Recognition by the French Civil Code That Animals Are Living and Sentient Beings: Symbolic Move, Evolution or Revolution?" *Global Journal of Animal Law* 1, (2015): 1–13; Mark Tuil and Walter Dijkshoorn, "Symboolwetgeving in Wording," *Nederlands Juristenblad* 274, no. 6 (2010): 353–354; Gieri Bolliger, "Legal Protection of Animal Dignity in Switzerland: Status Quo and Future Perspectives," *Animal Law* 22, no. 2 (Spring 2016): 359–362.
[160] Bolliger, "Legal Protection of Animal Dignity in Switzerland," 361.
[161] Article 3:2a (2) Burgerlijk Wetboek (The Civil Code of the Netherlands).

are living beings endowed with sentience" is similarly supplemented with the relativizing addition that "with the exceptions of the laws that protect them, animals are regulated under the legal status of goods."[162] One wonders what the actual additional value of awarding animals the status of "animated objects" is, since, as we have seen, their handling by humans could already be restricted and *was* already restricted by several legal prescriptions in animal welfare law and criminal law. It seems safe to conclude that the discussed developments are less spectacular than they may seem to the legally untrained eye. The provisional significance of these legal developments may be primarily sought in the symbolic sphere, rather than bringing about a more fundamental change in the legal status of non-human animals.

Political animal advocacy parties

A second development, one that could possibly enrich the political status of non-human animals, is the fact that the number and representative power of political animal advocacy parties, which claim to (among other things) represent non-human animal interests in representative institutions, is increasing. This could make it likely that the interests of animals are increasingly heard in the primary democratic institutions, and could thus possibly strengthen the political status of non-human animals.

Worldwide, there are currently nineteen political parties whose main aim it is to represent animal interests.[163] Four of those currently hold actual representative positions: the Dutch party since 2006, the Portuguese party and the Australian party since 2015, and the party in the United Kingdom since 2017. The world's first animal advocacy party was the German *Partei Mensch Umwelt Tierschutz*, which was established in 1993. The Dutch *Partij voor de Dieren* (established in 2002) was the first animal advocacy party to gain representative positions on a national level in 2006. The representatives of these relatively new animal advocacy parties are elected in the traditional

[162] Article 515-14 Code Civil (The Civil code of France).
[163] "International Movement," Party for the Animals, https://www.partyfortheanimals.nl/international-movement/, accessed August 2019.

way, and they aim to draw attention to animal interests in representative institutions to a greater extent than conventional parties do.

There is reason to believe that animal advocacy parties are indeed successful in putting animals' interests on the political agenda. A 2016 study found that the attention for animal welfare issues in the Dutch parliament increased "markedly" after the Dutch political Party for the Animals had entered it in 2006.[164] Due to the absence of alternative explanations for this sharp increase in parliamentary attention for animal issues, researcher Simon Otjes (1984–) claims that it is "very likely" that this change was caused by the manifestation of the Party for the Animals in parliament.[165] If this effect is not typical for the Netherlands—there are no indications that this is the case—and if the worldwide number and size of animal advocacy parties with representative positions keeps growing, then is it reasonable to expect that animal interests will earn increasing attention in the primary institutions of liberal democracies around the world in the upcoming years.

Despite these prospects, it is important to realize that even if such parties grow in number and size, this will not bring about the fundamental shift in the political status of animals that is normatively required. There are at least two downsides to this form of political animal representation which renders it insufficient to function as an adequate institutionalization of the consideration right of sentient animals. These two criticisms also apply to more conventional political parties insofar as they decide to bring animals' interests to the fore. There is, in a political-institutional sense, no categorical difference between animal advocacy parties and other political parties which bring animal interests to the political table. Both depend on the votes of human political agents to get their (not necessarily objective) people elected into representative positions, and consequently both suffer the same shortcomings.

A first problem with this type of animal representation is that there is no guarantee that the political efforts of such a party are objective with regard to species membership. There is no guarantee that *all* sentient animals' interests are represented, let alone fairly proportional to their

[164] Simon Otjes, "The Hobbyhorse of the Party for the Animals," *Society & Animals* 24 (2016): 383–402.
[165] Otjes, "The Hobbyhorse of the Party for the Animals," 383, 399.

numbers and proportional to the strength of their interests. The political agenda that an animal advocacy party presses does not necessarily balance out the different interests of different non-human animals, but may be biased instead. The representatives of a political (animal advocacy) party may, deliberately or not, prioritize human interests, the interests of the animals most close to humans, or animals who can otherwise count on more human sympathy. This is not an inconceivable risk at all, for it is obvious that some animals (humans included) garner more human sympathy than others on arbitrary grounds. Since it is in representatives' interests to attract as many votes as possible, it is only natural that they will prioritize the interests of the animals for whom the electorate has the most sympathy. Respecting the wishes of the electorate is the only conceivable survival strategy for a political party in a liberal democracy, and the electorate is presumably generally much more open to human rights protection or panda preservation than to welfare protection for octopuses. Objectively speaking, however, it is not at all clear that panda's interests are deserving of more political attention and concern than octopuses' interests. In short, the first shortcoming of any form of animal representation through (conventional or animal advocacy) political parties carries a serious risk of speciesism and what could be labelled "interspeciesism" (arbitrary discrimination between animals of the same species)[166] in it, with which it could arbitrarily and illegitimately exclude certain sentient animals from being politically considered.

The second and most important downside of this way of representing animals is that political parties will only get a fair shot at representing animals' interests if human political agents are willing to vote for them, which is problematic in light of the non-contingency requirement. There is obviously no secured institutional position allocated to the parties that aim to represent animal interests in the democratic institutions, nor any guarantees with regard to their size and the strength of their political

[166] An example of what is labelled here as "interspeciesism" is an unequal protection of rabbits in different contexts. Often, pet rabbits enjoy relatively strong legal protection, while rabbits used for scientific or cosmetic experiments enjoy relatively weak legal protection. This difference in legal protection can be labelled as *interspeciesist*, because it arbitrarily discriminates between animals of the same species.

influence. The continued existence and representative power of these parties are susceptible to political fluctuations and many other external factors, making this type of political animal representation a whimsical undertaking. Among other things, the representation of non-human animals' interests through political parties is dependent on the concern that human voters have for other animals and on their willingness to reflect this concern in their political vote. In other words, the representation of non-human animals' interests through political parties is uncertain and unstable at a fundamental level. This inherent feature of, in Robert Garner's terms, strong anthropocentrism makes this form of representation inadequate to function as a satisfactory institutionalization of animals' consideration right, for it fails to meet the non-contingency requirement. Fully respecting the consideration right of sentient non-human animals requires more than the optional representation of their interests whenever humans feel like it. An interspecies democracy should, as Garner writes, have animal representation "irrespective of the level of concern for animals in wider human society," for politically considering their interests is not a human hobby that voters can freely ascribe to or not but a democratic duty.[167]

One may object, however, that it is unreasonable and undemocratic to disqualify this type of animal representation on the mere account that these political parties have no secured institutional role. After all, in principle, no democratic party deserves a secured institutional position, so why should an animal advocacy party have one? Does the democratic equality principle not entail that no interest or preference is more deserving than others? Should animal advocacy parties not have to fight for their subsistence and political influence by collecting votes like any other party, as is currently the case?

This appeal to the ideal of a political level playing field seems only sensible and democratic in an anthropocentric paradigm, that is: when it is assumed that only human interests are worthy of political representation. If a democracy only takes notice of humans, it seems perfectly reasonable and democratic to assign political powers to parties in accordance with the

[167] Garner, "Animals, Politics and Democracy," 114.

number of votes cast for them, just as it is reasonable and democratic not to grant any of the parties special privileges, such as a secured institutional position. These rules create a level playing field for all humans with voting rights, and assigning any political party a secured institutional role would unbalance this fundamental equality. So far, the objection against assigning any party a secured institutional role seems convincing, reasonable, and democratic.

We must remember, however, that this book is not about anthropocentric democracy, but about interspecies democracy. If we accept the argument that some non-human animals also have a consideration right, this fundamentally alters our perspective. We can then see that the rules that prescribe that political powers are assigned to parties according to the number of votes cast for them no longer create a level playing field, but instead preserve an essentially discriminatory practice that even creates a situation of political *in*equality between humans and other animals. In the paradigm of the interspecies democracy, the current democratic battle for political influence through voting for political parties is not equal to begin with: humans are in possession of all the "arms," namely their votes, whereas non-human animals by definition have no "arms," nor any other means of getting their interests onto the democratic board. Therefore, there is no equal democratic contest to begin with. An equal democratic contest is only truly equal if all concerning parties have access to the same arms, but this is clearly not the case. The falsely perceived "equal" combat between political parties is, in fact, exclusive and discriminatory, for it clearly favours the interests and preferences of those who can vote, while excluding those of individuals who cannot vote. Therefore, it is misleading to refer to the ideal of a political level playing field when maintaining that animal advocacy parties should compete with other parties "equally." This combat between parties intrinsically favours "human advocacy parties" and thus cannot establish a level playing field on its own. This is the reason why the representation of non-human animals' interests must be established in a different way than through a political competition based just on votes. The logic behind requiring a secured institutional position for animal interests alongside all human interests is precisely to compensate for the fact that

non-human animals lack all the voting arms that humans have. From the perspective of the interspecies democracy, a political level playing field for humans and other animals can only be created through installing an institutional position for non-human animal interests that is not dependent on votes that non-human animals will never cast.

In short, the consideration right of non-human animals can never be sufficiently institutionalized if we rely solely on the representation of animal interests by political parties that in turn depend on votes for their representative existence and political strength. It is important to add here, however, that the normative dismissal of animal advocacy parties as a form of animal enfranchisement on account of lacking a secured institutional position does *not* automatically mean that assigning animal advocacy parties a secured institutional position *would be* an acceptable option. It will be argued in chapter three that this would be undesirable for other reasons.

In sum, due to the two discussed shortcomings concerning (inter)speciesism and contingency of political consideration, the rise of political animal advocacy parties alone cannot establish the normatively desired situation in which all resident sentient animals have their interests independently considered in a non-contingent way.

Democratic transparency and freedom of speech

The third development that may improve the protection of animal interests in liberal democracies is related to the fact that animal welfare organizations increasingly focus on defending the human civil right to free speech, which has potential beneficial side-effects for non-human animals. Through focusing on the legal protection of free speech and transparency of animal industries, it might be possible to indirectly further the interests of animals who are suffering in typically opaque conditions.

Most of the suffering of non-human animals in liberal democracies, both in number and in severity, still happens behind the closed doors of the farm industry and experimentation facilities. There is reason to believe that public exposure of such hidden animal use leads to better legal welfare protection for these non-human animals. In *Animals, Equality and Democracy*,

Siobhan O'Sullivan demonstrates that there is a correlation between the visibility of animals and the extent to which they are legally protected.[168] Animals who are visible to the public generally enjoy relatively good legal protection, whereas animals who are hidden away generally do not. Even though O'Sullivan, strictly speaking, merely detects a correlation between visibility and legal protection, it is possible and likely that there is also a causal relationship between the two. In other words, high levels of visibility may not accidentally coincide with higher levels of legal protection: it is possible that visibility (indirectly) *causes* better animal welfare legislation. It is quite conceivable that once people are confronted with animal (ab)use, they tend to prohibit it. We may see this process at work in liberal democracies around the world: resistance to relatively public forms of animal abuse such as bullfighting, fox hunting, and the exploitation of animals in marine mammal parks and circuses is growing. This growing public disapproval has also translated into an increase of legal bans on such public animal abuses.[169] As O'Sullivan illustrates in her book, visibility of the abuse is an important, if not indispensable condition for this development. A causal relationship between visibility and legal protection would suggest that if only we made the ways in which we harmfully treat animals in everyday businesses more transparent, public dismay and improved legislation protecting these animals would follow. Concentrating on improving transparency of the animal industries may thus eventually lead to better legal protection for a great number of non-human animals.

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[168] O'Sullivan, *Animals, Equality and Democracy*.

[169] Stuart Winter, "New Poll Shows Bullfighting is on the Way Out," Express, January 20, 2016, https://www.express.co.uk/news/nature/636496/poll-shows-bullfighting-on-way-out; Mark Nayler, "Are Spaniards Over Bullfighting?" Culture Trip, June 15, 2017, https://theculturetrip.com/europe/spain/articles/are-spaniards-over-bullfighting/; Ashley Cowburn, "85% of the British Public are Opposed to Repealing Fox Hunting Ban, Poll Reveals," Independent, December 26, 2017, https://www.independent.co.uk/news/uk/politics/fox-hunting-poll-boxing-day-league-against-cruel-sports-ban-theresa-may-election-a8127851.html; Will Coldwell, "Marine Park Attractions: Can They Survive?" The Guardian, September 12, 2014, https://www.theguardian.com/travel/2014/sep/12/seaworld-blackfish-marine-park-attractions-future; "Europeans Want Wild Animals in Circuses Banned, Poll Reveals," Stichting Aap, October 3, 2018, https://www.aap.nl/en/news/europeans-want-wild-animals-circuses-banned-poll-reveals; "Countries With Restrictions or Ban of Wild Animals in Circuses," Four Paws International, June 19, 2018, https://www.four-paws.org/campaigns-topics/wild-animals/restrictions-keeping-wild-animals-in-circuses.

O'Sullivan suggests that enhancing transparency of the animal industries can be defended on democratic grounds: "Integral to the notion of democracy is the idea that 'we the people' are involved in making decisions informing the type of society we live in. Yet in the case of animal protection it is almost impossible to take animals' interests, or the interest a human may have in not harming animals, into account because few of us are in a position to assess how well the interests of animals are being met."[170] O'Sullivan accurately draws attention to the fact that, in an open democratic society, the public has a right to know what is going on in society in order to be able to shape society according to its own will. The public can only do that, however, if they have access to information that provides them with a clear view of the actual current state of their society. If certain dubious actions are chronically tucked away and impossible to become aware of without breaking the law—as many atrocities in the animal industries are—the public is seriously compromised in their democratic right to participate in policy making. How can people make sure that the right aspects of society are given political priority if one dark aspect of our society is chronically underexposed and thereby almost immune to public scrutiny? How can we ascertain for ourselves that the level of animal welfare in the animal industries reflects the level as desired by the public, if the public is unable to inform themselves about the actual situation in the animal industries? A certain level of transparency is vital in an open society, so that the public is able to employ their democratic arms should any injustice reveal itself. O'Sullivan seems to be right in asserting that demanding transparency of the animal industries is perfectly defensible on basic democratic grounds. Due to this democratic basis for enhancing transparency, one need not necessarily subscribe to the interspecies democratic theory as proposed in this book in order to support transparency improvements in the animal industries. Since transparency is essential for any democracy to function properly, even democrats without special concern for animal welfare should

[170] O'Sullivan, *Animals, Equality and Democracy*, 165–167.

be able to join those who demand more transparency in the animal industries.[171]

An interesting legal development in the context of transparency of the animal industries is the emergence of what critics indicate as "Ag-gag laws." These laws have recently been introduced in several states in the United States of America. Ag-gag laws have the effect of silencing whistle-blowers in the context of animal abuse and food safety scandals by criminalizing whistle-blowers who make, possess, or publish footage from inside animal farms or slaughterhouses. The footage under attack often exposes severe animal abuse, and it is thus precisely the kind of footage that typically leads to public outrage and a public debate on raising animal welfare standards or on improving the enforcement of existing rules. By criminalizing the making, possession, and publication of such footage, American democratic transparency is compromised, for these laws hinder the American people in knowing what goes on inside these farms and slaughterhouses. In light of this, we might even conclude that the right of the American people to govern democratically is compromised, because being able to know what goes on in society is a necessary prerequisite for democratic governance. The recent introduction of Ag-gag laws is thus not only alarming from the perspective of animal welfare, but also from the perspective of democratic governance.

A counteracting development can also be detected, however. Since 2013, a broad coalition of organizations for animal protection, civil liberties, and journalism has been dedicated to challenging Ag-gag laws in court for being in violation of the American Constitution. So far, they have been successful: the Ag-gag laws of three states so far (Idaho, Utah, and Iowa) have been ruled (partially) unconstitutional by courts. In all three cases, courts have ruled that the Ag-gag statutes violate the First Amendment of the American Constitution, which guarantees, among other things, the freedom of expression. According to the courts, the Ag-gag laws violate the

[171] Parts of the previous two paragraphs have been published before in: Janneke Vink, "If Slaughterhouses had Glass Walls…," Leiden Law Blog, March 31, 2017, http://leidenlawblog.nl/articles/if-slaughterhouses-had-glass-walls.

free speech rights of undercover investigators and journalists. In 2015 in Idaho, the Ag-gag statute was struck down as unconstitutional by the U.S. District Court for the District of Idaho on the grounds of violating the First and Fourteenth Amendments (more precisely its Equal Protection clause).[172] The State of Idaho appealed this decision, however, and brought the case to the United States Court of Appeals for the Ninth Circuit. In 2018, this federal court ruled the Idaho Ag-gag statute partly unconstitutional, holding that its core provision comprising the ban on recording the conditions inside factory farms and slaughterhouses violates the First Amendment.[173] In Utah in 2017, the Ag-gag statute was ruled unconstitutional by the U.S. District Court of Utah on account of being in violation of the First Amendment to the American Constitution.[174] Similarly, in Iowa, the U.S. District Court for the Southern District of Iowa struck down the Ag-gag statute in 2019, also holding that the ban on undercover investigations at factory farms and slaughterhouses violates the First Amendment.[175] Stephen Wells, executive director of the Animal Legal Defense Fund, which leads the coalition of non-profit organizations who challenge these laws in court, has expressed the

[172] "Idaho "Ag-Gag" Law Ruled Unconstitutional in Federal Court," Animal Legal Defense Fund (August 3, 2015), https://aldf.org/article/idaho-ag-gag-law-ruled-unconstitutional-in-federal-court/; "Court Enjoins Enforcement of Unconstitutional Ag-Gag Law," Animal Legal Defense Fund (November 12, 2015), https://aldf.org/article/court-enjoins-enforcement-of-unconstitutional-ag-gag-law/.

[173] "Coalition Defends District Court Victory Striking Down Unconstitutional Idaho Ag-Gag Law," Animal Legal Defense Fund (June 20, 2016), https://aldf.org/article/coalition-defends-district-court-victory-striking-down-unconstitutional-idaho-ag-gag-law/; "Federal Appeals Court Strikes Down Provisions of Idaho's Ag-Gag Law in Precedent-Setting Victory for Animals, Workers, Free Speech," Animal Legal Defense Fund (January 4, 2018), https://aldf.org/article/federal-appeals-court-strikes-provisions-idahos-ag-gag-law-precedent-setting-victory-animals-workers-free-speech/; "Challenging Idaho's Ag-Gag Law," Animal Legal Defense Fund (January 4, 2018), https://aldf.org/case/challenging-idahos-ag-gag-law/.

[174] "Utah Ag-Gag Law Declared Unconstitutional," Animal Legal Defense Fund (July 7, 2017), https://aldf.org/article/utah-ag-gag-law-declared-unconstitutional/; "Utah Will Not Appeal Decision Holding Ag-Gag Law Unconstitutional," Animal Legal Defense Fund (September 7, 2017), https://aldf.org/article/utah-will-not-appeal-decision-holding-ag-gag-law-unconstitutional/; "Challenging Utah's Ag-Gag Law," Animal Legal Defense Fund (last updated September 7, 2017), https://aldf.org/case/challenging-utahs-ag-gag-law/.

[175] "Court Rules Iowa Ag-Gag Law Unconstitutional in Major Victory for Free Speech and Animal Protection: Undercover Investigations at Factory Farms Protected by First Amendment," Animal Legal Defense Fund (January 9, 2019), https://aldf.org/article/court-rules-iowa-ag-gag-law-unconstitutional-in-major-victory-for-free-speech-and-animal-protection/; "Challenging Iowa's Ag-Gag Law," Animal Legal Defense Fund (January 9, 2019), https://aldf.org/case/challenging-iowas-ag-gag-law/.

confidence that "These unconstitutional laws will fall like dominos."[176] It is probable indeed that these three rulings will function as legal precedents in potential upcoming court cases concerning the constitutionality of Ag-gag laws in other states.

How are we to appreciate these developments concerning transparency in the animal industries in the light of non-human animals' legal position? Do they affect the legal position of non-human animals at all? Above all, if the recent emergence of Ag-gag laws has any effect on non-human animals' legal position, it must be a negative one. After all, these laws cause less instead of more transparency in animal farming, and we have seen that the opaqueness of the conditions under which animals are used correlates with lower legal levels of welfare protection. However, we have simultaneously detected a trend in which these laws are successfully challenged by non-profit organizations, rendering these Ag-gag developments relatively harmless in three states so far. By appealing to the civil rights of the American Constitution, these organizations have succeeded in neutralizing the harmful effects Ag-gag laws could have had on animals and the quality of animal welfare legislation. Although praiseworthy in this regard, we must admit, however, that the successes achieved by these non-profit organizations do nothing more than that: neutralizing a potential threat to animals and the legal standards concerning animal welfare. Their efforts will not improve non-human animals' legal status, not even if Ag-gag laws would indeed come to "fall like domino's," because these efforts are merely aimed at regaining the legal situation as it was before the introduction of Ag-gag laws.

There may be some room for optimism when we take a closer look at the developments as discussed above, however—which is why they still qualify as promising developments. Two valuable lessons can be learned from what has been discussed, and if these lessons are adequately transformed into strategies by animal welfare groups, they have the potential of raising legal animal welfare standards in liberal democracies in the future.

[176] "Utah Ag-Gag Law Declared Unconstitutional," Animal Legal Defense Fund (July 7, 2017), https://aldf.org/article/utah-ag-gag-law-declared-unconstitutional/.

First, we have seen that demanding more transparency in animal industries could possibly lead to improved animal welfare standards in the long term. If there is indeed a causal relationship between the two, then new doors to improving animal welfare standards within the current structures of liberal democracies are opened. Demanding more transparency in typically opaque sectors is then not only advantageous to our open societies, but also a tool for improving animal welfare standards. Animal welfare groups could put this supposition to the test and start focusing more on transparency of the animal industries. If a causal relationship does not exist, it is possible that nothing changes, but if it does, this may effectively lead to higher animal welfare standards in the future. Transparency thus is a potential hidden gem waiting to be discovered by animal welfare groups.

The second valuable lesson that can be deduced from the foregoing is that humans can sometimes employ their own legal rights in order to indirectly further animal interests. The lawsuits concerning the Ag-gag laws teach us that the rights of humans may indirectly also further some animal interests if their interests overlap and humans' rights are employed in a clever way. It is likely that humans' legal rights can be creatively employed in other areas of the law as well and generate beneficial consequences for non-human animals in those contexts too. If taken to heart and used in strategies by animal welfare groups, these two lessons have the potential to indirectly and gradually improve actual animal welfare and legal animal welfare standards in liberal democracies in the long term.

The main question remains, however, whether an intelligent use of these two lessons would improve the more fundamental legal position of non-human animals in liberal democracies. Unfortunately, it would not. Even if animal welfare groups were to instantly and permanently focus on improving transparency of the animal industries, and if they were to relentlessly employ civil rights in their fight for better animal welfare, this would at best probably only have the effect of improving animal welfare conditions and legal standards. Suppose, for the sake of argument, that all types of animal use were transparent (slaughterhouses with glass walls, farm animal raising accessible through video streams, all animal experiments answered for in public reports, etc.), and that the employment

of civil rights in legal disputes for the benefit of other animals were a daily routine. This would probably benefit non-human animals directly and indirectly. It would enable the public to better assess how well the interests of animals are currently met; it may make us more inclined to voluntarily take their interests into account, or to give these interests more weight in our political and economic decisions; and it would probably lead to higher legal animal welfare standards. For these reasons, and the earlier-mentioned reason of contributing to the strength of democracies as such, pursuing higher levels of transparency for corporations or institutes which use animals is to be applauded, as is indirectly standing up for animal welfare through the use of human civil rights. However, in light of the bigger picture, these are only minor gains, insignificant even to the basic political-legal position of non-human animals in liberal democracies. Not even absolute transparency of all animal use will lead to the situation in which animals' interests are non-contingently and institutionally assessed. Even if animals were able to look us in the eye from behind the glass walls of a slaughterhouse, they would still be slaughtered, and more fundamentally, they would still be essentially dependent on our willingness to take their interests into account when we make liberal democratic decisions. Our eye contact could seduce us to take their interests more serious than is currently the case, but truly taking their interests seriously would in no way be an institutional commitment. The non-contingency requirement, in other words, would still not be met. Something similar is true for employing humans' legal rights in an attempt to improve the welfare conditions of non-human animals. No matter how seriously pursued, these efforts cannot alter the fact that non-human animals remain fundamentally dependent on our will to take legal notice of their interests. Besides that, non-human animals' interests could still only be made relevant in court if they collided with human interests, which is another shortcoming, this time in light of the independence requirement. In sum, even the brightest prospect of turning the two lessons learned into practice would not lead to the required alteration in the position of non-human animals in liberal democracies.

2.3 Normative assessment of the status quo

The previous section has clarified the current position of non-human animals in liberal democracies and some possible future improvements. This section assesses the normative acceptability of the current position of non-human animals, including the three possible improvements discussed, in the context of the criteria for animal enfranchisement.

We have seen that non-human animals have no meaningful political or legal status in the liberal democracies of our time. Our assessment has pointed out that the basic frameworks of liberal democracies are such that non-human animals are fundamentally dependent on humans to have their interests taken into account, both in political and in legal considerations. There appears to be no incentive or compulsion for humans to address animals' interests properly. Against the background of the normative requirements for non-human animals' rightful position in liberal democracies, this is quite troubling.

The legitimacy criterion

The fact that liberal democracies reserve no institutional place for non-human animals' interests raises serious legitimacy concerns, because, as it was argued, an interspecies interpretation of the procedural democratic legitimacy principle requires that the institutional framework of a democracy offers all members of the demos some sort of political consideration on an equal level, and thus requires that the interests of non-human animals are attended to in the basic procedures of a democracy.

A similar legitimacy concern with the current-day liberal democratic framework was earlier expressed by Robert Garner. He has formulated what is arguably one of the most important questions in current political philosophy: "[Is] a political system that does not directly incorporate the interests of animals … entitled to describe itself as a genuine democracy?"[177] Garner questions the very characterization of the current political model as genuinely democratic because of the fact that it lacks any form of non-human animal interest incorporation. By calling into question the

[177] Garner, "Animals, Politics and Democracy," 111.

characterization of current democracies as genuinely democratic, Garner seems to hint that the current political model is lacking in procedural democratic legitimacy, for such legitimacy requires that institutions are in place that can qualify as "democratic." Since the current institutions fail to offer *all* members of the demos some sort of political consideration on an equal level, instead blatantly excluding the non-human part of the demos, it could be argued that current-day liberal democracies are lacking in legitimacy from an interspecies perspective.

In fact, this suggestion is mild compared to other thinkers' assertion that the absolute human political dominion over other animals is not only democratically illegitimate, but tyrannical. Jeremy Bentham hoped for the day when the rest of the animals would acquire those rights "which never could have been withholden from them but by the hand of tyranny."[178] In Bentham's footsteps, Peter Singer, Steven M. Wise, Sue Donaldson, and Will Kymlicka have also characterized our (political) relationship with non-human animals as tyrannical.[179] Do these thinkers have a point? When we observe the factual situation in liberal democracies of today, it is clear that humans have given themselves the unlimited right to rule over non-humans' lives and that we rule over them in an arbitrary way. We are not formally committed to giving them any consideration, and benefits we reluctantly give them are contingent on our capricious wishes. This form of extreme subordination and political dependence, combined with arbitrary rule, are the core ingredients of tyrannical rule. Since non-human animals have no fundamental rights or any other rule-of-law-like protection to ascertain some level of fair governance over their lives, humans are effectively allowed to rule over them as tyrants. In principle, anything is permitted—as evidenced by the fact that the mass killing of non-human animals is daily routine in our otherwise civilized societies. It is thus not unreasonable to maintain that, from an interspecies perspective, the current

[178] Bentham, *An Introduction to the Principles of Morals and Legislation*, 310–311 (footnote 1).
[179] Singer, *Animal Liberation*, 17, 185, 204, 207, 226, 248; Wise, *Rattling the Cage*, 239–240; Sue Donaldson and Will Kymlicka, "Unruly Beasts: Animal Citizens and the Threat of Tyranny," *Canadian Journal of Political Science* 47, no. 1 (March 2014): 23–45.

human governance over other animals in liberal democracies is a form of tyranny.

The alarming result of this is that the omnipresent political and legal ignorance of non-human animals not only constitutes a violation of animals' consideration right, but it is also a disgraceful stain on current open societies, which should, of all things, ostracize tyranny.[180] The political and legal negligence of non-human animals' interests constitutes a democratic legitimacy problem that should concern all democrats. To be clear, this is of course not to disqualify the liberal democratic model as such, nor to deny the liberal or democratic character of our current political systems. If we forget about other animals and consider only humans, current liberal democracies are perfectly liberal and democratic, and they are the cleverest political systems people have come up with in documented history. But now that a democratic deficit with regard to other sentient animals has revealed itself, we cannot but conclude that these ingenious systems with their as of yet exclusively human characters are urgently in need of some adaptations in order to shake off their newly discovered tyrannical traits.

The non-contingency criterion

We have analysed that current liberal democracies generally have no fixed mechanism which provides for taking animal interests into account. This seems problematic in light of the second criterion for animal enfranchisement: the non-contingency criterion, which prescribes that the consideration of non-human animal interests must be institutionally safeguarded.

We have seen that there are some (existent and foreseeable) options for the consideration of animals' interests in current liberal democracies, but these options seem insufficient to constitute an adequate status for non-human animals. In all of the discussed options, the consideration of non-human animals' interests was still fully contingent on human generosity. In the case of political parties that claim to stand up for animal welfare, the extent of their political influence, and even their very existence are

[180] Popper, *The Open Society and Its Enemies (Vol. I)*, 65, 235 (note 6).

completely contingent on the electorate's noble mindedness to vote for such parties. Likewise, the mere existence of animal welfare laws, the quality of their content, their actual execution, and the extent to which there is judicial review of compliance with such laws are completely contingent on human will. For this reason, merely raising the level of animal welfare prescriptions in existing animal welfare laws in the future would still be insufficient, for contingency is inherent to this institutional instrument, and thus will continue to be a normative problem. The fact that some liberal democracies now legally define non-human animals as animated objects instead of regular objects does not affect the fundamental structure in which the legal consideration of non-human animals' interests is fully contingent on human will. Neither does the fact that some jurisdictions offer standing to animal welfare organisations in matters relating to animal welfare laws mean that this contingency is taken away. Whether or not judicial review of the compliance with animal welfare legislation is effectuated is then still dependent, among other things, on whether there even are animal welfare organizations around, whether they have sufficient resources at their disposal to start such legal proceedings, and whether they are prepared to initiate such proceedings. The same is true in the context of Ag-gag laws. Humans may employ their own legal rights in order to expose animal cruelty and thus arguably increase the general knowledge about and concern for animals, but this does not lead to a situation in which the consideration of animals' interests is institutionally safeguarded. Again, Ag-gag proceedings only occur to the degree to which non-profit organizations decide to make this a priority. Moreover, we have established that even the highest hypothetical level of transparency in animal (ab)use could not remove animals' more fundamental political and legal dependency on humans.

In short, despite all developments happening in the area of animal welfare in liberal democracies, the consideration of animal interests remains fundamentally contingent. Individuals functioning in the political and legal institutions of liberal democracies, such as political representatives and judges, are not formally obligated to take the interests of other animals into account. This gives reason to think that the basic structures of liberal

democracies as they are today are unable to facilitate a normatively acceptable institutional implementation of the consideration right of animals.

The independence criterion

In light of the third normative requirement, the independence requirement, the current outlines of liberal democracies also seem problematic. This criterion demands that animal interests are considered as an independent factor in liberal democratic interest-weighing processes.

In the current structures of liberal democracies, animals can generally only count on a recognition of their interests when these interests are in some way or another tied to human interests. This element of anthropocentrism has been persistently present in the history of liberal democracies. Many of the first anti-cruelty laws in liberal democracies prohibited certain forms of animal abuse not on account of the independent interests of the abused animals themselves but on account of contributing to human moral civilization. These laws were thus not meant to protect non-human animals from harm but for moral education: the idea was that a civilized people should abhor aggression against animals, and the purpose of these anti-cruelty laws thus was to teach people the moral lesson that one ought not to enjoy animal abuse.[181] To a large extent, current liberal democracies still continue this anthropocentric approach of offering only circuitous and indirect aid to animals.[182] Even though animal welfare laws have improved in the sense that they now generally grant that protecting non-human animal welfare is their core motivation, in most other contexts, animals' own interests are not recognized as being of independent value.

Illustrative is the legal debate in many liberal democracies concerning a potential ban on unstunned ritual slaughter of animals. More often than not, the centrally discussed issue is not whether the damage done to animals' welfare during unstunned slaughter is sufficient to impose a

[181] Erno Eskens, *Een Beestachtige Geschiedenis van de Filosofie* (Leusden: ISVW Uitgevers, 2015), 288–294; Dirk-Jan Verdonk, *Dierenrechten* (Amsterdam: Amsterdam University Press, 2016), 105–153; Smith, *Governing Animals*, 37–39.
[182] Smith, *Governing Animals*, 39–41.

duty on halal and kosher slaughterhouses to stun all animals before slaughter, but whether a liberal government may limit the freedom of religion of certain groups. This is a consequence of the fact that without legal subjectivity and rights, non-human animals' independent interests are virtually invisible to the law. As a result, not animals' obvious, elementary interests in not having to undergo immense additional suffering before they die, but the human right to religious freedom dominates the debate. In many countries, due to the poor legal position of non-human animals, the argument that animals needlessly die in horrible pain and anxiety is not considered a legally strong enough argument for integrally prescribing stunning prior to slaughter. An integral ban on unstunned slaughter thus requires legal backing in the form of arguments that address adjacent *human* interests, such as the human interest in having a secular government and religiously neutral laws.[183]

There are many situations in which we see that non-human animal interests play no independent role in liberal democratic institutions and may only be served if they coincide with human interests. We have observed, for example, that non-human animals (or their potential legal representatives) have no legal standing of their own. This is another way of saying that their interests are not recognized to be valuable enough to be protected in court. It is only when non-human animals' interests collide with human interests that access to the courts is sometimes offered, and then only to protect these *humans*' interests in pursuing animal welfare. The same phenomenon is at play in the context of the Ag-gag laws. The laws criminalizing the exposure of footage of animal abuse were not, and cannot be legally contested on the grounds of the interests of the animals themselves in revealing such abuses. Instead, again, a link with human interests must be established, this time the human interest in an open democracy, more precisely in free speech.

In short, we have seen that, in general, non-human animal interests are almost never considered to be of independent value in today's liberal

[183] Paul Cliteur, *The Secular Outlook: In Defense of Moral and Political Secularism* (Boston: Wiley-Blackwell, 2010); Paul Cliteur, "Criteria voor juridisch te beschermen godsdienstvrijheid," *Nederlands Juristenblad* 44–45 (2012): 3090–3096; Bastiaan Rijpkema and Machteld Zee, eds., *Bij de Beesten af! Over Dierenrecht en Onrecht* (Amsterdam: Uitgeverij Bert Bakker, 2013), 15–62; Carla M. Zoethout, "Animals as Sentient Beings: On Animal Welfare, Public Morality and Ritual Slaughter," *ICL Journal* 7, no. 3 (2013): 308–326.

democracies. The protection that is accorded to non-human animals is still generally derived from the well-established value of human interests. If such a link is missing, then non-human animals are almost always left empty-handed, for apart from modern animal welfare legislation, there are no institutional arrangements securing the intrinsic interests of non-human animals for their own, independent sakes. Due to the lack of such institutional enfranchisement, current liberal democracies fail in meeting the independency requirement for animal enfranchisement.

Now that the institutional outlines of current liberal democracies have been tested against the legitimacy, non-contingency, and independence requirements, two normative requirements have yet to be addressed: the human assistance requirement and the residency requirement. However, in absence of any institutional constellation that can account for non-contingently taking the independent interests of non-human animals into account, it seems hardly possible to discuss current compliance with the last two requirements of animal enfranchisement in modern-day democracies. These two requirements are more specified criteria for how such an institutional arrangement should be realized: by humans empowered to protect animals' interests and applicable to all sentient animals on the territory. Without any non-contingent and independent institutional arrangements in place, it is not possible to check whether they are currently adequately controlled by humans (human assistance criterion) and whether they currently apply to all sentient animals on the democratic territory (residency criterion). Therefore, compliance with these latter two requirements cannot be discussed, and it seems permissible to now summarize what has been said about animals' current position in liberal democracies.

The previous section started by analysing the most basic outlines of commitments that humans in key liberal democratic positions have in relation to animals' interests. The overall picture was that non-human animals have no meaningful political or legal status and that they are, in a legal and political sense, fundamentally dependent on human clemency. Three discussed recent developments could not alter the basic structures

which make non-human animals helpless dolls in liberal democracies: a new legal status as "animated objects," the rise of political animal advocacy parties, and an increasing focus on democratic transparency and the freedom of speech. This situation has been criticized in the current section for the fact that it does not meet any of the criteria of animal enfranchisement. Furthermore, apart from being a violation of animals' consideration right, the structures of current liberal democracies are also an affront to democratic principles that lie at the basis of this right and the open society itself. The current and foreseeable institutional constellation of liberal democracies seems unable to offer non-human animals what is rightly theirs, and at the same time undermines its own principles. For these two reasons, our anthropocentric liberal democracies seem in urgent need of an interspecies update; for animals' sake, but also for their own.

2.4 Similarities and differences with the enfranchisement of future people

The normative appreciation of the current basic structures of liberal democracies from an interspecies perspective has been quite ruthless. The remainder of this book will concentrate on investigating whether it is possible to make some alterations in the current institutional constellations of liberal democracies which may fix the indicated normative errors. To this purpose, I will investigate whether extending some pre-existing institutional enfranchisement options to non-human animals may bring the normative ideal of animal enfranchisement closer, but I will also investigate whether some new, yet merely theoretical institutional options may bring us closer to the normative ideal. In exploring these new models of animal enfranchisement, it will prove to be useful to look at some models that have already been developed and proposed in the context of the enfranchisement of future people.[184] In this section, I defend this methodology and argue that

[184] Most importantly: Dobson, "Representative Democracy and the Environment," 124–139; Kristian S. Ekeli, "Constitutional Experiments: Representing Future Generations Through Submajority Rules," *The Journal of Political Philosophy* 17, no. 4 (2009): 440–461; Kristian S. Ekeli, "Green Constitutionalism: The

it is fruitful and permissible to use some ideas concerning the enfranchisement of future people[185] in the context of animal enfranchisement.

One of the problems of looking into institutional options of improving the political and legal position of non-human animals is that there is quite a gap in the literature when it comes to pragmatic ideas on how to improve the position of non-human animals. In contrast, quite a lot has been written on the adjacent subject of how to practically improve the political and legal position of people who will probably come into existence in the future. This makes it attractive to look into the literature about future people enfranchisement to see whether it contains creative ideas of institutional design that can be used in the context of non-human animal enfranchisement as well. In research concerning the subject of how to practically improve the political and legal position of future people, problems related to the enfranchisement of future people are discussed, and these problems are often very similar to the ones we will encounter when investigating the actual enfranchisement of non-human animals. We may learn a great deal from how such problems are approached in the context of future people enfranchisement. Insofar as the literature concerning the enfranchisement of future people address design-technical problems which are also apparent in the context of animal enfranchisement, they seem suitable to learn from for our purposes.

Constitutional Protection of Future Generations," *Ratio Juris* 20, no. 3 (September 2007): 378–401; Kristian S. Ekeli, "The Principle of Liberty and Legal Representation of Posterity," *Res Publica* 12 (2006): 385–409; Ekeli, "Giving a Voice to Posterity," 429–450; Iñigo González-Ricoy and Axel Gosseries, eds., *Institutions for Future Generations* (Oxford: Oxford University Press, 2016); Michael Kates, "Justice, Democracy, and Future Generations," *Critical Review of International Social and Political Philosophy* 18, no. 5 (2015): 508–528; Kavka and Warren, "Political Representation for Future Generations," 21–39; Tine Stein, "Does the Constitutional and Democratic System Work? The Ecological Crisis as a Challenge to the Political Order of Constitutional Democracy," *Constellations* 4, no. 3 (1998): 420–449; Dennis F. Thompson, "Representing Future Generations: Political Presentism and Democratic Trusteeship," *Critical Review of International Social and Political Philosophy* 13, no. 1 (March 2010): 17–37; Dennis F. Thompson, "Democracy in Time: Popular Sovereignty and Temporal Representation," *Constellations* 12, no. 2 (2005): 245–261.

[185] More often, "future people" are instead referred to as "future generations," but given the individualistic angle of this book, I find "future people" a more appropriate term. Individual people can have rights; the social construct that is a generation cannot.

There are many similarities between the purpose of enfranchising future people and that of enfranchising non-human animals. To start with, both are concerned with increasing the political and legal concern for entities currently un(der)represented in liberal democracies. Just like non-human animals, future people currently have no institutionalized options of having their interests promoted in the relevant liberal democratic bodies.[186] In this sense, both future people and non-human animals are left at the mercy of currently living human beings. In addition, both future people and non-human animals lack the ability to comprehend their inferior position,[187] nor are they able to (collectively) protest against it, let alone change it themselves. In the case of future people, this is for the simple reason that they do not (yet) exist; for non-human animals the reason for this is the language barrier and their (to this end) inadequate capacities.

Additionally, the position of both non-human animals and future people is made worse by the fact that current human politicians have every reason to ignore and even damage their interests.[188] As we will explore more in depth in the next chapter, the currently active accountability-mechanism, which is meant as a protection against abuse of power, has the spill-over effect of encouraging ignorance of all interests of non-voters (among which both non-human animals and future people). After all, the fact that politicians are accountable for their professional results through periodic

[186] With regard to future people: Kavka and Warren, "Political Representation for Future Generations," 21; Ekeli, "Green Constitutionalism," 378–379; Ekeli, "Constitutional Experiments," 440; Ekeli, "The Principle of Liberty and Legal Representation of Posterity," 385–386; Kates, "Justice, Democracy, and Future Generations," 517.

[187] When it comes to future people, we soon find ourselves in a meta-philosophical maze. Certainly, many people who will be existent one day will, at the moment of actual existence, possess the cognitive abilities that are necessary to understand the politically inferior position of future people. However, at that moment, they will be *actual* people, no longer future people, which is why I maintain that "future people … lack the ability to comprehend *their* inferior position." Future people, as non-materialistic entities of a predictive nature, cannot comprehend anything. It is merely when they become a wholly different entity, namely an existing person with cognitive abilities, that the necessary conditions for comprehending anything are met.

[188] With regard to future people: Ekeli, "Green Constitutionalism," 398; Kates, "Justice, Democracy, and Future Generations," 517–519; Kavka and Warren, "Political Representation for Future Generations," 21, 28, 36; Stein, "Does the Constitutional and Democratic System Work," 425–427; Thompson, "Representing Future Generations," 19; Bruce Tonn and Michael Hogan, "The House of Lords: Guardians of Future Generations," *Futures* 38 (2006): 116.

elections causes a situation in which deviating from the interests and preferences of the electorate is politically dangerous, because ignoring *their* wishes may result in not being re-elected, whereas ignoring the interests of future people and other animals costs them nothing. Thus the accountability mechanism incites political ignorance of all interests other than those which the electorate finds important, from which future people and non-human animals suffer similar consequences: it leads to short-sighted and anthropocentric politics.[189]

Also strikingly similar are the opportunities and difficulties of establishing some kind of political representation for future people and non-human animals. Most importantly, both entities are obviously unable to authorize representatives to act on their behalf, nor are they able to hold them accountable through periodical elections.[190] This means that the enfranchisement of both entities would require us to look into less conventional methods which establish interests reflection in governance. In this context, non-human animals and future people are yet again comparable in that a certain amount of paternalism cannot be avoided when it comes to the political incorporation of their interests. Both concerned entities have no political agency, and so their enfranchisement necessarily requires that currently living humans think and act for them. Both types of enfranchisement thus also struggle with the risk of abuse of power by humans who ought to represent future people's or non-human animals' interests in the political organs, and must find a way to mitigate this risk (about which also more in the next chapter). These are all very relevant problems of the current political-legal position of both entities and for the anticipated practical enfranchisement of both entities, and thus institutional solutions to these problems in the one context are highly relevant to, and possibly even recyclable in the other context.

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[189] With regard to future people (short-sighted politics): Ekeli, "Green Constitutionalism," 398; Kavka and Warren, "Political Representation for Future Generations," 21, 28–29, 36; Stein, "Does the Constitutional and Democratic System Work," 425–427; Thompson, "Representing Future Generations," 17–22; Tonn and Hogan, "The House of Lords," 116, 118; Edith Brown Weiss, "In Fairness to Future Generations," *Environment* 32, no. 3 (April 1990): 10.

[190] With regard to future people: Ekeli, "Constitutional Experiments," 450.

It is important to clarify at this point, however, that the fact that I will refer to institutional solutions proposed for handling some of these problems in the context of future people does not mean that I subscribe to the underlying philosophical position that future people have rights such as the consideration right. It is not at all clear that the currently living have obligations to future people, something that is all too easily assumed by many writers on this subject.[191] Although taking a stance in this regard is not strictly necessary for the purpose of this book, I will briefly discuss some of the complications related to future people's alleged claim to political rights, for this illustrates how much stronger sentient animals' claim to political rights is.

In order for us to be persuaded to agree that future people indeed have political rights, it must be established that they are part of the democratic people, the demos. We have seen in the previous chapter that many writers are indeed convinced that future people are part of the demos, for the reason that current democratic decisions also affect future people. This contention can be challenged, however, for it might be argued that the ontological status of future people prevents them from being counted as part of the demos. Future people by definition do not exist in the current moment; they are only a prediction of the future. Thus, in a certain sense, they are also not affected by current-day political decisions, because strictly speaking, they *are not*. In line with this argument, we could also maintain that future people, on account of being non-existent, cannot *have* anything, including rights. As put forth by political economist Wilfred Beckerman (1925–): "properties, such as being green or wealthy or having rights, can be predicated only on some subject that exists. Outside the realm of mythical or fictional creatures or hypothetical discourse, if there is no subject, then there is nothing to which any property can be ascribed."[192] In short, speaking of future people as "being affected" or "having rights" is thus futile, for they are not subjects but hypothetical entities.

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[191] Most often implicitly, but sometimes also explicitly, for instance in: Kavka and Warren, "Political Representation for Future Generations," 22. Kavka and Warren state that: "We shall assume that it makes sense to speak of those currently living having obligations to future generations, and that we do in fact have certain obligations of this kind."

[192] Wilfred Beckerman, "Intergenerational Justice," *Intergenerational Justice Review* 2, no. 2 (2004): 3.

Future people's claim to rights is rendered even more problematic by the fact that they are not only predictions of the future, but that these predictions of future existence are also uncertain. It is impossible to be certain whether future people will ever come into actual existence, for we can never exclude the possibility of a meteor striking the earth today, or of other apocalyptic disasters which could destroy all life on earth.[193] Of course, the chances that these things will happen to us in the near future are very small, but the fact that they might happen is relevant to the philosophical question at hand. It means that even if, for the sake of argument, we would agree that the hypothetical nature of future people does not, in principle, prevent them from having rights, they still only *potentially*, not actually, qualify for a consideration right. Future people will only potentially come into existence as actual individuals, and thus they will only *potentially* be individuals with interests that could qualify for rights protection. Deducing actual rights from this mere potential qualification for these rights would be a logical error. As pointed out by others, "what follows from potential qualification are potential, not actual, rights. A potential president of the United States is not on that account Commander-in-Chief [of the U.S. Army]."[194] Similarly, a potential individual with potential interests is not on that account a bearer of actual rights, such as the consideration right. The ontological status of future people as hypothetical entities and the uncertainty regarding their future existence are thus critical elements that raise problems and make their claim to political rights particularly weak—certainly weaker than that of actually and presently living individuals.[195]

In line with the previous argument, there is also a good liberal case to make against the rights of future people. It is a liberal adage that rights are never "free," in the sense of having no consequences for others. The here debated rights of future people would necessarily come at the expense of actual individuals with demonstrable interests. A liberal might argue that in

[193] Christopher D. Stone, "Safeguarding Future Generations," in *Future Generations & International Law*, eds. Emmanuel Agius and Salvino Busuttil (London: Earthscan Publications, 1998), 76–79.
[194] Stanley I. Benn as referenced in: Ekeli, "The Principle of Liberty and Legal Representation of Posterity," 400.
[195] Daniel Callahan, "What obligations Do We Have to Future Generations?" in *Responsibilities to Future Generations*, ed. Ernest Partridge (Buffalo: Prometheus Press, 1980), 73–85.

order to legitimately limit a person's freedom, a benefitting entity must be apparent and demonstrable. From a liberal perspective, it can hardly be justified that currently living beings have to give up some of their *actual* freedom for the *possible* advantage of *possible* future beings. This seems like a bad trade off in liberal terms, for actual freedom is sacrificed without anything close to certainty that others will receive benefits in return. Due to the hypothetical nature of future people, it is all but certain that others will benefit from that costly sacrifice. As such, especially *liberal* democracies should be very careful in going down the road of giving rights to hypothetical entities.[196]

Some have argued that establishing institutional representation of future people's interests is undesirable for more practical reasons. It is hard, if not impossible, to predict the interests and needs of future people, as these are continuously influenced by unpredictable factors, such as technological progress and natural forces, not to mention the behaviour and choices of current people. We cannot possibly be certain about how many people there will be in the future and what their most pressing problems will be.[197] It is therefore practically impossible to take the interests of future people into account, even if we were to agree that they would have this political right from a principled point of view. This practical argument is obviously not relevant to the question whether future people have a claim to rights in the first place, however.

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[196] This is not to say that liberal democracies may not offer less radical methods of serving the most probable future interests of probable future persons. Current politicians could, for example, voluntarily internalize the probable interests of posterity.

[197] See on the (in)determinability of future people's interests and how it affects the possibility of representing future people also: Kavka and Warren, "Political Representation for Future Generations," 24–25 (arguing that we do know a great deal about the interests of future people); Dobson, "Representative Democracy and the Environment," 131–132 (arguing that it is clear that there will be future people, that what we do now will affect them, that they will have interests, that these interests are capable being represented, and that we can be fairly sure that they will want both a viable environment in which to live and the possibility of satisfying their basic needs); Ekeli, "Green Constitutionalism," 387–390 (arguing that we at least have reliable knowledge about the physiological needs of future people and that courts are to determine which natural resources are critical to the physiological needs of future people); Thompson, "Representing Future Generations," 22 (arguing that uncertainty about future people's interests is reason to protect their capacity for making their own collective decisions); Anja Karnein, "Can We Represent Future Generations?" in *Institutions for Future Generations*, eds. Iñigo González-Ricoy and Axel Gosseries (Oxford: Oxford University Press, 2016), 83–97 (arguing that establishing deliberative bodies may reduce the uncertainty about future people's interests).

These difficulties seem to resist assigning future people political rights. We have not, however, investigated all the relevant arguments exhaustively and properly, so a definitive stance on this matter will not be defended in this book. What has been discussed though, gives enough reason to doubt the validity of future people's claim to political rights. Arguably, future people are not part of the demos, because future people *are* not affected by current decisions, but merely *will be at risk of possibly becoming* affected by current decisions. Their "affectedness" by political decisions thus seems fundamentally different from that of sentient animals (humans included) who are currently alive. Arguably, whether to come to future people's aid or not is typically an issue that should be subject to pluralistic democratic debate among the actual living, without future people having the luxury of leaning on rights protection that would place part of this issue outside of the democratic realm. Fortunately, these uncertainties about future people's political rights need not be sorted out here. It is, however, interesting to see that, in comparison with future people, sentient animals' claim to political rights is particularly strong. The circumstances that could affect future people's claim to a consideration right are absent in the context of sentient non-human animals. Sentient non-human animals are actually existing individuals, they have actual and demonstrable interests, they are existent in this time and place, and because they actually do live on the territory and they actually are affected by the political decisions made, it is hardly contestable that they are part of the demos and consequently have a consideration right. In liberal terms, it is not a bad trade off to give them (political) rights, since for actual restrictions on human behaviour, other sentient animals get an upgrade in actual freedom or actual well-being in return, and this often will be a much larger share than that which was surrendered by humans. Lastly, this book has argued that, if some effort is expended, it is possible to get a reasonable idea of what sentient animals' interests are.

The purpose of this section was to illustrate why it is fruitful and permissible to use some ideas concerning the enfranchisement of future people in the context of animal enfranchisement. Due to the fact that there are many

similarities in the challenges of designing enfranchisement models for future people and for non-human animals, we can learn from solutions proposed by some thinkers who maintain that future people must be enfranchised as well, without needing to subscribe to their preliminary philosophical position that this is normatively required. The situations of future people and non-human animals are comparable when it comes to the aspect that is relevant to this book: improving the un(der)representation of currently politically excluded entities. Both find themselves in a fundamentally subordinated position, both cannot make use of the conventional democratic methods of authorization and accountability, and thus both would need unconventional methods to have their interests considered in the institutions of a liberal democracy (if this were desirable in the case of future people). For this reason, I consider it methodologically acceptable to use some ideas from the models and solutions constructed for improving future people's political position in the next chapters, without implying that I also endorse the underlying presupposition that future people have a claim to political enfranchisement.

2.5 Conclusion

The main aim of this chapter was to get a clearer view of the normative goals of animal enfranchisement, of the current possibilities for animal enfranchisement in liberal democracies, and of their normative acceptability. The chapter proceeded in three stages.

First, five normative requirements of animal enfranchisement in liberal democracies were deduced from the interspecies theory of democracy. These criteria prescribe that liberal democracies must reserve an institutional place (*legitimacy requirement*) in which humans (*human assistance requirement*) are institutionally bound (*non-contingency requirement*) to consider the independent interests (*independence requirement*) of sentient non-human animals who reside on the territory of the state (*residency requirement*). The actual institutionalization of non-human animals' consideration right must be in line with these demands in order for it not to undermine the very democratic principles that underpin this right. These

five criteria continue to function as the normative framework for animal enfranchisement in the remainder of this book.

The second stage consisted of investigating what non-human animals' current position in liberal democracies is and whether this is sufficient in the light of the aforementioned enfranchisement criteria. Thus the current political and legal status of animals in liberal democracies was assessed, as well as three promising current developments which may directly or indirectly contribute to improving the actual protection of animals' interests in the nearby future. When set against the normative background, the overall picture of non-human animals' position was quite grim, and the three discussed developments were not able to alter this assessment, not even if they were to succeed in generating the most positive results possible in the nearby future. In that case, the legal and political institutions of liberal democracies would still have no in-built obligations to address the interests of non-human animals properly. The normative assessment of current liberal democratic structures led to some quite shocking findings. Regarding the (interspecies) legitimacy of current liberal democracies, we had to admit that thinkers typifying humans' political attitude towards other animals as "tyrannical" might have a point. Humans have given themselves the absolute right to rule over the lives of all other animals in an arbitrary and totalitarian way. This not only constitutes a grave violation of non-human animals' consideration right, but is also a democratic problem that undermines the principles that lie at the very basis of current open societies. Therefore, improving the position of non-human animals is not only essential in order to do justice to their consideration right, but it would also improve the democratic calibre of liberal democracies. The subsequent chapters thus focus on what types of institutional reform could improve non-human animals' position in liberal democracies.

In envisioning the interspecies liberal democracy of the future, it would be a waste of energy to reinvent the wheel completely if it is possible to learn from comparable pre-existing enterprises in adjacent disciplines. In our case, some models of institutional reform that have been proposed in the context of future people enfranchisement seem usable. The enfranchisement

of future people faces many of the problems that are also present in the context of non-human animal enfranchisement. These similarities, together with the fact that literature on interspecies institutional design is scarce, led me to the conclusion that it is fruitful and methodologically permissible to use ideas of institutional design concerning the enfranchisement of future people in the context of non-human animal enfranchisement. This was the third and last stage of this chapter. It has been stressed however, that these cross-references do not imply that this book subscribes to the underlying philosophical position that future people have political rights. In what follows, the options of improving liberal democratic institutions so as to make them account for non-human animal interests as well will be explored.

3

Enfranchising animals in political institutions

Introduction

The extreme political subordination of non-human animals is an alarming and fundamental problem of liberal democracies. Due to the suppressive and human-exclusive character of current-day liberal democratic institutions, some thinkers have lost confidence in these institutions, and have even argued that animal advocates have no reason to respect the prevailing political institutions.[198] This fatalistic and potentially anarchistic view of the matter is not shared in this book, however. The current blindness of liberal democratic institutions to non-human animals is worrying, but it need not cause us to lose all faith in the liberal democratic institutions or to disrespect them, nor does it mean that the liberal democratic model as such is to be discarded with. After all, there is not the smallest indication that other political systems could better accommodate a fair political and legal position for non-human animals, let alone while also offering the fruits of liberal democratic systems, such as political equality and respect for individuality, autonomy, and personal freedom. Furthermore, in *The Open Society and Its Enemies*, Karl Popper rightly points out that "It is quite wrong to blame democracy for the political shortcomings of a democratic state. We should rather blame ourselves, that is to say, the citizens of the democratic state. … Those who criticize democracy on any 'moral' grounds fail to distinguish between personal and institutional problems. It rests with us to improve matters. The democratic institutions cannot improve themselves. The problem of improving them is always a problem for *persons* rather than

[198] Friederike Schmitz, "Animal Ethics and Human Institutions: Integrating Animals Into Political Theory," in *The Political Turn in Animal Ethics*, eds. Robert Garner and Siobhan O'Sullivan (London: Rowman & Littlefield, 2016), 43.

for institutions. But if we want improvements, we must make clear which *institutions* we want to improve" (italics original).[199] In other words: if we are of the opinion that current institutions have serious shortcomings when it comes to the enfranchisement of non-human animals, we must not immediately throw in the towel and resign ourselves to democracy's failure but instead work on improving the institutions which show the defects in question. Humans are not helpless creatures who can only passively observe the liberal democratic institutions and stand by while they somehow mysteriously change into something unacceptable. Humans are the creators, guardians, and adapters of institutions, and if these institutions fall short in one way or another, we can gather our social "tools" and start adapting them in the preferred direction. As Popper reminds us, democracy itself provides the institutional framework for the reform of political institutions, but what democracy cannot do is provide *reason*. Only humans can "inject" reason into political institutions while designing new ones or adjusting old ones.[200] We are thus not necessarily stuck with the current unreasonable and anthropocentric institutions. It must be, in principle, possible to adjust the institutions of our open societies in such a way that they will come to reflect a reasonable regard for non-human animals' interests, if only humans find the urge to do so. Liberal democracies have shown to be astonishingly flexible in the sense that their political and legal institutions can adapt to radically changed ideas of equality, and there is no reason to think that this is not possible this time. If we, like Popper, think of liberal democracy as an almost "scientific" political model that continuously facilitates adaptation to the latest knowledge and moral convictions through gradually abandoning the social policies that could not withstand critical scrutiny, then there is some reason to be optimistic.[201] Current liberal democracies, which have institutionalized the scientific method to learn from mistakes, might be saved from the accusation of being illegitimate if the currently neglected

[199] Popper, *The Open Society and Its Enemies (Vol. I)*, 127.
[200] Popper, *The Open Society and Its Enemies (Vol. I)*, 126.
[201] Karl Popper, *The Poverty of Historicism* (London: Routledge & Kegan Paul Ltd, 2004/1957); Popper, *The Open Society and Its Enemies*; Michael Shermer, *The Moral Arc: How Science and Reason Lead Humanity Toward Truth, Justice and Freedom* (New York: Henry Holt and Company, 2015).

interests of non-human animals are institutionalized by humans. This would, in sound Popperian reasoning, indeed enhance the open society, since Popper believed that minimizing suffering and fighting tyranny were two fundamental moral demands for mankind.[202]

There are roughly two potential ways in which the enfranchisement of non-human animals in liberal democratic institutions can take form: one political, the other legal. The first option is institutionalizing the consideration right of animals in *political* institutions. In this division between political and legal institutions, political institutions are taken to be all governmental institutions concerned with the legislative and executive processes of a liberal democratic state. A successful enfranchisement of non-human animals in these political institutions would have the result that animal interests become a factor in the political deliberations of a state, and thus, ideally, their interests would be duly referenced in the legislation and policies that follow from this deliberation. Examples of incorporating animal interests in political institutions could be reserving a number of seats in parliament for animal representatives or installing a commission (possibly with veto power) on issues related to animal welfare.

The second way in which the enfranchisement of non-human animals in liberal democratic institutions can take form is through institutionalizing the consideration right of non-human animals in the *legal* framework of a liberal democracy, which comprises the institutions essential for the rule-of-law element of a liberal democracy. Through adopting legally binding duties for humans to respect the interests of non-human animals and by creating some type of institutional embedding for this, non-human animals could be legally enfranchised. Examples of incorporating animal interests in legal institutions are introducing a constitutional state objective on animal welfare or fundamental legal rights for non-human animals.

The distinction used here between the "political" and "legal" institutions of a liberal democracy obviously is only a simplification of the much more complex reality in which legal and political aspects of a liberal democratic state often overlap and mutually affect one another. The

[202] Popper, *The Open Society and Its Enemies (Vol. I)*, 65, 235 (note 6).

constitution, for example, often details not only the most fundamental political structures of a state but also the most important legal rights of citizens. It is thus impossible to say whether the constitution is "political" or "legal," for it clearly has characteristics of both. Similarly, the legislative body is not merely "political": because it produces law, it could, from that perspective, also be labelled as "legal." Not even the law itself is straightforwardly "legal," for many legal rules have important political side-effects or regulate political processes. Likewise, the "political" enfranchisement of animals will ultimately only be possible through legal changes that demand and establish adaptations in the political processes. Even though the distinction between political and legal institutions is thus far from ideal, distinguishing between institutions in this way is necessary to bring some structure to the many and divergent options of giving effect to animals' consideration right that will be discussed in the remainder of this book.

In this chapter, the possibility of *politically* institutionalizing regard for non-human animal interests will be investigated. To this end, the most important general challenges of politically incorporating animals' consideration right will be discussed and analysed. In the first section, the six most important and foreseeable challenges of politically institutionalizing animal interests will be discussed. They are: (I) whether non-human animals can be politically represented by humans at all; (II) the challenge of determining the right content of representation; (III) the challenge that animal representatives must be prevented from abusing their political power; (IV) the challenge of determining the right amount of political power that ought to be assigned to animal representatives; (V) the challenge of controlling the democratic costs[203] of politically enfranchising non-human animals; (VI) the challenge of institutionally dealing with the heterogeneity of animals' interests. In the second section, the findings of the first section are brought together and analysed as a whole, mainly against the background of the five criteria for animal enfranchisement. In the third section, it will be elucidated that, given

[203] The term *democratic costs* refers to immaterial costs that the endeavour of enfranchising non-human animals may incur, which could be problematic from a democratic point of view.

the deeper characteristics of the political sphere, it is not realistic to expect that all the requirements for animal enfranchisement will be met by merely making institutional adjustments in the political sphere.

3.1 Challenges of politically institutionalizing regard for animal interests

There seem to be many possibilities of politically institutionalizing a certain regard for animal interests. Some examples are installing an animal ombudsman, reserving a certain amount of seats in parliament for animal representatives, and introducing an extra-parliamentary committee on animal welfare. Apart from the fact that one can think of many different such models for politically enfranchising animals, the specific institutional embedding of each of those options could also be up for debate. Specific details concerning, among other things, the competences of such new institutions, the selection of representatives or other occupants of key positions, and the embedding of such institutions in the pre-existing balance of powers are not fixed and could vary significantly. What should the competences of an extra-parliamentary committee be? What qualifications should a candidate animal ombudsman have? Who or what institution should review the work of permanent animal representatives in parliament? There are no fixed answers to these questions, for, in principle, we could design such models in any way we like. The fact that many political enfranchisement models are conceivable, combined with the fact that the details of each of these models can also vary greatly, means that there is an almost indefinite pool of options for politically enfranchising animals. It is therefore impossible to exhaustingly investigate all the conceivable models of political animal enfranchisement on their own specific merits, and this chapter has no pretention to do so.

A different methodology of investigating the possibilities of politically enfranchising animals is possible, however, and that is to analyse which overarching problems we are likely to encounter in all or many such models of political animal enfranchisement. It is possible to investigate the enfranchisement of animals from a more abstract perspective and look for overarching challenges that seem to be inherent to the political enfranchisement of animals as such and are thus likely to be apparent in

many of these specific models. The benefit of this methodology is that this type of analysis will enable us to eventually establish some more general recommendations about the political enfranchisement of non-human animals, recommendations which should be relevant to a great number of specific models of political animal enfranchisement.

I. The challenge of representing non-human animals

The first challenge that is immediately apparent when considering political animal enfranchisement concerns the difficulty of politically representing non-human animals. We have established before that non-human animals are political patients and that they are thus in need of human assistance if they are to have any meaningful political status at all. But is it possible to politically represent non-human animals?

The fact that non-human animals are by definition political patients seems to create additional challenges when it comes to their political representation. Our communication with non-human animals is far from ideal, non-human animals cannot comprehend politics, and they cannot reflect on the world as required for political acting. As a result of these difficulties, we cannot rely on the political mechanisms that generally seem to work in the case of human representation.[204] Essential to the representation of human agents is hearing what their political preferences are, but this is obviously not practicable with non-human animals. Additionally, only human agents are able to communicate their explicit discontent if their representative does not offer the kind of representation wished for. Human agents can, in other words, communicate their political wishes and preferences to their representatives and redirect them if necessary, while non-human animals cannot. It has been suggested by some thinkers that these deficiencies of non-human animals disqualify them as candidates for formal political representation. Hanna Pitkin, for example, argues that necessary preconditions for formal representation are having a

[204] Smith, *Governing Animals*, 103–105. With regard to the representation of future people, Kristian Skagen Ekeli has similarly pointed out that common political mechanisms such as authorization and accountability are impracticable: Ekeli, "Constitutional Experiments," 450. Obviously, to say that these mechanisms generally seem to work in the case of human representation is not to say that the representation of humans in liberal democracies is flawless and cannot be further improved.

will of one's own, having some sort of capability to judge the representatives on the rightness of the offered representation, and being able to initiate government activity. Without having such a will and capabilities of "action and judgment," politicians would be taking care of their constituents rather than representing them, just like parents take care of their children instead of representing them, writes Pitkin.[205] Given the obvious impotence of non-human animals to instruct and judge their hypothetical representatives, it indeed seems right to say that this classic form of formal representation as it currently works for human agents is not an option in their case.

The inability of non-human animals to scrutinize and reflect on the offered representation does not, however, necessarily lead to having to abandon the idea of politically representing animals altogether, because different types of representation exist. In his essay "The Rights of Animals and Unborn Generations," political and legal philosopher Joel Feinberg points out that there is no logical reason to require that a principal must be able to direct and instruct his representative.[206] Although Feinberg stresses this point in the context of the *legal* representation of non-human animals, his arguments are similarly relevant to the claim that non-human animals cannot be *politically* represented on account of their incompetence to direct and instruct their representatives. Feinberg argues that although some type of active steering of the representative by the represented is generally apparent in typical representative relationships, "there appears to be no reason of a logical or conceptual kind why that *must* be so" (italics original).[207] There seems to be, in other words, simply no reason to demand that represented animals have the capacity to appoint, instruct, and control their representatives themselves. Moreover, human political patients who are similarly "incompetent" in relevant ways exist, and these individuals are not excluded from representation either. To the contrary, they have access to legal representatives who can be appointed to act on their behalf. These representatives must exercise their own professional judgment in deciding what adequately acting on behalf of the principal requires. Feinberg: "Small

[205] Pitkin, *The Concept of Representation*, 154, 162, 209–211, 232; Smith, *Governing Animals*, 103–109.
[206] Feinberg, "The Rights of Animals and Unborn Generations," 43–68.
[207] Feinberg, "The Rights of Animals and Unborn Generations," 48.

children and mentally deficient and deranged adults are commonly represented by trustees and attorneys, even though they are incapable of granting their own consent to the representation, or … of giving directions."[208] In this framework, much is required of the legal representative, but little or no demands are made on the principal, because he may leave everything to the judgement of his agent.[209] This makes this type of representation particularly suitable for principals who lack independent judgement and action capabilities, such as non-human animals. There is, according to Feinberg, no reason to assume that this type of legal-trustee representation should not be open to other animals. Similarly, in the context of political representation, the shortcomings of non-human animals need not immediately lead to the radical conclusion that political representation as such is impossible. Instead, it seems appropriate to be more nuanced and hold that only the type of political representation as it is currently used for human political agents is untenable for non-human animals. A different kind of representation might be still possible and adequate, however. Trustee representation, a form of political caretaking that places lower demands on the represented but higher demands on the trustees who will politically represent them seems particularly suitable in the case of non-human animals.

Gregory S. Kavka and Virginia Warren, in their search for possibilities of political representation for future people, take a road that is similar to that of Feinberg.[210] It was previously pointed out that, among other things, future people are similar to non-human animals in that both are unable to instruct their political representatives. In exploring the theoretical relevance of this complicating circumstance, Kavka and Warren echo Feinberg's standpoint that the fact that principals cannot communicate their wishes to their representatives does not necessarily mean that representation as such is impossible. They add, however, that this would only be true if the representative were completely in the dark about what the interests of his principal are. Then, obviously, no form of political or legal

[208] Feinberg, "The Rights of Animals and Unborn Generations," 48.
[209] Feinberg, "The Rights of Animals and Unborn Generations," 48.
[210] Kavka and Warren, "Political Representation for Future Generations," 21–39.

representation would be practically possible. Kavka and Warren: "If one party [had] no reasonable beliefs at all about what another party's interests are, … it would be impossible for the former to represent the latter, except by acting on the latter's instructions."[211] In other words: a lack of instructions is, on its own, not detrimental to the possibility of representation; that is only the case in combination with complete ignorance about the interests of the principal. However, as long as there is some information available about what the principal's interests are, there is no reason to claim that the inability of the principal to instruct his representative is fatal to political representation altogether. An atypical kind of representation is still possible if the representative is able to make "better than random" judgments about the likely interests of the principal and how policies may affect these interests.[212] Since it is possible for humans to have some idea about what the interests of sentient non-human animals are, it is not necessary to disqualify non-human animals for political representation on the grounds that they are unable to instruct their representatives. This circumstance will, however, place greater demands on the representative, for he will have to give substance to his profession by acting as a political trustee, as will be discussed in the next subsection.

II. Content of representation and political guardianship

The incompetence of non-human animals to directly inform and instruct their representatives puts additional pressure on the responsibility of the representative in determining the content of the representation. In general forms of representation, the representative can relatively easily determine the content of representation mainly by listening to what political preferences human agents explicate. However, this source of information is largely absent in the case of non-human animal representation. Non-human animals cannot always communicate their personal preferences, and certainly not political preferences and ideas. Therefore, determining the content of non-human representation cannot take place in the same way as

[211] Kavka and Warren, "Political Representation for Future Generations," 24–25.
[212] Kavka and Warren, "Political Representation for Future Generations," 25.

that of humans.[213] Furthermore, it remains to be seen whether the preferences of non-human animals—if even somehow (physically) expressed—should be really leading animal representatives in their political representation of animals. Determining the content of representation thus is quite a challenge for any political animal representative.

Generally, there seem to be two sources which can define the content of representation. First, the interests of the represented. Second, the preferences of the represented. In this distinction between preferences and interests, interests are best understood as they were defined before: a certain good or action is in an individual's interest if it positively affects the well-being of that individual. Preferences, on the other hand, are expressions of (political) will. Preferences often overlap with interests, that is: people often want what is conducive to their well-being, but this is not necessarily the case. In what follows, preferences that run counter to the actual interests of an individual will be termed "irrational preferences." An example of such an irrational preference is some peoples' preference to use a tanning bed, even though this runs counter to their objective interests in maintaining good health, because using a tanning bed increases the chance of developing skin cancer, and thus may cause an unpleasant sickbed and shorten a person's lifespan. For most people, in all likelihood, the overall happiness gained from using a tanning bed will, on balance, not weigh up to (the risk of) getting seriously ill and shortening their lifespan. In those cases, the preference for using a tanning bed can be deemed an irrational preference, because the preference is not in alignment with the overall interests of that person. In some exceptional cases, however, using a tanning bed may bring a person so much happiness and thus increase his well-being so much that, on balance, this outweighs the negative impact that the practice has on his health interests. In these exceptional cases, the preference for using a tanning bed can be qualified as a rational preference that still is in that person's

[213] It is not denied here that there will probably always be some interpretation problems in the communication between representatives and the represented, even between perfectly capable human representatives and perfectly capable human constituents. The point made here, however, is that human language enables us to express our preferences quite straightforwardly to one another, and thus gets us a long way in narrowing the interpretation gap, much more so than imperfect types of communication with other animals can.

interest, because on balance it has a positive impact on the well-being of that individual.

The distinction between interests and preferences is important in this context of discussing the content of animal representation, for it might be argued that the accent on either preferences or interests is different in the case of non-human animal representation when compared to human representation. It seems logical that, in the representation of political agents, the *preferences* of the represented are of pivotal value, whereas representing political patients requires the representative to focus more on the *interests* of the represented. In other words, it seems that representatives of political agents should focus more on the preferences of their constituents, whereas representatives of political patients should focus more on the actual interests of their principals.

Human agents generally have a well-developed capacity to understand and reflect on the world and on their own lives, and they can make relatively good predictions of future events, because they know and understand (many of) the causal rules of the world. For this reason, it is relatively uncontroversial to presume that they can generally autonomously understand their own interests and that they, in some cases, may deliberately prefer something that runs counter to their objective interests. We accept, in other words, that human agents sometimes have and pursue irrational preferences, such as using a tanning bed while this, on balance, negatively affects the well-being of that person. If a human agent has such irrational preferences and acts on them, we assume that he understands the consequences of this choice, and we deem it acceptable or even preferable that a political representative honours this choice out of respect for the autonomous and informed choice of his constituent. Exactly because human agents are rational and because they are capable of reflecting on their own lives in a complex way, we accept that human agents can politically pursue something that, strictly speaking, contradicts their objective interests. Smokers can politically pursue lower taxes on cigarettes, even though they are aware that this may stimulate the behaviour that poses a risk to their health and even if the pros of smoking do not weigh up to the cons in light of these people's overall well-being. Besides interests, liberal democracies

also value individual autonomy, and consequently ideally abstain from paternalism over informed, rational, and autonomous individuals. Consequently, representative politicians are generally expected to follow up on these sometimes irrational preferences of the electorate.

Obviously, other animals express (irrational) preferences too, and one could argue that these should also be uncritically accepted by their representatives as genuine political positions under the umbrella of respect for individual autonomy. This would mean that animal representatives would have to take the expressed preferences of non-human animals as their lead in determining the content of representation, even if these preferences are irrational in the sense of impairing the overall well-being of the animals themselves. However, having such "respect" for the autonomy of the non-human animal would be misplaced. Precisely because non-human animals are equipped with fewer capacities that allow them to be informed about the world and the consequences of their actions, politically respecting all of their preferences, including irrational ones, would be a mistake. This can be clarified with an example.

Suppose a certain national nature park is struggling with an alarming outbreak of a lethal canine disease. Several wolves have been found dead and a couple of companion dogs who have entered the park have also met their end because of the disease. For this reason, the park is temporarily closed off for companion dogs. It is plausible that many dogs, especially those who are used to having their daily walk in this park, want to enter the park nonetheless, and express these preferences by forcefully pulling their human companions in the direction of the park entrance and swinging their tails when approaching the park. A local political animal representative may translate these expressions of dog preferences into a political preference for lifting the dog ban on the park. Must he, as a matter of representing the dogs, respect the dogs' irrational preferences and politically pursue withdrawing the dog ban on the park, even though he knows that this may lead to more dog deaths? Are these expressed dog preferences, in other words, to be politically respected the same way as the sunbather's autonomous but irrational wish to reduce taxes on entrance fees for tanning salons?

There are two things that this example illustrates. First, it illustrates that it is, unlike Kimberly K. Smith argues, not true that "we can assume that they [non-human animals] want what is conducive to their welfare."[214] Non-human animals, like the dogs wishing to enter a contaminated park, obviously often want what harms their welfare. Other examples of animals having such irrational preferences are animals wanting to eat themselves into obesity; animals not wanting to eat, drink, or go to the veterinarian when ill; animals wanting to scratch open healing wounds; or animals wanting to play wildly while recovering from a bone fracture. In all these examples, animals have preferences that, if pursued, would directly run counter to their objective interests. In contradiction to Smith's assertion, the preferences of non-human animals thus are often a poor indication of animals' actual interests.

The second thing that this example illustrates is that animal representatives should not uncritically accept and politically pursue all expressed preferences of non-human animals. It would be an obvious mistake for the animal representative in the example to respect the dogs' wishes to go into the contaminated park by politically pleading for lifting the ban. This would have the effect of pleading for policy that leads to the death of some of the representative's principals. That does not seem to ever be an acceptable fulfilment of the task of animal representatives. Still, the theoretical question remains what the relevant difference between the human constituents' preferences and the non-human animal principals' preferences is. Why are humans' irrational preferences generally to be politically respected and non-human animals' irrational preferences generally not?

Importantly, non-human animals are, in a fundamental way, generally *uninformed*. They are generally uninformed about many facts of the world, and ignorant of many rules of logic that rule the world, mainly because humankind has not yet succeeded in communicating this abundance of complex information to other animals (supposing that some other animals possess the capacities necessary to process such information).

[214] Smith, *Governing Animals*, 104.

This information, however, enables a person in general to envision the alternatives he has (going to the tanning salon or not), to make reliable predictions about his own future well-being when each of these alternatives is pursued (increased risk of an early death due to skin cancer or not), and to make an autonomous choice between these alternatives (accepting the increased risk of an early death or not). Crucially, lack of information generally prevents non-human animals from envisioning the alternatives they have (entering a contaminated park or not), from making reliable predictions about their own future well-being when each of these alternatives is pursued (possibly dying of the canine disease or not), and thus from making an autonomous choice between these alternatives (accepting this possible early death or not). In other words, unlike most people who visit tanning salons, non-human animals often cannot oversee the consequences of their choices and actions. Whereas the tanning salon visitor is generally aware of the consequences of his unhealthy behaviour and may autonomously choose to continue sunbathing nonetheless, the dog wanting to enter the park has no idea of the contamination, nor that entering the park may cost him his life. The irrational preferences of the tanning salon visitor on the one hand and the dog on the other hand are thus not fully comparable, and thus also not equally respectable. The crucial difference seems to be whether an individual is making an *autonomous and informed choice* to either accept the foreseeable consequences or not. The tanning salon visitor's preference rest on an informed, considered, and autonomous decision, whereas the dog's preference is shrouded in ignorance, and rests on no such decision at all.[215] Implied in the preference of the tanning salon visitor is the acceptance of the fact that he may get ill and die years sooner than necessary. In most cases, he is aware of that, he has autonomously weighed the pros and cons of continuing to sunbathe, and he has autonomously accepted the consequence of risking illness and early death. The dog will also risk early death if his irrational preference is carried out, but unlike the sunbather, the dog is not aware of this, and thus cannot and has not autonomously accepted this fatal consequence. Because of his

[215] That is, insofar as the sunbather is a moral agent and insofar as addiction does not impair his autonomy. Moral patiency and addiction reduce the level of autonomy implied in the preference.

fundamental uninformedness, the dog was never in the position to weigh the pros and cons of entering the nature park. Putting the dog's irrational preference into political practice thus does not seem to constitute respect for his autonomy but rather respect for his ignorance, which is much less laudable—and certainly not prescribed by liberal democratic principles. It is important to emphasize here that even though it may be true that non-human animals *generally* do not express the type of reflected preferences that humans generally have, it cannot be ruled out that some non-human animals may, on some exceptional occasions, have perfect information positions and express preferences in the full sense of implying an informed and autonomous decision. Such exceptionally informed and autonomous decisions should ideally be respected in the political reflections of the animal representative.[216] In general, however, non-human animal preferences are likely to be under-informed and under-reflected preferences, because of their generally poor information position.

When we compare the situation of human agents with that of non-human animals in light of what the content of political representation should be, we see some important differences. The content of human agents' representation is primarily determined by their explicated preferences—even if these are irrational from an objective point of view. It is, however, much harder to ask non-human animals what they wish for, and even if they could occasionally communicate their preferences to us, animal representatives would still have to filter out the preferences that run counter to animals' actual, objective interests. Therefore, to construct the content of political representation, animal representatives will have to determine what animals' actual interests are and politically pursue these interests. In determining the scope of their interests, scientific facts, experience, and rationality must be leading. Crucially, these three factors are often a better indication of non-human animals' interests than the animal's own will. Just

[216] Neither the uninformedness of non-human animals nor the informedness of humans are a natural given. Obviously, exceptions exist. In general, however, it seems fair to say that *most human individuals* can achieve some level of essential informedness, whereas *most non-human individuals* cannot. Since we are discussing this subject in the context of how a political system should, in general, be set up, it seems prudent to work with these generalizations. Needless to say, institutional exemptions should be arranged for individuals who deviate from these generalizations.

like the profession of a child advocacy attorney sometimes requires him to *not* act on the child's direct preferences for the child's own sake, so must the animal representative deploy his own judgment rather than blindly replicating the preferences of animals in political contexts. If non-human animals express preferences, they ought to play a secondary role in their political representation. Dogs may wish to enter a contaminated park, but scientific facts, experience, and rationality tell us that it is in their interest not to grant this wish. Human agents, with their superior knowledge about the facts of the world and its causal rules, which in combination enables them to make superior predictions of future states of well-being, are generally in the best position to make such decisions for dogs. This means that in some cases, the preferences of non-human animals may be overruled, but only if scientific facts, experience, or rationality tells us that it is in the animals' own overall interests.[217] Crucially, the profession of the animal representative is thus not so much representing the animals themselves, with all their irrational and harmful preferences, but rather to represent the interests of these animals.[218]

Burkean trusteeship

It thus seems that, in order to make the political representation of non-human animals work, we must make high demands of the role of the representative. The animal representative must be able to filter out the irrational preferences of non-human animals that would harm their own interests if acted upon. Such an understanding of what it takes to be a representative is not at all new. A political-theoretical background for such a rich understanding of the representative's profession can be found in Edmund Burke's work on political trusteeship. Confronted with the challenges of non-human political representation, breathing life back into his traditional concept of trustee representation may prove to be valuable.

[217] Obviously, the negative impact that restraining the animal's will has on his well-being (such as the disappointment that follows from being prevented from going into the park, or the anxiety that follows from being forced to go to the veterinarian) ought also to be taken into account in this weighing process.
[218] See on this point of representing either *people* or people's *interests* in the context of the representation of future people: Kavka and Warren, "Political Representation for Future Generations," 24.

Edmund Burke was an Irish philosopher and a practicing politician for the Whig Party who made name for himself as the founding father of conservatism.[219] Being a political philosopher and a practicing politician himself, Burke had distinguished thoughts about the proper fulfilment of the profession of the political representative.[220] Burke was a known defender of the idea of political trustee representation, in which the emphasis is on the representative's own autonomy and judgement, rather than on the wishes of the constituency. He thought that, in political representation, it is not the specific instructions, directions, or expectations of the constituency that should be leading, but rather the representative's own knowledge and judgment about the proper course of action. In other words, the representative ought not to uncritically echo the constituents' preordained opinions in the political bodies (*delegate representation*), but rather must be an autonomous representative who employs his own mature judgment and enlightened conscience in deciding what is best for the nation: a *trustee*. The trustee representative is thus "trusted" with the responsibility to make the right decisions in any political circumstances that may arise, and this trust is buttressed by his (alleged) superior knowledge, character, and judgment capacities. The delegate representative, on the other hand, is not so much trusted for making good decisions himself, but is rather a puppet of the electorate, meant only to carry out the explicit instructions "delegated" to him by his constituents.[221]

The trusteeship-type of representation thus clearly emphasizes the capacities of the representative himself and his wide discretion in deciding on the content of representation. The trustee's discretion includes the freedom to focus on what he thinks are the objective interests of his constituents, which may differ from how the constituents perceive their own interests themselves. Trustee representation implies that the trustee may choose to not follow the preferences of his constituents and pursue a

[219] Rudolf Boon, *Een Progressieve Conservatief: Edmund Burke als Tijdgenoot* (Soesterberg: Uitgeverij Aspekt, 2004).
[220] Edmund Burke, "Mr. Edmund Burke's Speech to the Electors of Bristol," in *Select Works of Edmund Burke: Miscellaneous Writings (Vol. IV)*, ed. Francis Canavan (Indianapolis: Liberty Fund, 1999/1774), 5–13.
[221] Delegate representatives have also been compared to servants, mirrors, megaphones, envelopes, tools, limbs, mouthpieces, typewriters, and telephones. Pitkin, *The Concept of Representation*, 146–147,151–152; Feinberg, "The Rights of Animals and Unborn Generations," 47.

different course of action instead (such as one that would be in the interests of the nation as a whole). Trustee representation does not, however, necessarily imply that the opinions and preferences of the constituency have no role to play. Burke considered it not only reasonable, but imperative that a representative is informed by the "weighty and respectable opinion" of his constituents, an opinion "which a Representative ought always to rejoice to hear; and which he ought always most seriously to consider."[222] He, however, also makes it clear that even though these weighty and respectable opinions must be taken into account, they cannot have a significant restricting effect on the autonomous decision of the representative. The trustee weighs the wishes of the constituents on his own and to the best of his abilities. The idea that constituents should be able to issue mandates which the representative is bound to blindly obey, vote for, and argue for is dismissed by Burke.[223] Burke put this philosophical position into practice as well, which eventually cost him dearly. In 1778, as a member of the British Parliament for the district of Bristol, Burke actually acted contrary to the explicit wishes of his constituents. The Bristolians could have known what was coming for them. Burke, in his inaugural speech in 1774, had warned them that he would not be a "flatterer" and that he would be prepared to act against the opinions of the Bristolians if he thought the general good of the rest of the British community demanded it.[224] And so it happened that Burke voted contrary to the explicit wishes of his Bristolian constituents, in a matter concerning trading regulations with Ireland. After this affair, Burke became so unpopular that he did not stand a chance of being re-elected for the same district in 1780.[225] In a speech in the House, Burke commented on this matter as being "an example to future representatives of the Commons

[222] Burke, "Speech to the Electors of Bristol," 10–11.
[223] Burke, "Speech to the Electors of Bristol," 11.
[224] Burke, "Speech to the Electors of Bristol," 11–12.
[225] However, Burke accepted a safe seat and became representative for the district of Malton. He held this seat from 1780 to 1794. Francis Canavan, "Speech to the Electors of Bristol," in *Select Works of Edmund Burke: Miscellaneous Writings (Vol. IV)*, ed. Francis Canavan (Indianapolis: Liberty Fund, 1999/1774), 3–4.

of England, that one man at least has dared to resist the desires of his constituents when his judgment assured him that they were wrong."[226]

As illustrated by this example, the practical viability of Burkean trustee representation in the real world is questionable (when applied to humans, that is). John Stuart Mill, also a supporter of the trustee model of representation, warned in 1861 that the viability of the trustee model depends heavily on what he called the "constitutional morality" of the electorate.[227] If voters do not elect representatives based on their character and judgment capacities, but instead let themselves be seduced into voting for demagogues on account of their alluring but static political promises (in other words: delegate representatives), the trustee model does not stand a chance of persisting. With such a poor electoral attitude, trustees—like Burke—will lose their seats, and demagogues determined to get voted into parliament by telling the people what they want to hear but who lack the right judgement capacities will come to dominate politics instead. Mill predicted that without cultivation of the moral duty of electors to "choose educated representatives, and to defer to their opinions," the representative systems would eventually convert into ones of mere delegation. "As long as they [the electors] are … free to vote as they like, they cannot be prevented from making their vote depend on any condition they think fit to annex to it. By refusing to elect any one who will not pledge himself to all their opinions, … they can reduce their representative to their mere mouthpiece, or compel him in honour, when no longer willing to act in that capacity, to resign his seat. And since they have the power of doing this, the theory of the Constitution ought to suppose that they will wish to do it; since the very principle of constitutional government requires it to be assumed, that political power will be abused to promote the particular purposes of the holder." Hence, Mill predicted, "let the system of representation be what it may, it will be converted into one of mere delegation if the electors so choose."[228]

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[226] Charles MacFarlane, *The Cabinet History of England (Vol. 19)* (London: Charles Knight and Co., 1846), 61–62.

[227] Mill, "Considerations on Representative Government," 504–505.

[228] Mill, "Considerations on Representative Government," 504–505, 512.

It seems Mill's prophecy came true. Current-day liberal democracies seem to bear more resemblance to the delegate model of representation than to the trustee model of representation. Instead of electing representatives on account of their superior knowledge and judgment capacities, the alternative delegate "character of mind" seems to be omnipresent among the electorate in current-day liberal democracies. It is the attitude in which the electorate does not particularly look up to representatives, but sees them more as tools that can be used to get its pre-established opinions replicated in the political institutions. Mill illustrated this mind-set as follows: "[it is the character of mind] which thinks no other person's opinion much better than its own, or nearly so good as that of a hundred or a thousand persons like itself. Where this is the turn of mind of the electors, they will elect no one who is not, or at least who does not profess to be, the image of their own sentiments, and will continue him no longer than while he reflects those sentiments in his conduct."[229] It almost seems like Mill was describing the electorate of twenty-first century liberal democracies.[230] Apparently, trustee-like representation is not what people are looking for—or at least not voting for. However, despite the unpopularity of the trusteeship idea today, Burke's trustee concept is highly relevant in the context of *animal* representation. It may function as a theoretical foundation for the preferred role of animal representatives.

It must be noted that Burke did not devote a single word to non-human animals in the speech that became his classic exposé on trusteeship representation.[231] Nor can he, to the best of my knowledge, be linked in any other way to an animal-friendly philosophical outlook—which is not surprising considering that Burke lived in the eighteenth century.[232] Jeremy

[229] Mill, "Considerations on Representative Government," 508.

[230] As an advocate of accessible education, John Stuart Mill could only have dreamed of the highly educated electorates and the high level of accessibility of information that democracies have today. It is interesting to contemplate the question of whether Mill would still be an advocate of the trustee type of representation if he could have foreseen how well-educated the electorate, and how accessible information would be in the twenty-first century.

[231] Burke, "Speech to the Electors of Bristol," 5–13.

[232] Burke addresses animals in *A Philosophical Enquiry into the Origin of Our Ideas of the Sublime and the Beautiful*, but non-human animals did not become a coherent part of his political philosophy. Edmund Burke, *A Philosophical Enquiry into the Origin of Our Ideas of the Sublime and the Beautiful*, ed. Paul Guyer (Oxford: Oxford University Press, 2015).

Bentham was, in that sense, quite an exception and far ahead of his time for publishing on the moral status of non-human animals as early as the eighteenth century. Considering the foregoing, it seems reasonable to assume that Burke did not have any intention of including non-human animal representation in his concept of trustee representation. However, with its emphasis on the autonomous judgment of the representative, Burkean trustee representation seems to offer an interesting solution to the earlier discussed problem that non-human animals typically cannot instruct their representatives on the content of their representation. The trustee model of representation, with its focus on the independent and informed judgment of the representative to discover the true interests of his principals, is thus particularly suitable for animal representation.[233] Trustee representation creates an opportunity of representing the interests of individuals who cannot represent these interests themselves, nor form or explicate political preferences. The fact that non-human animals are unable to join in the mentally demanding game of politics thus does not need to mean that they are doomed to be ignored in the political sphere, if only human trustees can make political decisions and judgments on their behalf.

Paternalism

One issue regarding trustee representation remains to be addressed, however. Political trustee representation and political guardianship (terms that are used interchangeably in this book) have often been criticized on the ground that such types of representation are too paternalistic for modern liberal democratic standards. Democrats, especially liberal ones, are obviously wary of paternalism. For apart from possibly having positive effects, paternalism is also a potential threat to the autonomy and freedom of the individual being taken care of. It is clear that guardian-like types of representation have a strong inherent element of paternalism, and since there is a fine line between rightfully administered paternalism and unwarrantedly taking away someone's freedom to make choices for themselves and to behave in their own way, the acceptability of trustee-like

[233] Smith, *Governing Animals*, 103–106. See also: Cochrane, *Sentientist Politics*, 46–47.

animal representation with regard to paternalism must be addressed before we can advocate this type of representation for non-human animals.

How dangerous paternalism can be to individual freedom and autonomy is immediately apparent when we consider the world's disastrous historical applications and misuses of the guardianship idea. Many authoritarian regimes, such as those of Vladimir Lenin (1870–1924) and Mao Zedong (1893–1976) have appealed to the idea of guardianship by maintaining that a strong guardian of superior knowledge, character, and virtue is needed to bring about the general good. The track record of guardianship types of governance in the real world thus gives rise to quite some suspicion with regard to the guardianship concept.[234] The fact that authoritarian leaders have tried to base their legitimacy in the guardianship model is, in other words, a serious negative indication for adopting such a model, and this real-world experience should at the very least stimulate us to find ways to prevent such abuses of power in possible future applications of the guardianship model. However, it must be said that virtually every theoretical political model has been abused by power-hungry leaders in the real world, and such historical misuses alone cannot be decisive in disqualifying a theoretical political model altogether.[235] Real-world failures are not absolute proof of the normative deficiency of a theoretical model, for real-world failures may be caused by mistakes in the practical translation of the theoretical idea. In the case of the guardianship idea, the primary reason for the failure of its real-world application seems to be that paternalism was administered over perfectly politically competent people. Furthermore, adequate institutional protections against abuse of power by the "guardian" were lacking. We must learn lessons from these mistakes if we are to seriously consider introducing guardian-like representation for non-human animals.

It must be clarified at this point that this book in no way seeks the revival of political guardian representation of humans. The only context in which guardian representation is considered possibly relevant is that of non-human animal representation. What is being investigated are merely the

[234] Dahl, *Democracy and Its Critics*, 52–55, 63–64, 77.
[235] Dahl, *Democracy and Its Critics*, 52, 63.

options of offering guardian-like political representation of non-human animals; the political representation of humans remains unaffected in the sense that human constituents' ability to determine the content of their representation is fully accepted. Because of this limited application of the guardianship idea, the two most important criticisms of guardianship representation are beside the point, since these concern application of the guardianship idea to humans. The criticisms are that, first, guardianship governance forecloses active political engagement of ordinary humans, and second, that the concept of guardianship governance is based on the dubious premise that ordinary humans are politically incompetent. Both do not affect the proposal here, since they specifically concern political guardianship over humans. The only claim on which the non-human application of the guardianship model rests, and which is defended, is that non-human animals generally lack the competences needed to politically represent themselves and to instruct human representatives on the content of their representation. This claim has been extensively defended in this book. The latter criticism, regarding the underestimation of humans' political competency, thus is beside the point in the context of non-human animal representation. The other criticism, that guardianship governance obstructs democratic engagement, also misses the point in the context of non-human animal representation. In their case, guardianship representation does not foreclose active democratic engagement—after all, this was already impossible to begin with—rather, guardianship representation *opens up* options for (passive) democratic engagement that non-human animals otherwise would never have.

Non-human animal guardian representation thus does not have the same principled problems that human guardianship representation does. This is not the same as saying that any type of guardian representation is permitted, however. Even if guardian-like representation of non-human animals is in principle allowed, we must still be on the lookout for illegitimate forms of paternalism which may ultimately result in abuse of power by the trustee. Generally, there seem to be two cumulative requirements in order to consider paternalistic rule to be legitimate. First, it must be beyond doubt that the "pater" (political trustee) is the better judge

of the interests of the principal. Second, the "pater" may only utilize his power in the interest of the principal.

The first requirement, which prescribes that the trustee must be the better judge of the principal's interests, is almost automatically met if non-human animals are represented by human trustees. On account of their previously discussed superior knowledge of the world, human agents are almost always the better judge of the interests of other animals. Precisely because non-human animals are fundamentally uninformed about the world, helping them in determining and protecting their true objective interests is a typical kind of justified paternalism.[236] It is the type of paternalism that is particularly welcome in a liberal democratic society. Taking care of other animals in this sense is legitimate paternalism, similar to keeping human babies alive or deciding for a child that it is best to be vaccinated because it is in his best interest. The child does not have the relevant information or the intellectual skills to make such complex decisions for himself. On account of their fundamental uninformedness, taking care of non-human animals by filtering out their preferences that run counter their own objective interests is a legitimate kind of paternalism that can safely be practiced by political animal trustees.

The second requirement, which prescribes that the trustee may only utilize his power in the interest of his principal, is more challenging. This requirement is intended to prevent abuse of power, but as our experience with real-world applications of the guardianship model demonstrates, it is not easy to make guardians act incorruptibly. The guardianship model has an inherent danger of the corruption and abuse of power by the guardian, and it is thus of pivotal importance to bolster any application of this model with an adequate protection against abuse of power by the political animal trustee. Political animal trusteeship hence can only be a serious contender for politically institutionalizing animals' consideration right if it is surrounded by institutional safeguards that can prevent animal trustees from abusing their powers in authoritarian Leninist and Maoist ways. Since there seems to be no other option than exercising a form of paternalism over

[236] Goodin, *Reflective Democracy*, 54–55.

animals if we are to politically institutionalize their consideration right, the next challenge is controlling the risk of abuse of power. We must, in other words, find a way of ensuring that animal trustees use their political power for the right ends: the interests of animals. Whether the risks of abuse of power can be kept in check and how this can be done will be discussed in the next subparagraph.

III. Abuse of power

An important obstacle in realizing political animal representation is the difficulty of minimizing the risk of abuse of power. All political systems contain an inherent risk that power will be abused, and democracy is no exception to this rule. Great philosophers have warned us of this time and again. John Stuart Mill pointed out that it must be assumed "that political power will be abused to promote the particular purposes of the holder; not because it always is so, but because such is the natural tendency of things, to guard against which is the especial use of free institutions."[237] And, as Mill also pointed out: "Although the actions of rulers are by no means wholly determined by their selfish interests, it is chiefly as a security against those selfish interests that constitutional checks are required."[238] In yet another work, Mill once again stressed the importance that "laws and institutions require to be adapted, not to good men, but to bad."[239] Karl Popper similarly held that "It is reasonable to adopt, in politics, the principle of preparing for the worst, as well as we can, though we should, of course, at the same time try to obtain the best. It appears to me madness to base all our political efforts upon the faint hope that we shall be successful in obtaining excellent, or even competent, rulers. … Rulers have rarely been above the average, either morally or intellectually, and often below it."[240] In addition, James Mill thought it a "law of nature, that a man, if able, will take from others any thing which they have and he desires." To suppose that a person (in power)

[237] Mill, "Considerations on Representative Government," 505.
[238] John Stuart Mill, *The Logic of the Moral Sciences* (London: Gerald Duckworth & Co. Ltd., 1988/1843), 80.
[239] John Stuart Mill, "The Subjection of Women," in *On Liberty and Other Writings*, ed. Stefan Collini (Cambridge: Cambridge University Press, 1989/1869), 151.
[240] Popper, *The Open Society and Its Enemies (Vol. I)*, 121–123.

will *not* take from every man what he pleases is, according to Mill, "to affirm that Government is unnecessary" because it would assume that human beings will abstain from injuring one another of their own accord.[241] Assuming that, if left uncorrected, political power might be used to serve a ruler's own ends instead of the legitimate ends for which power has been bestowed on him seems imperative for drawing up any responsible institutional proposal.[242]

Abuse of power can take many shapes, and we must be aware of the different types of abuse if institutions are to be guarded against it. In its mildest version, power may be used for the wrong ends if representatives genuinely misinterpret the preferences of the human agents they ought to represent or if they genuinely misunderstand the interests of the political patients they ought to represent. Representation typically requires interpretation and translation of interests and preferences, and it is a known fact that many things can get lost in interpretation and translation. In the mildest form of this problem, the representative makes a genuine mistake that, though without intention, has the effect of disrespecting the preferences and interests of the represented. Because of the lack of intention here, it may be more accurate to call this unfortunate exercise of power *misuse of power* rather than abuse of power. In the worst version of abuse of power, power is intentionally abused by a representative to violate the (moral and/or legal) rights of the ones subjected to that power in order to serve other, illegitimate ends. Between this excessive abuse of power and unintentional misuse of power, many intermediate forms of abuse of power are possible, all of which ought to be prevented to the greatest extend possible.

Given the fact that abuse of power in all its forms is always lurking around the corner, any proposed adjustment to the institutional arrangements of a liberal democracy must keep a strict eye on preventing it. In designing institutional adjustments to give effect to the consideration right of non-human animals, we must therefore carefully address this issue of how to prevent abuse (or misuse) of power from happening.

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[241] Mill, "Government," 8, 17.

[242] This is not the same as assuming that *all* people are corruptible. The mere assumption here is that, like any other person in a democracy, *a* corruptible person can obtain a powerful position.

Animals' susceptibility to abuse of power

For several reasons, non-human animals are especially vulnerable to falling victim to abuse of power by their representatives. To begin with, we have seen that a trustee type of representation is the only option for non-human animal representation, and given its paternalistic character, this option comes with greater risks of abuse of power. A trustee is typically assigned extensive interpreting and translating powers in order to be able to determine the content of representation, and he has the power to divert from and overrule the expressed preferences of the principal, without the principal being able to correct the trustee. These circumstances typical to guardianship representation give an animal trustee a lot of power and make non-human animals particularly vulnerable to falling prey to abuse of power.

The second circumstance typical to non-human animal representation that makes abuse of power more likely is the fact that the earlier-mentioned identity of interests between the representatives and the represented is almost entirely lacking. It has been discussed earlier in this book that it was James Mill's insight that the interests of the representatives and those of the represented have to be largely similar in order to reduce the risk of abuse of power significantly. This is because, and I again echo James Mill here, "the Community cannot have an interest opposite to its interest."[243] If the interests of the representative and his constituency are largely similar, a representative will almost automatically act in the interests of his constituency, because it is also in his own interests to act in that particular way. However, as also discussed earlier, non-human animals have few interests that overlap with those of their human representatives. To the contrary, human and non-human interests very often conflict, and are sometimes even mutually exclusive. The Millian identity of interests is, in other words, largely absent, which means that there is little reason to expect that representatives will automatically act in the interests of non-human animals and use their powers for this legitimate end. This renders non-human animals particularly vulnerable to abuse of power by their human

[243] Mill, "Government," 7.

representatives, since the institutional circumstance that should make representatives more likely to use their powers for the right cause is absent. There is no reason for despair yet, however, as Mill also taught us that if an identity of interests is naturally lacking, additional institutional mechanisms may function as an alternative inducement for using political power for the right ends instead.

The most obvious and proven mechanism of generally inducing representative rulers not to abuse their power is the mechanism of general periodic elections. General periodic elections minimalize the risk of abuse of power by first pre-authorizing rulers and then holding them accountable for their political decisions afterwards. First, the people who will be ruled *authorize* representatives by assigning them their posts by means of general elections. This enables voters to authorize only those people who they trust and expect to represent them in a sincere way. Second, we make representatives *accountable* for their political behaviour by guaranteeing that abusers of power can be sent away in the next election. Periodic general elections, in other words, enable voters to get rid of the representatives who have shown to be of bad character or who have otherwise failed in representing their interests or political preferences. Combined, these mechanisms of authorization and accountability give human voters control over who is in power, and thus offers them two important instruments to prevent and end possible abuse of power by their representatives. Through these two mechanisms, risks of abuse of power can be reasonably contained, even if a natural identity of interests is lacking.

Crucially, however, these classic protections against abuse of power obviously are not applicable in the case of non-human animal representation, since non-human animals cannot exercise political agency, and thus cannot authorize representatives or hold them accountable by voting in general elections.[244] Only human agents with certain cognitive capacities seem to be able to take part in the complex processes of authorizing politicians and holding them accountable. Non-human animals cannot and will not vote, which makes authorizing representatives and

[244] Smith, *Governing Animals*, 104–106.

holding them accountable in a classic sense impossible. As a consequence, they cannot exercise the control over their representatives that seems essential for combatting abuse of power. This is the third circumstance that contributes to making the risk of abuse of power at the expense of non-human animals dangerously high.

It follows from the foregoing reflections that, as a rule, non-human animals are extremely susceptible to abuse of power by their hypothetical human representatives. The circumstances or mechanisms that normally tend to curtail this risk are not apparent or not applicable in the context of animal representation. In short, the problems are that: (I) their political representation requires an atypical and—because of the paternalism involved—particularly risky form of trustee representation; (II) a natural form of identity of interests is lacking; and (III) the usual institutional mechanisms preventing abuse of power, authorization and accountability, are inapplicable because they require a level of political agency that non-human animals lack. The fact that non-human animals are highly vulnerable to abuse of power means that we must be extremely critical when it comes to judging animal representative frameworks on their aptitude of controlling the risk of abuse of power. We must, in other words, be close to certain that potentially corruptible humans have no institutional opportunities to abuse their power at the expense of non-human animals. With the classic mechanisms for controlling the risk of abuse of power out of reach, it seems that institutional protections against abuse of power must take a different form. It may be necessary to consider unconventional institutional arrangements in order to ascertain that political animal trustees will not, in James Mill's terms, make "mischievous use" of their power and turn it against non-human animals.

Character selection strategies

Karl Popper famously argued that "institutions are like fortresses. They must be well designed *and* manned" (italics original).[245] In contemplating how to design institutional arrangements which are meant to combat abuse

[245] Popper, *The Open Society and Its Enemies (Vol. I)*, 126.

of power, it is important to realize that combatting abuse of power does not only require that we design institutions in a clever way, but also that we attract the right people to man these institutions. Following this Popperian wisdom, we can distinguish between two types of strategies that can help to ensure that representatives behave in alignment with the interests of those who they are supposed to represent. On the one hand, there are what I call *institutional nudging strategies*, which focus on the design of institutions, and on the other hand there are what I call *character selection strategies*, which focus on manning these institutions with the right people. In discussing these two types of strategies and their potential to lower the risk of abuse of power by animal trustees, we may also learn from ideas that have been put forward in the context of the representation of future people, as they, too, would be typically vulnerable to abuse of power if they were to be politically represented.

Let us start with the *character selection strategies*, which concern the manning of institutions. These are strategies which can be used to establish a reliable level of alignment between the interests of the represented and the offered representation by selecting representatives on the basis of certain characteristics. Since non-human animals cannot elect representatives on their good character, we could consider establishing such alignment through institutionally screening candidates for the representative functions on the basis of their good intentions and genuine concern for the animals they would represent. Candidates must, in other words, have a suitable character and attitude for becoming a reliable animal trustee. Candidates must be screened in if they seem actually concerned about the interests of non-human animals and are likely to represent these in a sincere way and rejected if they seem less animal-friendly and sincere.

It could be suggested that an institutionalized selection of genuinely concerned candidates is not really necessary. In the context of future people representation, political theorists Iñigo González-Ricoy and Axel Gosseries have suggested that, to a certain extent, the selection of future-oriented candidates will naturally occur, likely because they think that primarily future-oriented people would naturally be interested in taking on the job of

representing future people.[246] Translated into the context of non-human animal representation, this could equally mean that candidates for animal representative positions need not be selected, because candidates genuinely interested in non-human animals will automatically present themselves.

Even though González-Ricoy and Gosseries's assumption is probably true to a certain extent—probably, *primarily* people with a genuine interest in animals would be interested—it would be irresponsible to gamble on the idea that only suitable candidates will present themselves. The assumption that the selection of animal-friendly representatives will naturally occur can, in other words, be disputed. It is possible that people with an insincere interest in animals (for example people who profit economically from activities which require animal exploitation), will also attempt to occupy such powerful positions for strategic reasons.[247] Becoming a formal representative of non-human animals could offer them a unique opportunity to acquire political power to further their own interests from that position. Considering the advice of father and son Mill and Karl Popper that we should prepare for the worst rulers, it does not suffice to simply assume that only sincere people will be drawn to the position of representing animals, and we must institutionally prepare for insincere people trying to become animal trustees for strategic reasons.

It thus seems wise to consider introducing character selection criteria which should filter out inadequate animal-trustee candidates. It is quite a challenge, however, to identify and select sincerely committed candidates. In the context of the representation future people, it has been suggested that certain personality traits and characteristics generally indicate a sincere and actual concern for future people, and that the representatives must be

[246] Iñigo González-Ricoy and Axel Gosseries, "Designing Institutions for Future Generations: An Introduction," in *Institutions for Future Generations*, eds. Iñigo González-Ricoy and Axel Gosseries (Oxford: Oxford University Press, 2016), 9.

[247] A similar concern has been voiced in: Ekeli, "Giving a Voice to Posterity," 437. González-Ricoy and Gosseries recognize that there is a risk of strategic manipulation, oddly enough right before they express their confidence that "candidates will be informally screened for their future-friendliness, even if proxy requirements are not formally included." González-Ricoy and Gosseries, "Designing Institutions for Future Generations," 9.

selected on those features.[248] Similarly, in the context of animal trustees, we could consider adopting formal requirements which should help us to select suitable candidates. But what features or characteristics can indicate such a sincere concern? In the context of the representation of future people, it has been suggested that being part of the "environmental sustainability lobby" may be an indication of genuine concern for the future, and that thus only such people qualify for becoming a representative of future people. This idea was put forward by political theorist Andrew Dobson (1957–), when confronted with the problem of aligning the representation of future people with their actual interests.[249] Dobson suggests that a proxy (substitute) electorate for future generations should be drawn from the present generation and that they should execute the functions of a normal electorate: providing and electing representatives (in this case for future generations). In discussing how to establish that these proxy members and representatives would indeed use their power to truly represent the interests of future generations, Dobson concludes that taking a random sample from the present generation might be too risky, because random citizens might give unreasonable priority to present generations' interests. There would, in other words, be too high a risk of misuse or abuse of power if future generations' representatives were randomly picked from the general public. Rather, Dobson maintains, a lobby that currently "has its eyes firmly fixed on the future" must be identified, and the people who constitute that lobby must be given the exclusive right of becoming candidates for future generations' representatives.[250] Since the environmental sustainability lobby is used to thinking about the interests of future generations, Dobson considers them a suitable group from which to draw representatives of future generations. It remains unclear, however, how we can identify the

[248] Thompson, "Representing Future Generations," 33–34; Dobson, "Representative Democracy and the Environment," 132–133; Philippe van Parijs, "The Disfranchisement of the Elderly, and Other Attempts to Secure Intergenerational Justice," *Philosophy & Public Affairs* 27, no. 4 (Autumn 1998): 308–314; Juliana Bidadanure, "Youth Quotas, Diversity, and Long-Termism: Can Young People Act as Proxies for Future Generations?" in *Institutions for Future Generations*, eds. Iñigo González-Ricoy and Axel Gosseries (Oxford: Oxford University Press, 2016), 266–281; Ekeli, "Giving a Voice to Posterity," 438.
[249] Dobson, "Representative Democracy and the Environment," 132–133.
[250] Dobson, "Representative Democracy and the Environment," 132–133.

people who constitute the "environmental sustainability lobby." Dobson reluctantly notes that it is "admittedly hard to pin down" such a lobby and the people who constitute it, but offers no further instructions on how to practically find and select the people invested in environmental sustainability.[251]

In an interpretation of Dobson's work, philosopher Kristian Skagen Ekeli suggests that such a lobby may consist of people who are a member of an environmental group or organization.[252] Being such a member seems to be a clear indication of having sincere concern for the future. Other features have also been suggested to indicate a certain genuine involvement in the future and the people in it. Being a parent, and thus being genuinely concerned about the future of your children, may be such a feature.[253] Alternatively, being young may indicate a genuine involvement in the future, for young people have to deal with a relatively big part of the future themselves.[254]

In the case of animal trustees, comparable features which may indicate a certain genuine concern with non-human animals could be: being a member of an animal rights or welfare group or organization or having a track record of animal-friendly behaviour in the past, such as having done voluntary work in an animal shelter or having (had) a profession which is conducive to animal welfare, such as veterinarian. The assumption then is that being prepared to invest time and energy in improving the welfare of animals indicates a genuine concern for animals. Apart from positive indications, negative indications may also be taken into account. The feature of being convicted of animal abuse in the past may be taken as an indication of having disregard for animals. Similarly, having (had) a profession which (often) involves harming animals, such as that of animal farmer and butcher, may be reason to be screened out as a candidate for becoming an animal

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[251] Dobson, "Representative Democracy and the Environment," 133. See also: Cochrane, *Sentientist Politics*, 48.
[252] Ekeli, "Giving a Voice to Posterity," 435–437. Ekeli himself rejects the idea that the right to represent future generations should be restricted to environmental organizations and their members.
[253] Van Parijs, "The Disfranchisement of the Elderly," 308–314; Thompson, "Representing Future Generations," 33.
[254] Bidadanure, "Youth Quotas, Diversity, and Long-Termism," 266–281; Thompson, "Representing Future Generations," 33.

representative, for this may also indicate inattentiveness to animal welfare. Accepting people who meet the positive quality criteria and rejecting people who meet the negative quality criteria may contribute to preventing abuse of power of animal representatives.

The effectiveness of this character selection strategy based on formal quality criteria is questionable, however. It can be questioned whether formal quality requirements for candidate representatives would be successful in screening out indisputably unsuitable candidates, and thus whether they could establish sufficient protection against abuse of power.[255] Even people who check the aforementioned boxes (being a member of an animal rights group, having been a volunteer in an animal shelter, having no track record of animal abuse, etc.) are not necessarily reliable animal representatives who will not abuse their power. Before selection criteria can constitute a reliable protection against abuse of power, the assumptions that underlie these various selection criteria must be proven to be valid. Assumptions such as "people with children are more likely to think and act in a future-friendly way" have to be checked on their validity against empirical evidence.[256] The opposite could be just as true: possibly, caring about future people correlates with having no children at all, because overpopulation is likely to become a big problem for future people. Empirical backup is needed before we can count on selection criteria to screen out people with unfit attitudes for becoming an animal representative. We cannot just assume that, for example, veterinarians have more genuine concern for animal welfare than farmers and that they are thus more likely to be suitable animal representatives. Given the high risk of abuse of power, what is needed is something close to certainty about these factors, and without evidence on the underlying correlations, we cannot be certain that the criteria which rely on them will select the right people for the job.

[255] If power *itself* truly corrupts, the whole idea of selecting people on the suitability of their characters would be futile. In that case, the act of assigning a person political power would bring out the worst in people, even in those people who initially seemed to have the perfect character for becoming a representative. Periodical screening might then be imperative.

[256] González-Ricoy and Gosseries, "Designing Institutions for Future Generations," 9.

Furthermore, the effectiveness of formal quality criteria is dubitable because even if the features mentioned are proven to *generally* indicate a genuine concern for non-human animals, this is no guarantee that *every* person who meets the criteria will have the required character for becoming an animal trustee. Indications of having a suitable character for becoming an animal trustee are nothing more than that: mere indications. A verified correlation between feature X and a genuine concern for animals can only serve to indicate a likelihood that X-people are animal-friendly, but obviously atypical X-people also exist. In other words, even if veterinarians are generally likely to have a genuine concern for the welfare of non-human animals, this does not mean that every veterinarian has this genuine concern. There may still be veterinarians around who could not care less about the welfare of non-human animals, and given the advice of Popper and both Mills, we have to institutionally prepare for precisely these atypical veterinarians trying to become an animal trustee. If the character selection strategies are to constitute a significant protection against abuse of power, they must be able to screen precisely these people out as candidate representatives for non-human animals. Since the discussed character selection criteria are unable to do so, they do not seem, on their own, to constitute sufficiently reliable protection against abuse of power.

Apart from their doubtable effectiveness in preventing abuse of power on their own, there seem to be additional problems with introducing character selection criteria for candidate representatives. It can be questioned whether selecting people on account of having certain features is desirable from a more principled point of view, even if it were effective in preventing abuse of power. Kristian Skagen Ekeli has pointed out that selection criteria are sometimes unintentionally more selective than they seem.[257] They may not only select for the intended feature, but unintentionally also select for certain more substantive points of view if these views correlate with the selected feature. With regard to Dobson's proposal to merely select people from the environmental sustainability lobby to become future people's representatives, Ekeli points out that this

[257] Ekeli, "Giving a Voice to Posterity," 435–437.

selection criterion might not only select for the desired characteristic of caring about the future, but simultaneously and unintendedly also for more substantial views on *how* the interests of future people are best met.[258] In this case, it is likely that the selection criterion unintentionally selects only people who are of the opinion that future generations' interests are best met through preserving nature for upcoming generations. This is because being a member of an environmental organization is not only likely to correlate with having concern for the future, but also with having the substantial view that nature must be protected and preserved. However, it is not at all certain that preserving nature for future people is the best way of meeting their interests. As Ekeli points out, technological optimists might claim that it is not nature preservation that serves the interests of future people best but investing in technological development.[259] Technological optimists might argue that investing in, for example, the development of genetically modified crops is the best way of meeting future people's interests, because they will face great challenges in meeting their nutritional needs due to climate change and the rise of the world population. Ironically, investing in genetic modification is something of which environmental organizations generally disapprove. Hence, if only people from environmental organizations are eligible to become representatives of future people, the viewpoint of technological optimists is likely to remain unheard. The selection criterion that singles out people from environmental organizations thus unintendedly makes substantial choices *for* preserving nature and *against* technological development, while it is not at all certain which of these would serve the interests of future people best. Ekeli points out that this constitutes a democratic problem, for by giving one particular group with a restricted range of perspectives the exclusive right to determine what best serves the interests of future people (or, in our context, animals), an open public debate on these matters is frustrated.[260] Selection criteria thus indirectly cause one particular substantial view to be granted the status of "truth," without there having been any proper pluralistic debate in which all different views were

[258] Ekeli, "Giving a Voice to Posterity," 436.
[259] Ekeli, "Giving a Voice to Posterity," 436.
[260] Ekeli, "Giving a Voice to Posterity," 435–437.

heard. Since the interests of animals are not easily identified, and since they certainly are no "truth" only knowable to veterinarians and members of animal rights groups, the questions of what their interests are and which policies can best serve them are best either pluralistically debated and answered in open societal debate or answered by those who have the most credible claim to knowing these "truths": scientific experts in disciplines relating to animal interests.

It must be added here that this book takes this democratic critique as not only affecting the discussed criterion of Dobson but character selection criteria in general, because all features for which criteria can select run the risk of having hidden correlations with substantive world views. Ekeli himself, however, directs his critique specifically at Dobson's criterion (that selects people from the environmental sustainability lobby), without losing faith in character selection criteria in general. Ekeli even tries to come up with a better alternative for selecting suitable representatives for future people. He argues for introducing "legal norms" which merely allow people who "in fact *care* for the welfare of future people" to become a guardian (italics original).[261] In order to not undermine his own democratic critique on Dobson's criterion, Ekeli argues that these norms should be "inclusive, in the sense that they should not place restrictions on the variety of viewpoints about what best serves the interests and needs of posterity."[262] But *how* we can select people who "care" about future people without becoming non-inclusive with regard to substantive viewpoints is not elucidated by Ekeli. In a footnote, he admits that "it can be complicated to specify the content of such laws in an adequate way, and it is likely that controversies will arise. Therefore," Ekeli maintains, "this is a matter that should be placed in the hands of democratically elected legislators."[263] This, however, merely seems to push the problem around—possibly a symptom of the fact that it is wholly impossible to simultaneously select people who truly "care," without accidentally excluding more substantial views from the debate. As a

[261] Ekeli, "Giving a Voice to Posterity," 437–438.
[262] Ekeli, "Giving a Voice to Posterity," 437–438.
[263] Ekeli, "Giving a Voice to Posterity," 438 (footnote 11).

suggestion for the legislator, Ekeli proposes that "certain powerful organized interest groups, such as labor unions and employers' federations" should be excluded from becoming representatives of future people.[264] It is not at all clear, however, how this can be an acceptable solution. After all, this move is likely to also (unintentionally) exclude particular substantial views from the democratic debate.

Institutional nudging strategies

The second option that may improve the alignment between the behaviour of representatives and the interests of non-human animals is introducing *institutional nudging strategies*. The attention is then not focused on selecting people of a certain character but on employing external nudges (positive and negative institutionalized sanctions) which ought to cause the necessary alignment. Such nudging mechanisms should encourage representatives to promote or adopt policies that align with the interests or preferences of the individuals they ought to represent. It will become clear, however, that it is quite hard to come up with an institutional nudging mechanism that can make animal trustees act in alignment with the interests of the animals they ought to represent.

The most prominent nudging mechanism in our current human democracies are the earlier-discussed general elections. General elections align the behaviour of representatives with the preferences and interests of the electorate. Being (re-)elected to a representative position (*authorization*) functions as a positive sanction for presenting good plans or having shown good political behaviour (in the sense that it aligns with the preferences of the constituency), and not being elected again (*accountability*) functions as a negative sanction for not delivering the wanted political behaviour (recall how Edmund Burke was sent packing when he refused to follow the wishes

[264] It is also remarkable that Ekeli seems to have quite some faith in the legislator to find a way to establish the proposed reform, which should exclude, among others, "powerful organized interest groups," considering that only a moment before, he states that: "democratic decisions often reflect the outcomes of political bargaining processes where powerful organized interest groups (such as labor unions and employers' federations) play an important role" and that "it is difficult to achieve the necessary … political support for effective environmental reforms." Ekeli, "Giving a Voice to Posterity," 431–432, 438.

of his Bristolian constituents). It has already been pointed out, however, that non-human animals cannot make use of this proven institutional nudging mechanism meant to prevent abuse of power, since they cannot participate in general elections.

The strong nudging effect that general elections have on politicians' behaviour—aligning it with the wishes and interests of the electorate—seems to result in having to decide against popular election as a way of selecting *animal* representatives and as a way of holding them accountable. If animal representatives were elected via general elections, there would be too strong incentives for the animal representatives to be responsive to the electorate consisting of only human agents, instead of being responsive to non-human animals. Since only humans would be able to vote for them again, it would be extremely appealing for animal trustees to ignore all interests and values that are not directly shared by the human electorate. Animal representation would then still be contingent on human clemency. A general election of animal representatives is thus likely to increase rather than decrease human-biased political behaviour, which is obviously not conducive to sincere animal representation.

However, there seem to be some options for relaxing some of the anthropocentric pressure on animal representatives if they were to be elected by the general public. Ekeli has pointed out that the pressure on the representatives of future people to be responsive to the presently living can be reduced if they could only serve one term, and thus would not be eligible for re-election as either ordinary representatives or as the representatives of future people.[265] A similar construction could lift some of the anthropocentric pressure off of animal representatives. A different option with a similar effect is giving animal representatives life-long appointments in that position after being elected by the general public. These institutional moves would make animal representatives more independent from the human electorate. The representative is then no longer dependent on human agents to have his term extended, which will make him freer to act in the interests of non-human animals, even if this runs counter to human interests.

[265] Ekeli, "Giving a Voice to Posterity," 439–440; Stein, "Does the Constitutional and Democratic System Work," 440.

However, lessening the anthropocentric pressure on animal trustees obviously does not guarantee that they will act in the interests of non-human animals. Moreover, as Ekeli has also pointed out with regard to disabling the re-election of the representatives of future people, the consequence of this would be that the (animal) trustees would not be accountable to anyone.[266] This makes these options barely a better alternative from the perspective of preventing abuse of power. Furthermore, these moves would only relieve some but not all of the pressure representatives would feel to be responsive to the human electorate, since they merely affect the pressure caused by the retrospective accountability mechanism. However, in their prior authorization of an animal representative, the electorate is also likely to choose a candidate which they expect to serve their own interests best. The authorization nudge is not affected by this move of making re-election impossible. So even if the accountability mechanism were disabled, popular (s)election of animal representatives would still bring a high risk of abuse of power with it. It therefore seems wise to move away from the idea of popularly elected animal representatives, otherwise it is hard to guarantee that the animal representatives will not attach disproportionate weight to human interests and preferences and abuse the political power that was originally meant for representing non-human animals.

Now it may seem logical that decoupling the selection of animal representatives from popular election requires us to introduce new types of external institutional nudges which should encourage representatives to align their political choices with animals' interests. However, some thinkers have suggested that external institutional nudges and their corresponding sanctions are not necessary. Kimberly K. Smith has argued that it might be enough if political animal representatives act according to their internalized commitments, and are merely "accountable" to their own principles.[267] Additionally, Smith writes, we may rely on practices of "surrogate accountability." Smith argues that animal welfare organizations or animal

[266] Ekeli, "Giving a Voice to Posterity," 439–440.
[267] Smith, *Governing Animals*, 113.

lovers may refuse to support or even publicly shame animal representatives who have, in their view, failed to adequately pursue animal welfare.[268] This should discourage representatives from abusing their power. Smith's option of "surrogate accountability" seems somewhat similar to what political philosopher Dennis F. Thompson (1940–) has suggested in the context of the representation of future people. Thompson argues that it is sufficient if representatives are merely accountable to the requirements of a role.[269] The role would "express the perspective of future citizens" (in this context, non-human animals) and the role requirements would "in effect stand as a surrogate for future citizens," Thompson explains.[270] The incentive to act in accordance with the interests of the represented party is then as subtle as the "conventional habit" of sticking to one's formal role, and, as in Smith's proposal, the nudge that should prevent representatives from abusing their power would not be a clear negative institutionalized sanction but rather a more subtle "social [dis]approval."[271]

A different possibility which has been proposed to better align the political behaviour of the representative with the interests of the represented without introducing institutionalized sanctions is improving the quality of deliberation among representatives.[272] It has been suggested that an improved deliberation process may allow representatives to be better informed about the interests of their principals and thus to improve the quality of the decisions made. In the context of the representation of future people, González-Ricoy and Gosseries argue that such extensive deliberation may also induce a "greater awareness of long-term problems and openness to act on the interests of future generations."[273] The same may be true for

[268] Smith, *Governing Animals*, 112–113.
[269] Thompson, "Representing Future Generations," 17–37.
[270] Thompson, "Representing Future Generations," 28.
[271] Thompson, "Representing Future Generations," 29–30.
[272] In the context of the representation of future people: Ekeli, "Giving a Voice to Posterity," 429–450; Ekeli, "Constitutional Experiments," 440–461; González-Ricoy and Gosseries, "Designing Institutions for Future Generations," 10.
[273] González-Ricoy and Gosseries, "Designing Institutions for Future Generations," 10.

non-human animals, so it may ultimately benefit the alignment between the offered representation and the interests of non-human animals.[274]

These discussed options which do not involve institutional sanctions do not seem sufficient in combatting abuse of power, however. Even though commitments to a role or personal principles and improved deliberation may *allow* a better alignment to be achieved, they do not necessarily bring this about. These options are simply too permissive to constitute adequate mechanisms against abuse of power. Relying on representatives' commitments to a role or to internalized principles could only be effective in preventing abuse of power if there were institutional big sticks to enforce this commitment. In the proposals of Smith and Thompson, however, such institutional securities are lacking, which in effect means that if representatives were suddenly to shed their noble commitments, non-human animals would lose their representation and be left out in the cold. Recalling the ominous warnings of Popper and Mill Senior and Junior yet again, we know that non-binding commitments are clearly insufficient. Betting merely on deliberative improvements also seems insufficient, since this option, too, is much too permissive.[275] As González-Ricoy and Gosseries themselves point out: the alleged positive effects of improved deliberation are (among other things) dependent on whether the involved persons are sensitive to the weight of rational argument.[276] Furthermore, a sincere deliberation process also requires the participants to put aside self-interests.[277] Since it cannot be assured that people who are impervious to rational arguments or who are unable to put their self-interest aside will try to become animal representatives, improving deliberation can, on its own, not constitute sufficient protection against abuse of power. Furthermore, even if only people receptive to rational argument and able to put aside their

[274] In the context of non-human animal representation, the usefulness of adopting deliberative mechanisms is assessed in: Robert Garner, "Animal Rights and the Deliberative Turn in Democratic Theory," *European Journal of Political Theory* (February 25, 2016): 1–21 [published online before print] and in: Garner, "Animals, Politics and Democracy," 103–117.

[275] See also: Cochrane, *Sentientist Politics*, 42–43.

[276] González-Ricoy and Gosseries, "Designing Institutions for Future Generations," 10.

[277] Garner, "Animals, Politics and Democracy," 107–109; Garner, "Animal Rights and the Deliberative Turn in Democratic Theory," 3.

self-interest were to present themselves as candidate representatives, deliberative mechanisms would still be insufficient in attaining the required alignment. Robert Garner has pointed out that more thorough deliberation obviously offers no guarantees with regard to substantial outcomes.[278] In other words, even if animal representatives were to deliberate in the most ideal circumstances, this would not automatically guarantee an outcome that would align with animals' interests.

A different option to improve this alignment, which does involve institutional sanctions, is to replace the accountability that a representative normally has to the electorate with accountability to a commission or some other organ. Animal representatives would then be answerable to a different organ and have to account for their political choices and behaviour before this organ. Such an organ may be authorized to correct the representative or even dismiss him from his professional duty if he has acted in a way that can hardly be perceived as representing non-human animals (this review can be either marginal or substantial). Through this method of negative institutional sanctioning, representatives can be "nudged into" aligning their political choices with the interests of non-human animals. In order for it to be a better alternative to accountability through general elections and for it to truly bring about the necessary level of alignment, it seems logical that the reviewing organ is composed of people who are truly invested in the objective interests of non-human animals. This seems to compel us to opt for selection criteria yet again, in order to rule out that strategic candidates will seize the positions to which representatives will be accountable. We have seen, however, that selection criteria give rise to numerous other problems, while at the same time failing to truly screen out unfit people. Therefore, it seems virtually impossible to establish new review organs of which the members are genuinely involved. There seems to be one other option, however.

Possibly, animal representatives could be made accountable to courts. Courts are arguably in the right position to check animal representatives on the representation they have offered, for judges are

[278] Garner, "Animals, Politics and Democracy," 109–110; Garner, "Animal Rights and the Deliberative Turn in Democratic Theory," 11–16.

institutionally bound to (objective) legal principles, and they must rule without bias. In order to enable judicial review of animal representatives, there would have to be a legal instruction for animal representatives, compliance with which the courts can check. The permissibility of this legal basis would determine how substantial the courts' review would be. Somewhat simplified, there seem to be two alternatives. The first option is that the legal mandate for animal representatives is quite strict and thus not very permissive. They will be bound by a set of specific legal instructions on how to fulfil their role. In this case, it suffices if courts are offered relatively small reviewing powers which authorize them to only marginally check whether representatives have complied with these specific instructions. The second option is that the legal mandate for animal representatives is looser and thus quite permissive. They are then not bound by a set of specific instructions but merely by one general instruction, for example one which instructs them to "represent non-human animals." In this case, courts need relatively extensive reviewing powers which should authorize them to substantially check whether the political behaviour of animal representatives could reasonably be interpreted as having "represented non-human animals."

Both options seem to have serious problems, however. With regard to the first option, Ekeli has pointed out in the context of the representation of future people that it is as good as impossible to formulate adequate instructions and that, more fundamentally, it is also in principle undesirable to tie representatives to a set of highly restrictive rules.[279] Both objections also seem valid in the context of non-human animal representation. The unpredictability of future social circumstances and the complexity of animals' (mutually contradicting) interests makes it virtually impossible to formulate adequate detailed instructions for animal representatives in advance. Moreover, even if this were possible, the question of who would be the designated person or group of persons to determine what is generally in the best interests of animals, and thus who would formulate these instructions, still remains unanswered. This person or group of persons

[279] Ekeli, "Giving a Voice to Posterity," 439.

would have to be a legitimate source, and it would, again, need to be established that they have no ulterior motives but to serve the objective interests of non-human animals. It seems that the legislative branch would be the only legitimate body to produce such instructions, but given the anthropocentric nudges which work on legislators, it would be unlikely that the instructions they produce would treat animal interests with the needed objectivity. In short, it thus seems not only impossible and undesirable to formulate a set of strict and adequate instructions for animal representatives; it also merely pushes the problem around because it requires that a new, reliable source for formulating these instructions is found.

The second option, in which representatives are not bound by a set of strict instructions but by one general instruction, is problematic in the light of the separation of powers. In this institutional constellation, courts would need to substantially check whether politicians have sufficiently and reasonably pursued the interests of non-human animals in their political behaviour. Such review would inevitably drag courts into a political swamp of normative values, ideological preferences, political choices, political style, and political trade-offs, from which a court can impossibly distil any objective and legal "truths." In order to adequately determine whether an animal representative has sufficiently pursued the interests of animals, a court would have to undertake a substantial political examination and engage in highly political debates, things from which courts should stay well away—if not for the separation of powers, then certainly for the sake of maintaining an objective stature and reputation of independence. Additionally, this option, too, would not be a true solution, but would also merely push the problem around. In this case, the same problem we have encountered before comes back to haunt us again: what precisely are the interests of animals in a certain situation, and who is the designated party to establish this? In order to determine whether animal representatives have sufficiently pursued animals' interests in their political behaviour, courts need to know what their interests were. A court, however, has no special claim to knowledge in this area. It may be suggested that a court may consult experts on such matters, but this again would be tricky, since then experts would become indirectly responsible for deciding highly political

matters. The (political) objectivity of these experts, however, is not necessarily guaranteed.[280] In short, the second option of binding animal representatives to a fairly permissive legal mandate must also be rejected on the grounds that it would require a form of political review by courts that is undesirable in light of the separation of powers and that it would again only push around the problem of finding a legitimate and objective source for determining animals' true interests.

Several strategies to mitigate the risk of abuse of power by animal representatives have been discussed, and although, of course, not all conceivable possibilities were integrally investigated, the provisional findings should alarm us. The most viable options for minimizing the risk of abuse of power have been explored, but none so far seems sufficient to establish an institutional constellation in which ill-intentioned, incompetent, or corruptible trustees can be prevented from doing damage to animal interests. Some of the examined character selection strategies and institutional nudging strategies have the potential of encouraging animal trustees to be more animal-friendly, but none can guarantee that animal trustees would be unable to make "mischievous use" of their power and use their position to seriously damage the interests of non-human animals. The fact that non-human animals are not political agents plays a crucial role in this, because it means that they themselves—the only ones who indisputably have their interests at heart—cannot play the reviewing role which is so essential to counteracting abuse of power. It seems that we have not yet found a way to institutionally rule out that animal trustees can abuse their power at the expense of non-human animals.

IV. Distribution of political power

A yet different challenge for political animal enfranchisement is determining how political power ought to be distributed among human representatives

[280] In theory, it might be possible to create certain legal rules which ought to establish that experts who inform the judiciary have no political ties. However, whether this is possible is not further investigated here for the reason that the hypothetical type of judicial review discussed here is already dismissed for constituting a breach of the separation of powers.

on the one hand and animal trustees on the other. If animal trustees were to be introduced in the institutional constellations of liberal democracies, how much political power ought to be assigned to them? Or, more accurately, how much political power ought to be *transferred* from human representatives to non-human animal trustees? It seems that animal trustees can only be given political power by taking it away elsewhere. Assigning powers to animal trustees is thus essentially a matter of transferring political power from human representatives to animal trustees. Determining how much political power will need to be transferred appears to be quite a challenge, because on the one hand animal trustees will need sufficient power in order to be able to make a political fist for non-human animals, but on the other hand, animal trustees must not become so powerful that they can paralyze the representation of human citizens and nullify the valuable intellectual input of human representatives. Determining the right amount of political power to be transferred to animal trustees will be one of the fundamental challenges of enfranchising non-human animals in the political institutions.

In the context of this challenge, two objectives seem to be at play, neither of which must be jeopardized. The first is the objective of achieving a political consideration of animals' interests that is not contingent but institutionally secured. This objective seems to require that substantial political powers are available for animal trustees in order for them to not be politically nullified by human representatives. If human representatives have so much power that they can, in practice, negate the political input of animal trustees, then the consideration of non-human animal interests would not be institutionally safeguarded. Such a situation is undesirable in light of the non-contingency requirement, and thus has to be prevented. Animal trustees need sufficient political power in order to be able to politically combat institutions that represent humans, thereby putting actual flesh to the bones of the consideration right of animals. In general, the stronger and more powerful the institutions that represent animals will be, the smaller the chance that animal interests will be unjustly disregarded.

The second objective that must not be jeopardized is continued respect for the political input of human citizens. Even though it is important

that non-human animal consideration is not wholly contingent in a democracy, it is also not desirable to give animal trustees such strong political powers that the democratic process no longer gives due consideration to human interests and preferences. The intent of injecting animal interests into the democratic institutions is to enable a fair political weighing of all interests, and this not only implies the absence of institutionalized discrimination against non-human animals, but also the absence of institutionalized discrimination against humans. We must thus be careful not to sacrifice humans' political input for the sake of establishing non-human animal representation.

Now that the two objectives at play are defined, the difficulty of finding a balance between the political powers of human representatives on the one hand and animal trustees on the other becomes clear. It was pointed out that assigning political power to animal trustees necessarily comes at the expense of the political strength of institutions that represent humans, for political power is taken away from them. Assigning animal trustees substantial political powers in order to secure a non-contingent consideration of animals' interests may thus, in theory, lead to a situation where human preferences or interests will be unjustly neglected, because the institutions defending them are weakened and may not have enough power left to defend their cause. The theoretical challenge at hand is thus to find a balance between, on the one hand, the power granted to the political bodies responsible for representing humans, and on the other hand, the power granted to the political bodies responsible for representing non-human animals, while also respecting both groups' democratic right to be non-contingently represented.

One likely objection must be addressed at this point. It may be argued that the risk of humans becoming politically victimized by the introduction of powerful animal representatives is, in practice, not really a risk at all. It may be argued that it is extremely unlikely that animal trustees, who are humans, after all, will become so passionate about politically defending non-human animals that they will disregard human interests and preferences in the process. This seems to be merely a theoretical, not an actual risk, critics may argue. After all, it has been pointed out that it will be

hard to find and select animal trustees who will genuinely act in the interests of animals. This makes it unlikely that they, as humans, will choose to side with non-human animals instead of humans if it comes down to it. How is this objection to be appreciated? Even though there is some truth in this objection in the sense that this risk indeed would probably be quite small, it would not be wise to make no institutional efforts to mitigate this small risk—which is a risk, after all. The fact that it may be hard to find and select sincerely dedicated animal trustees does not automatically mean that no such people will become animal trustees. It is still possible that a person who is highly passionate about animal welfare will become an animal trustee and that he will, if the possibility presents itself, ruthlessly disregard any human interest or preference which stands in the way of pursuing the best for non-human animals. Yet again, we must recall the advice of the Mills and Popper that institutions ought to prepare for extremes, thus also for animal trustees who lack regard for humans.

In order to be able to determine an acceptable amount of political power for animal trustees that can secure both objectives, we must first know how we can determine "an amount" of political power in general. This is, however, not easy at all. Political power is an elusive phenomenon which cannot be exactly expressed in numbers. The amount of political power that an institution has is always determined by a number of factors, among which the interacting powers of other institutions. There seem to be two factors, however, which clearly have great influence on the amount of political power that an institution has in general: its competences (expressed in legal mandates), and its size (such as the amount of seats for representatives). The amount of political power of an institution is, in that sense, comparable to the power of a horse-drawn carriage. The total amount of power is primarily determined by what the individual horses can do (the *competences* of the horses) and by the total number of horses pulling the car (in other words, the *size* of the group of horses).

With regard to the first factor, concerning competences, it seems clear that an institution has more political power the more competences it has and the broader these competences are. When considering animal trustees, assigning them the competence to veto acts of parliament would certainly

make them more powerful than assigning them the competence to merely advise the parliament. The second factor, the size of the group of animal trustees, is similarly determinate for how powerful it is. Suppose that some number of animal trustees were to gain seats in parliament and that these trustees would have the exact same competences as other members of parliament. In that case, the number of animal trustees (the size of the institution that represents animals, in other words) would clearly determine how powerful they would be. The more parliamentary seats for animal trustees, the more political power animal trustees would have. In looking for a defensible distribution of political power between human representatives and animal trustees, we must thus keep in mind that these two factors, *competences* and *size*, are the ones we can modify in order to bring about a larger change in the total amount of political power of animal trustees.

The competences of institutions that represent animals

Let us first consider looking for an appropriate amount of political power for animal trustees by exploring different competences. Suppose that we were considering introducing an extra-parliamentarian body as a way of constitutionally realizing the right of non-human animals to be politically considered. For convenience' sake, let us call this body an "animal committee," but this can, in principle, be any political body constituted of animal trustees. Further suppose that the human parliament stays the way it is: representing humans only. This animal committee would be added to and embedded in the institutional structures in order to take institutional notice of animal interests. The question that immediately presents itself, and that is directly related to the theoretical issue discussed here, is: what competences ought such an animal committee have?

The first objective, that the political consideration of animals' interests must not be contingent, seems to require that the animal committee has substantial powers. From this perspective, the animal committee will need the power to overrule (amend or even invalidate) any act of parliament, and possibly executive decisions too, if the committee considers the act or decision to unwarrantedly violate non-human animals' interests. The committee would, in other words, need veto power (a competence) over

initial political decisions in order to be able to ensure that non-human animals' interests are non-contingently considered.[281] Under the condition that the animal trustees would indeed politically act in accordance with the interests of non-human animals, the animal committee would simply strike down any act of parliament or executive decision that unwarrantedly violated the interests of non-human animals. An animal commission with veto power thus seems appealing as an option for politically institutionalizing the consideration right of animals from the perspective of the non-contingency requirement.

Assigning an animal committee veto power may, however, lead to a situation in which human interests and preferences are disproportionally discredited, since political issues will only be approached from the perspective of non-human animals in the final instance. The second objective, which is to protect human democratic rights as well, thus is jeopardized if an animal committee is assigned veto power (especially if animal trustees are not popularly elected, as was considered preferable from the perspective of preventing abuse of power). There would be no guarantee that an animal committee with veto powers would give due regard to human interests and preferences. Since, by definition, a veto committee has the last word, there would also be no option for the human parliament to make corrections in this regard. In principle, the competences of the animal committee would allow the committee to interfere every time an act of parliament is issued that has even the remotest relation to animal interests. Furthermore, the animal committee would be allowed to strike down acts of parliament that even minimally infringe on the interests of non-human

[281] The idea of a political body with veto powers is not uncommon in the literature on the representation of future people. Dennis F. Thompson references the plebeian Tribune in the Roman Republic. This Tribune's mission was to protect the rights and interests of the plebs, who were otherwise underrepresented in politics. The Tribune had the power to veto legislative acts. Even though Thompson takes inspiration from the Roman Tribune for the trustee committee for future people that he proposes, he does not copy the Tribune's power to veto legislative acts in his own model without attenuating it. He argues that any overruling decision of the trustee committee should be reviewed by an independent judiciary. Also, Tine Stein has proposed to install an ecological council with veto competences. In her proposal, however, the veto competence does not concern amending or invalidating proposed legislation or executive decisions, but it merely assigns the council the right to suspend legislation. In effect, the environmental council would only be able to delay the legislative process. Thompson, "Representing Future Generations," 30–32; Stein, "Does the Constitutional and Democratic System Work," 436–442.

animals, even if, objectively speaking, this infringement were justified. In short, it seems like the second objective of respecting the democratic rights of humans is incompatible with assigning a hypothetical animal committee veto competences. The two objectives at play seem to be pulling in opposite directions when it comes to determining the amount of power that must be assigned to animal trustees through adjusting competences.

It may still be possible to find a middle ground, however. It is possible to limit the political mandate of the animal committee somewhat by making its veto power conditional on meeting some substantial criteria.[282] We can imagine, for example, that the law would formulate specific conditions under which acts of parliament may be amended or invalidated by the animal committee. The competence of the committee to overrule acts of parliament could be conditional, for example, on fundamental non-human animal interests being truly in danger. The law could determine that the animal committee would be merely authorized to overrule an act of parliament if, for example, this act were to "demonstrably affect the fundamental interests of non-human animals." A different option is that the law could dictate that the animal committee may only overrule an act of parliament if the "anticipated effects" of that act on animal welfare were "severe."

Obviously, there are many more options of making the competences of the animal committee conditional, but these need not be exhaustively assessed. This is not necessary because it seems that the general effectivity of the method of limiting the powers of the animal committee by making its competences conditional can be questioned. Even though this method may seem, in theory, an attractive option, it is hard to see how it could be effective in practice. The crucial question is who ought to determine whether an act of parliament "demonstrably affects" non-human animal interests, or whether the "anticipated effects" of an act of parliament on animal welfare are "severe." Yet again, we are confronted with the problem that no legitimized person or group of persons can be trusted to genuinely, objectively, and incorruptibly review these matters. Both the human

[282] González-Ricoy and Gosseries, "Designing Institutions for Future Generations," 11–14.

parliament and the animal committee would be stakeholders in deciding these matters, and they both are not objective enough to review whether the conditions that trigger the veto power of the animal committee are met. The human parliament obviously has a strong incentive to block the overruling powers of the animal committee, and the animal committee has an obvious incentive to rule in favour of its own veto rights. Judicial review might be thought to be a solution here. Courts, after all, may be trusted to be objective in this regard. However, the matters at hand are yet again highly politically sensitive, and the legal basis necessarily imprecise, which means that, in this context, too, judicial review would be undesirable from the perspective of the separation of powers and from the perspective of maintaining the impartial and objective reputation of the judiciary in general.

It seems that finding a balance between the powers of human representatives and animal trustees by adjusting the competences of the animal trustees is difficult, if not impossible. The signalled risk that human interests and preferences will be institutionally disregarded if the animal committee gains substantial competences are not typical to the discussed animal committee but inherent to assigning significant competences to any group of animal trustees as such. This risk is thus likely to reappear in every other institutional design in which animal representatives are assigned a substantial amount of political power by way of giving them broad competences. As a consequence, we might consider equalizing their competences with those of human representatives, and continue our search for the right amount of political power that ought to be transferred to the group of animal trustees by way of altering the other factor instead: their size. Possibly, we can come closer to finding an equilibrium of political powers if we take a closer look at the dimension of the group of animal trustees.

The size of institutions that represent animals

When contemplating on what the right size of a group of animal trustees could be, one well-established method of distributing political power immediately presents itself: equal distribution of political power, which would effectively mean that one human citizen would weigh as much as one

sentient non-human animal citizen. Would it be desirable to install a number of animal trustees proportional to the number of sentient non-human animals in a certain state? Could we, in other words, extend the principle of equal representation beyond humans and include non-human animals in this principle as well? There seem to be some problems with uncritically applying the principle of equal representation in the context of interspecies democracy. Some of these problems are quite similar to the objections that have been voiced against an equal representation of future people.[283]

The first objection against a proportional distribution of political power among animal trustees and human representatives based on the volume of their principals and constituents, is that it seems impossible to practically realize. In the context of future people representation, it has been pointed out by Gregory S. Kavka and Virginia Warren that it is impossible to know how many future people will exist.[284] Something similar is true with regard to non-human animals: it is virtually impossible to determine how many sentient non-human animals reside on the territory of a particular state. This seems to obstruct the practical realization of equal interspecies representation, for which the number of non-human animal citizens must be known. Accepting a dynamic citizenship of non-human animals, which has been proposed earlier in this book, would further complicate the matter. In this context, dynamic animal citizenship would mean that sentient animals would have to be politically represented the moment they enter the territory of the state. Hence, the number of sentient animals will not only be impossible to determine, but also always in flux due to animals continuously crossing the borders. Consequently, the fixed number of animal trustees in representational institutions can never be precisely proportional to the unknown and fluctuating number of sentient animals with a consideration right.

It seems possible, however, to accept this as a fact and work around these practical difficulties by making an estimation of the number of sentient

[283] Stone, *Should Trees Have Standing*, 21; Kavka and Warren, "Political Representation for Future Generations," 34–35; Thompson, "Representing Future Generations," 29.
[284] Kavka and Warren, "Political Representation for Future Generations," 34.

animals on the territory of a state instead.[285] Making the number of animal trustees proportional to the estimated number of non-human animals with a consideration right seems an imperfect but practically viable option. However, other objections would still plead against accepting equal representation in an interspecies context. Kavka and Warren have illustrated that making the representation of future people proportional to their estimated number would lead to a situation in which the representatives of future people would vastly outnumber current representatives.[286] Something similar would, again, be true in the context of non-human animal representation. If we were to make the number of animal trustees proportional to the estimated number of sentient non-human animals residing in a state, only a small number of representative positions would be left for human representatives. This would make their political power virtually negligible, which seems instinctively objectionable. For Kavka and Warren, the prospect of such an imbalance in political power is enough reason to reject an equal representation of future people.[287] It seems, however, that a convincing additional argument must be given before we can definitely reject a proportional distribution of power among non-human animal trustees and human representatives. If equal representation is *in principle* justified, we seem to have to accept the consequences of applying it in practice too, even if these consequences were to initially feel objectionable.

There is, however, a good principled case to make against equal distribution of power in the interspecies democracy. Equal representation as a matter of principle does not seem easily justifiable in an interspecies context, because this would deny the objective surplus value that political agency has over political patiency. The underlying presumption of equal representation is that all individuals with a right to political representation have something close to an equally valuable input to politics. That is to say, it is assumed that one person's interests and preferences are not more valuable than another's. A democracy typically accepts that all votes,

[285] In the context of future people representation: Kavka and Warren, "Political Representation for Future Generations," 34.
[286] Kavka and Warren, "Political Representation for Future Generations," 34.
[287] Kavka and Warren, "Political Representation for Future Generations," 34.

through which interests and preferences are politically defended, count equally. It would be inadequate, however, to presume that non-human animals have just as much to offer, *politically*, as human political agents—which is not the same as saying that their *interests* are of less value, which is not the case. We must recognize that when it comes to the political input of humans and non-human animals, there is a relevant difference which would make it unreasonable to stick with the assumption that both are equally valuable. The input of human agents in politics is richer and objectively more valuable, for they bring in not only their interests, but also considered political preferences and opinions, long-term visions about the general path of politics, and generally the capabilities to keep a state and a government up and running. These considered political opinions and capacities that only political agents possess are indispensable for operating and maintaining a political system. Non-human animals, like children, have no such political ideas and competences. Their "input" consists of interests only, and they only need representation for defending their interests on an equal level with those of humans. Were we to assign political positions to animal trustees in proportion to the number of non-human animals, this would be a denial of the objective surplus value of the political capabilities and reflected political preferences of human agents. Therefore, it seems that uncritically adopting the principle of equal representation in an interspecies democracy is unwise.

A different problem concerns the legitimacy gap that would arise if the principle of equal representation were accepted in an interspecies context. If human and non-human animals were proportionally represented, animal trustees would not only have a proportional say on matters that relate to the welfare of individuals, which would be justified, but also on matters which do not directly concern the welfare of individuals. Animal trustees would have proportional influence on more complicated and abstract matters which require advanced and sophisticated consideration, such as matters relating to the constitutional structures of the state. Animal trustees would, in other words, have the political power to co-decide these matters which do not directly relate to animal interests. Importantly, however, animal trustees would not be democratically legitimized for co-deciding these matters, because their principals, non-human animals,

typically have no political ideas or ideological preferences about the constitutional structures of the state which their trustees can represent. This would thus create a situation in which animal trustees would have substantial power to decide matters relating to the general path and future of liberal democratic institutions, while lacking guidance from their principals, and thus legitimacy on these matters. Creating such a legitimacy gap by introducing equal interspecies representation is highly undesirable from a democratic point of view (about which more in the next subsection), which is another principled reason for rejecting equal interspecies representation. In an attempt to circumvent this legitimacy gap, one may argue that we could opt for making the competences of animal trustees conditional to the circumstance of relating to welfare issues. However, we have just established that conditional competences such as these, although attractive in theory, are hardly practicable because they confront us with the problem that no legitimized person or group of persons can be trusted to genuinely, objectively, and incorruptibly review whether the condition that triggers the powers of the animal trustees is fulfilled.

If we agree that human agents may be assigned more than proportional political powers on account of their surplus capacities, which define their political agency, it seems that we must let go of the 1:1 ratio in political power distribution and find a new ratio. It is quite a challenge to find a new ratio that could be normatively defensible, however. One option of distributing power could be to choose a percentage and assign animal trustees that percentage of seats in parliament. In the context of the enfranchisement of future people, Kristian Skagen Ekeli has proposed that we assign the representatives of future people five percent of political power, expressed in parliamentary seats.[288] Could something similar be an option in the context of non-human animal enfranchisement?

There are some problems with picking a random percentage such as five percent for determining how many parliamentary seats will be assigned

[288] Ekeli, "Giving a Voice to Posterity," 434.

to animal trustees.[289] The first and most obvious problem is its arbitrariness. In the context of the representation of future people, Ekeli all to easily skips the fundamental question of how a number such as five percent can be justified. To Ekeli, the exact amount of political power to be transferred to the representatives of future people (in other words, the percentage) is not what is important; the fact that future people are represented at all is what matters. From the perspective of deliberative democracy, Ekeli values that the representatives of future people are able to make available "relevant proposals, information, and arguments" concerning the interests of future people in parliament, and he considers the number of representatives who ought to do this of secondary importance.[290] However, secondary importance or not, the choice of a certain percentage is a fundamental choice that must be accounted for in a normative sense. This percentage directly influences the total amount of political power for animal trustees, and this thus ought not to be an arbitrary number. Picking a random number for determining the ratio of power distribution without underpinning it with arguments seriously underestimates the fundamentality of this choice. Why would five percent of political influence be the right amount and not the tenfold of that: fifty percent? As long as such a fundamental question remains unanswered, adopting a five percent policy, or any other arbitrary number, seems normatively hard to defend.

The second problem with picking a random percentage is that it cannot be regarded as a serious solution to the challenge of finding the right balance in the political powers of human representatives and animal trustees. It seems that no one percentage can secure the two previously discussed objectives. If animal trustees were to have little power, expressed in a small percentage of seats (such as five percent), then it could not be assured that non-human animals' interests would be given due consideration. To Ekeli, this is not a problem, since for him it is sufficient if

[289] An argument against arbitrary quota that was put forward by Dennis F. Thompson that will not be discussed here is that arbitrary quota would undermine the principle of equal representation. This argument is not further discussed because it was just argued that this principle might not be appropriate in the interspecies context anyway. Thompson, "Representing Future Generations," 29.
[290] Ekeli, "Giving a Voice to Posterity," 442, 445–446.

the interests of future people are merely *voiced* in parliament (which can be achieved by even one representative), not necessarily duly considered.[291] In our context, however, non-contingency of non-human animal consideration is one of the key requirements for animal enfranchisement, and the legitimacy criterion requires an institutional setting that could reasonably be interpreted as reflecting the political equality of every member of the demos. Consequently, very little power for animal trustees, such as five percent of parliamentary seats, would be normatively deficient. On the other hand, if animal trustees had a larger percentage of seats, say sixty or eighty percent, then the other objective of respecting humans' interests and preferences would be in danger, which is also undesirable. Not even a middle ground, such as a fifty-fifty ratio of seats distribution would solve matters here, because it would still be an arbitrary division, and the previously noted objection that animal trustees would not be legitimized to decide matters beyond the welfare of individuals would still stand.

The foregoing illustrates that it is very difficult to come up with a distribution of political power between human representatives on the one hand and animal trustees on the other that is normatively defensible and practically realizable. It seems clear that we cannot compromise on any of the pursued objectives which, in short, prescribe respecting both humans' and non-human animals' democratic rights. Furthermore, we have seen that we must be careful not to create a legitimacy gap by assigning animal trustees political powers over issues on which the interests of non-human animals offers them no guidance.

Modifying the competences of animal trustees or the size of the institution comprised of animal trustees cannot solve the issue here, because the objectives pursued seem mutually exclusive. The more we restrict the political power of animal trustees (in competences or size), the more the animal institution becomes a toothless tiger and the more we move into the direction of compromising on non-contingency and interspecies legitimacy requirements. Inversely, the more extensive the political powers of animal

[291] Ekeli, "Giving a Voice to Posterity," 442, 445–448.

trustees (in competences or size), the greater the compromise on humans' preferences and interests, and the greater the legitimacy gap. Pushing around political power between human representatives and animal trustees is not likely to lead to a solution here. Any conceivable distribution of political power will not only necessarily be arbitrary, but it will also compromise on one of the pursued objectives and thus be normatively deficient.

V. Democratic costs

It has been suggested in previous subsections that, from the perspective of preventing abuse of power, the political enfranchisement of non-human animals would require the shifting of some political power from human representatives to animal trustees who are not popularly elected. Apart from the problems with this manoeuvre that have already been discussed (removing popular election is still insufficient in combatting abuse of power, and it cannot be determined how much political power ought to be transferred to animal trustees), there may be some additional, yet undiscussed reservations about transferring political power to unelected animal trustees. These various reservations concern the acceptability of this manoeuvre from a democratic point of view, and may thus be summarized as concerns about the *democratic costs* of enfranchising non-human animals. Controlling these democratic costs is the next challenge of politically enfranchising non-human animals.

Concerns about how democratic the investigated political enfranchisement of non-human animals is must be taken seriously. Three possible democratic problems with enfranchising non-human animals can be identified. The first democratic objection against the enfranchisement of non-human animals is that transferring political power from human representatives to animal representatives *as such* is problematic. The second objection considers assigning animal trustees political power to (co-)decide matters which are *not related to animal interests* problematic. The third objection considers assigning political power to animal trustees who are *not popularly elected* to be a democratic problem. These objections and whether they are convincing will now be discussed.

Assigning animal trustees political powers as such

The main reason for considering the political enfranchisement of sentient non-human animals was democratic in nature. From this perspective, the first concern, that assigning political power to animal trustees is *per se* democratically illegitimate, seems alienating. The objection here is that such a transfer of political power is, in and of itself, undemocratic—irrespective of whether animal trustees are elected by the human public or not and irrespective of the competences they will have. Animal trustees simply ought not to gain political power from this point of view.

This objection seems quite crude and misplaced if we recall the reason for assigning non-human animals passive democratic rights in the first place. We have seen that a consistent application of classic democratic principles leads to the conclusion that some non-human animals are also part of the demos and that this has consequences for our understanding of democratic legitimacy. Democratic legitimacy in its least demanding form (procedural legitimacy) requires having basic democratic institutions and procedures in place that are consistent with the political equality of every member of the demos. The current institutional structures of liberal democracies raise serious legitimacy concerns, because we have seen that they are unwarrantedly anthropocentric. From this perspective, giving animal representatives a role in the democratic process as such seems not to decrease democratic legitimacy but rather increase it. Animal trustees could offer the non-human part of the demos the political representation that they have a principled right to, but that is currently lacking.

The objection that introducing animal trustees is illegitimate per se can only be persuasive if we stick with the anthropocentric democratic paradigm and conflate democratic legitimacy with human voting. In other words: it is only in the paradigm of the old anthropocentric idea of democratic legitimacy that the insertion of animal representation as such can be perceived as decreasing democratic legitimacy. In this old paradigm, reflecting the political equality of the demos is mistakenly equated with respecting only the wills of human agents. "Universal suffrage," which in practice means distributing political power merely among human agents, is then taken to be a sufficient means of institutionalizing political equality and

thus considered democratically legitimate. However, merely respecting the explicated wills of people by means of elections is inherently discriminatory, for it ignores the fact that there are also individuals in the demos who are of political concern but who cannot engage in the complex activity of voting. Since political non-agents can also have relevant interests deserving of democratic respect, the "popular vote" can no longer be a synonym for democratic legitimacy, because only human agents are able to vote. Applying this old idea of democratic legitimacy in this context by claiming that injecting animal trustees is by definition undemocratic would be highly inconsistent. In interspecies liberal democracy, such an old and anthropocentric idea of what democratic legitimacy entails must make way for one that is more consistent with modern understandings of animals. In fact, the interspecies notion of democratic legitimacy seems to prescribe rather than resist transferring some political power from human representatives to animal representatives.

Assigning animal trustees political powers unrelated to animal interests

Shifting political power from politicians who represent humans to politicians who represent other animals thus need not constitute a democratic problem as such. In fact, the opposite seems true. However, the second democratic concern with regard to enfranchising animals is not directed at enfranchising them as such but problematizes the hypothetical option of assigning animal trustees political powers that go beyond deciding matters which are related to animal interests. This concern was already briefly voiced in the previous subsection about the proper distribution of political power, and it seems an appropriate concern.

That there is not by definition a democratic problem with adopting animal trustees in the institutional structures of liberal democratic states does not mean that everything is permitted. What follows from a modern interspecies interpretation of democratic legitimacy is that there must be some non-contingent institutional reckoning of non-human animals' interests, possibly through installing animal trustees. These trustees, however, would only have legitimacy insofar as they utilize their power to defend non-human animals' interests. They would be appointed and

legitimized to execute precisely that task and for nothing more than that. Since their principals, non-human animals, cannot offer them guidance on anything beyond matters relating to their interests, animal trustees would not be legitimized to use their political powers for matters which go beyond animal interests. They would, for example, not be legitimized to decide matters such as whether a country should adopt binding referenda, whether the retirement age should be raised, or whether taxes should be heightened, because these matters do not directly affect the interests of non-human animals, and the trustees' opinions on these matters are thus not legitimized, nor more valuable than those of other human agents. If animal trustees had the possibility to co-decide these matters, a legitimacy gap would appear. They would have substantial influence on complicated and abstract matters which require advanced consideration but for which they are not democratically legitimized. They are merely legitimized for doing what the "equality of every member of the demos" requires, and since non-human animals are merely equal to human agents in that they have interests to be defended, the legitimate mandate for animal trustees merely concerns defending these interests, not personal political preferences unrelated to animal interests.

Assigning unelected animal trustees political powers

The third democratic concern with regard to politically enfranchising animals problematizes the proposed choice of decoupling the selection of animal trustees from popular election. This implies a loss of popular control over the government, which may constitute a democratic problem.

Let us first recall what the reasons were for decoupling the selection of animal trustees from popular election. First of all, it was argued that the mere existence of animal representatives should not be fully dependent on whether the human electorate feels enough urgency to elect them, because this would be a violation of the non-contingency requirement. One could argue, however, that we could ensure a safe, non-contingent institutional position for animal trustees but still select them by way of general elections. There was, however, a more important reason why this option ought to be rejected. The main reason to reject election of animal trustees by the general

public was that authorization by the human electorate would incite animal trustees to make anthropocentric political choices. Their election would likely frustrate the alignment of animal trustees' political behaviour with the actual interests of non-human animals and thus encourage abuse of power. It was primarily for this reason that decoupling elections from the selection of animal trustees was considered essential.

Disconnecting the selection of animal trustees from general elections seems to cause a new problem, however: it also weakens societal control over governance. Political power would be transferred from elected human representatives to non-elected animal representatives: representatives over which society has no control. This would mean that some amount of political power would be placed outside of popular control. Both the selection and the functioning of animal trustees would then no longer be subject to public scrutiny. This transfer of political power thus diminishes popular control over the state and its institutions, governance, and policy.

Weakening society's grip on the state is almost always a bad idea. Popular control, in the sense that society has a controlling influence over the specific doings and the general direction of the state and its institutions, is one of the most important aspects of a liberal democracy. One of the benefits of popular control is that it helps to align governance with the wishes of the electorate, but this benefit can be relativized in the interspecies context, because we have seen that it merely aligns governance with the wishes of human political agents, not the complete interspecies demos. However, alignment is not the most important function of popular control. More importantly, by means of popular control, society is able to keep in check the well-known tendency of governments to extend their own powers, suffocate society, invade people's private lives, trample on people's rights, and ultimately clamp down on society as a whole and become totalitarian. It is, in that sense, apt to say that either the people control the government, or the government will control the people. Precisely to prevent the latter, in other words to protect individual rights and maintain a limited government instead, popular control is a jewel to be guarded with the utmost seriousness. The liberalness and limitedness of a government can only be preserved if society guards its own limits, which must be institutionally

facilitated through enabling popular control of governance. Furthermore, popular control enables society to not only criticize government, but also to immediately redirect it in case it derails (self-correction) and to remedy any detected problem, which is essential to democracies.[292] Through self-correction, popular control thus also enables society to improve governance in the long term.[293]

In short, popular control is an essential precondition for the long-term stability and success of liberal democracies. A democracy with failing popular control is in danger of degradation. Electoral appointment of government officials is the primary instrument to bring about popular control, and thus shifting political power from elected officials to unelected animal trustees would put a section of political power beyond popular control. It would institutionally block off popular control in proportion to the amount of power that will be transferred to unelected animal trustees. In the light of the foregoing, such a loss of popular control seems worrying, and ought to be prevented.

In sum, not all democratic objections against transferring political power to animal trustees are convincing. Transferring political power to animal trustees could not be rejected on the mere ground that this transfer, as such, would be democratically illegitimate. There is reason, however, to be wary of transferring political power to animal trustees if they are not popularly elected and/or if these powers include the power to decide matters not related to the interests of non-human animals. In these cases, introducing animal trustees might do more harm to liberal democracies than can be made up for by improving interspecies democratic legitimacy.

[292] Popper, *The Open Society and Its Enemies (Vol. I)*. See on self-correction as an essential element of democracies also: Bastiaan Rijpkema, *Militant Democracy: The Limits of Democratic Tolerance*, trans. Anna Asbury (New York: Routledge, 2018).
[293] Popper, *The Open Society and Its Enemies (Vol. I)*, 124–125.

VI. Conflicting interests

A different problem that needs to be addressed and that poses a challenge to politically enfranchising non-human animals is that the interests of non-human animals that trustees ought to bring into the democratic process are not homogeneous.[294] Up to this point, I have been talking about "non-human animal interests" as though they constitute a distinguishable group of identical interests and as if no conflict exists *between* the interests of different non-human animals. This is, however, obviously an oversimplification of reality.

In reality, there are not only many conflicts of interests between non-human animals on the one hand and humans on the other, but also between non-human animals of a certain species on the one hand and animals of another species on the other, or even between animals of one and the same species. What is in the general interest of foxes (prohibiting fox hunting by humans, for instance), runs directly counter the general interest of rabbits, on whom foxes prey. What is in the general interest of the lion (prohibiting trophy hunting, for instance), is not in the general interest of the gazelle, and so forth. When speaking of animal trustees' task to represent animals' interests in political institutions, it is thus not adequate to speak of *the* interests of non-human animals, as if it were a homogeneous thing that can be easily deducted from merely studying animals. Speaking in such general terms fails to take account of the reality in which the interests of some animals are necessarily in conflict with the interests of other animals. Demanding animal trustees to represent *the* interests of non-human animals thus is a more complicated assignment than it seems, for representing a widely varying group of animals necessarily involves representing many mutually excluding interests.

The diversity of animals' interests and their unavoidable internal conflicts are, however, clearly not unique to non-human animals. The natural situation among non-human animals is comparable to that among humans, who also have mutually exclusive and competing interests. The

[294] In the context of the enfranchisement of future people, the heterogeneousness of future people's interests was addressed by Kristian Skagen Ekeli, in: Ekeli, "The Principle of Liberty and Legal Representation of Posterity," 393–394. See on animals also: Cochrane, *Sentientist Politics*, 56–60.

resources necessary for fulfilling our interests are limited, and thus, according to the old wisdom of Thomas Hobbes (1588–1679), humans become "enemies" of one another if they desire things that they cannot both enjoy. Ultimately, they need some type of government to manage and remedy these (looming) conflicts.[295] Still, no government can prevent human interests from conflicting with one another. Even in current well-functioning liberal democracies, many conflicts of interests between humans exist. What is in the interest of a poor person (free education, affordable collective health care, substantial taxes on savings), is often not in the interest of a rich person. What is in the interest of a person who travels only by public transport (state subsidies on public transport, high taxes on CO2 emissions) is not in the interest of a person who generally travels by car, and so on. In these ways, and many more, human interests also clash with one another, which is inevitable in a world in which scarcity is a reality. This situation of endlessly clashing human interests does not seem to be radically different from that of non-human animals. At best, governments can hope to manage these unavoidable conflicts of interests by forming an institutional framework in which such conflicts can be remedied in a relatively peaceful way. For human agents, the most obvious way of institutionally channelling these unavoidable conflicts of interests is to offer individuals the possibility to defend their unique set of interests by equipping them with voting rights. For non-human animals, however, this is not an option, and so another solution will have to be found.

Categorical representation

One option of institutionally channelling the multiple and diverging interests of non-human animals is to introduce separate trustees for different categories of animals who have similar interests. We may label this option *categorical representation*. It is possible to establish distinct animal trustees for different species of animals, for example distinct trustees for respectively foxes, rabbits, lions, and antelopes. Alternatively, it is possible to establish

[295] Thomas Hobbes, *Leviathan*, ed. Richard Tuck (Cambridge: Cambridge University Press, 1996/1651), 86–111.

distinct trustees for prey animals on the one hand and predatory animals on the other hand. Dividing non-human animals into different groups with overlapping interests allows us to assign each of these groups their own trustee.

An important problem with such a construction, however, would be that any demarcation of a group, for example along species or predator/prey lines, would necessarily be inconclusive. Matching distinct trustees to different categories of animals fails to take into account the reality that the interests of animals do not necessarily follow species membership or predator/prey lines either. In reality, interests also clash between animals of the same species, for example when the political issue is whether some rabbits are to be sacrificed for experimentation objectives in order to gain medical knowledge that would benefit all pet rabbits. Additionally, predatory animals and prey animals may occasionally share the same interests, for instance when the political issue is whether the protected status of a certain nature park will be withdrawn in order to build apartments in the area where both predatory and prey animals live. Categorical representation thus does not seem ideal, because demarcation lines aimed at grouping animals with similar interests together are necessarily inadequate.

Internal weighing

Categorical representation may not be the only option for institutionally channelling the multiple and diverging interests of non-human animals, however. A different option is what we may label *internal weighing*.[296] It is possible to make animal trustees professionally responsible for managing the multitude of interests amongst non-human animals by making it their responsibility to first map all the relevant interests and then weigh these interests by themselves. In practical terms, internal weighing would proceed

[296] Internal weighing must be distinguished from the earlier-discussed concept of encapsulated interests, which refers to the situation where people with representation rights allegedly also automatically represent others who lack representation rights of their own, because the latter's interests are presumed to be included in the "master's" interests. Whereas the concept of encapsulated interests has no specific concern for equally and independently weighing the interests of the represented (women/children/non-human animals) against other interests, having independent and equal concern for the interests of all those represented is a crucial requirement in the here discussed ideal concept of internal weighing.

as follows. First, the animal trustee would need to form an idea of the interests of animals that are relevant to a certain political issue. He must, for example, form an idea of the independent interests of the foxes and the rabbits (and all other sentient animals) who can be harmed and benefitted by a possible ban on fox hunting. Subsequently, he would need to determine which of these interests is, over all, the weightiest and let this be decisive in determining what course of political action he will pursue.

In the first step, the trustee would be required to picture the relevant interests of all animals who would be affected by a certain political course of action. These interests ought to be, as it were, present in the trustee's mind. This phenomenon, in which representatives invoke, include, and involve the interests of entities not already explicitly present in the democratic institutions, has been labelled *deliberation within* by Robert E. Goodin.[297] Deliberation within requires that representatives "deliberate" in their own minds and try to envision the views of others without these others being able to present and defend their own views and interests. Deliberation within might be a partial substitute for the explicit categorical representation of different groups of animals with specific interests, because the perspectives of the foxes, rabbits, lions, and gazelles are already "present" in the representative's mind. In theory, the representative can "project himself into" the position of any animal at any time, enabling him to bring into the deliberation the perspective of all relevant animals.

The more challenging part of handling animals' diversity of incompatible interests, however, is the second step: the weighing of these "imaginatively present"[298] interests. Not only must the trustee be able to envision all relevant independent interests relating to a specific political issue (step one), he must also objectively weigh these divergent and numerous interests (step two) and determine which interest is the weightiest. This step appeals even more to the qualities of the animal trustee. The animal trustee yet again will have to utilize his own intellectual powers and judgement capacities to decide which animal interests are objectively

[297] Goodin, *Reflective Democracy*; Robert E. Goodin, "Democratic Deliberation Within," *Philosophy & Public Affairs* 29, no. 1 (Winter 2000): 81–109.
[298] Goodin, "Democratic Deliberation Within," 83, 84, 98, 99.

the weightiest, having considered all non-human animals' interests relevant to the respective political issue. The *number* of individual animals affected by a certain political course of action and the *gravity of the impact* on the welfare of those individuals are two factors which may guide the trustee in determining whose interests are the weightiest and ought to be politically prioritized.[299] The trustee obviously ought not to let personal preferences or species bias cloud his judgment.

There seem to be some problems with internal weighing too, however. Objectivity is of the utmost importance if we were to opt for internal weighing. In that case, the only chance for non-human animals of having their interests genuinely considered in the democratic process is when the animal trustee does so in his head. It thus will have to be ascertained that the trustee weighs out all the relevant non-human animal interests on their objective merits, and he must eventually make an unbiased judgment as to which animals' interests are the ones to prevail. Without this objectivity, the non-contingency requirement is violated, because by the mere absence of animal X in the trustees' mind, this animal will no longer have any chance of having his interests politically considered. It seems, however, that the objectivity of animal trustees can hardly be guaranteed, which means that a non-contingent consideration of animal interests also cannot be guaranteed. Since the weighing of animal interests would be particularly opaque (for they would proceed in the trustee's mind), and since we have seen that animal trustees are virtually unaccountable, it seems also impossible to institutionally force trustees into the required objectiveness.

In short, the reality that the interests of non-human animals are heterogeneous and in constant conflict with one another is yet another challenge that makes the political enfranchisement of non-human animals particularly complicated. Both categorical representation and internal weighing fail in institutionally channelling the diversity of interests among non-human animals in a normatively acceptable way.

[299] In the context of future people representation: Ekeli, "The Principle of Liberty and Legal Representation of Posterity," 393–395.

3.2 Recapitulation of politically institutionalizing regard for animal interests

The foregoing elaboration has illustrated that giving effect to non-human animals' consideration right in the political institutions comes with many challenges, some of which appear to be very hard to solve. The central complicating theme, which was directly or indirectly central to almost any discussed challenge, is the reality that non-human animals are political patients, unable to be aware of, understand, and engage in political acts. The political patiency of non-human animals turned out to be a cause of other problems, and the solutions that were suggested to solve these problems caused many new problems in return. It ultimately led us into a web of intertwined normative and practical requirements of political animal enfranchisement, and many of these have appeared to require opposite things. The purpose of this recapitulating and analysing section is to clarify how the independently discussed challenges in this chapter relate to one another and to the enfranchisement criteria. This recapitulation will help us to form an idea of the overall possibility of enfranchising animals in political institutions and to gain a better understanding of the underlying problems of this endeavour.

At the very beginning of this chapter, it was noted that non-human animals' political patiency disqualifies them from general, formal political representation, because they are unable to elect and redirect their own political representatives. Furthermore, they cannot inform their political representatives about the preferred representation of their interests. These circumstances forced us to opt for a less common form of political representation: political guardianship. A political guardian or trustee would have to professionally represent and defend the actual interests of non-human animals. He would have to inform himself about the latest scientific knowledge of animals' interests in order to be able to know how animals will be affected by certain policies, and he would have to distinguish between animals' important preferences and their irrational preferences that he generally ought to disregard. Furthermore, since the interests of different animals conflict with one another, the political animal trustee might also

have to become responsible for mapping out the relevant interests of all sentient non-human animals and then determine the relative weight of these interests. It has been argued, however, that this would require an unreasonable objectivity on the side of the trustee and that thus a non-contingent consideration of animal interests cannot be guaranteed. The other option of institutionally dealing with the heterogeneity of animal interests, categorical representation, also seemed far from ideal, which left the challenge of dealing with the heterogeneity of animal interests ultimately unsolved.

The inevitable choice of trustee representation complicated other challenges. One of those challenges is controlling the risk of abuse of power. This is a challenge to any form of representation, but we have seen that, especially in the case of trustee representation, preventing abuse of power is extremely difficult but all the more important. An animal trustee has relatively many opportunities to abuse his power, for it is his job to give substance to the content of representation, he is allowed to overrule the expressed preferences of his principals, and animals have no option of controlling him. The bad track record of guardianship governance in history should make us extra alert to abuse of power. It was thus considered highly important to find a way to ascertain that the political animal trustee, who would paternalistically look after the interests of non-human animals in political institutions, would only act in the interests of the animals and thus not abuse his power.

In finding ways to control this risk of abuse of power, the reality that non-human animals cannot elect their own representatives came back to haunt us again. Popular control by way of general elections is a proven mechanism against abuse of power in the human case. By authorizing and holding their representatives accountable via elections, human agents are enabled to screen out the politicians that they distrust or that have proven to abuse their power. Since non-human animals are unable to elect their own representatives, the world's most efficient instrument of preventing and remedying abuse of power is not available to non-human animals—a difficulty yet again rooted in their political patiency.

Because non-human animals cannot elect and control their representatives, there is a shortage when it comes to the accountability of animal representatives. This is problematic, because accountability is one of the key mechanisms that can prevent and remedy abuse of power. Without recovering some type of accountability, there seems to be no guarantee that animal trustees will align their political choices with the actual interests of non-human animals and animal trustees cannot be redirected or institutionally sanctioned if they abuse their power at the expense of the animals they ought to represent. But if not to their principals, to whom or what should political animal trustees be accountable? Thompson and Smith have suggested that trustees could be made accountable to their own personal principles or to an ideal fulfilment of their role. We have seen, however, that these options are too permissive to constitute an effective accountability mechanism and adequately control (imminent) abuse of power.

A different and more rigorous option that was considered is making animal trustees accountable to an external political body. Animal trustees then become answerable to a different political organ and have to account for their political choices and behaviour before this organ. This option, however, also could not offer a conclusive solution to the problem discussed here, for it would merely push the problem around. The reviewing organ would need to be composed of people who are truly invested in the objective interests of non-human animals. This "solution" thus merely shifted the problem to the reviewing institution: how can we guarantee that the people reviewing the animal representatives are objective and genuinely concerned with the true representation of non-human animals' interests? This seemed impossible.

Yet another alternative was making animal trustees accountable to (constitutional) courts. The objectivity of courts is relatively uncontroversial in liberal democracies. This move, however, yet again raised more questions than that it offered true solutions. Who would be a legitimate author to formulate a set of instructions for animal trustees, which would have to function as a legal basis for this review and as legal guidance for the courts? How substantial ought the courts' review be? How can we prevent a

situation in which courts are tempted or even required to make politically sensitive rulings and breach the separation of powers? Where do we find a legitimate, non-political, and objective source which can assist courts in determining non-human animals' true interests? For many reasons, accountability to courts was also considered highly undesirable, while also not being a solution to the challenge of mitigating abuse of power.

A last option to tackle this challenge could be to make animal trustees accountable to general voters (that is, human political agents). This could easily be done by asking voters to (also) elect animal trustees. We have seen, however, that trying to fix the accountability gap regarding animal trustees in this way increases rather than decreases the risk of abuse of power by animal trustees. Making animal trustees dependent on the votes of humans would be a stimulus to be responsive to *their* preferences rather than to pursue non-human animals' interests, and it would thus confront animal trustees with a strong anthropocentric incentive. General elections of animal trustees would, in other words, probably have the opposite effect of what we are trying to achieve with them: they would likely provoke abuse of power against non-human animals, instead of preventing and remedying it.

So, accountability to the human electorate also could not fix the accountability gap. This means that a satisfactory means of establishing accountability for animal trustees has not yet been found. This is a serious shortcoming, for it will become very hard to guarantee that animal trustees will use their power for the right ends if they are not accountable. We have, however, seen that other strategies of limiting the risk of abuse of power exist. In theory, it is possible to strictly regulate the selection of candidates for the positions of animal trustees by introducing selection criteria. The problem with this, however, is that the effectiveness of character selection strategies is disputable and that they bring significant democratic costs with them. Character selection strategies thus cannot offer a sufficient protection against abuse of power by animal trustees either. The challenge of controlling abuse of power thus also seems to remain a problem to which there is no clear-cut solution.

As a result of the fact that a general election of animal trustees would persuade them to act in accordance with the preferences of humans and thus substantially increase the already unacceptable high risk of abuse of power, it was proposed that if animal trustees were introduced at all, they should certainly not be elected by the general public. This move of detaching the selection of animal trustees from general elections again led us deeper into the swamp. It has three alarming consequences.

The first consequence of not having the general electorate vote animal trustees into office is that this automatically means that animal representatives and human representatives can no longer be the same people. It was argued in chapter two that introducing separate human and non-human representatives was not an implicit condition to the independence requirement. That is, so far, there was no principled reason to opt for separate animal representatives. The politicians we have today could, in principle, take up the task of representing other animals as well, if we were to succeed in introducing institutional mechanisms to make them do so. However, the conclusion that animal trustees can no longer be subject to human election changes this matter. It means that human representatives cannot simultaneously act as animal trustees, because the people executing the tasks of the animal trustees cannot be popularly elected. Since it is unwise to change the authorization and accountability mechanisms that work so well for human representatives (by making human representatives unelected too), this means that representing humans and representing non-human animals can no longer be done by the same people.

The fact that animal trustees and human representatives must be different people creates a yet new challenge, a challenge which is thus also an indirect second consequence of the initial choice to reject the general election of animal trustees. Now that we are compelled to introduce separate animal trustees, a new balance of power ought to be found. Political power must be transferred from old-fashioned human representatives to the new animal trustees, and the new challenge this confronts us with is that it must be determined *how much* power would have to be transferred. We have seen that this challenge is, yet again, unsolvable if we are to stick with the unassailable principle that both humans and sentient non-human animals

have the right to have their interests duly considered. Furthermore, we have seen that we must be careful not to create a legitimacy gap by giving animal trustees too many political powers, among which those which would enable them to decide matters that go beyond animal interests. This brings us to the last challenge.

The last challenge of politically institutionalizing the right of non-human animals to be considered is making sure that this enterprise will not incur overly high democratic costs. Two realistic potential democratic costs have been identified, both related to the choice of detaching the selection of animal trustees from popular election, and they thus constitute the third consequence of detaching the appointment of animal trustees from general elections. First, if unelected animal trustees were able to decide matters which go beyond the interests of non-human animals, this would constitute a democratic cost, because they are not democratically legitimized for such matters. The political patiency of non-human animals means that they cannot offer their trustees guidance on these matters, and trustees thus lack legitimacy on such matters. In theory, this democratic cost could be avoided by not assigning animal trustees the political power to determine matters which go beyond the interests of non-human animals. We have seen, however, that making the competences of animal trustees conditional in this sense would hardly be a solution, because it confronts us with the seemingly unsolvable problem of having to find an objective party that can determine whether the respective condition is fulfilled.

The second democratic cost is inherent to introducing unelected animal trustees. This democratic cost is losing some amount of popular control over state governance. If animal trustees are not elected by the general public, the appointment of animal trustees will necessarily become a matter of (s)election by fewer people. This amounts to a loss of popular control, for the political power given to animal trustees will no longer be subject to the will of the general public, nor will it be controlled by the general public. Society's grip on state governance will thus weaken in accordance with the amount of power that will be assigned to unelected animal trustees. This is a serious problem, because popular control is an absolutely essential aspect of liberal democracies. There seems to be no

solution to this problem, because what is minimally required for counteracting abuse of power and securing a non-contingent and due consideration of animal interests (namely: assigning significant powers to unelected animal trustees) is in direct conflict with what is required for upholding an essential facet of liberal democracies (namely: maintaining popular control over governance). This leaves us with yet another challenge unsolved.

3.3 Conclusion

In this chapter, the opportunities and challenges of institutionalizing non-human animals' consideration right in the political sphere were explored. The previous recapitulation, which interconnected the different findings of this chapter, paints a troubling picture. In chapter one, we have learned that the mere fact that non-human animals are political patients does not mean that they do not have democratic rights. In this chapter, however, we have learned that their political patiency most likely *is* a crucial obstacle in giving practical effect to their consideration right in political institutions. Enfranchising non-human animals politically would require us to dive into an ambitious project of political trustee representation, but many challenges regarding this project yet remain unsolved. Without solving these challenges first, politically enfranchising non-human animals by way of introducing powerful but unelected animal trustees seems unwise. Not only would it be far from ideal in light of the enfranchisement criteria, but it could also seriously affect the "limited government" aspect of liberal democracies and even the long-term stability and sustainability of liberal democracies.

A deeper analysis of the political sphere of liberal democracies makes it unlikely that the noted challenges can be solved. Political institutions in liberal democracies seem to be founded on the fundamental anthropological assumption of the rational and self-serving individual with political agency. Political institutions and their intermediate checks and balances are designed and have evolved in such a way that they are effective if the people occupying them try to pursue their own interests politically. As such, the political institutions of liberal democracies have no pretention to be any more objective, fair, or balanced than is required for providing political

agents equal chances of pursuing their own interests in the political institutions. This fundamental focus on the selfish and politically autonomous person means, however, that there is some fundamental discomfort between the political institutions of liberal democracies on the one hand and the political position of political patients on the other hand. One only needs to think of the political position of children, comatose humans, mentally ill people, and people with extremely low intellectual capacities to notice this discomfort. Put bluntly: in the political institutions of liberal democracies, political patients are, in principle, always one step behind. The noted problems related to the enfranchisement of non-human animals in political institutions must be understood against this background of a persistent and fundamental unease between political patients and liberal democratic political institutions.

It seems overly naïve to expect that an equal, independent, and non-contingent consideration of non-human animals' interests can be achieved in this political arena, which has no place for political patients and where objectivity does not seem to be a rule of the game. The normative theory of this book requires an objective interspecies weighing of interests, but this objectivity can never be acquired in a context in which merely political judgments are made by political agents who are institutionally expected to act in their own interest. The political nature of these judgments implies a certain automatic priority for human-ness, political agency, autonomy, and selfishness. Expecting complete objectivity in the weighing of different interests in the political arena thus seems to expect the impossible. Pulling some occasional strings in political institutions will not help us here, because this cannot alter the fundamental rules and structures of the game that is being played in the political sphere. Politics is, one way or the other, a business of competing subjective self-interests, and the ground rule is that one stands up for oneself if one is to be taken into political consideration. This quite fundamentally puts political patients well behind.

The lack of objectivity and the neglect of political patients in *political* institutions do not mean that liberal democracies *as such* lack objectivity and a due regard for political patients, however. When we yet again consider human political patients, we notice that their incompetence to politically

participate do not render them second-class citizens, which is due to legal corrections. Crucially, the initial broad lines of democracy, which may initially disadvantage political patients, are compensated by legal institutions, which right initial wrongs done to political patients. One of the great assets of liberal democracies is precisely the combination of and interaction between the political and the legal sphere. Combined, they establish something like objective regard for, and equal treatment of individuals. It is precisely the compensating assets of the *legal* institutions which ultimately establish something close to objectivity, equality, and due regard for initially disregarded individuals, such as political patients.

In this light, it seems clear that the political sphere is not the place to look for objective judgments about the interests of animals. In other words, fair decisions concerning the interests of non-human animals are not likely to emerge by enfranchising them in the political institutions. We might, however, consider institutionalizing animal interests in the legal institutions, which seems a more logical choice in light of the foregoing. The ground rules of the legal game resonate much better with our enterprise of enfranchising non-human animals. In the legal sphere, processes and actual institutions are directed by long-proven principles of justice, which are, through our constitutions, also presumed to be democratically backed by society. Legal rules, judgments, and institutions are required to be objective and impartial, they ought to respect the equality principle (as applied beyond political agents), and they ought to give due regard to the interests of individuals—even if they cannot stand up for themselves. The law itself and Lady Justice's blindfold forces objectivity on purveyors of justice: they must be free from political motives and they are not to be led by private opinions and self-interest in their balancing of interests, nor may these be reflected in the decisions in which this balancing results. As will be argued in the remainder of this book, such legal objectivity should and could also imply objectivity with regard to the species membership of individuals and thus require agents of justice to not let any species bias seep into legal judgments. Crucially, these to the enfranchisement of animals highly relevant principles are already engrained in the legal sphere, and so it will not be necessary to artificially bring about objectivity and due regard for

political patients in a context in which it simply does not fit. It is much more likely that the criteria for non-human animal enfranchisement will be met if we merely extend protections that the law already offers to non-human animals. It thus seems fruitful to now leave the terrain of the political institutions and move on to that of the legal institutions.

4

Enfranchising animals in legal institutions: Constitutional state objective

Introduction

The foregoing has illustrated that an ideal institutionalization of non-human animals' consideration right is not likely to be achieved in the political institutions of a liberal democracy. It is a logical move to now look into whether the legal institutions of liberal democracies are better equipped to give effect to non-human animals' consideration right. In liberal democracies, state power is typically subject to the rule of law, which means that the law—primarily the constitution—limits the authority of the government and the ways in which power may be exercised. Appealing to the rule of law thus might be a fruitful strategy to attain the institutional reform sought in this book: making liberal democratic states formally and systematically consider the interests of sentient non-human animals. Put the other way around, the goal is to limit the state's ability to unreasonably disregard the interests of sentient non-human animals. Appealing to the rule of law by adjusting the constitution in such a way that animal consideration becomes a constitutional duty for state officials then seems to be an attractive option. Constitutions, as the most prominent legal documents of liberal democratic states, define the most important values and principles of societies, the limits of state authority, the obligations that states have with respect to citizens, and the rights that citizens have in relation to the state and in relation to other citizens. These prominent documents could well be the proper place to institutionally arrange the enfranchisement of non-human animals in liberal democracies. Moreover, constitutional provisions are typically difficult to change, and constitutional adjustments are thus

particularly effective in establishing long-term effects and meaningful changes in the larger institutional framework of liberal democracies.

It thus seems fruitful to look for constitutional change that can bring about a duty for state officials to take due notice of non-human animal interests. Constitutional provisions can take many shapes, however. They can assign specific powers to certain governmental bodies, they can detail individual rights, they can explicate certain state objectives, and they can comprise general regulations of constitutional design and organization. What type of constitutional provision could possibly establish the desired reform?

There are two types of provisions that could reasonably be expected to potentially bring about a duty for state officials to take due notice of non-human animals' interests. There are, in other words, two contenders that are worth considering in our search for legally institutionalizing the consideration right of animals in the primary institutions of liberal democracies. First, a constitutional provision comprising a *state objective*. Such a provision could prompt governments to take animal welfare interests into account as part of their constitutional duties. Second, one or more provisions comprising *fundamental legal animal rights*. Sentient animals could be assigned (certain) fundamental legal rights, which would straightforwardly force a state to take non-human animal interests into account. These two legal options, and the question of whether they would have the potential to meet the normative enfranchisement criteria, will be investigated in the current chapter and the next chapter.

The main aim of this chapter, accordingly, is to explore one of the possibilities of legally institutionalizing the consideration right of non-human animals. More precisely, the option of introducing a constitutional provision that makes protecting animal welfare a state objective will be investigated. In the first section, the nature of state objectives in general and four political and legal effects of such a provision specifically in the context of animal welfare are discussed. In the second section, in what ways such a provision differs from legal rights will be elucidated. The third section comprises a case study: how does the already existing state objective on animal welfare in the Swiss Constitution currently function? The fourth

section analyses whether the constitutional state objective has the potential to bring about a position for non-human animals that meets the five enfranchisement criteria. The fifth section encompasses the conclusion of this chapter.

4.1 The constitutional state objective and its political and legal effects

One option of persuading governments to also take account of non-human animals' interests is introducing a constitutional provision comprising a state objective on animal welfare.[300] Such constitutionally embedded state objectives—which are sometimes also called "fundamental objectives," "policy principles," "constitutional objectives," or "directive principles of state policy"—are a relatively new phenomenon. Currently, Switzerland, India, Brazil, Slovenia, Germany, Luxembourg, Austria, and Egypt have a constitutional state objective on animal welfare, and Belgium is considering adopting one as well.[301] Furthermore, the *Treaty on the Functioning of the European Union* contains an atypical provision which might be understood to be a meta-state objective: it commands member states of the European Union and the Union itself to "pay full regard to the welfare requirements of animals" in formulating and implementing some of the Union's policies, "since animals are sentient beings."[302] In Switzerland, the first European country to adopt a constitutional state objective on animal welfare in 1973, the state objective reads: "The Confederation shall legislate on the protection of animals."[303] Germany, also a relatively early adopter (2002), has a

[300] Parts of this section have been published before in: Janneke Vink, "Het Constitutionaliseren van de Zorg voor Dieren als Wezens met Gevoel," Speech at an expert hearing regarding the proposal to revise article 7*bis* of the Belgian Constitution, recited in the Senate, Brussels (Belgium), March 19, 2018, and in: Janneke Vink, "Dierenwelzijn: Van Onderhandelbare Naar Grondwettelijke Waarde," *Nederlands Juristenblad* 93, no. 26 (July 2018): 1862–1869.

[301] Jessica Eisen, "Animals in the Constitutional State," *International Journal of Constitutional Law* 15, no. 4 (November 2017): 909; "Voorstel tot Herziening van Artikel 7bis van de Grondwet," 6-339/1, April 25, 2017 (Belgian constitutional revision bill).

[302] In doing so, "the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage" ought to be respected. Article 13 of the *Treaty on the Functioning of the European Union*.

[303] Bolliger, "Legal Protection of Animal Dignity in Switzerland," 316–317; Article 80, first paragraph of the *Bundesverfassung der Schweizerischen Eidgenossenschaft* (Federal Constitution of the Swiss

comparable but more extensive provision that is generally understood to be a state objective on animal welfare: "Mindful also of its responsibility toward future generations, the state shall protect the natural foundations of life *and animals* by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order" (italics JV).[304] These formulations of state objectives may seem quite permissive on first appearance, but we will see that their legal implications stretch further than what a purely literal interpretation might suggest.

Before we can proceed to discuss the general features and political and legal effects of a constitutional state objective, however, it must be noted that the exact meaning and precise implications of a state objective are, to a certain extent, always dependent on its specific implementation in a specific jurisdiction. Factors such as the formulation of the state objective, the (constitutional) legislator's original intentions in introducing it, and the wider constitutional context influence the legal implications and practical functioning of a constitutional state objective.[305] Obviously, legal systems around the world vary greatly, and although there are some generally accepted categories of legal systems with similar core characteristics (such as common law jurisdictions versus civil law jurisdictions), no two countries have the same and thus perfectly comparable legal structures. All jurisdictions have their local singularities and traditions, which complicates making transnational generalizations about the legal significance of constitutional state objectives. It seems nonetheless possible, however, to discern some generally recognized and accepted functions of state objectives. According to comparative law expert Joris Larik, who has done

Confederation), unofficial translation provided by the Swiss government, https://www.admin.ch/opc/en/classified-compilation/19995395/index.html.

[304] Article 20a of the *Grundgesetz für die Bundesrepublik Deutschland* (Basic Law for the Federal Republic of Germany), official translation provided by the German government (trans. Christian Tomuschat, David P. Currie, Donald P. Kommers and Raymond Kerr, in cooperation with the Language Service of the German Bundestag), https://www.btg-bestellservice.de/pdf/80201000.pdf.

[305] Generally, the more precisely a state objective is formulated, the less discretionary space there is for state officials. Inversely, the more permissively a state objective is formulated, the more it allows for different interpretations and the wider the discretionary space for state officials is. See also: Claudia E. Haupt, "The Nature and Effects of Constitutional State Objectives: Assessing the German Basic Law's Animal Protection Clause," *Animal Law* 16, no. 2 (Spring 2010): 227.

comparative research on constitutional state objectives and their doctrines in Germany, France, and India, doctrines on constitutional state objectives show "sufficiently similar legal features to speak of a norm category which transcends different jurisdictions." Larik argues that, in spite of the many differences between legal systems, constitutional state objectives are a norm category in their own right, which makes it possible to identify some general functions and effects of these constitutional provisions.[306]

Characteristic of constitutional state objectives is that they are formal expressions of a social-political goal that the state aims to pursue. In a generally accepted definition, drafted by a German expert commission on objectives of the state in a 1983 report, constitutional objectives are described as "constitutional norms with legally binding effect, which enjoin on public policy the continuous observance of, or compliance with certain tasks, i.e. objectively delineated objectives."[307] A different definition of *Staatszielbestimmungen*, as state objectives are appealingly called in German, is provided by comparative law expert Karl-Peter Sommermann (1956–), who describes them as "constitutional provisions which commit the government in a legally binding manner to the pursuit of a certain objective, without granting subjective rights to the citizen."[308] The constitutional state objective can thus be summarized as a type of governmental self-binding with the purpose of securing a lasting investment in a certain social-political goal.

State objectives have several functions. The most obvious is their symbolic function: they elucidate that a state considers a certain social-political goal significant enough to include it in its most important legal document: the constitution. Apart from their symbolic significance, constitutional state objectives also have more complex political and legal effects. Since they are binding constitutional provisions, they lift the

[306] Joris Larik, *Foreign Policy Objectives in European Constitutional Law* (Oxford: Oxford University Press, 2016), 31, 64. The transnational comparability of constitutional state objectives specifically on animal welfare is discussed in: Eisen, "Animals in the Constitutional State," 909–913.
[307] Referenced in: Larik, *Foreign Policy Objectives in European Constitutional Law*, 31–32.
[308] Karl-Peter Sommermann, *Staatsziele und Staatszielbestimmungen* (Tübingen: Mohr Siebeck, 1997), 326; Larik, *Foreign Policy Objectives in European Constitutional Law*, 32.

respective aspect of the general good to a constitutional legal status, which, as we will see further on, has important legal implications.[309] The goal stipulated in a constitutional state objective requires primarily the legislator's attention, but is also binding for the executive and judicial branches.[310] The fact that the state is bound to further the constitutionalized social-political goal implies that decreasing the quality of pre-existing legislation or regulation on the respective matter (e.g. animal welfare standards) is unconstitutional.[311] Legislation that amounts to seriously compromising or frustrating the successful pursuit of a constitutional state objective is, according to mainstream legal opinion, also unconstitutional.[312] The most important legal function of a state objective, however, is that it may function as a legal basis for limiting the fundamental legal rights of humans.[313] This is possible through judicial interpretation, when (the outer boundaries of) fundamental rights are interpreted in the light of the constitution as a whole, or through legislation, when the (constitutional) legislator considers it necessary to limit a certain right in order to do justice to a constitutionally protected state objective. Further legal effects follow from legal interpretation at various levels and domains of governance, for instance in the interpretation of open norms in lower legislation. As a result of a state objective on, e.g., animal welfare, more weight may be attached to animal welfare when interpreting open norms or when weighing out interests in several (political or legal) contexts.[314] The enforceability of state

[309] Larik, *Foreign Policy Objectives in European Constitutional Law*, 64.
[310] Larik, *Foreign Policy Objectives in European Constitutional Law*, 32, 41, 64; Haupt, "The Nature and Effects of Constitutional State Objectives," 226; Bolliger, "Legal Protection of Animal Dignity in Switzerland," 316.
[311] Haupt, "The Nature and Effects of Constitutional State Objectives," 228–229; Kate M. Nattrass, ""…Und Die Tiere": Constitutional Protection for Germany's Animals," *Animal Law* 10 (2004): 303; Gieri Bolliger, "Constitutional and Legislative Aspects of Animal Welfare in Europe: Animal Welfare in Constitutions," *Stiftung für das Tier im Recht*, February 1, 2007, 2.
[312] Larik, *Foreign Policy Objectives in European Constitutional Law*, 34–35, 42.
[313] Larik, *Foreign Policy Objectives in European Constitutional Law*, 15–65; Eisen, "Animals in the Constitutional State," 918–924; Haupt, "The Nature and Effects of Constitutional State Objectives," 237–257; Nattrass, "…Und Die Tiere," 302–304; Bolliger, "Legal Protection of Animal Dignity in Switzerland," 315–319.
[314] Nattrass, "…Und Die Tiere," 288–289, 292–293, 298–300, 302–311; Haupt, "The Nature and Effects of Constitutional State Objectives," 216, 225–230, 246–251, 256; Vanessa Gerritsen, "Animal Welfare in

objectives differs per jurisdiction, but it varies between no possibilities of enforcement at all to marginal enforceability in exceptional cases.[315] Even though state objectives have many similarities with social rights (in formulation, goal, and function), there is a broad consensus that state objectives do not comprise individual legal rights, nor could they arise from them through creative interpretations.[316]

In the animal welfare context, a constitutional state objective could contain a state's duty to further the protection of animals' interests or the duty to take care of animals as a matter of constitutional obligation. It would thereby make explicit that devotion to animal welfare protection is not an optional hobby but a formally recognized objective of the state. It could, in other words, have the effect of reducing some of the ambiguousness concerning the state's attitude towards animal welfare by making the protection of animals' welfare an official goal of the state. We will now zoom in on how some of the previously mentioned key features of state objectives in general would function in the context of animal welfare. We can roughly distinguish four effects that a state objective on animal welfare has.

Effect I: A basis for limiting fundamental legal rights

The most important effect of a state objective on animal welfare is that it is a constitutional basis for limiting other constitutional values, among which even individual rights. In effect, if backed by a constitutional state objective, animal welfare protection can require that fundamental rights of humans are limited to a certain degree.[317]

Switzerland: Constitutional Aim, Social Commitment, and a Major Challenge," *Global Journal of Animal Law* 1 (January 2013): 2–3; Larik, *Foreign Policy Objectives in European Constitutional Law*, 15–65.

[315] Larik, *Foreign Policy Objectives in European Constitutional Law*, 31, 64–65; Haupt, "The Nature and Effects of Constitutional State Objectives," 225–230.

[316] Larik, *Foreign Policy Objectives in European Constitutional Law*, 32–33, 36–37, 40, 42; Haupt, "The Nature and Effects of Constitutional State Objectives," 222–226, 256; Jessica Eisen, "Liberating Animal Law: Breaking Free From Human-Use Typologies," *Animal Law* 17, no. 1 (Fall 2010): 62–64; Nattrass, "…Und Die Tiere," 302; Vink, "Dierenwelzijn," 1862–1863; Margot Michel and Eveline Schneider Kayasseh, "The Legal Situation of Animals in Switzerland: Two Steps Forward, One Step Back—Many Steps to Go," *Journal of Animal Law* 7 (May 2011): 41.

[317] Larik, *Foreign Policy Objectives in European Constitutional Law*, 15–65; Eisen, "Animals in the Constitutional State," 918–924; Haupt, "The Nature and Effects of Constitutional State Objectives," 237–

That state objectives can have this effect has been confirmed by the German *Bundesverfassungsgericht* (Constitutional Court) on several occasions. In 2010, the German Constitutional Court explicitly acknowledged that animal welfare, precisely because of its constitutional status, can function as a justification for limiting other constitutional values, among which fundamental rights.[318] In a different case, the German Constitutional Court stated that animal welfare can be a legitimate ground for limiting the constitutional freedom of occupation.[319] The Court has also confirmed the legality of a legislative prohibition on sexual abuse of animals, while petitioners considered that prohibition an infringement on their constitutionally protected freedom of sexual autonomy.[320] The Court ruled, however, that sexually assaulting animals does not fall under the scope of the right to sexual autonomy, because animal welfare is a legitimate goal that limits that right. It thereby explicitly referred to the constitutional state objective on animal welfare.[321] That state objectives can have a limiting effect on fundamental rights is also confirmed in other jurisdictions and in the context of different state objectives and rights, among which property rights.[322] Importantly, however, the potential of restricting fundamental rights is limited. Undisputed is that animal welfare will obviously not attain automatic precedence over other constitutional values, but a proportionality test is required if a conflict of constitutional interests must be resolved.[323] Crucially, the state objective can only have limiting effects on the *periphery* of fundamental rights, not on their core, which means that human interests will retain their legal dominance.[324]

257; Nattrass, "…Und Die Tiere," 302–304; Bolliger, "Legal Protection of Animal Dignity in Switzerland," 315–319.

[318] BVerfG, October 12, 2010 - 2 BvF 1/07, §121, ECLI:DE:BVerfG:2010:fs20101012.2bvf000107.

[319] BVerfG, July 3, 2007 - 1 BvR 2186/06, §37, ECLI:DE:BVerfG:2007:rs20070703.1bvr218606.

[320] Article 2, first paragraph in conjunction with article 1, first paragraph of the *Grundgesetz für die Bundesrepublik Deutschland.*

[321] BVerfG, December 8, 2015 - 1 BvR 1864/14 - §11-12, ECLI:DE:BVerfG:2015:rk20151208.1bvr186414.

[322] Larik, *Foreign Policy Objectives in European Constitutional Law*, 40, 43, 49–53, 64–65; Nattrass, "…Und Die Tiere," 303–304; Eisen, "Animals in the Constitutional State," 918–924.

[323] Haupt, "The Nature and Effects of Constitutional State Objectives," 216, 229–230; BVerfG, October 12, 2010 - 2 BvF 1/07, §121, ECLI:DE:BVerfG:2010:fs20101012.2bvf000107.

[324] Eisen, "Animals in the Constitutional State," 918; Eisen, "Liberating Animal Law," 62, 67–68, 75; Nattrass, "…Und Die Tiere," 306–307; Larik, *Foreign Policy Objectives in European Constitutional Law*, 43;

In Germany, the state objective on animal welfare was introduced precisely with the intention of offering a legal foundation on which fundamental legal rights could be limited, in order to make animal welfare regulations effective again.[325] Due to strong and extensive constitutional protection of humans, statutory animal welfare legislation was often practically useless previous to the introduction of the state objective on animal welfare—a phenomenon with which other jurisdictions struggle as well. This is because the rules of legal hierarchy dictate that constitutional interests take precedence over statutory legislation, unless there is a legal basis for limiting these constitutional interests in statutory law. Since German statutory animal welfare legislation had no such legal basis prior to the introduction of the state objective in 2002, it could only limit behaviour that was not protected by a constitutional right.[326] Due to the vast expansion of the scope of fundamental rights in the last few decades, however, many forms of unethical treatment of animals could not be effectively contested by statutory animal welfare law, because they were protected by fundamental rights. This even led a German government official to stating that a constitutional backing of general animal welfare legislation was imperative, else "it is not worth the paper it is written on."[327]

The legal discrepancy in constitutionally protected human interests on the one hand and animal interests without such a status on the other hand led to an almost automatic and ethically barely defensible precedence of often minor human interests over major animal interests. Balancing these interests was often legally impossible, because immediate precedence had to be given to constitutionally protected interests: those of humans, in spite of the weightiness of the opposing non-human animal interests. A famous German court case clearly illustrates how constitutional protections of fundamental rights of humans frustrated a proper execution of general

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Haupt, "The Nature and Effects of Constitutional State Objectives," 249; BVerfG, December 8, 2015 – 1 BvR 1864/14, §11–12, ECLI:DE:BVerfG:2015:rk20151208.1bvr186414.

[325] Nattrass, "…Und Die Tiere," 288–302; Haupt, "The Nature and Effects of Constitutional State Objectives," 216–221; Schaffner, *An Introduction to Animals and the Law*, 159–161.

[326] Haupt, "The Nature and Effects of Constitutional State Objectives," 217–219, 237–257; Nattrass, "…Und Die Tiere," 288–302; Eisen, "Liberating Animal Law," 64–66; Eisen, "Animals in the Constitutional State," 917–918.

[327] Referenced in: Nattrass, "…Und Die Tiere," 299.

animal welfare legislation prior to the introduction of the state objective. In a 1994 case, a researcher was initially denied a permit to do a study on the grounds that the research involved animal cruelty incompatible with the relevant animal welfare legislation. The researcher's idea was to sew the eyes of new-born monkeys shut for one year, then forcing the eyes open again, implanting an electrode in them, and forcing the monkeys to do visual exercises for half a year, while being tied to a chair. These activities would be in clear violation of the applicable statutory animal welfare legislation: the *Tierschutzgesetz*. In court, the researcher argued, however, that handling the monkeys in these ways would fall within the scope of his constitutionally protected freedom of research, and that denying him the permit thus constituted an unwarranted infringement of his constitutional right. The court followed him in this argument, and ruled that denying him a permit to conduct this animal experiment was indeed an unjustified infringement on his constitutionally protected freedom of research.[328] According to the court, the applicable animal welfare legislation (viz. *Tierschutzgesetz*) should be interpreted in the light of the Constitution, in which animal welfare had not yet been adopted as a state objective, but the freedom of research *was* protected. This meant, according to the court, that the decision on whether or not the proposed research involving animal cruelty fell within the scope of the constitutional freedom was left to the ethical discretion of the researcher himself.[329] In this case, the German animal welfare legislation thus had no value for animals, because the constitutional right of a human applied. Similar cases in which courts struggle with the legally inferior status of animal welfare legislation, effectively preventing them from paying due regard to animal welfare legislation, are also known in the context of the freedoms to (artistic) expression and religion.[330]

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[328] Article 5 of the *Grundgesetz für die Bundesrepublik Deutschland*.

[329] BVerfG, June 20, 1994 - AZ 1 BvL12/94; Nattrass, "…Und Die Tiere," 294; Erin Evans, "Constitutional Inclusion of Animal Rights in Germany and Switzerland: How Did Animal Protection Become an Issue of National Importance?" *Society and Animals* 18, no. 3 (2010): 235–236; Eisen, "Liberating Animal Law," 64–65.

[330] Nattrass, "…Und Die Tiere," 288–302; Haupt, "The Nature and Effects of Constitutional State Objectives," 213–257; Eisen, "Liberating Animal Law," 64–65; Evans, "Constitutional Inclusion of Animal Rights in Germany and Switzerland," 235–239.

This problem of ineffective animal welfare legislation that Germany faced prior to the introduction of the state objective on animal welfare is not typical to the German legal system, however. The constitutional rights of humans often have the potential of disarming statutory animal welfare legislation.[331] Sometimes, animal welfare legislation already makes an exemption for harmful behaviour that is protected by a fundamental right (such as a legislative exemption to the general command to stun animals prior to slaughter); other times, welfare prescriptions will lose their value when confronted with a fundamental right in a specific court case. Without the added constitutional weight, effective and consistent enforcement of statutory animal welfare legislation will oftentimes be subordinated to the protection of the constitutional rights of humans. This can make animal welfare legislation a toothless tiger whenever a human constitutional right is in question. Animal welfare legislation that has no constitutional backing thus can prohibit many types of practices infringing on animal welfare, but it cannot always limit practices that fall under the constitutional protection of individual rights. If animal-harming practices are protected by constitutional freedoms and animal welfare legislation is to prohibit these practices, and thus to limit these constitutional freedoms, it must have a solid legal basis to do so. A constitutional state objective can offer such a legal basis, because a fundamental right can be limited by countervailing constitutional interests, such as other individual rights or state objectives. In the context of limiting fundamental rights, the state objective's value thus lies primarily there where fundamental rights render animal welfare law ineffective due to the absence of a constitutional legal basis for it. In these cases, the state objective offers animal welfare legislation the opportunity to become effective again by providing a legal ground on which the periphery of fundamental rights can be limited.

A state objective on animal welfare thus can be used as a legitimate legal basis for existing but also for new legislation, yet to be developed, that aims to limit animal-harming human behaviour that falls within the peripheral sphere of fundamental rights. The state objective can legally back

[331] Schaffner, *An Introduction to Animals and the Law*, 38–49; Haupt, "The Nature and Effects of Constitutional State Objectives," 237–257; Nattrass, "…Und Die Tiere," 283–312.

new animal welfare legislation that bans certain animal-unfriendly practices that were previously impossible to prohibit. In this way, it can contribute to phasing out certain forms of animal abuse that fall under the scope (more precisely: the peripheral protection) of fundamental legal rights. Possible contenders for such out-phasing are: certain forms of animal harming which are protected under the freedom of (artistic) expression;[332] the unnecessary addition of extra suffering to the slaughter of animals by not stunning them, often protected as a religious freedom;[333] and excessive and prolonged torture of animals during experiments under the protection of scientific or academic freedom.[334] Such activities strongly compromise animal welfare, while allegedly not falling within the core protection of the respective fundamental rights of humans.

Effect II: Conflicts of interests, interpretation of open norms, and fuller review

The state objective may also have effects on the development, interpretation, application, and review of statutory animal welfare legislation and regulation. With regard to the development of the law, it must be noted that a state objective may encourage the legislative and executive branches to develop more and stricter legislation and regulation in the context of animal welfare.[335] With regard to the application, interpretation, and review of animal welfare legislation, the executive branch and the judicial branch are

[332] Nattrass, "…Und Die Tiere," 293–294, 303–304; Haupt, "The Nature and Effects of Constitutional State Objectives," 253–256; Schaffner, *An Introduction to Animals and the Law*, 38–43; Eisen, "Liberating Animal Law," 65–66.
[333] Haupt, "The Nature and Effects of Constitutional State Objectives," 237–246; Nattrass, "…Und Die Tiere," 291–292, 299, 301–305; Evans, "Constitutional Inclusion of Animal Rights in Germany and Switzerland," 236–239; Schaffner, *An Introduction to Animals and the Law*, 43–49; Cliteur, "Criteria voor Juridisch te Beschermen Godsdienstvrijheid," 3090–3096; Zoethout, "Animals as Sentient Beings," 308–326; Paul Cliteur, *Philosophical Criteria to Identify False Religion: Why Halal Animal Slaughter, Child Marriage, Circumcision, and the Burqa are Crimes* (Lewiston: Edwin Mellen Press, 2018).
[334] Haupt, "The Nature and Effects of Constitutional State Objectives," 246–253; Nattrass, "…Und Die Tiere," 291–294, 298–308; Evans, "Constitutional Inclusion of Animal Rights in Germany and Switzerland," 235–236; Eisen, "Animals in the Constitutional State," 919; Eisen, "Liberating Animal Law," 65.
[335] Nattrass, "…Und Die Tiere," 299; Haupt, "The Nature and Effects of Constitutional State Objectives," 226–229.

expected to apply and interpret relevant existing law in light of the constitutionally protected state objective.[336] Judicial decisions and development of the law through judicial interpretation ought to reflect the values laid out in the constitution. This may have far-reaching effects.

Most importantly, having to interpret relevant existing law in light of the constitutionally protected state objective has the effect of increasing the legal value attached to legislation concerning animal welfare. Incorporating the care for animals in the constitution as a state objective indirectly lifts animal protection to a higher level in the hierarchy of the law. This means that, in theory, the interest of safeguarding animal welfare, with its legal basis in the constitution, will be able to combat other constitutional values with almost equal legal force, even though it cannot infringe the core protection of fundamental rights, as was just noted. Additionally, the state objective may also affect the interpretation of open norms, which are omnipresent in animal welfare legislation. Such open norms require an ethical assessment in a specific case, and thus relatively leave a great deal of room for judicial interpretation. Examples of open norms in animal welfare legislation are legal provisions which prohibit the killing or harming of an animal "without a reasonable cause," "without necessity," when "ethically unjustifiable," when "ethically unacceptable," or "without a sound reason."[337] In solving conflicts of interests, for example when giving substance to these open norms in a specific case, the constitutional status of animal welfare means that judges and state officials must attach significant value to the welfare of animals as a matter of constitutional obedience, regardless of whether the respective parties value animal welfare or not.[338] After all, according to the principle of the rule of law, the state—judges included—is bound to the norms and values as reflected in the constitution. In the legal balancing of interests, animal welfare thus becomes an independent factor of undisputed importance which may not be ignored,

[336] Haupt, "The Nature and Effects of Constitutional State Objectives," 226, 229–230.
[337] Nattrass, "…Und Die Tiere," 288–290, 291–292; Haupt, "The Nature and Effects of Constitutional State Objectives," 246–253.
[338] Nattrass, "…Und Die Tiere," 299–300, 302–311; Haupt, "The Nature and Effects of Constitutional State Objectives," 216, 229–230, 246–251, 256; BVerfG, October 12, 2010 – 2 BvF 1/07, §121, ECLI:DE:BVerfG:2010:fs20101012.2bvf000107.

but has to be balanced against other interests. The protection of the welfare of animals can, as a result of its constitutional support, no longer be set aside as if it were an optional hobby of subordinate legal value. With the state objective, the need to protect animals' welfare acquires a non-negotiable, independent status in the legal balancing of conflicting interests, because the state objective commits governmental bodies to take the interests of animals into account. In this context, the state objective can prompt state officials to take some distance from human interests, a distance that is necessary for an objective interspecies weighing of interests.[339]

Furthermore, a state objective on animal welfare may also affect the substantialness of the review of animal welfare legislation and regulation. This review is often marginal, but as a result of the state objective, it is possible that this review will have to become more substantive.[340] State officials of the executive and judicial branches responsible, respectively, for dispensing and reviewing permits for animal-harming behaviour (such as permits for animal experiments and unstunned slaughter) may be required to switch from assessing permit requests or dispersions merely on purely procedural requirements to assessing them more substantially and thus also go into relevant ethical questions. They may, for example, be required to assess in depth whether the expected animal suffering weighs up to the countervailing interest (such as the importance of the expected result of the experiment) and whether less harmful alternatives were exhaustively explored and sufficiently considered. A fuller review of the permissibility of animal-harming activities in the light of the applicable animal welfare legislation may mean that permits for such activities will more often be denied on the ground of animal welfare concerns.[341] With this shift to a fuller review, part of the discretion in whether or not to execute behaviour that is harmful to animals also shifts from the individual citizen to (the executive and judicial branch of) the state.[342] This shift matches the more fundamental

[339] Haupt, "The Nature and Effects of Constitutional State Objectives," 250.
[340] Nattrass, "…Und Die Tiere," 288–289, 291–292, 299–300, 305, 307–308; Haupt, "The Nature and Effects of Constitutional State Objectives," 229–230, 246–256.
[341] Nattrass, "…Und Die Tiere," 288–289, 291–292, 299–300, 305, 307–308; Haupt, "The Nature and Effects of Constitutional State Objectives," 229–230, 246–256.
[342] Nattrass, "…Und Die Tiere," 292, 307–308; Haupt, "The Nature and Effects of Constitutional State Objectives," 251.

idea that the protection of animals' welfare is not merely a matter of individual and personal morality but also a political responsibility of the state.

Effect III: Presence in legislative and executive considerations

The third effect of the state objective is that it affects the considerations of the legislative and the executive branches in various ways. The state objective ideally functions as a guide for future legislative action and the development of society in the long term.[343] In other words, the state objective hints at giving due priority to protecting animal welfare and requires reasonable legislative attention and effort in that area. Furthermore, including a state objective in the constitution may also have the effect of preventing or removing political controversy on the respective subject, as respect for the constitution is assumed to be shared by all state officials.[344] Respecting animal welfare will thus become a cause of indisputable status, one that needs to be addressed in legislative and executive considerations as a matter of constitutional compliance. Legislative or policy choices that affect animal welfare must thus ideally reflect consideration for the welfare of animals.[345] Yet again, this may lead to a more balanced weighing between human and non-human interests in legislative and executive considerations.

How this could work in practice can be illustrated in the context of the oft-made executive decision to preventatively "destruct" (read: kill) healthy animals on a large scale when a cattle plague breaks out. When taking account of animal welfare becomes a constitutional objective, such a decision would have to rest on a more thorough justification than without the support of a state objective. Arguably, economic reasons alone, such as the fact that vaccinated meat may not be sold—which makes pre-emptive destruction more economically attractive—are not sufficient for taking such a radical measure.[346] With a state objective on animal welfare, the welfare of

[343] Haupt, "The Nature and Effects of Constitutional State Objectives," 224, 226–229; Larik, *Foreign Policy Objectives in European Constitutional Law*, 64–65.
[344] Haupt, "The Nature and Effects of Constitutional State Objectives," 224.
[345] Haupt, "The Nature and Effects of Constitutional State Objectives," 225–229; Nattrass, "…Und Die Tiere," 298–300, 302–303; Gerritsen, "Animal Welfare in Switzerland," 2–3 (footnote 7).
[346] Nattrass, "…Und Die Tiere," 293.

animals, too, should play a role in the political weighing of the different relevant interests. Moreover, the constitutional status of animal welfare could also mean that the government must actively search for alternatives of controlling the disease, alternatives that have a less destructive effect on animal welfare. The state objective can be understood to create a commitment to seriously consider such alternatives, even if they are more expensive.[347] Highly disputable would be executive decisions such as the one made by the Dutch government in 2017, when it decreed to slaughter sixty thousand healthy, productive, and even pregnant cows, and paid out forty-two million euros in public money (termed "kill subsidies" in the Dutch press) for that massacre.[348] The reason was that the government had to meet environmental standards in which it lagged behind because of the government's own negligence in the preceding years. Such policy decisions—ordering the mass killing of thousands of healthy animals as a result of bad environmental book keeping by the government—would be barely justifiable, arguably even unconstitutional, if taking care of animal welfare were a constitutional state objective.

Effect IV: Safeguarding progress

A fourth effect of a constitutional state objective on animal welfare is that it prevents degeneration of existing animal welfare protections in legislation and regulation.[349] Accordingly, this "locking effect" means that the government must, at a minimum, uphold the quality of animal welfare protections, but preferably improve it. The constitutional state objective thus has an inherently progressive effect. Although this locking effect is a generally accepted feature of state objectives, it must be noted that it is almost never legally enforceable in court. Generally speaking, the most

[347] Haupt, "The Nature and Effects of Constitutional State Objectives," 229, 247–253; Nattrass, "…Und Die Tiere," 293, 299–300, 302–303, 306; Gerritsen, "Animal Welfare in Switzerland," 3.
[348] Emiel Hakkenes, "De Koe Kan Sterven Met Subsidie," Trouw, February 17, 2017, https://www.trouw.nl/groen/de-koe-kan-sterven-met-subsidie~ac0c2fce/; Emiel Hakkenes, "Stormloop Op Sterfsubsidie Voor Melkkoeien," Trouw, February 21, 2017, https://www.trouw.nl/home/stormloop-op-sterfsubsidie-voor-melkkoeien~a32197c7/.
[349] Haupt, "The Nature and Effects of Constitutional State Objectives," 228–229; Nattrass, "…Und Die Tiere," 303; Bolliger, "Constitutional and Legislative Aspects of Animal Welfare in Europe," 2.

important body responsible for reviewing the government's compliance with this commitment to either maintain or improve the quality of animal welfare protections will be the legislative branch and ultimately the electorate, through the well-established paths of existing checks and balances. Only in highly exceptional cases will a (constitutional) court dare to assess whether the government has complied with the progressive commitment that the state objective entails.[350]

4.2 Difference with fundamental legal rights

To prevent confusion and disappointment on this point, it is important to also draw attention to a legal effect that a state objective does not have. As stated before, introducing a constitutional state objective is fundamentally different from introducing individual legal rights. By constitutionally transforming animal welfare into a state objective, animals are not granted legal rights, either positive or negative rights. A state objective is merely a formal testimony of commitment by the state, and offers animals no subjective legal ammunition to (through a legal representative) defend themselves with in court.

Occasionally, there seems to be some unawareness about the fact that a state objective does not confer rights on its beneficiaries, however. An occurrence in the Belgian parliamentary debate on the introduction of their first state objective (on sustainable development) is illustrative of some of the incomprehension regarding the legal categorization of state objectives. During this parliamentary debate, jurist and Member of Parliament Alfons Borginon (1966–) expressed reservations about introducing a new title in the Constitution specifically for state objectives. Instead, he said, "It would have been better if the new right [with which he meant the state objective] were anchored under Title II of the Constitution."[351] Title II of the Belgian Constitution contains fundamental rights, however, and is labelled "On

[350] Haupt, "The Nature and Effects of Constitutional State Objectives," 226–231; Larik, *Foreign Policy Objectives in European Constitutional Law*, 15–65.

[351] "Ontwerp tot Invoeging van een Titel I*bis* en een Artikel 7*bis* om Duurzame Ontwikkeling als Algemene Beleidsdoelstelling voor de Federale Staat, de Gemeenschappen en de Gewesten in de Grondwet in te Schrijven," DOC 51 2647/004, March 23, 2007, 9.

Belgians and their rights."[352] By referring to the state objective as a "right," and by suggesting that the new provision be included under the title for fundamental legal rights, Borginon revealed that there was, at least on his side, ambivalence about the legal status of the proposed state objective.

This confusion on the side of a legally schooled member of parliament about the legal categorization of a state objective is understandable, however. A plausible explanation of the incident is that Borginon might have conceived of the new provision as a positive right, instead of a (to Belgian constitutional law at that time) completely new type of provision: the state objective. In their formulation and function, constitutional state objectives bear close resemblance to positive rights.[353]

Positive rights are rights that typically demand action by the state (hence: "positive"). They must be distinguished from negative rights, which typically prescribe inaction of the state (hence: "negative").[354] Positive rights thus dictate that the state must actively pursue action in order to let citizens enjoy a certain right ("the right *to*" be provided with certain goods or services), whereas negative rights dictate that the state must refrain from infringing on certain liberties of citizens ("the right to be free *from*" certain state interference and coercion). Positive rights often entail economic, social, and cultural rights, whereas negative rights entail the more classical civil and political rights. Examples of positive rights are the entitlements to housing, a sustainable living environment, social security, health care, and education—they require an effort by the government. Examples of negative rights are the freedom of speech, freedom of religion, and the freedom from slavery—they require that the state does not infringe these individual liberties. Negative rights thus are the primary protection of citizens against harmful infringements by powerful governments, whereas positive rights are more instructive norms, explications of governmental aspirations. An

[352] *Belgische Grondwet* (Belgian Constitution), translation provided by the Belgian House of Representatives, https://www.dekamer.be/kvvcr/pdf_sections/publications/constitution/GrondwetUK.pdf.
[353] Larik, *Foreign Policy Objectives in European Constitutional Law*, 36–37.
[354] This distinction is not as strict as it may seem. It is often pointed out that respecting positive rights can occasionally require an inactive attitude from the state and that respecting negative rights can occasionally require an active attitude from the state. These are exceptions, however.

important difference between the two is that negative rights are almost always legally enforceable, whereas most positive rights are not enforceable in a court of law.[355] This is understandable in the light of the separation of powers. Positive rights impose upon the government the duty to respect, promote, and fulfil these rights, but the extent to which this is possible ultimately depends on the availability of resources. Deciding on the distribution of the state's resources is an inherently political task, for which the two political branches are best equipped and responsible, not the judicial branch.[356] Judicial review of the government's compliance with positive rights is thus, with reason, controversial in the light of the separation of powers, for it would require courts to go into the fundamentally political question of whether the state's resources were properly distributed.

Positive legal rights thus bear a close resemblance to constitutional state objectives, for they both demand a positive effort by the state, often without corresponding legal enforceability. Furthermore, the formulation of positive rights and state objectives is often very similar. Compare, for example, the close resemblance in formulation of the *state objective* on animal protection in the Swiss Constitution and the *positive right* to public health in the Dutch Constitution. The Swiss state objective reads: "The Confederation shall legislate on the protection of animals."[357] The Dutch positive right to health reads: "The authorities shall take steps to promote the health of the population."[358] Both the state objective and the positive right are put into the same template of: "Governmental entity X shall put effort into social goal Y." This is a wider phenomenon among social rights and state objectives, which makes it hard to distinguish between the two based on their mere formulations.

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[355] Some positive rights are more readily subject to judicial enforcement than others, however. Cass R. Sunstein, "Against Positive Rights," *East European Constitutional Review* 35, (Winter 1993): 36–37.
[356] Sunstein, "Against Positive Rights," 37.
[357] Article 80, first paragraph of the *Bundesverfassung der Schweizerischen Eidgenossenschaft* (Federal Constitution of the Swiss Confederation).
[358] Article 22, first paragraph of the *Grondwet voor het Koninkrijk der Nederlanden* (Constitution of the Kingdom of the Netherlands), official translation provided by the Dutch government, https://www.government.nl/documents/regulations/2012/10/18/the-constitution-of-the-kingdom-of-the-netherlands-2008.

Yet another factor that also seems to blur the lines between state objectives and positive rights is that the same social goals are, in practice, sometimes legally framed as a state objective and other times as a positive right. For example, governments' responsibility to preserve a sustainable living environment for citizens: in some jurisdictions, this social goal is framed as a positive right, in other jurisdictions as a state objective.[359] In the Netherlands, for instance, this governmental goal is conceptualized as a social right. Article 21 of the Dutch Constitution reads as follows: "It shall be the concern of the authorities to keep the country habitable and to protect and improve the environment."[360] The German Constitution, however, formalizes this governmental goal via the legal construction of a state objective: "Mindful also of its responsibility toward future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order."[361] Although they have a comparable function in explicating the state's seriousness in pursuing this social goal, the Dutch legal construction confers a positive right upon citizens, whereas the German legal construction does not.

Like the member of the Belgian Parliament Alfons Borginon, one might easily get the impression that, given these similarities, there is no real difference between state objectives on the one hand and positive rights on the other. They both have the function of expressing the state's commitment to putting effort into pursuing a certain goal, without automatically creating a legally enforceable commitment. They are also similarly formulated, and both legal concepts are used to constitutionalize the same social objectives. In spite of these similarities, however, positive rights and state objectives are

[359] Tim Hayward points out that "more than 70 countries have constitutional environmental provisions of some kind," and that "in at least 30 cases these take the form of environmental rights." This does not imply, obviously, that the rest of the provisions are state objectives, but what it does illustrate is that the options of constitutionalizing environmental protections are diverse. Tim Hayward, "Constitutional Environmental Rights: A Case for Political Analysis," *Political Studies* 48, no. 3 (June 2000): 558.
[360] Article 21 of the *Grondwet voor het Koninkrijk der Nederlanden* (Constitution of the Kingdom of the Netherlands).
[361] Article 20a of the *Grundgesetz für die Bundesrepublik Deutschland* (Basic Law for the Federal Republic of Germany).

not identical. This becomes immediately clear when we take a look at the placement of state objectives in constitutions. An analysis of the placement of state objectives in constitutions teaches that they are not categorized as (positive) rights. In Germany, the state objective on animal welfare is placed in Title II, on "The Federation and the *Länder*," instead of in Title I, on "Basic Rights."[362] In Switzerland, the state objective on animal protection is not listed under the title (II) that contains fundamental rights, named "Fundamental Rights, Citizenship and Social Goals," but under the title (III): "Confederation, Cantons and Communes."[363] The placement of state objectives concerning animal welfare in national constitutions seems to imply that the provisions in question are not intended by the constitutional legislators to bring about positive (nor, clearly, negative) rights.

More fundamental than this practical evidence of a difference in constitutional placement of state objectives and positive rights is that, in spite of being hardly enforceable, a positive right still is in essence a fundamental *right*, and a state objective is not.[364] Fundamental rights are typically held by individuals against the state and sometimes also against other people—the so-called "horizontal effect." State objectives, on the other hand, are part of the law that organizes the state. Put differently: state objectives are part of objective law and do not grant concrete subjective rights to particular legal subjects. Positive rights, by contrast, can be a source of specific subjective rights in the sense that particular beneficiaries can derive concrete powers and entitlements from these provisions. The beneficiaries of a constitutional right are thus provided with the right to the explicated good, whereas a state objective does not provide its beneficiaries with rights or entitlements. This difference can be illustrated if we consider the previously discussed social goal of providing citizens with a sustainable living environment. We have seen that this goal can be legally conceptualized as both a state objective and a positive right, in relatively

[362] Article 20a of the *Grundgesetz für die Bundesrepublik Deutschland* (Basic Law for the Federal Republic of Germany).
[363] Article 80 of the *Bundesverfassung der Schweizerischen Eidgenossenschaft* (Federal Constitution of the Swiss Confederation).
[364] Larik, *Foreign Policy Objectives in European Constitutional Law*, 32–33, 36–37, 40, 42; Haupt, "The Nature and Effects of Constitutional State Objectives," 222–226, 256; Eisen, "Liberating Animal Law," 62–64; Nattrass, "…Und Die Tiere," 302; Vink, "Dierenwelzijn," 1862–1863.

similar words. Still, a positive right to a sustainable living environment has a fundamentally different legal meaning than a state objective on a sustainable living environment. As a positive right, it provides citizens with the *right* to a sustainable living environment, even though this may not always be enforceable in a court of law. As a state objective, however, it creates no subjective rights for citizens. The state objective is merely a *declaration* of a state's intention to provide citizens with a sustainable living environment. It is a declaration about the prioritizations in the fundamental organization of the state that does not create rights.

Even though the practical effects of positive rights and state objectives may often be similar, differentiating between state objectives and positive rights is important, especially in the context of protecting animals. Given the legal status of non-human animals, there currently seems to be no unambiguous way of legally conceptualizing the social goal of taking notice of animal welfare as a hypothetical positive right. It has been pointed out earlier that non-human animals are currently categorized as ("animated") legal objects, not subjects (possible rights bearers). If regard for animal welfare were legally constructed as a positive right, however, the legal status of non-human animals might become ambiguous.[365] The fact that animals are not (yet) categorized as legal subjects implies that they cannot have rights, and so legally framing the governmental goal of having regard for animal welfare as a positive right could be interpreted as a legal recognition that non-human animals are legal subjects with rights. Alternatively, to prevent ambiguousness concerning the legal status of non-human animals, a positive right of animal welfare could also be implemented (or interpreted) as being a right of *humans*, not of non-human animals themselves. In that way, non-human animals would still not have rights, and thus their legal status would remain unaffected. This option, however, would lead to a circuitous, legally ugly, and inconsistent construction in which the beneficiaries of a constitutional right are not the same entities as the rights holders.[366] A state objective on animal welfare, on the other hand, rightly recognizes non-human animals as its primary beneficiaries, but does not affect their legal

[365] Vink, "Dierenwelzijn," 1862–1863 (footnote 4).
[366] Vink, "Dierenwelzijn," 1862–1863 (footnote 4).

status as ("animated") objects. In this light, a constitutional state objective may in many respects look much like a positive right, but it is the better alternative of the two if one's goal is to unambiguously preserve the legal ("animated") object status of non-human animals (which is likely to be a goal of many states for some time to come).

4.3 State objective on animal welfare in Switzerland

Now that we have a clearer view of the effects that a constitutional state objective has and does not have in theory, it may be informative to look into the actual functioning and effectiveness of a state objective on animal welfare in a country that already has one. Switzerland is an appropriate choice for providing such an impression. It was the first European country to include animal welfare as a specific issue within its Constitution, and its legal system appears to offer animals some of the best protections in the world.[367] The Swiss Federal Constitution (abbreviated as SFC) has two allegedly ground-breaking provisions concerning animals. First, article 80 SFC, containing a state objective that declares animal welfare in general to be a state matter. Second, article 120 SFC, which declares (or "acknowledges," depending on one's philosophical outlook) that living beings have dignity. Because of this combination, Swiss constitutional protection for animals is relatively high, which makes this country particularly suitable for study. If the practical functioning of the Swiss state objective appears to fail at meeting the enfranchisement criteria, then the legal constructions in other countries with a state objective but without the added dignity protection are even less likely to meet the enfranchisement criteria. Moreover, Switzerland has had a constitutional state objective for a long time (over forty years), and

[367] Bolliger, "Legal Protection of Animal Dignity in Switzerland," 316–317; Bolliger, "Constitutional and Legislative Aspects of Animal Welfare in Europe"; Gerritsen, "Animal Welfare in Switzerland," 8; Michel and Schneider Kayasseh, "The Legal Situation of Animals in Switzerland," 17; Cecilia Mille and Eva Frejadotter Diesen, "The Best Animal Welfare in the World? An Investigation into the Myth About Sweden," trans. Niki Woods, Djurens Rätt, 2009, 29; Smith, *Governing Animals*, 118. Switzerland is one of the few countries that gets an A-ranking (the best in the A to G ranking) in the Animal Protection Index, a classification of fifty countries around the world by their commitments to protect animals and improve animal welfare in policy and legislation. "Swiss Confederation: Animal Protection Index 2014 ranking: A," World Animal Protection, November 2014, https://api.worldanimalprotection.org/sites/default/files/api_switzerland_report.pdf.

the country thus has had plenty of time to reflect on the functioning of the state objective and correct any possible deficiencies or shortcomings found in its legal construction.

The Swiss state objective on animal welfare is constitutionalized in article 80 of the Swiss Federal Constitution. The first section of this provision reads: "The Confederation shall legislate on the protection of animals."[368] The second section contains a list that specifies the legislative fields that are of particular importance (animal keeping, animal trade, animal experimentation, etc.).[369] The third section assigns competence to the twenty-six cantons in enforcing animal welfare regulations.[370] It is the prevailing legal opinion that with the introduction of this provision on animal welfare into the Swiss Federal Constitution, Switzerland made animal welfare a legally protected national interest with a constitutional status equal to other national objectives and that the provision binds all three governmental branches.[371] The state objective also functions as a constitutional basis for statutory animal welfare protection, which makes it possible for animal welfare prescriptions to compete with fundamental rights of humans on a more equal footing.[372] The introduction of animal welfare into the constitution therefore not only has symbolic value, European animal law expert Gieri Bolliger (1968–) argues, but also far-reaching practical significance.[373]

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[368] Article 80, first paragraph of the *Bundesverfassung der Schweizerischen Eidgenossenschaft* (Federal Constitution of the Swiss Confederation).

[369] "It shall in particular regulate: a. the keeping and care of animals; b. experiments on animals and procedures carried out on living animals; c. the use of animals; d. the import of animals and animal products; e. the trade in animals and the transport of animals; f. the killing of animals." Article 80, second paragraph of the *Bundesverfassung der Schweizerischen Eidgenossenschaft* (Federal Constitution of the Swiss Confederation).

[370] "The enforcement of the regulations is the responsibility of the Cantons, except where the law reserves this to the Confederation." Article 80, third paragraph of the *Bundesverfassung der Schweizerischen Eidgenossenschaft* (Federal Constitution of the Swiss Confederation).

[371] Michel and Schneider Kayasseh, "The Legal Situation of Animals in Switzerland," 3, 11; Bolliger, "Legal Protection of Animal Dignity in Switzerland," 318; Gerritsen, "Animal Welfare in Switzerland," 2–3 (footnote 7).

[372] Bolliger, "Legal Protection of Animal Dignity in Switzerland," 318–319; Gerritsen, "Animal Welfare in Switzerland," 2–3.

[373] Bolliger, "Legal Protection of Animal Dignity in Switzerland," 318–319.

The Swiss legislator has acted on the state objective. In 1981, in an attempt to give due regard to the state objective, the Swiss parliament passed Switzerland's most important animal welfare legislation: the *Tierschutzgesetz* (Animal Welfare Act, abbreviated as AWA).[374] The Animal Welfare Act comprises rules on animal welfare applicable to all animals in all sectors (in animal farming and in animal experimentation, but also to companion animals and wild animals). The legal animal welfare framework set out in the AWA is further specified in the *Tierschutzverordnung* (Animal Welfare Ordinance, abbreviated as AWO), a federal ordinance lower in the legal hierarchy, enacted by the Swiss Federal Council (a seven-member executive body of the Swiss government, elected by both chambers of the Federal Assembly).[375] The Animal Welfare Ordinance includes more than 220 articles and has five appendices which all further address the general rules of the AWA.[376] The introduction of the AWA and the AWO are the most important and measurable actual effects of the Swiss state objective so far.

As stated before, the Swiss Constitution also contains a provision that acknowledges the "dignity of living beings" (*Würde der Kreatur*), which is taken to include non-human animals in Swiss doctrine.[377] Switzerland was the first country to have introduced such a constitutional provision, and it did so as early as 1992.[378] It is important to also include this provision in our analysis of the practical meaning of the Swiss constitutional state objective,

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[374] *Tierschutzgesetz* (Swiss Animal Welfare Act), unofficial translation provided by Interpharma, https://www.globalanimallaw.org/downloads/database/national/switzerland/Tierschutzgesetz-2005-EN-2011.pdf.

[375] *Tierschutzverordnung* (Swiss Animal Welfare Ordinance), unofficial translation provided by Interpharma, https://www.globalanimallaw.org/downloads/database/national/switzerland/TSchV-2008-EN-455.1-2011.pdf.

[376] Bolliger, "Legal Protection of Animal Dignity in Switzerland," 320.

[377] Article 120, second paragraph of the *Bundesverfassung der Schweizerischen Eidgenossenschaft* (Federal Constitution of the Swiss Confederation). Swiss doctrine has given the term "living beings" the unnatural meaning of excluding humans but including non-human animals and plants, and possibly also other organisms, such as bacteria, algae, and mildew. Bolliger, "Legal Protection of Animal Dignity in Switzerland," 326–327 (including footnote 91); Michel and Schneider Kayasseh, "The Legal Situation of Animals in Switzerland," 4.

[378] Michel and Schneider Kayasseh, "The Legal Situation of Animals in Switzerland," 3; Bolliger, "Legal Protection of Animal Dignity in Switzerland," 311, 313, 323–324; Bolliger, "Constitutional and Legislative Aspects of Animal Welfare in Europe."

because this provision on the dignity of living beings could add flesh to the bones of the state objective. It has the potential to enrich the significance of the state objective. Constitutionally recognizing the dignity of animals could have revolutionary effects, if it indeed expands the philosophical concept of dignity, formerly only accorded to humans, to other animals as well.[379] If accorded to them in the original Kantian way, animal dignity protection would, at minimum, mean the end of using animals as mere means to an end.[380] In theory, it could have the effect of impeding all state action that facilitates using animals purely as objects (such as dispensing permits for animal experimentation and providing public subsidies for animal farming), and possibly even prompt the government to outlaw all such purely instrumental uses of animals.

When raising such high expectations of a significant transition, article 120 SFC, covering animal dignity, can only disappoint. The first section of the provision reads as follows: "Human beings and their environment shall be protected against the misuse of gene technology." The second section reads: "The Confederation shall legislate on the use of reproductive and genetic material from animals, plants and other organisms. In doing so, *it shall take account of the dignity of living beings* as well as the safety of human beings, animals and the environment, and shall protect the genetic diversity of animal and plant species" (italics JV).[381] Paradoxically, the dignity of living beings, a concept that originally meant the opposite of using an individual as a mere means to an end, is here mentioned in the context of using animals for genetic engineering. This immediately gives rise to a certain scepticism: is the concept of dignity given a different meaning than how it is generally used? It is also remarkable that article 120 SFC is not an article that independently recognizes the dignity of living beings, but an article primarily focused on genetic engineering, which *en passant* recognizes the dignity of living beings. The sceptical reader might say that, since this

[379] See on Kantian animal philosophy: Regan, *The Case for Animal Rights*; Frederike Kaldewaij, *The Animal in Morality: Justifying Duties to Animals in Kantian Moral Philosophy* (Zutphen: Wöhrmann Print Service, 2013).
[380] Michel and Schneider Kayasseh, "The Legal Situation of Animals in Switzerland," 7, 9–10; Bolliger, "Legal Protection of Animal Dignity in Switzerland," 389.
[381] Article 120 of the *Bundesverfassung der Schweizerischen Eidgenossenschaft* (Federal Constitution of the Swiss Confederation).

acknowledgement of living beings' dignity is merely done in the context of genetic and reproductive engineering, it can have no legal implications outside of that context. He might ask why the legislator first and only introduced this concept in the context of reproductive and genetic engineering if he meant to recognize the dignity of living beings as a general principle. The legislator could have created a separate article for living beings' dignity, as he did for human dignity. Article 7 of the Swiss Federal Constitution recognizes human dignity without referring to a specific context: "Human dignity must be respected and protected."[382] Human dignity is thus independently recognized, and in addition to this independent general recognition of human dignity, the importance of respecting human dignity in several medical-technical contexts is repeated in other articles (118b, 119, and 119a of the SFC). A similar general and self-contained article recognizing living beings' dignity does not exist, however. The absence of an independent article on living beings' dignity could mean that the legislator intended to recognize it only in the context of genetic and reproductive engineering.

On the other hand, from a more philosophical point of view, it remains to be seen whether recognizing dignity in one context can have meaning for that context only. The philosophical concept of dignity seems to resist such an interpretation, because dignity pre-eminently indicates comprehensiveness and permanency. Dignity is a matter of either having it or not, it is an all-or-nothing concept.[383] From this point of view, the dignity of a living being, once recognized, cannot be valid in one context and absent in the other. The *opinio juris* also follows this line of thought. Even though the dignity of living beings was specifically and exclusively mentioned in the context of gene technology, its implications are taken to exist beyond that context. According to Swiss doctrine, the protection of animal dignity is a general constitutional principle that must not only be respected in all state

[382] Article 7 of the *Bundesverfassung der Schweizerischen Eidgenossenschaft* (Federal Constitution of the Swiss Confederation).
[383] Bolliger, "Legal Protection of Animal Dignity in Switzerland," 325–326, 328.

action, but also in the complete Swiss legal system.[384] As with article 80 SFC, the dignity-of-living-beings provision binds all three governmental branches.[385]

The constitutional recognition of animal dignity seems to have had some effect on lower Swiss legal sources. The most important effect it has had, is that the recognition of animal dignity was copied into the Animal Welfare Act in 2008, although it lost some of its meaning in the process. Whereas the dignity concept in article 120 of the Constitution recognizes the dignity of *all animals* except humans, the AWA dignity provision quite controversially merely covers vertebrates, cephalopods, and decapods.[386] In spite of this loss, the dignity concept is given a prominent role as a guiding principle in the AWA. The first provision of the act emphasizes the importance of animal dignity for the rest of the document and for all other regulations based on the AWA (most notably the AWO).[387] The AWA gives this commitment further content by legally protecting animals against certain infringements of their welfare. In principle, non-human animals are protected against inflictions of pain, suffering, harm, and the inducement of anxiety.[388] A violation[389] of the animal's dignity, however, is also legally constituted when he is "exposed to anxiety or humiliation, if there is major interference with its appearance or its abilities or if it is excessively instrumentalised."[390] This is where the added value of dignity protection in

[384] Michel and Schneider Kayasseh, "The Legal Situation of Animals in Switzerland," 3–4; Bolliger, "Legal Protection of Animal Dignity in Switzerland," 325–330; Gerritsen, "Animal Welfare in Switzerland," 2–3 (including footnote 5).
[385] Bolliger, "Legal Protection of Animal Dignity in Switzerland," 328.
[386] Bolliger, "Legal Protection of Animal Dignity in Switzerland," 335 (footnote 154), 326–327, 369–370.
[387] Article 1 of the *Tierschutzgesetz* (Swiss Animal Welfare Act); Bolliger, "Legal Protection of Animal Dignity in Switzerland," 334–335; Michel and Schneider Kayasseh, "The Legal Situation of Animals in Switzerland," 14.
[388] Article 4, second paragraph and article 26, first paragraph of the *Tierschutzgesetz* (Swiss Animal Welfare Act); Bolliger, "Legal Protection of Animal Dignity in Switzerland," 336–337; Michel and Schneider Kayasseh, "The Legal Situation of Animals in Switzerland," 14.
[389] The AWA uses the term "violation" to indicate a transgression of animal dignity that may be justified and the term "disregarding" to indicate a transgression of animal dignity that cannot be justified. This deviates from common legal practice in which the term "violation" is used to indicate a transgression of a legally protected interest that cannot be justified. Bolliger, "Legal Protection of Animal Dignity in Switzerland," 345 (including footnote 236).
[390] Article 3, section a and article 26, first paragraph of the *Tierschutzgesetz* (Swiss Animal Welfare Act); Bolliger, "Legal Protection of Animal Dignity in Switzerland," 337–343.

comparison with common animal welfare legislation comes to the fore: the animal also finds himself legally protected against certain actions that do not necessarily inflict physical injury.[391]

The aforementioned legal protection of animals and their dignity is, however, not robust, but rather of relative value.[392] The actions that *in principle* constitute a violation of the animal's dignity (causing pain, suffering, harm, anxiety, humiliation, substantial interference with his appearance or abilities, and excessive instrumentalisation) may, according to the law, be legally *justified* by "overriding interests."[393] Put the other way around, all of these sometimes extremely harmful practices done to animals are legally permissible if they serve "overriding interests." In order to be justified, the interest of a person in violating an animal's dignity must, on balance, outweigh the animal's interest of not having his dignity violated.[394] The amount of *actual* legal protection based on the animal's dignity, therefore, only becomes clear after all relevant interests are balanced in a certain given case. The AWA offers no instructions on how this balancing of interests must be done—a significant hiatus in the construction of this law, especially given the risk of biased weighing because one of the involved parties (humans) have to do the balancing themselves. Luckily, however, we are not completely left empty-handed here. The principle of proportionality is generally employed in matters like this, and doctrine also recognizes the proportionality test as the right procedure in this matter.[395] In this context, the legally required weighing of interests therefore comes down to the following. In order to be legal, the action that affects the animal's dignity (causing pain, suffering, harm, anxiety, humiliation, substantial interference with their appearance or abilities, and excessive instrumentalisation) must:

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[391] Bolliger, "Legal Protection of Animal Dignity in Switzerland," 337–338; Michel and Schneider Kayasseh, "The Legal Situation of Animals in Switzerland," 14.
[392] Bolliger, "Legal Protection of Animal Dignity in Switzerland," 344–345; Michel and Schneider Kayasseh, "The Legal Situation of Animals in Switzerland," 14.
[393] Article 3, section a and article 4, second paragraph of the *Tierschutzgesetz* (Swiss Animal Welfare Act); Bolliger, "Legal Protection of Animal Dignity in Switzerland," 344–353; Michel and Schneider Kayasseh, "The Legal Situation of Animals in Switzerland," 13–14.
[394] Bolliger, "Legal Protection of Animal Dignity in Switzerland," 337–338, 344–345; Michel and Schneider Kayasseh, "The Legal Situation of Animals in Switzerland," 13–14.
[395] Bolliger, "Legal Protection of Animal Dignity in Switzerland," 346.

(I) be suitable, (II) be necessary to achieve a legitimate purpose, and (III) serve a legitimate interest that proportionally prevails over the severity of the stress caused to the animal.[396] Important to note here is that in the balancing of these interests, animal dignity is on the same normative level as other constitutionally protected values, such as the fundamental rights of humans, due to its constitutional basis.[397] The fact that all are protected in the Constitution suggests that giving human interests general and absolute precedence is impermissible. Such would, according to Swiss animal law experts Margot Michel and Eveline Schneider Kayasseh, "undermine the quintessence of the dignity of the Creature and reduce it to an empty phrase."[398]

In addition to the previous analysis, two questions need to be further addressed. First: whether this legally required balancing of interests is consistent with any reasonable explanation of animal dignity. Second: whether this legally required balancing of interests is as promising in practice as it appears in theory.

With regard to the first issue, the foregoing analysis confirms the scepticism articulated earlier: it seems that the dignity of animals is not given a legal meaning that is anything similar to that of the dignity of humans, nor does it come close to any other reasonable understanding of dignity. In Swiss law, the legal implementation of animal dignity has essentially led to a legal framework that does precisely the opposite of implementing dignity protection. Neither the dignity concept in the Constitution nor its implementation in the AWA offers animals the absolute protection against purely instrumental use that reasonably could have been expected on the basis of the philosophical and commonsensical understanding of the concept of dignity.[399] Whereas human dignity is generally taken to have an inviolable core content which is unconditionally

[396] Bolliger, "Legal Protection of Animal Dignity in Switzerland," 346.
[397] Bolliger, "Legal Protection of Animal Dignity in Switzerland," 345.
[398] Michel and Schneider Kayasseh, "The Legal Situation of Animals in Switzerland," 9; Bolliger, "Legal Protection of Animal Dignity in Switzerland," 345.
[399] Bolliger, "Legal Protection of Animal Dignity in Switzerland," 311–395.

protected by law, Swiss animal law subordinates animal dignity protection to "overriding" human interests.[400] The dignity protection offered to animals thus is completely fluid, because it is—in clear violation of all reasonable explanations of dignity protection—subordinate to utilitarian calculations. Furthermore, not only does the law not inexorably forbid causing animals severe pain, suffering, and harm, even the animal's life is not protected against destruction, a thorn in the side of many Swiss animal law experts.[401] The dignity protection, which according to prevailing legal opinion should include respect for the inherent value of animals,[402] is thus completely hollowed out, for as Gieri Bolliger aptly notes: "a value can hardly be more ignored than by its complete destruction."[403]

Despite the constitutional recognition of animals' dignity and the basic philosophical meaning of dignity as deserving of being treated as a subject and not degraded to a replaceable object, Swiss law still allows the lives and basic interests of animals to be sacrificed on the altar of human need (and greed). Since constitutional dignity protection has not led to a core protection of some elementary animal interests, it thus has not lived up to its potentials in this sense. Precisely in unconditionally protecting certain core interests of non-human animals, a legal system with dignity protection could have had added value over a legal system with merely a state objective on animal welfare. Instead, in Switzerland, just like in countries without dignity protection, the law allows for the killing and harming of animals if legally justified by mere "overriding interests." Animal experimentation, and many other practices in which animals are used as sole means to an end, are still legal under Swiss law, in spite of constituting clear violations of animal

[400] Michel and Schneider Kayasseh, "The Legal Situation of Animals in Switzerland," 5–7; Bolliger, "Legal Protection of Animal Dignity in Switzerland," 329–333.
[401] Michel and Schneider Kayasseh, "The Legal Situation of Animals in Switzerland," 10, 15–17, 41; Bolliger, "Legal Protection of Animal Dignity in Switzerland," 357–358, 371–373; Gerritsen, "Animal Welfare in Switzerland," 7–8, 10.
[402] Bolliger, "Legal Protection of Animal Dignity in Switzerland," 325–326 (including footnote 83), 335–337, 393; Michel and Schneider Kayasseh, "The Legal Situation of Animals in Switzerland," 7–11, 14; Gerritsen, "Animal Welfare in Switzerland," 6.
[403] Bolliger, "Legal Protection of Animal Dignity in Switzerland," 371.

dignity (in the philosophical sense).[404] It is legal, for instance, to rear animals for the sole reason of killing them. This would obviously be unthinkable if it involved humans, because it would be the gravest violation of their dignity. With regard to humans, dignity is taken by many to be the philosophical basis for granting them fundamental rights, it prohibits exclusive instrumentalisation, and it leads to a legally inviolable core protection. Importantly, this core protection, which includes for instance protection against torture, is absolute and unrestricted, which means that it may not be compromised in any weighing of interests.[405] Animal dignity, in contrast, has not led to the granting of fundamental legal rights to animals, the unconditional prohibition of exclusive instrumentalisation, or to a legally inviolable core protection of animals' most important interests—human interests may always prevail.[406] The legal concept used in the Swiss Federal Constitution, "dignity," thus has two fundamentally different meanings depending on the species of the entity to which it applies. According to some Swiss law experts, attaching poor legal meaning to the concept of dignity of animals in comparison to that of humans is not only highly hypocritical, but also a serious problem for the legal system of Switzerland. A coherent legal system ought not to attach two almost opposite meanings to the same legal concept, or legislative contradictions are likely to arise.[407] The fact that the animal version of dignity is robbed of its original meaning in Swiss law is thus not only worrisome in itself, but also because it brings incoherence into the Swiss legal system.

Although insufficient when set against the rather high standard of the philosophical concept of dignity, the legal structures of Switzerland may still be interesting from a less demanding point of view. After all, Swiss law seems to require weighing the interests of humans and non-human animals

[404] Bolliger, "Legal Protection of Animal Dignity in Switzerland," 314, 358, 368–395; Michel and Schneider Kayasseh, "The Legal Situation of Animals in Switzerland," 9–10, 13; Gerritsen, "Animal Welfare in Switzerland," 1–15.
[405] Michel and Schneider Kayasseh, "The Legal Situation of Animals in Switzerland," 5–6; Bolliger, "Legal Protection of Animal Dignity in Switzerland," 329–331.
[406] Michel and Schneider Kayasseh, "The Legal Situation of Animals in Switzerland," 7–11, 14–17; Bolliger, "Legal Protection of Animal Dignity in Switzerland," 331–333.
[407] Bolliger, "Legal Protection of Animal Dignity in Switzerland," 331–333; Michel and Schneider Kayasseh, "The Legal Situation of Animals in Switzerland," 7.

against one another when certain animal-harming behaviour is legally assessed, which would be quite revolutionary. As stated above, according to legal doctrine, only proportional harms to the animals are legally allowed. Accordingly, an action that injures an animal seems, in principle, only legal if it is suitable, necessary to achieve a legitimate purpose, and if it serves an interest that prevails over the severity of the stress caused to the animal. If actually applied in this way, the unique Swiss combination of a state objective on animal welfare and dignity protection would signify a vast improvement of the legal structures from an interspecies point of view.

Despite this promising requirement of having to balance interests, however, the actual functioning of this legal framework has so far been rather disappointing. The legal escape route which allows for harming animals on the grounds of "overriding interests" is eagerly taken and creatively interpreted to allow for even the most harmful (and dignity violating) actions. Somehow, humans almost always find their own interests to be prevailing over non-human animals' interests, leaving non-human animals in the cold. To Swiss humans and legal practice, the utility of animals is still much more important than their basic interests or their dignity, even though the Swiss Constitution recognizes that they have it.[408] Despite all constitutional efforts, animals in Switzerland are still horribly, but legally exploited in numerous ways, exploitations that could not be justified if truly objectively tested against the proportionality criteria that have been accepted as applicable here by legal doctrine. It is unthinkable that a truly sincere and objective (non-speciesist) balancing of interests—as, according to doctrine, is required by law—would lead to the conclusion that, for example, humans' gastronomical preferences outweigh a farmed animal's interest in avoiding a life full of pain, suffering, and eventually slaughter.[409] That one individual's gastronomical preferences are more important than another individual's most elementary interests may be the prevailing opinion in society, but could hardly be the outcome of a truly objective weighing of interests.

[408] Michel and Schneider Kayasseh, "The Legal Situation of Animals in Switzerland," 17.
[409] Singer, *Animal Liberation*.

It should not come as a surprise that many experts in Swiss law criticize the rather disappointing application of the constitutional provisions on animals in practice. Swiss animal law expert Vanessa Gerritsen is disillusioned that "As in other countries, Swiss society and authorities are not willing to stop the exploitation of animals. There are strict limits to the use of animals, but their disposability is not essentially in question."[410] Margot Michel and Eveline Schneider Kayasseh both subscribe to that analysis. They also note that the usability of animals is not fundamentally questioned, and add that the value of the protection of animals against the infliction of suffering remains restricted due to the subordination to human interests.[411] Gieri Bolliger too, concludes that "the far-reaching conceptual reorganization of Swiss animal law has not yet led to a fundamental change in the human-animal relationship in practice."[412] Intensive rearing of animals in order to kill them is still legal under Swiss law, despite the fact that it is, as Bolliger points out, the textbook example of mere instrumentalisation and disproportional animal use.[413]

4.4 Normative assessment of the constitutional state objective

Let us now move away from the Swiss situation and analyse state objectives on animal welfare more generally from a normative perspective. Compared to some of the political options of enfranchising animals that were addressed earlier, the here-discussed model of the constitutional state objective seems more promising—at least in theory. Appealing to the constitution allows a liberal democracy to legitimately steer legislation, policy, and state action into a certain (in this case: more animal-friendly) direction, without compromising on liberal democratic values. From the perspective of the enfranchisement criteria, the state objective on animal welfare is not fully ideal, however. In this section, important pros and cons of the constitutional state objective on animal welfare will be assessed in the context of the enfranchisement criteria.

[410] Gerritsen, "Animal Welfare in Switzerland," 9.
[411] Michel and Schneider Kayasseh, "The Legal Situation of Animals in Switzerland," 17.
[412] Bolliger, "Legal Protection of Animal Dignity in Switzerland," 312.
[413] Bolliger, "Legal Protection of Animal Dignity in Switzerland," 373–376.

The independence criterion

It seems that a state objective on animal welfare is quite an attractive theoretical option when it comes to living up to the independence requirement. It has the potential to establish a more independent position for animals and their welfare in the constitutional structures of the liberal democratic state.

We have seen that in liberal democracies without a state objective on animal welfare, the welfare of animals has no meaningful independent status in the political or legal balancing of interests. To be included in such considerations, animal welfare generally has to coincide with human interests or preferences. In other words, in states without a state objective on animal welfare, it is generally not required to address animal welfare as a separate issue which is of importance for its own sake. In theory, a constitutional state objective on animal welfare can alter this. With a constitutional state objective on animal welfare, animal welfare evolves from a non-committal value into an independent value of constitutional importance, and this implicitly and explicitly recognizes that animal welfare is an inherently important and legitimate aspect of the constitutional state.[414] Since a constitution with a state objective on animal welfare recognizes animal welfare as an independent value, it ought to be separately addressed in legislative and executive deliberations. As a consequence of the state objective, animal welfare is thus no longer only of importance if it coincides with values that humans cherish, but it becomes a value to be pursued independently.

Apart from improving the independent status of animal welfare in legislative and executive considerations, the state objective also has the potential to improve the independent status of animal welfare in the context of more specific conflicts of interests, such as in court cases. Whereas without a state objective, animal welfare could often be ignored in such contexts, or could only have played an indirect role as an interest that is secondarily pursued by humans, the state objective requires that animal welfare is noticed as an independent player on the field of interests. That is:

[414] Vink, "Dierenwelzijn," 1862–1869.

regardless of human endorsement, because its independent value now stems from the constitution and need no longer be externally inserted by humans. Furthermore, due to a state objective, the interests of animals even get a chance of prevailing over human interests as protected in the peripheral sphere of fundamental rights. However, despite the fact that, in theory, the state objective facilitates these improvements in relation to the independence requirement, it is not at all certain that they will be realized. This will be clarified in the next subsection.

The non-contingency criterion

The state objective also has the potential to reduce the contingency with which animal interests are taken into account in liberal democracies. The state objective is a formal reflection of the state's commitment to be involved in the lives and welfare of its non-human inhabitants, notably laid down in the most important document of the liberal democratic state. This is an important improvement when it comes to the relationship between animal welfare and the liberal democratic state, regardless even of whether a state truly adheres to the state objective. Even if a constitutional state objective on animal welfare were to be completely ignored in practice, it nonetheless would continuously send the message that the situation *should be* otherwise, and thus consequently put pressure on state officials to change the status quo in accordance with what is required by the constitution. In this way, a state objective on animal welfare, even if not adhered to by the state, is functional in the sense of pointing out that there might be a legitimacy problem with current governance.[415] It is also important that adopting such a serious commitment to the welfare of animals in a constitution removes political controversy on the issue in question.[416] This should have the indirect effect of removing some of the contingency of paying due attention to animal interests by state officials. If indeed accepted as a constitutional principle, the welfare of a state's animal inhabitants can no longer be the exclusive concern of politicians affiliated with green parties and animal

[415] Larik, *Foreign Policy Objectives in European Constitutional Law*, 24–25.
[416] Haupt, "The Nature and Effects of Constitutional State Objectives," 224, 256.

advocacy parties, but rather must be the concern of *all* state officials, for all of them are, given the rule of law, bound by constitutional values and norms. These consequences of the state objective may subtly improve the non-contingency with which animal interests are taken into consideration by the state.

Despite these improvements, however, it is clear that even with a constitutional state objective, the inclusion of animals' interests in governmental deliberations is, to a great extent, still dependent on several other factors, such as the integrity and personal commitment to animal welfare of individuals in key governmental positions, the societal willingness to respect animal welfare, and the urgency of other state matters that require attention and resources. In other words, a state objective has the potential to have important effects, such as limiting fundamental rights when this is necessary for respecting animal welfare, making animal welfare a factor of importance in specific legal disputes and in wider policy and legislative considerations, and safeguarding progress on this issue in the longer term, but these effects are not automatically realized. Putting flesh to the bones of the state objective requires sincere and active commitment and dedication from state officials.

The same is true for the theoretical improvements in relation to the independence requirement as just discussed. Addressing animal welfare as an independently important issue, and thus making the state objective meaningful in practice, also requires commitment and dedication from state officials. Characteristic of a state objective, however, is leaving state officials a large amount of discretionary space in giving effect to the objective. Respecting animal welfare is thus an objective of the state that, although it may not be actively frustrated, is practically just waiting to be addressed whenever state officials are of the opinion that there is enough urgency and resources to actually address it. In determining when, how, and to what extent acting on the state objective is required, governments are typically allowed significant discretion.[417]

[417] In Germany, for example, decisions on *whether* to take action to pursue the state objective, *when* to do so, and *how* to do so remain at the discretion of the legislature. Haupt, "The Nature and Effects of Constitutional State Objectives," 226–227.

Furthermore, the state objective has inherent limitations that, regardless of the level of governmental commitment, seem to render it insufficient to ever secure a truly non-contingent and equal consideration of animals' interests. We have seen that, even though they are included in the same important legal document, constitutional state objectives cannot fully and equally compete with the fundamental rights of humans, for they cannot justify infringing on the core protection of fundamental legal rights. Due to this limitation, a true equal weighing of interests remains ultimately impossible, for even animal welfare rules backed by a constitutional state objective cannot prevail over human interests that fall under the core protection of fundamental legal rights—no matter how elementary or weighty they are. This fact that a state objective cannot function as a basis for competing with the fundamental rights of humans on an equal footing means that animal interests will continue to remain fundamentally legally subordinate to human interests, even in jurisdictions which have adopted a state objective on animal welfare.

Yet another shortcoming is that a state objective does not automatically create a legal basis on which hypothetical legal animal representatives could actively pursue the enforcement of animal welfare rules in court.[418] Undertaking legal action on behalf of an animal in order to address certain illegal animal-harming behaviour or the failure of administrative agencies to enforce animal protection rules thus remains impossible, for even in the presence of a state objective, the required legal standing is still lacking (with the exception of the earlier-discussed standing for some animal welfare organizations in some jurisdictions under specific circumstances).

The inability of the state objective to secure a non-contingent and equal weighing of humans' and non-human animals' interests in all state actions also came to the fore in the case study regarding the Swiss constitutional provisions on animal welfare. Not even the country with the best constitutional protection for animals on earth has succeeded in attaining this goal. This is not to deny that the introduction of animal welfare as a

[418] Haupt, "The Nature and Effects of Constitutional State Objectives," 231–237; Nattrass, "…Und Die Tiere," 304.

state objective and the recognition of animal dignity in the Swiss Constitution have had a significant effect on Swiss law. Most notably, it improved the protection of animal welfare in the law, and even though supporting empirical data seems unavailable, possibly also the actual treatment of animals in Switzerland. However, the purpose of the Swiss case study was not to investigate whether the Swiss constitutional protection of animals has improved actual animal welfare, but whether it improved the political and legal position of animals from the perspective of the enfranchisement criteria. In the context of the non-contingency criterion, it seems that the Swiss construction did not come close to ensuring a serious and non-contingent position for animals and their interests. Even in Switzerland, non-human animals' most elementary interests are still fundamentally subordinated to all kinds of human interests, and an objective and fair weighing of these interests is not guaranteed.[419] The Swiss case study has elucidated that even in the company of a constitutional recognition of animal dignity, a state objective cannot alter the unwarranted dominance of human interests in the legal sphere. Although, according to Swiss legal doctrine, the legal structures should prompt judges to only accept infringements on animals' welfare that are truly proportional and necessary, we see that, in practice, legal norms are anthropocentrically interpreted and applied so as to allow for many forms of animal harm and even pure instrumentalisation.

Most likely, this loose interaction with the state objective is caused by the fact that the state objective itself does not explicitly instruct state officials (including the judiciary) to weigh interspecies interests in the equal way that is required according to legal doctrine. It is possible that state officials may be reluctant in culling human freedoms to use, abuse, and instrumentalise other animals as long as there is no clear or explicit assignment and authorization to do so. After all, weighing human and other animals' interests non-contingently and equally against one another would have greatly disruptive effects on current liberal democratic societies, in which

[419] Bolliger, "Legal Protection of Animal Dignity in Switzerland," 311–395; Gerritsen, "Animal Welfare in Switzerland," 1–15.

disproportional animal (ab)use and instrumentalisation are omnipresent.[420] State officials might be reluctant to cause such disruptive effects on society on the mere basis of the legal *doctrine* on how the weighing of interests should take place. Possibly and understandably, they are only willing to take that legal leap if such a requirement were backed by a strong democratic authorization in the form of explicit legislative instructions in that direction. A constitutional state objective, with its inherent allowance for great discretionary and interpretation space, may be understood by many to not send a clear enough message or offer a firm enough legal mandate to demand such a ground-breaking legal shift. Absent explicit legislative authorization to weigh non-human animal interests non-contingently and, in principle, equally to those of humans, state officials may thus feel inclined to continue attaching greater weight to human interests while subordinating or even ignoring non-human animals' interests as a way of reflecting societal opinions on this matter.[421]

As a matter of handling the state objective, this is understandable, given its open and multi-interpretable nature. However, with Switzerland's additional constitutional recognition of animal dignity, giving this much power to public opinion in, for instance, judicial decisions is less defensible. Unlike a state objective, a constitutional recognition of animal dignity should not be open to many interpretations. The meaning of dignity is primarily determined by centuries of philosophical contemplations on the concept and by the commonsensical use of the term, which means that the options of legally interpreting "dignity" are limited. Protection of dignity should primarily include a protection against exclusive instrumentalisation that is not subject to utilitarian considerations, as this seems implied in the very meaning of "dignity." Once animal dignity is constitutionalized, public opinion on whether or not forms of exclusive instrumentalisation can be "justified" by other interests is thus redundant and should not be necessarily relevant to judicial contemplations on what dignity protection requires precisely. Clear constitutional demands, after all, commit a judge to respecting them, even if this contradicts a temporarily popular opinion.

[420] Gerritsen, "Animal Welfare in Switzerland," 14–15.
[421] "Societal" is then obviously understood anthropocentrically, as merely comprising human society.

Whereas a state objective inherently leaves much room for interpretation favourable to public opinion, constitutional dignity protection seems to require hard and unnegotiable norms which the judiciary is expected to apply regardless of societal support in a certain circumstance. As stated before, this is where dignity protection of animals could have had added value over a state objective on animal welfare: it would have been logical if dignity protection had covered an absolute core protection of animals. We must, however, conclude that dignity protection as realized in Switzerland has not lived up to this potential of offering this added value over a mere state objective. The most horrible ways of using, abusing, and, crucially, purely instrumentalising animals are still a daily and legal routine in the country that is formally burdened with the task of protecting animal welfare and that recognized the dignity of animals in its most eminent legal document. In sum, it is safe to say that the state objective, even if combined with constitutional dignity recognition, has trouble in meeting the non-contingency requirement, because it seems unable to secure a non-contingent and equal weighing of humans' and non-human animals' interests in the considerations of the state.

Enforceability

One of the aspects of a state objective on animal welfare that causes it to fall short in relation to the non-contingency requirement is the fact that a state objective can hardly be legally enforced. There seem to be two interrelated reasons for this. First, the checks and balances that generally work well to establish compliance with the constitution seem to malfunction here. Second, the fact that a state objective typically allows for much discretionary room makes it rather unsuitable to be strictly enforced.

Many of the general checks and balances in liberal democracies are anthropocentric in the sense that they ultimately rely on the selfish motives of the human electorate. This leads to problems when the same mechanisms are used to establish compliance with a constitutional provision that, quite revolutionary, does *not* primarily aim to protect human interests, but non-human interests instead. In that case, checks and balances that are ultimately

anthropocentrically driven (by the egoism of the human political agent, that is) struggle to establish compliance with the norm.

As discussed, a state objective ought to have various institutional effects, and which body is ultimately responsible for reviewing compliance with these effects differs by jurisdiction. In most cases, however, the legislator, the electorate, and the judiciary (in general, or a constitutional court) will be responsible for monitoring compliance with the state objective.[422] When it comes to the responsibility of the legislative branch or (ultimately) the electorate to check compliance with the state objective—for example the extent to which the executive branch succeeds in giving due regard to animal welfare in its considerations—we know that there is a clear anthropocentric incentive at play. Since the electorate is exclusively human, this may mean that state officials under popular control are neither intrinsically nor institutionally inclined to correct the executive branch if it does not succeed in paying due regard to animal interests.

With regard to the checking mechanism that calls on the judiciary to review compliance with the state objective, we have seen that there may be some more or less legitimate reticence to effectively give priority to animal interests when they are, objectively speaking, weightier. As discussed above, this judicial self-restraint may well be based on a (in light of the separation of powers) healthy reservation to not exert powers that are not explicitly assigned by law and to not enforce norms that are not explicitly stated in law. The vagueness that is inherent to state objectives thus also plays a big role here, but this aspect will be more extensively addressed further below.

It seems safe to say that enforcing a constitutional state objective is very hard and that a state objective never automatically constitutes legal guarantees, which is partly due to the malfunctioning of general checks and balances in this context. This is worrisome in the light of the non-contingency requirement. Therefore, we might consider improving the checks and balances that function in the context of the state objective before we can definitively reject the state objective on animal welfare as an animal enfranchisement option on grounds of normative deficiency. In

[422] See for an elaboration on the Dutch checks and balances in the context of a hypothetical state objective: Vink, "Dierenwelzijn," 1865–1866.

contemplating improving these checks and balances, we may learn from some of the institutional changes that have been proposed by Kristian Skagen Ekeli in the context of future people and their constitutional protection. By this route, we will also arrive at the second reason for why state objectives are hardly enforceable: they are inherently permissive.

In one of his constitutional models, Kristian Skagen Ekeli proposes making the protection of the interests of future people a state objective.[423] Specifically, he proposes a "posterity provision," a constitutional provision that commits a state to "avoid and prevent decisions and activities that can cause avoidable damage to critical natural resources that are necessary to provide for the basic physiological (biological and physical) needs of future generations."[424] Ekeli signals the same problem we have encountered as well: the practical value of a constitutional state objective is generally little, due to the fact that it is hardly enforceable. He, however, proposes some additional procedural changes in an attempt to make a state objective on future peoples' interests more enforceable and holds that his proposed provision thus constitutes "a better and more adequate basis for judicial enforcement than the [existing] alternatives."[425] It might be useful to now elaborate a little on Ekeli's posterity provision model, especially the procedural remedies he proposes to remedy the permissiveness of the state objective.

The posterity provision that Ekeli proposes has three sections, the first of which contains the state objective itself, which, in short, commits the state to preventing avoidable damage being done to resources that are critical to future people. To escape the trap of proposing a provision that has little or no practical effect, Ekeli attempts to improve the practical value of this state objective by complementing it with two additional procedural sections. These procedural sections regulate the process of enforcement and

[423] Even though Ekeli does not explicitly refer to the provision he proposes as a "state objective," (he mentions that it includes "a statement of public policy," however) it has all the relevant characteristics of a state objective and thus will be treated as such in this chapter. Ekeli, "Green Constitutionalism," 378–401.
[424] Ekeli, "Green Constitutionalism," 379, 391.
[425] Ekeli, "Green Constitutionalism," 378–379, 399.

are thus meant to function as a big stick to ensure compliance with the state objective by the legislative and executive branches.

The goal of the second section is to enable legal guardians to initiate legal proceedings on behalf of posterity, through which they can attempt to have the state objective enforced in court. More precisely, this section must be understood to assign courts the competence to appoint such guardians and to provide the legal basis of legal standing for such guardians.[426] Translated into our context, we could consider creating a similar procedural addition to state objectives on animal welfare that allows legal guardians to initiate legal proceedings on behalf of non-human animals in order to attempt to have the state objective enforced in court. Courts will then be able to review the state's compliance with the constitutional state objective, and legal guardians of animals will be able to contest state behaviour in court. This would, in principle, allow the courts to review all actions of the legislative and executive branches that might interfere with the state objective, among which bills, acts of parliament, and decisions and regulations made by the executive branch.

The third section of Ekeli's posterity provision describes three measures that the reviewing court can impose in an attempt to make the state comply with the state objective. According to Ekeli, courts should be enabled to "(1) require that state authorities undertake environmental and technological *impact assessments* before they make decisions affecting critical natural resources; (2) require that the final *enactment of a proposed law is delayed* until a new election has been held if the court believes that … the law in question can cause avoidable damage to critical natural resources; or (3) require a *referendum* on the law proposal under consideration" (italics JV).[427] Translated into the context of a state objective on animal welfare, this would mean that courts would be enabled to: (I) require that the state authorities undertake animal welfare impact assessments before they make decisions affecting animal welfare, (II) require that the final enactment of a proposed law is delayed until a new election has been held if the court believes that the law in question can cause avoidable damage to animal welfare, and (III)

[426] Ekeli, "Green Constitutionalism," 391–394.
[427] Ekeli, "Green Constitutionalism," 394–395.

require a referendum on the proposed law under consideration. With these competences, reviewing courts can interfere with the legislative and executive processes if their assessment leads them to believe that the state objective is about to be disrespected by the state. This may improve the enforceability of a state objective, and, as Ekeli considers important, possibly also the process of deliberation and decision-making.[428]

How are we to appreciate these procedural additions in the light of improving the enforceability of a state objective on animal welfare? Could procedural additions such as the ones proposed by Ekeli in the context of future people take away some of the permissiveness of a state objective on animal welfare? The effectivity and normative desirability of the proposed type of judicial review will now be discussed.

To start with, there may be some reservations about the model that Ekeli proposes from the perspective of effectivity. More precisely, the measures that the courts can impose in order to compel the legislative and executive branch to act in line with the state objective, namely ordering an impact assessment, delaying the enactment of law, and ordering a referendum, are not likely to be effective in the animal welfare context. With regard to the first measure, which would allow the court to require that state authorities undertake animal welfare impact assessments before they make decisions affecting animal welfare, it is unclear how this would be effective in establishing compliance with the state objective. Governmental decisions regarding animal welfare, especially executive ones, are not always publicly announced before they are made. Decisions made without prior public notification thus remain deprived of judicial review, for it remains unclear how a legal guardian could pre-emptively start legal proceedings regarding such a decision. More importantly, however, with regard to decisions that do end up under judicial scrutiny, it remains unclear how ordering that an impact assessment on animal welfare must be made can establish compliance with the state objective. An impact assessment does not seem to give any guarantees with regard to the substantial decision that follows after the impact assessment is conducted. In other words: requiring an impact

[428] Ekeli, "Green Constitutionalism," 395–397.

assessment to be undertaken is not the same as requiring officials to take due notice of the state objective. Even if an impact assessment is made, government authorities may still decide to negate or disproportionally harm animal interests, which would constitute a disregard for the state objective that the court cannot prevent or sanction.

The second measure, the one that enables courts to require of the legislator that the final enactment of a proposed law is delayed until a new election has been held if the court believes that that law may cause avoidable damage to animal welfare, struggles with the same problem. It does not in any way guarantee that animal interests will be paid due respect after delay and new elections. To the contrary, we have already seen that general elections are a particularly poor device for remedying disregard for animal interests (or, for that matter, future people's interests). General elections introduce rather than remove anthropocentric and "presentist" incentives, because only presently living human agents vote. Additionally, delaying the legislative deliberation process can, on its own, offer no guarantees with regard to the substantial outcome of that process.[429] It is thus not clear how a court could force or even persuade legislators to pay due respect to animal welfare in a proposed law by merely delaying the legislative process and ordering new elections.

Moreover, the same is true with regard to the third measure: requiring a referendum on a proposed law. In this case, too, it is not clear how a referendum, or delay, could make the legislator change a proposal of law so as to make it sufficiently respectful of animal interests. A referendum, like general elections, also constitutes an anthropocentric (and presentist) incentive, due to the specific characteristics of voters. Yet again, this measure, if imposed by a court, seems to be unable to persuade, let alone force the state to comply with the state objective.

In sum, it seems that the type of judicial review that Ekeli has proposed is not likely to be effective in adding practical value to a state objective on animal welfare. Even with the competences that Ekeli proposes,

[429] See on deliberative improvements and their (in)significance to substantial outcomes in the context of animal welfare: Garner, "Animal Rights and the Deliberative Turn in Democratic Theory," 1–21; Garner, "Animals, Politics and Democracy," 103–117.

courts still cannot make governmental bodies respect the state objective. In spite of its probable ineffectiveness, however, there is also a serious normative argument against introducing the type of review that Ekeli proposes. More precisely, the emphasis that Ekeli's model places on judicial review is troublesome in the light of the separation of powers.

Given the open nature of state objectives and the consequential fact that they do not create clear and firm obligations, Ekeli-like judicial review would lead to a situation in which highly sensitive and political matters would have to be decided by a branch that is not directly democratically legitimized, nor equipped for that task. Since state objectives do not create clear rights or even relatively clear instructions with which the judicial branch can work, the judiciary will be forced to make substantive considerations relating to the state objective. In an animal welfare version of Ekeli's model, courts will be required to determine whether the intended decisions and activities of the executive and legislative branches are consistent with the formal *objective* to pay due respect to animal welfare. This is an almost impossible task, for an objective lays out very few concrete norms in the context of which the judiciary can assess state behaviour. Without additional legislative clarification on what this objective requires precisely, the judicial branch would be forced to give substance to this open norm itself, which raises concerns with regard to the separation of powers.

Ekeli has tried to remedy this problem by specifying what the state objective requires: government authorities are to prevent making decisions that can eventually cause "avoidable damage," in order to avoid judicial interference with their work. This does not ease the judicial task at all, however, for "avoidable damage" still is a soft norm very much open to debate. Determining what constitutes "avoidable damage" to "critical resources for future generations" or, in our case, animal welfare, is still a highly political matter. Whether damage is "avoidable" is not only interlinked with inconclusive risk assessments but also with the availability of resources and the distribution of these resources in a society.[430] Whether,

[430] Kristian Skagen Ekeli recognizes these difficulties: he does not deny that "judicial enforcement of the posterity provision poses important problems—especially with regard to uncertainty about the future

and how many resources are to be spent on preventing certain inconclusive risks of future damage are inherently political questions to which there are no clear-cut objectively "true" answers, only political ones.[431] Due to their political nature, these questions ought to be answered by the political branches only. In Ekeli's model, however, the judiciary is burdened with determining these political matters, which seems an unwise violation of the separation of powers. Additionally, burdening the judiciary with establishing these political matters also puts its neutrality and a-political reputation at risk, which may ultimately result in a dangerous loss of public respect and general societal support for (decisions of) the judicial branch. For all these reasons, the judicial branch should ideally not be burdened with making the controversial and political considerations that giving substance to a vague state objective would require it to.

Ekeli anticipated critique from the angle of the separation of powers, however, and defends his model against such critique by stating that it "does not imply that legislators will be deprived of their power to make decisions on the above mentioned complex and politically controversial issues."[432] Additionally, Ekeli seems to argue that there is nothing atypical about the judicial review implied in his model, that it is merely a form of ordinary checking and balancing.[433] To start with the latter statement, contrary to Ekeli's view, the substantial judicial review as proposed by Ekeli seems quite extraordinary. As mentioned earlier, comparative research shows that the actual enforceability of state objectives in court varies between no possibilities of enforcement at all to marginal enforceability in

effects of present decisions and activities," and he furthermore admits that it is "by no means an easy task for courts to weigh and balance the short-term socio-economic interests of present people against the interests of future generations." For Ekeli, however, these difficulties do not constitute a decisive argument against accepting judicial enforcement of the posterity provision. Ekeli, "Green Constitutionalism," 387–390, 392–394.

[431] Given the resemblances between positive rights and state objectives, Cass R. Sunstein's view that it is unrealistic to expect courts to enforce positive rights seems equally valid when it comes to the enforcement of state objectives: courts lack the tools of a bureaucracy and cannot create government programs, because they do not have a systematic overview of government policy. Sunstein, "Against Positive Rights," 37.

[432] Ekeli, "Green Constitutionalism," 383–387, 393.

[433] Ekeli, "Green Constitutionalism," 393.

exceptional cases.[434] There is a good reason for this general lack of judicial enforceability of existing state objectives: state objectives are generally too indefinite and permissive to be enforceable in court without jeopardizing the separation of powers. In *ordinary* checking and balancing, the judiciary ideally has fairly clear guidelines and preferably not a decisive vote on highly political matters. In this case, however, the guideline is a state objective, an open political mandate, the legal implications of which are not explicated in the law itself, and thus a poor guideline for judges.

Ekeli's second statement that attempts to save his model from critique from the perspective of the separation of powers is that the legislative branch will not be deprived of their power to make decisions on these politically controversial issues. There are two ways in which one could respond to this statement. First, we could point out that, even though the power of the legislative branch to make decisions on these politically controversial issues is, legally speaking, not "taken away" in the sense that its mandate is reduced, its power is nonetheless *practically* curtailed. Courts will gain decisive reviewing powers on these matters, which means that the legislative powers are, in practice, restricted. It is thus possible to defend the position that, practically speaking, power is transferred from the legislative to the judicial branch.

The second way in which one could respond to Ekeli's statement is by pointing out that his statement misses the point. Even if, for the sake of argument, we were to agree that judicial review as proposed by Ekeli does not *take away* power from the legislative branch and transfer it to the judicial branch, this still does not make his model acceptable in light of the separation of powers. The single fact that the judiciary *gains* substantial reviewing powers on highly political matters, regardless of where this power is coming from, is sufficient cause for concern. The fact that the judicial branch always has the last word in a liberal democracy means that courts, in Ekeli's model, will effectively be able to correct or even bar state action whenever it deems this appropriate, and thus will be enabled to make

[434] Larik, *Foreign Policy Objectives in European Constitutional Law*, 31, 64–65; Haupt, "The Nature and Effects of Constitutional State Objectives," 225–230.

decisive politically controversial decisions.[435] This, on its own, is enough reason to reject the type of judicial review that Ekeli proposes.

In addition to the critique of Ekeli's posterity provision model, two final adjacent points must be stressed. First: the critique on the substantial judicial review of a state objective that Ekeli proposes does not imply a rejection of judicial review in general. Second: substantial judicial review of state objectives seems unwise in general, however.

Firstly, the rejection of the type of judicial review that Ekeli proposes does not imply a rejection of judicial review *per se*, nor is it a defence of the too simplistic idea that courts can function as value-free calculators which merely apply the law. This would be a simplification of the reality in which (especially constitutional) courts interpret law on a daily basis. It is unavoidable that courts work with and interpret open norms and that they sometimes even have to go into politically sensitive questions. The purpose of open norms in law then is to give courts some discretion to work with the law in all the widely differing cases with which they will be confronted. What is disturbing about the thorough review of the state objective proposed by Ekeli, however, is that the purpose of employing an open norm here is not to leave the *judiciary* broad discretionary space to interpret it, but the political branches themselves. A state objective is primarily directed at the legislative branch, and the purpose of the vagueness in the formulation of a state objective is to offer this branch broad discretionary space. As a consequence, a state objective necessarily encompasses few guidelines on how the government should act and thus how the judiciary can legally assess governmental acts.

Secondly, it may be clear by now that as a result of their permissive and political nature, state objectives are particularly unsuitable to be enforced in court. State objectives are legal devices primarily aimed at the

[435] Ekeli challenges the uncontroversial observation that courts have the last word in such cases, because: "the legislature should have the opportunity to change judicial decisions—for the future—by amending constitutional laws," or so he argues. This argument does not seem very convincing, however. Legislation is necessarily future-oriented and can thus not retrospectively "change judicial decisions." The legislator could, of course, change the law in such a way that future law diverges from what courts have determined it to be in the past, but even then courts will still have the last word about this new law if judicial review in an Ekeli-like fashion were possible. Ekeli, "Green Constitutionalism," 393.

political branches, and as such they are intentionally vaguely formulated in order to allow for much discretion. Political branches need this discretion in order to remain flexible and be able to adequately respond to unpredictable social realities. As a result of this vagueness, however, judicial review becomes necessarily problematic, because in order to review them, courts would be required to fill in the open norm with more detailed norms themselves. This would be problematic from the perspective of the separation of powers, because it would enable the judiciary to make key political considerations, to judicially construct norms, and to make politically controversial decisions that do not necessarily have democratic approval.

In light of the foregoing, it seems that the contingent character of the state objective is not a flaw that ought to be fixed, but rather inherent to the nature of a state objective. The political-legal instrument of codifying a state objective has its limits in what it can do for a liberal democracy: a state objective simply does not seem to allow for a high level of enforceability. Trying to improve the enforceability of the state objective then misses the point, because a state objective is necessarily vague and necessarily goes hand in hand with a certain discretionary space for the political bodies—for example, the room to specify how and when this goal has to be pursued. Crucially, this amount of liberty for the legislature and executive branch necessarily constitutes a certain contingency. To the extent to which these bodies are free to pursue the state objective how and when they choose, animal interests consideration will remain contingent. It thus seems that the state objective is ultimately unfit to secure due attention to animals' interests in de considerations of liberal democratic states. As a result, we must conclude that a constitutional structure with a state objective on animal welfare does not meet the non-contingency requirement of animal enfranchisement.

4.5 Conclusion

This chapter has assessed one of the options of institutionalizing the consideration right of non-human animals in the legal institutions of liberal democracies: the constitutional state objective on animal welfare. We have

seen that a state objective on animal welfare may, in theory, have four important effects which improve the extent to which the state has regard for animal interests in various political and legal considerations. These effects of the constitutional state objective could imply significant improvements when it comes to the independence and non-contingency requirements of animal enfranchisement. In other words: a constitutional state objective on animal welfare has the potential to have some positive effects on the political and legal status of non-human animals in liberal democracies when compared to their position in liberal democracies without such a state objective. A state objective on animal welfare has the potential to serve as a basis for addressing animal welfare in several political and legal contexts, and it is an important formal recognition of the independent value of the welfare of animals. Such a state objective quite straightforwardly expresses that the welfare of animals is not a matter of importance only if humans attach value to it, but a serious and elementary aspect of liberal democratic governance that, in some way or another, requires political attention. A state objective thus may improve the independent status of animal welfare and decrease the casualness with which it is addressed in political and legal considerations.

Importantly, the state objective may serve as a basis for these positive effects without in any way compromising on the democratic process or principles that are essential to the functioning of liberal democracies—that is, if substantial judicial review of compliance with the state objective is omitted. Unlike many of the options of pure political animal enfranchisement that were discussed in the previous chapter, the state objective does not have dangerous undemocratic shortcomings which should prevent us from implementing it, nor does it seem to bring about any other risks to liberal democracies. This is because it employs constitutions' unique and well-embedded function of legitimately influencing the law and political actions of the liberal democratic state. It seems that the state objective can only offer improvements when compared to the status quo in liberal democracies without a state objective on animal welfare, while not facing the problems that a purely political enfranchisement of animals

would give rise to. In other words: it seems that the result of adopting a constitutional state objective on animal welfare can only be positive.

At the same time, our enthusiasm about the state objective must be tempered, because we have seen that merely adopting a state objective on animal welfare does not lead a state to meeting the criteria for non-human animal enfranchisement. Although it may theoretically function as a basis from which further improvements may stem, and in that sense has some potential, the state objective offers very few guarantees in practice. The case study regarding the Swiss state objective on animal welfare illustrated that a state objective may be more satisfying in theory than in practice. Its biggest shortcomings are related to the non-contingency requirement and the independence requirement: a state objective has too little structural effect, and as a result of its permissiveness, much of its potential in relation to the independence requirement is not realized in practice. We have seen that, as an expression of policy preference, a state objective does not provide clear instructions. On that account, politicians are relatively free to interpret the objective as they seem fit in specific circumstances, and they are hardly accountable for how they give substance to the state objective. Given the vague instruction of the state objective and the broad discretionary space that it offers state officials, a relative disregard for the goal stated in the state objective can be unsatisfactory, but is hard to pin down as clearly unconstitutional.

It is unlikely that the contingent relationship between the state and its concern for animal interests will fundamentally change merely as result of adopting a state objective on animal welfare. The contingency of a state objective, and thus its allowance for human abuse of power against non-human animals, is likely to remain a problem, because it is rooted in the permissive nature of state objectives. The body to which the political branches are accountable (directly or indirectly) under common checks and balances is the electorate. The exclusively human electorate is not likely to require politicians to give a rich meaning to the state objective, however, since this is likely to come at the expense of their own liberties and their share of societal resources. We have also seen that not even combining a state objective with a constitutional recognition of the dignity of animals (the

Swiss model), nor enhancing the state objective by introducing substantial judicial review of it (the Ekeli model) can solve this contingency problem. Even if the state objective is complemented with a provision that recognizes the dignity of animals, the state objective remains a relatively weak legal instrument. The other option that was investigated which could possibly have strengthened the state objective was to mandate the judiciary to review the state's compliance with the state objective. This approach also failed, however. State objectives essentially do not create hard and measurable rules for governmental action. As a result of this general permissiveness of state objectives, an effective judicial check on compliance with a state objective would require a thorough type of review that would be problematic in light of the separation of powers. Judicial review of the state's compliance with a state objective thus can only be very marginal if we are to prevent a breach of the separation of powers, which is so central to the rule of law and the functioning of liberal democracies. Mere marginal judicial review, however, cannot improve the state objective in such a way that it meets the non-contingency requirement.

With its typical allowance of significant discretion for the political branches, a constitutional state objective can only offer a basis from which animal welfare may be furthered if human society demands it, but it cannot offer the institutional guarantees to which non-human animals are entitled. This legal instrument could certainly open some doors that would otherwise remain closed, but does, on its own, not suffice from the perspective of non-human animals' consideration right. We have to conclude that, although a state objective on animal welfare may be an interesting intermediate model in the historical process of the political and legal emancipation of non-human animals, it has to be rejected as an ideal model, because it remains normatively deficient in light of the enfranchisement criteria, and thus cannot give non-human animals the political and legal status to which they are entitled.

5

Enfranchising animals in legal institutions: Fundamental legal rights

Introduction

In 1789, Jeremy Bentham analysed that it is due to "the insensibility of the ancient jurists" that non-human animals "stand degraded into the class of *things*," (italics original) and that their interests thus are as good as irrelevant to the legal system.[436] Our analysis of the current legal status of non-human animals has shown that, since then, nothing fundamental has changed about the legal categorization and status of animals. The spirit of these "ancient jurists" responsible for putting non-human animals into the category of "things" still haunts our legal system. Today, however, the legal categorization of animals as objects, as well as their related lack of individual rights, is increasingly contested. In this chapter, I will investigate whether the fundamental choice of the ancient jurists to leave all non-human individuals out of the sphere of rights can be successfully contested and whether transforming sentient animals into legal persons with fundamental legal rights would be a defensible option of enfranchising non-human animals in liberal democracies.

The first section of this chapter discusses what is true of several enthusiastic media reports and even academic sources that have claimed that some non-human animals have already been granted fundamental legal rights somewhere around the world. In the second section, the nature of the rights that are the subject of this chapter is elucidated. What are the characteristics of the fundamental legal rights under investigation? The third section deals with additional arguments that could ground and justify

[436] Bentham, *An Introduction to the Principles of Morals and Legislation*, 310–311.

assigning non-human animals such rights. The fourth section assesses the normative acceptability of assigning sentient non-human animals fundamental legal rights in light of the enfranchisement criteria. The last, fifth section, encompasses the conclusion of this chapter.

5.1 Unbreaking news: Animals not granted rights

Before we get to elucidating what is meant, precisely, by the specific "fundamental legal rights" that this chapter considers assigning to sentient animals and whether assigning animals such rights would be defendable, a certain ambiguity about the status quo of animals and their current "rights" must be debunked. Every once in a while, big headlines appear in media around the world about animals being granted "rights," but are these truly rights? In order to have a distinctive meaning and to be able to change the legal status of animals into a distinctively different one, "rights" in general must mean something like a subjective legal protection of the animal itself that stretches beyond ordinary legal rules that merely apply to them. Have non-human animals been granted any such "rights" anywhere in the world?

In 2014 and 2015, media all over the world reported on an alleged landmark case concerning an orangutan named Sandra, stating that the ape had been granted basic rights. "In Argentina, a Court Grants Sandra the Orangutan Basic Rights," *Time Magazine* headlined.[437] *CNN* titled an article "Argentine Orangutan Granted Unprecedented Legal Rights," in the article quoting the attorney on the case as saying that Sandra was ruled a subject of law, "a nonhuman being that has certain rights, and can enforce them through legal procedure."[438] Similar media coverage was given to a case concerning an Argentinian chimpanzee named Cecilia in 2016. *Independent* reported: "Chimpanzees Have Rights, Says Argentine Judge as She Orders

[437] Helen Regan, "In Argentina, a Court Grants Sandra the Orangutan Basic Rights," Time Magazine, December 22, 2014, http://time.com/3643541/argentina-sandra-orangutan-basic-rights/.
[438] Emiliano Giménez, "Argentine Orangutan Granted Unprecedented Legal Rights," CNN Espanol, January 4, 2015, https://edition.cnn.com/2014/12/23/world/americas/feat-orangutan-rights-ruling/index.html.

Cecilia be Released From Zoo."[439] *Metro* reported on the Cecilia case: "Judge Rules World's Loneliest Chimp Has Rights and Must be Freed."[440] Based on international news reports such as these, one could easily get the impression that legal rights for non-human animals are no longer a hypothetical option, but already exist in several places around the world.

The truth is, however, that reports such as these often suffer from an uncritical misinterpretation of local judicial rulings, rulings that can only be properly understood with extensive knowledge of the legal documents in question and the legal system of the specific jurisdiction. Given the substantial differences between legal systems in different countries, the legal meaning of a local ruling can easily be misinterpreted by people with too little knowledge of the respective jurisdiction and the local legal system. Spectacular-sounding legal rulings can thus turn out to be not spectacular at all, if only properly understood in the context of the legal system in the respective jurisdiction.

Legal experts seem generally sceptical about the actual legal meaning and significance of the rulings in the aforementioned Argentinian cases. Benito Aláez Corral, specialized in constitutional law, claimed that the 2014 ruling on Sandra is less spectacular than it may seem. The court's statement on which the media's reports seem to have been based, was, according to Aláez Corral, in fact a non-binding statement.[441] Steven M. Wise, litigating similar cases in the U.S.A. as founder and president of the *Nonhuman Rights Project*, is also sceptical about the alleged legal implications of Sandra's case. He believes "with reasonable certainty" that "Sandra has not been granted personhood, the right to *habeas corpus*, nor any other legal right, and that

[439] Gabriel Samuels, "Chimpanzees Have Rights, Says Argentine Judge as She Orders Cecilia be Released From Zoo," Independent, November 7, 2016, http://www.independent.co.uk/news/world/americas/argentina-judge-says-chimpanzee-poor-conditions-has-rights-and-should-be-freed-from-zoo-a7402606.html.
[440] Simon Robb, "Judge Rules World's Loneliest Chimp Has Rights and Must be Freed," Metro, November 7, 2016, http://metro.co.uk/2016/11/07/judge-rules-worlds-loneliest-chimp-has-rights-and-must-be-freed-6240568/.
[441] Benito Aláez Corral quoted in: Steven M. Wise, "Sandra: The Plot Thickens," Nonhuman Rights Blog, January 12, 2015, https://www.nonhumanrights.org/blog/sandra-the-plot-thickens/.

[this case concerns] a regular animal welfare investigation."[442] Adding to the obscurity of the case and feeding scepticism concerning this case is the fact that the group who started the proceedings on Sandra's behalf, the Argentinian *Association of Professional Lawyers for Animal Rights*, is remarkably non-transparent. They do not publicize the relevant, allegedly ground-breaking legal documents, and they even refuse to offer elucidation on the legal aspects of the case to their (informal) sister organization in the U.S.A.[443]

The ruling in Cecilia's case suffers from similar ambiguity and is also open to different interpretations. The judge in this case, María Alejandra Mauricio, allegedly ruled that Cecilia was a "subject of [a] nonhuman right."[444] However, in clarifying this ruling, judge Mauricio also stated that the ruling on this case was not at all a ground-breaking step toward the legal recognition of personhood for great apes, but rather results from a quirk in the structure of Argentinian law.[445] According to the judge, Cecelia's case was not at all about civil rights, "but about rights that belong to their species: their development, their life in their natural habitat."[446] Shawn Thompson, who follows the legal efforts in the U.S.A. and Argentina to win rights for apes notes that the over-enthusiastic interpretation of the two Argentinian cases in the media might not only be based in an incorrect understanding of the respective judicial rulings, but also in an incorrect understanding of the Argentinian legal system.[447] Argentina is a civil law jurisdiction, which implies that the legal significance of judicial precedents is much less than in

[442] Steven M. Wise, "Update on the Sandra Orangutan Case in Argentina," Nonhuman Rights Blog, March 6, 2015, https://www.nonhumanrights.org/blog/update-on-the-sandra-orangutan-case-in-argentina/.
[443] Wise, "Update on the Sandra Orangutan Case in Argentina."
[444] Ignacio Zavala Tello, "En Una Decisión Judicial Inédita, la Mona Cecilia Será Trasladada de Mendoza a Brasil," Los Andes, November 3, 2016, http://www.losandes.com.ar/article/tras-una-decision-judicial-inedita-la-mona-cecilia-sera-trasladada-a-brasil.
[445] Merritt Clifton, "Argentinian Court Grants Zoo Chimp a Writ of Habeas Corpus," Animals 24-7, November 8, 2016, http://www.animals24-7.org/2016/11/08/argentinian-court-grants-zoo-chimp-a-writ-of-habeas-corpus/.
[446] María Alejandra Mauricio quoted in: Zavala Tello, "En Una Decisión Judicial Inédita, la Mona Cecilia Será Trasladada de Mendoza a Brasil."
[447] Shawn Thompson, "When Apes Have Their Day in Court," *Philosophy Now* 111 (December 2015 / January 2016): 26–29.

jurisdictions with a common law system, such as the U.S.A. and the United Kingdom. For substantially changing the legal categorization of non-human apes and for granting them individual rights of their own, therefore, one or two legal precedents in case law are not sufficient (that is, if these rulings had the meaning attributed to them by the media).[448] Just like in any other civil law country, this requires a substantial legal change through legislative activity, which has not yet occurred in Argentina, nor, to the best of my knowledge, in any other country.[449]

More disconcerting than overly enthusiastic media coverage is that we find similar inaccuracy in some academic work. Jessica Eisen, notably legally schooled herself, claims in a 2010 paper that New Zealand has granted the great ape the "right not to be subjected to experimentation."[450] On closer inspection, however, it is clear that New Zealand did not introduce legal animal rights at all. The country merely changed its ordinary Animal Welfare Act and added a general ban on harmful experimentation on non-human hominids. A paper about this legal transition, to which Eisen herself notably refers, explicitly emphasizes that this new Act "does not confer explicit legal rights to them [non-human great apes]" and that the provisions containing *rights* were rejected precisely on the ground that they "would change the intent and approach of the bill from welfare to rights."[451] Moreover, not only did the legal change not add up to the revolutionary paradigm shift that Eisen suggests, the overall significance of this change in animal welfare legislation has even been questioned, because "none of New Zealand's three dozen non-human hominids were ever at risk of being subjected to harmful research."[452]

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[448] Janneke Vink, "Hoe Zijn de Rechten van Andere Dieren dan Mensen te Waarborgen?" in *Hoe Zwaar is Licht? Meer dan 100 Dringende Vragen aan de Wetenschap*, eds. Beatrice de Graaf and Alexander Rinnooy Kan (Amsterdam: Uitgeverij Balans, 2017), 314–317.
[449] See also: Jonas-Sébastien Beaudry, "From Autonomy to Habeas Corpus: Animal Rights Activists Take the Parameters of Legal Personhood to Court," *Global Journal of Animal Law* 1 (July 2016): 5.
[450] Eisen, "Liberating Animal Law," 69.
[451] Rowan Taylor, "A Step At a Time: New Zealand's Progress Toward Hominid Rights," *Animal Law* 7 (2001): 37–38.
[452] Taylor, "A Step At a Time," 38.

In a similar fashion, in her book *Animals, Equality and Democracy*, Siobhan O'Sullivan claims that primates in Spain have enjoyed legal rights since 2008. O'Sullivan: "spectacularly, in 2008 Spain became the first country to extend legal rights to some nonhuman animals. Which animals received that special privilege? Why it was non-human primates of course."[453] In truth, however, non-human primates were not granted legal rights in Spain at all. According to legal scholar Joan E. Schaffner, something different and less spectacular happened. The Deputies of the Environment, Agriculture and Fishing Commission of the Spanish Parliament adopted a resolution which called on the government to promote the Great Ape Project (which is known for advocating the granting of legal rights to other apes).[454] The resolution appears to be non-binding, but the Deputies had "the expectation that it would be implemented into law within four months."[455] In a footnote, Schaffner adds: "The Government apparently never responded and the law was never enacted," leaving Spanish non-human apes, just like their worldwide brothers and sisters, ultimately without legal rights.[456]

As noted above, the misunderstandings of what have falsely been perceived to be ground-breaking changes in the legal status of non-human animals are often rooted in a lack of knowledge or misunderstanding of the local legal context. The law, being a highly complicated matter even without all of its transnational differences, can easily be misunderstood by scholars without legal training, but also by legal scholars without sufficient knowledge of the respective legal system, legal traditions, and other legal peculiarities in a specific jurisdiction. Most often, we see that ordinary changes to statutory animal welfare law are misinterpreted as an attempt to extend fundamental legal rights to other animals. However, as explained earlier, statutory animal welfare laws merely regulate the ways in which we may handle other animals, but do not fundamentally call into question the very legal categorization of animals as ("animated") objects, nor do these laws provide animals with enforceable individual rights.

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[453] O'Sullivan, *Animals, Equality and Democracy*, 22.

[454] See also: Singer, *Animal Liberation*, xiii. See on the Great Ape Project: Paola Cavalieri and Peter Singer, eds., *The Great Ape Project: Equality Beyond Humanity* (New York: St. Martin's Griffin, 1996/1993).

[455] Schaffner, *An Introduction to Animals and the Law*, 2.

[456] Schaffner, *An Introduction to Animals and the Law*, 2, 194 (including footnote 7).

A related source of misinterpretations is ignorance with regard to the legal value of judicial decisions. Again, the uniqueness of jurisdictions, with all their curiosities, nuances, and to outsiders almost impenetrable traditions, leads to a situation in which the precise legal value of one judicial ruling can hardly be understood but by a handful of legal experts. This is because the significance of one judicial decision to the development of the law differs per legal system. In this context, a general distinction between legal systems can be made. In common law jurisdictions, the development of the law relies much more heavily on judicial decisions (precedents) than it does in civil law jurisdictions, in which the emphasis is more on legislative action. Therefore, sudden spectacular changes of the law such as the recognition of non-human animals as legal persons with legal rights are *generally* more likely to happen through a judicial decision in a common law country than in a civil law country.[457] This general difference between common and civil law systems may allow us to make some good guesses about the legal significance of specific judicial decisions, but for a legally precise analysis of a singular judicial decision, more information about the specific legal system is needed.

The third source that causes confusion about the legal status of animals is a linguistic one. It is a longstanding practice to formulate *ethical* convictions about the proper interaction with animals in rights-language. Moral entitlements are often labelled "rights" as well (such as: "animals have the right not be made to suffer"), which may easily, though falsely be interpreted to mean *legal* rights.[458] The type of rights that are the subject of the remainder of this chapter are fundamental, legal non-human animal rights. To the best of my knowledge, such legal non-human animal rights have not yet been implemented in any jurisdiction in the world. In the next section I will clarify what such fundamental legal rights would entail precisely.

[457] Vink, "Hoe Zijn de Rechten van Andere Dieren dan Mensen te Waarborgen," 314–317.
[458] Paul Cliteur, *De Filosofie van Mensenrechten* (Nijmegen: Ars Aequi Libri, 1999), 36–40.

5.2 Characteristics of fundamental legal animal rights

The type of rights under examination in this chapter are the most solid ones: (I) negative, (II) individual, (III) fundamental, (IV) legal rights. This section explores what these rights we are considering assigning to non-human animals entail.

To start with, the rights examined here are *negative* because they do not primarily require positive action on the part of a government, but a negative, "back-off" governmental attitude: the state must keep away from the basic sphere of rights of individuals, and often must keep others from infringing individuals' rights as well. These rights, in other words, form a protective shield around the individual; these must be respected by others, but primarily by the state. It must be added here that this chapter will not investigate the option of assigning non-human animals positive rights. This is because it is highly likely that positive rights suffer quite some shortcomings, among which the same normative shortcomings that we have encountered with regard to state objectives, since positive rights are similar to state objectives in relevant aspects.[459] Like state objectives, positive rights are generally hard to enforce, and thus they, too, are likely to be too contingent and unable to realize the independent status for animal interests that is normatively required.

The second characteristic of the rights under examination is that they are *individual*. When it comes to rights, all that matters is the individual. Fundamental legal rights protect each rights-bearing individual, regardless of group membership, against infringements of his personal rights, even against collective decisions. In a widely shared understanding of rights, the idea of individual rights is precisely to prevent a society from sacrificing the individual on the altar of "the greater good." In other words, individual rights protect the individual rights bearer from becoming a helpless pawn in utilitarian calculations. Without this Dworkinian "trump" effect, such

[459] Furthermore, as pointed out in section 4.2, legally constructing due regard for animal welfare as a positive right could either make the legal status of non-human animals ambiguous (if non-human animals were the rights holders themselves) or would lead to a circuitous, legally ugly and inconsistent construction (if humans were the rights holders of a positive right to due regard for animal welfare).

calculations could have required a utilitarian, "useful" sacrifice of the individual in order to benefit the greater good, such as social welfare.[460] When they have rights, however, individuals may not be treated as mere "receptacles of value"[461] but must be valued *as* individuals, for their own sakes. Rights thus lift individuals out of ordinary balancing processes and recognize that they are subjects who deserve consideration in their own right, apart from any possible aggregative usefulness.

Thirdly, the rights discussed here are *fundamental* because they are generally recognized to be one of the most important aspects of liberal democracies. Protecting fundamental rights is believed by many to be the most important task of a liberal democratic state, if not its *raison d'être*.[462] As such, fundamental legal rights are part of liberal democracies' most elementary legal document: the constitution. This, fourthly, also explains why we speak of *legal* rights: the respective rights are not (merely) moral rights, but legalized rights, an essential part of the law in a liberal democracy.

What is considered in this chapter then, is assigning certain non-human animals actual fundamental legal rights. These rights would offer animals the highest legal protection and would be enforceable by law. It seems reasonable that these rights would only be distributed among *sentient* animals, for two reasons. First, the position defended earlier that merely sentient animals have interests that are affected by the political decisions of a state and thus have a consideration right seems to qualify only these animals for rights. Second, as will be argued further on in this chapter, legal rights are closely linked with interests, and as such, only animals with interests (hence: sentient animals) qualify for legal rights. In short, the considered proposal thus is that sentient non-human animals will be granted fundamental legal rights.

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[460] Ronald Dworkin, "Rights as Trumps," in *Theories of Rights*, ed. Jeremy Waldron (Oxford: Oxford University Press, 1984), 153–167.
[461] Peter Singer, *Practical Ethics* (Cambridge: Cambridge University Press, 2011/1980), 106; Regan, *The Case for Animal Rights*, 205–206.
[462] Locke, *Second Treatise of Government*.

Obviously, assigning fundamental legal rights to sentient non-human animals would have some effects we have not experienced before in the history of liberal democracies. The rights we are considering assigning to other sentient animals are the heaviest constitutional artillery around, since they have the exceptional power to trump democratic majority decisions.[463] Such rights thus would have the effect of preventing sentient animals' interests from being all too easily sacrificed on the altar of common (human) goals. Just like the existing fundamental rights of humans, sentient non-human animals' rights would be binding for all governmental branches, and enforceable through judicial (constitutional) review in most jurisdictions.[464] Assigning sentient non-human animals such rights would mean that state officials could no longer simply ignore the interests of sentient animals in decision-making processes, or at least not the interests that are secured by animals' rights. Doing so would be a violation of the constitution and the principle of the rule of law. As noted before, fundamental legal rights must often also be respected in horizontal legal relationships, which means between non-governmental entities, such as citizens. Liberal democratic governments have a crucial role in ensuring that citizens can effectively enjoy their fundamental rights, which in effect means that they must outlaw and actively try to prevent infringements on individual citizens' rights by others. In addition, they are expected to repressively remedy and adequately sanction infringements on rights by others which have already taken place.

Without doubt, fundamental legal rights are the most sacrosanct elements of a liberal democracy, but as noted earlier, they are not absolute. Fundamental legal rights can be restricted, but every single restriction, whether imposed by legislation, policy, judicial decision, or specific actions, must be legally accounted for in the sense that the restriction must be underpinned with legally valid reasons. What counts as legally valid reasons for restricting a fundamental legal right differs per jurisdiction, but

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[463] This function is, though empirically established, also normatively criticized. See for instance: Jeremy Waldron, "A Right-Based Critique of Constitutional Rights," *Oxford Journal of Legal Studies* 13, no. 1 (1993): 18–51.

[464] Expert in comparative constitutional law Arne Mavčič has made a comparative analysis of systems of constitutional review in more than 150 countries. The results of this analysis are available at: http://concourts.net/chart.php.

requirements for legitimate restriction are always rigid and almost always involve proportionality and necessity standards. Furthermore, some fundamental legal rights are often thought to have an inviolable core, a core that may not be infringed under any circumstances. In most liberal democratic countries, rights bearers can have restrictions of their rights checked for validity and legitimacy in a (constitutional) court of law. Judges of (often constitutional) courts will then determine whether, given the particular circumstances, enough consideration was given to individual rights and whether the restriction meets all the criteria that ought to be met. If a court considers a certain restriction illegitimate, then certain parts of legislation, policy, or executive decisions can be ruled unconstitutional and void. In sum, fundamental legal rights truly are some of the heaviest instruments in a liberal democracy: they utilize a constitution's function to restrict government. Introducing fundamental, legal sentient-animal rights thus would have an unprecedented restrictive effect on governance for the benefit of sentient animals' interests.

5.3 Justifying fundamental legal animal rights

Considering the robust character of rights and the impact they have on both the political-legal landscape and the lives of individuals, the threshold for introducing such a high-impact instrument in liberal democracies seems quite high—higher than adjusting the law in any other way. Fundamental legal rights never come cheap. Apart from the economic costs that come along with the instalment of institutions to make such rights enforceable and meaningful in practice, they come at a high immaterial price. After all, rights for one person necessarily reduce the amount of liberty that is left for others, and legal rights thus come at the expense of others. These, what we may call, "liberty costs" are carried by individuals, but apart from this type of costs, rights also have "democratic costs." Since fundamental legal rights offer something close to absolute protection, they essentially put some aspect of society beyond societal and democratic control. Rights reduce the total number of matters over which ordinary people have a say and narrow down the discretionary space of (democratically elected) state officials. Moreover, distributing legal rights among animals other than humans would

significantly alter the political and legal landscape, and it would have a significant impact on our societies, which so heavily rely on the types of animal use and abuse which would be illegal if sentient non-human animals were to have basic rights. For all of these reasons, the decision to extend fundamental legal rights to non-human animals must not be taken lightly. A robust justification is needed if we are indeed to consider introducing these "new" rights.[465]

Such a justification exists. Better yet, several such justifications exist. This book has argued that the consideration right of sentient non-human animals requires that their interests are independently and non-contingently taken into consideration in the institutions of liberal democracies. We have seen, however, that it is quite difficult to adequately incorporate sentient-animal interests in the institutions of liberal democracies. So far, all other, less radical options investigated have failed in institutionalizing animals' consideration right. Consequently, assigning sentient animals fundamental legal rights could be required if it could indeed do justice to animals' consideration right. Put the other way around, the democratic right of animals to have their interests duly considered would be the constituting reason and core justification for introducing fundamental legal animal rights, if that were to meet the enfranchisement criteria, that is (which will be investigated and confirmed in section 5.4). The main theory of this book is thus the first and most important justification for introducing fundamental legal rights for sentient animals.

However, additional justifications for introducing fundamental sentient-animal rights also exist, and since two of these justifications are not only compatible with this main justification for legal animal rights, but even strengthen it, they will also be discussed in this section. Hence, assigning sentient animals fundamental legal rights is not only required for doing justice to their consideration right, but, so this section argues, it can also be

[465] Strictly speaking, fundamental legal rights for sentient non-human animals need not necessarily be "new" rights. Rights that already exist for humans could be extended to other sentient animals. As pointed out by legal philosopher Bastiaan Rijpkema, this would not so much create "new" rights, but merely increase the amount of *subjects* to which (the same) rights are assigned. Bastiaan Rijpkema, "Minder Rechten voor Meer Subjecten: Over een 'Rechtendieet' ten Behoeve van Dieren," *Nederlands Juristenblad* 88, no. 40, (November 2013): 2811–2813.

justified by the fact that a common theory and understanding of rights, the so-called "interest-based account of rights," calls for the inclusion of sentient animals as rights bearers. Moreover, assigning sentient animals rights would significantly improve the consistency and credibility of the legal system as a whole, which could function as an additional, third justification for assigning sentient animals fundamental legal rights.

The welfare of animals and liberal pluralism

Before we can straightforwardly maintain that the interspecies democratic theory as set out in this book necessitates assigning sentient animals fundamental legal rights, however, we must not only investigate whether such reform would meet the enfranchisement criteria (which will be done further below), but we must also ascertain that this endeavour would not undermine liberal democratic values. In the latter context, an important issue that must be addressed is whether extending fundamental legal rights to other animals is compatible with the liberal character of liberal democracies.

Robert Garner and Kimberly K. Smith have pointed out that some influential liberal political theorists, such as Brian Barry and John Rawls, have not considered it appropriate to include non-human animals within liberal theories of justice, and that it is thus not at all clear that liberal governments should promote the welfare of non-human animals as a matter of official state policy.[466] Moreover, we can expect some liberals to be hesitant about liberal governments assigning animals *legal rights*, since rights protection has even more economic, democratic, and (human) liberty costs than ordinary welfare protection. By constitutionalizing rights for animals, some of animals' most basic interests will be offered guaranteed protection. Due to the rigidness of constitutions, that protection cannot be undone by the process of everyday politics, and thus an aspect of society is removed from political controversy and routine democratic revision.[467]

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[466] Garner, *The Political Theory of Animal Rights*, 16–20; Smith, *Governing Animals*, 35–69.
[467] Waldron, "A Right-Based Critique of Constitutional Rights," 18–51; Hayward, "Constitutional Environmental Rights," 566–568.

As Robert Garner notes in *The Political Theory of Animal Rights*, giving animal welfare protection a special status may, at first sight, be perceived to be illiberal.[468] Retracting this aspect from ordinary political deliberations by assigning animals *legal rights* may similarly give rise to liberal suspicion. More to the point, the core liberal principle of moral pluralism may conflict with retracting animal welfare aspects from the general political sphere.[469] According to this liberal principle, different conceptions of the good must be allowed to be (politically) defended while the state stays neutral on these issues (as much as possible).[470] Garner notes that in some orthodox liberal reasoning, harming animals—torturing them for fun, for example—is understood to be a conception of the good that people may freely pursue or decline, just like drinking beer and watching television.[471] This is not an *argumentum ad absurdum*. In *The Blind Watchmaker*, evolutionary biologist Richard Dawkins (1941–) mentions that he has heard "decent, liberal scientists" passionately defend their right to cut up live chimpanzees as a matter of personal preference, and thus without interference from the law.[472] The liberal principle of moral pluralism may thus be engaged to defend that torturing animals is a personal preference and to deny that protecting animal welfare is a state responsibility.[473]

If pursuing animal welfare is perceived to be an ordinary conception of the good, then according to liberal standards, it must compete with other conceptions of the good on equal footing. In that case, animal welfare cannot be officially pursued by the liberal state, or at least not beyond the extent to which the public subscribes to this view. The welfare of animals is then merely a pawn that may be pushed around the game board of liberal democracy, along with other pawns representing various other visions of the

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[468] Garner, *The Political Theory of Animal Rights*.
[469] Garner, *The Political Theory of Animal Rights*, 56–82.
[470] Garner, *The Political Theory of Animal Rights*, 61–62; Cochrane, *An Introduction to Animals and Political Theory*, 52–53, 60–61.
[471] Garner, *The Political Theory of Animal Rights*, 66–70; Cochrane, *An Introduction to Animals and Political Theory*, 52–53, 60–61.
[472] Richard Dawkins, *The Blind Watchmaker: Why the Evidence of Evolution Reveals a Universe Without Design* (New York: W. W. Norton & Company, 1996/1986), 263.
[473] The validity of the supposed "liberal" argument that eating animal meat is a personal preference that the liberal state should not prohibit is assessed in: Paul Cliteur and Janneke Vink, "Kunnen We Vleesconsumptie Verbieden?" *Ars Aequi* 63, no. 9 (September 2014): 658–664.

good, and the state may not favour one of these pawns. In this orthodox liberal paradigm, fundamental legal animal rights can hardly be justified, because the state would, in the enforcement of these rights, illiberally and illegitimately reduce the freedom of others on the basis of an arbitrary choice of one of the many conceptions of the good. Such would, in the game metaphor, ruin the fair liberal game.

Robert Garner suggests, however, that protecting the welfare of sentient non-human animals is not so much an arbitrary conception of the good, but a matter of justice.[474] *The Open Society and Its Animals* endorses that view, and it has even argued that pursuing the welfare of non-human animals must be understood to be a constituting task of the modern liberal democratic state. This book aims to illustrate that this task stems from liberal democracies' own foundational principles, in the same way that the task of pursuing human welfare does. Lacking in the performance of this task means that the state is lacking in legitimacy, for according to true liberal reasoning, the state lacks reason for existence if it fails to protect and serve its citizens at a fundamental level. Even liberals agree that neutrality is not the same as relativism and that the neutrality of a liberal democratic state must thus not be exaggerated in such a way that the state becomes totally indifferent to any and all value.[475] The liberal democratic state may be neutral to a great extent, but it has some core values that are not up for discussion, for without these values, the characteristics of the state would change in such a way that it no longer qualifies as liberal democratic. One of these core values is that a legitimate liberal democratic state must go to great lengths to protect its citizens against violence. Since avoiding violence is so imperative for the survival and welfare of citizens, a state that commits, facilitates, or condones violence towards its citizens can hardly be understood as ever having the (hypothetical) approval of its citizens, which makes it clearly illiberal.[476] As many liberals have agreed since the

[474] Garner, *The Political Theory of Animal Rights*; Garner, *A Theory of Justice for Animals*. See also: Cochrane, *Sentientist Politics*, 101–105.
[475] Garner, *The Political Theory of Animal Rights*, 90–95.
[476] Neutrality must thus not be confused with inactivity. State inaction in relation to animal welfare is anything but neutral: by its very inaction, the state would condone and facilitate extremely harmful and

enlightened and liberal work of John Stuart Mill: if there were only *one* undisputed task for the state, it was to prevent individual citizens from harming one another.[477] Today, it is only logical to include sentient non-human animals in this harm principle as well, since it is now obvious that sentient animals also have well-being and interests which can be harmed.[478] It seems that sentient non-human animals, too, must be perceived as citizens, the welfare of whom must be of prime concern to the liberal democratic state. The inclusion of sentient animals in the harm principle implies that pursuing their welfare can no longer be subject to pluralist considerations. In other words, safeguarding the most fundamental interests of human *and* non-human citizens is not an arbitrary preference that one may freely pursue or not: it is the core assignment of any liberal democratic state. By virtue of their residency in a liberal democratic state and their sentience (which, in turn, means that animals have interests that can be harmed by others and affected by state policies), sentient non-human animals on the territory of the state are citizens of the liberal democratic state as well. In the game metaphor, this means that basic sentient-animal welfare, just like basic human welfare, is not one of the pawns on the liberal democratic board that has to compete with other pawns and may even be pushed off—it is a constituting, permanent element of the board on which the game is played.

It appears that a modern understanding of sentient animals as beings with interests must lead us to a more modern understanding of liberalism and the liberal state as well. In this non-orthodox understanding of liberalism, pursuing animal welfare does not conflict with liberal values, but rather is required by liberal values. The supposed "liberal" charge that a liberal democracy should not officially pursue sentient-animal welfare (such as through legal rights) thus seems not liberal at all, or, at best, based in a

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often lethal treatments of its own non-human citizens—a cardinal liberal sin. See also: Garner, *The Political Theory of Animal Rights*, 89–91.

[477] John Stuart Mill, "On Liberty," in *On Liberty and Other Writings*, ed. Stefan Collini (Cambridge: Cambridge University Press, 1989/1869), 1–116.

[478] Garner, *The Political Theory of Animal Rights*, 61, 66–67, 162; Cochrane, *An Introduction to Animals and Political Theory*, 69.

shallow or outdated type of orthodox and anthropocentric liberalism. The idea that animal rights and (political) liberalism are, as such, irreconcilable must be rejected. Robert Garner and Alasdair Cochrane have convincingly argued the opposite: (political) liberalism is extraordinarily compatible with theories of non-human animal rights, especially when compared to other political theories.[479] The liberal tradition, with its reformist character; its universalistic principles; its egalitarian tendency; and its focus on individualism, equality, and freedom, naturally suggests a form of political emancipation in the direction of non-human animal enfranchisement. It is thus not surprising that the most convincing and well-established theories for moral animal protection come from the liberal tradition (utilitarianism, rights theory, and contractarianism). There seems, in sum, no reason to object to the introduction of legal animal rights in a liberal democracy from a liberal point of view. To the contrary: the political and legal enfranchisement of sentient non-human animals makes sense especially from a liberal point of view.

Interests and fundamental legal rights

The second justification for assigning sentient non-human animals fundamental legal rights is based in the fact that they are bearers of fundamental interests. If we conceive of liberal democracies as I have throughout this book, then protecting the most fundamental interests of sentient animals via rights is only natural.[480] A liberal democracy is then perceived as a political model in which all citizens' interests are balanced out, while respecting both the equality principle and individualism. This model offers all sentient citizens (regardless of their species) equal institutional possibilities to have their interests defended in the public realm. Most of these interests are initially politically balanced out in the democratic procedures of liberal democracies, but some interests are so fundamental to individuals, or are so hard to balance out politically, that they (also) qualify for insured protection via legal rights. This latter aspect accords with the

[479] Garner, *The Political Theory of Animal Rights*; Cochrane, *An Introduction to Animals and Political Theory*.
[480] Vink, "De Democratische Rechtsstaat als Belangenweegschaal," 43–56.

liberal (or constitutional) element of liberal democracies. Some interests of non-human animals are so elementary that they, like some human interests, qualify for strong constitutional rights protection.

In accordance with this vision of liberal democracy as an interests balancing model, the second justification for fundamental legal rights for non-human animals is also based in their interests. Notwithstanding the argumentative power of other animal-inclusive accounts of legal rights,[481] an interest-based account of rights seems to fit best with how liberal democracies are understood in this book. In the interest-based account of rights, not the uniqueness of humans, their supposed divine creation, their autonomy, or their dignity are the grounds on which their rights are based, but rather the mere fact that humans have interests. Some interests, such as the interests in not being tortured and killed, are so fundamental that they form the very reason for fundamental legal rights. These interests are simply so vital to the well-being of individual citizens that a liberal democracy must prevent them from being trampled upon in the ordinary democratic process, in the exercise of state power, or by actions of other citizens. Rights then simply mean that a liberal democratic state must go to great lengths to protect the most important interests of citizens. According to an interspecies understanding of this interest-based account of rights, the interests of non-human animals, too, can be the foundation for corresponding fundamental, legal animal rights.

The interest-based account of rights has some history. Joel Feinberg, in search of a foundation for rights, introduced the "interest principle" in 1974.[482] According to Feinberg, rights protect interests, and thus all living beings who have interests qualify for being a bearer of rights. To Feinberg, the link between rights and interests is obvious. An entity only has interests, after all, if he has subjective well-being that could qualify for legal protection

[481] For example, the animal-inclusive account of legal rights as offered by Steven M. Wise. Wise argues, in short, that there is nothing logical about tying fundamental legal rights to species membership, and that they instead must be tied to an objective criterion, which is, in his work, (a certain level of "practical") autonomy. Wise, *Rattling the Cage*; Steven M. Wise, *Drawing the Line: Science and the Case for Animal Rights* (Cambridge: Perseus Books, 2002).
[482] Feinberg, "The Rights of Animals and Unborn Generations," 51.

in the first place. There is no sense in legal rights protecting a stone from not being kicked down the road, for example, because that stone does not have subjective well-being from which the interest in not being kicked could arise. In Feinberg's terms: "a being without interests is a being that is incapable of being harmed or benefitted, having no good or 'sake' of its own."[483] Understanding entities without interests as entities which must be legally protected for their own good is thus futile. A legal system may have many rules *regarding* such entities without a "good," but these rules must be distinguished from *rights*, which protect the inherent good of a subject itself.[484] An example of rules regarding entities without a "good" are rules which protect historically important paintings from being ruined. It was referenced before that, although the condition of, for example, *The Starry Night* may deteriorate when water is poured on it, the painting itself has no subjective interest in avoiding such vandalism, because the oil and canvas obviously are not sentient. Rules protecting paintings against vandalism are not rights of the painting itself; they merely indirectly serve the interests that humankind has in preserving the painting. Feinberg's idea that only entities with interests qualify for being the bearers of rights thus excludes entities without well-being, but includes all entities with interests.

Importantly, these entities with interests who qualify for rights need not necessarily be moral agents, and so mentally ill people, children, and non-human animals also qualify for rights. Feinberg thus rejected the previously dominant idea that in order to qualify for rights, one must be a moral agent with the ability to claim these rights for oneself. Not only is it unclear why we should require that one must be able to claim one's rights for oneself in order to qualify for rights—after all, moral patients can have their rights defended by capable representatives acting on their behalf—this line of thinking also constitutes a dangerous threat to currently existing rights of moral patients. Many human individuals, such as children and the mentally disabled, are unable to claim their rights for themselves, but they have interests and rights nonetheless. Were we to accept the formula that one can only qualify for rights if one can enforce these rights oneself, then

[483] Feinberg, "The Rights of Animals and Unborn Generations," 51.
[484] See on moral obligations *regarding* vs. *to* entities: Cochrane, *Animal Rights Without Liberation*, 20–21.

consistent reasoning would lead to the conclusion that these human individuals could not be bearers of rights either. Feinberg rejected this formula, however, and argued that moral agency is irrelevant to rights and that having interests is thus sufficient for being a rights bearer.[485]

What follows from Feinberg's theory is that entities with interests are *eligible* for rights. His theory suggests a strong relation between interests on the one hand and legal rights on the other, but Feinberg's theory does not specify which interests qualify for legal protection, or, in other words, which rights are appropriate for which individuals. We can easily imagine many interests of individuals that do not immediately qualify for rights protection, such as the interest in having access to soft drinks or beers or the interest in having a neighbour water one's plants while on holiday.[486] Although these things are nice to have, almost anyone would agree that no one has a moral right to have access to beer or to having a neighbour water one's plants, let alone that these interests are fundamental enough to be legally protected via fundamental rights in a constitution. What is thus needed at this point is a rule which enables us to distinguish between the abundance of interests that individuals have. A guide, in other words, which helps us to decide which interests are fundamental enough to be transformed into rights.

This guidance is offered by the work of legal philosopher Joseph Raz (1939–). His rights theory can be understood as a useful addition to the interest-based account of rights as presented by Feinberg. Raz, like other thinkers engaged in interests theories of rights, is wary of haughty metaphysical explanations of rights, and instead identifies rights by the role they have in practical reasoning.[487] In Raz's understanding of rights, which is in line with Feinberg's, legal rights are as simple as legally protected interests of individuals.[488] Legally protected interests in the form of rights burden others with a duty to respect these interests. Take, for example, the fundamental legal right not to be tortured. This right, according to Raz's reasoning, must be understood to protect the welfare interests of the rights

[485] Feinberg, "The Rights of Animals and Unborn Generations," 45–51.
[486] Cochrane, *Animal Rights Without Liberation*, 42.
[487] Joseph Raz, "Legal Rights," *Oxford Journal of Legal Studies* 4, no. 1 (Spring 1984): 5.
[488] Raz, "Legal Rights," 12.

bearer, and functions through burdening the state and others with the duty to not torture the rights bearer. The right of X thus necessarily leads to a duty for Y.[489] Without these corresponding duties for others, rights would lack practical value.

Besides clarifying this relationship between rights and duties, Raz takes yet another step in enhancing the interests theory of rights by formulating a principle on the basis of which it can be determined which interests qualify for legal protection. According to Raz, only interests which are a *sufficient ground for holding others to be under a duty* qualify for being transformed into legal rights. Raz puts it as follows: "To say that a person has a right is to say that an interest of his is *sufficient ground* for holding another to be subject to a duty, i.e. a duty to take some action which will serve that interest, or a duty the very existence of which serves such interest. One justifies a statement that a person has a right by pointing to an interest of his and to reasons why it is to be taken seriously" (italics JV).[490] As Raz adds in a footnote, what importance those reasons must assign to the interest cannot be specified in the abstract, "except circularly by saying 'sufficient to justify the conclusion that that person has a right.' One can and should of course develop a theory of which interests are protected by rights and when," according to Raz.[491]

Alasdair Cochrane, working in the same interests tradition, has argued that whether an interest is "sufficient ground" for holding another

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[489] In dogmatic legal theory, it is often assumed that rights and duties go hand in hand, and that an individual can only have legal rights if he can also bear legal duties. This argument has already been extensively discussed in an abundance of animal rights literature and is generally dismissed. This discussion will not be fully repeated here. In short, there are three types of arguments which debunk this rights/duties dogma. (1.) As Raz points out, if individual X has rights, it means that *others* have duties to respect X's rights, which does not necessarily require X himself to be able to bear legal duties. (2.) That rights and duties should go together in the same person is, apart from principally unconvincing, also not reflected in the law as it is today: babies and mentally deranged people have rights, even though they cannot bear legal duties themselves. That they have rights nonetheless is a token of modern civilisation. (3.) It can be said that we already impose duties on some non-human animals in our midst: dogs and mice, for example, have a duty to not bite children or come into our houses, respectively. If they neglect this duty, we give them the ultimate punishment: we execute them (without due process). With regard to civil and criminal liability, the legal structures regulating non-human animals' duties could resemble those of babies and mentally deranged people.

[490] Raz, "Legal Rights," 5.

[491] Raz, "Legal Rights," 5 (footnote 10).

person to be under a duty is dependent on the *strength* of an interest. In other words: the strength of an interest is the prime indicator in determining whether it should be translated into a legal right.[492] An interest in having one's plants watered while on holiday is clearly of a different strength than the interest in not being tortured. In general, the interest in having one's plants hydrated is not strong enough to ground a duty in others to water one's plants, while the interest in not being tortured is strong enough to ground a duty in others to not torture people. Very strong interests, such as the interest in not being tortured, thus quite readily qualify for being transformed into fundamental legal rights. If interests fundamentally matter to the welfare of individuals, this is a strong reason to translate these interests into *prima facie* rights: rights that protect the interests which deserve the most thorough legal protection and that are, in principle, to be respected by others.[493] However, not all such *prima facie* fundamental legal rights can practically prevail at the same time, since fundamental legal rights often come into conflict with one another. We thus also need some guidelines on when and under what circumstances a *prima facie* right can prevail as a *concrete* right. In order to determine this, Cochrane also argues, the specific context must be assessed.[494] Are there any other interests at stake which compete with the one that is protected by a legal right? What is the strength of these competing interests? Are these interests also protected as legal rights? And what are the hypothetical burdens on the duty bearers if the right is to prevail as a concrete right? Evaluating such relevant factors in a specific case helps to determine whether an individual also has a *concrete* right which can ground concrete duties in others.

In this context, however, we are not so much interested in determining whether non-human animals have *concrete* rights. This is something ultimately to be decided in concrete cases, mostly before a court and, more importantly, not before the first hurdle of assigning them fundamental legal (*prima facie*) rights is taken. Let us thus go back to what has just been said about *prima facie* rights and the fact that the underlying

[492] Cochrane, *Animal Rights Without Liberation*, 42–43.
[493] Cochrane, *Animal Rights Without Liberation*, 45–46, 52–53.
[494] Cochrane, *Animal Rights Without Liberation*, 42–46.

interests must be strong enough to burden others with the duties to respect them. How do we determine whether an interest is strong enough to burden others with duties to respect this interest? Cochrane argues that two aspects are of importance in determining the strength of an interest. In my interpretation of Cochrane, he argues that the first aspect of importance is the objective value of the interest to the well-being of the potential rights bearer, and the second aspect of importance is the value that the potential rights bearer subjectively subscribes to attaining the good in which he has an interest.[495] Taken together, in determining the strength of interests, the value of the good that the interest protects for the individual whose interest it is must be determined.[496] More concretely, the interest in not being tortured (which is a subcategory of the interest not to suffer) is an interest of the utmost importance to a human's overall well-being, both objectively and subjectively, whereas having access to beer or soft drinks is an interest of very little importance to a human's overall well-being.

The same is true for other sentient animals. The interest in not being tortured (hence: not to suffer) is of the utmost importance to a cat's overall well-being, whereas having access to a luxurious meal is an interest of minor importance to the overall well-being of a cat. The strength of the interest in avoiding suffering is, accordingly, of a much higher level than the strength of the interest in having access to a luxurious meal. As Cochrane points out, we know that suffering is, by its very nature, a bad experience to phenomenally conscious entities.[497] Suffering is essentially an evolutionarily ingrained negative experience that warns us of things that potentially pose a threat to our survival, such as sickness or injury. The negative experience of suffering functions as a signal which should lead us to avoid certain situations which pose a potential threat to our survival. On the basis of

[495] Strictly speaking, Cochrane identifies "the level of psychological continuity between the individual now and when the good or goods will occur" as the second criteria for determining the strength of an interest. It seems, however, that this "psychological continuity" is, in its turn, only one factor that influences the total subjective value that an individual attaches to attaining a certain good that is in his or her interest. Since Cochrane clearly means to let the subjective value of an interest to an individual count as such, I considered it permissible to interpret this second criterion in broader terms, to mean the total value that an individual subjectively subscribes to attaining the good in which he has an interest. Cochrane, *Animal Rights Without Liberation*, 52–54.

[496] Cochrane, *Animal Rights Without Liberation*, 54.

[497] Cochrane, *Animal Rights Without Liberation*, 55–56.

scientific research, as well as basic evolutionary reasoning, we can be confident that all sentient animals, conscious of experience as they are by definition, are likely to experience suffering negatively as a rule. It follows that it is thus extremely important to avoid suffering for all sentient animals, and this is fundamental to their well-being. The interest in avoiding suffering is consequently very strong, strong enough to say that it is sufficient ground for imposing a duty on others to not make sentient beings suffer.[498] In other words, the interest not to suffer can justifiably function as a foundation for fundamental legal rights which protect this interest, such as the fundamental legal right not to be tortured.

The same is true for sentient beings' elementary interest in staying alive, Cochrane also argues.[499] Sentient animals have strong enough interests in continuing to live (in other words: in not being killed) to ground a fundamental legal right to life, even if the killing would be done without any form of suffering. By killing a sentient animal, one forecloses all of that animal's future opportunities of experiencing pleasure, which are vital to his well-being.[500] Put the other way around, continued living is essential to sentient animals' well-being, since it is the fundamental condition for being able to have pleasurable experiences in the first place. Continued life is thus not an interest like any other interest: it is, we could say, the mother of all interests—it enables the fulfilment of all other interests. The interest of sentient animals in staying alive is thus extremely strong, strong enough to ground duties in others to respect it. Therefore, all sentient animals have a justifiable claim to fundamental legal rights that protect their interest in continuing to live, which would, in effect, be the right to life.

In short, in addition to the interspecies democratic theory that was presented earlier in this book, the interest-based account of rights also offers a solid, straightforward, and independently valid justification for fundamental legal rights for sentient animals. In any case, it does so for rights that protect their interests in not suffering and in continued life. Because of their sentience (and thus subjective well-being), sentient animals

[498] Cochrane, *Animal Rights Without Liberation*, 54–57; Cochrane, *Sentientist Politics*, 29–30.
[499] Cochrane, *Animal Rights Without Liberation*, 64–68; Cochrane, *Sentientist Politics*, 28–29.
[500] Cochrane, *Animal Rights Without Liberation*, 65–66.

have strong interests in not being made to suffer and in not being killed. These interests are so strong that they are a sufficient enough reason for holding others to be subject to a duty to not kill and inflict suffering, and thus establish *prima facie* rights not to be made to suffer and not to be killed. Legally assigning all sentient animals these rights is a matter of justice and should thus, in principle, be a future endeavour for liberal democratic states.[501] In accordance with what has been argued above, failing to introduce these legal rights cannot be justified by referring to liberal pluralism. Due to the strength of all sentient animals' interests in continuing to live and avoiding suffering, citizens in a liberal democratic state can be legitimately coerced to respect sentient animals' rights not to be made to suffer or get killed. Once recognized as legal rights, the liberal democratic state is allowed, even obliged, to utilize state power to protect and uphold these rights of its non-human citizens.

The enhancement of legal systems

One may wonder whether introducing fundamental legal rights for sentient animals would not disrupt and maybe even impair legal systems in liberal democracies. In this subsection, I argue that fundamental legal rights for sentient animals would generally improve legal systems in liberal democracies in the long term, which is a third justification for these rights, but that they will have to be implemented in a responsible way.

To start with the latter reservation, it must immediately be granted that introducing fundamental legal animal rights in liberal democracies as they are today would have a great impact and could have disrupting effects. We have seen that animal interests are currently as good as neglected in the institutional structures of liberal democracies, and assigning non-human animals legal rights would fundamentally alter that. Legal rights for non-human animals would thus severely affect current political and legal structures, but also society at large. Disproportional use of non-human animals is ingrained in many sectors of our societies, and thus assigning

[501] Cochrane, *Animal Rights Without Liberation*, 13–15, 43.

rights to these animals would affect almost all of these sectors and the rules that regulate them. Many of the sectors which rely on animal use would either have to cease to exist or radically change.[502] In short, it seems that if today's liberal democracies were to introduce sentient-animal rights overnight, this could have some destabilizing and unpredictable effects. For these reasons, governments must see to it that if sentient-animal rights are indeed introduced one day, it should happen in an organized and orderly fashion. What it means *precisely* to responsibly implement fundamental legal rights for sentient animals is a matter of practical good governance that cannot be dictated far ahead of time, in the abstract, and without proper knowledge of the specific societal context in which these rights will be introduced. One could reasonably envision, however, that governments would manage this transition by, for instance, gradually improving the animal welfare standards in statutory law in the build-up to the eventual introduction of animal rights, introducing a constitutional state objective on animal welfare in the build-up to the introduction of animal rights, announcing future prohibitions of certain ways of treating animals which will severely effect or even terminate certain sectors in which animals are used ahead of time, controlling and assisting in the phasing out of such sectors, providing—in some cases—compensation for economic victims in terminated sectors, but also providing for sanctuaries which could give shelter to animal victims who might become homeless due to the termination of certain sectors.

Apart from the fact that governments would have to practically manage the hypothetical process of introducing legal animal rights in order to prevent disorder, an important question that remains to be addressed here is whether the hypothetical introduction of fundamental legal rights for sentient animals would risk damaging legal systems in the long term. This concern seems unfounded. In fact, the opposite seems true. Assigning sentient non-human animals fundamental legal rights would probably improve and modernize legal systems, which seem in need of such an update. Current liberal democratic legal systems seem to suffer from an

[502] Cochrane, *Animal Rights Without Liberation*.

ingrained but unwarranted conservativeness when it comes to how the law treats non-human animals. A legal system that still draws an insuperable line between humans and other animals seems to be based in a pre-Darwinian scientific worldview, and thus has a scent of outdatedness to it.[503] From that perspective, the credibility and consistency of legal systems would be enhanced if they were to break with the current custom of arbitrarily excluding non-human animals from the general protection that the law offers and from the scope of some of its central principles.[504]

We have seen that the law in liberal democracies currently draws a hard line between different sentient beings, with humans on one side of the line and all other sentient animals on the other side. According to the categorization of non-human animals in most legal systems in liberal democracies, non-human animals are legal objects, like couches and baseball bats, while all humans are placed on the complete opposite of the line, and are respectfully categorized as legal subjects. Legally, so to speak, humans are regarded as mortal gods, drenched in legal protection from top to toe, whereas the legal protection of all other sentient beings lags way behind. Thanks to Darwin and his scientific companions, however, we now know that, in the real world, that hard line separating humans from the rest of nature does not exist, and that both humans and other sentient animals are part of nature, which is continuous rather than compartmented.[505] From a scientific perspective, there are more differences between a cow and a baseball bat than between a cow and a human; in fact, there are more differences between a chimpanzee and an orangutan then there are between

[503] See also: Paul Cliteur, *Darwin, Dier en Recht* (Amsterdam: Boom, 2001); Vink, "Hoe Zijn de Rechten van Andere Dieren dan Mensen te Waarborgen," 314–317; Paul Cliteur and Janneke Vink, "De Gelijkheid en Vrijheid van Mensen en Andere Dieren," in *De Strijd van Gelijkheid en Vrijheid*, eds. Jasper Doomen and Afshin Ellian (Den Haag: Boom Juridische Uitgevers, 2015), 87–105.

[504] See on the inconsistency with which the law treats non-human animals and how this undermines liberal democratic values also: O'Sullivan, *Animals, Equality and Democracy*. As referenced before, Gieri Bolliger has drawn attention to the fact that attaching two almost opposite meanings to the same legal concept of "dignity," depending on the type of animal to which it applies, has led to a problematic inconsistency in Swiss law. Bolliger, "Legal Protection of Animal Dignity in Switzerland," 331–333.

[505] Darwin, *The Origin of Species*; Darwin, *The Descent of Man*; Richard Dawkins, "The Tyranny of the Discontinuous Mind," *New Statesman* 140, no. 5084/5085 (December 19, 2011): 54–57; Richard Dawkins, "Gaps in the Mind," in *The Great Ape Project: Equality Beyond Humanity*, eds. Paola Cavalieri and Peter Singer (New York: St. Martin's Griffin, 1996/1993), 80–87; Dawkins, *The Blind Watchmaker*.

a chimpanzee and a human.[506] Our legal systems, however, fundamentally fail to reflect this scientific reality. Factually, humans and other sentient animals are very close on the same scale, for, after all, humans *are* sentient animals. From a scientific point of view, the radical legal distinction between humans on the one hand and all other sentient animals on the other hand does not make sense—or at least no more sense than distinctions such as rats on the one hand and all other sentient animals (including humans) on the other hand, or aardvarks on the one hand and all other sentient animals on the other. By hanging on to this ancient dividing line that radically separates humans from other animals, our legal systems seem to be growing more alienated from the real world in which, since Darwin, we have been discovering more and more similarities between humans and other animals every day. In this modern time with modern scientific knowledge, it seems unreasonable to stubbornly stick to this ancient legal division, a division of which, more than two centuries ago, Bentham already argued that it should never have been accepted in the first place.[507]

Bentham is, however, not the only one who has criticized the very existence of this legal dividing line. Other legal philosophers have also argued that the strict legal border between humans and all other animals is irrational, inexplicable, unjustified, and outdated.[508] Scholars from other disciplines also view the legal system as making a caricature of reality, one that almost becomes a mockery, and which is on that account alienating to many. Evolutionary biologist Richard Dawkins has pointed out that lawyers are especially susceptible to having a "discontinuous mind": an attitude of too strongly subdividing elements of a factually continuous scale into separate categories.[509] In other words, the discontinuous mind is a mind-set of thinking in compartments. The discontinuous mind finds it hard to grasp

[506] Dawkins, "Gaps in the Mind," 82–83.
[507] Bentham, *An Introduction to the Principles of Morals and Legislation*, 310–311.
[508] Feinberg, "The Rights of Animals and Unborn Generations," 43–68; Stone, *Should Trees Have Standing*; Regan, *The Case for Animal Rights*; James Rachels, *Created from Animals: The Moral Implications of Darwinism* (Oxford: Oxford University Press, 1990); Cavalieri and Singer, *The Great Ape Project*; Francione, *Animals, Property and the Law*; Wise, *Rattling the Cage*; Cliteur, *Darwin, Dier en Recht*.
[509] As will be addressed further on, discontinuous thinking is mostly inevitable for lawyers since the law, which is abstract by necessity, can only work with categorisations.

the continuity that is present everywhere, but especially in nature and among sentient animals. In order to make reality mentally digestible, the discontinuous mind cuts the continuity up into parts and thinks of it as if it were discontinuous.[510]

In this case, the discontinuous mind insists on legally splitting entities up into different groups, while they are in fact very much alike in relevant ways. The legal discontinuous mind wishes to lift humans above the natural continuum, as if the human species were radically different from the rest of nature, and give them important legal privileges on account of their species membership. From Dawkins' evolutionary-historical perspective, however, "species," as a naturally ambiguous category in itself, does not seem to be a very solid or relevant category on which to base the entire legal system. Darwin thought "species" was an unnatural term, one that had been arbitrarily given to a set of individuals closely resembling each other, for the sake of convenience.[511] Dawkins, too, writes that "It is only the discontinuous mind that insists on drawing a hard and fast line between a species and the ancestral species that birthed it. Evolutionary change is gradual—there never was a line, never a line between any species and its evolutionary precursor."[512] In reality, Dawkins stresses, the (history of the) natural world is a continuum with all sorts of intermediates and ring species, even though they are usually extinct.[513] Dawkins illustrates this by noting that our 200 millionth great grandfather was a fish. We are connected to him by an unbroken line of intermediate ancestors, and every one of them belonged to the same species as its parents and its children.[514] Still, on the whole, we changed from fish into *Homo sapiens*.

The point gets even clearer when Dawkins challenges his readers to name when the first *Homo sapiens* was born.[515] This baby of course does not exist, or his parents would have birthed a baby of a different species, which

[510] Dawkins, "Gaps in the Mind," 81–82.
[511] Darwin, *The Origin of Species*, 59–60. See also: James Rachels, "Darwin, Species, and Morality," *The Monist* 70, no. 1 (January 1987): 98–113.
[512] Dawkins, "The Tyranny of the Discontinuous Mind," 54–57.
[513] Dawkins, "Gaps in the Mind," 82.
[514] Dawkins, "The Tyranny of the Discontinuous Mind," 56.
[515] Dawkins, "The Tyranny of the Discontinuous Mind," 56–57.

is considered impossible. From the evolutionary-historical perspective, one can merely see a "smeary continuum" of (so-called) "species" *gradually* turning into new "species" over time, without a clear and demonstrable point of transition between them.[516] "Species" is thus, from an evolutionary-historical perspective, merely "an arbitrary stretch of a continuously flowing river," not a discrete category at all.[517] It is only when some of the intermediates between two "species" become extinct that the differences between "species" reveal themselves and become as clear as they (often) are today. Dawkins compares the distinctiveness between species to that between "tall" people and "short" people: it is only when all people of intermediate height disappear that the categories "tall" and "short" will come to have clearly delineated edges.[518]

The inconclusiveness of the category "species" from an evolutionary perspective illustrates that using the criterion of species membership for rights distribution is not as self-evident as it may seem. Accordingly, human rights, in the sense that they are reserved for the human species only, also have nothing obvious or self-evident to them, Dawkins argues.[519] Dawkins explains that "the only reason we can be comfortable with such a double standard," the legal standard between humans and other animals that is, "is that the intermediates between humans and chimps are all dead."[520] But as far as morality and law is concerned, the arbitrary fact that intermediates are dead should be irrelevant.[521] The law, however, irrationally relies heavily on this evolutionary accident, by regarding the species membership of humans as the Holy Grail. How unreasonable this is becomes painfully clear with a thought experiment that Dawkins proposes.[522] What if we were to find, on somehow forgotten islands somewhere in the world, some of the intermediates between current humans, and chimps and humans' last

[516] Dawkins, *The Blind Watchmaker*, 264.
[517] Dawkins, *The Blind Watchmaker*, 264.
[518] Dawkins, "Gaps in the Mind," 81; Dawkins, *The Blind Watchmaker*, 262.
[519] Dawkins, *The Blind Watchmaker*, 263.
[520] Dawkins, *The Blind Watchmaker*, 263.
[521] Dawkins, "Gaps in the Mind," 85; Rachels, "Darwin, Species, and Morality," 98–113.
[522] Dawkins, *The Blind Watchmaker*, 263; Dawkins, "Gaps in the Mind," 85. Steven M. Wise proposes to do a similar thought experiment: how would we, and the law in general, react if some Neanderthals or a tribe of Homo erectus were to suddenly emerge? Wise, *Rattling the Cage*, 243.

common ancestor? If, in other words, we were confronted with the intermediates between us and the ancestor we have in common with chimpanzees? Since there would be no clear demarcation line which separates humans from the newly discovered others, Dawkins contemplates that "either the whole spectrum would have to be granted full human rights …, or there would have to be an elaborate apartheid-like system of discriminatory laws, with courts deciding whether particular individuals were legally 'chimps' or legally 'humans.'"[523] In that case, "our precious system of norms and ethics would come crashing about our ears. The boundaries with which we segregate our world would be all shot to pieces. Racism would blur with speciesism in obdurate and vicious confusion."[524] Such is the unreasonableness of our current legal systems, which attach disproportional and inexplicable value to the arbitrary category of "species," while being blind to truly relevant characteristics of individuals, such as sentience.

It must be emphasized here that drawing attention to the natural "smeary continuum" is not to deny that there are, in the current day and time, obviously clear distinctions between humans and other species, and between different non-human species, nor is this to deny that there must be important differences in the rights to which they are respectively entitled. Obviously, if we look at the living animals of today, we can uncomplicatedly distinguish between different species because the intermediates are long gone, just like we would be able to uncomplicatedly distinguish between "tall" and "short" people if all people of intermediate height would be dead today. The differences between living species of today also allow us to differentiate between the rights that certain species are entitled to. It is obvious that aardvarks and rats need no freedom of religion and rights to vote, but they are nonetheless likely to qualify for rights protection against e.g. torture. Differences in rights distribution may exist, even between different species of sentient animals. In order to be legitimate and consistent with basic requirements of justice such as non-arbitrariness, however, these differences cannot be justified by mere species membership (e.g. being

[523] Dawkins, *The Blind Watchmaker*, 263.
[524] Dawkins, "Gaps in the Mind," 85.

human or not), as is currently the case, but only by relevant and objectively ascertainable differences, differences which may sometimes more or less *accidentally overlap* with species membership. Species membership is thus merely a convenient trait of subordinate relevance which could help us to group individuals which happen to have like characteristics, characteristics which *are* primarily relevant to rights distribution. To put it yet differently, it could be legitimate to assign different rights to different species of animals, but the rationale for this cannot be that animals of a certain species are entitled to these rights *because* they belong to a certain species, but that the animals of that species conveniently also happen to share relevant characteristics on the basis of which rights can be legitimately distributed, such as sentience (for welfare rights) or political agency (for voting rights).

A different point that must be emphasized here is that the above does not aim to criticize or underappreciate the fact that the law can merely offer a simplified reflection of reality. The law can never capture all the nuances and complexities of reality, and to say that it should is to wish for the impossible. The law, as an abstract institution, must necessarily work with categories which do not always fully reflect reality and thus often comprise legal fictions. This is inherent to any legal system, and it is no reason for concern as long as the divergences between reality and the legal fiction are small and relatively harmless and as long as judges are able to ferret out the exceptions to the rule in specific cases and restore justice in these specific cases. In our context, the necessary abstractness of the law means that it is indispensable to legally draw a line *somewhere* in the continuous nature, in other words, to make discontinuous what is, in fact, continuous. Such is the unenviable task of jurists. That a line must be drawn is thus not denied here, but the point this book is trying to make, and that has been stressed before by Bentham and others, is that the current one is drawn in the wrong place.[525] It seems much more logical and, so I have argued, justified to move the line somewhat and make it distinguish not between humans and the rest of the world, but between sentient animals and the rest of the world. If we

[525] Bentham, *An Introduction to the Principles of Morals and Legislation*, 310–311; Wise, *Rattling the Cage*; Cochrane, *Animal Rights Without Liberation*; Alasdair Cochrane, "From Human Rights to Sentient Rights," *Critical Review of International Social and Political Philosophy* 16, no. 5 (December 2013): 655–675.

look at what rights truly protect, it all comes down to interests, which is why it is much more logical to let all entities with interests, namely sentient animals, into the sphere of rights. Refusing to move the legal separation line in this direction makes the legal denial of reality (in other words, the legal fiction) so glaring that it becomes a problem. Not only because it has fatal consequences for non-human animals and is an injustice with regard to them, but also because it means that legal systems remain inconsistent in their rights distribution and, importantly, still based on a worldview that is clearly inaccurate from a modern, scientific point of view. This, in turn, harms the credibility of modern legal systems, which should ideally keep up with modern scientific insights and not stick to ancient unscientific idealizations regarding humans' biological distinctiveness from the rest of nature. Moreover, if we accept the irrationality, arbitrariness, and invidiousness implied in the exclusion of other sentient animals from the sphere of rights, this ultimately may also undercut the very foundations of our own fundamental legal rights.[526]

Sticking to the unreasonable systematic exclusion of other sentient animals not only harms the credibility of legal systems; it also fundamentally undermines the equality principle which is so central to liberal democratic legal systems.[527] The equality principle has a prominent place in any liberal democratic legal system, which is reflected in virtually all legal documents of important stature. The equality principle does not only have a prominent place in most, if not all national constitutions of liberal democratic countries, but also in the most important international legal documents of our time. The equality principle as laid down in such documents resembles the understanding of the principle as put forth by philosopher James Rachels (1941–2003): individuals are to be treated equally, unless there is a relevant difference between them that justifies the difference in treatment.[528]

Importantly, in deciding whether or not differences are relevant, only rationality may decide, not ambiguous personal preferences or other

[526] Wise, *Rattling the Cage*, 79–80.
[527] Cliteur and Vink, "De Gelijkheid en Vrijheid van Mensen en Andere Dieren," 87–105.
[528] Rachels, *Created from Animals*, 176. See also: Singer, *Animal Liberation*.

arbitrary factors. This is what Lady Justice's blindfold symbolizes: justice ought to be done without regard for irrelevant factors. Due to the blindfold, Lady Justice should not be able to see skin colour, gender, or other irrelevant factors. Unequal treatment based on *irrelevant* factors adds up to unjustified discrimination—a cardinal sin in liberal democracies. The equality principle so understood is included in almost all prominent liberal democratic legal documents around the world. An example is the first article of the Dutch Constitution, which deserves to be quoted on account of offering an impeccable and clear description of the equality principle. It prescribes that: "All persons in the Netherlands shall be treated equally in equal circumstances. Discrimination on the grounds of religion, belief, political opinion, race or sex or on any other grounds whatsoever shall not be permitted."[529] The most important article of the Dutch Constitution thus prescribes, along the lines of Rachels' definition of the equality principle, equal treatment in equal circumstances, and prohibits discrimination "on any grounds whatsoever." Similarly, the *European Convention on Human Rights* prohibits "discrimination on any ground" in the "enjoyment of the rights and freedoms set forth in this Convention."[530] In the United States of America, the Fourteenth Amendment to the Constitution guarantees "any person within its jurisdiction the equal protection of the laws."[531] The most important rights document of our time, the *Universal Declaration of Human Rights*, also forbids discrimination of any kind and states that: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[532]

[529] Article 1 of the *Grondwet voor het Koninkrijk der Nederlanden* (Constitution of the Kingdom of the Netherlands).
[530] Article 14 of the *European Convention on Human Rights*, authentic English version provided by the European Court of Human Rights, https://www.echr.coe.int/Documents/Convention_ENG.pdf.
[531] Section 1 of *Amendment XIV to The Constitution of the United States of America*, official version provided by The National Archives and Records Administration, https://www.archives.gov/founding-docs/amendments-11-27.
[532] Article 2 of the *Universal Declaration of Human Rights*, official version provided by the United Nations, http://www.un.org/en/universal-declaration-human-rights/.

Crucially, however, none of these documents extends their legal protection to non-human animals, even though they all pay explicit lip service to the equality principle. Despite their noble promises, these prominent documents *do* discriminate on a certain ground: species membership.[533] We have seen, however, that species membership is an irrelevant characteristic when it comes to the distribution of fundamental legal rights, and the principled exclusion of other sentient animals from rights thus adds up to unjustified discrimination. Lady Justice should be blind to the irrelevant factor of species membership, but instead she peeks and ruthlessly strikes out every individual unfortunate enough to not belong to her preferred species *Homo sapiens*. In a sound and non-biased application of the equality principle, however, sentient non-human animals should be able to claim some of the rights in these documents as well, since their sentience is a relevant characteristic when it comes to, for example, the right not to be tortured. If we take the equality principle seriously, there is no reason to protect humans against torture, but not chimpanzees or pigs. However, despite the fact that both human individuals and pig individuals suffer heavily from torture, rights against torture are only distributed among human individuals. The rights distribution in these legal documents is biased, arbitrary, and in clear violation of the equality principle itself—ironically the most prominent principle of these documents. By discriminating in the distribution of rights while also paying lip service to the equality principle, these legal documents undermine their own credibility and eminence, which is a great liability for legal documents of this stature.

In short, it seems safe to conclude that liberal democratic legal systems would, in the long term, significantly improve if they were to adopt certain fundamental legal rights for sentient non-human animals. Even though we now know that non-human animals have interests that qualify for rights protection as well, the clock in the legal world has stood still for quite some time now, and legal systems remain unreasonably conservative in excluding all non-human individuals from the legal sphere. The most

[533] Cliteur and Vink, "De Gelijkheid en Vrijheid van Mensen en Andere Dieren," 87–105.

prominent liberal democratic documents of our time recognize the centrality of the equality principle, but still apply it in a pre-Darwinian manner: excluding all beings that are not human. They thus fail to reflect the undeniable reality that other animals are, in relevant ways, a lot like us. The legal world does not seem to dare to cross the species barrier, which we have seen comes at great costs: liberal democracies currently have biased, inconsistent, arbitrary, uncredible, and fundamentally self-undermining legal systems. Making the leap and crossing the species barrier by assigning rights to other sentient animals as well could largely eliminate these unfortunate defects and hence improve and modernize the legal systems in liberal democracies significantly.

5.4 Normative assessment of fundamental legal animal rights

Now that we have a reasonable idea of what type of rights could, in principle, be assigned to other sentient animals and which justifications could account for introducing such rights, it is time to assess the normative acceptability of introducing fundamental legal animal rights in the context of the five enfranchisement criteria. During this assessment, the feasibility of this hypothetical project will also be addressed by discussing some challenges of institutionalizing legal sentient-animal rights along the way.

The legitimacy criterion

From the perspective that sentient animals are part of the demos, their current exclusion from political and legal consideration has been criticized for being illegitimate. What has so far been said about assigning fundamental legal rights to sentient animals seems to indicate that this move could significantly improve the legitimacy of liberal democracies from an interspecies perspective.

What is needed in order to meet the legitimacy requirement is that sentient animals' interests will be paid due regard in the considerations of state officials in the basic institutions of liberal democracies. Providing sentient animals with a thorough legal position by assigning them fundamental legal rights seems to have this effect and is thus indeed likely

to meet the legitimacy requirement. Although fundamental rights seem to be primarily a *legal* instrument, it has strong spill-over effects in the political sphere. I have pointed out earlier that I have artificially separated the political and legal functions and institutions of a liberal democracy in this book for the sake of maintaining a clear structure, but that democracy and the law (or the political and legal spheres) are in fact not easily separable. That is what we are looking at here as well. Due to the interaction between democracy and the rule of law, any constitutional adjustment does not only have legal effects, but also clear political effects. Everyone in a liberal democracy must pay respect to the constitution: citizens, judges, representatives, and other state officials. With constitutional rights for sentient animals, the courts as well as the members of the legislative and executive branches must not only take notice of animals' interests, but must also effectively protect the basic interests of animals as covered by their rights. Hence, introducing fundamental legal rights for animals does not only have the potential to bring about an acceptable legal status, but also an acceptable political status, due to the political effects of these rights.

Four objections and their refutations

Although introducing fundamental legal rights for animals may have these desired effects, one may wonder whether there are yet unmentioned reasons for being reticent about introducing fundamental legal animal rights. Some objections may indicate certain alleged disadvantages of introducing legal animal rights that some may view as affecting the legitimacy of this endeavour. We will discuss four such objections that are likely to be raised: (I) The objection that assigning non-human animals rights makes inappropriate and disproportional use of a constitution; (II) The objection that opening a constitution up to non-human entities corrupts the intrinsic anthropocentric character of the constitution; (III) The objection that assigning sentient animals rights ignores the fact that some sentient animals are not autonomous and thus would conflict with foundational autonomy principles of liberal democracies; (IV) The objection that using a constitution instrumentally to reduce the discretionary space of politicians is at odds with its principled character.

The first objection comprises the concern that we are making inappropriate use of constitutions. One may object that although it may be a respectful goal to offer non-human animals a political and legal status, employing a constitution to this end is not quite appropriate because it would be a disproportionally radical intervention. I believe this objection is mistaken and that employing the constitution is justified in this context. The underlying concern of this objection, which seems to be that a constitution must not be employed lightly, seems to be correct in principle, however. Indeed, the red line throughout this book has been that we ought to opt for the least radical means of institutionalizing the consideration right of animals, in order to avoid unnecessary liberty, democratic, and economic costs and not risk unbalancing the larger, fragile framework of liberal democracies. That is precisely why we have gone through all the less radical options of giving animals a meaningful political-legal status first, and why offering animals legal rights was discussed last. This methodology has led to the conclusion that not one of the other, less radical, investigated options is likely to be able to offer animals a sufficient political-legal status in liberal democracies.

The fact that less radical options failed, in combination with the seriousness of the injustice that is kept intact if we do not institutionalize animals' consideration right, made constitutional rights come into view. Offering animals legal rights was, in other words, not at all a foregone conclusion; only after a long and thorough process of considering and eliminating less radical alternatives did it become a serious option. From the current perspective, in which lesser alternatives have been rejected, offering sentient animals legal rights does not seem so far-fetched anymore. After all, sentient non-human animals have a rightful claim to have their interests considered in liberal democracies' institutions, and we have found no other place but the constitution able to accomplish this goal. If they are not protected through constitutional rights, non-human animals' elementary interests remain free to be trampled upon in society, the democratic process, executive actions, and legal disputes. Their position would resemble those of children without rights: unable to politically and legally stand up for themselves and without guarantees that others will sufficiently stand up for

them instead. As much as we do not accept such an inferior position for vulnerable children, so should we not accept it for vulnerable sentient non-human animals. The investigation in this book has led to the conclusion that the constitution is needed in order to neutralize this extreme political and legal vulnerability.

This is where we get to the second anticipated objection against deploying the constitution in the proposed way: does introducing rights for non-human entities not corrupt the intrinsic human (or anthropocentric) character of a constitution? Although it is factually unprecedented that a constitution assigns fundamental legal rights directly to non-human animals, this does not automatically mean that constitutional protection *should* only apply to humans. Arriving at this conclusion would require us to commit the naturalistic fallacy: deducing normative rules from a factual situation. There are no reasons to assume that a constitution should only function for the direct benefit of humans as a matter of principle. In fact, this would even be quite a discriminatory assumption to make, just like assuming that a constitution can only function for the benefit of adults, men, or white people would be highly discriminatory. Instead, a constitution is preferably perceived to protect certain principles and rights as such; the number of entities to which they apply can (and normally does) diverge over time as moral and scientific enlightenment proceeds.[534] In order to not frustrate the development of constitutional principles and the path of justice, the open-endedness of constitutions should be defended. If critics suggest we ought to break with the open and inclusionary character of constitutions, then better reasons than those resting on the naturalistic fallacy must be given.

However (thirdly), maybe it is not the character of the constitution, but the deeper foundational principles of liberal democracies that should

[534] Laurence H. Tribe draws attention to the fact that the American Constitution and its amendments prohibit certain wrongs, such as cruel punishments (Eight Amendment) and slavery (Thirteenth Amendment), without specifying which victims can enjoy this protection. According to the Constitution, cruel punishments and slavery are wrong *as such*, no matter on whom they are inflicted. Tribe points out that, even though current judges are not likely to interpret these principles so generously as to include cruel punishments or slavery of non-human animals, they allow for being interpreted in that way one day nonetheless. Laurence H. Tribe, "Ten Lessons Our Constitutional Experience Can Teach Us About the Puzzle of Animal Rights: The Work of Steven M. Wise," *Animal Law* 7 (2001): 3–4.

stop us from introducing rights for non-human animals. Maybe liberal democracies are typically anthropocentric systems, in which non-human animal rights would be misplaced. Although we can, again, establish that liberal democracies have indeed factually always been mostly anthropocentric, this need not necessarily be the case. To the contrary, we have seen that many of the constituting principles of liberal democracies seem to endorse rather than conflict with the purpose of assigning non-human animals rights. The roots for non-human animal rights lie in the liberal democratic principles themselves. As has come to the fore in this book, the democratic and egalitarian principle of equal consideration of interests, the contractarian principle that a state must have the (hypothetical) consent of its citizens in order to be legitimate, the utilitarian principle that a state must maximize the common welfare, the liberal harm principle, the principle of affected interests, the (legal) equality principle, and (liberal) individualism all support instead of resist assigning fundamental legal rights to sentient animals.

One may object at this point, however, that the assumed anthropocentric character of liberal democracies' institutions is not a mere matter of preference for one species, but a reasoned choice to engage only with autonomous subjects. Perhaps non-human animals should be excluded on account of the fact that they lack the most important precondition for earning a meaningful status in liberal democracies: autonomy. Maybe not all of the aforementioned liberal democratic principles comprise the foundation of liberal democracies, but autonomy is the fundamental building block instead. Is having a meaningful status in liberal democracies then not exclusively reserved for autonomous individuals?[535] Without having the pretention of being able to solve the unsolvable discussion about whether or not non-human animals are *generally* autonomous, we can say two things about this which should be able to settle the matter.[536] For the sake of

[535] On whether human rights protect something distinctive about human beings (including autonomy), see also: Cochrane, "From Human Rights to Sentient Rights," 659–662.

[536] Obviously, in addition to many differences between species and between individual animals, there are also different concepts of autonomy, which makes the discussion on whether or not non-human animals generally are autonomous futile.

argument, let us assume that there are many sentient animals who are not autonomous.

To begin with, it seems to be a misunderstanding to maintain that autonomy is the prime foundational building block of liberal democracies. We have seen that non-autonomous humans exist and that they have meaningful political-legal statuses as well. This seems to indicate that it is not autonomy that is the leading principle in liberal democracies, but the equality principle and individualism. There is nothing about non-autonomous humans that makes them less valuable or less worthy of a fair (but passive) political-legal position—and the same is true for other non-autonomous sentient animals. Although autonomy plays an important role in determining which individuals qualify for rights or roles which require political agency (such as voting rights and representing roles), it is irrelevant when it comes to the question who deserves to be considered in the liberal democratic state. We generally do not and should not allow autonomy requirements to unconditionally prevail and cause a political and legal mass exclusion of the non-autonomous in liberal democracies. We see that in today's liberal democracies, the hypothetical harmful effects of respecting autonomy (effects that impact non-autonomous humans, who, as a result, are at risk of being politically ignored) are neutralized by their fundamental legal rights. This illustrates how an initial respect for autonomy is ultimately "overruled" by the equality principle and individualism through assigning rights. Hence it is not autonomy, but ultimately individualism and the equality principle which seem to be the core principles of liberal democracies.

Secondly and relatedly, we have seen that autonomy is too high a threshold for those legal rights which merely serve to protect the most elementary interests of individuals, such as those in not being made to suffer or get killed. One need not be autonomous in order to have a claim to the right not to be tortured. Non-autonomous animals, including human ones, have as much of an interest in not being tortured as autonomous animals. Relevant for these related interests and rights is the capacity of sentience, not autonomy. Excluding non-autonomous entities from the sphere of fundamental legal rights due to the mere fact that they are not autonomous

thus adds up to unjustifiable discrimination, for it would discriminate on the basis of irrelevant factors. If only autonomous individuals were to benefit from the protection that a liberal democracy can offer, then not only certain non-human animals, but also babies and all other non-autonomous humans would not qualify for rights. Babies, just like certain non-human animals, would not be able to lay claim to the right not to be tortured—a consequence not many of us are likely to accept. In short, assigning rights to sentient animals, even if they are not autonomous, is not at odds with the deeper foundational principles of a liberal democracy. The opposite is true: these principles require that fundamental legal rights are assigned to other sentient animals as well.

The fourth objection that should be considered is that it would be wrong to instrumentally use a constitution to reduce the discretionary space for the political branches so as to make sure that they take account of non-human animals' fundamental interests. One could argue that this way of bringing animals' interests into the political sphere is at odds with a constitution's principled character. This objection also seems misplaced. Even though a constitution is obviously a principled document, this does not automatically mean that it cannot be used to limit the options of the political branches. It is a generally accepted and even distinctive characteristic of constitutions that they can legitimately influence or even decisively limit the discretionary space of the political branches. This is one of the key elements of the rule of law in liberal democracies. Constitutions typically protect important values and rights that are to be safeguarded from political whims, even if these whims have the support of a political majority. This function of constitutions is especially important for the protection of political patients. In the context of children's rights, we have seen that the interests of these political patients must be given due regard in the political sphere as a matter of constitutional compliance. The discretionary space of the political branches is then legitimately limited for the sake of securing the elementary interests of children, which otherwise would be at risk of being trampled upon. Protecting the interests of political patients through rights thus makes logical use of the rule of law, according to which the constitution can safeguard basic elements of justice without needing the continuous majority

backing of political agents. This function is not in any way new, nor does it corrupt the nature of a constitution.

The non-contingency criterion

The second criterion against which fundamental, legal animal rights have to be tested is the non-contingency criterion. One of the most persistent problems in our quest for establishing a political and legal status for non-human animals has been meeting the non-contingency requirement. In all of the previously investigated options, removing the contingency with which animals' interests are taken into account seemed virtually impossible. In any of the investigated political or legal options, animals' interests were still ultimately only promoted to the extent to which humans wanted them to be promoted, and the prevention or termination of disproportional infringements on animals' interests was still ultimately contingent upon (enough) humans wanting this. This book has argued, however, that democratic principles dictate that we move away from this contingency and instead find an institutional constellation in which animal interests are considered irrespective of arbitrary human wishes. Fundamental legal rights for non-human animals are likely to establish such a normatively desirable institutional constellation in which regard for animal interests is institutionally guaranteed.

We have seen earlier that deploying the constitution is a good start for removing some of the contingency regarding respect for animals' interests. As the most important legal document of a liberal democracy, a constitution has the power to limit human behaviour in order to serve legitimate ends, such as the protection of political processes or the protection of individual rights. By constitutionally recognizing that animals have fundamental legal rights, the constitution's unique function of legitimately reducing the discretionary room of politicians and others is engaged. Through these constitutionally protected rights, politicians and all other people are bound to not only formally take notice of, but also equally and proportionally respect the interests of animals which are protected by their rights. Fundamental legal rights for animals thus seem to have the unique

potential to reduce the contingency with which animal interests are regarded.

In order to live up to that potential, however, sentient-animal rights will need to be carefully embedded in mechanisms of rights enforcement. Just like the fundamental rights of humans, sentient-animal rights will only be effective if there are institutions with the task of watching over their practical enforcement. In the general scheme of checks and balances, representatives and the electorate are often (co-)responsible for checking whether the government's executive and legislative activity respects individual rights as laid down in the constitution. We have seen, however, that this check is seriously flawed when it comes to constitutionally protected interests that are not directly humans', because this check has an inherently anthropocentric character. Fortunately, this political check on constitutional compliance is not the only check, and in most liberal democratic countries individual rights are also subsequently protected through judicial review. The judiciary functions as a watchdog over fundamental legal rights, and individuals can ask (constitutional) courts to check whether their rights are sufficiently respected by the government (or sometimes also by others). Through this procedure, individual rights bearers can personally initiate a case which draws attention to their most important interests (as protected by rights), even if the government has initially neglected to pay attention to these interests. Through the combination of individual rights and judicial review, individuals can thus take their rights into their own hands and effectively remove any possible contingency regarding the respect for their elementary interests. Judicial review therefore seems crucial to protect animals' rights in practice and to make these rights actually meaningful.

To a large extent, animals can benefit from the well-established mechanisms of judicial rights enforcement which are already embedded in current liberal democracies. Obviously, liberal democracies already have well-established and sustainable networks of checks and balances which already guarantee a non-contingent regard for rights. In principle, the rights of sentient non-human animals are just as suited to being watched over by courts as the existing fundamental rights of humans are. That is to say, there

seem to be no principled objections against extending judicial review to non-human animals' rights. However, this does not mean that simply adopting legal rights for animals in a constitution would suffice to meet the non-contingency requirement. In order to make sentient-animal rights actually effective in practice, and to truly enable judicial review of these rights, some procedural adjustments are required. Although the *exact* practical realization and implementation of legal animal rights is, strictly speaking, not the subject of investigation in this book, it seems necessary to briefly explore some of the innovative ideas which have been suggested in this context. Only exploring these ideas can give us the necessary confidence that meeting the non-contingency requirement is not utopian, but achievable in practice, and that the necessary institutional adaptations would not unbalance the basic structures of liberal democracies.

To start with, in order to unlock the option of judicial review of animal rights, procedural rules of standing and legal representation will need to be adjusted in such a way that they allow for legal representation of sentient animals by human lawyers. Unlike the previously discussed type of standing as currently offered to animal organizations in some legal systems, the type of standing meant here would be unique and unprecedented in that it should enable animal representatives to legally defend the animal's *own* interests and rights, not the indirect interests of an animal organization. Offering animals' legal representatives this kind of standing is not as ground-breaking as it may seem. As referenced before, Feinberg has pointed out that it is an overly dogmatic and dangerous assumption that one must be able to defend one's rights for oneself in order to have these rights.[537] There is nothing strange or paradoxical about legal representatives who represent the rights of others in courts.[538] Indeed, this is standing legal practice; it happens on a daily basis in any liberal democracy. Not only moral patients such as children and the mentally ill need to be represented by lawyers to have their rights effectively protected; even moral agents are legally represented by lawyers on a daily basis. Having rights is not dependent on being able to defend them yourself, but on having interests,

[537] Feinberg, "The Rights of Animals and Unborn Generations," 43–68.
[538] Tribe, "Ten Lessons Our Constitutional Experience Can Teach Us," 3.

and necessary for effectuating these rights is not being able to defend them yourself, but having someone around to defend these rights for you. In order to unlock this option of legal representation for rights-bearing sentient animals, procedural rules of standing and legal representation will have to be adjusted, which is only a minor change in the larger scheme of things. In the spirit of Feinberg, others have also suggested that standing rules must be broadened so as to include other animals as well, if they are to enjoy effective legal protection.[539]

As a result, what is also needed are legal representatives who can and will represent animals in court, since obviously non-human animals cannot "take their rights into their own hands." This raises important questions, such as who these persons must be and what their qualifications ought to be, and who ought to be responsible for the financial backing of these legal representatives.[540] Furthermore, should legal representatives represent animals on an *ad hoc* basis, needing to be appointed every time they bring a case to court, or is it preferable to sustainably authorize them *ex ante* as legal representatives?[541] Interesting suggestions have been made in this regard. Christopher D. Stone has famously made a case for legal guardians for natural entities and future people.[542] Kimberly K. Smith has also contemplated the option of assigning animals legal representatives.[543] According to Smith, the construct of a so-called *guardian ad litem* seems a workable model for representing animal interests in court.[544] Such a

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[539] Stone, *Should Trees Have Standing*; Francione, *Animals, Property and the Law*; Staker, "Should Chimpanzees Have Standing," 485–507; Katherine A. Burke, "Can We Stand for It? Amending the Endangered Species Act with an Animal-Suit Provision," *University of Colorado Law Review* 75 (Spring 2004): 633–666; Smith, *Governing Animals*, 118–123.

[540] See on the first two issues: Gary L. Francione, "Personhood, Property and Legal Competence," in *The Great Ape Project: Equality Beyond Humanity*, eds. Paola Cavalieri and Peter Singer (New York: St. Martin's Griffin, 1996/1993), 254–255.

[541] In the context of legal representation of future people: Ekeli, "The Principle of Liberty and Legal Representation of Posterity," 392 (footnote 12); Ekeli, "Green Constitutionalism," 391–392.

[542] Stone, *Should Trees Have Standing*, 1–31, 103–114. See on legal guardians for future people also: Ekeli, "The Principle of Liberty and Legal Representation of Posterity," 385–409.

[543] Smith, *Governing Animals*, 118–123.

[544] Smith's proposal merely covers existing animal welfare law, but we could envision a guardian *ad litem* also pressing animal rights cases in court. Smith, *Governing Animals*, 121–123. On a guardian *ad litem* for future generations, see also: Bradford Mank, "Protecting the Environment for Future Generations: A Proposal for a Republican Superagency," *New York University Environmental Law Journal* 5, no. 2 (1996): 496.

guardian is a legal representative for individuals who are unable to instruct their attorneys. The guardian is then burdened with representing the independent interests of the ward (often a child, but in this case a non-human animal), and he is appointed by a court. Such legal guardians may step forward themselves and need not necessarily be lawyers, for their primary job would be to draw a court's attention to a possible breach of animal rights, after which it is up to the court to contemplate on and decide the respective case.

Alternatively, the state could train and provide public officials who actively trace down animal rights breaches and bring the (suspected) violators before a court of law in administrative, criminal, or even civil law suits. This option has some similarities to a unique position that the Swiss Canton of Zurich had from 2007 to 2010: that of animal lawyer for animal protection in criminal matters.[545] This position in Zurich closely resembled that of a public prosecutor dedicated to animal welfare cases, but tasks and responsibilities of a state animal attorney could obviously be broader than that, and could come to include the sought legal defence of animal rights.

A yet different option, recently suggested in the context of legal environmental protection by councillor at the Belgian Council of State Pierre Lefranc, is to reintroduce a modern version of the ancient Roman legal action called *actio popularis*.[546] The *actio popularis* allows for any citizen to bring a case to court on the basis of its general interest to the public. The *actio popularis* thus has a lower threshold for initiating a lawsuit and does not require a citizen to indicate a personal interest in the case. When translated into the context of animal rights, the law could allow for any citizen, and possibly also non-governmental organizations, to bring a case to court concerning a suspected animal-rights breach (involving one or a larger number of animals). Animal rights violations could then be perceived as infringements on the public interest in safeguarding rights and animal welfare in general, and thus any citizen could bring such a case to court.

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[545] Gerritsen, "Animal Welfare in Switzerland," 13–14; Smith, *Governing Animals*, 118–123.
[546] Pierre Lefranc, "De Actio Popularis ter Bescherming van het Milieu: Wenselijk?" in *De Toegang tot de Rechter de Lege Ferenda in Milieuaangelegenheden*, ed. Pierre Lefranc and Charlotte Ponchaut (Mechelen: Wolters Kluwer, 2017), 19–29.

Because they serve to safeguard public interests, these lawsuits should be, in principle, free of charge for the initiating citizens or organizations, unless, of course, the court were confronted with pertinent abuses of law.

A different idea that is worth considering and that could be combined with the aforementioned ideas is to install distinctive courts with special expertise on animal interests.[547] The extraordinary cases that would follow if one of the abovementioned options were to become a reality seem to require special knowledge on animal rights and animal interests, and this expertise could be centralized in specialized animal rights courts.

This book has no pretention to exhaustively explore all the options of enabling an effective judicial review of hypothetical animal rights. Some general remarks about the abovementioned options can be made, however. In light of the importance of establishing sincere and genuine legal representation of animals in court, it seems advisable that legal representatives are not directly exposed to anthropocentric incentives, either by way of appointment or election or by way of financial provision.[548] Furthermore, in light of not allowing the protection of animals' interests to be contingent on human (political) preferences, it seems advisable to not make the capacity of legal animal representatives to bring cases to court too dependent on personal or political resources, or other arbitrary human willingness. The effectuation of fundamental legal rights should ideally not be dependent on resource or capacity problems. This seems to favour arrangements in which the budget for animal rights cases is large and/or the number of potential legal representatives is high.

The latter is the case in a scenario that involves the *actio popularis*. In that case, the number of potential legal guardians would be high, because all citizens, and possibly also non-governmental organizations, could start

[547] In the context of environmental rights, Tim Hayward has proposed the establishment of a specialist environmental court. Hayward, "Constitutional Environmental Rights," 564.

[548] Even though preventing bias of *legal* animal representatives is reasonably important in this context, it could be said to be not *as* important as it is with regard to the earlier discussed *political* animal representatives. This is because political animal representatives would have direct power themselves, whereas *legal* animal representatives, especially in criminal and administrative cases, have the primary task of bringing a certain case to a court's attention, and it is the court that ultimately has the power to decide the matter, not the legal animal representative.

proceedings to protect animal rights. This would make the enforcement of animal rights less prone to capacity problems and political under-prioritizing, and thus more secure.[549] For principled reasons as well, not only the *actio popularis*-option, but also the state-funded animal attorneys option seems attractive. It was argued that effective animal protection should not be a mere nice gesture, but that protecting the fundamental rights of animals is a core task of liberal democratic governments. Enabling *actio popularis* claims and/or establishing public animal attorneys would reflect that idea. These two options embody the idea that animal-rights protection is an undeniable part of the common interest for which the state carries responsibility and for which public funds can be legitimately utilized. It would also be in line with the general liberal democratic practice of financially facilitating legal assistance and representation for the most vulnerable in society, individuals who would otherwise have great difficulties practically effectuating their rights.

The effectiveness of legal animal rights in jurisdictions without constitutional review

It seems that judicial review of animal rights is important for making animal rights effective in practice. This raises two questions, however. First, if the effectuation of legal animal rights relies heavily on judicial review, does this not mean that legal animal rights will be ineffective in countries in which there is no or little judicial review of rights? The second question is about the normative desirability of judicial review of rights. I have argued before that having the judicial branch monitor compliance with a constitutional state objective on animal welfare is normatively undesirable for the reason that it requires judges to go into substantial political questions. If judicial review of a constitutional state objective is normatively undesirable, is judicial review of fundamental legal rights not similarly normatively undesirable?

[549] Circumventing capacity problems was the original intent of the *actio popularis*. Pierre Lefranc: "Citizens were given such a right to bring a case for pragmatic reasons: it could solve the issue of understaffing of the competent authorities, without having the intention of replacing them" (translation JV). Lefranc, "De Actio Popularis ter Bescherming van het Milieu," 21.

The first issue, regarding the (in)effectiveness of animal rights in countries which do not allow for constitutional review of fundamental legal rights, is not a mere theoretical issue. In some countries, the legal system does not allow for judicial review of constitutional legal rights. The Dutch Constitution, for example, forbids the judicial branch to review Acts of Parliament on their compatibility with the Constitution.[550] This does not automatically mean that fundamental legal (animal) rights cannot be effective in such countries, however, for two reasons. First, the prohibition against courts reviewing legislation is not as black and white as it seems, for it only forbids review against the national Constitution, not against international rights documents.[551] Many fundamental rights, such as the right not to be tortured and the right to life, are not only protected in national constitutions, but also in international treaties. Regardless of the prohibition on judicial review against the national Constitution, the Dutch judicial branch is still allowed to review legislation in light of these international legal rights documents, which means that there is still effective judicial review of the most important fundamental rights. It is not unimaginable that fundamental legal animal rights will be adopted in international treaties one day as well, which would enable effective judicial review of these rights even in countries such as the Netherlands.[552]

However, even without such international backing of fundamental legal rights, neither the existing constitutional rights of humans nor hypothetical future animal rights are useless in these countries. The second reason why a prohibition on constitutional review does not automatically mean that animal rights cannot be effective in such countries relates to the fact that such countries have different checks and balances in place which should create effective rights protection in different ways. As pointed out before, each national legal system has its own peculiarities and checks and

[550] "The constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts," thus article 120 of the *Grondwet voor het Koninkrijk der Nederlanden* (Constitution of the Kingdom of the Netherlands).
[551] Articles 93 and 94 of the *Grondwet voor het Koninkrijk der Nederlanden* (Constitution of the Kingdom of the Netherlands).
[552] See for international (non-binding) documents on animal rights and animal welfare also the informal *Declaration of Animal Rights* and the *Universal Declaration on Animal Welfare* (which is still a draft proposal that has not yet been adopted).

balances which, if all is well, makes the liberal democracy as a whole function. This is also true of legal systems which do not allow for constitutional review by the judiciary. No one would seriously assert that fundamental legal rights have no practical effect in a country such as the Netherlands. This is because the Dutch legal system has its own peculiarities and local mechanisms of checks and balances that make fundamental legal rights meaningful. Without going into detail too much, in the Netherlands, fundamental rights are sufficiently respected and protected despite the lack of constitutional review because the totality of checks and balances compensates for this "shortage." For example, because, as was just illustrated, the most important fundamental rights are still protected by the judiciary because many of the rights set down in the national Constitution also have equivalents in international rights documents. Additionally, the Council of State has an important role in the preparatory stage of the legislative process and advises the Lower House and the government on the compatibility of proposed legislation and regulations with the Constitution. Ultimately, however, the legislative branch is responsible for making sure that no legislation is passed that does not respect the rights guaranteed in the Constitution. Moreover, the ban on constitutional review is not as absolute as it seems in the sense that judges do not avoid *any* elaborations on compliance with fundamental legal rights, merely direct checking of Acts of Parliament against the Constitution. Lastly, courts do monitor general compliance with statutory laws, laws which are often meant to give practical meaning to fundamental legal rights and which should effectively protect the interests to which fundamental legal rights refer. This means that these rights are sometimes indirectly monitored by the judicial branch.

In sum, we may be confident that even countries without constitutional review have developed alternative ways in which fundamental legal rights get the effective protection their highest status in law requires. Although within most legal systems constitutional review is a significant contributor to making legal rights effective in practice, this is not necessarily so in any jurisdiction. It is thus too simple to maintain that fundamental, legal animal rights can only be effective (in other words, meet

the non-contingency requirement) in jurisdictions which have constitutional review.

The acceptability of judicial review of legal animal rights

Let us now discuss the second issue, which addresses the apparent inconsistency of largely relying on judicial review in this rights context, while having denounced judicial review in the context of constitutional state objectives for reasons of normative undesirability.

It must be pointed out here that judicial review of a state objective and of fundamental legal rights are fundamentally different types of review, so much so that it is not inconsistent to denounce the first while accepting the latter. Judicial review of legal rights is much less problematic than that of state objectives. In the context of constitutional state objectives, judicial review seemed an unwise idea, but as expressed then, the reason was not a general opposition to judicial review as such. The reason for wariness about judicial review was that the judicial branch would be required to check compliance with essentially vague instructions that the political branches established for the purpose of offering guidance for themselves. This type of review would require judges to ultimately make truly substantial political decisions, a task for which this branch is not equipped. In the case of fundamental legal rights, however, these rights are not put into the constitution as a preferred guide for the political branches themselves, but as strict prohibitions placed there with the clear intention of mandating courts to enforce these rights should anyone (including the political branches) fail to respect them.[553] One of the functions of adopting fundamental legal rights in a constitution is precisely to enable the judiciary to monitor the political branches' compliance with them, and the instructions are not vague but relatively clear in this case. Determining whether *rights* are sufficiently respected is a much cleaner and more apolitical consideration than determining whether the (self-imposed) *objective to pay due regard to animal welfare* is met in legislation and executive decisions or actions. The latter

[553] That is, with the exception of countries without constitutional review, in which constitutional rights obviously do not mandate courts to directly enforce them.

would require judges to go into substantial assessments of the different interests at stake in governing a country, whereas determining whether fundamental legal rights were respected is relatively easy due to the fact that they trump almost any other interest. Whether fundamental legal rights are violated is thus much more objectively determinable than whether the political branches have, on balance, paid "due regard" to one of the various interests at stake. Review of rights can be relatively formal, whereas review of state objectives would be mostly substantial. Due to these relevant differences between these two types of judicial review, it is not inconsistent to reject one but accept the other.

The foregoing has offered reasons for maintaining that judicial review of fundamental legal rights is more acceptable than review of state objectives, but this does not yet establish that judicial review of rights is acceptable as such. Possibly, judicial review of rights is less unacceptable but, all things considered, still ultimately unacceptable from a normative point of view. Should we not assess judicial review of animal rights on its own merits and ask whether we would not be transferring too much power from the legislative and executive branches to the judicial branch in asking judges to assess legislation and government action in court? Although it may be tempting to extensively go into the debate about the separation of powers here, this is not necessary to offer an answer to this question.

To start with, it is true that, due to constitutional review, the courts will indeed be burdened with assessing political decisions of various kinds, and that they will often have to interpret the legal rights of sentient animals. In performing these tasks, courts may indeed be required to sometimes give a more concrete meaning to these rights, which some would argue is a legislative task, not a judicial one.[554] That being said, we must keep in view the crucial fact that judicial review against the background of sentient animals' rights does not fundamentally differ from judicial review against the background of humans' rights. In fact, one could say that the rights of humans *are* sentient-animal rights,[555] and thus that review against the

[554] For example: Waldron, "A Right-Based Critique of Constitutional Rights," 18–51.
[555] Floris van den Berg and Janneke Vink, "Human Rights are Animal Rights," (paper presented at *The Future of Human Rights: Conceptual Foundations, Norms and Institutions Conference*, Utrecht, May 28, 2015).

background of these rights would essentially be the same. There is nothing in the nature of legal non-human animal rights that would make review against their rights more substantive or more political—and would thus require us to give additional justifications—than review against the background of the rights of humans. Hence, what is true for arguments in favour of and against judicial review in the context of humans' rights is simultaneously true for judicial review in the context of other animals' rights. Concerns about transferring too much power to the judiciary to determine the content of the law and about giving the judiciary the right to correct the political branches are thus not typical to judicial review in the light of non-human animal rights, but to judicial review in the light of fundamental legal rights as such. Given the wide acceptance of judicial review in the context of humans' rights, there should not be much resistance against similar review in the context of other animals' rights.

Some may find this way of answering the question regarding the acceptability of judicial review in the context of sentient-animal rights unsatisfactory. It must be pointed out though that this book has no pretention to settle the complex debate about judicial review and the separation of powers. It may be valuable, however, to make some general additional remarks on this matter, which may take away some of the possible unease over judicial review of (animal) rights. To start with, it must be pointed out that courts have a legitimate function in liberal democracies.[556] They have a strong role in ensuring that the fundamental legal rights of individuals are enforced, and they are in the best position to do so. Liberal democratic countries have different, but almost always ingenious institutional constellations which are intended to guarantee the objectivity, impartiality, and independence of the judiciary. This makes this branch particularly well-equipped to monitor and protect the most important values of a nation, without bias and without having pre-established (political) interests. A constitution can be understood to comprise the most important and sustained values of a country, and since the defence of these values should not be dependent on whimsical political

[556] Hayward, "Constitutional Environmental Rights," 566–568.

fluctuations, courts are the most appropriate institutions to be made responsible to watch over these highest goods of a people. In order to be able to protect and serve these higher values (including the rights) of the people, however, the judiciary must be able to correct or invalidate certain parts of legislation and executive acts if they constitute violations of the constitution. By safeguarding the most important values and rights of a people, even in the face of a political majority, judicial review contributes to making a democracy a *liberal* democracy, in which protecting individual rights is the highest good.

From some perspectives, the judiciary negating the will of a temporary political majority (as expressed in legislation or in governmental decisions) is perceived to be undemocratic. This seems a too superficial conclusion, however—especially if we take into account that non-human animals have a democratic consideration right as well. What is negated if the judiciary overrides the "majority will" and gives preference to fundamental legal rights instead is not the actual majority will of *the people* as a whole, but merely the majority will of the current *electorate*—in other words: political agents. We have seen, however, that equating the electorate with "the people" is a serious logical fallacy which can be (and *is* in the history of mankind) used to politically discriminate against women, slaves, children, human political patients, and non-human animals. From the perspective of liberal democracy, respecting the constitutional rights of individuals who are not part of the electorate but who nonetheless have a consideration right is necessary in order to meet legitimacy requirements. Only through effective protection of the rights of this politically ignored part of the people can we ascertain that the interests of *all* affected individuals constituting the demos are paid due regard. From this perspective, a judicial check that should safeguard individual rights in the face of political decisions is not undemocratic, but highly democratic. Without this check, the democratic rights of the individuals who are part of the democratic people but not of the electorate would be disregarded. Rejecting the notion of judicial powers watching over fundamental legal rights on the grounds that this is undemocratic thus can only be convincing if we hold to the ancient idea of democracy that discriminates against political patients.

The independence criterion

It is now time to address the third criterion for animal enfranchisement: the independence criterion. We have seen that the fact that non-human animals have interests that are different from those of humans makes an independent political and legal position for them indispensable. In order to meet this requirement, fundamental legal animal rights must ensure that animals' interests are independently considered in the institutions of liberal democracies, regardless of their connection to humans. Can fundamental legal animal rights establish an institutional situation that lives up to that norm?

Some in the animal rights field have argued that the hypothetical legal rights for animals would not directly protect the independent interests of the animals themselves, but rather the *relationship* that humans have with other animals.[557] Accordingly, Kimberly K. Smith argues that "the idea is not to grant legal rights to animals as a way to express a commitment to universal, equal natural rights." Instead, Smith holds, legal rights are used "to recognize and protect the human/animal bond."[558] This understanding of rights—which, strictly speaking, are no animal rights at all, but rather extended rights of humans, because they merely extend the legal protection of humans to their relationships with other animals—seems to be based on a relational ethic in which—at risk of oversimplification—animals with closer bonds with humans are perceived to be more ethically "valuable" than those who have lesser or no bonds with humans.[559] This underlying ethical understanding of animals' moral value and the duties we have with regard to them is not only problematic from an ethical point of view,[560] but especially harmful when combined with *legal* rights theory. In any eminent international rights document, such as the *Universal Declaration of Human Rights*, legal rights are taken to mean the precise opposite of the meaning Smith tries to attach to them. Fundamental legal rights recognize precisely

[557] Smith, *Governing Animals*, 57.
[558] Smith, *Governing Animals*, 57.
[559] Donaldson and Kymlicka, *Zoopolis*; Clare Palmer, *Animal Ethics in Context* (New York: Columbia University Press, 2010).
[560] Alasdair Cochrane, "Cosmozoopolis: The Case Against Group-Differentiated Animal Rights," *LEAP* 1 (2013): 127–141.

that, as a matter of principle, rights bearers are valuable *in and of themselves*; they are valuable in their own right. Rights bearers are, in other words, no mere "receptacles of value," as explained earlier. Their moral and legal significance is not externally "bestowed on them" by the fact that other individuals value them, nor by the fact that other—apparently more valuable—people have relationships with them. In this widely accepted understanding of legal rights, the value of right bearers resides in the individuals themselves and hence cannot vanish all of a sudden were external "value granters" to disappear or were they to stop valuing the rights bearers. This common understanding of legal rights resonates with internationally respected legal documents, as well as with the way in which this book has characterized legal rights. It is this understanding of rights that will remain to be central in the remainder of this book, since there seems to be no good reason to adopt Smith's extraordinary view. Better yet, it would be wrong, maybe even speciesist, to all of a sudden discard this widely accepted view of rights, just because we are considering assigning them to non-human animals as well. The understanding of legal animal rights as proposed by Smith must thus be declined as corrupting the very meaning of legal rights as commonly understood and used, and as making legal rights essentially empty shells that can only be filled with "value" by others.

Fundamental legal rights have, up to this day, thus always protected the *independent* interests of rights bearers, for they assign legal protection to rights bearers regardless of the value that other people attach to them. This seems to imply that fundamental legal rights are a very appropriate institutional choice for meeting the independence requirement. How legal rights would function as the protectors of the independent interests of animals will be illustrated when we assess their effects in several contexts.

First, as pointed out above, fundamental, legal animal rights would be binding for all state officials due to their constitutional recognition. Members of the legislative branch would be required to pay respect to the legally protected interests of animals, regardless of support for this among the electorate. Legislators may not, in a Millian fashion, regard these animal rights as "indisputably included" in the rights or interests of humans, but instead must pay independent attention to them in their political

considerations. They are bound to respect the independent interests of animals as protected in their fundamental legal rights as a matter of legislative integrity and as prescribed by the rule of law. Due to the fact that human and animal rights would be of equal legal value, the interests of humans cannot just be given automatic preference when they come into conflict. Members of the legislative branch would have to weigh these interests fairly and equally against one another, and must try to find a solution that respects both parties' fundamental rights to the highest level possible. The laws, as a product of legislative activity, will need to reflect the independent concern for the interests of animals that are protected by their rights, and in most countries this is eligible to be reviewed by the judiciary.

Also, in the context of executive governance, fundamental legal animal rights would lead to having to regard animal interests as an independent factor of concern. Members of the executive branch would be equally bound to respect the rights of both humans and other animals as much as possible. Just like their legislative colleagues, executive public officials cannot just assume that the interests and rights of animals are somehow automatically respected, but instead have to take explicit notice of them in deliberations that precede executive decisions and regulations. In principle, the constitutional status of non-human animals' rights would require that executive public officials give due regard to animals' independent interests in everything they do.

An example can clarify this function of legal rights in the context of executive governance. Imagine, for example, that the mere presence of certain animals leads to a disruption of public order. Say that geese would paralyze flight traffic for hours with their presence on the airstrips, or that horses or deer would step onto the highway and cause risky situations with their presence. If these animals had the fundamental legal right to life, the police could not decide to simply kill them just because they are a nuisance—or at least not without having to deal with the consequences of these kills in the legal aftermath. Even though their presence may be unwanted and an undeniable nuisance to the public, killing these animals would not automatically be permitted. Due to the fact that these animals would have the independent fundamental legal right not to be killed,

shooting them while alternatives to solve the issue exist would be a violation of their fundamental legal rights.

In solving the issue, the police would have to operate as they would have done if the individuals on the air strips or highways were (mentally confused) humans. Immediately shooting them would clearly be unacceptable for the reason that it would constitute a disproportional violation of their fundamental rights. Just like the police would be bound to exhaust all less radical means of solving the issue first before shooting a human being, the same would be true if it were not a human but a different animal with fundamental legal rights. As long as other options exist, like luring or driving the animal away, or anesthetizing or capturing him and dragging him away, killing an individual with the right to life cannot be a legally acceptable option. The way in which fundamental legal animal rights would protect the *independent* value of individual animals clearly comes to the fore here. This example illustrates that animals' rights need to be respected even if virtually no other person has an interest (economic or other) in respecting their rights. Even if practically nobody opts for letting the deer or geese on the traffic lanes live, the constitutional weight of their rights means that their interests do not require Smith-like "external bestowal" value in order to be independently regarded and respected. Fundamental legal rights, in and of themselves, require precisely this independent consideration.

That fundamental legal animal rights lead to having to independently consider the interests of sentient animals is also true in the context of legal disputes. As a consequence of their rights, non-human animals would all of a sudden become subjects relevant to all sorts of legal actions and cases. We have seen that without rights, non-human animals were only indirectly relevant to the law: as property of humans, or as beneficiaries of animal welfare legislation. With fundamental legal rights, however, they would come to be of direct concern to the law in their own right. With legal animal rights, it is no longer necessary to point to the financial damage suffered by an animal owner or to a violation of statutory welfare laws in order to make infringements on elementary animal interests legally relevant. With rights, such infringements are automatically and even

primarily relevant because they constitute an infringement of the rights of animals themselves.

Better yet, if the introduction of rights is accompanied by adequate adjustments in procedural law, rights also open up the possibility of lawsuits about animal rights violations being initiated. Legal representatives of animals would then be offered the means to challenge infringements on their rights in courts. Non-human animals are then no longer fundamentally dependent on whether their elementary interests collide with other interests that others wish to pursue in court, but are given their own, independent, entrance into the court room. A disproportional disregard for their fundamental interests then becomes sufficient reason in and of itself to start legal procedures, due to the fact that rights made these interests independently valuable.

The human assistance criterion

The fourth requirement of giving effect to the consideration right of animals was quite obvious: human assistance is needed in the realization of their political and legal position. Since non-human animals are political patients, a certain amount of anthropocentrism in involving animals' interests in a liberal democracy cannot be avoided, nor is that desirable. Humans are necessarily responsible for identifying and articulating the interests of other animals and for defending them in the appropriate institutions. Since the effective protection of fundamental legal rights is a core duty of the liberal democratic state, it seems only natural that the state will facilitate such assistance for non-human animals at different institutional levels—possibly similar to how it does so for vulnerable humans.

It is impossible to discuss here all the ways in which the state can practically facilitate such political and legal assistance for non-human animals, and some viable options of legal assistance have already been discussed anyway. What seems fruitful, however, is to discuss two general difficulties which may be encountered in offering such assistance, and how these difficulties may be remedied. The first difficulty with regard to such assistance is that representing animals other than humans is a highly complicated matter. As was pointed out earlier in this book, the people who

will be professionally responsible for taking notice of animals' interests may find it hard to determine what the animals' interests are exactly in a certain context. The second difficulty with regard to human assistance relates to the fact that relinquishing any species bias and having sincere regard for other animals may not always come naturally and calls upon the finest qualities of humans. People professionally responsible for assessing and weighing humans' and other animals' interests might find it difficult to overcome their natural anthropocentric bias. The fact that a certain anthropocentrism is inevitable, because humans must politically and legally assist other animals in making their consideration right meaningful, does not mean, however, that irrational anthropocentric biases can be permitted in weighing transspecies interests. If non-human animals' interests are to be given equal consideration, the people responsible for weighing interests in the relevant institutions must be as unbiased and objective as possible.

Determining animals' interests: Proposal for a scientific forum

With regard to the first problem, which regards the difficulty of determining non-human animals' interests, a remedy may be that the state provides for a platform of independent scientific experts who can advise on animals and their interests. Such a scientific forum can help in reliably determining the general interests of certain species, but also in determining the interests of a specific animal or of a group of animals at stake in a specific context. Since pinning down the interests of non-human animals is a highly complicated matter for which state officials are generally not trained, asking the professional advice of scientific experts in, for instance, biology seems inevitable. In a forum in which experts of different scientific fields can gather, the most up to date scientific knowledge concerning animals' interests can be determined. These experts can collect and conduct scientific studies which can help answer questions such as: "which animal species are sentient?" and "which animal species have strong interests in social interaction with other animals?" This information can be used to determine which animals are entitled to which rights, for policy deliberations in which the impact on animals needs to be mapped out for different scenarios, and for determining which animals have which interests in specific legal

disputes. Such scientifically grounded background information is indispensable for any state that wishes to assign fundamental rights non-arbitrarily, give animals due and equal consideration in legislation and policy deliberations, and enable judges to make sound assessments of legally relevant interests.

The proposed scientific forum seems an adequate solution to the problem that the people professionally burdened with taking animals' interests into account are generally ill-informed about the interests of these animals. For example, in order to determine which animals have a claim to a fundamental right that protects their interest in not being made to suffer, the legislative branch will need to know which species precisely are sentient in order to be able to assign rights non-arbitrarily.[561] Members of the legislative branch are generally not biology experts, however, and do not have this information immediately at their disposal. Since the question regarding the sentience of animals is not a political question for the answering of which having a political opinion is sufficient, but instead a scientific question, the answering of which requires scientific knowledge, public officials would need external reliable information on which to base their judgment regarding rights distribution. The scientific forum as proposed here would be in the right position to answer this question and could provide the legislative branch with proper and solid advice. On the basis of their objective advice, state officials can then determine which species of animals will be assigned fundamental legal rights which protect its basic interest in, e.g., not being made to suffer.

Similarly, politicians may frequently wonder what interests of which animals are at play in (other) legislative or executive considerations. In dossiers on environmental preservation, for instance, or in other dossiers which directly or indirectly affect animals' interests, politicians may wonder how several scenarios would affect the animals in a certain area. In such situations too, they ought to be able to consult scientific experts such as

[561] Jessica Eisen, in advocating a "species-based model" of providing animals legal protection, points out that "Discussing what the law can and should do to protect a particular species invites inquiry into what that animal is like, what it needs, and even what it should be guaranteed." Eisen, "Liberating Animal Law," 75.

ecologists on these matters and have them conduct impact studies on animal welfare. Additionally, legal representatives and judges will often encounter questions concerning the interests of a specific animal in a specific context, in which *general* information on the species does not suffice. Legal representatives, as well as judges, should then also be able to call on scientific expertise in order to be able to make sound legal decisions. The scientific forum must thus ideally not only be available for offering information on species' general interests, but also for offering *ad hoc* advice about animal interests in legal disputes, or for specific political impact studies.

In sum, the first issue of the difficulty in determining the interests of animals that is necessary for offering them political and legal assistance may thus be remedied if the state facilitates an independent scientific forum which can determine the most up-to-date scientific knowledge on animal interests and advise the various branches on matters related to animal interests.

Objectivity: Lady Justice's blindfold

The second general difficulty involved in offering animals human assistance in the relevant institutions is that anthropocentric and other unreasonable biases need to be filtered out. Fundamental legal rights for animals seem to have significant potential to resolve this issue. In chapter three, we have seen that it is probably impossible to overcome the difficulty of bias if we try to implement the consideration right of animals in *political* institutions. This is because politicians have a strong and institutionalized loyalty to the electorate, and their dependence on the fully human electorate continuously fuels anthropocentric biases. Given these counteracting nudges, it would be somewhat naïve to expect that they would take objective and due notice of animal interests and weigh them on equal scales with human interests. We have also seen that formally requiring politicians to do so through political sanctions seems to come with unacceptably high democratic costs.

If we switch our focus from the political institutions to the legal institutions of a liberal democracy, however, we are confronted with a much brighter outlook. Having state officials consider animal interests equally and

without bias seems to be much more attainable if animals had fundamental legal rights, because these rights would force state officials to adopt an objective attitude. Crucially, if sentient animals gained fundamental legal rights, their rights would be of equal value to humans' fundamental rights. Due to the rules of legal hierarchy, which determine that fundamental legal rights are of equal value and importance, unreasonably or disproportionally favouring certain fundamental rights over others would be impermissible since this would violate the equal status of the rights in the constitution. Therefore, favouring human interests or rights over other animals' rights merely on the basis of an anthropocentric bias and not on reasonable arguments would be unconstitutional, and that counts for all levels and branches of governance. In other words, fundamental legal animal rights effectively establish that anthropocentric biases must be repudiated as a matter of constitutionality. Ignoring anthropocentric biases in weighing non-human animals' and human interests is then no longer a matter of free choice and good intentions, but a constitutional duty, the compliance with which the judiciary checks (in jurisdictions with such judicial review, that is). Precisely because courts are, more than anything else, bound to respect the constitution and the fundamental legal rights laid down in it, they cannot legally accept deeds, behaviour, legislation, or policy which demonstrate unreasonable bias. Obviously, judges cannot prevent personal (gender, race, or species) biases from existing in the minds of people, but they can, and professionally are required to, prevent irrational biases from becoming actual rights breaches of individuals. By lifting animal interests to the same legal status as human interests by giving them rights, judges are thus legally required to reject forms of species discrimination. Judges are, in this sense, the ultimate gate-keepers who must reject any irrational biases on the grounds of unconstitutionality and conflict with principles of justice, and they themselves are also formally required to make only objective assessments. They must, in their service to Lady Justice, be blind to species membership if non-human animals were to acquire rights of equal legal status to those of humans.

In sum, the second identified problem of overcoming anthropocentric bias in offering animals human assistance at whichever

level of governance is remedied to a large extent through assigning non-human animals fundamental legal rights. If animals' basic interests were to be transformed into rights, assigning objective and proportional value to the interests of animals alongside those of humans would no longer be a political or personal choice, but a clear constitutional obligation which would bind all branches.

The residency criterion

The last requirement for animal enfranchisement regards the demarcation of the group of animals who can legitimately claim institutionalization of their consideration right in a liberal democratic state. I have argued that static citizenship rights are hard to establish with regard to non-human animals and that dynamic citizenship, in the sense that only animals on the territory of the state have a right to being considered in the liberal democratic framework, might be a practically achievable alternative. Can fundamental legal animal rights be assigned to sentient animals on the territory of the state only?

There seems to be nothing in the institution of legal rights that prevents them from being applied in the way proposed here: that they would be activated only if the rights-bearing animal resides on the territory of the state. It should be possible to make residency on the territory of the state a necessary condition for enjoying fundamental legal rights by including this condition in the formulation of these rights in the constitution. A legal formulation such as the following could quite easily establish the desired construction: "All sentient animals who reside on the territory of the state have the right not to be tortured." In this way, it is immediately clear to all levels and branches of government that the state has a duty to respect and enforce the right not to be tortured of only the sentient animals on the territory of the state. It thus seems possible to design fundamental legal rights in such a way that they meet the fifth criterion of animal enfranchisement. We could call such rights *residency-dependent rights*.

It could be useful to elaborate a little on how this construction would work in practice. In practice, such a construction would mean that the state would only be responsible for sentient animals whilst they reside on the

territory of the state. In effect, sentient animals who constantly reside on the territory of the state would constantly enjoy fundamental legal rights, which would have to be constantly taken into account by all branches of government. This would be the case for a great many animals, and hence many animals would have their fundamental legal rights respected by the same state throughout their lives. However, many animals cross national borders once or more times in their lives. For such migrating animals, the situation would be different.

Take, for example, a group of birds who reside on the territory of state X for six months and on the territory of state Y for the other six months of the year. These birds would enjoy fundamental legal rights for six months in state X and for the other six months in state Y. The visited state would only be responsible for the effectuation of these rights during the time that the birds are on its territory, for it is that state which most directly affects the birds' lives at that point in time. To be clear, this would not mean that the rights of the animals who live in a state permanently are *twice as valuable* as those of the animals who are abroad half of the time. The moment the migrating animals enter the territory of the state, the duty of the state to respect their rights is activated, and these rights are not in any way less valuable, subordinate, or inferior to the rights of other animals. Moreover, in order to enable the state to give due weight to the interests of the animals on its territory, it will have to have access to information concerning the estimated number and sort of animals residing on its territory. The previously proposed scientific forum could possibly play a role in providing such information.

One possible misunderstanding about the temporary character of the rights of migrating animals that must be addressed relates to the fact that addressing rights violations in court is almost always retrospective. It is not unimaginable that a situation could occur in which there would be a trial about a breach of animal rights at a moment that the victimized animal is abroad, and thus—if we accept the dynamic citizenship construction—without nationally recognized legal rights. Say, for instance, that human Dirk has abused a dog. Suppose that the dog is abroad with Dirk's wife Iris at the time of the trial that concerns the abuse. One may wonder whether

this means that the trial must be dismissed for the reason that the victimized animal has no nationally recognized rights at the time of trial, and that the state is thus no longer under an obligation to legally remedy violations of that animal's rights. In other words, ought the judges in Dirk's trial to dismiss the case, or acquit Dirk because his victim is abroad?

The residency-dependent rights as proposed here do not necessarily lead to that conclusion. To the contrary, it would be at odds with principles of justice to accept that rights would work in this way. Changed circumstances do not necessarily affect the legal assessment of a wrong done in the past. In order to determine how a certain past event must be legally qualified (has Dirk abused the dog and thus violated the law and the dog's rights?) the rights and circumstances at the time of that event are relevant, not the rights and circumstances at the time of trial.[562] What is relevant is that at the time of the abuse, the dog had rights, and that there were valid criminal laws in place that prohibited abuse of dogs. The *current* inactivity of the dog's rights due to him being abroad is thus no reason to disregard the rights that the dog had in the past, nor for dismissing the case, or for acquitting Dirk.

That it would be odd to accept such a dismissal or acquittal can be illustrated by comparing this case with a different hypothetical case, one about human property rights. Suppose Tom bought a bike in 2018. Further suppose that Tom's bike was stolen shortly after, but that he retraced it and immediately sold it to someone else, all within 2018. Now also suppose that due to capacity problems with the public prosecution's office, the criminal case about the theft of Tom's bike in 2018 only started in 2019. Despite the fact that, at the time of trial, Tom has no rights over the bike anymore due to having sold it, the theft in 2018 still remains a violation of the criminal law and of Tom's property rights at that time. The theft still was theft at that time, and should be punished accordingly.

In sum, the fact that some rights are not eternally valid is no reason to not retrospectively restore justice. If sentient animals were to have

[562] See for reflections on what could be extraordinary exemptions to this positivist principle: Gustav Radbruch, "Gesetzliches Unrecht und Übergesetzliches Recht," *Süddeutsche Juristen-Zeitung* 1, no. 5 (August 1946): 105–108.

residency-dependent rights, this would not relieve the state of its duty to retrospectively persecute and punish past violations of migrating animals' rights.

5.5 Conclusion

In the last two chapters, we have assessed whether the consideration right of non-human animals can be sufficiently institutionalized in the legal institutions of liberal democracies. To that end, the two most viable options that could have reasonably been expected to bring about a duty for state officials to take notice of non-human animal interests have been investigated: the constitutional state objective on animal welfare and assigning sentient non-human animals fundamental legal rights. Having rejected the constitutional state objective on account of being insufficient from the perspective of the enfranchisement criteria, the remaining option investigated in this chapter was to assign sentient non-human animals fundamental legal rights, which would be unprecedented. More precisely, the rights under investigation were characterized as negative, individual, fundamental legal rights, which would be similar to the existing fundamental rights of humans.

Such legal animal rights would have a great impact on individual citizens, society, politics, and the legal system, which does not only mean that they cannot be introduced overnight, but also that these rights would have to be backed by a thorough normative justification. The main justification for such rights would be based in the interspecies democratic theory of this book: sentient animals, as individuals who are affected by state policy, have a right to have their interests duly considered by the liberal democratic state. This justifies assigning sentient animals fundamental legal rights, and we have seen that that would be consistent with liberal and democratic values and principles.

An additional and compatible justification for legal sentient-animal rights can be found in interest-based theories of rights. If legal rights protect interests, then sentient animals are also entitled to certain legal rights. A third justification for assigning sentient animals fundamental legal rights is that this would significantly improve legal systems. Liberal democracies

currently uphold biased, inconsistent, arbitrary, uncredible, and fundamentally self-undermining legal systems, because these legal systems resolutely exclude non-human animals from the sphere of rights, while endorsing principles that require the inclusion of sentient non-human animals in the sphere of rights. Assigning sentient animals fundamental legal rights would improve liberal democratic legal systems by making them less arbitrary, less biased, less self-undermining, more consistent, more credible, and more in harmony with modern scientific knowledge.

There are thus convincing reasons to consider introducing fundamental legal rights for sentient animals. But could such a hypothetical institutional constellation meet the five normative criteria for animal enfranchisement? In light of these five normative criteria, the credentials of fundamental legal rights for sentient non-human animals seem very strong. Such rights would significantly enhance the legitimacy of liberal democracies. Fundamental legal rights would legally require that sentient animals' most essential interests are non-contingently taken into account as independent factors by state officials of all branches. Lady Justice's blindfold should lead purveyors of justice to forgo irrational biases if non-human animals were indeed to have fundamental rights, and it would be possible for state officials to acquire objective information on what the interests of sentient animals are precisely. Making legal animal rights residency-dependent could establish that only sentient animals on the territory of the liberal democratic state enjoy such rights. If accompanied with adequate practical regulations and if carefully institutionally embedded, implementing fundamental legal rights for sentient animals could meet all five criteria for animal enfranchisement—a unique score among the options that have been investigated in this book. Furthermore, if introduced in a responsible manner, fundamental legal rights for sentient animals would also not undermine or compromise liberal democratic values, nor jeopardize the long-term stability of liberal democracies, but rather improve them by eliminating arbitrariness and undermining features currently existent in this political model.

Conclusion

The central purpose of this book has been to investigate whether the fundamental structures of liberal democracies should reflect the fact that many non-human animals are individuals with interests, and whether this is possible without undermining or destabilizing their institutions. This investigation has been carried out in two stages. First, the normative stage, focussing on the question whether liberal democracies should engage with the fact that many animals are individuals with interests. Second, the stage concerning institutional design. This stage involved an inquiry into the current position of animals in the institutional outlook of liberal democracies and how this could be improved in a responsible manner.

In investigating whether the fundamental structures of liberal democracies should reflect the fact that many non-human animals are individuals with interests, the point of departure was the principles that already lie at the basis of liberal democracies, such as the principle of affected interests and the principle of political equality. It was argued that these principles need not necessarily exclude non-human animals, but rather focus on individuals and their interests, which implies that other animals must be incorporated in them as well, now that we know that they are individuals with interests too. In other words, sentient non-human animals on the territory of the state have a consideration right. It was argued that if liberal democracies are to truly honour their foundational principles, they ought to give recognition to the fact that sentient animals have politically and legally relevant interests too, which should translate into assigning them a political-legal status and embedding this status in the basic institutions of the state. It logically followed from the interspecies democratic theory in this book that the enfranchisement of sentient non-human animals must meet five criteria. Ideally, liberal democracies must reserve an institutional place (*legitimacy requirement*) in which humans (*human assistance requirement*) are institutionally bound (*non-contingency requirement*) to consider the independent interests (*independence requirement*) of sentient non-human animals who reside on the territory of the state (*residency requirement*).

The second stage involved an inquiry into the current political-legal position of non-human animals in liberal democracies and the extent to which this position meets the enfranchisement criteria. It was found that the basic political-legal frameworks of liberal democracies around the world currently fail to reflect the fact that many non-human animals have interests which make them politically and legally relevant entities. In other words, liberal democratic institutions still reflect the ancient conjecture that politics and law have nothing to do with non-human animals, a notion that can be seriously contested from the perspective of modern scientific findings and modern moral insights. We thus had to conclude that the institutions in current liberal democracies are unacceptably anthropocentric and outdated.

The fact that current liberal democracies fail to institutionalize animals' consideration right was considered problematic for two reasons. First, structurally disregarding the interests of sentient animals in liberal democracies constitutes an injustice with regard to these animals, because they have a rightful democratic claim to have their interests duly considered. Second, the fact that liberal democracies fail to give animals their due harms the legitimacy and defensibility of this political model as such. The longer liberal democracies continue to stubbornly ignore the scientific findings and moral progress when it comes to non-human animals, the more they lose credibility and the more they undermine their own core values. It was argued that a democratic deficit is kept intact so long as sentient animals' consideration right is not institutionalized, and that from an interspecies perspective, current liberal democracies not only have a legitimacy problem, but can even be said to have tyrannical and totalitarian traits. Furthermore, by categorically refusing sentient animals entry into the sphere of rights, liberal democracies uphold arbitrary, inconsistent, and irrational legal systems which are based on an outdated scientific worldview. These are all very serious problems which are rooted in the systematic and arbitrary exclusion of non-human animals from liberal democratic institutions. As such, they can be remedied by giving animals a political-legal status that meets the enfranchisement criteria, which would not only do justice to animals, but also improve the defensibility and sustainability of liberal democracies.

The next challenge was to assess whether and how the institutional structures of liberal democracies could be reformed so as to give due recognition to sentient animals' consideration right without undermining liberal democratic values or unbalancing the system as a whole. It followed that merely adapting the political institutions is not likely to lead to a solution here, because several difficulties would prevent a normatively defensible enfranchisement of animals from being established in the political sphere. More fundamentally, the political sphere seemed to have some inherent deeper characteristics which make it unlikely that a satisfying enfranchisement of the interests of sentient animals can be achieved in that context at all. More promising seemed to be the two adaptations to legal institutions that were investigated: introducing a constitutional state objective on animal welfare and introducing fundamental legal rights for sentient animals. The book has argued that, from a normative perspective, only introducing fundamental legal rights for sentient animals would be an acceptable institutionalization of animals' consideration right. Put differently, among the investigated options, only legal animal rights can establish an institutional outlook that meets all five enfranchisement criteria. As such, this book has argued that sentient animals on the territories of liberal democratic states ought, eventually, to be assigned fundamental legal rights which protect their most important interests. Which rights ought to be established for which animals is an issue that must ultimately be decided after a thorough investigation of the interests of animals. Given the indisputably strong interests that all sentient animals by definition have in life and in not suffering, however, this book has argued that rights which protect these interests must be among the rights that ought to be established (such as the right to life, the right not to be tortured, or the right to bodily integrity). Importantly, however, what these rights are called is of secondary importance; what matters is that the rights of sentient animals should cover their most fundamental interests, regardless of their label.

Even though *The Open Society and Its Animals* thus advocates the eventual introduction of legal sentient-animal rights on normative grounds, it has not offered a blueprint on how such rights are to be specifically embedded in

practice. Also, although this book offers a vision of where liberal democracies should, in the long run, be heading, it does not specifically lay out a path that must be followed in order to get there, or a corresponding time schedule. Obviously, these details are omitted on purpose, as the amount and velocity of change that institutions can bear differs from society to society and from time to time, and such change thus cannot be planned in the abstract and far in advance. This book has discussed some general ideas on how legal animal rights *could* eventually be embedded in practice though, such as introducing animal attorneys, the *actio popularis*, animal rights courts, and a scientific forum with expertise on animal interests. The primary purpose of envisioning these practical constructs was, however, to illustrate that an effective embedding of animal rights in liberal democracies should be possible without causing new problems that could affect basic liberal democratic structures. Whether it is, on balance, desirable to actually introduce animal attorneys, the *actio popularis*, animal rights courts, and scientific forums must be re-examined in each specific context if and when a liberal democratic state decides to actually introduce legal animal rights.

Despite the fact that the exact path that must be taken in order to realize interspecies liberal democracies cannot be specified, it is possible to say something about what liberal democracies of today can and cannot do in the short term in working their way toward that goal. This book has argued that, despite the normative rightness of fundamental legal animal rights, it would be unwise to introduce such rights overnight in today's liberal democracies. Obviously, from the perspective of normative rightness, legal animal rights should be introduced sooner rather than later. Every day liberal democracies continue their disregard for the interests of non-human animals, the injustice with regard to animals is kept intact. Giving animals their due thus seems to require introducing legal animal rights as soon as possible. From the perspectives of practicality, effectivity, and harbouring the stability of liberal democracies, however, introducing such a high impact instrument into the current anthropocentric institutions overnight seems undesirable. For several reasons, it seems more prudent to gradually work towards this goal via piecemeal engineering. For one, many sectors in liberal democratic societies currently rely heavily on the (ab)use of animals, and

outlawing these sectors overnight may have unpredictable economic effects. One may argue, of course, that this is the price of justice that we have to pay. There are, however, better arguments for piecemeal engineering our way to animal rights instead of introducing them overnight which relate to effectiveness and the stability of liberal democracies.

From the perspectives of effectiveness and the stability of liberal democracies, it seems wiser to carefully and gradually embed these rights into the respective institutions when the time is ripe. Two things are of special importance in this context: gaining societal support for this change, and the gradual prior adjustment of adjacent law, regulations, and institutions so as to prepare them for the introduction of actual legal rights and for making these rights work adequately in practice. If radical changes in the law are established without adequate institutional anticipation and without sufficient societal support, they are more likely to be ignored than to actually bring about the sought-after (legal) change. It is plausible that the ground-breaking legal change would be neutralized by reductive legal interpretation, and that society would not accept this disruptive change and resist its implications in practice. Illustrative is the introduction of the recognition of animal dignity in the Swiss Constitution. Instead of actually bringing about a radical legal change, the provision is reductively interpreted so as to mean only insignificant minor legal adjustments. Importantly, this "radical legal change" so recklessly instigated is not only ineffective, it is even counterproductive and harmful. It harms the Constitution, because the more constitutions make meaningless promises, the more they lose credibility and societal respect. In effect, the Swiss dignity provision fuels scepticism about the Constitution while having little practical effect for animals. In the long term, scepticism about a constitution and loss of credibility and societal respect for a constitution can be serious liabilities to liberal democracies' stability. Additionally, we have seen that the sudden legal change in Switzerland has also harmed the legal system by polluting it with inconsistency when it comes to the important term "dignity." The same could happen if legal animal rights were introduced without the appropriate institutional anticipation and societal support: these rights could be reductively interpreted to only mean minor legal changes

and to be fundamentally different from the fundamental rights of humans we know today. This would render this change ineffective; might make the introduction of real animal rights more difficult in the future; and could even bring additional harm to constitutions, the fundamental rights of humans in it, and to the legal system at large.

For all of these reasons, it seems imperative that legal animal rights are not introduced overnight, but gradually, with sufficient concern for societal support and institutional anticipation and embedding. Obviously, this does not imply that we can just sit back and wait for it to happen. The normative position of this book implies that we must be serious about terminating the tyrannical traits that liberal democracies currently have in relation to non-human animals as soon as possible, and this process can be sped up by various forms of social action. What I have argued, however, is that we must be careful not to do more harm than good to liberal democracies in this process, especially if animals are not even benefitted by it in practice. The position of this book thus is, in short, that it is imperative that liberal democracies work their way towards introducing legal animal rights in a *responsible* manner. This implies that, in the short term, states should start making more animal-friendly policy and legislative choices, such as cutting public subsidies for sectors which evidently harm animals and improving the enforcement of existing animal welfare rules. They could also loosen standing regulations in the short term so that they allow for a legal defence of the animals' interests already covered in current legislation. Apart from such small reform in policy and legislation choices, however, deeper institutional reform is obviously also required. An institutional instrument extensively investigated in this book might be helpful in setting the first more significant step towards the goal of responsibly working our way towards legal animal rights: the constitutional state objective.

Even though the constitutional state objective was criticized in this book for being unable to establish a political-legal status for animals that is normatively sufficient, this legal instrument has also been praised for being able to improve the status of animals somewhat nonetheless. Importantly, this book has noted that this instrument can do this without harmful side-effects to liberal democratic institutions and values. As such, the state

objective is an appealing candidate for piecemeal engineering our way towards legal animal rights.

A constitutional state objective has the potential to improve the position of non-human animals when it comes to the non-contingency and independence requirements. Most importantly, a constitutional state objective expresses that animal welfare is not an arbitrary hobby that liberal democratic governments may pursue or not, but an important task that ought to be given serious attention. Recognizing this seems to be a crucial first step towards eventually assigning non-human animal citizens actual legal rights. Furthermore, the constitutional state objective encourages state authorities to make serious work of improving the legal standards of animal welfare, or to initiate animal welfare laws insofar as they were absent before (as was the effect of the Swiss state objective on animal welfare). The locking effect of the state objective puts pressure on state officials to constantly improve animal welfare norms.

In addition, the constitutional state objective can help to "lift" the status of statutory animal welfare laws in the hierarchy of law, so that they can remain effective even if they come into conflict with the peripheral fundamental rights protection of humans. It can also be a basis for introducing new statutory legislation containing prohibitions on certain harmful treatments of animals which are now still protected by the fundamental rights of humans, such as the rights to religious freedom, scientific freedom, and the freedom of speech. As such, the state objective can serve to keep or put the legal protection of animals in alignment with the societal opinion on what protections animals deserve, insofar as this was previously legally frustrated due to the fundamental legal rights of humans.

The book has noted that a constitutional state objective typically allows for a large discretionary space for politicians. In light of the enfranchisement criteria, this feature was considered disadvantageous, because it frustrated meeting the non-contingency requirement. From the perspective of piecemeal engineering, however, the discretionary space that the state objective typically allows for is interesting. It allows state officials to interpret the state objective dynamically, while the locking effect suggests that these interpretations should be more and more progressive. Even

though we have seen that there is reason to doubt whether existing checks and balances can be effective in enforcing the locking effect, the constitutional state objective is nonetheless an interesting instrument because it adds an additional hurdle for lowering animal welfare norms, because this would imply unconstitutional action by the government. Additionally, even if the locking effect were to fail to safeguard the state objective being interpreted in an ever more progressive direction, the fact that politicians have quite some freedom in deciding how to give effect to the state objective could still turn out well if society itself has an increasing concern for animal welfare. With its constitutional basis, the state objective would give state officials a firm mandate to instigate significant political and legal changes which benefit animals if society supported that.

There are some indications to believe that there is indeed a general trend towards increasing concern for animal welfare. Since Bentham's time, moral concern for animal welfare and the amount and quality of animal welfare legislation have only increased. More recently, the rise and growth of animal advocacy parties also gives reason to assert that people find animals' well-being increasingly important. There even seems to be some increase in people's willingness to assign animals legal rights, from twenty-five percent of people wanting to assign animals the rights to be free from harm and exploitation (exactly similar to those of humans) in 2003, to thirty-two percent in 2015.[563] Obviously, this is not to say that there is a secured upward path to increasing concern for animals, but it nonetheless suggests that it is possible to eventually attain the goal pursued in this book through democratic piecemeal engineering, if only moral enlightenment continues and if we persist in rationally defending the case that sentient animals have a claim to legal rights. *The Open Society and Its Animals* has attempted to do its part by arguing that sentient animals have a democratic claim to legal rights, by visualising what the animal-inclusive open society of the future could look like, and by showing that it truly is a viable option that would not only benefit animals and serve justice, but also improve the open society itself.

[563] Jeff Jones and Lydia Saad, "Gallup Poll Social Series: Values and Beliefs," May 2015, https://cdn.cnsnews.com/attachments/gallup_animals-poll.pdf.

Acknowledgement of sources

Some of the ideas in this book have been published before. The thoughts on liberal democracy as an interest-weighing mechanism and the importance of James Mill's depiction of democracy to this idea were first published in a chapter that I wrote for an edited volume on environmental rights.[564] Parts of section 2.2, which concerned transparency as a democratic principle, have been published before as a blog article on the Leiden Law Blog, a legal blog platform for popular science of Leiden University.[565] Parts of section 4.1, which concerned the constitutional state objective, were also part of two previous works: expert advice for the Belgian Senate on a proposal of law to add a state objective on animal welfare to the Belgian Constitution and a scholarly paper in which I investigate the desirability of implementing a similar provision in the Dutch Constitution as well.[566] The differences between common law and civil law systems in attaining legal animal rights as addressed in section 5.1 were also shortly addressed in a chapter that I wrote for an edited volume on the most pressing questions in contemporary science.[567] In that chapter, I also first suggested that current legal systems are based on an outdated scientific worldview.[568] Finally, some ideas expressed in section 5.3, regarding how current legal systems undermine the equality principle, were published in a chapter co-authored with my promotor Paul Cliteur for an edited volume on equality and freedom.[569]

[564] Vink, "De Democratische Rechtsstaat als Belangenweegschaal," 43–56.
[565] Vink, "If Slaughterhouses had Glass Walls…."
[566] Vink, "Het Constitutionaliseren van de Zorg voor Dieren als Wezens met Gevoel"; Vink, "Dierenwelzijn," 1862–1869.
[567] Vink, "Hoe Zijn de Rechten van Andere Dieren dan Mensen te Waarborgen," 314–317.
[568] Vink, "Hoe Zijn de Rechten van Andere Dieren dan Mensen te Waarborgen," 314–317.
[569] Cliteur and Vink, "De Gelijkheid en Vrijheid van Mensen en Andere Dieren," 87–105.

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Glossary of terms

Active political rights
A category of political rights that require political agency of the rights holder in order to make sense. These are rights that enable political participation, such as the right to vote and the right to politically represent others. See also section 1.4 and *Passive political rights*.

Anthropocentrism
A strong or exclusive, not always justified focus on humans and their interests. See also *Strong anthropocentrism* and *Weak anthropocentrism*.

Character selection strategies
Strategies that can help establish that representatives or representative institutions function in alignment with the interests of those they are supposed to represent by focussing on the manning of these institutions with the right persons. See also section 3.1.III and *Institutional nudging strategies*.

Consideration right
The (passive) political right to have one's interests considered by the political communities' rulers. *The Open Society and Its Animals* argues that all sentient animals on the territory of a liberal democratic state have a consideration right. See also section 1.4, *Passive political rights*, and *Interspecies democratic theory*.

Constitutional state objective
A constitutional norm with legally binding effect, which enjoins on public policy the continuous observance of or compliance with certain tasks or objectives (in the context of this book: protecting animal welfare). Sometimes also called: "fundamental objective," "policy principle," "constitutional objective," or "directive principle of state policy." See also section 4.1.

Democratic costs
Immaterial costs that the endeavour of enfranchising non-human animals may incur, which could be problematic from a democratic point of view. See also sections 3.1.V and 3.2.

Dynamic citizenship
A citizenship framework for non-human animals in which the mere presence of a sentient non-human animal on the sovereign territory of a certain liberal democratic state activates that state's duty to give due political consideration to the interests of that animal. See also section 2.1, *Residency criterion*, and *Residency-dependent right*.

Enfranchisement
Throughout *The Open Society and Its Animals*, the term "enfranchisement" is used in the broad sense of indicating some type of political or legal recognition of non-human animals in basic institutional structures, not in the narrow sense of extending voting rights to non-human animals. See also *Enfranchisement criteria*.

Enfranchisement criteria
Normative requirements for institutionalizing the consideration right of non-human animals, derived from the interspecies democratic theory presented in this book. This book argues that there are five enfranchisement criteria, which together prescribe the normatively preferred enfranchisement of sentient animals in liberal democracies as follows. Liberal democracies must reserve an institutional place (*legitimacy criterion*) in which humans (*human assistance criterion*) are institutionally bound (*non-contingency criterion*) to consider the independent interests (*independence criterion*) of sentient non-human animals who reside on the territory of the state (*residency criterion*). See also section 2.1, *Legitimacy criterion*, *Non-contingency criterion*, *Independence criterion*, *Human assistance criterion*, *Residency criterion*, and *Interspecies democratic theory*.

Fundamental legal rights
This book typifies the fundamental legal rights it discusses as negative, individual, fundamental legal rights. *The Open Society and Its Animals* concludes that assigning sentient animals on the territory of liberal democratic states certain fundamental legal rights, such as the right not to be tortured and the right to life, could establish a normatively desirable situation in which sentient animals' consideration right is institutionally respected. See also section 5.2.

Human assistance criterion
One of the five enfranchisement criteria. The human assistance criterion prescribes that humans must assist in the realization of non-human animals' consideration right by objectively representing their interests in the appropriate institutions. See also section 2.1 and *Enfranchisement criteria*.

Identity of interests
A coinciding of interests between the rulers and the ruled. An identity of interests should prevent abuse of power, because the community can have no sinister interest within itself and with respect to itself. James Mill thought achieving an identity of interests to be an essential democratic ideal. See also section 1.4 and James Mill, "Government."

Independence criterion
One of the five enfranchisement criteria. The independence criterion prescribes that non-human animals' interests must be regarded and institutionalized as an independent factor in liberal democratic considerations. See also section 2.1 and *Enfranchisement criteria*.

Institutional nudging strategies
Strategies that can help establish that representatives or representative institutions function in alignment with the interests of those they are supposed to represent by focussing on the design of these institutions. See also section 3.1.III and *Character selection strategies*.

Interests
A certain good or action is in an individual's interest if it positively affects the well-being of that individual. See also section 1.2.

Interspecies democratic theory
The normative democratic theory developed in the first chapter of *The Open Society and Its Animals*. The theory holds that sentient non-human animals on the territory of a liberal democratic state have a consideration right: the (passive) political right to have their interests considered by the political communities' rulers, on account of having politically relevant interests. See also chapter 1, *Consideration right*, and *Enfranchisement criteria*.

Interspeciesism
Arbitrary discrimination between animals of the same species. See also section 2.2.

Legitimacy criterion
One of the five enfranchisement criteria. The legitimacy criterion prescribes that basic democratic structures must reflect a due and equal regard for sentient non-human animals in order to qualify as democratically legitimate. See also section 2.1 and *Enfranchisement criteria*.

Non-contingency criterion
One of the five enfranchisement criteria. The non-contingency criterion prescribes that the consideration of sentient non-human animals' interests may not be contingent in the sense that it is dependent on the willingness of humans to do this, but must be non-contingent in the sense of institutionally secured. See also section 2.1, *Enfranchisement criteria*, and *Weak anthropocentrism*.

Passive political rights
A category of political rights that do not require political agency of the rights holder in order to make sense. The consideration right is a passive political right. See also section 1.4, *Active political rights*, and *Consideration right*.

Political agency
The characteristic of being able to act with the intention of affecting political institutions. See also section 1.3, *Political agent*, *Political patient*, *Political patiency*, and Angie Pepper, "Political Agency in Humans and Other Animals."

Political agent
An individual who is able to act with the intention of affecting political institutions. See also section 1.3, *Political agency*, and *Political patient.*

Political patient
An individual who is unable to act with the intention of affecting political institutions. See also section 1.3, *Political patiency*, and *Political agent.*

Political patiency
The characteristic of being unable to act with the intention of affecting political institutions. See also section 1.3 and 1.4, *Political agent*, *Political patient*, and *Political agency.*

Residency criterion
One of the five enfranchisement criteria. The residency criterion prescribes that the consideration right of sentient non-human animals currently living and residing on the sovereign territory of a liberal democratic state must be institutionalized. See also section 2.1, *Enfranchisement criteria*, *Dynamic citizenship*, and *Residency-dependent right.*

Residency-dependent right
A right that becomes activated only if the rights-bearing individual resides on the territory of the state. See also section 5.4, *Residency criterion*, and *Dynamic citizenship*.

Strong anthropocentrism
A situation in political systems in which the interests of non-human animals are only considered to the extent to which humans want them to be considered, in other words: contingently. See also *Anthropocentrism*, *Weak anthropocentrism*, and Robert Garner, "Animals, Politics and Democracy."

Weak anthropocentrism
A situation in political systems in which there is human representation of animal interests irrespective of the wishes of any particular human electorate, even if these interests clash with important human interests. The non-contingency criterion favours a weak anthropocentric institutional setting. See also *Anthropocentrism*, *Strong anthropocentrism*, *Non-contingency criterion*, and Robert Garner, "Animals, Politics and Democracy."

Summary

The Open Society and Its Animals

The Open Society and Its Animals is an interdisciplinary study centred on the political and legal position of animals in liberal democracies. With due concern for both animals and the sustainability of liberal democracies, *The Open Society and Its Animals* seeks to redefine animals' political-legal position in the most successful political model of our time: the liberal democracy.

There is reason to reconsider the relationship between the open society and the animals in it. Whereas animals used to be regarded as objects without consciousness and feeling, modern science points out that many animals are sentient and that, like humans, they have certain elementary interests. Since interests play a crucial role in the political and legal theories that form the foundation of liberal democracies, it seems only natural that the revised perception of animals has consequences for the liberal democratic institutional framework too. *The Open Society and Its Animals* argues that the modern perception of animals as individuals with interests compels us to reconsider the political and legal position of animals in liberal democracies, and for two reasons: to do justice to the animals themselves and to improve the credibility and sustainability of the open society.

Research question and structure

The dual focus on both animals and the open society is reflected in the book's main research question: *Should the fundamental structures of liberal democracies reflect the fact that many non-human animals are individuals with interests, and is this possible without undermining or destabilizing their institutions?*

The first, normative, stage of the investigation asks whether the fact that many animals have interests should have consequences for the fundamental structures of liberal democracies, and if so, what criteria the new political-legal position of animals should meet. Point of departure are the principles that already lie at the basis of liberal democracies, such as the

principle of affected interests, the principle of political equality, and the principle of equal consideration of interests. These principles do not necessarily exclude non-human animals, because they focus on individuals and their interests, which implies that other animals can and ought to be incorporated in them as well. The interspecies democratic theory that is developed in the book is based in such classical liberal democratic principles, and it follows from this theory that sentient non-human animals on the territory of the liberal democratic state have a *consideration right*. They have a democratic right, in other words, to have their interests taken into account by the political rulers of liberal democratic states. From the interspecies democratic theory, five criteria for the enfranchisement of animals in liberal democracies naturally follow. Ideally, liberal democracies must reserve an institutional place (*legitimacy criterion*) in which humans (*human assistance criterion*) are institutionally bound (*non-contingency criterion*) to consider the independent interests (*independence criterion*) of sentient non-human animals who reside on the territory of the state (*residency criterion*).

The second stage of the investigation in the book involves an inquiry into the current political-legal position of non-human animals in liberal democracies, the extent to which this position meets the enfranchisement criteria just mentioned, and how this position could possibly be improved. *The Open Society and Its Animals* finds that the basic political-legal structures of liberal democracies around the world currently fail to reflect the fact that many non-human animals have interests which make them politically and legally relevant entities. Animals' interests have no formal role to play in liberal democratic institutions, the protection of their most elementary interests is contingent on the whimsical inclinations of humans, and animal interests can often only be formally and effectively protected if they overlap with human interests. In short, the fundamental structures of current liberal democracies fail to meet the criteria for animal enfranchisement.

The next challenge is to assess whether and how the institutional structures of liberal democracies could be reformed so as to give due recognition to sentient animals' consideration right without undermining liberal democratic values or unbalancing the system as a whole. The book

finds that merely adapting the *political* institutions is not likely to lead to a solution in this regard, because several difficulties prevent a normatively defensible enfranchisement of animals from being established in the political sphere. Most problematic is the fact that non-human animals cannot engage in the political processes themselves. This circumstance leads to a number of different problems, since political processes and checks and balances seem to be founded on the fundamental anthropological assumption of the rational and self-serving individual with political agency. More promising are the two adaptations to *legal* institutions that are investigated: introducing a constitutional state objective on animal welfare and introducing fundamental legal rights for sentient animals.

A constitutional state objective on animal welfare straightforwardly expresses that the welfare of animals is a serious and elementary aspect of liberal democratic governance that requires political attention. It has the potential to have significant positive effects on the political and legal status of non-human animals in liberal democracies. Importantly, the state objective can serve as a basis for these positive effects without compromising on the democratic process or principles that are essential to the functioning of liberal democracies.

At the same time, enthusiasm must tempered, because the state objective offers very few guarantees in practice. The state objective on animal welfare must be rejected as an ideal model, because it is normatively deficient in light of the enfranchisement criteria and thus cannot give non-human animals the political and legal status to which they are entitled. However, *The Open Society and Its Animals* argues that, even though it is not ideal, the state objective on animal welfare could be an interesting intermediate model in the historical process of the political and legal emancipation of non-human animals, and that it is a realistic alternative to introducing fundamental legal animal rights in the short term.

In the quest for a normatively acceptable enfranchisement of animals, assigning sentient animals fundamental legal rights is a serious option. More precisely, these would be negative, individual, fundamental legal rights, which would, in type, be similar to the existing fundamental rights of humans. Introducing such legal animal rights would have a great impact on

individual citizens, society, politics, and the legal system, which does not only mean that this cannot be done overnight, but also that these rights would have to be backed by a thorough normative justification. The main justification for such rights would be based in the interspecies democratic theory of the book, but two additional justifications can also be given.

The first additional justification can be found in an interest-based account of rights. If legal rights can be understood to protect interests, as Joseph Raz and Joel Feinberg argue, then sentient animals would also be entitled to certain legal rights. The second additional justification is that assigning sentient animals legal rights would significantly improve legal systems. Liberal democracies currently resolutely exclude non-human animals from the sphere of rights, while endorsing principles that would require the inclusion of sentient non-human animals in the sphere of rights. From an interspecies perspective, Lady Justice should be blind to the often irrelevant factor of species membership, for example in the distribution of welfare rights. Assigning sentient animals fundamental legal rights would improve liberal democratic legal systems by making them less arbitrary, less self-undermining, more consistent, and more in harmony with modern scientific knowledge.

In light of the criteria for animal enfranchisement, the credentials of fundamental legal rights for sentient non-human animals are very strong. Through incorporating animal interests in the basic structures of the liberal democratic state by introducing fundamental legal animals rights, the interspecies legitimacy of liberal democracies would be significantly improved. Fundamental legal animal rights legally require that sentient animals' most essential interests are non-contingently taken into account as independent factors by state officials of all branches. If accompanied by adequate practical regulations and carefully institutionally embedded, implementing fundamental legal rights for sentient animals could meet all five criteria for animal enfranchisement—a unique score among the options that are investigated in the book. Furthermore, if introduced in a responsible manner, fundamental legal rights for sentient animals would also not undermine or compromise on liberal democratic values or jeopardize the long-term stability of liberal democracies, but rather improve them by

eliminating arbitrariness and undermining features currently existent in this political model.

In short, *The Open Society and Its Animals* argues that fundamental legal rights for sentient animals have to be introduced in order to respect sentient animals' democratic right to have their interests considered in the liberal democratic state. However, given the drawbacks and dangers implied in introducing such a thorough legal change overnight, *The Open Society and Its Animals* argues for reformative caution and stresses the importance of having sufficient concern for societal support and proper institutional anticipation and embedding. It seems wise, in other words, to *piecemeal engineer* our way into a more animal-inclusive open society of the future. *The Open Society and Its Animals* attempts to do its part by arguing that sentient animals have a democratic claim to fundamental legal rights, by visualising what the animal-inclusive open society of the future could look like, and by showing that it truly is a viable option that would not only benefit animals and serve justice, but also improve the open society itself.

Summary in Dutch

De Open Samenleving en Haar Dieren

The Open Society and Its Animals (*De Open Samenleving en Haar Dieren*) is een interdisciplinair onderzoek dat handelt over de politieke en juridische positie van dieren in de democratische rechtsstaat. Met oog voor zowel dieren als de bestendigheid van democratische rechtsstaten, poogt *The Open Society and Its Animals* de politiek-juridische positie van dieren in het meest succesvolle politieke model van deze tijd, de democratische rechtsstaat, te herijken.

Er lijkt voldoende aanleiding te zijn om de verhouding tussen de open samenleving en haar dieren te heroverwegen. Hoewel dieren lange tijd beschouwd werden als objecten zonder bewustzijn en gevoel, wijst de moderne wetenschap uit dat veel dieren *sentiënt* (lees: met bewustzijn en gevoel) zijn en dat zij, net als mensen, zekere elementaire belangen hebben. Omdat belangen een centrale rol spelen in de politiek-filosofische en rechtsfilosofische theorieën die ten grondslag liggen aan de democratische rechtsstaat, lijkt het vanzelfsprekend dat de herziene perceptie van dieren ook consequenties heeft voor het institutionele raamwerk van de democratische rechtsstaat. *The Open Society and Its Animals* redeneert dat de moderne perceptie van dieren als individuen met belangen ons noodzaakt de politieke en juridische positie van dieren in democratische rechtsstaten te heroverwegen, om twee redenen: om dieren recht te doen, en om de geloofwaardigheid en bestendigheid van de open samenleving te verbeteren.

Onderzoeksvraag en structuur

De tweezijdige focus op enerzijds dieren, anderzijds de open samenleving komt terug in de onderzoeksvraag van het boek: *Zou het feit dat veel niet-menselijke dieren individuen met belangen zijn gereflecteerd moeten worden in de fundamentele structuren van democratische rechtsstaten, en is dat mogelijk zonder hun instituties te ondermijnen of te destabiliseren?*

In de eerste, normatieve fase van het onderzoek wordt de vraag behandeld of het feit dat veel dieren belangen hebben consequenties voor de fundamentele structuren van democratische rechtsstaten zou moeten hebben, en indien dat het geval is, aan welke criteria de nieuwe politiek-juridische positie van dieren zou moeten voldoen. Vertrekpunt hierbij zijn de principes die al aan de basis liggen van de democratische rechtsstaat, zoals het principe van de getroffen belangen (*principle of affected interests*), het politieke gelijkheidsbeginsel, en het principe van een gelijke overweging van belangen (*principle of equal consideration of interests*). Deze principes sluiten niet noodzakelijkerwijs niet-menselijke dieren uit, want in de kern draaien zij om individuen en hun belangen, hetgeen impliceert dat ook andere dieren in deze principes geïncorporeerd zouden kunnen en moeten worden. De intersoortelijke[570] democratische theorie die ontwikkeld wordt in het boek is gebaseerd op dergelijk klassiek democratisch-rechtsstatelijke principes, en het volgt uit deze theorie dat sentiëntele dieren op het territorium van de democratische rechtsstaat een *consideratierecht* hebben. Zij hebben, met andere woorden, een democratisch recht om hun belangen in overweging genomen te hebben door de politieke leiders van een democratische rechtsstaat. Uit de intersoortelijke democratische theorie vloeien vijf criteria voor de politiek-juridische integratie van dieren in de staatsstructuren (*enfranchisement*) voort. Idealiter voorziet de democratische rechtsstaat in institutionele ruimte (*legitimiteitscriterium*) waarbinnen mensen (*menselijke assistentie-criterium*) institutioneel gebonden zijn (*niet-contingent-criterium*) om de onafhankelijke belangen (*onafhankelijkheidscriterium*) van sentiëntele dieren die op het territorium van de staat verblijven (*verblijfscriterium*) in overweging te nemen.

In de tweede fase van het onderzoek wordt de huidige politiek-juridische positie van niet-menselijke dieren in democratische rechtsstaten onderzocht, de mate waarin deze positie voldoet aan de zojuist genoemde criteria voor de politiek-juridische integratie van dieren, en hoe deze positie eventueel zou kunnen worden verbeterd. *The Open Society and Its Animals*

[570] "Intersoortelijke" is het Nederlandse equivalent van "interspecies," wat zoveel betekent als: over de grenzen van diersoorten heen. Een intersoortelijke democratische theorie betreft aldus niet alleen mensen, maar ook andere dieren.

concludeert dat de basale politiek-juridische structuren van democratische rechtsstaten in de wereld er momenteel onvoldoende in slagen recht te doen aan het feit dat veel niet-menselijke dieren belangen hebben die hen tot politiek en juridisch relevante entiteiten maakt. De belangen van dieren spelen geen formele rol in de instituten van de democratische rechtsstaat, de bescherming van hun meest elementaire belangen is afhankelijk van de onberekenbare wensen van mensen, en veelal kunnen dierlijke belangen slechts formeel en effectief worden beschermd als zij overlappen met menselijke belangen. Kortom, de fundamentele structuren van hedendaagse democratische rechtsstaten voldoen niet aan de criteria voor de politiek-juridische integratie van dieren.

De logische uitdaging is dan om te onderzoeken of en hoe de institutionele structuren van de democratische rechtsstaat hervormd kunnen worden zodat zij een redelijke uiting gaan geven aan het consideratierecht van sentiëntele dieren, zonder daarbij democratisch-rechtsstatelijke waarden te ondermijnen of het geheel uit balans te brengen. Het boek concludeert dat het onwaarschijnlijk is dat enkel het aanpassen van de *politieke* instituten in deze context tot een oplossing zal leiden, omdat diverse omstandigheden het tot stand komen van een normatief verdedigbare positie voor dieren in het politieke domein belemmeren. Meest problematisch is het feit dat niet-menselijke dieren zelf niet kunnen deelnemen aan politieke processen. Deze omstandigheid leidt tot een keur aan problemen, omdat politieke processen en *checks and balances* lijken uit te gaan van een rationeel en zelfzuchtig handelend individu met politieke handelingsbekwaamheid. Veelbelovender zijn de twee aanpassingen aan *juridische* instituten die onderzocht worden: het introduceren van een constitutionele staatsdoelstelling inzake dierenwelzijn, en het introduceren van fundamentele grondrechten voor sentiëntele dieren.

Een constitutionele staatsdoelstelling inzake dierenwelzijn drukt onomwonden uit dat het welzijn van dieren een serieus en elementair aspect is van democratisch-rechtsstatelijk regeren en dat dit aspect politieke toewijding vereist. De staatsdoelstelling heeft in potentie enkele significante positieve effecten op de politieke en juridische positie van niet-menselijke dieren in de democratische rechtsstaat. Belangrijk is dat de staatsdoelstelling

als basis voor deze positieve effecten kan dienen, zonder te compromitteren op het democratisch proces of op principes die cruciaal zijn voor (het functioneren van) de democratische rechtsstaat.

Tegelijkertijd moeten wij het enthousiasme enigszins temperen, want een staatsdoelstelling geeft in de praktijk weinig garanties. De staatsdoelstelling inzake dierenwelzijn moet als ideaal model afgewezen worden, omdat het normatief tekortschiet in het licht van de criteria voor de politiek-juridische integratie van dieren, en dus dieren niet de politieke en juridische status kan bieden die hen toekomt. *The Open Society and Its Animals* betoogt echter dat een staatsdoelstelling inzake dierenwelzijn, hoewel niet ideaal, een interessant 'tussenmodel' kan zijn in het historische proces van de politieke en juridische emancipatie van niet-menselijke dieren, en dat het voor de korte termijn een realistisch alternatief is voor het invoeren van fundamentele grondrechten voor dieren.

In de zoektocht naar een normatief acceptabele politiek-juridische integratie van dieren zijn fundamentele dierengrondrechten een serieuze optie. Meer precies zou het gaan om negatieve, individuele, fundamentele, juridische rechten, die gelijk zouden zijn aan het type fundamentele grondrechten dat mensen nu hebben. Het introduceren van dergelijke juridische dierenrechten zou echter een grote impact hebben op individuele burgers, de samenleving, de politiek en het rechtssysteem, hetgeen niet alleen betekent dat dit niet van de een op de andere dag zou moeten geschieden, maar ook dat zulke rechten moeten kunnen rusten op een robuuste normatieve rechtvaardiging. De primaire rechtvaardiging voor dergelijke rechten zou gebaseerd zijn op de intersoortelijke democratische theorie die in het boek ontwikkeld wordt, maar er kunnen ook twee aanvullende rechtvaardigingen worden gegeven.

De eerste aanvullende rechtvaardiging vindt haar basis in een belangen-georiënteerde notie van rechten (*interest-based account of rights*). Als wij juridische rechten begrijpen als zijnde een institutionele bescherming van belangen, zoals Joseph Raz en Joel Feinberg al deden, dan zouden sentiëntele dieren ook aanspraak moeten kunnen maken op enkele rechten. De tweede aanvullende rechtvaardiging is dat rechtssystemen aanzienlijk zouden verbeteren door het toekennen van enkele fundamentele

grondrechten aan sentiëntele dieren. Democratische rechtsstaten sluiten momenteel niet-menselijke dieren rigoureus uit van het rechtendomein, terwijl zij wel principes voorstaan die de inclusie van sentiëntele dieren in het rechtendomein zouden vergen. Vanuit een intersoortelijk perspectief zou Vrouwe Justitia eigenlijk blind moeten zijn voor de vaak irrelevante factor van diersoort, bijvoorbeeld waar het gaat om het toekennen van welzijnsrechten. Het toekennen van fundamentele grondrechten aan sentiëntele dieren zou de rechtssystemen van democratische rechtsstaten verbeteren door deze minder arbitrair, minder zelf-ondermijnend, meer consistent, en meer in harmonie met moderne wetenschappelijke kennis te maken.

In het licht van de criteria voor de politiek-juridische integratie van dieren zijn de papieren van fundamentele dierengrondrechten zeer goed. Door dierenbelangen te incorporeren in de basale structuren van de democratische rechtsstaat met behulp van fundamentele dierengrondrechten zou de intersoortelijke legitimiteit van de democratische rechtsstaat significant verbeteren. Fundamentele grondrechten voor dieren kunnen bewerkstelligen dat de meest essentiële belangen van sentiëntele dieren niet-contingent en als onafhankelijke factor in overweging moeten worden genomen door functionarissen van alle drie de staatsmachten. Indien zorgvuldig institutioneel ingebed en vergezeld gaande van adequate praktische regulering, zou het implementeren van fundamentele grondrechten voor sentiëntele dieren ervoor kunnen zorgen dat aan alle vijf criteria voor de politiek-juridische integratie van dieren voldaan wordt – een unieke score onder de opties die onderzocht worden in het boek. Mits op een verantwoorde wijze ingevoerd, zouden fundamentele grondrechten voor sentiëntele dieren geen democratisch-rechtsstatelijke waarden ondermijnen of daarop compromitteren, noch de lange-termijn stabiliteit van de democratische rechtsstaat onder druk zetten. Integendeel, juridische dierengrondrechten zouden een en ander juist versterken, door de momenteel aanwezige arbitraire en ondermijnende facetten van het democratisch-rechtsstatelijke bestel weg te nemen.

Kortom, *The Open Society and Its Animals* betoogt dat sentiëntele dieren fundamentele grondrechten zouden moeten worden toegekend om

recht te kunnen doen aan het democratisch recht dat zij hebben om hun belangen overwogen te hebben in de democratische rechtsstaat. Echter, gezien de risico's die het van de een op de andere dag introduceren van een dergelijk ingrijpend instrumentarium met zich mee zou brengen, staat *The Open Society and Its Animals* een voorzichtige hervorming voor, en benadrukt het boek het belang van maatschappelijk draagvlak en een degelijke institutionele anticipatie en inbedding. Het lijkt, in andere woorden, wijs om tot een toekomstige intersoortelijke open samenleving te komen door middel van stapsgewijze hervorming (*piecemeal engineering*). *The Open Society and Its Animals* tracht daar een aandeel in te leveren, door te beargumenteren dat sentiëntele dieren een democratisch recht op juridische grondrechten hebben, door te visualiseren hoe een toekomstige dier-inclusieve open samenleving eruit zou kunnen zien, en door te laten zien dat dit daadwerkelijk een haalbare en vruchtbare optie is die niet alleen dieren ten goede zou komen, maar ook de open samenleving zelf.

Curriculum vitae

Janneke Vink (Schiedam, 1990) holds a Bachelor's degree in Law (Leiden University, 2011), a Master's degree in Criminal Law and Criminal Procedure (Leiden University, 2013) and a *cum laude* Master's degree in Jurisprudence and Philosophy of Law (Leiden University, 2013). Vink has been lecturer of several Jurisprudential courses at Leiden University, guest lecturer for a science course on Human Evolution at Leiden University, lecturer for the Pre-University College at Leiden University, editor and author for the Leiden Law Blog, and is founding board member of the Dutch branch of the non-governmental organization Minding Animals. Vink is also a member of the study group on Animal Ethics of the Dutch Research School of Philosophy (Nederlandse Onderzoeksschool Wijsbegeerte). Her doctoral research was conducted at the Institute for the Interdisciplinary Study of the Law at Leiden University. Vink is currently Assistant Professor at the Department of Constitutional and Administrative Law and Jurisprudence of the Open University of the Netherlands.

The Open Society and Its Animals is an interdisciplinary study centred on the political and legal position of animals in liberal democracies. With due concern for both animals and the sustainability of liberal democracies, *The Open Society and Its Animals* seeks to redefine animals' political-legal position in the most successful political model of our time: the liberal democracy.

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