The open society and its animals

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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.