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THINKING OUTSIDE THE CAGE: SACRIFICE, EQUALITY AND THE PLIGHT OF THE ANIMAL

By

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DECLARATION

I declare that this dissertation, which I hereby submit for the degree LLM (Jurisprudence) at the University of Pretoria, is my own work and has not previously been submitted by me for a degree at this or any other tertiary institution.

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SUMMARY

In this dissertation I illustrate the existence of anthropocentric social and legal configurations that are maintained through the embodiment of a belief system in which animals occupy a space as sacrificial beings, and philosophically examine and call into question the way in which we relate to animals within these schemata of domination. These sacrificial structures or arrangements contain animals in an identity which marks them as Other and I subsequently call for a problematisation and destabilisation of these structures. I employ a critical approach that seeks to move beyond the traditional rights-based approach that has come to dominate animal liberation discourse. Such an approach emphasises the significance of deconstruction for animal ethics and highlights the way in which the animal is subjected to marginalisation within anthropocentric schemata of domination.

From this perspective, I argue that we need a deconstruction and ensuing displacement of the human (subject) as phallogocentric structure and that we need to embrace a mode of being that facilitates the development of an ethical relation to the animal Other. To this end, I advance veganism as a form of deconstruction and ethical way of being that allows us to criticise and resist repression of the animal Other.

I also contemplate animal subjugation as a relation to the law and examine the ideological underpinnings of animal welfare theory and animal rights theory, the two most prominent theories aimed at transforming the human-animal relation. I proceed to critically engage with the philosophical presuppositions of animal rights theory as a possible foundation for animal liberation by addressing, like others have done before me, the historical and theoretical gaps of rights theory. I argue that animal rights theory invokes dichotomies and rigid identities that replicate and perpetuate anthropocentric relations of subordination by (paradoxically) confirming a certain interpretation of the human subject that lies at the very core of animal subjugation. I ultimately argue that such an approach must be rejected if we are to hold open the possibility of recalibrating the animal's status as sacrificial being.

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CHAPTER 1 INTRODUCTION

1.1 Preface

Humans' relationship with other animals has proven to be a complex, confusing and discerning one, often exposing the capacity to arbitrarily discriminate, marginalise and enslave. This behaviour becomes all the more startling once we examine the foundations and logical inconsistencies of the presuppositions underlying our actions. Hannah Arendt has confuted the portrayal of evil as inevitably linked with rudiments of malice and premeditation. For Arendt, the banality of evil lies in the individual's inability and unwillingness to critically reflect, to unthinkingly accept and engage in everyday acts that are prejudicial to others.[1]

Nowhere does this depiction of evil ring truer than in our treatment of animals. Our behaviour towards them illustrates an incapacity for empathising with the victims of our actions and the unwillingness to examine the beliefs that propel our conduct. Through centuries of denouncing animals to objects to be used as we see fit, we have normalised the torture, exploitation and killing of our fellow earthlings. We embody a set of assumptions wherein animals occupy a space as sacrificial beings, making our actions seem rational. As long as these assumptions are left unquestioned, the speciesist[2] and hierarchical way of valuing different parts of nature will be preserved and the process of Othering, through the perpetuation of human-animal and subject-object value dualisms, will persist. Our unwillingness to scrutinise our belief systems and the way we relate to animals might ultimately prove to be the biggest impediment to the advancement of an ethical relation to the animal Other.

My argument in this study is premised on the view that there is something fundamentally wrong with both the ethics and the law governing our treatment of animals. In this regard I furthermore share the view that there can be no meaningful separation between a strive for 'formal' justice in the public legal sphere and in the 'informal' sphere of social relations. In the context of feminist theory, Drucilla Cornell's

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1 See Arendt H *Eichmann in Jerusalem: A report on the banality of evil* (1963).

2 Singer defines 'speciesism' as 'a prejudice or attitude of bias in favour of the interests of members of one's own species and against those of members of other species'. Singer P *Animal liberation* 4 ed (2009) 6.

reading of Jacques Lacan's analysis of the cultural constructs that play a role in the formation of identity within a gender hierarchy, emphasises that prevailing societal norms and assumptions will inevitably be replicated in the legal system.[3] The same holds true for the pervasiveness of the way in which we view animals within an anthropocentric speciesist hierarchy and the profound hold that this has over attempts at transformation in various spheres. The way in which the law 'others' the animal and sanctions and legitimises her pain and suffering, reiterates Cornell's claim. Jacques Derrida uses the term 'carnophallogocentrism' to illustrate the complexity of the various traditions that configure the sacrificial structure characterising 'the (human) subject' and the hegemony that typifies our interaction with animals. He delineates carnophallogocentrism as:

> The whole canonized or hegemonic discourse of Western metaphysics or religions, including the most original forms that this discourse might assume today ... [being discourse that is] a matter of discerning a place left open, in the very structure of these discourses (which are also "cultures") for a noncriminal putting to death. Such are the executions of ingestion, incorporation, or introjections of the corpse. An operation as real as it is symbolic when the corpse is "animal".[4]

A deconstruction of carnophallogocentrism, for Derrida, fundamentally necessitates an interrogation of our (anthropocentric) conceptualisation of animality and the ethico-political consequences thereof. Whilst the question of animality 'is difficult and enigmatic in itself, it also represents the limit upon which all the great questions are formed and determined, as well as all the concepts that attempt to delimit what is "proper to man", the essence and future of humanity, ethics, politics, law, "human rights", "crimes against humanity", "genocide", etc'.[5] Derrida engages with these (de)limitations by questioning the way in which the human-animal distinction is drawn in Western metaphysical discourse as an oppositional cut. By juxtaposing the human (subject) and animal (object), the differences between humans and animals are

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3 Cornell D *The philosophy of the limit* (1992) 174.

4 Derrida J and Nancy J '"Eating well," or the calculation of the subject: An interview with Jacques Derrida' (trans Connor P and Ronell A) in Cadava E, Connor P and Nancy J (eds) *Who comes after the subject?* (1991) 96, 112.

5 Derrida J and Roudinesco E *For what tomorrow ... A dialogue* (2001) (trans Fort J, 2004) 63.

conceptualised as a contradiction and our hegemony is maintained. Destabilisation of this human-animal oppositional distinction not only challenges the anthropocentric order in which the human claims a position as patriarchal centre of beings, but opens up a space for a further deconstruction of traditions and institutions that are founded on- and maintain such distinction, like the *de jure* legitimisation of animal exploitation and sacrifice.

I will accordingly also investigate animal subjugation as a relation to the law in this dissertation. The role of law in sustaining anthropocentric relations of power and domination has been illustrated by various institutionalised legal readings, most recently in the case of *Smit NO v Zwelithini Kabhekuzulu NO*[6] when the trustees of Animal Rights Africa approached the Pietermaritzburg High Court for an interim interdict that would prevent the inhumane suffering and killing of at least one animal during the *Ukweshwama* festival in Kwazulu Natal. The law confirmed the animal to be nothing more than the legal property of his owner, a mere object that possessed no interest to merit protection from suffering. He was a 'thing' and sacrificial object and could subsequently be subjected to almost any human practice, even if it caused horrific suffering. Despite the existence of the Animal Protection Act 71 of 1962 ('the Animal Protection Act'), supposedly intended to prevent cruelty to animals, the application from Animal Rights Africa was dismissed. The outcome of this case thus begs a questioning of not only the legitimisation of anthropocentric privilege and domination, but the efficiency of the way in which we utilise the law in the pursuit of animal liberation.

The *Ukweshwama*-finding is the latest addition to a large corpus of case law reinforcing the sacrificial object status of animals. Being acutely mindful of the suffering that goes on around me, reading these judgments makes me feel like a stranger in a strange land. J.M. Coetzee accurately illustrates this feeling by way of Elizabeth Costello, the title character and protagonist in one of his novels.[7] After receiving an award for her contribution to literature, Costello utilises her lecture as an opportunity to address the plight of the animal. After her speech, she is overcome by

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6 *Smit NO & others v His Majesty King Goodwill Zwelithini Kabhekuzulu & others* [2010] JOL 25699 (KZP).

7 See Coetzee J *Elizabeth Costello: Eight lessons* (2003).

the complacency of her fellow man and the seemingly impotence of her words. She says to her son:

> It's that I no longer know where I am. I seem to move around perfectly easily among people, to have perfectly normal relations with them. Is it possible, I ask myself, that all of them are participants in a crime of stupefying proportions? Am I fantasizing it all? I must be mad! Yet every day I see the evidences. The very people I suspect produce the evidence, exhibit it, offer it to me. Corpses. Fragments of corpses that they have bought for money. It is as if I were to visit friends, and to make some polite remark about the lamp in their living room, and they were to say, "Yes, it's nice, isn't it? Polish-Jewish skin it's made of, we find that's best, the skins of young Polish-Jewish virgins." Then I go to the bathroom and the soap wrapper says, "Treblinka – 100% human stearate." Am I dreaming, I say to myself? What kind of house is this? Yet I'm not dreaming. I look into your eyes, into [your wife's] eyes, into the children's, and I see only kindness, human kindness. Calm down, I tell myself, you are making a mountain out of a molehill. This is life. Everyone else comes to terms with it, why can't you? *Why can't you?*[8]

The answer to Costello's question, I would argue, is that we shouldn't come to terms with it. We need a fundamental shift in the way we recognise and relate to animals. The plight of the animal does not call for acceptance, but rather for critical reflection, a commitment to scrutinising our way of being and the willingness to utilise the outcome of this process as a premise for personal judgment.

1.2 Problem statement, research questions and underlying theory

The proposed problem I identify is the existence of an anthropocentric hierarchical structure which is maintained through the embodiment of a belief system in which animals occupy a space as sacrificial beings. Within this sacrificial structure or arrangement humans claim a privileged position as the *telos* and central point of reference amongst other animals. The research questions arising from my problem statement are as follows:

[8] *Idem* 114 - 115.

1. How do we address and eradicate this hierarchical structure and the categorisation of the animal as Other and sacrificial being?

I will argue that we need a deconstruction and ensuing displacement of the human subject as phallogocentric structure and patriarchal centre of beings and that we need to embrace a mode of being that allows us to promote an ethical relation to the animal Other. To this end I will explore the possibility of justice, specifically in relation to the animal, and advance veganism as a form of deconstruction and one ethical way of being that allows us to criticise and resist anthropocentric configurations that maintain and perpetuate subjugation of the animal Other.

2. What is the relationship between animal welfare theory and animal rights theory?

In answering this question, I will assert that there are fundamental theoretical and ideological inconsistencies between the two paradigms that demand a conceptual separation. I will illustrate that animal welfare theory accepts and functions within the anthropocentric hierarchical structure that I have identified and perpetuates a human-animal value dualism, whilst animal rightists seek to destabilise this structure by recalibrating the animal's status as sacrificial being.

3. Can the more progressive approach grounded in rights theory effectively address the plight of animals and liberate them from oppression?

I will argue that animal rights theory, notwithstanding its ideological aspiration, will not provide an adequate basis of relief from the exploitive way in which we treat them as animal rights theory is founded on an assumption of similarity, a presupposition that facilitates the exercise of power and human domination and denies the singularity and otherness of the animal Other.

My theoretical point of departure for the exploration of the problem statement will be a critical approach that seeks to move beyond the traditional rights-based approach that has dominated discourse on animal ethics. With this, I wish to introduce a

deconstructive approach that illustrates the significance of deconstruction for animal ethics and highlights the way in which the animal is subjected to marginalisation within anthropocentric schemata of domination. My approach draws on critical and ethical strands in Continental philosophical thought, specifically Derrida's deconstructive gestures with regards to questions of animality, law and justice[9] and Emmanuel Levinas' theory of ethics.[10]

1.3 Motivation

We find various approaches that seek to liberate animals from the struggling end of the human-animal power relationship. The most dominant and celebrated approach is based in rights theory and regards the inclusion of animals in the community of rightsholders as an important prerequisite for a strive towards the ideal of 'equality'. At the heart of this attempt, lies an obvious engagement with the very notion of equality itself. What is equality? Who is entitled to equal consideration and why?

Equality was translated and adopted from mathematical science, where it is used to describe binary relations of quantitative equivalence, into moral and legal discourse.[11] Equality's translation into an explanatory norm has problematic consequences. True to its mathematical roots, equality still functions as a relational term in law and moral discourse, articulating a relationship of identity or non-identity

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9 See Derrida J *The animal that therefore I am* (2006) (trans Wills D, 2008); Derrida and Roudinesco *For what tomorrow*; Derrida and Nancy '"Eating well"' in *Who comes after the subject?*; Derrida J 'Force of law: The "mystical foundation of authority"' in Anidjar G (ed) *Acts of religion* (2002) 230.

10 By exploring the human-animal relationship through the prism of Levinasian ethics, my study supports the supposition that the animal (Other) does indeed have a 'face' that calls my mode of existence into question. Whilst Levinasian ethics is undeniably constrained by an anthropocentric predilection, I share the view that the face of the Other cannot be delimited to the human realm as the underlying logic of Levinas' thought does not allow for such anthropocentrism. See Levinas E *Totality and infinity: An essay on exteriority* (1961) (trans Lingis A, 1969). For a direct engagement by Levinas on the question of 'the animal', see Levinas E 'The paradox of morality: An interview with Emmanuel Levinas' (trans Benjamin A and Wright T) in Bernasconi R and Wood D (eds) *The provocation of Levinas: Rethinking the other* (1988) 168. (In this interview, Levinas *inter alia* grants that 'one cannot entirely refuse the face of an animal. It is via the face that one understands, for example, a dog' (p 169). For a comprehensive discussion on the value of Levinasian ethics for animal studies, see Crowe J 'Levinasian ethics and animal rights' (2008) 26 *Windsor Yearbook of Access to Justice* 313; Calarco M *Zoographies: The question of the animal from Heidegger to Derrida* (2008) 55 - 77; Calarco M and Atterton P (eds) *Animal philosophy: Essential readings in continental thought* (2004).

11 Camp I and Gonzalez M 'The philosophical notion of equality' (2009) 8 *Ave Maria Law Review* 153, 156 - 166.

between subjects. There is however no independent substantive normative core to 'equality'. Equality is a vacuous concept that can only function derivatively in relation to an external criterion or measure and is furthermore dependent on accompanying normative directives dictating specific treatment, these directives giving 'equality' its overall (normative) shape.[12]

Discourse on animal ethics has been preoccupied with equality-based arguments for centuries. Utilitarian thinker Jeremy Bentham was one of the first scholars to argue that equality, as a basic moral principle, requires that equal consideration of interests should apply to all animals regardless of specie. Bentham drew a comparison between the oppression of humans (racism) and other animals that are not human (speciesism):

> The day *may* come when the rest of the animal creation may acquire those rights which never could have been witholden from them but by the hand of tyranny. The French have already discovered that the blackness of the skin is no reason a human being should be abandoned without redress to the caprice of a tormentor. It may one day come to be recognized that the number of the legs, the villosity of the skin, or the termination of the *os sacrum* are reasons equally insufficient for abandoning a sensitive being to the same fate.[13]

Whilst Bentham uses the term 'rights' in the passage, his argument is really about equality. Bentham's moral argument does not require or presuppose the existence of a right, but is based on a being's equal capacity to suffer and experience happiness and the interest in avoiding the former and pursuing the latter.[14] He notoriously described claims about the existence of 'natural and imprescriptable rights' as 'nonsense upon stilts' and fictions like the 'belief in witches and unicorns'.[15] Being one of the ontological presuppositions of rights theory, the notion of 'equality' is however as fundamental in animal rights discourse as it is in utilitarian theory. The

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12 See Westen P 'The meaning of equality in law, science, math, and morals' (1983) 81 *Michigan Law Review* 604.

13 Bentham J *An introduction to the principles of morals and legislation* 2 ed (1823) 235.

14 Singer *Animal liberation* 8.

15 See Bentham J 'Anarchical fallacies: Being an examination of the declaration of rights issued during the French revolution' in Waldron J (ed) *Nonsense upon stilts* (1987) 46.

proposed extension of rights to animals is founded in the classical tradition of natural law and the (human) rights theory that developed from this paradigm in the seventeenth and eighteenth centuries. The philosophical premises of rights theory reflect the ideal of a community of rational, autonomous subjects whose territory or property is worthy of protection from other subjects.[16]

Rights theory, as a basis for advancing the interests of humans and other animals alike, has been critiqued from various perspectives. Almost two hundred years after Bentham's rejection of 'natural rights', critical legal scholar Costas Douzinas argues from the speculative tradition of philosophy that (human) rights theory is haunted by historical and theoretical gaps and that the philosophical presuppositions and logic of rights theory renders it incapable of realising its emancipatory ideal through reason and law.[17] Critical feminist philosophers like Carol Adams and Josephine Donovan have argued that the concept of 'animal rights' is problematic if we are to consider the assumptions of similarity (between humans and other animals) and the ontology of (equal) autonomous agency underlying animal rights theory.[18] Derrida, too, rejects rights language as a mode of advancing our relation to animals and critiques rights theory as a way of separating ourselves from other animals and disavowing our own animality. Animal rights theory, for Derrida, is one of the ways in which we confirm and perpetuate the oppositional human-animal dualism that he finds so problematic:

> To confer or to recognise rights for "animals" is a surreptitious or implicit way of confirming a certain interpretation of the human subject, which itself will have been the very lever of the worst violence carried out against nonhuman living beings.[19]

Like the abovementioned group of diverse theorists, I do not believe that extending rights to animals will provide an adequate basis for liberation from the exploitive way in which we treat them. There is no solid philosophical foundation to rights theory that allows for it to be utilised as a tool of resistance against domination and oppression.

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16 Donovan J and Adams C 'Introduction' in Donovan J and Adams C (eds) *Beyond animal rights: A feminist caring ethic for the treatment of animals* (1996) 13, 14.
17 See Douzinas C *The end of human rights* (2000).
18 See Donovan and Adams 'Introduction' in *Beyond animal rights.*
19 Derrida and Roudinesco *For what tomorrow* 65.

As Douzinas argues, 'there is nothing at the core of the onion, no centre or kernel that gives (human) rights their overall shape'.[20] Rather, rights are used as rhetorical tools to rationalise and facilitate the exercise of power. The history and development of rights theory reflect a shift away from nature - as the standard of right - towards the individual and the legalisation and transformation of her desires into rights. With this shift, 'is' and 'ought' were collapsed and rights reduced 'to the disciplinary priorities of power and domination'.[21]

Within the discourse and practice of animal rights, this power and domination manifests in an anthropocentric hierarchical structure. The striations of this hierarchy can as easily be used to grant rights to certain animals as it can be to justify denying rights to those at the lower ranks in the hierarchy. It is generally held that possessors of rights should share a common attribute(s). The same 'similarity argument' that propelled the civil rights movement, feminist movement and gay rights movement, also serves as the basis for the animal rights movement. The premise of this argument is that similar entities should be treated alike.[22]

Whether argued from a welfarist-, utilitarian-, rights based- or contractarian perspective, the similarity argument has permeated animal liberation discourse. Utilitarians like Bentham and Peter Singer call for equal treatment of animals on the basis of the similarity between the being's nervous system and that of humans and their ensuing capacity to suffer,[23] whilst animal rights activists like Steven Wise call for the legal personhood of animals with the mental capacities to meet the criteria of the standard tests for personhood.[24] This (similarity) argument is one of the many problematic outgrowths related to the (legal and moral) doctrine of equality. In terms of the similarity principle, two subjects are deserving of uniform treatment when found to be similar or 'equal' in relation to an external measure or criterion. This process of comparison condenses the subjects to a specific representational schema, a necessary and inevitable precondition when attempting to compare and allineate

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20 Douzinas C *Human rights and empire: The political philosophy of cosmopolitanism* (2007) 14.
21 Douzinas *The end of human rights* 11.
22 Bryant T 'Similarity or difference as a basis for justice: Must animals be like humans to be legally protected from humans?' (2007) 70 *Law and Contemporary Problems* 207, 208.
23 Singer *Animal liberation* 11.
24 Wise S *Rattling the cage: Toward legal rights for animal*s (2000) 32.

wholly individual subjects, thereby rendering the approach irreconcilable with an attempt at advancing the ethical relation to the animal Other. This obstacle is peculiar to the milieu of moral and legal discourse, wherein the subjects are characterised by singularity and particularity. Conversely, the subjects of mathematics have no differentiating or individualising characteristics, each proxy of 'one' or 'x' being quantitatively identical to the next 'one' or 'x'.[25] This mask of similitude is lost in equality's translation into law and moral philosophy.

The similarity argument as a basis for advancing the interest of animals is furthermore fundamentally anthropocentric, as the human is utilised as the ground symbolic and measure against which all other animals are measured. The similarity argument renders the diversity of animal life immaterial and 'promotes pernicious hierarchical ordering of nonhuman animals based on their relative proximity to humans'.[26] Within the anthropocentric structure, the human subject inevitably occupies a space at the top rank of the hierarchy with other animals being subserviently ranked according to their (perceived) proximity to humans. The result is that the other animal is identified and categorised as the symmetrical Other. Simone De Beauvoir has illustrated how women are denied being 'part of the human *Mitsein*' when denied her otherness by being marked as *man's* Other.[27] For De Beauvoir, this is the manifestation of a patriarchal society that justifies female subjugation through the creation of myth:

> A myth implies a subject who projects its hopes and fears of a transcendent heaven. Not positing themselves as Subject, women have not created the virile myth that would reflect their projects; they have neither religion nor poetry that belong to them alone: they still dream through men's dreams. They worship the gods made by men. And males have shaped the great virile figures for their own exaltation: Hercules, Prometheus, Parsifal; in the destiny of these heroes, woman has merely a secondary role. Undoubtedly, there are stylised images of man as he is in his relations with women: father, seducer, husband, the jealous one, the good son, the bad son; but

25 Camp and Gonzalez 'The philosophical notion of equality' *AMLR* 157.
26 Bryant 'Similarity or difference as a basis for justice' *LCP* 210.
27 De Beauvoir S *The second sex* (1949) (trans Borde C and Malovany-Chevallier S, 2009) 17.

> men are the ones who have established them, and they have not attained the dignity of myth, they are barely more than clichés, while woman is exclusively defined in her relation to man. The asymmetry of the two categories, male and female, can be seen in the unilateral constitution of sexual myths. Woman is sometimes designated as 'sex'; it is she who is the flesh, its delights and its dangers. That for women it is man who is sexed and carnal is a truth that has never been proclaimed because there is no one to proclaim it. The representation of the world as the world itself is the work of men; they describe it from a point of view that is their own and that they confound with the absolute truth.[28]

Similarly, the myths of the animal also justify the categorisation of the animal as Other and perpetuates a human-animal dualism. The justificatory apparatus of an anthropocentric order require the creation of myths, as it is this exact structure of rationalisation that denies the animal her singularity, intrinsic worth and being. This allows us to not only maintain a hierarchical barrier between ourselves and other animals, but also erects a pecking order amongst the animals that are not human. The extent to which 'animal rights' have been realised, being extended to only a small group of primates considered to be our closest nonhuman relatives, reflect such hierarchy. It also illustrates the complexity and ambiguity of the myths of the animal. As De Beauvoir argues, 'it is always difficult to describe a myth; it does not lend itself to being grasped or defined; it haunts consciousness without ever being posited opposite them as a fixed object. The object fluctuates so much and is so contradictory that its unity is not at first discerned...'.[29] The animal is both the wise owl and the pest, man's best friend and meat, brethren and slave, nature and thing.

Like De Beauvoir, I feel a discomfort with an approach aimed at reinterpreting, rather than dethroning or displacing myths. Myth reflects the repression of animals in an identity that categorises them as the Other, the myth aims to justify this identification of the animal as Other. This structure of justification denies particularity and

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28 *Idem* 166.
29 *Ibid*.

multiplicity and just as 'each woman becomes Woman',[30] the animal is also abstracted and denied her singularity, being turned into something rather than being acknowledged as someone. The myth will thus ultimately only perpetuate the categorisation of the animal as Other, in turn undermining the recognition of the animal as individual being. In this dissertation I aim to 'dethrone' the myths of the animal by deconstructively engaging with the anthropocentric apparatus that demand the creation of myth, rather than reinterpreting myths of the animal.

1.4 On terminology

Although the term 'animal' strictly speaking refers to all beings belonging to the kingdom *Animalia* and thus includes human beings,[31] for the purposes of this dissertation the term 'animal', unless otherwise stated, will be used to denote animals that are not human. I have come to reject the term 'nonhuman animal' that is commonly used in literature on animal ethics, due to the subordinate connotation that the term engenders.

The term 'animal rights', and specifically the phrase 'animal rights movement', is often used loosely to depict any attempt at addressing and bettering the plight of animals. For the purposes of this dissertation the terms 'animal rights' and 'animal rights movement' specifically refer to a theory or approach based on the notion that animals should be rights-bearers in order to entitle them to (legal) protection against violation. I use the term 'animal advocacy (movement)' as a hypernym to refer to the whole spectrum of theoretical and philosophical approaches that reflect a moral concern for animals and the term 'animal liberation' in reference to an approach committed to the complete abolition of animal use and the enactment of an ethical relation to the animal Other.

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30 Cornell D *Beyond accommodation: Ethical feminism, deconstruction and the law* 2 ed (1991) 190.

31 Humans are biologically classified as belonging to 'phylum: Chordata, class: Mammalia, order: Primates, family: Hominids, species: *Homo sapiens*'. Korsgaard C 'Interacting with animals: A Kantian account' in Beauchamp T and Frey R (eds) *The Oxford handbook of animal ethics* (2011) 91, 91.

1.5 Chapter overview

This dissertation consists of five chapters. After this introductory chapter in which I give an exposition of the meaning we ascribe to the animal and the space that she consequently occupies within an anthropocentric hierarchical structure, I proceed in chapter two to address my first research question by reflecting on the prospect of destabilising this anthropocentric structure and advancing an ethical relation to the animal Other. In the first part of this chapter I trace the lineage of the term equality and investigate its operation in moral and legal discourse. The manifold ramifications of the logical functioning of equality in these contexts are a central concern of this dissertation and my theoretical exposition in this chapter will facilitate my reflections in the following chapters.

I will firstly illustrate why equality's translation into a legal and moral concept is problematic for various reasons and argue that the articulation of normative directives through the language of equality precludes the possibility of an ethical encounter with the animal Other. The logical functioning of legal- and moral equality necessitates association with an external measure and a subsequent reversion to generality, thereby disavowing the alterity of the Other. In the second part of the chapter I will explore the idea of justice, conceptualised as an incalculable duty to the Other, as a possible alternative to the language of equality. I will examine the interplay between law and justice through Derrida's notion of '(un)deconstructability'[32] and draw on Drucilla Cornell's reconceptualisation of deconstruction as the 'philosophy of the limit'[33] to highlight the ethical significance of deconstructive theory for law. Finally, I will explore how we can address anthropocentric formations by explicating a link between the need for a deconstruction of the human subject (as being that sacrifices) and veganism (as one mode of being and form of deconstruction that both resists the categorisation of the animal as sacrificial being and displaces the human as head of an anthropocentric hierarchical structure).

In chapter three I will engage with my second research question by philosophically examining the two most prominent theories that afford protection to animals and the

[32] See Derrida 'Force of law' in *Acts of religion*.
[33] See Cornell *The philosophy of the limit*.

ideological purlieu that separates these theories. On the one end, animal welfarists aim to protect the interest of animals in not suffering (unnecessarily) and call for a set of human derived guidelines to direct the way we treat the animals under our control.[34] Animal welfare is based on utilitarian theory and concretised in animal protection laws that prohibit gratuitous acts of cruelty and criminalises certain pronounced abusive behaviour towards animals. On the other end, proponents of the animal rights approach maintain that animals possess moral rights and draw on the human rights paradigm that developed from natural law and natural rights theory to endorse a set of robust (legal) rights to govern our treatment of animals.[35] Animal rights are prohibitionist, liquidating the property status of animals and protecting animals against all forms of human (ab)use, torture and killing.

My main focus in this chapter is to illustrate that these two approaches are based on contradictory views on the moral status of animals and that the 'new welfarist' approach which advocates welfarist reforms as essential short-term steps *en route* to the ultimate ideal of animal rights is philosophically unsound in assuming that these approaches are ideologically compatible. Welfarists accept and function within an anthropocentric construction that presupposes a (human) subject – (animal) object value dualism whilst animal rightists strive to displace this status of animals as sacrificial objects. My exploration of the ideological foundations of animal rights theory in this chapter provides the platform from which I will explore the philosophical presuppositions, or what Douzinas calls 'the conditions of existence',[36] of (animal) rights discourse in the following chapter. I will start off by giving a brief history of animal law and conception, highlighting the dissonant perspectives that facilitated the divergence of the welfare- and rights-based approaches. I will draw on Derrida's thesis on the exclusion of animals from the proscription 'thou shalt not kill' as facilitator of hegemony and sacrifice[37] and Karin van Marle's deconstructive approach

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34 See Summer L *Welfare, happiness and ethics* (1996); Hooker B *Ideal code, real world* (2000); Frey R 'Moral standing, the value of lives, and speciesism' in LaFollette H (ed) *Ethics in practice* 3 ed (2007) 192.

35 See Regan T *The case for animal rights* 2 ed (2004); Regan T *Defending animal rights* (2001); Wise *Rattling the cage*; Francione G *Rain without thunder: The ideology of the animal rights movement* (1996).

36 Douzinas *The end of human rights* 3.

37 See Derrida and Nancy '"Eating well"' in *Who comes after the subject?*

of slowness[38] to critically reflect on the inherent conflict and ideological discrepancies between these approaches that in my opinion render an amalgamation paradoxical and counterproductive.

Having identified animal rights theory as ideologically engaged in the struggle to liberate animals from human domination and their status as sacrificial beings in the previous chapter, I turn to examine whether the philosophical and theoretical foundations of rights theory allow for the realisation of its emancipatory ideal in chapter four. I will answer my third research question on whether the extension of legal rights to animals can effectively address their plight and liberate them from oppression in the negative, arguing that animal rights have only paradoxes to offer and ultimately preserve the anthropocentric hierarchical structure that it seeks to displace.

In this chapter I aim to address, like others have done before me, the historical and theoretical gaps of rights theory.[39] Although my specific focus will be on animal rights theory, this task requires that I review both animal rights literature and law and literature relating to human rights, since the human rights paradigm serves as the foundation for the rights theory applied to other animals. To this end I will trace the genealogy of 'rights', from its classical natural law beginnings as 'natural rights' to its mutation into 'human rights', highlighting how this shift was facilitated by the creation of a radical new moral discourse that destroyed the classical tradition of natural law. I will then employ a semiotic approach to investigate the composition of rights and how rights have been utilised as symbolic strategies in the pursuit of animal liberation. My focus will be on deconstructing the similarity principle that characterises the current concept of animal rights. The similarity principle arrogates 'the human' as ground symbolic and requires that animals be measured against humans to determine their worthiness of rights. I aim to illustrate that this approach is irreconcilable with an attempt at advancing an ethical relation to the animal Other and that it perpetuates hierarchy. Contra the animal liberation movement's aspiration of disimprisoning

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38 See Van Marle K 'Law's time, particularity and slowness' (2003) 19 *South African Journal on Human Rights* 239.

39 See Douzinas *The end of human rights*; Douzinas *Human rights and empire*; Gaete R *Human rights and the limits of critical reason* (1993); Evans T (ed) *Human rights: Fifty years on* (1998).

animals from captivity and exploitation, this approach furthermore requires that research be done on animals to prove their similarity, rendering the approach internally paradoxical.

In my final chapter, I will reflect on the preceding chapters. I will provide a holistic overview of the issues that I pursued and considerations that I discovered by briefly summarising the key aspects of my study and drawing my arguments to a close.

CHAPTER 2 MOVING BEYOND THE LANGUAGE OF EQUALITY TOWARDS AN ETHICAL RELATION TO THE ANIMAL OTHER: JUSTICE, DECONSTRUCTION AND THE LAW

2.1 Introduction

My study is based on the argument that our treatment of animals stem from social and legal constructs that contain animals in an identity which marks them as Other and sacrificial beings. My aim in this chapter is to reflect on how we can dismantle and eradicate these anthropocentric constructs that preserve the fallacy that animals exist as a means to human ends in order to affirm the animal as individual with intrinsic worth and liberate her from human oppression.

The language of equality is commonly employed to articulate theories aimed at facilitating a shift in the way we recognise and treat animals and ultimately displacing their subordinate status as sacrificial beings.[40] In this chapter I will argue that it is counterproductive to employ the language of equality in legal and moral discourse, as it is an empty concept that has no meaning apart from the exterior principles and directives it incorporates by reference.[41] Equality functions in relation to a predetermined or anterior criterion of measurement, thereby reverting to generality and repressing its subjects to a specific representational schema. I aim to illustrate that the 'idea of justice' moves beyond the generality of the language of equality by consigning the individuality of a subject and will propose that we employ this as an alternative normative framework to the language of equality.

To this end, I will start off by tracing the lineage of the term equality and its adoption and meaning in legal and moral discourse. I will then highlight the congruence between equality and justice and illustrate why the idea of justice, conceptualised as an incalculable demand, moves beyond the language of equality and provides a better framework through which to conceptualise and articulate normative directives. In the second part of the chapter I will illustrate why a strive towards the idea of

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40 See Singer *Animal liberation*; Wise *Rattling the cage*; Hursthouse R *Ethics, humans and other animals: An introduction with readings* (2000).

41 Westen 'The meaning of equality in law, science, math, and morals' *MLR* 604.

justice does not condense the Other to a specific context or representational schema by prescribing a normative directive at the hand of a single criterion, but demands that we strive to wholly embrace the (singular) being of the Other. In this part of the chapter I will examine the philosophical foundations of- and reciprocation between justice and deconstruction against the deconstructable structure of the law and drawing on Drucilla Cornell's reconception of deconstruction as the 'philosophy of the limit', I will illustrate the ethical significance of deconstruction for law. Relying on this notion of ethics, I will finally examine the idea of justice as it relates to animals by demonstrating the deconstructive capacity and critical potential of veganism[42] and arguing that veganism plays an important role in exposing and resisting anthropocentric configurations that perpetuate the subservient position of the animal Other. Veganism, I will argue, is a way of being in the world that resists and displaces the human as patriarchal centre of beings and allows us to circumvent some of the repressive dispositions characterising the human as phallogocentric structure, facilitating the liberation of the animal from human domination and exploitation.

By doing so I am allineating veganism, justice and the strive for an ethical relation, the latter being understood as a concern with 'the kind of person one must become in order to develop a nonviolative relationship to the Other'.[43] As will become clear from the following discussion, my contemplations on veganism as a form of deconstruction and way of being however entails tentative reflections rather than a concretised or simplified account of justice or the ethical relationship to the animal Other.[44] Veganism does not constitute justice or a definite solution to the plight of the animal, the moral question is complex and, as Derrida reminds us, comes back 'to determining the best, most respectful, most grateful, and also most giving way of relating to the other and of relating the other to the self'.[45] I will emphasise that the

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42 There is an explicit ethical dimension to the concept of veganism that I advance in this dissertation. Consequently, veganism as I use it here does not signify a restrictive diet for health or religious reasons, but refers to a belief system and way of being that opposes the commodification of animals and the extension of this philosophy into all areas of life.

43 Cornell contrasts the ethical relation with morality, the latter designating 'any attempt to spell out how one *determines* a "right way to behave," behavioural norms which, once determined, can be translated into a system of rules'. Cornell *The philosophy of the limit* 13.

44 For the alternative view that 'there is no essential co-belonging of deconstruction and vegetarianism' and accompanying call for 'a thorough deconstruction of existing discourses on vegetarianism', see Calarco M 'Deconstruction is not vegetarianism: Humanism, subjectivity, and animal ethics' (2005) 37 *Continental Philosophy Review* 175.

45 Derrida and Nancy '"Eating well"' in *Who comes after the subject?* 114.

force of *différance* prevents us from embracing the Other in totality, that 'one eats him regardless and lets oneself be eaten by him'.[46] As 'one never eats entirely on one's own' it is ultimately not a question of eating, but of eating *well*.[47] I will explore and advance veganism as one way of eating well.

2.2 Understanding (and misunderstanding) equality: Treating unequals equally

The notion of equality is a perplexing one. Despite being the subject matter of an extensive body of scholarship, it is as scarcely understood as it is widely used. The term has become infused in our everyday vernacular and we 'strive towards' animal equality, social equality, racial equality, gay- and lesbian equality – often not realising that equality is in itself a vacuous concept that is entirely reliant on preceding normative standards that endow the term with meaning.[48]

The language of equality becomes problematic on several levels when applied as an explanatory norm in legal and moral discourse. Because the concept has no normative content of its own, it obscures the underlying issues at hand. Within this context, equality can only ever function as an (empty) place holder through which to articulate a relationship of identity or non-identity that configures between subjects in relation to a specific criterion. This articulation of identity or non-identity (or equality and inequality) can only have meaningful consequences when accompanied by a normative directive dictating specific treatment owed or due to these subjects, as a mere pronouncement of equality does not generate a directive prescribing the way a subject should be treated: an 'ought' does not simply evolve from an 'is'.[49] But as will become clear from the following discussion, the content of this directive, this 'ought', forms the entire substance of equality when applied in legal and moral discourse, rendering the terms 'equal' and 'unequal' redundant and confusing in this context.

Apart from the abstruse nature of equality, the underlying logic of equality also necessitates general application of a 'one size fits all' criterion. Equality finds its

46 *Ibid*.
47 *Idem* 115.
48 Westen 'The meaning of equality in law, science, math, and morals' *MLR* 604.
49 *Idem* 614.

genesis in the abstract science of mathematics, where it is applied to subjects circumscribing quantity. These subjects have no specie, social class, race, sexuality or any other distinguishing and individualising feature. No number 'three' is ever different from another 'three'.[50] In stark contrast to this, the subjects of law and morality are wholly unique individuals and to be unique means to necessarily be unequal and non-identical to another. In this context, equality functions analogously by comparing the subjects' relation to an external measure. Even in this application we can see that equality cannot completely break away from its mathematical nature. Equality remains a relational term, 'a comparison to a measure'.[51]

We are faced with an obvious paradox when trying to compare or measure wholly unique subjects. In order to overcome this paradox, equality has to revert to generality. Equality does not embrace the singularity of entities, but rather prescribes normative directives after recognising commonality that they share in a particular context and thereby condenses the subject to a particular representational schema. This disavowal of singularity and particularity, as I will repeatedly emphasise throughout this dissertation, is a fundamental ethical failure that precludes the possibility of an ethical relation with the Other.

Equality and inequality are of course two sides of the same coin, and one of the most prominent arguments against the idea of animal liberation is that animals are not our equals, that they are different from us in ways that make them sub-human.[52] Proponents of the animal advocacy movement advance a contra-positive argument, arguing that animals possess certain characteristics that we regard as fundamental to being human and that this places animals on equal footing, so to speak, when it comes to questions of equal moral consideration and legal protection. Whilst adversaries of the animal rights movement hold that that we can only argue that animals (should) possess rights similar to those of humans when we dismiss 'innate human characteristics, the ability to express reason, to recognise moral principles ...

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50 Camp and Gonzalez 'The philosophical notion of equality' *AMLR* 156 - 166.

51 *Idem* 160.

52 See Schmahmann D and Polacheck L 'The case against rights for animals' (1995) 22 *Environmental Affairs Law Review* 747; Hearne V 'What's wrong with animal rights?' (1991) September *Harpers* 59.

and to intellectualise',[53] animal rights advocates highlight common denominators like the capacity to suffer, subjective consciousness and similar emotional predispositions.[54]

There is no doubt that there are differences between animals and humans. Nor is there however any doubt that there are various differences between women and men, blacks and whites and homosexuals and heterosexuals. Some will of course argue that the degree of difference between whites and blacks and heterosexuals and homosexuals is smaller than the one between humans and animals. These are after all members of the same specie, the primary differences being skin colour and sexual orientation. Such an argument, ironically, brings us closer to the core and (il)logic of equality when applied in moral philosophy and law: that equality is fundamentally an (empty) comparative concept reliant on a preceding external standard or criterion of measurement, as 'one cannot declare two things to be equal or unequal without first comparing them, and one cannot compare them without first possessing a standard by which they can be jointly measured'.[55]

Proponents and opponents of the animal liberation movement are actually not in disagreement on whether humans and animals are 'equal', but rather about the standard or criterion for measuring the equality (or inequality) of humans and animals that would grant (or deny) them entrance into our sphere of moral consideration. The question then, as I will hereafter explain, is never 'are they equal?' but rather 'are they equal in a certain *respect*'?

In order to understand the confusion and problematic nature of the notion of equality when applied in moral philosophy and law, I will firstly consider the core meaning of the term in mathematics, where it originated, and then examine its incorporation and usage in law and philosophy.

53 Schmahmann and Polacheck 'The case against rights for animals' *EALR* 752.
54 See Singer *Animal liberation*; Regan *The case for animal rights*; Wise *Rattling the cage*.
55 Westen 'The meaning of equality in law, science, math, and morals' *MLR* 608.

2.3 The lineage of the term equality

Equality is derived from equal, which originates from the Latin *aequus*. The term *aequus* can be used in various ways, *inter alia* in reference to an even, level space; to indicate the equal division of something into different parts; and to describe someone's nonpartisan, equitable treatment of others.[56] *Aequus* stems from the Greek term *eoika*, which essentially connotes similarity and not equality, as the Greek term for equal is *isos*.[57] The term equality however has a political meaning in both Latin and Greek and refers to equality of place and age in Latin and has the additional meaning of equality of ratio and proportion in Greek.[58] The latter usage of the term is especially evident in the work of Aristotle, who emphasised the binary meaning of equality as a term that connotes both alikeness and proportional equivalency:

> Equality is twofold: one sort is numerical, the other is according to merit. By numerical I mean being the same and equal in number or size; by according to merit, [being equal] in respect to a ratio. For example, three exceeds two and two one by an equal amount numerically, whereas four exceeds two and two one by an equal amount with respect to a ratio, both being halves. Now while there is agreement that justice in an unqualified sense is according to merit, there are differences, as was said before: some consider themselves to be equal generally if they are equal in some respect, while others claim to merit all things unequally if they are unequal in some respect. Hence two sorts of regimes particularly arise – [rule of] the people and oligarchy. Good birth and virtue exist among few persons, these things among more: nowhere are there a hundred well-born and good persons, but in many places the well off are many. Yet to have everywhere an arrangement that is based simply on one or the other of these sorts of equality is a poor thing. This is evident from the result: none of these sorts or regimes is lasting. The reason for this is that, once the first and initial error is committed, it is impossible not to

56 Camp and Gonzalez 'The philosophical notion of equality' *AMLR* 155.
57 *Idem* 155.
58 *Idem* 156.

> encounter some ill in the end. Hence numerical equality should be used in some cases, and in others equality according to merit.[59]

In this passage Aristotle firstly alludes to the grounding that the term equality finds in mathematics. Secondly, and more importantly, he advances a notion of equality that is not absolute but rather functions as a comparative concept in relation to an external criterion: 'equality *in some respect*'.[60] But how did we come to employ the idea of (mathematical) equality in law and morals? What is the logical nexus between the proposition 'one plus one equals two' and our constitutional principle that 'everyone is equal before the law and has the right to equal protection and benefit of the law'?[61] To answer these questions we need to understand the descriptive- and prescriptive character of equality which, although seemingly rendering the term with two different contextualised meanings, means the same in all its usages.[62]

2.3.1 Descriptive equality: The way things are

When we say that one plus one equals two we are making a descriptive pronouncement, we are stating things the way they are. From this elementary exposition we can firstly deduce that any descriptive reference to equality presupposes plurality, as no solitary thing can be said to be either equal or unequal. Plurality in itself does however not lead to an exposition of equality or inequality, as two objects that are merely conjoined do not necessarily stand in any form of relationship to one another. Consequently, we can also deduce that statements of equality or inequality exceed mere conjointment and that it is comparative in nature.[63] In turn, this presupposes an external standard against which the objects can be measured, as we cannot say that two subjects, for instance Sarah and her companion Labrador Cody, are either equal or unequal without having a measure or standard to compare them against.

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59 Aristotle *The politics* (trans Lord C, 1984) 148.
60 Camp and Gonzalez 'The philosophical notion of equality' *AMLR* 157.
61 See section 9(1) of the Constitution of the Republic of South Africa, 1996.
62 Westen 'The meaning of equality in law, science, math, and morals' *MLR* 607.
63 *Idem* 608.

To say that Sarah and Cody are descriptively equal, then, means that they are equal in significant descriptive respects. Peter Westen identifies three elements characterising assertions of descriptive equality (or inequality):

> To reduce the two concepts to their constituent parts, to speak of descriptive 'equals' (or 'unequals') is to say that (i) two or more things, (ii) have been compared to another by reference to a particular reference of measurement (iii) and have been found to be identical (or nonidentical) by reference by that particular standard.[64]

To argue that Sarah and Cody are descriptively equal is to assert that they are identical with regard to certain descriptive standards that we deem relevant, (like sentience, emotional capacity to be distressed or weight) but not in other respects. Similarly, to argue that Sarah and Cody are descriptively unequal is to assert that they are nonidentical with regard to certain descriptive standards that we deem relevant, (like the ability to speak English, drive a car or meaningfully partake in political elections) but not in other respects.

Certain consequences flow from this understanding of descriptive equality and inequality. Since no two things will ever be identical in every respect (as we would then not be dealing with two things, but one and the same thing) or completely nonidentical in every respect (as that would mean that the two things are not of this world), all things are both descriptively equal and descriptively unequal in some regard.[65] This firstly reiterates Aristotle's notion that there is no such thing as absolute equality. Secondly, the inherent derivative nature of statements of descriptive equality and -inequality becomes clear. Before we can say that two things are descriptively equal, we have to '(i) identify a descriptive standard for measuring them, (ii) invoke the descriptive standard to measure each of them, and (iii) compare the results'.[66] These steps do not serve any explanatory function, but are merely succeeded by a derivative and conclusive statement on the outcome of this comparative process: that the two things are equal (because they are identical in

64 *Idem* 611.
65 *Idem* 610 - 612.
66 *Idem* 613.

significant descriptive respects) or unequal (because they are nonidentical in significant descriptive respects).[67] How, then, do we transpose a descriptive conclusion (that Sarah and Cody are equal) to a prescriptive resolution (that Sarah and Cody must be treated equally)?

2.3.2 Prescriptive equality: The way things should be

It should be clear from the preceding explanation that a descriptive pronouncement of equality does not *ipso facto* dictate a prescriptive directive. Normative equality cannot be deduced from empirical equality, because any two subjects are descriptively equal (and unequal) in some regard and one would otherwise have to infer that the two subjects are simultaneously morally equal and -unequal.[68]

Prescriptive- and descriptive statements of equality and inequality do however share an important common factor in that they are both articulated through the 'language of equality'. Pronouncements of moral- or legal equality also presuppose plurality (at least two subjects) and the existence of an external standard of comparison. The distinctness of descriptive- and prescriptive statements of equality does not lie in the nature of the comparisons they denote, but in the standards against which the comparison is made: descriptive equality is based on descriptive standards whilst prescriptive equality is based on prescriptive standards.[69] Descriptive equality describes a state of sameness at the hand of empirical criteria and prescriptive equality draws on normative standards to prescribe the way that subjects should be treated.

Prescriptive directives automatically configure within the specific structure of prescriptive standards. As Westen explains, prescriptive standards have the following structure:

> Persons who possess characteristics C subscript 1, C subscript 2, C subscript 3, ... C subscript 10, shall render to persons possessing traits T subscript 1, T subscript 2, T subscript 3, ... T subscript 10,

67 *Ibid.*
68 *Idem* 614.
69 *Idem* 615.

> treatment with features F subscript 1, F subscript 2, F subscript 3, ... F subscripts 10, or suffer penalties with elements E subscript 1, E subscript 2, E subscript 3, ... E subscript 10, for failing to do so.[70]

As such, we can identify two fundamental components to prescriptive standards: they are firstly composed of descriptive standards to identify both subjects with specific characteristics and traits and treatment with specific features. Secondly, they conjoin all of these descriptors, requiring subjects with certain characteristics to treat subjects with certain traits in a particular manner.[71] This amalgamation constructs a normative rule that renders subjects prescriptively equal inasmuch as the entities are defined as being entitled to- or owing identical treatment, or prescriptively unequal when defined as not being entitled to- or owing identical treatment.[72]

Consider, for example, the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. The act aims to, *inter alia*, give effect to section 9 of the Constitution and promote equality and eliminate unfair discrimination. The schedule to the act provides a list of unfair practices 'intended to illustrate and emphasise some practices which are or may be unfair, that are widespread and need to be addressed'.[73] To this end, section 10 of the schedule specifies that clubs and associations that unfairly refuse to consider a person's application for membership of the association or club on any of the prohibited grounds[74] or fail to promote diversity in the selection of representative teams, are engaging in unfair practises.

This prescription may be formulated as follows: 'All clubs and associations shall promote racial-, gender-, age- and cultural diversity when selecting representative teams'. Like all prescriptive rules, this one also categorises subjects according to the

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70 *Ibid.*
71 *Ibid.*
72 *Ibid.*
73 Section 29(1) of Act 4 of 2000.
74 Section 1 defines the prohibited grounds as '(a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth; or (b) any other ground where discrimination based on that other ground (i) causes or perpetuates systemic disadvantage; (ii) undermines human dignity; or (iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a)'.

treatment owed or due to these subjects. Accordingly, it 'defines the extent to which such [subjects] are identical or nonidentical, equal or unequal'.[75]

As is the case with descriptive equality, certain consequences derive from the structure of prescriptive equality. Because prescriptive standards inevitably incorporate descriptors for identifying subjects with certain traits (i.e. racial and gender minorities) who are entitled to claim treatment with specific features, (i.e. to be promoted when representative teams are selected) from subjects with certain characteristics (i.e. clubs and associations) and because no two subjects are equal by every descriptive standard, it logically follows that the two subjects can never be equal by every possible prescriptive standard either. Likewise, insomuch as prescriptive standards inevitably accommodate descriptive standards for identifying subjects and all subjects are necessarily equal with reference to some descriptive standard, it also logically follows that all subjects are equal by some prescriptive standard. This ultimately means that the same two subjects that are prescriptively equal in one regard are as a matter of course also prescriptively unequal in other regards, and *vice versa*.[76] Equal treatment in one regard, then, will necessarily entail unequal treatment in another and consequently 'prescriptive standards do not treat [subjects] as either equals or unequals, but as equals and unequals'.[77]

As prescriptive equality signifies a relationship of identity among subjects based on a prescriptive rule, prescriptive equality is entirely derivative for the same reasons that descriptive equality is derivative.[78] Pronouncements of moral- or legal equality cannot be made in the absence of a moral or legal standard dictating specific treatment. It is however this standard or rule that forms the entire substance of prescriptive equality, as the actual pronouncement of prescriptive equality does not add anything to the content of the preceding rule that states how the subjects should be treated. The two subjects are either alike in terms of the rule (and thus prescriptively equal) or different in terms of the rule (and thus prescriptively unequal): 'the terms "equal" and

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75 Westen 'The meaning of equality in law, science, math, and morals' *MLR* 616.
76 *Ibid.*
77 *Idem* 617.
78 *Ibid.*

"unequal" in law and morals are nothing but "rhetorical" devices for talking about legal and moral rules'.[79]

2.4 All animals are equal, but some are more equal than others

The logic of equality, when correctly understood, should dictate the way we articulate claims of equality and inequality in legal and moral discourse. Westen refers to the 1858 Illinois senatorial campaign between Stephen Douglas and Abraham Lincoln to illustrate how misperceptions regarding the derivative nature of equality can mask the actual crux of the issue at hand.[80]

The Douglas - Lincoln debate focussed primarily on the Declaration of Independence, which states that 'all men are created equal', and the space that blacks occupy within the meaning of the declaration. Douglas, holding that a black person 'is not and never ought to be a citizen of the United States' because 'the signers of the Declaration had no reference to the negro whatsoever, when they declared all men to be created equal',[81] supported the enslavement of blacks. Lincoln, on the other hand, understood the Declaration to mean that all men 'are equal in their right to "life, liberty, and the pursuit of happiness"'[82] and consequently opposed black enslavement. Not understanding the derivative nature of equality, Douglas and Lincoln misidentified the issue at hand as the question whether blacks and whites were 'created equal', when 'their real disagreement was not about equality, but about the content of the prescriptive standard that ought to determine the equality or inequality of blacks and whites in one particular respect - their capacity for enslavement'.[83]

Blacks and whites cannot logically be declared to be equal in the absence of a standard or criterion by which to measure whether they are identical or nonidentical, because 'to declare blacks and whites equal or unequal is merely a way of talking

79 *Idem* 619.
80 *Idem* 605 - 607.
81 *Idem* 605 - 606.
82 *Idem* 606.
83 *Idem* 623.

about relationships that obtain among them as a "logical consequence" of measuring them by given descriptive or prescriptive standards'.[84]

The same logic holds true for discourse on equality between humans and animals. The logic of equality dictates that all animals, human and nonhuman, are necessarily equal (in certain respects) but that some are more equal (in other respects). It just depends on the descriptive or prescriptive standards by which their 'equality' is measured. It is for this very reason that many leading proponents of animal liberation see great value in challenging the standards by which we declare animals to be unequal to humans and emphasises that the difference between humans and animals is ultimately a matter of degree and not of kind. Peter Singer, for instance, convincingly argues that it is no less arbitrary and morally wrong to argue that animals are not our equals because they belong to a different specie, than it is for men to oppress women or whites to oppress blacks because of differences in sex and race.[85]

'Speciesism', as Singer defines it, 'is a prejudice or attitude of bias in favour of the interests of members of one's own species and against those of members of other species'.[86] The very same logic that support arguments against racism and sexism also support the arguments against speciesism. If we can firstly agree that it is not morally acceptable for whites to oppress blacks purely because they are not white or for men to exploit women because they are not men and we can secondly agree that membership to a specie is as arbitrary a criterion as race or sex, we should logically agree that it is not morally permissible for humans to exploit animals because they are not human.

Whilst these arguments find grounding in the logic of equality, it also illustrates the problematic nature of the concept when applied in legal- and moral discourse. Within the abstract science of mathematics, where the concept of equality is most at home, one plus one will always equal two, because each 'one' will always be identical to the

84 *Idem* 623 - 624.
85 Singer *Animal liberation* 1 - 23.
86 *Idem* 6.

next 'one'. The number 'one' has no distinct feature that distinguishes it from another number 'one':

> When abstracting numbers, all differentiating aspects are removed. When one sees four cars parked on the opposite side of the road, one can say there are two cars on the left and two on the right. They are equal in number. Yet in reality the cars can be wholly different in their color, size, make and engine. To talk, however, of four cars or about an equal number of cars, one must abstract from actual existing particulars, otherwise one could not count four of something. Mathematical equality is a univocal notion.[87]

When applied in law and moral philosophy, however, equality functions in relation to individual beings. These individual beings will, as we have already seen, always be equal in one respect and always unequal in another respect. And this 'respect' or criterion is the ventriloquist and the language of equality nothing more than the puppet in her hands, the placeholder or proxy through which to articulate and dictate prescriptive directives.

Equality, then, is indeed empty and confusing: '"empty" in that it derives its entire meaning from normative standards that logically precede it; "confusing" in that it obscures the content of the normative standards that logically precede it'.[88] It is for this reason that I share the view that it is counterproductive to employ equality as an explanatory norm. Where there is consensus that two entities should be regarded (prescriptively) equal, equality is redundant as there is already agreement on the prescriptive rules that dictate equal treatment. Equality is also inessential when there is disagreement as to whether two entities are prescriptively equal, because this presupposes disagreement on the prescriptive rules for the treatment of the entities and necessarily also means that there is no consensus on the external criterion (prescriptive standard) for establishing equality.[89]

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87 Camp and Gonzalez 'The philosophical notion of equality' *AMLR* 157.
88 Westen 'The meaning of equality in law, science, math, and morals' *MLR* 604.
89 *Idem* 628.

2.5 Moving beyond equality toward the idea of justice

I have thus far illustrated that equality is an empty rhetorical device and that the logical functioning of equality becomes problematic when applied to the subjects of law and moral philosophy. To say that equality is an 'empty' concept does however not mean that it is meaningless and to critique its efficacy as an explanatory norm does not by the fact itself constitute a critique of its underlying values.[90] The language of equality, to the extent that it is employed in relation to social dealings and a system of legal rules, is intrinsically tied to the idea of justice.[91] Within this context, as should be clear from the preceding discussion, equality ultimately aims to provide a standard or ideal measure of what is owed to others. In light of this, I will henceforth explore and propose the idea of justice, as the infinite right of the Other, as a possible alternative to the language of equality.

To be clear, I am in no way arguing that justice and equality are synonyms. As we will see, justice remains evasive and indefinable, rendering an attempt to advance an absolute concept of what justice is, unjust in itself. Through Jacques Derrida's conceptualisation of justice as aporia, we will also see why we can only engage with an 'idea of justice'. Derrida urges us be 'just with justice' and this demands that we not confine justice to any context or conceptualisation. To quote Derrida:

> One must be *juste* with justice, and the first justice to be done is to hear it, to try to understand where it comes from, what it wants from us, knowing that it does so through singular idioms (*Diké, Jus, justitia, justice, Gerechtigkeit*, to limit ourselves to European idioms that it may also be necessary to delimit, in relation to others). One must know that this justice always addresses itself to singularity, to the singularity of the Other, despite or even because it pretends to universality. Consequently, never to yield on this point, constantly to maintain a questioning of the origin, grounds and limits of our conceptual, theoretical or normative apparatus surrounding justice – this is, from the point of view of a rigorous deconstruction, anything but a neutralization of the interest in justice, an insensitivity toward injustice. On the contrary, it hyperbolically raises the stakes in the

90 *Idem* 661.
91 Camp and Gonzalez 'The philosophical notion of equality' *AMLR* 153.

> demand for justice, the sensitivity to a kind of essential disproportion that must inscribe excess and inadequation in itself. It compels to denounce not only theoretical limits but also concrete injustices, with the most palpable effects, in the good conscience that dogmatically stops before any inherited determination of justice.[92]

But whilst we cannot condense justice to any given context or definition, the link between equality and justice is also clear from Derrida's words. Derrida emphasises that justice functions within a 'normative apparatus' and that it addresses itself 'to the singularity of the Other'. From these words we can firstly identify an element of consonance and secondly see why justice takes us beyond the generality of equality.

Insofar as a strive for justice and the advancement of a prescriptive directive aimed at defining an entity as owing or being owed certain treatment are both inherently normative, there is clear consonance. Justice however moves beyond the generality of the language of equality to a state of particularity. Even though equality functions in relation to individuals when applied in legal and moral discourse, it necessarily abstracts the individual to the external criterion of measurement. The logical functioning of equality necessitates this abstraction. We necessarily need to compare the two (or more) subjects in relation to a standard: be it race, gender, hair colour or membership to a specific specie. This means to articulate the relationship between the two subjects in terms of sameness and thereby deny the absolute individuality and otherness of the subject.

Justice, on the other hand, 'addresses itself to singularity' and not to commonality. Derrida links the concept of justice to 'the heteronomic relation to the Other, to the face of the Other that commands me, whose infinity I cannot thematise and whose hostage I am'.[93] Justice, then, goes beyond the commonality shared by two subjects to embrace the singular face of the Other (subject). This singularity, as I will soon illustrate, is also the most fundamental aporia of justice for Derrida. There inheres an unsolvable paradox in an attempt to capture the singularity of justice in the generality of law. Derrida asks:

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92 Derrida 'Force of law' in *Acts of religion* 248.
93 *Idem* 250.

> How to reconcile the act of justice that must always concern singularity, individuals, groups, irreplaceable existences, the other or myself *as* Other, in a unique situation, with rule, norm, value, or the imperative of justice that necessarily have a general form, even if this generality prescribes a singular application in each case?[94]

In the remainder of this chapter I will examine how this reconciliation can take place through a deconstructive questioning. This reconciliation, as Derrida warns, is anything but simple, as the distinction between justice and law will always be a fictitious one that can never be conceptualised as a logical opposition: 'it turns out that law claims to exercise itself in the name of justice and that justice demands for itself that it be established in the name of a law that must be put to work (constituted and applied) by force, "enforced". Deconstruction always finds itself and moves itself between these two poles'.[95]

2.6 Law, justice and the (deconstructive) space inbetween

To assert that law and justice are not synonyms, is no longer a controversial statement. The inability of a system of positive law to bring about a realm of even-handedness, has been widely illustrated and criticised.[96] It was believed, not too long ago, that blacks were naturally born into a destiny of slavery,[97] that women were physiologically and psychologically inferior and lesser beings than their male counterparts[98] and that homosexuality, like cancer, was a disease that necessitated medical treatment.[99] Not surprisingly, the law reflected these dogmas and by doing so engaged in a process of 'othering', by creating a protagonist-antagonist dualism and ultimately facilitating subordination. Laws relating to animals are also a direct manifestation of the philosophical presuppositions that underpin the way we perceive

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94 *Idem* 245.
95 *Idem* 251.
96 See Fuller L 'Positivism and fidelity to law - A reply to professor Hart' (1958) 71 *Harvard Law Review* 630; Hutchinson A 'A postmodern's Hart: Taking rules sceptically' (1995) 58 *The Modern Law Review* 788.
97 See Walvin J *Questioning slavery* (1996).
98 See Mill J *The subjection of women* (1869).
99 See D'Emiloi J *Sexual politics, sexual communities* (1998).

the animal Other. What is needed, is a deconstruction of the system that fails to embrace that which is other to the system.

A deconstructive questioning of the system gives us insight into the different components that comprise the system and the interplay between these parts. More importantly, for the purposes of my study, it illustrates how deconstruction itself resides in the space between law and justice and how deconstruction addresses what Derrida calls 'the problem of justice'.[100]

2.6.1 The problem of justice

A search for- and demand of justice is often accompanied by the problematic (and ultimately unattainable) task of defining justice. The inevitable certainty of pluralism and resulting challenge of identifying just substantive principles, force us to confront a reality wherein my ideal of justice will more often than not differ from, if not directly rival, that of my neighbour. But as Derrida reminds us, justice is a transcendent, incalculable experience and consequently 'one cannot speak *directly* about justice, thematize or objectivise justice, say "this is just", and even less "I am just", without immediately betraying justice, if not law'.[101] Subscription to this insight can however generate noteworthy concerns: if we are not able to recognise and concretise certain minimal standards as just, what are we (or should we be) striving for? Is an ethical critiquing of law not an exercise in futility, a postponement of the inevitability of equating justice to law? This reasoning is however clearly not in accord with Derrida's insistence on reserving 'the possibility of a justice, indeed of a law that not only exceeds or contradicts law but also, perhaps, has no relation to law, or maintains such a strange relation to it that it may just as well demand law as exclude it'.[102]

> This excess of justice over law and calculation, this overflowing of the unpresentable over the determinable, cannot and should not serve as an alibi for staying out of juridico-political battles, within an institution or a state, between institutions or states.[103]

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100 Derrida 'Force of law' in *Acts of religion* 237.
101 *Ibid*.
102 *Idem* 233.
103 *Idem* 257.

Derrida's fundamental argument that justice exceeds law is based on Michel de Montaigne's insight (in turn followed by Blaise Pascal) into the origin of the law. Law, not originating from justice or reason, is built on custom. That, according to Montaigne, is the 'mystical foundations of the authority of laws':

> Custom creates the whole of equity, for the simple reason that it is accepted. It is the *mystical foundation of its authority*. Whoever carries it back to first principles destroys it.[104]

Montaigne argues that law has not been constructed in a way that allows for the embodiment of justice. We abide by the law not 'because they are just, but because they have authority'.[105] Here I deliberately use the word 'constructed', as the notion of law as a self-generating construct propelled by inherent force, is fundamental to Derrida's insistence that the law is deconstructable.

Employing the idiomatic expression 'to enforce the law' as point of departure, Derrida exposes the inevitable force that lies at the core of law. He argues that, whilst there are certainly laws that are not enforced, 'there is no law without force, whether this force be direct or indirect, physical or symbolic, exterior or interior...'.[106] Without this force, any system's claim to be law would be redundant. This act of force central to the genesis of any legal system, endow the system with legitimacy. Since this constitutive force 'cannot by definition rest on anything but themselves, they are themselves a violence without ground. This is not to say that they are in themselves unjust, in the sense of "illegal" or "illegitimate". They are neither legal nor illegal in their founding moment'.[107]

By understanding that the law is primarily 'a fictional creation which self-perpetuates' and that there is no higher charge behind law, we can in turn understand that any attempt to conflate justice and positive law will inevitably result in naive legal positivism; a falsely held belief that justice can be found within the rights and

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104 Montaigne quoted in Derrida 'Force of law' in *Acts of religion* 239.
105 *Idem* 240.
106 *Idem* 233.
107 *Idem* 242.

remedies provided by an existing legal system.[108] We can never completely attain justice by merely imparting a decision that is in accord with legal rules. Justice, as we will later see, is the limit to any legal system. Here it is worth noting the ethical dimension to Derrida's deconstructive thought. By exposing the mythological structure underlying the authority of law, he accentuates the risk involved in safeguarding existing ideals as unquestionable truth.[109]

Before I turn to an analysis of Derrida's conceptualisation of justice as aporia, I would like to highlight an important nexus between justice and deconstruction that Derrida evokes in *Force of law*, namely the potential of deconstruction to destabilise the (arbitrarily constructed) limits that we erect to lead us in determining which entities are worthy of being subjects of justice. History bears witness to numerous examples of marginalisation, and the focus of our concern for justice continues to be limited. Derrida argues that the violence of injustice is only applicable to humans, more specifically 'man as a speaking animal':[110]

> One would not speak of injustice or violence toward an animal, even less toward a vegetable or a stone. An animal can be made to suffer, but one would never say, in a sense said to be proper, that it is a wronged subject, the victim of a crime, of a murder, of a rape or a theft, of a perjury.[111]

The exclusion of groups deemed inferior, Derrida argues, is however not restricted to animals, as 'there are still many "subjects" among humankind who are not recognised as subjects and who receive this animal treatment'.[112] The barrier between those worthy of justice ('subjects of justice') and those not worthy ('non-subjects of justice') is thus unstable.[113]

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108 Litowitz D 'Derrida on law and justice: Borrowing (illicitly?) from Plato and Kant' (1995) 8 *Canadian Journal of Law and Jurisprudence* 325, 330.

109 Cornell *The philosophy of the limit* 10.

110 Derrida 'Force of law' in *Acts of religion* 246.

111 *Ibid*.

112 *Ibid*.

113 Balkin J 'Transcendental deconstruction, transcendent justice' (1994) 92 *Michigan Law Review* 1143, 1143.

But what is the significance of identifying and exposing this (unstable) anthropocentric barrier that excludes the animal from our sphere of concern for justice? This generates the opportunity for animal liberation scholars to deconstruct the barrier and challenge the exclusion of animals as possible subjects of justice, as membership to a specific specie should not be the decisive criterion granting moral citizenship to a subject.[114] The potential of deconstruction to challenge these barriers embodies the possibility of re-setting the boundaries and, ultimately, ethically embracing the animal Other. As Derrida argues:

> [B]y deconstructing the partitions that institute the human subject (preferably and paradigmatically the adult male, rather than the woman, child, or animal) at the measure of the just and the unjust, one does not necessarily lead toward injustice, nor to effacement of an opposition between just and unjust but, in the name of a demand more insatiable than justice, leads perhaps to a reinterpretation of the whole apparatus of limits within which a history and a culture have been able to confine their criteriology.[115]

2.6.2 Conceptualising justice as aporia

For Derrida, the very notion of justice embodies impossibility, a set of aporias that cannot be dissolved without paradoxicalising justice. This impossibility, as I have already argued, should not hinder our struggle for justice. We always owe justice to the Other and although this 'incalculable' demand can never be satisfied, the strive for justice nevertheless imposes a limitless responsibility, a 'bottomless duty to the Other'.[116]

Derrida articulates three unsurpassable aporias to formulate his argument that justice is 'the experience of what we are unable to experience'.[117] The first aporia, the epokhē of the rule, illustrates the impossibility accompanying any attempt to generate a just outcome to a scenario whilst also adhering to prescribed legal doctrine. To act

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114 For an exposition of speciesism and the belief that only human life in sacrosanct, see Singer *Animal liberation* 18 - 23.
115 Derrida 'Force of law' in *Acts of religion* 247.
116 Litowitz 'Derrida on law and justice' *CJLJ* 328.
117 Derrida 'Force of law' in *Acts of religion* 244.

justly, according to Derrida, one must necessarily be free, because 'one will not say of a being without freedom, or at least of one who is not free in a given act, that its decision is just or unjust'.[118] A judge acting within the parameters of the law is however caught in a paradox: bound by rules and precedent on the one hand, the individualism of each case requires a *de novo* approach on the other, 'an absolutely unique interpretation which no existing coded rule can or ought to guarantee absolutely'.[119] Strict adherence to- and application of a rule cannot be equated to making a just decision, or even any decision.

To obtain justice through law, the judge needs to simultaneously judge the law, and judge by means of the law. A just decision will 'be both regulated and without regulation', it will 'preserve the law and also destroy or suspend it enough to have to reinvent it in each case'.[120] To act in conformity with a legal principle might result in a decision that is unjust, whilst a just outcome might have no grounding in law. Thus, we clearly see 'justice run up against the limitations of law, and law run up against the impossibility of justice'.[121]

The second aporia is absorbedly related to the first and reveals the paradoxical relation between (a decision following the) law and justice. The 'haunting of the undecidable', which is caught in every legal decision, distinguishes decision making from calculation and illustrates why justice cannot exist with or without a decision. This undecidability is more than the mere pressure facing a judge when confronted with two or more decisions, it represents the experience of being caught in an unsurpassable moment of undecidability whilst taking cognisance of legal rules.

We need to clearly distinguish decision making from calculation, 'for if calculation is calculation, the *decision to calculate* is not of the order of the calculable, and it must not be so'.[122] Whilst a decision not passing 'the test and ordeal of the undecidable' can never be a free decision, but only 'the programmable application ... of a calculable process', it is not possible to establish whether the judge went through this

118 *Idem* 251.
119 *Ibid*.
120 *Ibid*.
121 Litowitz 'Derrida on law and justice' *CJLJ* 332.
122 Derrida 'Force of law' in *Acts of religion* 252.

test and ordeal before rendering her decision.[123] Because there is no recipe or prescription for justice, we can never formulate or construct a 'just' law. But whilst justice is foreign to encapsulation, a decision still needs to be made.[124] This decision might be in accordance with the law and thus legal, but not just. The moment of undecidability, although being a necessary stride in arriving at a 'just' decision, will not in itself bring about justice either, 'for only a decision is just'.[125] To attain justice through law thus requires the (impossible) amalgamation of an incalculable experience with a calculable, rule governed construct. Ultimately there can be no justice without a decision and no decision can effectively capture justice. This leads Derrida to arrive at the conclusion that a decision can never 'be said to be presently and fully just: either it has not yet been made according to a rule, and nothing allows us to call it just, or it has already followed a rule'.[126]

With the third aporia, Derrida illustrates how the immediacy and urgency that characterise justice, hinders deliberative practice. Because the demand for justice is always immediate, it obstructs the horizon of knowledge, which is 'both the opening and the limit that defines either an infinite progress or a waiting and awaiting'.[127] The infinite demand for justice does not allow for a subsequent engagement with 'the infinite information and unlimited knowledge of conditions, rules or hypothetical imperatives that could justify it'.[128] By making a decision we bring an untimely halt to an attempt at rendering bottomless justice to the Other, which is why justice is always 'to come': '[Justice] remains *by coming*, it *has* to come, it *is* to come … it deploys the very dimension of events irreducibly to come'.[129]

These three interrelated aporias demonstrate why law is inaccessible to justice: trying to deposit an incalculable duty (justice) into calculable rules (law) is like trying to fit a square into a circle. The aporias also illustrate why we can only deconstructively engage with an 'idea of justice' and highlights how justice attaches to the singularity of the Other. This conceptualisation thus clearly takes us beyond the generality of

123 *Ibid*.
124 Litowitz 'Derrida on law and justice' *CJLJ* 332.
125 Derrida 'Force of law' in *Acts of religion* 253.
126 *Ibid*.
127 *Idem* 255.
128 *Ibid*.
129 *Idem* 256.

equality of respect as defined in a particular context and imposes a responsibility without limit. To quote Derrida:

> If there is a deconstruction of all presumption to a determining certainty of a present justice, it itself operates on the basis of an "idea of justice" that is infinite, infinite because irreducible, irreducible because owed to the other – owed to the other, before any contract, because it has *come*, it is a c*oming,* the coming of the other as always other singularity.[130]

But what is the reciprocity between law and justice? Whilst Derrida explicitly distinguishes law from justice, he does not place the two at counter-ends of a binary dualism. Derrida illustrates the reciprocal action through the notion of 'undeconstructability'. Both the deconstructability of law and the undeconstructibility of justice makes deconstruction attainable. Deconstruction therefore subsists in the space that divides law, which as a construct will always be deconstructable, from the undeconstructability of justice. We thus see a symbiotic relationship ultimately ending in mutual reinforcement: 'justice undermines law and law undermines justice'.[131] We also see a clear nexus between justice and deconstruction, in fact Derrida goes as far as saying '*deconstruction is justice*'.[132]

For the purposes of this dissertation I will not further examine this statement on the several levels needed to do justice to Derrida's thought. My focus is rather on illustrating how deconstruction is intrinsically tied to- and engaged in a demand for infinite justice. As I will be focussing on an idea of justice as it relates to animals, I will examine the ideology of sacrifice that has come to define animals in this context and explore how a displacement of this ideology can be brought about. As Derrida emphasises, such an examination is essential:

> If we wish to speak of injustice, of violence or a lack of respect toward what we still so confusedly call the animal – the question is more

130 *Idem* 254.
131 Valverde M 'Derrida's justice and Foucault's freedom: Ethics, history, and social movements' (1999) 24 *Law and Social Inquiry* 655, 659.
132 Derrida 'Force of law' in *Acts of religion* 243.

> current than ever (and so I include in it, in the name of deconstruction, a set of questions on carno-phallogocentrism) – one must reconsider in its totality the metaphysico-anthropocentric axiomatic that dominates, in the West, the thought of the just and the unjust.[133]

To this end, I will highlight the ethical force of deconstruction and illustrate how veganism, as a form of deconstruction, can destabilise the anthropocentric hierarchical structure which contains the animal in an identity as sacrificial being and belies her singularity. Veganism as deconstructive gesture not only displaces the human subject as phallogocentric structure, but simultaneously aspires to enact the ethical relationship by providing a framework through which to determine precepts for moral action. It is important that we see veganism as *aspiring* to enact the ethical relation rather than actualising the ethical relation. Deconstruction preserves the ethical relation by illustrating its impossibility, thereby recognising the ethical as a limit to the achievable.[134] Deconstruction's relationship to the notion of (im)possibility and its concern with the ethical relation is accurately articulated by Cornell in her conceptualisation of deconstruction as 'the philosophy of the limit'.

2.7 Reconceiving deconstruction as the 'philosophy of the limit'

By renaming deconstruction the 'philosophy of the limit' Cornell, 'driven by an ethical desire to enact the ethical relation',[135] allows us to better comprehend the philosophical foundations of deconstruction and its implications for a legal system. The philosophy of the limit refocuses our attention on the limits that hinder philosophical understanding and subsequently highlights two aspects of deconstructive theory that are vital to comprehending philosophical perspectives on legal problems. Firstly, deconstruction seen as the 'philosophy of the limit' reserves the possibility of ethical engagement within deconstructive thought. By juxtaposing a view of deconstruction as an exercise ultimately generating an 'unreconstuctable litter' with a notion of deconstruction as a philosophy that limits, Cornell illustrates that

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133 *Idem* 247.

134 Cornell *The philosophy of the limit* 84. For a similar ethical reading of deconstruction, see Bernasconi R 'Deconstruction and the possibility of ethics' in Sallis J (ed) *Deconstruction and philosophy: The texts of Jacques Derrida* (1987) 122.

135 Cornell *The philosophy of the limit* 62.

deconstructive tradition allows for the discovery and preservation of standards for ethical conduct and the capacity of deconstruction to advance the ethical relation is thus emphasised. The focus of Cornell's project is rather on 'expos(ing) the quasi-transcendental conditions that establish any system, including a legal system as a system'.[136] This shift in focus emphasises a 'beyond' intrinsic to any system, that which is excluded from the system.

Secondly, deconstruction seen as a limit captures the ineptness that inevitably accompanies any attempt to grasp meaning. In critiquing Hegelian idealism, Charles Pierce employs the notion of 'secondness' to indicate that we will always be left with a residue after an attempt to conceptualise, something that 'resists', because we can never interpret reality in its totality.[137] This restriction to a system of meaning emphasises the subjective nature of reality and impinges on our relationship to the Other, as it 'demands our attention to what is outside ourselves and our representational schema'.[138] Understanding the sphere of 'secondness' is thus foundational to any attempt at advancing the ethical relation to the Other.

This attempt to heed the call of the Other should however not be seen as an effort to incorporate that which is other into the system. There will always be an Other to the system, as the functioning of *différance*[139] impedes any system from integrating its other into the system. What Cornell calls a 'nonviolative relation to the Other'[140] is not founded in forced unity, but in the recognition of the Other's particularity and ensuing difference. Paradoxically, an instance of sameness emanates from this very recognition. Amidst this ethical asymmetry we find phenomenological symmetry by recognising that the Other, also being an 'I' just as I am an 'I', is simultaneously different from me and the same as me.[141] Unity stems from our singularity and this interplay between ethical asymmetry and phenomenological symmetry is pivotal to

136 *Idem* 1.
137 *Ibid*.
138 Cornell D 'Institutionalization of meaning, recollective imagination and the potential for transformative legal interpretation' (1988) 136 *University of Pennsylvania Law Review* 1135, 1198.
139 Cornell describes *diffèrance* as 'the "truth" that "being" is presented in time and, therefore, there can be no all encompassing ontology of the "here" and "now"'. Cornell *Beyond accommodation* 108.
140 Cornell *The philosophy of the limit* 13.
141 *Idem* 55.

heeding the call of the Other. As Derrida explains, 'without the phenomenon of other as other no respect would be possible. The phenomenon of respect supposes the respect of phenomenality. And ethics, phenomenology'.[142]

With this interpretation of the ethical relation we firstly see another ethical dimension to Derrida's deconstructive thought. Derrida attempts to reserve the prospect of a nonviolative relationship by showing that the Other should be regarded as the 'unsayable', as 'one cannot speak of the ethical as the beyond to metaphysics other than in the language of ontology'.[143] Secondly, Derrida's insight requires that we acknowledge the ethical relation as an aspiration and not a possibility, as 'the possibility of the ethical lies in its impossibility; otherwise, the ethical would be reduced to the actual, to the totality of what is'.[144]

Deconstruction protects the ethical relation from being reduced to 'the mere Other of Ontology', an appropriation that denies the alterity of the other. Deconstruction then exposes the limit to the achievable. It is, as Cornell reconceptualises the practice, a philosophy that limits. This limit of impossibility, as with the impossibility of justice, does however not relieve us from our limitless responsibility:

> There is [always] disruption of totality. The Other cannot be completely eliminated in any given representational system. The Other survives. In this sense, the ethical is a necessity as well as an impossibility – a necessity in that the remain(s) cannot totally be evaded even if they need not be heeded. The Other remain(s).[145]

In answering the question whether deconstruction enacts the ethical relation, Cornell thus reminds us we ultimately enact the ethical relation through aspiration and not actualisation.[146] I wish to illustrate that veganism provides one possible way of being and mode of *aspiring*, of relating to the animal Other, that resists her categorisation as *my* Other and acknowledges her as singular entity with intrinsic worth.

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142 Derrida J *Writing and difference* (1967) (trans Bass A, 1978) 151.
143 Cornell *The philosophy of the limit* 83.
144 *Ibid*.
145 *Idem* 84.
146 *Ibid*.

2.8 Veganism and deconstruction

In *Comment ne pas manger – Deconstruction and Humanism*,[147] David Wood formulates various arguments to substantiate his assertion that, despite an attempt to address and advance the ethical relation to 'the animal' through the deconstruction of the (human) subject, Derrida's thought is haunted by a humanist predilection. For Wood, Derrida's critique of Heiddegerian thought as constrained by 'a certain anthropocentric or even humanist teleology'[148] is ironic and paradoxical because Derrida himself fails to recognise and advance the relation between (the) deconstruction (of the human subject) and vegetarianism.

Whilst I agree with Wood that there is deconstructive capacity inherent to our resistance to animal sacrifice through physical consumption, I do not subscribe to the notion that we can oppose anthropocentric configurations by merely renouncing the consumption of flesh and other products that require the actual killing of animals. Rather than commensurating deconstruction with vegetarianism, what is needed is a deconstruction *of* vegetarianism. My primary aspiration here is to expose the undercurrents of sacrifice and anthropocentrism that underlie vegetarianism and to illustrate why deconstruction, if recognised as a vehicle through which we respond to our ethical responsibility to (animal) otherness, should rather be identified with veganism.

It needs to be noted from the onset that the scheme of domination that has come to be synonymous with the (human) subject spans the entire spectrum of our existence, with various institutions maintaining this ideology of sacrifice. Derrida's objective of deconstructing the (human) subject as a being that sacrifices is obvious. One of the nuances to Derrida's deconstructive undertaking that might not be so apparent, is his concomitant exposure of the role of law as facilitator of this sacrificial behaviour. As I emphasised in the introductory chapter, I do not believe that our anthropocentric cultural constructs can be separated from the (legal) system that allows for the 'non-criminal putting-to-death' of animals, as the law (being a human construct) will

147 Wood D 'Comment ne pas manger – deconstruction and humanism' in Steeves H (ed*) Animal others: On ethics, ontology and animal life* (1999) 15.

148 Derrida J *Of spirit: Heidegger and the question* (1987) (trans Bennington G and Bowlby R, 1989) 55.

reproduce and perpetuate prevailing social structures. To this extent any rigid separation between our aspiration towards 'formal' justice in the public sphere and 'informal' justice in the sphere of socio-ethical relations will ultimately prove to be fictitious, as sustainable transformation in the one sphere is dependent on transformation in the other.[149] As any destabilisation of species hierarchy will thus inevitably be observed by the law, our resistance of anthropocentric social configurations also exposes and resists the anthropocentric character of the law. This reciprocity between- and challenge to the private-public division needs to be borne in mind as I advance veganism as a practice that deconstructs anthropocentrism. Before I can do this, I first need to sketch the background to Wood's critique on Derrida.

2.8.1 The (human) subject and sacrifice

In an interview with Jean-Luc Nancy entitled '"Eating Well", or the calculation of the Subject'[150] Derrida deconstructs the notion of subjectivity by engaging with the question 'who comes after the subject'? Derrida destabilises the question from the onset and broadens the scope of his deconstructive undertaking (to include 'the animal') by alluding to the segregative nature of the pronoun 'who' as facilitator of a problematic human-animal dualism. Despite Nancy's effort to delineate the 'who' in his question as a sphere transcending subjectivity, as a 'place "of the subject" that appears precisely through deconstruction itself'[151], Derrida remains adamant that the 'substitut[ion] [of] a very indeterminate "who" for a "subject" overburdened with metaphysical determinations is perhaps not enough to bring about any decisive displacement' of subjectivity.[152]

Derrida then goes on to draw a nexus between the 'who' and the notion of 'sacrifice' and it is here where Derrida, according to Wood, 'parts company with vegetarianism'.[153] Derrida starts off by saying 'I would still try to link the question of the "who" to the question of "sacrifice". The conjunction of "who" and "sacrifice" not only recalls the concept of the subject as phallogocentric structure, at least according

149 Cornell *The philosophy of the limit* 174.
150 Derrida and Nancy '"Eating well"' in *Who comes after the subject?* 96.
151 *Idem* 98.
152 *Idem* 100.
153 Wood 'Comment ne pas manger' in *Animal others* 32.

to its dominant *schema*: one day I hope to demonstrate that this *schema* implies carnivorous virility'.[154] Derrida calls this schema of domination 'carnophallogocentrism' and emphasises that it is a discourse which ingests and incorporates the animal in both a real and symbolic sense.[155]

Wood focuses on the difference between symbolic- and actual sacrifice and argues that Derrida 'interiorize[s] the actual eating of animals inside the symbolic eating of anything by anyone', thereby convoluting this distinction in an attempt to amalgamate the two manifestations of sacrifice.[156] As a degree of symbolic sacrifice seems inevitable to Wood he argues that this superficial amalgamation allows us to simultaneously accept this fate and congruently evade our ethical responsibility to take steps that could eradicate actual sacrifice. Wood argues as follows:

> First [Derrida] assimilates – there is no other word for it – real and symbolic sacrifice so that real sacrifice (killing and eating flesh) becomes an instance of symbolic sacrifice. With this change of focus, the question of eating (well) can be generalized in such a way as to leave open the question of real or symbolic sacrifice. And to the extent that in this culture sacrifice in the broad (symbolic sense) seems unavoidable, there would seem to be little motivation for practical transformations of our engagement in sacrificial behaviour.[157]

The practical transformation that Wood refers to is of course the ethically motivated espousal of a vegetarian existence. Vegetarianism, Wood argues, can be seen as a deconstructive practise insofar as it 'can become a finite symbolic substitute for an unlimited and undelimitable responsibility – the renegotiation of our Being-toward-other-animals'.[158] Wood's assertion is thus that vegetarianism circumvents real sacrifice and, as the symbolic manifestations of sacrifice are inescapable, vegetarianism provides an adequate pragmatic foundation for advancing the ethical relation to the animal Other. And this is where his argument becomes problematic. It

154 Derrida and Nancy '"Eating well"' in *Who comes after the subject?* 113.
155 *Idem* 112.
156 Wood 'Comment ne pas manger' in *Animal others* 30.
157 *Idem* 31.
158 *Idem* 32.

is a dangerous and violent appropriation to place only the actual killing of an animal in the register of real sacrifice and all other forms in the register of symbolic- and consequently unavoidable sacrifice. Here I would like to comment on Wood's interpretation of Derrida's exposition of the inevitability of symbolic sacrifice and his assertion that vegetarianism proliferates resistance to anthropocentric schemata of domination.

2.8.2 Symbolic sacrifice as secondness

In his interview with Nancy, Derrida argues that a sort of symbolic violence is a general inevitability of life and that 'vegetarians, too, partake of animals, even men. They practice a different mode of denegation'.[159] Derrida has elsewhere argued that 'a certain cannibalism remains unsurpassable' and that he consequently does not believe in 'absolute vegetarianism':

> Vegetarians, like everyone else, can also incorporate, symbolically, something living, something of flesh and blood – of man and of God.[160]

These assertions, I believe, are consistent with Derrida's argument that the ethical relation is an impossible possibility, impossible because we cannot condense the ethical to the actual and thereby realise the relation. As is the case with (the impossibility of) justice, this does however not relieve us of our ethical responsibility to strive towards an ethical relation to the animal Other. Clearly the inevitable violence and denegation that Derrida speaks of does not refer to the actual killing of animals for consumption, or to any form of violence that can be avoided for that matter.

The inevitability lies in the impossible, that which always resists our attempt to heed the call of the Other. Symbolic sacrifice, therefore, dwells in the sphere of secondness; it is the manifestations of sacrifice that resists concretisation, encapsulation and eradication. This form of sacrifice cannot be concretised because

159 Derrida and Nancy '"Eating well"' in *Who comes after the subject?* 114 - 115.
160 Derrida and Roudinesco *For what tomorrow* 67 - 68.

there will always be a surplus to our system of meaning that resists an attempt to interpretively harmonise any 'sign'[161] with the suffering. This manifestation of sacrifice cannot be semeiotically encapsulated either because there is no enclosed circle in which interpretation of the sacrifice takes place, 'the sign itself always points us to another sign beyond the repetition implicit in self-reference'.[162] This sacrifice is analogous to what Cornell refers to as 'the irreducible exteriority of suffering'; neither past- nor future instances of this manifestation of sacrifice can be 'interpreted away'.[163] Symbolic sacrifice is the residue that evades internment by any system of signs. With this in mind, let me now turn to the problematical aspects of Wood's assertion that vegetarianism deconstructs humanist predilections.

2.8.3 The anthropocentric predilection of vegetarianism

The argument that vegetarianism is a form of deconstruction that resists actual sacrifice and anthropocentric configurations falls short on two levels. Firstly, we need to clearly delineate the disparity between symbolic and actual sacrifice. If we are to subscribe to my argument that symbolic sacrifice stems from inevitable violation and real sacrifice from violative conduct that can be avoided, we will see why vegetarianism does not circumvent real sacrifice.

For the animals that produce the byproducts that form part of a vegetarian lifestyle, life is anything but natural and nonviolative. After being debeaked to avoid the cannibalistic behaviour that would otherwise ensue from the overcrowded conditions, layer hens are confined to battery cages so small that they are denied even the most basic desire to spread their wings. Layer hens endure these circumstances until they are no longer physically able to produce enough eggs to outweigh the costs of keeping them alive. They are then usually sold to low income households for home slaughter or killed.[164] Sadly, the reality that accompanies the dairy that we consume is not any rosier. Predestined for a lifetime of pregnancies and milking, cows are fed an artificially manipulated diet and hormones that promote lactation, resulting in ten

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161 For Pierce, a 'sign' is something that carries extended meaning, something through which we 'know something more'. Zick T 'Cross burning, cockfighting, and symbolic meaning: Toward a first amendment ethnography' (2004) 45 *William and Mary Law Review* 2261, 2330.

162 Cornell 'Institutionalization of meaning' *UPLR* 1198.

163 *Idem* 1170.

164 Pickover M *Animal rights in South Africa* (2005) 153.

times the milk production of a cow under natural conditions. After an abnormally short life of three to five years, the cows are sent to the slaughterhouse where they are killed and processed into meat for consumption.[165] Similarly the cruelties to which sheep are subjected during the 'production' of wool, the suffering that laboratory animals endure when cosmetics and household products are tested on them and the outright exploitation accompanying horse- and Greyhound racing, to name but a few examples, reflect a grim reality of animals suffering greatly at the hands of human oppressors. It is hard to accept Wood's implicit argument that the sacrifice typifying these animals' lives are merely symbolic. The sacrifice is very real and can, more importantly, be avoided by adopting a vegan lifestyle.

There are some that may argue that the lives of these animals need not be so violative, that we can circumvent these harsh conditions by rearing animals in 'free-range' environments and implementing welfare strategies to better their overall life conditions. It is not my goal to address the false promises and pragmatic impracticalities of these 'free-range' conditions[166] and welfarist approaches at this time. I will extensively address the underlying philosophy of welfarism in the next chapter. For now I'd rather like to demonstrate that, even if we accept the possibility of raising and utilising these animals in a way that is completely natural and nonviolative, vegetarianism as a form of deconstruction will still fail to resist anthropocentric configurations.

Secondly, vegetarianism is underscored by the notion that human beings have the right to freely take and use the byproducts of animals as we see fit. Granted that animals are not directly killed for this purpose, they still occupy a dimension as sacrificial beings; they are seen as means to an (human) end. This anthropocentric approach places man in the position of the dominant subject with the animal being denounced to subservient Other. No degree of 'humane' treatment or loving affection can eliminate this anthropocentrism inherent to vegetarianism. The slave working under reasonable or even plush conditions is still exactly that: a slave, an individual having no other alternative than being servant to her master. The argument that vegetarianism can deconstruct and subsequently resist our anthropocentric way of

165 *Idem* 149.
166 For more on 'free-range' conditions see Safran Foer J *Eating animals* (2009) 61.

dealing with- and thinking about other animals is consequently internally paradoxical. It is true that 'carophallogocentrism is not a dispensation of Being toward which resistance is futile; it is a mutually reinforcing network of powers, schemata of domination, and investments that has to reproduce itself to stay in existence'.[167] These schemata of domination can and should furthermore be resisted, but by attempting to resist one anthropocentric institution with another one we run the risk of perpetuating the system we seek to eradicate.

2.9 Conclusion

This chapter should by no means be misconstrued as a critique of vegetarianism as such. It should go without saying that vegetarianism is indeed a more ethical way of being than a carnivorous existence, resisting (if nothing else) the killing of so many of our fellow earthlings. By exposing the anthropocentric values woven into the supposedly unprejudiced fabric that constitute vegetarianism, I have merely tried to argue that it would be philosophically inconsistent to associate vegetarianism with the deconstruction of carnophallogocentrism as there can fundamentally be no ensuing displacement of the (human) subject as dominant figure. Conversely, veganism destabilises the human subject as phallogocentric structure by resisting the sacrificial status that animals take on in an anthropocentric order, rejecting the idea that we can utilise animals as long as they are treated 'humanely' and not killed.

I started off by illustrating that equality is an empty rhetorical tool that draws on external standards in order to articulate a relationship of identity or non-identity in relation to prescriptive directives. As the language of equality does not add anything of substance to the prescriptive directives it incorporates by reference, it is redundant and counterproductive to employ equality as an explanatory norm as it obscures the content of the standards that precede it.[168] The logical functioning of equality furthermore necessitates a reversion to generality and articulates the relationship between subjects in terms of sameness, thereby recanting the alterity of the subjects. I illustrated that Derrida's conceptualisation of justice, heavily reliant on the Levinasian notion of justice, is intrinsically tied to the ethical relation to the Other and

167 Wood 'Comment ne pas manger' in *Animal others* 33.
168 Westen 'The meaning of equality in law, science, math, and morals' *MLR* 663.

able to take us beyond the symmetry and generality of the language of equality toward a state of assymetry and particularity. As Derrida states: 'Here *équité* is not equality, calculated proportion, equitable distribution or distributive justice, but rather, absolute dissymmetry'.[169] I specifically explored the idea of justice as it relates to the animal Other and advanced veganism as a form of deconstruction and mode of being that aspires to enact the ethical relation, all the while cautioning against a reading of veganism *as* justice. Such an interpretation would contradict the very conseptualisation of justice that lies at the core of my project. My view of justice is not that of a state or event that is reliant on another state or event(s) that construct conditions that make justice possible, but rather of justice as 'a goal or telos that performances strive for'.[170] And this strive is infinite, because it 'require[s] the very experience of aporia'[171] that I discussed earlier. Justice (for the animal Other) is not a state of affairs that stops with veganism, 'but rather a movement toward the particularity of the [animal] Other'.[172] This idea of justice requires that we constantly examine and question our understanding of what is due to the singular Other.

Insofar as we will never be able to fully embrace the absolute dissymmetry and irreducible specificity of the Other, we will never be able to claim a just existence. Yet this realisation is accompanied by a limitless responsibility that poses an arduous test to our humanity, daring us to engage in a battle that is both a necessity and an impossibility. This call to responsibility, as Cornell reminds us, 'is prior to our subjectivity, prior to our choice. We may not answer, but we are not free to simply silence the call.'[173] The remainder of this dissertation will be devoted to a critical questioning of dominant approaches that aim to answer this call.

169 Derrida 'Force of law' in *Acts of religion* 250.
170 Menke C 'Ability and faith: On the possibility of justice' (2005) 27 *Cardozo Law Review* 595, 598.
171 Derrida 'Force of law' in *Acts of religion* 244.
172 Valverde 'Derrida's justice and Foucault's freedom' *LSI* 658.
173 Cornell *The philosophy of the limit* 84.

CHAPTER 3 RIGHTS THEORY, WELFARISM AND THE 'NEW WELFARIST' AMALGAMATION

3.1 Introduction

The anthropocentric schemata of domination that I sketched in the previous chapter are nuanced and complex arrangements that are maintained by various traditions. Derrida's articulation of this network of relations as 'carnophallogocentrism' accurately captures this complexity by highlighting dimensions of sacrifice (carno), masculinity (phallo) and speech (logo) that all contribute to the hegemonic configuration.[174] In the previous chapter I argued that we need to deconstruct and displace the human subject as phallogocentric structure in order to oppose the containment of animals in an identity which marks them as sacrificial beings. I also contemplated the idea of justice for the animal Other and reflected on veganism as one way of recognising and respectfully relating to the animal Other.

In this chapter I begin to consider law's relation to animal subjugation, both as facilitator of animal sacrifice and as possible enabler of animal liberation, by philosophically examining the relationship between the two most prominent theories intended to address the plight of the animal. I will illustrate how the animal advocacy movement is broadly divided into two camps, one calling for the 'humane' treatment of animals and the other for the complete abolition of human (ab)use of animals. The distinction and interaction between these approaches, respectively known as animal welfarism and the rights-based approach, has been muddied in recent years by intellectual and practical efforts. This has lead to the emergence of 'new welfarism', an approach that sees welfarist reforms as essential short-term steps *en route* to the ultimate ideal of animal rights. My main aim in this chapter is to explore the ideological foundations underlying animal welfare- and animal rights theory and to illustrate that these approaches are based on contrasting and irreconcilable ideologies, rendering an amalgamation of the approaches highly problematic and detrimental to the ideal of animal liberation.

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174 Derrida and Nancy '"Eating well"' in *Who comes after the subject?* 112. For further engagement with Derrida's argument that the metaphysics of subjectivity excludes animals 'from the status of being full subjects', see Calarco *Zoographies* 103 - 149.

I will start off by briefly sketching the history of the animal advocacy movement and highlighting the developments that facilitated the divergence of the welfare- and rights-based approaches. I will then examine the rationale and assumptions underlying the new welfarist position and argue that this approach constitutes an uncritical 'privileging of the present' that is ultimately to the detriment of the ideal that animal rightists strive to realise. I will draw on Karin van Marle's jurisprudence of slowness to argue that we need to create a (moment of) thinking that is able to address the plight of the animal and meaningfully reflect on the way in which we utilise the law to facilitate the transformation towards animal liberation. By following Van Marle's deconstructive approach, which she connects with 'slowness, lingering and greater attention',[175] we can reflect on the fundamental ideological discrepancy between the welfare and rights-based approach that makes a theoretical and strategic amalgamation highly problematic. In order to illustrate this ideological dissonancy I will return to Derrida's interview with Jean-Luc Nancy that I discussed in the previous chapter, specifically focussing on Derrida's argument that humans maintain a conceptual human-animal divide by failing to embrace animals in the proscription 'thou shalt not kill' and examining how this prohibition translates into the respective theories.

3.2 The history of the animal advocacy movement

The history of a united attempt at addressing the interests of animals in the Western world can be dated back to the mid-eighteenth century. Before that time, animal protectionism was rare and we primarily find isolated examples of individual acts of kindness towards animals, like Pythagoras and Leonardo da Vinci who both reportedly bought caged birds from street vendors with the purpose of setting them free.[176] Organised attempts aimed at protecting animals were however nonexistent for the most part.[177]

175 Van Marle 'Law's time, particularity and slowness' *SAJHR* 245.
176 Niven C *History of the humane movement* (1967) 39.
177 Silverstein H *Unleashing rights: Law, meaning and the animal rights movement* (1996) 29.

3.2.1 The rise of the animal welfare movement

After a sixty-year period that saw several works critiquing the widespread brutality towards animals, the 1800's saw a united effort take shape in England to address the plight of animals.[178] These literary works *inter alia* denounced sadistic practices like cock throwing, critiqued the cruel treatment of horses and other farm animals and advanced the notion that we have a moral duty to treat animals 'humanely'.[179] Whilst these works did not enjoy mainstream readership, they played an important role in sensitising the general public to change: 'the writers were, so to speak, the artillery bombarding a position from a reasonably safe distance; the brunt of the fighting had to be done by the Members of Parliament'.[180]

This fight commenced in 1800 when Sir W. Pulteney introduced a bill in the English Parliament that was aimed at the prevention of bullbaiting. Whilst the majority of the Parliament found that the bill 'interfered with the amusement of the people' and opposed the bill, it raised considerable public awareness on the issue of animal cruelty.[181] A more detailed and inclusive bill aimed at the prevention of 'wanton and malicious cruelty to animals' was introduced in 1809 and passed in the House of Lords before it was rejected in the House of Commons.[182] Several years later the Martin's Act, intended to prevent cruelty to cattle, passed both houses of parliament in 1822 and became the first animal protection legislation in England.[183] During this time, organised efforts began to grow outside the realm of the legislature and in 1824 the Society for the Prevention of Cruelty to Animals (SPCA) was formed with the main purpose to enforce the newly enacted legislation.[184] The SPCA is regarded as the first animal protection organisation and credited with laying the foundations for what would eventually become the animal welfare movement.[185] The SPCA struggled in the early years after its formation and would only gain noteworthy momentum in 1840 after Queen Victoria ordered that the organisation become the Royal SPCA. This enabled the RSPCA to establish additional branches and the movement

178 *Idem* 30.
179 *Ibid*.
180 Niven *History of the humane movement* 55.
181 *Idem* 58.
182 Carson G *Men, beasts and gods: A history of cruelty and kindness to animals* (1972) 49.
183 *Idem* 50.
184 *Idem* 53.
185 Silverstein *Unleashing rights* 31.

gradually spread though Europe, with similar organisations being formed across the continent.[186]

Whilst the welfare movement in England initially focused exclusively on cruelty to domesticated animals, a new branch of animal protection was born in the 1860's when the antivivisection movement formed.[187] With this, the focus expanded to include animals used in scientific experimentation. The formation of the antivivisection movement would bring about the first split in the larger animal advocacy movement. Whilst some proponents of the movement sought to minimise the suffering imposed on animals used in experimentation, others advocated the complete abolition of vivisection. These ideological inconsistencies generally divided the animal advocacy movement into the antivivisection camp and the welfare camp.[188] Notwithstanding these ruptures, the new branch of animal advocacy achieved notable success. A new bill aimed at protecting laboratory animals was passed in parliament in 1876 and once again the antivivisection movement gained momentum and spread through Europe, with several groups forming across the continent.[189]

The animal welfare movement soon moved across the Atlantic to the United States. The aristocrat Henry Bergh, influenced by the proceedings in England, started organising a movement and introduced the idea of animal defence to the United States in the 1860's.[190] Bergh's efforts lead to the first anticruelty statute being passed in New York in 1866, which read:

> Every person who shall, by his act or neglect, maliciously kill, maim, wound, injure, torture or cruelly beat any horse, mule, cow, cattle, sheep or other animal belonging to himself or another, shall upon conviction be adjudged guilty of a misdemeanour.[191]

186 Carson *Men, beasts and gods* 54.
187 Silverstein *Unleashing rights* 31.
188 *Ibid*.
189 *Ibid*.
190 Niven *History of the humane movement* 106.
191 *Idem* 108.

Parliament also instituted the American SPCA, which was headed by Bergh. This was the first private animal welfare organisation in the Western hemisphere and by utilising its delegated powers, the ASPCA prosecuted several cases involving the neglect of farm animals.[192]

3.2.2 The shift from welfarism to rights

Over the years the focus of welfare organisations like the ASPCA shifted from a concern with farm animals to the protection of domestic animals like dogs and cats.[193] Whilst several factors contributed to this shift, the most prominent factors included the location of the welfare organisations in the cities, where the majority of animals were domesticated animals, and city funds being allocated to address doorstep issues like stray animals. Furthermore, the regulation of welfare issues outside the city borders posed an increased burden on already limited resources.[194]

The World Wars and worldwide industrialisation amplified this shift and animal welfare issues were gradually pushed to the periphery. Consequently, the welfare movement lost momentum during the first half of the century.[195] The 1960's brought a steady revival of animal welfare concerns, but it wouldn't be until the 1970's that the intellectual efforts of scholars like Peter Singer would revitalise the movement and initiate a shift towards rights talk. It is important to note that, whilst Singer's approach to animal liberation is grounded in utilitarian theory and not rights theory, his work has nevertheless provided a philosophical foundation for animal rights theorists and played a pivotal role in the creation of many animal rights organisations, including People for the Ethical Treatment of Animals (PETA), the world's largest animal rights organisation.[196] The reborn movement rapidly gained momentum during the 1980's and established popularity as the 'animal rights movement', advocating the philosophy that animals should be included in the community of rightsholders.[197]

192 *Ibid*.
193 *Idem* 109.
194 *Ibid*.
195 Silverstein *Unleashing rights* 32.
196 *Ibid*.
197 *Ibid*.

The emergence of the rights movement was accompanied by inevitable tension and conflict with the animal welfare movement, whose approach to animal advocacy differed in 'focus, philosophy, language and tactics'.[198] By now, the welfare movement focussed almost exclusively on companion animals and turned a blind eye to the plight of farm animals and animals used in experimentation. As Helena Silverstein notes, 'it was not uncommon for board members of humane organisations to support hunting and meat consumption. Moreover, welfare groups held that treatment of animals should be guided by compassion: animals deserve *some* protection, deserve to be treated humanely, but do not have rights'.[199] The focus of welfarists has always been one of reform. Animal welfarists seek the implementation of legislation that improves the lives of the animals that we utilise and not a basic shift in the way we see and relate to animals.

Conversely the animal rights movement rejects human utilisation of animals, irrespective of the degree of 'humaneness' accompanying the use. Animal rightists contend that a desire for meat consumption, leather products, hunting or entertainment cannot validate or justify the emanating suffering imposed on animals and therefore seek a radical shift in the way we relate to animals. For the rightists, this shift will not stem from mere compassion but requires the extension of rights to animals.[200]

Whilst the chasm between the welfare camp and the rights camp remains, recent years have seen the gap shrink and in some cases even disappear. The reason for this narrowing, as we will see, has been both practical and theoretical. Some welfare societies have started to expand their focus to the plight of animals used in food production and experimentation and some rightists believe that welfare strategies should be employed *en route* to the extension of rights to animals. Some theorists see (ideological) common ground between these two approaches and argue that there can consequently be no meaningful separation.

198 *Idem* 33.
199 *Ibid*, own emphasis.
200 See Regan *The case for animal rights*.

The consequence of this is that 'animal rights' has become a generic term that refers to a wide range of views and approaches to the protection of animals. Tom Beauchamp, for instance, sees the distinction between the two camps as 'a crude tool for dividing up the world of protective support for animals' and rejects the use of 'animal rights' as a polarising term that suggests that there is 'inherent conflict or an inseparable gulf between "rightists" and "welfarists"'.[201] Rather, he argues that 'the many theories that afford protection to animals are better analysed as a spectrum of accounts spread across a continuum that ranges from, on one end, a minimal set of human obligations to animals (e.g., "do not treat animals cruelly" and "do not slaughter inhumanely") to, on the other end, a maximal and prohibitionist set of human obligations to animals (e.g., "do not kill animals" and "do not utilise animals in laboratories")'.[202] These hybrid approaches maintain a new welfarist stance that supposes the possibility of mutually reinforcing reciprocity between welfarism and rights theory.

In the remainder of this chapter I will argue that this continuum account of animal advocacy theories and the hybrid approach of new welfarism is theoretically unsound and counterproductive. The welfare- and rights-based approaches are based on fundamentally incompatible views on the place of animals in our moral community and are therefore indeed, in my opinion, separated by an inseparable ideological gulf. This gulf, I will furthermore argue, needs to be maintained if we are to circumvent some of the violent and reductive aspects of the law relating to animals and ultimately facilitate the much needed shift in the way we view animals.

3.3 The amalgamation of welfarism and rights

The new welfare approach regards adherence to welfare measures as important incremental steps towards the ultimate goal of animal rights, animal welfare is seen as the short term means towards the long term goal of animal rights. As Gary Francione explains, 'it appears as though the new welfarists believe that some causal connection exists between cleaner cages today and empty cages tomorrow, or

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201 Beauchamp T 'Rights theory and animal rights' in Beauchamp T and Frey R (eds) *The Oxford handbook of animal ethics* (2011) 198, 200 - 201.

202 *Idem* 201.

between more "humane" slaughter practices today and no slaughtering tomorrow'.[203] The consequence of this approach is that the 'animal rights' movement 'temporarily' pursues an ideological and practical agenda that concurs with the approach followed by those who condone the utility status of animals.[204]

The rationale behind the new welfarist approach is twofold. Firstly, welfarist reforms are seen as bringing about positive change to the conditions in which animals live and die and it is believed that these types of improvements can incrementally lead to the eradication of all animal (ab)use.[205] Secondly, the extension of rights to animals is seen as a 'utopian' ideal that can only (possibly) be realised in the long term. Consequently, the new welfarists argue, we need concrete normative guidance in the form of welfare policies to inform the way we interact with animals on a day to day basis *en route* to the ideal of animal liberation.[206]

As Francione argues, a certain confusion regarding the micro and macro levels of moral theory preoccupies the reasoning of the new welfarists.[207] Ingrid Newkirk, co-founder and current president of PETA, sees welfare reform as something that 'can only bring us closer to our ultimate goal' (of animal rights).[208] Newkirk uses the example of a statute requiring that a thirsty cow awaiting slaughter be provided with water to illustrate her support of welfare legislation. Newkirk criticises animal rights advocates who refused to support such a statute on the basis that it maintains the utility status of animals, arguing that she 'cannot imagine how those vegetarians with clean hands, who declined to help, could explain their politics to the poor cows, sitting in the dust with parched throats'.[209]

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203 Francione G 'Animal rights and animal welfare' (1996) 48 *Rutgers Law Review* 397, 399.

204 *Ibid*.

205 This view on the reciprocity between welfare reform and the strive for animal rights leads animal advocates like Wayne Pacelle to argue that the distinction between animal welfare theory and animal rights theory is a 'distinction without distinction'. See Pacelle W 'Wayne Pacelle, unplugged' (1994) November *The Animals' Agenda* 28.

206 Francione 'Animal rights and animal welfare' *RLR* 399 - 400. Animal rights theorists Steven Wise and Susan Hankin also argue in favour of an incremental approach to ultimately secure rights for animals. See Wise S *Drawing the line: Science and the case for animal rights* (2002); Hankin S 'Not a living room sofa: Changing the legal status of companion animals' (2007) 4 *Rutgers Journal of Law and Public Policy* 314.

207 Francione 'Animal rights and animal welfare' *RLR* 422 - 426.

208 *Idem* 423.

209 Newkirk quoted in Francione 'Animal rights and animal welfare' *RLR* 423. For an adaptation of Ingrid Newkirk's thirsty-cow story to illustrate how the pursuit of welfare reform is detrimental to

I have little doubt that most people, and I include both meat eaters and ethical vegetarians and vegans, will feel a moral imperative to give water to a thirsty cow awaiting slaughter and will act on this belief when having the opportunity to do so. The point is, of course, that it is not a matter of *either* supporting welfare reform *or* turning a blind eye to the cow's suffering. It is possible to feel morally obligated to minimise her suffering without supporting an animal welfare stance merely because it also strives to lessen suffering. In fact, there is good reason to oppose welfarism if you belief that it perpetuates the institutionalisation of animal exploitation that lie at the very core of the suffering that the cow awaiting her slaughter has to endure.[210]

Francione uses a hypothetical scenario to forcefully deconstruct Newkirk's argument and expose the interconnectedness between the suffering of animals, which presents only one interest that warrants consideration and protection, and the enabling ideological foundations of the schemata of domination in which that suffering occurs. Francione asks that we place ourselves in the position of 'a guard working in a prison in which completely innocent people are being tortured and jailed by government security forces for no reason other than that they have political views that differ from those of the government'.[211] As you disagree with the way in which the prisoners are treated, you take all the steps that someone in your position can to minimise the suffering of the prisoners. This means that you refrain from directly partaking in the infliction of torture and physical ill-treatment of the prisoners and provide hungry and thirsty prisoners with food and water when you are able to do so.[212]

Upon deciding that you not only disagree with the institutionalised violation of the prisoners' basic rights but that you want to eradicate the system of political persecution and bereavement of other interests 'that together define the minimal conditions of what it means to not be treated exclusively as a means to an end', you

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the animal rights movement, see DeCoux E 'Speaking for the modern Prometheus: The significance of animal suffering to the abolition movement' (2009) 16 *Animal Law* 9.

210 Taimie Bryant shares Francione's view that the property status of animals, which is maintained and perpetuated by welfarism, is foundational to the problem of animal exploitation. Bryant argues 'the reason that the legal status of animals as the property of humans has such a dramatic effect is that it rests so firmly on the ideology of humans' presumed superiority to animals and humans' presumed centrality in the natural world'. Bryant T 'Sacrificing the sacrifice of animals: Legal personhood for animals, the status of animals as property, and the presumed primacy of humans' (2008) 39 *Rutgers Law Journal* 247, 255.

211 Francione 'Animal rights and animal welfare' *RLR* 423.

212 *Ibid*.

resign from your position as guard and form an organisation that seeks to destabilise the regime.[213]

This pursuit of destabilisation can be approached from at least two perspectives. Firstly you can seek the enactment of legislation requiring that the prisoners periodically be given water and food, except under circumstances that the warden deems it 'necessary' that food and water be withheld in the interest of state security. This can be followed by another law requiring that prisoners be tortured 'humanely', except under circumstances wherein it is necessary to deviate from this directive. Alternatively you can aim your efforts at the foundation of the institutionalised exploitation, at the government that condones and facilitates the imprisonment and torturing of people for the regime's self-benefit. You might raise public awareness on the existence of such practises through demonstrations or protests and lobby for political change.[214]

These two approaches differ significantly in focus. The first approach exclusively addresses the prisoner's interest in not suffering and seeks that legislative reform concretise at macro level what the guard, whilst working in prison, did at micro level. Whilst the second approach continues to address the prisoner's pain and suffering, it acknowledges this pain and suffering as an outgrowth of the system of institutionalised exploitation in which people are treated as a means to an end and aims to destabilise the hegemonic foundation rather than alleviating the symptoms.[215]

The guard faced by a hungry and thirsty prisoner decides on an issue of morality at a micro level that concerns a course of action in response to another person's suffering that stems from a socially and legally sanctioned deprivation of her interests. The guard's response and approach at macro level is an entirely different issue: 'it is not the case that the decision to offer water to the prisoner requires that the guard try to secure laws to achieve that reduction of suffering on an institutional basis by, for

213 *Idem* 424.

214 *Ibid*.

215 The premise of Francione's argument pertaining to institutionalised animal exploitation is that the animal is maintained in a subordinate and vulnerable position due to her legal categorisation as 'a thing' or property. See Francione 'Animal rights and animal welfare' *RLR* 397. For the view that the recalibration of animals' property status poses a challenge to 'humans' primacy at the top of a hierarchical world order', see Bryant 'Sacrificing the sacrifice of animals' *RLJ* 255.

example, providing a glass of water to each prisoner on the way to execution'.[216] Whilst the interest in not suffering is certainly one that warrants protection, there are other interests at stake that need to be recognised as well.[217] The interest in not suffering is in fact secondary to the interest in not being treated instrumentally in a system of institutionalised exploitation when the suffering emanates from that very utilisation: 'after all, even if the prisoner was not tortured, or subjected to thirst and hunger – that is, even if the interest in pain and suffering was respected completely – the prisoner would still be a prisoner'.[218]

I want to argue that the welfare-rights amalgamation is akin to an attempt at mixing oil and water. The discordant ideological foundations of welfare theory and rights theory renders a consolidation disagreeable for the same reason that the molecular structure of water and oil makes suffusion impossible. Welfarism accepts the utility status of animals and maintains the anthropocentric framework in which it functions, whilst rights theory seeks the total abolition of human use of animals and attempts to displace this hegemonic structure. The constituent parts of new welfarism are thus fundamentally at odds, rendering the approach internally fissured and philosophically unsound.

The same theoretical illogic is found in the appropriation of the philosophy of *ubuntu* by pro-market interest groups to support neoliberal policymaking. Albeit a complex and often contested concept, the philosophy and language of *ubuntu* has been extensively employed in post-apartheid South Africa by various interest groups; 'from nationalists who use the concept to argue for a "rebranding" of the country to business leaders and government policy-makers keen to make South Africa a more business-friendly place'.[219] Literature on '*ubuntu* capitalism' provides one example of the marketisation of *ubuntu* discourse. These writings illustrate an attempt at synthesising *ubuntu* theory and a (capitalist) market agenda to create 'a home-grown corporate management culture that combines social and economic justice with

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216 Francione 'Animal rights and animal welfare' *RLR* 425.

217 For a critique on the centrality of suffering in the utilitarian approach see Diamond C 'Eating meat and eating people' in Sunstein C and Nussbaum M (eds) *Animal rights: Current debates and new directions* (2004) 93.

218 Francione 'Animal rights and animal welfare' *RLR* 426.

219 McDonald D '*Ubuntu* bashing: The marketisation of "African values" in South Africa' (2010) 37 *Review of African Political Economy* 139, 139.

improved profits'.[220] This begs the question whether the philosophy of *ubuntu* can be reconciled with an explicit materialist formation of market society. I support the view that this question must be answered in the negative. '*Ubuntu* capitalism' is a contradiction in terms as the theoretical underpinnings and ideologies of the individualised and commodified sphere of capitalism stand in stark contrast with the element of communalism that is intrinsic to the African philosophy of *ubuntu*.[221] The marketised (re)conception of *ubuntu* draws on a classical liberal notion of collective relations, premised on the conjecture that one is contributing to the greater wealth of all by bettering yourself. The *ubuntu* social dialectic is however not driven by such individualism 'and appear fundamentally at odds with the market's *homo economicus*'.[222]

Some scholars argue that, despite being compromised by such a discursive shift, *ubuntu* retains transformative potential 'that can be meaningfully revived for more progressive change'.[223] Such a 'creative' interpretation and application of *ubuntu* lacks theoretical rigour and denies the complexity and nuanced philosophic nature of *ubuntu*, reducing *ubuntu* to a single element that can be employed in service of a capitalist market ideology. Mogobe Ramose warns that several methodological, semantic and historical problems emanate from attempts to 'metamorphoze' *ubuntu* into an abstract single element in order to align this philosophy with what would otherwise be a conflicting paradigm.[224]

> To dissolve the specificity of *ubuntu* into abstract universality is to deny its right to be different. It is to accord undue primacy to the universal over the particular. This dissolution neither enlightens nor closes the question of universals and particulars.[225]

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220 *Idem* 140.

221 The element of communality or togetherness is evident in various translations of the concept of *ubuntu* as 'I am because you are' (Prinsloo E 'The African view of participatory business management' (2000) 25 *Journal of Business Ethics* 275, 277), 'a person is a person because of others' (Blankenberg N 'In search of a real freedom: ubuntu and the media' (1999) 13 *Critical Arts Journal* 42, 43) and 'a spirit of neighbourliness' (Kamwangamalu N 'Ubuntu in South Africa: A sociolinguistic perspective to a pan-African concept' (1999) 13 *Critical Arts Journal* 24, 24).

222 McDonald '*Ubuntu* bashing' *ROAPE* 148.

223 *Idem* 139.

224 See Ramose M 'The ethics of *ubuntu*' in Coetzee P and Roux A (eds) *Philsophy from Africa* 2 ed (2002) 324, 326 - 329.

225 *Idem* 327.

Ubuntu is ultimately not merely 'compromised', but changed into something that it is not. Similarly, the new welfarist attempt at synthesising animal welfare and -rights also dissolves the particular progressive ideological foundation that undergirds animal rights theory into general rhetoric that serves to justify our continued containment of animals in a subordinate position, thereby entrenching the *status quo* and indefinitely postponing the strive for justice. The water cannot eventually infuse with the oil to create a new substance. But in order to understand why welfarism will not serve the ideal that the animal rights movement strives to realise, we need to critically examine the philosophical foundations, the 'molecular structure', of these theories rather than thoughtlessly yielding to the here-and-now anthropocentric legal disposition in the hope that minor changes in the way we abuse animals now will one day bring about animal rights.

The latter approach amounts to what Van Marle calls a 'privileging of the present' that counteracts 'visions of a future, a not-yetness that is never present, always postponed'.[226] We focus so intently on the present, the fact that we don't have any animal rights today and won't have any animal rights tomorrow, that we do not take the time to critically reflect on the approach we employ in (re)'negotiating the past, present and future'.[227] I believe Van Marle's call to attentiveness and proposal of slowness is needed to create an instant from which we can critically (re)consider the new welfare approach to animal liberation.

3.3.1 The need for a moment of slowness and reflection amidst chaotic violence towards animals

The questions of time and memory are central to Van Marle's jurisprudence of slowness. Milan Kundera's reflection on the ecstatic slowness of the motorcyclist, cut off from both the past and the future in the instant of his flight, provides Van Marle with a starting point from which to contemplate the law and (legal) interpretation and their relation to time. From here, Van Marle takes on the task of creating an approach of slowness in the midst of chaotic movement.

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226 Van Marle 'Law's time, particularity and slowness' *SAJHR* 245.
227 *Idem* 255.

Law's chronology is one of inescapable speed, inescapable because of the very nature of law. 'Law, because of its rule-bound nature, and judgements, because of their over-emphasis on calculation, excludes the needs of the particular and ... "closes the door of the law"'.[228] This means that the (needs of the) particular moment becomes enveloped in the general and therein lies the violence of the law: 'the violence (and reductive nature) [of the law] refers to law's tendency to make the particular general and the concrete abstract'.[229] Whilst this intrinsic characteristic of the law and legal judgement is inescapable, it should always be borne in mind as we engage in legal reading and interpretation. We cannot eradicate this inherent characteristic of the law, but an approach of slowness can help us circumvent some of its reductive tendencies.[230]

Slowness calls for a disruption and a suspension to create a moment from which we can (re)consider. 'Law's present is always that of the need to establish, to distinguish, to create sure foundations. The present can only be redeemed by affirming a time that is not one of resolution; rather, a holding open of many versions of events, of differently inflected truths'.[231] These inflected truths reside in the past of collective memory. Memory as 'a support of an embodied and embedded recollection' constitutes disruption in itself, for, as Van Marle reminds us, 'memory ... is a construction and in this sense the traditional concepts of linear and chronological time are disrupted'.[232] Here we see why the past is as significant for Van Marle in the 'de-privileging [of] the present' as the future is.[233] Legal interpretation's relation with the past and future illustrates a paradox:

> Because we employ our past experiences when we imagine and our imagination when we remember, the paradox of imagining the past and remembering the future is created. Time, memory and imagination accordingly become part of a more complex configuration than a mere linear or chronological remembering or projection.[234]

228 *Idem* 242.
229 *Ibid*.
230 *Idem* 243.
231 Douzinas C and Geary A *Critical jurisprudence: The political philosophy of justice* (2005) 254.
232 Van Marle 'Law's time, particularity and slowness' *SAJHR* 241.
233 *Ibid*.
234 *Ibid*.

This relation exposes multiple voices, differences and manifold notions of truth. The question that Van Marle poses acknowledges and seeks to address this complexity: how do we listen to these voices and engage with these truths to- and from the here and now? Or, (re)turning to my focus in this section, how do we interpret and relate the 'imagined' past and continuing violence towards animals and the only present legal recourse of welfare reform against a postponed and 'remembered' future of animal liberation?

The multiplicity of voices and truths cannot be heard in (law's) speed. We are called to slow down and firstly acknowledge and contemplate the spirit of complexity peculiarising the specific situation which, as Van Marle reminds us, is situated in the past, present and future. In order to adequately address these different dimensions, she calls for 'a disruption of a chronological and linear conception of time' so that we can embrace the nuances of the situation.[235] Van Marle uses artistic passages to illustrate how such a disruption can come about. She specifically engages with Martin Hall's archaeological investigation that offers two contrasting approaches to the contemplation of time and memory, a short story by Paul Auster that highlights the relevance of attention to detail and particularity, and an animated film by William Kentridge in which memory is portrayed in a manner that fractures and problematises conventional conceptions of time.[236]

Van Marle then translates the notion of attentiveness that we find in these artistic events into a deconstructive approach to the law and (legal) interpretation. Her main aim is to investigate the time aspect intrinsic to deconstruction and to illustrate how this deconstructive approach can assist in providing an interpretation (of a text or situation) that is regardful of particularity and the fluidity of meaning. Such an approach 'embraces both a disruption of chronological time – and accordingly multiple notions of truth and fluidity of meanings – and a slowness or dwelling (strategy of delay)'.[237] This strategy of delay firstly underlines the ethical imperative of deconstruction by acknowledging the limits of any attempt at interpretation, 'that

235 *Ibid*.
236 *Idem* 245 - 250.
237 *Idem* 250.

which cannot be known, that which escapes',[238] thereby recalling both Charles Pierce's notion of secondness and the limits and impossibility of (the) law as justice that I examined in the previous chapter. This approach furthermore remains, at its very core, a call to 'read and reread, interpret and re-interpret without hastening to a final end', thereby postponing law's time and speed that generalises and universalises.[239] Slowness becomes synonymous with (critical) reflection and in a sense Van Marle echoes an Arendtian call to *think*. I belief we need to 'take the time' to think and critically reflect on the new welfare approach, its underlying assumptions and theoretical foundations. This requires that we embrace a spirit of continuity, keeping in mind the complexity of the moment as a configuration of past, present and future, rather than collapsing time into the speed of the present instant only.

3.4 The theoretical foundations and internal paradoxes of new welfarism

As stated before, my main aim in this chapter is to illustrate the ideological inconsistencies regarding the place of animals in our moral community that inheres in the space that separates welfare- and rights-based approaches, and not to elaborate on the theories underlying the respective approaches. A brief exposition of the theoretical foundations of these approaches is however necessary to elucidate and facilitate the following discussion.

3.4.1 Utilitarianism and moral rights

The philosophical grounding of animal welfarism can be traced back to the writings of scholars like Jeremy Bentham and John Stuart Mill, whose work provides a framework for a utilitarian defence of animal interests. Up until the late-twentieth century Mill's views were almost regarded as a canonical expression of utilitarian theory, with utilitarian thought not undergoing any major changes in the hundred years since Mill's contribution.[240] Mill's views provided a model that approaches utilitarian theory as 'consequentialist, welfarist, aggregative, maximising, and

238 *Idem* 251.
239 *Idem* 255.
240 Frey R 'Utilitarianism and animals' in Beauchamp T and Frey R (eds) *The Oxford handbook of animal ethics* (2011) 172, 172.

impersonal'.[241] His views were consequentialist insofar as the rightness or wrongness of an act depended on the goodness or badness of its consequences. His views were welfarist in that rightness was seen as a function of goodness, the goodness being understood as counting the welfare of both humans and animals. The impersonal and aggregative dimensions of this model stem from the view that rightness should be determined through the neutral assessment of the increase and reduction in the welfare of all influenced by the act, and that the increases should be calculated across all subjects affected. Lastly his views were maximising in that the principle of utility was formulated, in light of welfarist considerations, as 'always maximise net happiness'.[242]

It was however Bentham who had a greater impact on utilitarian theory as a foundation for animal welfare. Bentham claimed that a being's capacity to suffer is a sufficient condition for moral consideration. The question, he argued, 'is not Can they *reason*? nor Can they *talk*? But, Can they *suffer*?'[243] With this, Bentham included animal suffering in the social utility function and almost all the utilitarians after Bentham, including Robert Nozick and most prominently Peter Singer, would follow suit. It is not hard to see what effect this emphasis on suffering has on the utilitarian argument, 'it simply seizes upon the pain involved, weighs it against the pain on the other side (though the method of doing so is not obvious and hardly ever discussed), and decides accordingly what ought to be done'.[244] It thus comes down to a utilitarian balancing: the right action will be the one that produces the largest summative balance of pleasure over pain.[245]

Animal rightists, on the other hand, reject utilitarian balancing and believe that the rightness of an act towards an animal requires the recognition of moral rights. The theoretical underpinnings of animal rights can be found in natural law and natural rights theory.[246] Human rights developed from these theories and provided a framework that was adapted to advance rights theories that can accommodate

241 *Ibid*.
242 *Idem* 172 - 173.
243 Singer *Animal liberation* 7.
244 Frey 'Utilitarianism and animals' in *The Oxford handbook of animal ethics* 175.
245 Nussbaum M 'The capabilities approach and animal entitlements' in Beauchamp T and Frey R (eds) *The Oxford handbook of animal ethics* (2011) 228, 236.
246 Silverstein *Unleashing rights* 27.

animals. Consequently the term 'rights' fundamentally has the same meaning in both human- and animal rights paradigms.

In order to claim that animals have rights within a natural rights theory, theorists advance different views on what (exact criterion) grants an animal moral citizenship or standing. Whilst there is no consensus on this point, they commonly employ an interest theory to assert that animals share one or more attributes or interests that we regard as fundamental to being human and that merit protection by rights. These attributes or interests, they all agree, grant animals the rights to *inter alia* life, liberty and bodily integrity. The most comprehensive theory of animal rights was developed by Tom Regan, who primarily relies on subjective consciousness to argue that animals are, like humans, 'subjects of a life' and that this grants animals rights that cannot be violated for the sake of human interests. Regan argues as follows:

> [Animals] bring the mystery of a unified psychological presence to the world. Like us, they possess a variety of sensory, cognitive, conative, and volitional capacities. They see and hear, believe and desire, remember and anticipate, and plan and intend. Moreover as is true in our case, what happens to them matters to them. Physical pleasures and pain – these they share with us. But they also share fear and contentment, anger and loneliness, frustration and satisfaction, and cunning and imprudence; these and a host of other psychological states and dispositions collectively help define the mental lives and relative well-being of those humans and animals who ... are 'subjects of a life'.[247]

Steven Wise grounds his argument for animal rights on Immanuel Kant's philosophy of dignity and proposes a neo-Kantian test to determine which animals possess 'practical autonomy' and subsequent moral rights.[248] Wise's approach is related to Regan's insofar as Wise argues that practical autonomy 'is not predicated on the ability to reason, but on a being's possession of preferences, the ability to act to

247 Regan *Defending animal rights* 42 - 43.

248 Wise S 'Animal rights, one step at a time' in Sunstein C and Nussbaum M (eds) *Animal rights: Current debates and new directions* (2004) 19, 32.

satisfy them, and the sense that it is she who wants and seeks satisfaction'.[249] Rights theorist Gary Chartier also argues that animals possess moral rights and draws on natural rights theory to advocate for (legal) animal rights.[250]

By regarding animals as possessing moral rights, these theorists bestow a distinctive moral status on animals. This moral status cannot be harmonised with a view of animals as utility objects or the property of their owners, a view that welfarists readily accept. Animal rightists see animals as possessing inherent value separate from their usefulness to humans. These contradictory views on the moral status of animals constitute a fundamental ideological chasm between animal rights theory and animal welfare theory, one that I will now illustrate by returning to Derrida's interview with Jean-Luc Nancy. In this interview, Derrida also argues that humans maintain their hegemony and a view of animals as sacrificial beings by failing to embrace animals in the 'thou shalt not kill' prohibition. To be clear, Derrida's argument is not aimed at critiquing animal welfarism, at least not directly. Nor does it in any way constitute a support of animal rights theory. It does however provide a suitable platform from which to illustrate and engage with the ideological inconsistencies between the welfare- and rights based approaches that, in my opinion, demand a conceptual separation of the two paradigms.

3.4.2 Thou shalt not kill (the human)

We firstly need to contextualise Derrida's argument as part of a bigger project aimed at deconstructing the privileging of the human (subject) within an anthropocentric sacrificial structure. For Derrida, this privileging stems from the entrenched binary human-animal opposition that has been constructed in Western metaphysical discourse. Derrida finds this juxtaposition problematic and urges that we rethink the dissimilarities between humans and animals through the logic of *différance*, rather than an oppositional distinction.[251] This project requires an in-depth investigation and questioning of the place of animality in Western metaphysics, a task that Derrida customarily approaches through a rigorous reading of Martin Heidegger's texts:

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249 Goodman E 'Animal ethics and the law' (2006) 79 *Temple Law Review* 1291, 1301.

250 See Chartier G 'Natural law and animal rights' (2010) 23 *Canadian Journal of Law and Jurisprudence* 33.

251 Calarco 'Deconstruction is not vegetarianism' *CPR* 189.

> Can the voice of a friend be that of an animal? Is friendship possible for the animal or between animals? Like Aristotle, Heidegger would say: no. Do we not have a responsibility toward the living in general? The answer is still "no," and this may be because the question is formed, asked in such a way that the answer must necessarily be "no" according to the whole canonized or hegemonic discourse of Western metaphysics or religions...'.[252]

One of the most pervasive ramifications of this oppositional human-animal divide is the problem of sacrifice. The way in which we view the killing of animals within this hegemonic structure, as necessary carnivorous sacrifice, rests on an ideology that assumes the superiority of humans over animals and the centrality of humans in the natural world: 'through our conduct we define the "other-than-human" (animal) as the means to human ends'.[253] The (human) killing of animals is not seen as murder but remains, to use Derrida's phrase, a 'noncriminal putting to death'. With these assumptions, we avoid taking any moral responsibility for the animal. As Derrida explains:

> The subject is responsible for the other before being responsible for himself as "me". This responsibility to the other, for the other, comes to him, for example (but this is not just one example among others) in the "Thou shalt not kill." Thou shalt not kill thy neighbour. Consequences follow upon one another, and must do so continuously: thou shalt not make him suffer, which is sometimes worse than death, thou shalt not do him harm, thou shalt not eat him, even a little bit, etc... But the "Thou shalt not kill" is addressed to the other and presupposes him. It is destined to the very thing that it institutes, the other as man. It is by him that the subject is first of all held hostage. The "Thou shalt not kill" – with all its consequences, which are limitless – has never been understood within the Judeo-Christian tradition ... as a "Thou shalt not put to death the living in general."... the other, such as this can be thought according to the

252 Derrida and Nancy '"Eating well"' in *Who comes after the subject?* 112.
253 Bryant 'Sacrificing the sacrifice of animals' *RLJ* 255 - 296.

> imperative of ethical transcendence , is indeed the other man: man as other, the other as man.[254]

Derrida draws a link between the scope of the term 'murder' and the 'category of others-to-whom-we-owe-responsibilities'.[255] If animals can only be killed and not murdered, they are excluded from the category of others-to-whom-we-owe-responsibilities. The implication is also that the killing of an animal cannot be unjust or unlawful, as it is the element of wrongfulness that characterises the distinction between killing and murdering. 'Thus, the hegemony of humans is sustained by both the act of casual killing and its conceptualisation as not murder'.[256] A displacement of this hegemony, for Derrida, requires that we 'sacrifice sacrifice':

> Discourses as original as those of Heidegger and Levinas disrupt, of course, a certain traditional humanism. In spite of the differences separating them, they nonetheless remain profound humanisms *to the extent that they do not sacrifice sacrifice.*[257]

It is important to keep Derrida's thesis on the inescapability of a sacrificial existence in mind when interpreting this passage. As I have emphasised in the previous chapters, Derrida is adamant that certain manifestations of sacrifice inevitably remain in the impossibility of its delimitation, that 'one eats [the Other] regardless and lets oneself be eaten by him'.[258] The unwillingness to 'sacrifice sacrifice', for Derrida, refers to an unwillingness to question dominant discourse that sees the killing of animals as noncriminal and to adapt our (un)ethical response to animals accordingly.[259] Derrida's engagement with the 'thou shalt not kill' proscription leaves open a space in which we can contemplate the utilisation of the law as a means to facilitate the sacrifice of sacrifice. It is in this space that I will now illustrate the contrasting moral spaces that the animal occupies in the utilitarian based animal welfare theory and the animal rights theory.

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254 Derrida and Nancy '"Eating well"' in *Who comes after the subject?* 112 - 113.
255 Bryant 'Sacrificing the sacrifice of animals' *RLJ* 298.
256 *Ibid*.
257 Derrida and Nancy '"Eating well"' in *Who comes after the subject?* 113.
258 *Idem* 114.
259 Calarco 'Deconstruction is not vegetarianism' *CPR* 181.

3.4.3 Sacrificing the animal

We have seen that animal welfarists acknowledge that animals possess interests that warrant consideration, most notably the interest in not suffering. But this interest is qualified and can best be described as an interest in not suffering *unnecessarily*. The utilitarian approach does not seek to eradicate suffering, but to balance the (animal) suffering against the (human) pleasure derived from the utilisation (of the animal). We can immediately identify limitations to the balancing process itself. From a methodological perspective the measuring of pleasures and pains is severely problematic, especially across species. But we can take another step back and ask what is pleasure and what is pain? As Martha Nussbaum argues, these very touchstones of utilitarianism are disputed concepts.[260] These limitations become even more apparent, and confusing, when we examine the legal translation and concretisation of the animal welfare approach.

Animal welfarists seek to address their concerns through the enactment of animal protection legislation that regulates the conditions in which animals live and die. This legislation aims to reduce the suffering of animals whilst confirming the status of animals as property to be used to the benefit of their owners. The Animal Protection Act aims 'to consolidate and amend the laws relating to the prevention of cruelty to animals'. A deconstructive reading of the act exposes the need for clarification and qualification of its purpose. Like most animal protection legislation this one is also under-inclusive and vague. The word 'unnecessarily' or 'unnecessary' appears at least eight times in section two alone. Section 2(1)(b) only forbids confinement or tethering that causes the animal 'unnecessary' suffering and similarly, section 2(1)(c) prohibits only the 'unnecessary' starving, under feeding or withholding of water or food from any animal. This means that it is conversely necessary and permissible to sometimes starve the animal. As 'unnecessary' is not defined in the act, standard practices constitute the norm and 'necessity'. Ultimately only acts of gratuitous violence are recognised as contravening the act: 'as long as an individual or entity can justify as necessary the infliction of suffering on animals, that infliction of

[260] Nussbaum 'The capabilities approach and animal entitlements' in *The Oxford handbook of animal ethics* 236.

suffering is beyond the reach of state anticruelty laws, regardless of the type and degree of suffering the animals experience'.[261]

In *S v Gerwe*[262] the appellant was *inter alia* charged with contravening the Animal Protection Act by stabbing a dog in the neck. The relevant section of the act in terms of which the appellant was charged read that 'any person who cruelly overloads, overdrives, overrides, beats, kicks, goads, ill-treats, neglects, infuriates, terrifies, tortures or maims any animals shall, subject to the provisions of this act ... be guilty of an offence'.[263] The appeal court grappled with the word 'cruelly' and in trying to make sense of this proviso shunned the particular and reverted to general, abstract legal doctrine, thereby clearly illustrating Van Marle's argument on the limits of the law and 'the violence that is brought into institutionalised legal readings and interpretations'.[264] King AJ held that 'the word "cruelly" indicates that *mens rea* in the form of intention is required. It is not enough to show objectively ill-treatment; subjectively it must be shown that the accused intended to "torture and maim"'.[265] The appeal court found that the stab wounds to the dog's neck did not provide sufficient 'evidence' that the dog was tortured or maimed and overturned the conviction of the court *a quo*.

The approach that the court followed in this case is a clear indication of the way in which the law views animals. The dog was not seen as an individual subject or as a party to the litigation that could be wronged in any way, but a mere object that could (possibly) be damaged. The most palpable trace of the court's (and law's) view of the dog is arguably its reference to the dog as an 'it',[266] as if the dog was not a living, sentient creature with a particular sex and breed, let alone a name. The court's approach and outcome of the case begs a questioning into the role and effectiveness of the Animal Protection Act, which is supposed to promote the welfare of animals and 'prevent cruelty to animals'. We however find the same view of animals in this very act. The act throughout refers to the 'destruction'[267] of an animal, once again inculcating the view of animals as inanimate things and perpetuating a binary human-

261 Bryant 'Sacrificing the sacrifice of animals' *RLJ* 248.
262 1977 (3) SA 1078 (T).
263 Section 2(a) of Act 71 of 1962.
264 Van Marle 'Law's time, particularity and slowness' *SAJHR* 243.
265 1977 (3) SA 1078 (T) at 1079.
266 *Idem* at 1078.
267 See *inter alia* sections 3(1)(a), 4(3)(b) and 5(1) of Act 71 of 1962.

animal, subject-object opposition. The animal is denied the dignity of being able to 'die' and denounced to an object that can only be destroyed. Derrida has also engaged with the notion of dying and the way that it is used in discourse to appositionally define 'the human' and 'the animal'. He complicates and destabilises this distinction by arguing that

> [o]ne could point to a thousand signs that show that animals also *die*. Although the innumerable structural differences that separate one "species" from another should make us vigilant about any discourse on animality or bestiality *in general*, one can say that animals have a very significant relation to death, to murder and to war (hence to borders), to mourning and to hospitality, and so forth.[268]

Derrida once again asks that we be mindful of the 'innumerable structural differences' between humans and animals, that we approach the partitions and separations as *différance* rather than an oppositional limit. Van Marle's proposal of slowness comes into play here, as it is through a strategy of delay that we can explore difference and particularity and circumvent the universalisation and generalisation brought about by law's speed. The Animal Protection Act however maintains an oppositional dualism and, 'as every opposition does, effaces the differences and leads back to the homogenous'.[269] Through this dualism we maintain our hegemony and exclude animals from our sphere of moral consideration. It comes as no surprise, then, that courts have on several occasions found that animal welfare legislation is not aimed at protecting animals at all, but rather to protect humans and their property. In *R v Moato*[270] the court considered the purpose of the Prevention of Cruelty to Animals Act 8 of 1914 and Van den Heever J found as follows:

> Die oogmerk van die wetgewing was nie om diere tot regsgenote te verhef nie en hierdie verbod is nie bedoel om aan hulle beskerming te verleen nie. Die oogmerk was klaarblyklik om te verbied dat een regsgenoot so ongenadig teenoor diere optree dat hy daardeur die

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268 Derrida J *Aporias: Dying – awaiting (one another at) the limits of truth* (1993) (trans Dutoit T, 1993) 75 - 76.

269 Derrida J 'Geschlecht II: Heidegger's hand' (trans Leavey J) in Sallis J (ed) *Deconstruction and philosophy: The texts of Jacques Derrida* (1987) 161, 174.

270 1947 (1) SA 490 (O).

> fyner gevoelens en gewaarwordings van sy medemens leed aandoen.[271]

This *ratio* was upheld in *S v Edmunds*[272] when Miller J stated that the object of the act 'was not to elevate animals to the status of human beings but to prevent people from treating animals in a manner which would offend the finer sensibilities of society'.[273] In the minority judgement of *NCSPCA v Openshaw*[274] Cameron J departs from this view, arguing that 'though not conferring rights on the animals they protect, the [Societies for the Prevention of Cruelty to Animals Act 169 of 1993 and the Animal Protection Act 71 of 1962] are designed to promote their welfare. The statutes recognise that animals are sentient beings that are capable of suffering and of experiencing pain. And they recognise that, regrettably, humans are capable of inflicting suffering on animals and causing them pain. The statutes thus acknowledge the need for animals to be protected from human illtreatment'.[275] Cameron however follows this passage by unambiguously reiterating that 'like slaves under the Roman law, [animals] are the objects of the law, without being its subjects'.[276]

Scholars have argued that Cameron's statements, whilst representing progression from preceding cases on the legal status of animals, nevertheless remain puzzling and paradoxical.[277] Whilst recognising that animals' capacity to suffer constitutes a ground for protection against cruel treatment, Cameron also asserts that animals are objects without any legal rights. If humans have duties towards animals that stem from their interest in not suffering, one can argue that such duties, in terms of a Hohfeldian conception of rights, do indeed confer correlative rights upon the animals to be free from human abuse.[278]

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271 *Idem* at 492 - 493. Freely translated, the court held that the purpose of the act was not to endow animals with legal personhood or to protect animals. Rather, the purpose was to forbid legal persons to act so cruelly towards animals that the finer sensibilities of his fellow humans would be harmed.

272 1968 (2) PH H398 (N).

273 *Idem* at 758.

274 (462/07) 2008 ZASCA 78 (RSA).

275 *Idem* at par 38.

276 *Idem* at par 39.

277 See Bilchitz D 'Moving beyond arbitrariness: The legal personhood and dignity of non-human animals' (2009) 25 *South African Journal on Human Rights* 38.

278 *Idem* 48 - 49.

Wesley Hohfeld published his famous article on the fundamental distinctions between different types of legal rights in 1913.[279] Hohfeld's analysis was the culmination of an extensive body of analytical jurisprudence on the basic differences between legal liberties and legal rights.[280] Hohfeld identified a set of eight basic legal rights consisting of four primary legal entitlements (rights, privileges, powers and immunities) and their opposites (no-rights, duties, disabilities and liabilities).[281] 'Rights' are state enforceable claims that others operate in a certain manner in relation to the holder of the right. 'Privileges' permit the holder to act in a certain manner without being accountable for damages to others and without others having redress to state powers for the prevention of those acts. 'Powers' reflect the ability to, through state-enforcement, alter the legal entitlements possessed by oneself or others and 'immunities' protect one's entitlements from being altered by others.[282] Correspondingly, the four opposites reflect the absence of such entitlements. One has 'no-right' when one does not have the power to beckon the state to direct the conduct of others and 'duties' reflect the absence of permission to act in a certain manner. 'Disabilities' refer to the absence of the ability to alter legal entitlements and 'liabilities' reflect the absence of protection from having one's entitlements being altered by others.[283]

Hohfeld illustrated the internal relationships between the different fundamental legal rights by arranging them in terms of opposition and correlativity. The jural opposites are structured as rights / no-rights, privilege / duty, power / disability and immunity / liability. The jural correlatives are structured as right / duty, privilege / no-right, power / liability and immunity / disability.[284]

Hohfeld used the concept of 'opposites' to express that one must have one or the other right, but not both (of the opposites). As the opposites contradict one another

279 Hohfeld W 'Some fundamental legal conceptions as applied in judicial reasoning' (1913) 23 *Yale Law Journal* 16.

280 Pacewicz L 'Human rights in the state of nature: Indeterminacy in the resolution of the conflict between security and liberty' (2011) 17 *University College London Jurisprudence Review* 34, 37.

281 Singer J 'The legal rights debate in analytical jurisprudence from Bentham to Hohfeld' (1982) 6 *Wisconsin Law Review* 975, 986.

282 *Ibid*.

283 *Ibid*.

284 Hohfeld 'Some fundamental legal conceptions as applied in judicial reasoning' *YLJ* 30.

on the same subject, they cannot exist in the same person.[285] The concept of correlativity is more complex. The Hohfeldian analysis emphasises that advantages are just one side of the legal rights coin. At the same time that an advantage is conferred on one citizen, a vulnerability is necessarily constructed on the part of others: 'legal rights are not simply entitlements, but jural relationships'.[286] The notion of correlativity is used to express a single legal relation from the perspective of the two parties:[287]

> If X has a right against Y that he shall stay off the former's land, the correlative (and equivalent) is that Y is under a duty toward X to stay off the place.[288]

A duty that X owes Y translates into Y having a right against X. The expressions are counterparts, rights are fundamentally duties placed on others to act in a specific manner.[289] Likewise, privileges and no-rights are also correlatives:

> Whereas X has a *right* or *claim* that Y, the other man, should stay off the land, he himself has the *privilege* of entering on the land; or, in equivalent words, X does not have a duty to stay off. The privilege of entering is the negation of a duty to stay off.[290]

Relying on this view of rights as claims based on duties, David Bilchitz critiques Cameron for not translating his recognition that we have a duty (not to inflict suffering on an animal) into a right (to not be subjected to suffering by human beings):

> A duty towards animals to avoid treating them cruelly would logically entail that they have a correlative right not to be subjected to cruel treatment. Even if we reject a strict correlativity between duties and rights in some cases (such as those involving general positive obligations upon individuals), it appears clear that such correlativity

285 Wise S 'Hardly a revolution – The eligibility of nonhuman animals for dignity-rights in a liberal democracy' (1998) 22 *Vermont Law Review* 793, 801.
286 Singer 'The legal rights debate' *WILR* 987.
287 *Ibid*.
288 Hohfeld 'Some fundamental legal conceptions as applied in judicial reasoning' *YLJ* 32.
289 Singer 'The legal rights debate' *WILR* 987.
290 Hohfeld 'Some fundamental legal conceptions as applied in judicial reasoning' *YLJ* 32.

> does hold where general negative obligations are involved. A duty to avoid inflicting suffering on an animal applies to every animal one comes into contact with: thus, every animal can claim a right to avoid having suffering inflicted upon it.[291]

Whilst there is certainly merit in this argument, I do not wish to comment on Cameron's unwillingness to think through the implications of his assertions on the status of animals in terms of the correlativity of duties and rights. Some readings and explications of Hohfeldian theory indeed support granting rights to animals[292] whilst others are not favourable to extending rights to animals.[293] Rather, I want to argue that Cameron's judgement reflects a characteristic welfare perspective and indeed a very progressive interpretation and application of this approach, his (minority) judgement thereby clearly highlighting the limits and inability of this approach to 'sacrifice sacrifice'. Cameron departs from an exclusively human-centric approach to animal welfare legislation, arguing that 'the interests of the animals' should be taken into account when the question of granting an interim interdict in terms of the act is considered.[294] Welfare theory does indeed acknowledge that animals have an interest in not suffering, but maintains the object-status of animals. This should not come as a surprise if we consider the theoretical foundations of animal welfarism. The utilitarian aggregation of consequences does not recognise every individual life as an end in itself, but allows for lives to be utilised as means for the ends of others.[295] If the pleasure-and-pain scale tips one way, the utilisation is permissible and the animal may be sacrificed. If it tips the other way the animal may not be utilised, at least not under those specific circumstances.

Peter Singer makes extensive use of images and narratives to vividly describe the almost unthinkable suffering that animals endure on factory farms and in laboratories. As Singer argues that the pleasure derived from these practices can't possibly outweigh the suffering, he holds that the utilitarian pleasure-and-pain scale holds

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291 Bilchitz 'Moving beyond arbitrariness' *SAJHR* 48 - 49.
292 See Francione G *Animals, property and the law* (1995); Wise 'Hardly a revolution' *VLR*.
293 See Wellman C *Real rights* (1995); Sumner L *The moral foundation of rights* (1987).
294 (462/07) 2008 ZASCA 78 (RSA) at par 49.
295 Nussbaum 'The capabilities approach and animal entitlements' in *The Oxford handbook of animal ethics* 237.

great value for the plight of the animal.[296] The ongoing suffering of animals in these environments, despite a long history of animal welfare advocacy and legislation, unfortunately suggest otherwise. But even if this was the case and we could eradicate large scale industrial factory farming through a utilitarian balancing of pleasures and pains, the scale won't tilt in favour of the animals in cases where traditional farming practices are appropriately adjusted and an appeal to the collective good outweighs the (reduced) suffering accompanying the utilisation of the animal.[297]

It is this utilisation and view of animals as sacrificial beings that rights theorists seek to eradicate. If animals possess rights, the argument goes, these rights will obstruct appeals to the aggregated human good from outweighing the interests of animals and humans won't be allowed to (ab)use animals as they see fit.[298] And here we see a fundamental ideological dissonancy between the welfarist and rights-based approach. Animal welfarism cannot 'sacrifice sacrifice', because the animal is categorised *as* a sacrificial being. The real problem with utilitarian animal welfare theory 'has nothing essentially to do with pain and suffering, even if they are intrinsically evil. The right starting place is that we are using animal lives for our own purposes and often using them up. Whether pain is or is not inflicted in the process, we are still using and often using up these lives'.[299] Animal rightists reject this view of animals and demand that we view animals as inviolable subjects with intrinsic worth and abolish all human use of animals. Whether the theoretical and philosophical foundations of rights theory allow for this outcome is another question, one that I will extensively address in the next chapter. But for now, the contrasting moral spaces that the animal occupy in the respective theories based on rights and welfare should be clear.

These fundamental discrepancies render welfarism incapable of advancing the ideal of animal liberation, if by animal liberation we understand the emancipation of animals to be free from human exploitation. Animal welfarism cannot displace or

296 See Singer *Animal liberation*.
297 Frey 'Utilitarianism and animals' in *The Oxford handbook of animal ethics* 176.
298 *Ibid*.
299 *Idem* 178.

destabilise the view of animals as subordinate utility objects, but conversely reinforces the property status of animals. The necessity of human (ab)use of animals as such is never questioned, within a welfarist framework 'only questions about the necessity of particular acts in relation to the presumed entitlement of humans to use animals' are addressed.[300] Consequently, human-animal interaction and conflict arising from competing interests is conceptualised in a way that means the interests of humans will inevitably prevail. Within this framework, a mere concern for the interest of animals in not suffering will not 'eventually' translate into emancipation. Emancipation requires the destabilisation of this anthropocentric sacrificial structure that accepts and maintains the subordinate status of animals. Rights theorists strive to bring about this destabilisation through the extension of rights to animals.

3.5 Conclusion

I have argued in this chapter that there is inherent conflict between the animal welfare approach and animal rights approach. The same ideological incongruencies that caused the initial split between the antivivisectionists and welfarists during the 1860's, remain until this day. This divergence stemmed from incompatible views on the moral status of animals, which not only render the two approaches contradictory, but makes an amalgamation detrimental to the ideals that animal rights theorists strive to realise. Animal welfarists accept and operate within a sacrificial anthropocentric structure that entrenches a human-animal binary opposition by conceptualising the dissimilarities between humans and animals as an oppositional cut. The utility status of animals as sacrificial beings is thereby perpetuated and not displaced, such displacement being the (opposing) aim of the animal rights movement.

I proposed that we follow Van Marle's deconstructive approach of slowness to interpret and reflect on the new welfarist amalgamation of utilitarian based welfare theory and rights theory. By proposing a 'strategy of delay' and 'de-privileging of the present', Van Marle is not denying the here-and-now, but on the contrary supporting an approach to (legal) interpretation that allows us to better understand the complexities that configure the *status quo*. By relying on Van Marle's deconstructive

300 Bryant 'Sacrificing the sacrifice of animals' *RLJ* 249.

insights and Derrida's argument that humans maintain their hegemony by excluding animals from the 'thou shalt not kill' prohibition, I tried to not only illustrate the contrasting moral spaces that the animal occupies in animal welfare theory and rights theory, but that the interim employment of welfare strategies to pursue the more liberal future goal of animal rights is the result of an uncritical privileging of the here and now and leads to an indefinite postponement of the strive for justice.

By highlighting the dissonance between the approaches, my aim was to illustrate that (animal) rights theory can and should be celebrated as pursuing a more progressive ideal of animal liberation than its welfarist predecessor. The question, then, is can the extension of rights to animals indeed realise this ideal and liberate them from oppression? To answer this question, we need to critically examine the philosophical foundations and development of rights theory to ascertain whether the current conceptualisation of animal rights can facilitate such an outcome. I will extensively address this issue in the following chapter.

CHAPTER 4 EXAMINING THE LANGUAGE OF (ANIMAL) RIGHTS AND SIMILARITY PRINCIPLE AS A FOUNDATION FOR ANIMAL LIBERATION

4.1 Introduction

In the previous chapter I addressed my second research question by philosophically examining the theoretical and ideological substructures of the welfare- and rights based approaches to animal advocacy. I argued that there is a significant gulf between these two approaches and that animal rights theory is rightly considered to be the more progressive theory in support of animal liberation. I furthermore argued that this divide between welfare- and rights theory must be maintained if we are to reject the categorisation of animals as sacrificial beings and meaningfully persist in the strive towards an ethical relation to the animal Other.

In this chapter I proceed to answer my third research question by examining the history and philosophical logic of rights theory in order to determine whether the theoretical premises of this discourse allows for the realisation of its emancipatory ideal. If the ultimate aspiration of the animal liberation movement is to free animals of human domination and exploitation and to develop an ethical relation to the animal Other, we need to ask ourselves if the approach we utilise is consistent with, and allows for, such an outcome. The animal advocacy movement has gained considerable academic momentum and it is for this very reason that I believe it is more important than ever that proponents of the movement ask themselves the same question that Alice in Wonderland asked the Cheshire cat upon reaching a fork in the road: 'Would you tell me, please, which way I ought to go from here?' The cat replies: 'That depends a good deal on where you want to get to.' Upon answering that she does not much care where she is going, so long as she gets somewhere, the cat's response to Alice is quite insightful: 'Then it doesn't matter which way you go ... you're sure to do that if you only walk long enough'.[301]

In this passage Lewis Carroll calls attention to the importance of critically reflecting on the route you choose to travel to your final destination and the reciprocity between

[301] Carroll L *Alice's adventures in Wonderland* (1869) 89 - 90.

a course of action and the emanating outcome. This chapter is meant to provide such a critical reflection on the 'route' of animal rights theory. The current conceptualisation of animal rights is based on a similarity argument that I find problematic on several levels, as it is essentially anthropocentric and facilitates a human-animal dualism that deprecates the animal to subhuman Other and supports the continued disfranchisement of animals.

Within a society characterised by an uneven balance of power and ensuing oppression and domination, we find various approaches that seek to remedy this structure and strive towards the ideal of 'equality'. The most prominent approach is grounded in rights theory and aims to reach a state of equality by allocating certain rights to subjects. The modern concept of animal rights was developed less than 40 years ago and finds theoretical, ethical and philosophical grounding in the pioneering work of scholars like Peter Singer[302], Steven Wise[303], Gary Francione[304] and Tom Regan[305]. This proposed extension of rights to animals draws on the liberal human rights paradigm. It is against this paradigm that proponents have conceptualised an artificial construct of formal rights for animals and the current conception ultimately calls for an extension of *human* rights to *animals*. An engagement with animal rights theory therefore necessitates a review of literature on human rights as there can be no meaningful separation of the two paradigms.

In this chapter I will critically investigate the liberal doctrine of individual (human) rights that informs the animal rights paradigm. To this end I will trace the shift that has taken place in natural law thinking and examine how this has come to shape our contemporary understanding of subjective rights. I will then examine the current conceptualisation of animal rights and, specifically focussing on the underlying similarity principle, illustrate why this conception of animal rights precludes the possibility of an ethical encounter with the animal Other and manifests in a hierarchical ordering of animals based on their perceived similarity to humanness.

302 See Singer *Animal liberation* 6.
303 See Wise *Rattling the cage*; Wise *Drawing the line.*
304 See Francione *Animals, property and the law*; Francione *Rain without thunder.*
305 See Regan *The case for animal rights*; Regan *Defending animal rights*.

Finally I will illustrate why this approach to animal liberation is irreconcilable with the ideals it strives to realise and consequently internally paradoxical.

4.2 The genesis and ontogenesis of natural law

4.2.1 Greco-Roman beginnings

The appeal to a higher law and a distinction between the law as it is and the law as it ought to be can be traced back to Sophocles' play on the trial of Antigone, written in 442 BC. When tried for disobeying King Creon's orders by burying her brother, Antigone appealed to 'the great unwritten, unshakable traditions' of the gods as guidance on what justice demanded under the circumstances that she found herself in.[306] Antigone's appeal does however not refer to 'natural law' as such and it wouldn't be until the 5th century that the Sophists introduced the term, thereby conjunctively using the terms 'nature' and 'law' in a way which significantly diverged from the previous Greek usage of these terms.[307]

Archaic Greece did not differentiate between law and convention or between right and custom. The employment of a critical approach towards traditional authority however necessitates external standards and it is through the discovery of nature that 'the claim of the ancestral [was] uprooted; philosophy appeal[ed] from the ancestral to the good, to that which is good intrinsically, to that which is good by nature'.[308] Greek philosophy and the ideas of nature and the just are triplets, all born from a resistance to conventional authority and accompanying injustices.[309] This development is evident in the history of the Greek word *dike*, an umbrella term for concepts and words related to the ideas of rightful, lawful and just.[310] *Dike* originally referred to the primordial order and included *nomoi* (customs) and *thesmoi* (norms) to which both god and mortal were subject. The word *nomos*, which would later be used for law, initially meant the same as *ethos*.[311] The meaning of the word *dike* would

306 Sophocles *Three Theban plays* (trans Fagles R, 1984) 82.
307 According to Douzinas, 'nature as a critical concept acquired philosophical currency in the fifth century when it was used by the Sophists against custom and law and, by Socrates and Plato in order to combat their moral relativism and restore the authority of reason'. Douzinas *The end of human rights* 27.
308 Strauss L *Natural law and history* (1965) 91.
309 Douzinas *The end of human rights* 25.
310 *Ibid*.
311 *Ibid*.

also change to denote rightful judgement, '*dikaion* was the right and just and *dikaios* the rightful person'.[312]

This evolution of *dike* and *nomos* to *dikaion* and *physikos nomos* intersects the discovery of nature and its usage as a critical concept by the Sophists.[313] They juxtaposed *physis* and *nomos* and *physis* acquired normative content. 'To reason' now meant 'to criticise'.[314] *Nomoi* was used to refer to social conventions and laws and thereby separated from the natural order.[315]

The Sophists initiated a move from natural to social philosophy and with this came a shift in the conventional understanding of law or *nomos*. Appeals to unwritten laws were increasingly met with cynicism and it was during this time and against this order of distrust of both cosmology and mythology that the Sophist credo 'man is the measure of all things' was born.[316] This gave rise to the idea of the 'naturally free and self-serving individual', which stood in juxtaposition to the objectivism that inhered in the traditional understanding of *physis* and *nomos*.[317] The Sophists came to see *nomos* as an unwarranted restriction of the natural agency of *physis* and the focus shifted towards an attempt at relieving *physis* of this suppression. Nature, as the ultimate norm, justified the strong man's exercise of his natural powers and human laws were seen as a tool that the weak assembled so that they could protect themselves against the strong: 'the nature of the Sophists combined the savage with the universal and stood both for the right of the strongest and for equality for all'.[318] Although we still see natural law being employed as a norm to challenge state laws and customs, the moral corpus that it was originally associated with had degenerated. It is in the work of Plato and Aristotle that we find an attempt to restore the normative character of nature by showing that it does not contradict law, but rather 'sets the fundamental norm of each being'.[319]

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312 *Idem* 26.
313 *Idem* 27.
314 Bloch E *Natural law and human dignity* (1961) (trans Schmidt D, 1988) 7 - 9.
315 Douzinas *The end of human rights* 27.
316 Le Roux W 'Natural law theories' in Roederer C and Moellendorf D (eds) *Jurisprudence* (2004) 25, 31.
317 *Ibid*.
318 Douzinas *The end of human rights* 27.
319 *Ibid*.

Before I examine Plato and Aristotle's influence on the development on natural law, it is at this stage important to note why Douzinas argues that the emergence of the concept of nature as a norm was not so much a discovery as it was an invention or creation. Notwithstanding their differences, the classic philosophers approached nature as a norm that had to be exposed 'because it is occluded by a combination of convention and ancestral authority'.[320] Nature was consequently not just the reality of the physical realm, but the standard that could detach philosophical and political thought from obscuring elements:

> Nature was philosophy's weapon, the unsettling and revolutionary promethean fire used in its revolt against authority and the law. Its 'discovery' and elevation into an axiological standard against convention emancipated reason from the tutelage of power and gave rise to natural right ... Thus nature was used against culture to create the most cultured of concepts.[321]

But employed as a strategy to contest claims of authority, the 'discovery' of nature was really an invention rather than a revelation.[322] In order for philosophy to fulfil its function it cannot yield to ancestral authority and consequently nature, in this context, must play the part of that which was obstructed by culture. In light of this, 'the origins of philosophy and the discovery of nature were revolutionary gestures, directed against the claims to authority of the past and of law-as-custom and giving rise to critique in the name of justice'.[323]

4.2.2 Plato and Aristotle's response to Sophist scepticism

Plato and Aristotle responded to the Sophists' destabilisation of the *physis – nomos* interaction by attempting to eradicate the contrast that the Sophists introduced between the concepts. Their thought was characterised by the idea that *physis* provided an objective substructure of right, justice and the good.[324] The relationship between justice and natural right, as we will see, was fundamental in classical

320 *Idem* 32.
321 *Ibid*.
322 *Ibid*.
323 *Ibid*.
324 Le Roux 'Natural law theories' in *Jurisprudence* 32.

philosophy and involved an engagement with justice on two related levels: that of the political order and the legal order.[325]

Plato extensively considered the question of justice in his seminal work *The Republic*. His engagement was narrated in the form of a dialogue between Socrates and several Sophists, most prominently Thrasymachus. Thrasymachus' reiteration of the idea that justice is the authority of the strong (man), provided the point of departure for an engagement with several definitions and perceptions related to justice and, very importantly, injustice. For Plato, the search for justice entailed a renunciation of injustice by way of reason.[326]

Plato started off by discrediting the idea that justice is achieved when people receive what is due to them, when debt is settled and friends and enemies are treated correlatively. He then turned to Thrasymachus' view of justice as a manifestation of the interest of the strong and the result that injustice can empower the honourable. Plato (through Socrates) exposed the logical contradictions and moral unsoundness of this argument and explicitly advanced the notion of justice as good and injustice as evil and held that justice is always preferable to injustice, 'right action is in all circumstances better than wrong'.[327] When however directly confronted by Thrasymachus to 'stop asking questions ... and tell [him] what [he] think[s] justice is',[328] Socrates admitted that he cannot provide a definition of justice. Plato understood that, whilst philosophy is rooted in reason, reason alone will not provide satisfactory proof of the superiority of justice.[329]

Rather than forging an artificial definition of justice, Plato returned to the cosmology of the natural philosophers and relying on the harmony that is found in natural fixed proportions, he developed 'a new understanding of *physis* as itself permeated by an intelligible and just order'.[330] This stood in contrast to the individualistic natural law advanced by the Sophists. Plato also contested the Sophists' devotion to the written

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325 Douzinas *The end of human rights* 33.
326 *Idem* 34.
327 Plato *The republic* (trans Lee D, 1974) 102.
328 *Idem* 75.
329 Douzinas *The end of human rights* 34.
330 Le Roux 'Natural law theories' in *Jurisprudence* 32.

state laws by proposing the direct rule by philosopher kings that governed in accordance with their knowledge of the ideal form (obtained through geometrical and mathematical discovery) of the right, good and just.[331]

Using different methodological tools, Aristotle also posed a challenge to the Sophists' scepticism. Aristotle criticised Plato's mathematical approach to identifying objective structures of justice in natural proportions and geometric essences as too abstract for the regulation of human relations. Aristotle, a botanist, rather suggested that biological growth patterns provided an objective foundation of justice. He held that the entire natural realm moved towards a fated purpose or function (*telos*). It is this *telos* that dictated an entity's position in the greater (natural) scheme of things and because this natural inclination presented an entity with its *telos*, Aristotle's approach does not draw a distinction between the 'is' and the 'ought to be'.[332] Consequently, the Good cannot be defined abstractly either, as it manifests in the *telos* of the specific entity.[333]

For Aristotle, reason could permeate the natural purposive progression. The form of reason applicable to just human relations does however not find any grounding in science or mathematics, but in Aristotle's notion of *phronesis* or practical wisdom.[334] Aristotle did not distinguish between law and justice and used the word *dikaion* to express the internal connections in this grouping of legal, political and ethical concepts.[335] A judge or *dikastes* had to discover the *dikaion*, 'the right or just state of affairs in a particular situation of conflict, according to the nature of that case'.[336] The judgement formed the *dikaion* and end of the law, there was no justice beyond the *dikaion*. The *dikaion* could only be discovered after the judge had established the *telos* of the subjects of justice. As Douzinas warns, the *dikaion* does not stem from an application of moral principles or legal rules and should not be confused with general

331 *Ibid*. Plato used a cave allegory to explicate a dualistic conception of reality in an attempt to elevate justice as a universal ethical idea and restore the objectivity that the Sophists corroded. See Plato *The republic* 317 - 318.
332 Le Roux 'Natural law theories' in *Jurisprudence* 33.
333 *Ibid*.
334 Douzinas *The end of human rights* 42.
335 *Idem* 38.
336 *Idem* 39.

justice[337] or morality: 'Particular justice, the art of the judge, was not about morality, utility or truth but about the sharing of external goods, of benefits, burdens and rewards'.[338] Aristotle's account of the judicial art thus follows a natural right approach based on an understanding of *physis* that is the objective foundation of justice that can give each subject her due in accordance with her nature and its relation to the bigger cosmos, or address the damage to a previously geometrically sound relationship.[339]

Both Plato and Aristotle's respective cosmologies were attempts to restore the objective foundations of the right and their influence proved to be substantial, guiding natural law thinking for centuries to come. It wouldn't be until roughly the 16th century that their classical understanding of natural law would be displaced by the efforts of the modern empirical scientists and their mechanical understanding of nature.[340]

4.3 The transition from natural law to natural rights

4.3.1 Stoic philosophy and natural right

The Romans adopted the Greek concept of justice and used it to develop Roman law into a sophisticated legal system.[341] Both the Roman *jus* and the Greek *dikaion* referred to the lawful and just decision that the jurist arrived at in a dispute. Whilst Aristotelian legal justice continued to flourish in Rome, another branch of Greek natural law thinking emerged through the Stoics philosophers and was applied for the first time.[342] As the Greek city-states started dissolving, the idea of a *jus gentium*, a law applicable to all imperial subjects, was introduced.[343] Whilst the Stoics stayed away from the political arena, their formulation of a universal (moral) humanity, founded in norms derived from rational human nature, could easily be employed to

337 Aristotle distinguished between general justice ('the moral disposition which renders men apt to do things, and which causes them to act justly and to wish what is just') and particular- or legal justice ('concerned with distribution and retribution and constituting the proper object of the juridical art'). Douzinas *The end of human rights* 38 - 39.
338 *Idem* 39.
339 Le Roux 'Natural law theories' in *Jurisprudence* 34.
340 *Ibid*.
341 Douzinas *The end of human rights* 47.
342 *Idem* 49.
343 *Ibid*.

control individuals' irrational behaviour and local nationalisms *en route* to a new cosmopolitanism.[344]

For the Stoics, a divine force of universal reason, the *logos*, pervaded reality and ordered all things.[345] All *humans* were thought to possess this *logos* and the Stoics emphasised the importance of a mental state of mind in harmony with the *logos*, rather than a strive towards harmonisation with external circumstances.[346] The dominant tenet, as Douzinas articulates it, was that 'the law, human institutions, rules and all worldly order proceed from a single source, all-powerful nature, the sole *fons legum et juris* and *logos* discloses them to man. Nature commands, it is a moral precept which orders men to obey the sovereign *logos* which rules history'.[347]

This diverged from the traditional Greek perspective. A person was now seen as an individual under a universal law that was applied equally to everyone, and no longer as a natural part of a whole (group).[348] The law was no longer derived from external nature, but from man's reason or internal (human) nature.[349] Here we see a decisive shift in man's relation to nature, including animals. Man was celebrated as 'rational being' and claimed a superior position over the rest of nature. This signalled a break with Aristotelian physics which regarded nature as a force that harmonised the human-animal relationship.[350] Whilst the human-animal relation in Aristotelian physics was indeed hierarchised, there was strong emphasis on harmonious interaction *with nature* rather than man having decree *over nature*. This relationship changed and 'while nature and reason were initially closely connected, reason eventually came to replace nature as the principal source of law. Following its commands is to follow our nature'.[351]

Douzinas and Ronnie Warrington see this as the first expression of the philosophical and ideological construction in the dominant Western metaphysics that Derrida calls

344 *Ibid*.
345 Le Roux 'Natural law theories' in *Jurisprudence* 34.
346 *Idem* 35.
347 Douzinas *The end of human rights* 51.
348 Le Roux 'Natural law theories' in *Jurisprudence* 35.
349 Douzinas *The end of human rights* 52.
350 *Ibid*.
351 *Ibid*.

'logocentric'.[352] The '*logos* as reason' was identified with the law and rational rule was presented as the foundation of community.[353] The idea of celebrating individual rights which derive from the nature of the rational human emerged for the first time in late Stoic thought.[354] But this elevation of- and strong emphasis on certain characteristics, like rationality, meant that minority groups perceived to be lacking these basic or 'fundamental' traits were positioned in a space of marginalisation. The standing of the 'irrational animal' was clear, as is the element of sacrifice inherent in this formation of subjectivity that excludes animals from the status of being full subjects of the law and moral community.[355]

Whilst the exclusionary logic underlying this element would go unquestioned and remain, other tenets in the strands of natural law thinking developed by the Sophists, Socratic philosophers and Stoics would soon come under threat as Christianity spread through the Roman Empire and quickly gained the status of official state religion. This resulted in a pursuit to reconcile the Greek agnostic cosmology with the principles underlying the dominant Christian belief system. This pursuit would ultimately culminate in the philosophical integrations developed by Augustine (drawing on Plato) and Aquinas (drawing on Aristotle).[356]

4.3.2 Augustine's theory of justice and the Christianisation of law

Douzinas sees the gradual Christianisation of Greco-Roman law as the main force behind the move towards a theory of natural rights.[357] The rise of Christianity facilitated a shift towards the marriage of *jus* and morality which was concretised in a set of commandments. Augustine's theory of justice played a vital role in this Christianisation of the law.

Augustine developed a theory of dual citizenship, arguing that every person is a citizen of both an earthly city and of the city of God. Whilst earthly citizenship was

352 Douzinas and Warrington calls this construction 'logonomocentrism'. See Douzinas C and Warrington R *Postmodern jurisprudence: The law of text in the texts of law* (1991) 25 - 28.
353 Douzinas *The end of human rights* 53.
354 *Ibid*.
355 See Calarco *Zoographies* 126 - 136.
356 Le Roux 'Natural law theories' in *Jurisprudence* 35.
357 Douzinas *The end of human rights* 53.

characterised by conflict, brought on by passions and desires of the body, the spiritual kingdom of the soul presented utopian peace. As we are not able to fully understand God's wishes, the promise of justice will never be fulfilled in this life and only the saved will one day join God in the realm of true justice, 'justice is a divine attribute which does not belong to this world'.[358]

Augustine's theory of dual citizenship had a significant impact on natural law thinking. The idea that a strive for justice could only be conceived through inward contemplation on the presence of God in the soul, signalled a radical break from Aristotelian and Platonic justice, the latter relying on an outward contemplation of the natural order.[359] Augustine argued that our thinking was internally powered by God's revelation and thereby subjected philosophy and reason to theology and faith.[360] Nature was no longer thought to possess inherent direction and lost its authority as source of objective good. With this, the focus of natural law shifted away from an engagement with objective nature towards the free will of God.[361]

Augustine's Christian philosophy remained influential in the Western world up until the 12th century when Aristotle's work was reintroduced through contact with the Arab world and the classic interest in nature was revived. Whilst the church initially forbid any engagement with Aristotle's work, Thomas Aquinas (heavily drawing on Aristotelian thought) solidified the shift by introducing a new reconciliation of Greco-Roman and Jewish-Arab thought.[362]

4.3.3 Aquinas' four layers of law

Aquinas set out to reconcile faith (as developed in Christian doctrine) and reason (as employed by Aristotle) by articulating a fourfold distinction between eternal law,

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358 *Idem* 55.

359 Le Roux 'Natural law theories' in *Jurisprudence* 36. Douzinas explains that 'the virtue of justice was defined as *ordo amoris*, the love of the order: by attributing to each his proper degree of dignity, justice leads men to an ideal state in which the soul is subjected to God and the body to the soul. When this order is absent, man, law and state are unjust. Justice is therefore the love of the highest good or God'. Douzinas *The end of human rights* 54.

360 Le Roux 'Natural law theories' in *Jurisprudence* 36.

361 *Ibid*.

362 *Idem* 37.

natural law, divine law and human law.[363] Here Aquinas' law had none of the uncertainties introduced by Aristotle and the classics: 'natural law is definite, certain and simple, no doubt is expressed about its harmony with civil society and the "immutable character of its fundamental propositions" formulated by God the lawgiver'.[364]

Aquinas did however remain true to Aristotelian thought when asserting that a rational order permeated nature and that this rational order could be accessed through human reason. This rational order or eternal law was instilled in the virtues that propelled things towards a proper end and controlled the relationships between these things. The rational order was however under the control of divine reason and Aquinas called this control (which had the nature of law) eternal law.[365]

As human reason is however characterised by (human) limitations, its interaction with divine reason or the eternal law remains imperfect. Our practical rationality or the natural law cannot be legislated in fixed formulation, 'it offers only general directions as to the character of people and the action of the law'.[366] These guidelines, because of their generality, were 'supple and flexible, imprecise and provisional, context dependent and situation following', leaving ample room for interpretation and discretion.[367]

By using relative natural law as a mediator, Aquinas successfully incorporated law and state into the divine order: 'while the state was the result of the original sin, it was also justified because it served the hierarchical celestial order as its human part. State law and its coercion were necessary punishment and indispensable remedy for sins and they were open to criticism only if they did not follow the edicts of the Church'.[368] Simultaneously, the state had to ensure the well-being of its citizens and found guiding rules and principles in the Decalogue. In so doing, Douzinas argues,

363 Douzinas *The end of human rights* 57.
364 *Ibid*.
365 Le Roux 'Natural law theories' in *Jurisprudence* 37.
366 Douzinas *The end of human rights* 58.
367 *Ibid*.
368 *Ibid*.

Aquinas equated the Decalogue with natural law and transformed it into 'a way of interpreting and justifying reality, an almost experimental method'.[369]

Aquinas' multi-layered approach ultimately aimed to combine Aristotelian cosmology and Christian faith. In the process, he expanded the classical cosmological framework through his assertion that the eternal reason or law of God could be found in nature. He also re-asserted, contra Augustine, the existence of a rational order of justice in nature.[370] This marriage of reason and faith would however soon be destabilised in the late scholastic thought.

4.3.4 William Ockham and the invention of the individual

The next stage that can be traced in the development of human rights, saw the classical and medieval tradition of objective *jus* turn into subjective rights and the birth of the sovereign individual.[371] The concept of right became tied to the individual subject and seen as a 'power' or 'liberty' that she possessed and that characterised her being.[372] The *universalia debate*, focussing on the existence of universals, was the main facilitator of this transition.[373]

William of Ockham was one of the most prominent participants in this debate and he supported and helped articulate the nominalist rejection of abstract concepts. He argued that only concrete entities existed in nature and that universal concepts were nothing more than words.[374] His argument countered the realists' view (relying on Aquinas) that nature was the source of clear universal essences or concepts. Ockham reiterated Augustine's voluntarism by emphasising the free and absolute nature of God's will and arguing that there can consequently 'be no natural essences in nature or no eternal or natural law to which God was bound'.[375] Ockham furthermore argued that God's will was not accessible through reason but only

369 *Ibid*.
370 Le Roux 'Natural law theories' in *Jurisprudence* 39.
371 Douzinas *The end of human rights* 61.
372 *Ibid*.
373 The *poverty debate* (concerned with the concepts of ownership and possession) and the *slavery debate* (concerned with the right of the subject to voluntarily sell herself into slavery) can also be identified as playing important roles in the development of subjective rights as forms of power. Le Roux 'Natural law theories' in *Jurisprudence* 39.
374 Weinrib L *Natural law and justice* (1987) 64.
375 Le Roux 'Natural law theories' in *Jurisprudence* 39.

through faith, thereby discounting the Thomist belief that humans could, through natural law, gain knowledge of the *lex aeterna*.[376] Our rational knowledge was restricted to the realm of the empirical, deeper essences in nature could only be *described* and this amounted to an engagement with conventional linguistic practices and not the natural essences as such.[377]

> Thus, meaning and value became detached from nature and were assigned to separate atoms or particulars, opening the road for the Renaissance concept of the genius, the disciple and partner of God and later for the sovereign individual, the centre of the world.[378]

The voluntarist position developed by the nominalists laid an important foundation for the purely mathematical view of nature that would reach its apex in Descartes and Newton.[379] Contra the realist perspective of Aristotle and Aquinas, which understood movement in nature as the result of relationships that establish between things because of their inherent qualities, the voluntarist view saw movement in nature as the outcome of external forces (such as God's will) that steer things in a certain direction.[380] Nature no longer possessed intrinsic qualities and movement could be explained through mathematical equations.

The legal and moral implications stemming from this new scientific view of nature were significant. Nature lost its authority as source of ethical guidance and this destroyed the very foundations of the classic natural law tradition. For Ockham, the control that a subject exercised over her life was a form of *dominium* or property and this natural property was a basic fact of human life and not a legal grant: 'the absolute power of the individual over his capacities, an early prefiguration of the idea of natural rights, was God's gift to man made in his image'.[381] Humans' central and privileged position amongst other beings was solidified and this was accompanied by the 'right' of the (human) 'subject' to arrange the 'objects' under her control. The animal was further denounced to subhuman object under the dominion of man. The

376 Friederich C *The philosophy of law in historical perspective* 2 ed (1963) 48.
377 *Ibid*.
378 Douzinas *The end of human rights* 62.
379 Le Roux 'Natural law theories' in *Jurisprudence* 40.
380 *Ibid*.
381 Douzinas *The end of human rights* 62.

absolute freedom of the subject to act and find 'truth' in the correct representation of 'objects' became her only source of dignity and with this, modern law came to be understood as a system of subjective rights.[382] 'From that point on, legal and political thought placed at the centre of its attention the sovereign and the individual with their respective rights and powers'.[383]

Douzinas sees the transformation of (objective) natural law into (subjective) individual right as the instigator of a 'cognitive, semantic and eventually political revolution'.[384] Hugo Grotius also regarded *jus* as a capacity or power that the subject possessed.[385] Grotius saw ownership as a way of exercising this capacity through an agreement. Ownership was no longer naturally given, but the manifestation of the wilful rearrangement of the natural division of things and with this, 'ownership as a limited but natural share in the common world [was] thus transformed into an unlimited subjective power (*protestas*) or absolute right'.[386] In this sense, ownership laid the conceptual foundation for all subjective rights, seen as the capacity to exercise unrestricted control over the object of a right.[387]

4.3.5 Hobbes and natural right

The radically new scientific view of nature laid the foundation for an inevitable change in the approach to the law of nature. As previously emphasised, nature lost its authority as source of ethical guidance and the focus shifted towards the rational mastery of nature, 'the human sense of the good life changed from a life lived *according to* nature, to a life lived *in control of* nature'.[388] Thomas Hobbes' effort to further develop and apply this mechanical view of nature made a significant contribution to political science and, as Douzinas argues, Hobbes had an even bigger and more lasting impact of jurisprudence 'in his radically new method of analysing

382 Le Roux 'Natural law theories' in *Jurisprudence* 40.
383 Douzinas *The end of human rights* 63. It is worth noting that Richard Tuck does not consider Ockham's explication to be the first systematic account of subjective rights. Rather, Tuck sees the assimilation of *ius* and *dominium* in the writings of the post-Accursians as the first use of *ius* in an active sense and form of subjective right. Tuck R *Natural rights theories: Their origin and development* (1979) 22 - 23.
384 Douzinas *The end of human rights* 63.
385 *Ibid*.
386 Le Roux 'Natural law theories' in *Jurisprudence* 40.
387 *Idem* 41.
388 *Ibid*.

legal foundations, in his re-definition of the traditional juridical concepts of law, right and justice, [and] finally, in his adjustment of traditional sources and ends of law to the concerns of modernity'.[389] Hobbes can be seen as the initiator of our modern understanding of rights, the first to advance the idea of rights as a substitute for justice.[390]

In his influential work *Leviathan*, Hobbes gives a clear exposition of the modern rights of man, which I will quote here at length:

> The right of nature, which Writers commonly call *Jus Naturale*, is the Liberty each man hath, to use his own power, as he will himselfe, for the preservation of his own Nature; that is to say, of his own Life; and consequently, of doing any thing, which in his own Judgement, and Reason, hee shall conceive to be the uptest means thereunto.
>
> By liberty, is understood, according to the proper signification of the word, the absence of externall Impediments: which Impediments may oft take away part of mans power to do what hee would; but cannot hinder him from using the power left him, according as his judgement and reason shall dictate to him.
>
> A law of nature, (*Lex Naturalis,*) is a Precept, or generall rule, found out by Reason, by which a man is forbidden to do, that, which is destructive of his life, or taketh away the means of preserving the same; and to omit, that, by which he thinketh it may be best preserved. For though they that speak of this subject, use to confound *Jus*, and *Lex, Right* and *Law*; yet they ought to be distinguished; because right, consisteth in liberty to do, or to forbeare; Whereas law, determineth, and bindeth to one of them: so that Law, and Right, differ as much, as Obligation, and Liberty; which in one and the same matter are inconsistent.[391]

389 Douzinas *The end of human rights* 69.
390 *Ibid*.
391 Hobbes T *Leviathan* (1651) (ed Tuck R, 1996) 91.

Douzinas recalls Janus, the Roman god of beginnings and transitions, to illustrate how Hobbes' declaration draws on classic natural law tradition whilst also introducing a radical break and shift towards an emphasis on the human (nature):

> [Hobbes' epigrammatic statement] is still in conversation with the Aristotelian tradition which distinguished between right (*dikaion, jus*) and law (*nomos, lex*) and attributed the dignity of nature to the former. But Janus' other face looks to the future. Natural right is not the just resolution of a dispute offered by a harmonious cosmos or God's commands. It derives exclusively from the nature of "each man".[392]

These rights, for Hobbes, are born in a natural world without any moral direction, in a state of nature characterised as constant 'warre, where every man is enemy to every man ... and the life of man, solitary, poore, nasty, brutish and short'.[393] There is no justice in the state of nature and without any sovereign power to enact and enforce law, no delineation of right or wrong.[394] There is consequently no ownership either, 'no dominion, no *mine* and *thine* distinct' and distribution of wealth is subject to the rule 'to be every mans, that he can get; and for so long, as he can keep it'.[395] The only law in the Hobbesian state of nature, is the natural law of self-preservation.[396]

Hobbes deduced several mandates from this law, *inter alia* granting humans the right to kill and enslave animals. The Hobbesian state of nature was not just characterised by 'every man being enemy to every man'; man was also seen as enemy to every animal and *vice versa.* Hobbes' discourse advanced a 'natural' hierarchy and elevated humans to a superior standing over animals by reason of the capacity of speech or language. He saw the communication that exists in the animal kingdom as nothing more than 'calls' made 'out of the necessity of nature' in order to signal danger, summons one another to feeding or to procreate.[397] For Hobbes, signification

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392 Douzinas *The end of human rights* 70.
393 Hobbes *Leviathan* 89.
394 'To this warre of every man against evey an, this also is consequent; that nothing can be Unjust. The notions of Right and Wrong, Justice and Injustice have there no place. Where there is no common Power, there is no Law: where no Law, no Injustice'. *Idem* 90.
395 *Ibid*.
396 Douzinas *The end of human rights* 71.
397 Hobbes T 'De Homine' (1658) (trans Wood C, Scott-Craig T and Gert B) in Gert B (ed) *Man and citizen* (1972) 37, 37 - 38.

and consequently understanding occurs through speech, both being requirements for 'society among men', peace and discipline: 'from this it is easily understood how much we owe to language, by which we, having been drawn together and agreeing to covenants, live securely, happily and elegantly; we can so live, I insist, if we so will'.[398] Lacking the capacity of language, animals are not capable of 'living well' and 'hence they merit not our consideration'.[399] Animals weren't citizens in the state of nature, but a part of nature that humans had to master and control:

> For if in the state of nature it is lawful for every one, by reason of that warre which is of all against all, to subdue, and also to kill men as oft as it shall seem to conduce unto their good, much more will the same be lawfull against Brutes; namely at their own discretion, to reduce those to servitude which by art may be tamed, and fitted for use, and to persecute and destroy the rest by a perpetuall warre, as dangerous and noxious. Our *Dominion* therefore over beasts, hath its originall from the *right of nature*, not from *divine positive Right*.[400]

Yet, in this world of constant war without any moral content, Hobbes still speaks of a *Lex Naturalis*. For Hobbes, it is possible to escape nature's state of a-morality through an arrangement of human passion (fear of death and yearning for peace) and instrumental reason (facilitating survival and peace).[401] Here, the role and character of reason is very important. Hobbes believed that human nature had common traits and that we could determine what is naturally right by observing these traits. Nature thus becomes a scientific hypothesis and its law is derived from the common patterns that we can observe in all humans.[402] Because human nature is objectively instilled in each individual, reason can infer natural laws applicable to the whole society by observing the way people behave. Reason no longer resided in the soul and was untied from the metaphysical claims of Stoicism and Christianity.[403] 'This is the calculative, instrumental reason of the moderns and its task in the field of

398 *Idem* 40.
399 *Ibid*.
400 Hobbes T *De Cive: Philosophicall rudiments concerning government and society* (1651) (ed Warrender H, 1983) 120.
401 Le Roux 'Natural law theories' in *Jurisprudence* 41.
402 Douzinas *The end of human rights* 71.
403 *Ibid*.

morals and politics is not to guide the conscience but to build a science through the observation of the external world and human nature'.[404]

From Hobbes' exposition of the natural law that is 'found out by reason', as quoted above, we can deduce various commandments or laws. The first is to search for peace, but to also protect oneself by any means necessary, when needed. The second dictates a social contract that mutually restricts the capacity of each subject.[405] Natural law thus aims to maintain peace and facilitate a return to the natural state. Language, as I already illustrated, was a condition for peace and a return to Hobbes' 'natural state' required the mastery of animals (who couldn't participate in this process due to the inability to 'agree to covenant'). These laws are seen as 'natural' as they stem from the hypothesis that we all share a natural instinct to survive and called 'laws', despite being construed through reason, because they are commanded by God.[406]

Hobbes' second law is particularly important. Because of the desire of self-preservation, subjects surrender unrestricted freedom and pass power onto the state in return for security, the state now having absolute sovereignty and the power to define the Right.[407] This view amounts to a destruction of the classic natural law tradition in which objective foundations of the Right were thought to exist in a natural order of relationships. Instead, Hobbes likens the will of the sovereign ('mortall god') with the Right and strips natural law of its capacity to provide direction in determining the content of the Right.[408] It is important for the purposes of my study to note that Hobbes' model of sovereignty is rooted in a hierarchised separation of humans from other animals. As Giorgio Agamben points out, humans were exempt from punishment or penalty for killing one another before surrendering power onto the sovereign. After entering into the social contract, however, only animals could be

404 *Idem* 72.
405 There are also several other laws stemming from these two, including 'that covenants should be obeyed; that gifts should be received in gratitude; that nobody should seek revenge; that no person should engage in hate speech; that no person should take undue pride in herself; that disputes should be referred to arbitration; and that no person should serve as her own judge'. Le Roux 'Natural law theories' in *Jurisprudence* 42.
406 *Ibid*.
407 Douzinas *The end of human rights* 75.
408 Le Roux 'Natural law theories' in *Jurisprudence* 42 - 43.

killed with impunity.[409] Whilst violence towards members of the social contract (humans) presented a violation of its terms, the killing of those who stayed in the state of nature (animals) was not put to the question.[410]

4.3.6 Locke and natural property rights

John Locke found the unlimited authority of the sovereignty problematic and responded to Hobbes' totalitarianism with a liberalist re-interpretation of natural law. Locke's theory presents a merger of natural law and the theory of subjective rights developed by Grotius and others, resulting in a theory of inalienable (natural) rights.[411] Locke reaffirmed the natural law as presenting an objective moral limit to state power and provided a comprehensive theory of rights that would shape the modern understanding of natural law.[412]

Like Hobbes, Locke also developed a social contract theory, but diverged in his understanding of life in the state of nature and the content of the social contract and state powers. Locke's state of nature is characterised by 'equal and independent' citizens who are subject to the law. Animals, however, were still seen as 'inferior creatures' and a mere means to an end:

> The *State of Nature* has a Law of Nature to govern it, which obliges every one: And Reason, which is that Law, teaches all Mankind, who will but consult it, that being equal and independent, no one ought to harm another in his Life, Health, Liberty or Possessions. For Men being all the Workmanship of one Omnipotent, and infinitely wise Maker; All the Servants of one Sovereign Master ... they are his property ... sharing all in one community of nature, there cannot be supposed any such subordination among us, that may authorize us to destroy one another, as if we were made for one another's uses, as the inferior ranks of creatures are for ours. Every one as he is *bound to preserve himself*, and not to quit his Station wilfully; so by the like

409 Agamben G *Homo Sacer: Sovereign power and bare life* (1995) (trans Heller-Roazen D, 1998) 106.
410 Vint S 'Animal studies in the era of biopower' (2010) 37 *Science fiction studies* 444, 445.
411 Le Roux 'Natural law theories' in *Jurisprudence* 43.
412 *Ibid*.

> reason when his own Preservation comes not in competition, ought he, as much as he can, *to preserve the rest of Mankind*.[413]

Natural law thus provides (human) citizens with (natural) rights to life, liberty and property. These rights are not inferred by the sovereign, but are fundamentally part of human existence.[414] In the absence of an authoritative body, the citizen is however the sole judge of her actions and may act freely according to her beliefs, rendering the natural state a place of fear and danger.[415] The only solution to conflict is to establish a civil society or government, 'and natural law is the sum of its dictates as regards peace and mutual security'.[416] But just as reason compelled that the state of nature be deserted, it also prescribed the powers of the government; the founding principle is that all authority is derived from the natural rights of the individuals. Consequently, Douzinas argues that Locke's social contract is no less one of subjection than that of Hobbes: 'every man "puts himself under an obligation to everyone of that society to submit to the determination of the majority, and to be concluded by it". Their "supreme power to remove or alter" the established government does not extend to the contract of subjection of the individual to the community and, while the right of resistance survives the contract, it is dormant and qualified'.[417]

Locke did however assert that the right of self-preservation poses a restriction to government's authority and that individual rights were best safeguarded by subjecting the civil authority to the laws of the legislature.[418] As Hobbes saw the possession of property as a fundamental ingredient in the pursuit of happiness and self-preservation, the protection of property was seen as the foremost goal of civil society. Consequently, the legislature was elected by the wealthy class to ensure that the rights of property were not put at risk.[419] The legislative power was however restricted by the law of nature, as Locke explained:

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413 Locke J *Two treatises of government* (1960) (ed Laslett P, 1967) 289.
414 Le Roux 'Natural law theories' in *Jurisprudence* 44.
415 Douzinas *The end of human rights* 81.
416 *Ibid*.
417 *Idem* 82.
418 *Ibid*.
419 *Ibid*.

> Thus the Law of Nature stands as an Eternal Rule to all Men, *Legislators* as well as others. The *Rules* that they make for other Mens Actions, must, as well as their own and other Mens Actions, be conformable to the Law of Nature, *i.e.* to the Will of God, of which that is a Declaration, and the *fundamental Law of Nature* being *the preservation of Mankind*, no Humane Sanction can be good, or valid against it.[420]

Citizens can thus rely on the natural law to assert their inviolable natural rights (which belong to the pre-political individual and served to protect her private interests) against the positive law of the state.[421] Natural law no longer posed an objective limit to the pursuit of interests and the voluntarist supposition of the absolute freedom of the will against a nominalist world without any intrinsic moral essence, was reaffirmed. And with this, we arrived at the liberal paradigm 'of social life as the exercise of subjective rights'.[422]

Johan van der Walt accurately summarises the shift in natural law thinking that culminated in natural rights as follows:

> The exposition of the theories of law and natural rights in the work of Grotius, Hobbes and Locke reflect a pervasive shift away from the objectivist Aristotelian and Thomist conceptions of natural law and justice which dominated Western legal and political thought at least up to the beginning of the modern age. Despite the use these authors still make of the objectivist conceptions of law and justice, their work can clearly be seen to propound the autonomous subjective judgement of free individuals as the cornerstone of law and justice. They clearly conceive social cooperation to be essentially a matter of the individual's liberty to express and expand the scope of his liberty in relation to other individuals. The Aristotelian notion of social interaction as the natural expression of an objective moral order clearly no longer applies in modern natural law theories. These theories are clearly the social theoretical equivalent of the atomistic

420 Locke *Two treatises of government* 376.
421 Le Roux 'Natural law theories' in *Jurisprudence* 44.
422 *Ibid*.

> Newtonian ontology of external relations. They signify the end of the regard for law and justice as the expression of objective relations in a common social bind which goes deeper than instrumental cooperation.[423]

And with this mutation, the Rubicon was crossed and we arrived at a theory of (natural) subjective rights. Given these developments in early modern social and legal thought that formed the substructure of rights, we can identify preliminary concerns regarding the application of rights theory to animals. Van der Walt's summary emphasises a major shift, or rather reverse, in the social organisation between the individual and society that grounds the ontology of autonomous agency that underlies rights theory. The rationalist ideological root of rights theory 'envisages a society of rational, autonomous, independent agents whose territory or property is entitled to protection from external agents'.[424] The category of 'persons' or rights-holders have always been exclusive. In order for animals to become the subjects of rights, they will have to be integrated into this category on account of some interest or capacity that attests sufficient similarity to the 'persons' or agents envisaged by rights theory. The notion of animal rights thus requires a postulation of similarity or equality of sameness (between humans and animals) that inevitably leads to a denial of their particularity and difference.

My second preliminary concern also relates to the ontology that underpins rights theory. The 'persons' populating the world of rights are 'equal autonomous agents who require little support from others, who need only that their space be protected from others' intrusions'.[425] We need to ask ourselves in what relation animals stand to this model of the self-certain, knowledgeable and reflective individual 'who stands towards the world in a position of perfect control'.[426] We cannot ignore the fact that a lot of animals, particularly domestic animals, are reliant on humans for survival.[427] The ontological foundation of rights seems to be unable to recognize and accommodate this reality without considerable strain.

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423 Van der Walt J *The twilight of legal subjectivity: Towards a deconstructive republican theory of law* LLD thesis, Rand Afrikaans University (1995) 122.
424 Donovan and Adams 'Introduction' in *Beyond animal rights* 14.
425 *Idem* 15.
426 Douzinas C 'The end(s) of human rights' (2002) 26 *Melbourne University Law Review* 445, 447.
427 Donovan and Adams 'Introduction' in *Beyond animal rights* 15.

4.4 From natural rights to human rights

The revolutionary documents of the 18th century can be seen as the starting point of modernity and human rights.[428] 'Human rights', as Douzinas emphasises, is of course a combined term: 'they refer to the human, to humanity or human nature and are indissolubly linked with the movement of humanism and its legal form. But the reference to "rights" indicates their implication with the discipline of law, with its archaic traditions and quaint procedures'.[429] The 'rights of man' were born when these two traditions momentarily merged in early modernity through the work of Hobbes and Locke, the American Declaration of Independence (1776) and Bill of Rights (1791) and the French *Déclaration des Droits de l'Homme et du Citoyen* (1789).[430] The French declaration is of particular importance as The Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations in 1948, closely resembles the French Declaration in both substance and form.[431]

Locke's influence is clearly concretised in the American Declaration of Independence, which sets out the 'self-evident truths' found in the Laws of Nature as *inter alia* that 'all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness ... That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed, that whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute a new Government'.[432]

Strong traces of Locke can also be found in the French Declaration of the Rights of Man and the Citizen. The Declaration starts with the bold statement that 'ignorance, forgetfulness, or contempt of human rights are the sole causes of public misfortune and government depravity', and that the French People have consequently 'resolved to set out in a solemn declaration the natural, inalienable and sacred human

428 Douzinas *The end of human rights* 85.
429 *Idem* 18.
430 *Ibid*.
431 *Idem* 85.
432 Sitaraman S *State participation in international treaty regimes* (2009) 145.

rights'.[433] The second article, ala Locke, clearly states that 'the final end of every political institution is the preservation of the natural and imprescriptible rights of man. Those rights are liberty, property, security, and resistance to oppression'.[434]

This amalgamation of political philosophy and constitution-making would however only last for a brief period and then dissipate during the industrial revolution and rise of the nation state, only to re-unite post World War II to configure a new paradigm of human rights.[435] It is with the introduction of the Universal Declaration of Human Rights (1948) that 'naturalistic "nonsense"' was turned into 'hard-nosed positive rights' and the summarized history of natural law ends.[436]

Douzinas marks this journey from classical natural law to contemporary human rights by 'two analytically independent but historically linked developments'.[437] The first, which he calls 'the positivisation of nature', saw the standard of right being transferred 'from nature to history and eventually to humanity or civilisation'. The second saw the 'legalisation of desire', with man ascending the throne as centre of the world and his free will becoming the principle of social organisation.[438] This dual progression established the trajectory where classical discourse on nature and our modern practice of human rights would intersect.[439]

It is against the backdrop of this dual progression that I would like to employ a semiotic approach to gain a deeper understanding of rights theory and critically investigate the way it has been utilized by scholars in the pursuit of animal liberation. I will be exploring rights 'as symbolic strategies of linguistic and legal communication with important political effects'.[440] To the extent that rights participate in the construction of legal subjects, it is important to understand the semiotic strategies

433 Finer S, Bogdanor V and Rudden B *Comparing constitutions* (1995) 208.
434 *Ibid*.
435 Douzinas *The end of human rights* 18.
436 *Idem* 9.
437 *Idem* 20.
438 *Ibid*.
439 *Ibid*.
440 *Idem* 253.

utilised in the extension of rights to new claimants[441] and I am consequently of the opinion that this approach is vital to an engagement with animal rights theory.

4.5 The language and semiotics of rights

We need firstly to understand why it is indeed possible to extend rights to animals. As we will see, the very nature and make-up of rights which allow for animals to be rights-bearers also poses a challenge to the conceptualisation of an equable animal rights theory. The notion of rights is part of the symbolic order of language and law and it is within this sphere that the scope and capacity of rights is determined. Rights do not stand in concrete relation to any specific thing or entity but is made up of legal and linguistic signs, words, symbols and ideals.[442] Consequently, 'no person, thing or relation is in principle closed to the logic of rights [and] any entity open to semiotic substitution can become the subject or object of rights; any right can be extended to new areas and persons, or, conversely, withdrawn from existing ones'.[443] Accordingly, we have seen civil rights being extended to socio-economic rights, and further to cultural and environmental rights and what were once the rights of the white, heterosexual male can now also be claimed by blacks, homosexuals and women.

Anything that's accessible to language can become the object of rights and as Douzinas jokingly remarks, 'the right to free speech or to annual holidays can be accompanied by the right to love, to good food or to have back episodes of Star Trek shown daily'.[444] A statement like 'I have a right to x' is tantamount to 'I want' and conveys a postmodern politics of identity, the 'want' always embodying at least the *possibility* of becoming a legal right:[445]

> The rhetorical elasticity of language finds no fixed boundaries to its creativity and ability to colonise the world. The only limits to the expansion or contraction of rights are conventional: the success or

441 *Idem* 254.
442 Douzinas 'The end(s) of human rights' *MELULR* 456.
443 *Ibid*.
444 Douzinas *The end of human rights* 254.
445 *Idem* 255.

> otherwise of political struggles, or the effects of the limited and limiting logic of the law.[446]

I want to argue that the involvement of political and legal institutions in the practice of rights however present difficulties for animal rights discourse at a more *fundamental* level than a confrontation with the laborious reality of political struggles or 'the limited and limiting logic of the law'. This fundamental difficulty can be ascribed to the anthropocentric constrictions that inhere in these political and legal institutions. By utilising these frameworks, animal rights discourse subscribes to- and perpetuates these constrictions.[447] Animal rights discourse is not only manifestly restrained to take up the strategies of identity politics, but also has to configure animality in accordance with anthropocentric norms and ideals.[448] This difficulty, as I will be illustrating in the remainder of this chapter, can clearly be seen in the dominant models of animal rights theory advanced by leading proponents of the movement. These models configure a notion of (animal) subjectivity that aligns with that of the 'man of rights'. This leads Matthew Calarco to argue that these models present, strictly speaking, 'not a case for animal rights but for rights for *subjects*, the classical example of which is human beings. And inasmuch as animals manifest morally relevant human, or subjectlike, traits, they are brought under the scope of moral consideration'.[449]

Whilst it is thus clear that it is indeed possible to extend rights to animals,[450] we need to ask ourselves what would be the basis of animal rights? Who would be entitled to them? What is an animal? Despite just quoting Douzinas on the possibility of ceaselessly expanding rights, my questions here are not meant to echo the superficial and ill conceived critique that the realisation of animal rights would require that we grant animals the right to vote and marry. Of course it is a *non sequitur* to argue that the extension of *some* existing rights to animals requires the extension of

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446 *Idem* 254.
447 Calarco *Zoographies* 8.
448 *Ibid*.
449 *Ibid*.
450 I am not arguing that animals, by being possible rights bearers, are part of the symbolic order. As Douzinas argues, '[animals'] lack of a developed language means that they are not socially born through entry into the symbolic order. But while they cannot become human subjects, nothing stops them from becoming legal subjects, if they are given rights and legal protections'. Douzinas *The end of human rights* 372.

all existing rights. I am not concerned with the specific rights that animals would (or should) have and what the scope of these rights would be. The question of including animals in the community of rightsholders should not be confused with (related, yet distinguishable) issues pertaining to the scope of rights.

Rather, I want to tentatively argue that we need to *ab initio* think through the implications of using terms like 'human' rights and 'animal' rights, each inherently embodying a problematic generalisation that affects the way we define our relationship with the Other. Just as the term 'human' includes men and women and absorbs racial, historical and gender differences, 'animal' refers to everything from lions to caterpillars, chimpanzees to mice.[451] These terms bring about instability, 'not just because of species diversity, but because its obvious supposed unimportance makes us realise that these terms are, to put it bluntly, metaphysical categories requiring all sorts of police work, and not simply useful conceptual tools, biological generalisations, etc.'[452] The point, as David Wood articulates it, is that 'there are no animals "as such," rather only the extraordinary variety that in the animal alphabet would begin with ants, apes, arachnids, antelopes, aardvarks, anchovies, alligators, Americans, Australians ...'.[453]

These terms employed in the pursuit of animal liberation, I want to argue, paradoxically entrench relations of subordination by negating plurality and difference and solidifying a human-animal dichotomy. We often find such essentialist, reductionist and instrumentalist tendencies in equality discourse. Van Marle resists this essentialism by calling for a radical understanding of difference. She rejects the abstraction of particularity into what she calls 'a comfortable difference'[454] through the reduction of differences to categories like gender, race or, I wish to add, specie. Van Marle elsewhere argues that equality discourse often 'leads to a denial of difference and a support for generalisation and universalism based on sameness, even where

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451 Wood 'Comment ne pas manger' in *Animal others* 16.
452 *Ibid*.
453 *Idem* 29.
454 Van Marle K 'Equality: An ethical perspective' (2000) 63 *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 595, 600.

there is an attempt to recognise difference'.[455] Van Marle's (ethical) understanding of equality is concerned with the idea of a heterogeneous public realm in which a plurality of voices can be heard and particularity can be recognised and respected rather than being assimilated to neutrality and sameness.[456]

Just as 'there are no animals as such', Cornell has also extensively argued that there is no essential woman and warned against a demand for equality for a mythical model woman.[457] For Cornell, such an approach merely reinforces a rigid gender identity and denies a woman the space to imagine 'who [she] is and who [she] seeks to become'.[458] Central to Van Marle and Cornell's interpretations of equality, lies the demand for a moral space in which equality is conceived of 'in terms of plurality and openness to radical difference'.[459] Only by embracing difference can we displace symbolic oppositions and hierarchies and resist fixed categorical identities. Such an approach recognises that dichotomies like male-female, gay-straight and human-animal cannot capture the complexity and multiplicity of (individual) differences and are inevitably exclusionary and hierarchical.[460]

Reference to the 'animal' of rights denies particularity and difference and connotes a problematic disengagement that perpetuates a human-animal hierarchy. Derrida has also rejected rights language as a way of advancing our relation to animals and emphasised that rights theory signifies an attempt to separate ourselves from other animals and even renounce our own animality:

> The axiom of the repressive gesture against animals, in its philosophical form, remains Cartesian, from Kant to Heidegger, Levinas or Lacan, whatever the differences between these discourses. A certain philosophy of right and of human rights depends

455 Van Marle K '"The capabilities approach", "the imaginary domain", and "asymmetrical reciprocity": Feminist perspectives on equality and justice' (2003) 11 *Feminist Legal Studies* 255, 256.

456 Botha H 'Equality, plurality and structural power' (2009) 25 *South African Journal on Human Rights* 1, 5.

457 See Cornell D *The imaginary domain: Abortion, pornography and sexual harassment* (1995); Cornell D *At the heart of freedom: Feminism, sex and equality* (1998); Cornell *Beyond accommodation.*

458 Cornell *The imaginary domain* 5.

459 Botha 'Equality, plurality and structural power' *SAJHR* 4.

460 *Idem* 36.

> on this axiom. Consequently, to want absolutely to grant, not to animals but to a certain category of animals, rights equivalent to human rights would be a disastrous contradiction. It would reproduce the philosophical and juridical machine thanks to which the exploitation of animal material for food, work, experimentation etc., has been practiced (and tyrannically so, that is, through an abuse of power).[461]

Having no fixed, concrete meaning, the 'animal' of rights, just as the 'human' of rights, functions as a floating signifier, 'a word and discursive element that is neither automatically nor necessarily linked to any particular signified or meaning' and consequently 'it cannot be fully and finally pinned down to any particular conception because it transcends and overlaps them all'.[462] As there is no stable connection between signifier and signified, meaning constantly shifts as it is passed on from one signifier to another.

In modernity, the ability to claim human rights is synonymous to being human. A new right can be extended when a (temporary and partial) determination is fixed on the word 'human'.[463] This process is a long battle that is fought in political, cultural and legal arenas through the employment of various strategies like public protests, lobbying and test-cases.[464] The animal rights movement has utilised all of these strategies, with varying degrees of success. In the South African context, lobbying groups like Fur-Free South Africa aims to mainstream animal rights by increasing visibility through protests and public demonstrations. Animal Rights Africa also recently took on a test-case[465] when they sought an interdict to prevent the cruel killing of a bull during the *Ukweshwama* festival in Kwazulu Natal.[466] All of these efforts are linked because of the symbolic and linguistic nature of the right being

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461 Derrida and Roudinesco *For what tomorrow* 71.
462 Douzinas 'The end(s) of human rights' *MELULR* 456.
463 Douzinas *The end of human rights* 255.
464 *Ibid*.
465 See *Smit NO & others v His Majesty King Goodwill Zwelithini Kabhekuzulu & others* [2010] JOL 25699 (KZP).
466 For a discussion of the constitutional issues arising from the case, see Rutherford Smith S 'Balancing the bull: *Smit NO v His Majesty King Goodwill Zwelithini Kabhekuzulu* [2010] JOL 25699 (KZP)' (2012) 27 *Southern African Public Law* 70.

claimed, which allows for the 'human' right to divide and transmute into rights of other subjects, like animals.[467]

Like other advocates for rights, the animal rights movement articulates its claims by emphasising both the similarity and difference of the applicants (animals) to groups that are already rightsholders. Firstly similarity between the human (nature) in general and nature of the plaintiff (animal) is asserted to ground the claim of sameness and demand for equality of treatment.[468] The extensive efforts of various animal rights theorists however prove that equality, in spite of the claims of declarations and constitutions, is not a given, but the result of social and political struggles concretised in the law.[469] The legal logic of equality that I emphasised earlier in this dissertation is once again evident; the concrete meaning of equality is constructed, there is nothing 'natural' about it. Rather, the liberal-democratic tradition's claim to fame is its ability to go beyond social differences and construct equality *contra* nature.[470] Douzinas consequently identifies the two aspects of new right claims as 'an appeal to the universal but undetermined character of human nature and, secondly, the assertion that the similarity between the claimants and human nature *tout court* admits them to the surplus value of the floating signifier and grounds their claim to be treated on an equal footing with those already submitted'.[471]

Secondly difference is emphasised to justify differential treatment in line with the applicant's specific identity. This is done by accentuating the distance between the individual characteristics of the plaintiff and abstract human nature.[472] If equality stems from political and legal battles against abstract nature, the particularity of concrete context-dependent nature is reintroduced by the claim to difference, meaning 'human rights-claims involve a paradoxical dialectic between an impossible demand for universal equality, historically identified with the characteristics of Western man and, an equally unrealisable claim to absolute difference'.[473]

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467 Douzinas *The end of human rights* 256.
468 *Ibid*.
469 *Ibid*.
470 *Ibid*.
471 *Ibid*.
472 *Ibid*.
473 *Ibid*.

Here we find another ramification of the problematic nature of moral- and legal equality that I illustrated in chapter two. Equality is one of the ontological presuppositions of (human) rights and, when applied in relation to individuals, reverts to generality in an effort to overcome the paradox that inheres in an attempt to find common ground between wholly unique subjects. But in this context, generality is not all that 'general', and certainly not neutral. We must not forget that the original subject of rights is the well-of, heterosexual, white (human) male. The ground symbolic concept of rights theory (and of equality in this context) remains heterosexual, white, male and very much human. Whilst the struggle for the rights of women and gays has been plagued by a denial of similarity, extension of rights in denial of their particularity is equally problematic. As feminists like Luce Irigaray have argued, the universality and generality of rights disavows the female experience and cannot adequately provide for the particular needs of women.[474] Within the dominant hegemonic structure of carnophallogocentrism that I earlier discussed, the problems in accepting and addressing the particular needs of animals will be as great, if not more pronounced. These are inevitable challenges that emanate when the starting point for an extension of rights is the question: in what respect are animals (not) *similar to humans*? This difficulty, as I've already said, can fundamentally be ascribed to the anthropocentric constrictions that inhere in political and legal institutions.

Before I critically investigate the similarity principle, we can conclude this section by saying that rights do not belong to humans or animals, but rather construct humans and animals.[475] Within the rhetoric of rights, a human 'is someone who can successfully claim human rights',[476] and the same holds true for the 'animal' of animal rights. And therein lies a major challenge for the proponents of the rights movement. Animal rights needs to be conceived in a manner that is inclusive, respects difference and advances the ethical relation without perpetuating hierarchy. The philosophical foundations of rights theory and the current conception of animal rights, I will argue, unfortunately have several shortcomings in this regard.

474 See Irigaray L *Thinking the difference* (1989) (trans Montin K, 1994).
475 Douzinas 'The end(s) of human rights' *MELULR* 457.
476 *Idem* 456.

4.6 Animal rights theory, the ethical relation and hierarchy

As we have seen in the previous chapter, an approach based in rights theory is easily distinguishable from a more conservative welfarist theory. The animal rights movement has however inherited the human rights movement's continuing battle to advance a united, terse conception that captures the essence of the rights advocacy movement. Whilst it may not be possible to provide a single coherent definition of animal rights, the approach is undeniably characterised by a leitmotif of 'similarity' or 'same-as', the argument that animals should be granted legal rights because they share certain human traits or characteristics that warrant consideration and protection. The rationale behind the similarity argument is that animals who possess capacities and characteristics similar to that of humans should receive equivalent protection, as a just society requires that similar entities be treated alike.[477]

As Gary Francione explains, the idea of animal rights is underpinned by the notion that (at least some) animals possess rights that normatively correspond to the rights possessed by humans.[478] The rationale supporting this inference is at least twofold:

> First, there is no characteristic or set of characteristics that is possessed by all humans (whom we regard as persons) that is not possessed by at least some animals. To put the matter a different way, those who support animal exploitation argue that animals are qualitatively different from humans so animals can be kept on the "thing" side of the "person/thing" dualism; animal rights advocates argue that there is no such difference because at least some nonhumans will possess the supposedly "exclusive" characteristic while some humans will not possess the characteristic ... There is another related, more "positive", reason to view animals as persons. Although there will undoubtedly be borderline cases, it is clear that at least some animals possess the characteristics that we normally associate with personhood.[479]

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477 Bryant 'Similarity or difference as a basis for justice' *LCP* 207.

478 Francione G 'Ecofeminism and animal rights: A review of beyond animal rights: A feminist caring ethic for the treatment of animals' (1996) 18 *Women's Rights Law Reporter* 95, 98.

479 *Ibid*.

From this exposition we can identify two tenets that are central to the current concept of animal rights. Firstly, the human (and personhood) is the standard against which animals are to be measured to determine their worthiness of rights. Secondly, only 'some animals' that embody and exhibit the essential humanlike characteristics will be included in the community of rights holders. There are several problematic consequences to this approach and I will henceforward discuss three of these repercussions; the disavowal of otherness, the perpetuation of hierarchy and the tension emanating from the dissonance between the practical implications of this approach and the philosophy underlying animal liberation.

4.6.1 The animal as symmetrical Other

Drucilla Cornell defines the ethical relation as 'the aspiration to a nonviolent relationship to the Other, and to otherness more generally, that assumes responsibility to guard the Other against the appropriation that would deny her difference and singularity'.[480] An ethical encounter requires that we transcend the self and engage with the otherness of the Other from outside a framework that employs the self as central point of reference. The Other is not similar to me and she is not the opposite of me, we are absolutely separated. This means that I cannot articulate my relationship to the Other in terms of sameness or opposition, the Other exists outside of myself and my egocentric understanding of the world. We are not of the same genus and consequently 'I cannot compare [the Other] to anything that I know, because then [the Other] would be in relation to me and denied its absolute otherness.'[481] Rather than centralising the self, the focus should be on the Other and her qualities of singularity and otherness.

Because the Other is an irreducible individual entity, the distance separating the self and the Other is characterised by asymmetry. We can never eradicate this distance, as it is this otherness of the Other that makes her other. Emmanuel Levinas describes this asymmetrical characteristic of the Other as alterity. Respect for the alterity of the Other requires that we not identify with her in terms of the self, as this would 'neutralise' and reduce the Other to an object that cannot affect me and create

480 Cornell *The philosophy of the limit* 62.

481 Smith N 'Incommensurability and alterity in contemporary jurisprudence' (1997) 45 *Buffalo Law Review* 503, 523.

a state of 'totality'.[482] The Other has an individual face that resists possession and it is this characteristic which, for Levinas, is fundamental to being other: 'Stranger means the free one. Over him I have no power. He escapes my grasp by an essential dimension, even if I have him at my disposal'.[483]

In advocating that (some) animals are worthy of legal protection in the form of rights, proponents of the rights movement articulate their claims by drawing comparisons between the capacities of these animals and those of humans. Steven Wise, for instance, argues that the test for personhood should be an enquiry into three criteria, namely whether the person '1) can desire; 2) can intentionally act to fulfil her desires; and 3) possesses a sense of self sufficiency to allow her to understand, even dimly, that it is she who wants something and it is she who is trying to get it'.[484] As apes possess the mental capacities that allow them to meet these criteria, Wise argues that they should be regarded as persons under the law. As we have seen, Francione also refers to the characteristics that some animals embody that are associated with personhood and Peter Singer finds common ground when it comes to a human's and animal's ability to suffer. Following in the footsteps of fellow utilitarian thinker Jeremy Bentham, Singer argues that 'the nervous system of animals evolved as our own did [and that it is] surely unreasonable to suppose that nervous systems that are virtually identical physiologically, have a common origin and common evolutionary function, and result in similar forms of behaviour in similar circumstances should actually operate in an entirely different manner'.[485]

Bentham's famous call for the equal consideration of animals based on their capacity to suffer is a golden thread that runs through literature on animal ethics, his thesis being employed far beyond the utilitarian context in which it was developed. For Bentham, a being's ability to suffer is a precondition for having any protectable interest.[486] This threshold requirement is clearly more inclusive than a criterion of sex, race, sexual orientation or membership to a specific specie, criteria used to

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482 Shepherd L 'Face to face: A call for radical responsibility in place of compassion' (2003) 77 *Saint John's Law Review* 445, 484.
483 Levinas *Totality and infinity* 39.
484 Wise *Rattling the cage* 32.
485 Singer *Animal liberation* 11.
486 *Idem* 8.

marginalise women, blacks, homosexuals and animals. The problem is that Bentham's contribution is weakened when applied as the basis of a comparative appraisal. The question 'Can they suffer?' can only be meaningful when the suffering is registered on the sufferer's terms.[487] Animals do not suffer like humans do, they suffer like animals do. Why is that not enough to be granted equal moral consideration?

In drawing these comparisons between the self and the Other, these theorists fail to respect the asymmetry that characterises the ethical relation and consequently preclude the possibility of an ethical encounter:

> Once I attempt to impose a logical relation between myself and the other, I will have connected the other to me within my schematic thought. Once this connection, this grasping, is made, I hold the other hostage by denying its very qualities of otherness or alterity. I renounce its identity as other. In order to be other, it must be wholly other, without relation or connection to me. Once I introduce a relation to the other, I exterminate its identity as an other by rendering it an object of phenomenon within my world. In order to preserve alterity, the terms I and Other cannot be brought together.[488]

The Other is thus absolutely other to the self. In order to appreciate this otherness, I firstly need to recognise and conceptualise myself as an individual and thereafter grant the Other the same recognition. The interplay between ethical asymmetry and phenomenological symmetry that I articulated in chapter two is once again evident and emphasises that 'I' am the point of departure to the ethical relation. As Levinas explains, 'alterity is possible only starting from *me*'.[489] This does not mean, however, that 'I' am the central point of reference for my relation to the Other. To relate to the (animal) Other in terms of the (human) self is to appropriate the Other and disregard the absolute distance separating the self and the Other. The other cannot be

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487 MacKinnon C 'Of mice and men' in Sunstein C and Nussbaum M (eds) *Animal rights: Current debates and new directions* (2004) 263, 271.

488 Smith 'Incommensurability and alterity in contemporary jurisprudence' *BLR* 524.

489 Levinas *Totality and infinity* 40.

minimised to an articulation of the self, because 'what is absolutely other does not only resist possession, but contests it'.[490]

De Beauvoir has emphasised the dangers of women being subjugated to man's Other 'from being considered not positively, as she is for herself, but negatively, such as she appears to man'.[491] For De Beauvoir, this strips the woman of her singularity and denounces her to an object that is 'devoid of meaning without reference to the male'.[492] Similarly, animal rights theory appropriates animals as man's Other by defining animals in relation to humans. When we ground our ethical responsibility in the likeness between the (human) self and (animal) Other, we 'privilege similarity over difference and selfness over alterity' and thereby fail to heed the call of the Other.[493] Ultimately we do not recognise the singularity of the Other but rather appropriate her as a reflection of the self and thereby collapse the ethical relation into absolute symmetry.

The ethical relation should rather remain a relationship of respect for the particular face of the Other, for the Other *as* other. Otherwise the question becomes: Is the Other like me? The dominant figure becomes the norm and 'that women are like men and animals are like people is thought to establish their existential equality, hence their right to rights'.[494] To be clear, I am not disputing that there are similarities between humans and animals. The question, rather, is why do animals have to be like us to escape the gross acts of barbarity that we inflict on them? The recognition of women's rights on male terms has done little to recalibrate the social status of women as sub-male and one can ask how much being seen as sub-human will benefit the animal liberation movement.[495]

490 *Idem* 38.
491 De Beauvoir *The second sex* 167.
492 *Idem* 6.
493 Lopez Lerma M 'Law in high heels: Performativity, alterity and aesthetics' (2011) 20 *Southern California Interdisciplinary Law Journal* 290, 300.
494 MacKinnon 'Of mice and men' in *Animal rights* 267.
495 *Idem* 271.

4.6.2 Hierarchical ordering

An approach that measures animals against a standard of humanness is clearly anthropocentric as it reflects a deeply imbedded perception that we are the centre and most important creatures on earth, the measuring-stick against which all other creatures' needs, interests and abilities are to be measured. The hierarchy emanating from this approach manifests on various levels: humans occupy a space at the top tier of the speciesist ladder with other animals being subordinately ranked below us. The similarity argument however also creates a pecking order amongst animals based on their proximity to humanness, thereby perpetuating both a human-animal divide and an inter-species hierarchy.

Catherine MacKinnon argued some eight years ago that animal rights, like women's rights, 'are poised to develop first for a tiny elite' because of the 'like us' analysis.[496] In retrospect her words were prophetic, as recent legal developments realised her prediction. The Balearic Islands granted legal rights to all great apes in 2007 and the Spanish parliament soon followed suit, passing a non-binding declaration in 2008 which also granted legal personhood to the great apes.[497] The resolution makes the killing of an ape,[498] our closest nonhuman relative, a crime and prevents humans from using apes in exploitive practices like medical experimentation, circuses and films.[499] Whilst the resolution brings about a vital crack in the species barrier that we have erected between ourselves and other animals, it also illustrates the hierarchical materialisation of the similarity argument.

Once we deem certain animals to be 'more equal than others' based on their propinquity to humanness, we can forecast the outcome. George Orwell illustrated the dire consequences of that mindset in *Animal Farm* more than half a century ago.[500] That was a contradictory ending to the egalitarian uprising in the book and, likewise, it will be an antithetical ending to the animal liberation movement. After decades of research, some of the the Great Apes enjoy legal protection similar to

496 *Ibid*.
497 Eisen J 'Liberating animal law: Breaking free from human-use typologies' (2010) 17 *Animal Law* 59, 69; Gislason B 'Humans and great apes: A search for truth and ethical principles' (2012) 8 *Journal of Animal & Natural Resource Law* 1, 22.
498 Includes gorillas, chimpanzees, bonobos and orangutans.
499 Eisen 'Liberating animal law' *AL* 70.
500 See Orwell G *Animal Farm* (1945).

humans, because they have been proven to be similar enough to humans to merit such protection. One can only wonder how long the road for dogs, rabbits, chickens and fish will be, how long it will take to prove that they are sufficiently similar to humans to be granted rights.[501]

The extension of rights to dogs, rabbits, chickens and fish is of course not a definite progression of animal rights theory under the same-as characteristic. Because no specific (human) characteristic is logically prescribed the choice remains arbitrary and can be changed to include or exclude certain animals as we see fit. The same argument used to grant rights to some animals, can thus be used to deny others of the same protection:

> Animals may feel pain, but cognitively process it differently or manage it more effectively. Animals may think, but not in the way humans do. If an animal lacks self-consciousness or the cognitive ability to anticipate his life in the future, the loss of his life may be deemed less meaningful than the loss of a human's life because humans do have self-consciousness and can project themselves into the future.[502]

When animals are proven to possess certain (humanlike) characteristics that are not valued by humans, this can even have an adverse effect. In a patriarchal society that favours masculinity over femininity and everything that is traditionally associated with this, the ability to suffer might actually be seen as a sign of weakness and not of communality that puts animals on equal footing with humans.

Ultimately, then, it seems there are right (and wrong) capacities to possess and a right (and wrong) way of feeling, being and thinking. J.M. Coetzee accurately illustrates the absurdity of this anthropocentric way of valuing animals. Through his alter ego, Elizabeth Costello, Coetzee gives a fictional account of the story of Sultan, one of the apes used by psychologist Wolfgang Köhler in his experimentations into the mental capacities of primates.[503] After being caught on African soil and shipped overseas to participate in a scientific experiment, the apes underwent a process of

501 Bryant 'Similarity or difference as a basis for justice' *LCP* 216.
502 *Idem* 211 - 212.
503 Coetzee J *The lives of animals* (1998) (ed Gutmann A, 1999) 27 - 30.

training aimed at humanising them.[504] To this end, Sultan was placed in a cage and one day, without warning or any apparent reason, deprived of the food that he was previously fed at regular intervals. A wire was then spun over his cage and bananas attached to the wire. After being supplied with three wooden crates, he was left to his own devices:

> Sultan knows: Now one is supposed to think. That is what the bananas up there are about. The bananas are there to make one think, to spur one to the limits of one's thinking. But what must one think? One thinks: Why is he starving me? One thinks: What have I done? Why has he stopped liking me? One thinks: Why does he not want these crates any more? But none of these is the right thought. Even a more complicated thought - for instance: What is wrong with him, what misconception does he have of me, that leads him to believe that it is easier for me to reach a banana hanging from a wire than to pick up a banana from the floor? – is wrong. The right thought to think is: How does one use the crates to reach the bananas?[505]

Realising this, Sultan positioned the crates under the dangling bananas, stacked them on top of the other, climbed to the top and brought down the bananas. After passing the first test, Sultan was faced with an increased challenge the next day. The exercise was repeated but this time the crates were filled with heavy rocks, rendering them immovable. Once again Sultan had to respond:

> One is not supposed to think: Why has he filled the crates with stones? One is supposed to think: How does one use the crates to get the bananas despite the fact that they are filled with stones?[506]

Sultan then emptied the crates and repeated the process of stacking the crates so that he could reach the bananas. It was clear to Sultan that he was being tested and it was a test that he had to pass if he wanted to silence his hunger. The test was of

504 *Idem* 27.
505 *Idem* 28.
506 *Ibid*.

course not over and the next day, the bananas were placed a metre outside of his cage and a stick thrown into his cage.

> The wrong thought is: Why has he stopped hanging the bananas on the wire? The wrong thought (the right wrong thought, however) is: How does one use the crates to reach the bananas? The right thought is: How does one use the stick to reach the bananas?[507]

These tests, as Coetzee remarks, propelled Sultan away from interesting, speculative thought and towards lower, practical reason.[508] What he (really) thought or wanted to think was not only indeterminable, but irrelevant. What mattered is that he thought and acted as Köhler wanted him to. Sultan's value was measured against his ability to demonstrate a predetermined capacity possessed and valued by humans. That predetermined capacity, in this case the ability to transfer insight and solve a problem, is of course arbitrary and can be changed to one that animals cannot possess.

Through this deconstruction of Köhler's experiment, Coetzee firstly illustrates the pragmatic limitations of research into the cognitive capacities of animals.[509] This approach of measuring and comparing animals is thus fundamentally unstable, as there can be no definitive data upon which to ground any affirmative or dissenting conclusion of similarity. Secondly, Coetzee highlights how this approach can, depending of the capacity employed for comparison, as easily be used to prove dissimilarity to animals as it can be used to prove similarity. Finally, Coetzee also exposes an internal contradiction to an approach that seeks to liberate animals by way of a *modus operandi* that requires that research be done on animals. In her closing remarks on Sultan, Coetzee has Costello say the following:

> In his deepest being Sultan is not interested in the banana problem. Only the experimenter's single-minded regimentation forces him to concentrate on it. The question that truly occupies him, as it occupies

507 *Idem* 29.
508 *Ibid*.
509 Bryant 'Similarity or difference as a basis for justice' *LCP* 213.

> the rat and the cat and every other animal trapped in the hell of the laboratory or the zoo, is: Where is home, and how do I get there?[510]

4.6.3 The same-as characteristic and animal experimentation

The use of animals for the purpose of research has always been a concern of animal advocates. Yielding to public outcry against the inhumane treatment of animals in laboratories, Britain adopted the first anti-vivisection law in 1876 and the use of animals in science remains a primary concern of animal rights organisations to this day.[511] People for the Ethical Treatment of Animals (PETA) is synonymous with the landmark 'Silver Spring monkeys' case, a battle against animal exploitation that gained momentum and transformed a group of friends committed to animal liberation into the world's largest animal rights organisation.[512]

The similarity argument requires that research be done on animals in order to prove that they are sufficiently similar to humans to warrant protection. The dissonance between this approach and the goal of freeing animals from exploitive research is obvious. Mere observations of animals avoiding painful stimuli and limping have in the past not been seen as sufficient evidence to prove that animals experience – and react to – pain in a way similar to humans.[513] If we furthermore consider the probable consequences of the realisation of animal rights[514] coupled with the high value that society places on data stemming from research that is done under 'controlled conditions', it is clear why mere observations of animals in their natural surroundings will not suffice as satisfactory proof of similarity.[515] Captivity and exploitive research are inescapable ramifications of the similarity argument.

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510 Coetzee *The lives of animals* 30.

511 Garvin L 'Constitutional limits on the regulation of laboratory animal research' (1988) 98 *Yale Law Journal* 369, 371.

512 This case lead to the first raid of a research laboratory in the USA on 11 September 1981, with police confiscating sixteen Macaques monkeys and one Rhesus monkey. Dr Edward Taub was charged with seventeen counts of animal cruelty and found guilty on six counts on 23 November 1981. The convictions were later reversed. See Pacheco A 'The Silver Spring monkeys' in Singer P (ed) *In defence of animals* (1985) 135.

513 Bryant 'Similarity or difference as a basis for justice' *LCP* 214.

514 This would ultimately require that we abjure the use of all animal products and lead a vegan lifestyle.

515 Bryant 'Similarity or difference as a basis for justice' *LCP* 220.

Past use of animals in scientific research paints a gruesome picture of mice being irradiated to cause lung cancer, rabbits being injected in their knee joints to induce chronic inflammation and electric shocks being administered to the tooth pulp of dogs, to name but a few examples.[516] Experiments conducted to determine animals' ability to feel pain have not been any less invasive and what is of even more concern, is that the findings of these experiments have not provided conclusive insight into the cognitive processing of pain by animals.[517] There is still room for debate and more painful research.

But even if there was a humane way to determine animals' capacity to feel pain, we need to bear in mind that they cannot meaningfully consent to being participants in these experiments aimed at advancing 'an idea of "chimpanzeeness" or "goldfishness" or "animalness"'.[518] Whilst the motives behind these experiments might be noble, this approach ultimately preserves a view of animals as objects and consequently perpetuates the very mentality it seeks to rupture.

4.7 Conclusion

Whilst Douzinas describes rights as 'one of the noblest liberal institutions' he also regards their triumph as the ideology of postmodernity to be something of a paradox, reminding us that 'our era has witnessed more violations of their principles than any of the previous and less "enlightened" epochs'.[519] For Douzinas, this paradox is the result of a historical, theoretical and philosophical gap, one that he addresses and fills almost entirely in his body of work.[520] It is not possible to tackle and execute such a mammoth task in the scope of one chapter. My goal, rather, was to explain how we arrived at the liberal understanding of (human) rights that informs the proposed extension of rights to animals and specifically focus on the similarity characteristic of the current concept of animal rights, which I believe renders it theoretically and philosophically inconsistent with the ideal of animal liberation.

To this end I started off by tracing the development of natural law thinking that ended in a theory of subjective rights and employed a semiotic approach to philosophically

516 Ryder R 'Speciesism in the laboratory' in Singer P (ed) *In defence of animals* (1985) 77, 81 - 82.
517 Bryant 'Similarity or difference as a basis for justice' *LCP* 213 - 214.
518 *Idem* 221.
519 Douzinas 'The end(s) of human rights' *MELULR* 446.
520 See *inter alia* Douzinas *The end of human rights*; Douzinas *Human rights and empire*.

examine the make-up of rights and its expansive potential that paves the way for animals to be the bearers of rights. I also highlighted the challenge that this poses to proponents of the movement in the formulation of an inclusive theory of rights. I then examined the human-animal interaction from the perspective of an ethical relation and illustrated what recognition of, and respect for, the otherness of the Other demands. I argued that the same-as approach denies the otherness of the Other and amounts to a reduction of the (irreducible) animal Other to a symmetrical reflection of the self which, as Levinas reminds us, is evidence of a fundamental ethical failure.[521] The similarity argument also facilitates the formation of hierarchies according to the degree to which animals possess arbitrarily identified human characteristics. As illustrated by the degree to which animal rights are currently recognised, the nature of this approach allows for it to be as easily employed for the discountenance of some animals as for the protection of others. Finally I highlighted the practical limitations and ideological inconsistencies of the same-as approach and illustrated why this course is incongruent with the ultimate goal of animal liberation.

In conclusion I would like to emphasise that I share the view that animals will, despite the problematic aspects of the current conception, undoubtedly be better off with rights than without them.[522] Like the road that Alice was on, the road of rights will indeed take us 'somewhere', and that place will be better than the one animals find themselves in now. But just as the present concept of rights has not, to date, been able to significantly change the social status of women and adequately address the emanating oppression, I do not believe that the current approach to the idea of animal rights allows for the realisation of the ultimate goal of the animal liberation movement. As long as our anthropocentric outlook persists and we employ humanness as the exclusive reference point from which to establish similarity and an ensuing right to rights, animals will without fail be subjugated; just as blacks will always, despite being rights bearers, be othered when whiteness is the norm, women when maleness is the measure and homosexuals within a heteronormative configuration.

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521 See Levinas *Totality and infinity*.
522 MacKinnon 'Of mice and men' in *Animal rights* 271.

CHAPTER 5 CONCLUSION

In the preface to *The order of things*,[523] Michel Foucault describes the unlikely impetus behind the text as an encounter with a passage from the Argentine writer Jorge Luis Borges in which Borges quotes 'a certain Chinese encyclopaedia' that divided animals into the following categories:

> (a) belonging to the Emperor, (b) embalmed, (c) tame, (d) sucking pigs, (e) sirens, (f) fabulous, (g) stray dogs, (h) included in the present classification, (i) frenzied, (j) innumerable, (k) drawn with a very fine camelhair brush, (l) *et cetera*, (m) having just broken the water pitcher, (n) that from a long way off look like flies.[524]

Whilst the apparent absurdity of this taxonomy moved Foucault to 'a laughter that shattered',[525] it also motivated him to contemplate the hegemony wielded by prevailing systems of classification. Borges' passage confronts us with the reality that our classifications of animals stem from social constructs that facilitate and justify the way in which we order our existence, and not universal or absolute truth. My study is based on this 'reality' and I accordingly challenged the categorisation and identification of animals as sacrificial beings in this dissertation.

In sketching the background for my reflections on the plight of the animal in the introductory chapter, I identified the existence of an anthropocentric hierarchical structure that recalls the (human) subject as patriarchal centre of beings to a schema of sacrifice (that Derrida calls 'carnophallogocentrism'). I argued that animal liberation requires the destabilisation of this structure and I proceeded in the following chapters to reflect on what a deconstruction and displacement of 'this hierarchy of subjectivity and the attendant sacrificial logic which underlies our culture and law'[526] might involve. Reflecting on the prospect of an ethical relation to the animal Other, I argued that the language of equality does not provide a sufficient framework through which

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523 Foucault M *The order of things: An archaeology of the human sciences* (1970).
524 *Idem* xv.
525 *Ibid*.
526 Chrulew M 'Feline divinanimality: Derrida and the discourse of species in Genesis' (2006) 2 *The Bible and critical theory* 18.1, 18.2.

to articulate normative directives. I attempted to illustrate that equality is an empty and confusing rhetorical device that has to revert to an external measure or criterion in order to articulate a relationship between subjects, thereby abstracting the relation to sameness and negating particularity. Such a disavowal of particularity, or what Levinas conceptualises as the alterity of the Other, constitutes a fundamental ethical failure that precludes the possibility of an ethical encounter with the (animal) Other.

Against this background, I considered the idea of justice as an alternative to the language of equality and argued that justice rests on an openness and concern with asymmetrical reciprocity by addressing itself to singularity, thereby resisting the reductive tendencies of equality discourse. Drawing on Cornell's reconceptualisation of deconstruction as the philosophy of the limit, I examined the ethical significance of deconstructive theory for law by illustrating the reciprocality of law, justice and deconstruction. Turning specifically to contemplate the idea of justice in relation to the animal, I considered the critical potential of veganism as a 'way of relating to the [animal] other and of relating the [animal] other to the self'.[527] Veganism deconstructs and destabilises the carnophallogocentric regime by decentring the human as dominant carnivorous subject and presents a mode of being that reflects a serious commitment to responding to our ethical responsibility to animals, both in thought and everyday life. My philosophical enquiry here was not meant to culminate in a final and encompassing account of justice or the ethical relation, but rather to highlight our ethical responsibility (to the animal Other). As Douzinas and Warrington argues, 'without the safe anchorage of a concept and without law, postmodern ethics is left with responsibility. Indeed with a responsibility for the responsibility created by the suffering of my neighbour'.[528]

I proceeded in chapter three to philosophically examine the ideological underpinnings of the two most dominant approaches that reflect a concern for our ethical responsibility towards animals and their translation into law. I drew on Van Marle's jurisprudence of slowness and Derrida's exposition of the sacrificial logic underlying Western culture's exclusion of animals from the 'thou shalt not kill' proscription as

527 Derrida and Nancy '"Eating well"' in *Who comes after the subject?* 114.

528 Douzinas C and Warrington R 'A well-founded fear of justice: Law and ethics in postmodernity' in Leonard J (ed) *Legal studies as cultural studies* (1995) 197, 204.

framework within which to illustrate the contrasting moral spaces that the animal occupies in these theories. I argued that utilitarian-based animal welfare theory rests on a view of animals as sacrificial beings, whilst animal rightists strive so 'sacrifice sacrifice' by recasting the relation of subjectivity to the animal Other. My examination in this chapter provided the foundation for my exploration of the philosophical presuppositions of rights discourse and practice in chapter four.

The historical and theoretical development of (natural) rights theory reflects a subjectivist turn away from a cosmological understanding of the world 'in terms of orderly relations that attributed to each and everything a proper place' to a world of individual forces that are only related externally, and eventually to the construction of subjectivity as a mode of existence and social organisation.[529] The disbandment of nature as the standard of right, paved the way for the translation of individual desire into rights. Rights, as Douzinas posits, 'are the legal recognition of individual will' and tools of power and domination.[530] Theodor Adorno reiterates that the concept of Western subjectivity that informs rights theory is not the essence of an individual's mere existence, but 'a quality which characterises *certain* human beings, those who belong to the bourgeois cultures of the West, in a specific way':[531]

> It is not wrong to raise the less cultural question whether after Auschwitz you can go on living – especially whether one who escaped by accident, one who by rights should have been killed, may go on living. His mere survival calls for the coldness, the basic principle of bourgeois subjectivity, without which there could have been no Auschwitz; this is the drastic guilt of him who was spared.[532]

Adorno refers to this subjectivity as a 'coldness' or 'calculatedness' that is as capable of emancipation as it is of facilitating Auschwitz, the cruellest violence.[533] This construction of subjectivity is of course absorbedly related to the various hegemonic hierarchies that configure the very substructures on which rights hang. Animal rights

529 Van der Walt *The twilight of legal subjectivity* 2 - 15.
530 Douzinas *The end of human rights* 11.
531 Van der Walt *The twilight of legal subjectivity* 10.
532 Adorno T *Negative dialectics* (1966) (trans Ashton E, 1973) 362 - 363.
533 Van der Walt *The twilight of legal subjectivity* 10.

theory, I argued, invokes dichotomies and rigid identities that replicate and perpetuate these hierarchies and relations of subordination, it paradoxically confirms a certain interpretation of the (human) subject that lies at the very core of animal subjugation.[534] I explicated a link between the ontology of equal autonomous agency underlying rights theory, the anthropocentric constraints at work in political and legal institutions and the similarity principle that characterises animal rights theory. There are several problematic outgrowths to this configuration and I specifically aimed to illustrate how the otherness of the animal is disavowed within this arrangement and how it maintains and perpetuates both a human-animal hierarchy and an inter-species hierarchy. I concluded that animal rights theory does not provide a sufficient foundation for animal liberation as it ultimately offers only the paradox that, in order to 'sacrifice sacrifice' and destabilise the human-animal hierarchy, it has to invoke some fundamental identity that draws on the human subject as ground symbolic, thereby entrenching the very hierarchy it seeks to topple.

My dissertation was thus not aimed at advancing an alternative ethical theory for animal liberation, but to philosophically examine and call into question the way we relate to animals and the dominant approaches we utilise to facilitate the transformation of the human-animal relation. I share the view that such a philosophical enquiry can have a significant impact on the plight of the animal. Whilst philosophy might not be practical on the level that medicine or architecture is, it does enter into dialogue with serious issues and practical consequences can and do stem from this. Our actions directly and indirectly affect the lives of animals and a critical interrogation of our justification of – and approach to – our interaction with other species can have drastic practical consequences.[535] As Calarco argues, 'philosophy, and perhaps philosophy alone at this point, is able to hold open the possibility that thought might proceed otherwise in regard to animals, without the assurances of traditional conceptions of animality and the human-animal distinction'.[536] The human as phallogocentric structure, then, has been deconstructed to not only expose the hegemony that lies at its foundation, but to hold open the possibility of recalibrating

534 Derrida and Roudinesco *For what tomorrow* 65.
535 Wood 'Comment ne pas manger' in *Animal others* 21.
536 Calarco *Zoographies* 4.

the animal's status as sacrificial being and returning her to the domain of ethical concern.

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