

## ARTICLE

# *Transition rather than Revolution: The Gradual Road towards Animal Legal Personhood through the Legislature*

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### Abstract

It is sometimes assumed that, in order for animals to be adequately protected by the legal system, their status first needs to change from property to person in one fell swoop. Legal personhood is perceived as the necessary requirement for animals to possess legal rights and become visible in law, distinguished from legal things. In this article I propose an alternative approach to animal legal personhood, which construes the road towards it as a gradual transition rather than a revolution. According to this alternative approach, animals become increasingly visible in law when their existing simple rights are shaped to function more like the rights of humans. Instead of a condition for the possession of rights, legal personhood should then be regarded as a (potential) consequence of growing animal rights.

**Keywords:** Animal law, Animal rights, Animal legal personhood, Civil law tradition

## 1. INTRODUCTION

It is sometimes assumed within animal law that adequate legal protection for animals is conditional on their recognition as legal persons.<sup>1</sup> Scholars such as Gary Francione and Steven Wise have argued that as animals are considerably more like humans than we ever imagined, it is no longer ethical to deny legal personhood to non-human animal species; these scholars therefore propose recognizing non-human animals as legal

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<sup>1</sup> See, e.g., G. Francione, ‘Animals: Property or Persons?’, in M.C. Nussbaum & C.R. Sunstein (eds), *Animal Rights: Current Debates and New Directions* (Oxford University Press, 2004), pp. 108–43.

persons as opposed to property.<sup>2</sup> Much of animal law scholarship, consequently, has been concerned with questions such as (i) which animals should be granted legal personhood; (ii) which characteristic (for instance, autonomy or sentience) should guide this determination; and (iii) once legal personhood has been established, which rights should animals be able to claim.

In a growing number of jurisdictions petitions of habeas corpus are being filed on behalf of animals, supported by a wide range of scholars via *amicus curiae* briefs, with the objective of gaining judicial recognition of animals as legal persons.<sup>3</sup> However, judges seem particularly reluctant to provide conclusive answers to questions of legal personhood for animals.<sup>4</sup> The main aim of this article is to propose an alternative non-judicial route to animal legal personhood. Instead of an immediate and complete recognition of animals as legal persons through the courts, I will illustrate how animals can become increasingly legally visible through legislative changes, with legal personhood as a possible, but not the necessary, end result. Drawing on Visa Kurki's Bundle Theory<sup>5</sup> and Saskia Stucki's distinction between simple and fundamental rights,<sup>6</sup> I will argue that the simple rights that animals have as a matter of positive law can be strengthened without the precondition of recognizing them as legal persons. This alternative approach, which focuses on legislative change rather than judicial recognition, is particularly relevant for the civil law traditions of Europe, in which statutes take precedence over case law and the option of habeas corpus is not widely available.

The article proceeds as follows. Section 2 outlines and assesses the traditional view that animal legal personhood is a precondition for the possession of legal rights. Section 3 sets out an alternative approach to animal legal personhood, which reframes it as the possible eventual consequence of the gradually increasing visibility of animals in law, demonstrating the road towards it with the use of what I call the 'Alternative Animal Rights Pyramid'. Section 4 applies this alternative pyramid to the context of the civil law traditions of Europe, showing how it can explain the changing status of animals. Lastly, Section 5 analyzes the strengths and shortcomings of the Alternative Pyramid for purposes of conceptualizing animal legal personhood. The article accepts current (national and supranational) law as the background against which an alternative approach to animal

<sup>2</sup> G. Francione, *Animals, Property, and the Law* (Temple University Press, 1995); S.M. Wise, 'Hardly a Revolution: The Eligibility of Nonhuman Animals for Dignity-Rights in a Liberal Democracy' (1998) 22 *Victoria Law Review*, pp. 793–915.

<sup>3</sup> Nonhuman Rights Project, 'Litigation: Challenging the Legal Thinghood of Autonomous Nonhuman Animals', available at: <https://www.nonhumanrights.org/litigation>. For a discussion see J.S. Beaudry, 'From Autonomy to Habeas Corpus: Animal Rights Activists Take the Parameters of Legal Personhood to Court' (2016) 4(1) *Global Journal of Animal Law*, pp. 3–35.

<sup>4</sup> An isolated success is the case of Cecilia, in which a chimpanzee was recognized as a legal subject by an Argentinian court: *Presentación efectuada por afada respect del chimpancé 'Cecilia': sujeto no humano*, 3 Nov. 2016, Tercer Juzgado de Garantías Mendoza, P-72.254/15. The very first success of a habeas corpus case was in Colombia, though it was later overturned by the Constitutional Court; for the initial case see Colombian Supreme Court of Justice, *Bear Chucho*, 26 July 2017, AHC4806-2017, Radicación No. 17001-22-13-000-2017-00468-02.

<sup>5</sup> V.A. Kurki, *A Theory of Legal Personhood* (Oxford University Press, 2019).

<sup>6</sup> S. Stucki, 'Towards a Theory of Legal Animal Rights: Simple and Fundamental Rights' (2020) 40(3) *Oxford Journal of Legal Studies*, pp. 533–60.

legal personhood needs to be developed. It remains largely neutral as to content, leaving open questions such as who can have rights and what they will be, yet assumes that the pursuit of a more comprehensive legal status for animals is a desirable aim.

## 2. THE TRADITIONAL VIEW OF ANIMAL LEGAL PERSONHOOD

Animal law concerns the study of the law addressing animals, as well as more normative questions with regard to the desirability of recognizing animals as legal persons and/or granting them fundamental rights.<sup>7</sup> In parallel with the rapid academic development of the field, a large body of animal advocacy has actively pushed to improve the legal status of animals in legal systems throughout the world. Most of these efforts employ what I refer to as the ‘traditional view’ of animal legal personhood.<sup>8</sup>

According to the traditional view, personhood and rights should be extended to (certain) animals through the application of the same liberal framework that afforded rights to human groups and corporations. In the common law context, an analogy is often made with slavery, most specifically the famous case of 1772 in which Lord Mansfield recognized James Somerset as a legal person, abolishing his status as property.<sup>9</sup> Advocates of the traditional view build upon similar arguments, seeking to obtain the same kind of ‘liberation’ for animals, turning them from property into persons. The argument goes that as with skin colour, the characteristic ‘species’ is an arbitrary criterion for determining the border between person and thing, and that it should be substituted for a morally relevant characteristic such as sentience, agency, intelligence or autonomy.<sup>10</sup>

An important underlying assumption for the traditional view is that law is binary, and one’s status can be only ‘person’ or ‘property’. As a result, as long as animals are denied personhood, they cannot possibly possess any legal rights. The main objective of the Nonhuman Rights Project, which shares this view, is to obtain judicial confirmation that some particular animals comply with the definition of ‘person’ and thus have the capacity to bear rights, which means that they can no longer be property.<sup>11</sup>

At common law, the most adequate legal instrument for the purpose is the writ of habeas corpus, the same instrument with which the personhood of James Somerset was asserted.<sup>12</sup>

<sup>7</sup> In the United States (US) and Canada, animal law courses are now offered at over 167 law schools. Journals such as *Animal Law*, the French *Revue Semestrielle de Droit Animalier* and *Global Journal of Animal Law* are devoted entirely to animal law. See also J. Wills, ‘What is Animal Law?’ (2019) 7 *Global Journal of Animal Law*, available at: <https://ojs.abo.fi/ojs/index.php/gjal/article/view/1658>.

<sup>8</sup> What I call the ‘traditional view’ is comparable with ‘the Orthodox view’ referred to by Visa Kurki; yet I use it to refer to a specific view of animal legal personhood rather than a view of legal personhood as such; see Kurki, n. 5 above, pp. 31–86.

<sup>9</sup> *Somerset v. Stewart* (1772) 98 ER 499. The analogy with slavery is often made in animal law literature; see, e.g., S.M. Wise, ‘Animal Rights, One Step at a Time’, in Nussbaum & Sunstein, n.1 above, pp. 19–25.

<sup>10</sup> J. Dunayer, ‘The Rights of Sentient Beings: Moving beyond Old and New Speciesism’, in R. Corbey & A. Lanjouw (eds), *The Politics of Species: Reshaping our Relationships with Other Animals* (Cambridge University Press, 2012) pp. 27–39; J. Jowitt, ‘Legal Rights for Animals: Aspiration or Logical Necessity?’ (2020) 11(2) *Journal of Human Rights and the Environment*, pp. 173–98.

<sup>11</sup> S.M. Wise, ‘Legal Personhood and the Nonhuman Rights Project’ (2010) 17(1) *Animal Law*, pp. 1–11.

<sup>12</sup> D. Davison-Vecchione & K. Pambos, ‘Steven M. Wise and the Common Law Case for Animal Rights: Full Steam Ahead’ (2017) 30(2) *Canadian Journal of Law and Jurisprudence*, pp. 287–309.

Habeas corpus petitions, which can be filed for persons kept in detention, make it possible to start a case ‘in the name of’ another person. As such, when they are filed in the name of animals, judges are forced to discuss the question of whether such animals comply with the definition of ‘person’.<sup>13</sup> The hope of the Nonhuman Rights Project is that, by eliciting judicial recognition that animals are indeed much like humans, the legal status of some intelligent and autonomous animals (such as chimpanzees and elephants) will one day be transformed from property into person.<sup>14</sup> Once an animal acquires personhood, it may be possible to gain such recognition for other suitable animals as well.

To illustrate the road to animal legal personhood, Steven Wise, the driving force behind the Nonhuman Rights Project, developed the ‘Animal Rights Pyramid’ (see Figure 1).<sup>15</sup> Legal personhood in this pyramid is located at the base level, and regarded as the capacity to bear rights, the ‘rights container’.<sup>16</sup> In theory, an animal could be a legal person without having any rights; in such a case, the ‘rights container’ would be empty. Hence, according to this view, legal personhood is the first step towards full legal visibility; it is ‘the capacity for rights-bearing’.<sup>17</sup> The second level is about whether an animal additionally also possesses legal rights as a matter of positive law – that is, whether the rights container is filled with actual legal rights. The third level concerns the question of whether the animal possesses a private right of action, and only at the fourth and last level should the court assess the question of standing.

The assumptions that are central to the Animal Rights Pyramid are representative of the traditional view of animal legal personhood, also outside the common law. Rights for animals should be achieved *through* legal personhood; having personhood precedes the possession of legal rights, and abolishing the property status of animals should therefore be the first target of animal advocates.<sup>18</sup> The specific view of Wise and his Nonhuman Rights Project can thus be taken as exemplary of the traditional view.

However, there are certain limits inherent in the traditional view that are only rarely recognized. Most importantly, by making legal personhood the very basis, it construes animal legal personhood as a binary ‘either/or’ proposition.<sup>19</sup> The idea that a certain animal could have a claim to one particular right *without* being regarded as a full

<sup>13</sup> A. Staker, ‘Should Chimpanzees Have Standing? The Case for Pursuing Legal Personhood for Non-Human Animals’ (2017) 6(3) *Transnational Environmental Law*, pp. 485–507.

<sup>14</sup> For some of the main works by Steven Wise, the driving force between the Nonhuman Rights Project, see S. Wise, *Drawing the Line: Science and the Case for Animal Rights* (Basic Books, 2003); S.M. Wise, *Though the Heavens May Fall: The Landmark Trial that Led to the End of Human Slavery* (Da Capo Press, 2006); S. Wise, *Rattling the Cage: Toward Legal Rights for Animals* (Perseus, 2000).

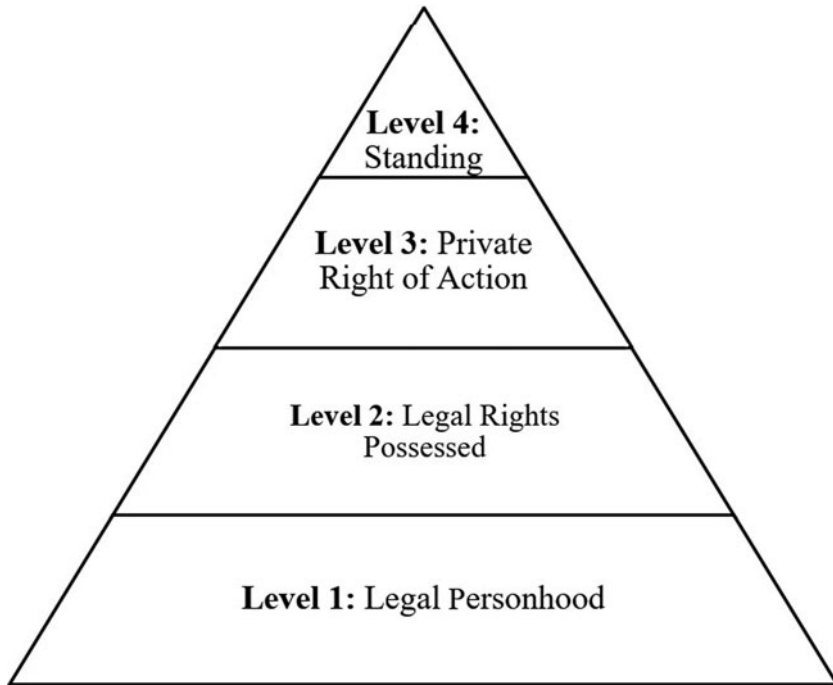
<sup>15</sup> Wise, n. 11 above, p. 2.

<sup>16</sup> Wise, *Rattling the Cage*, n. 14 above, Preface to the 2014 edn, p. xviii.

<sup>17</sup> S.M. Wise, ‘The Legal Thinghood of Nonhuman Animals’ (1996) 23(3) *Boston College Environmental Affairs Law Review*, pp. 471–546, at 472.

<sup>18</sup> For a discussion see R.N. Fasel, ‘Shaving Ockham: A Review of Visa A.J. Kurki’s “A Theory of Legal Personhood”’ (2021) 44 Symposium *Revus*, available at: <https://doi.org/10.4000/revus.6921>; and the reply of V. Kurki, ‘On Legal Personhood: Rejoinders, Reflections and Restatements’ (2021) 44 Symposium *Revus*, available at: <https://journals.openedition.org/revus/7425>.

<sup>19</sup> For a critique see A. Fernandez, ‘Not Quite Property, Not Quite Persons: A Quasi Approach for Nonhuman Animals’ (2019) 5(1) *Canadian Journal of Comparative and Contemporary Law*, pp. 155–231.



**Figure 1** The Animal Rights Pyramid by Steven Wise  
 Source Wise, n. 11 above, p. 2.

person is consequently not regarded a possibility. This assumption has recently been challenged by Kurki, who maintains that focusing on specific rights for animals instead of broad ‘personhood’ would be more appropriate and would have more chances of success.<sup>20</sup>

Some judges have expressed similar concerns. In 2020, Judge Fahey, in his concurring opinion in a case brought by the Nonhuman Rights Project concerning Tommy the chimpanzee, criticized the assumption that animals should be recognized as persons first. Judge Fahey regarded ‘[t]he reliance on a paradigm that determines entitlement to a court decision based on whether the party is considered a “person” or relegated to the category of a “thing”’ as problematic.<sup>21</sup> He held that whether a being has standing to seek freedom from confinement should not be dependent on such a binary ‘either/or’ proposition. In other words, the dichotomous premise of the traditional view might, in practice, pose an obstacle to its effectiveness.

There are other concerns pertaining to the traditional view. Some authors have argued that it is problematic to emphasize the human-like cognitive qualities of non-human animals as the reason why they qualify as persons. The view seems most relevant for those animals that are particularly ‘like’ humans in some way. As Taimie Bryant states:

<sup>20</sup> V. Kurki, ‘Legal Personhood and Animal Rights’ (2021) 11(1) *Journal of Animal Ethics*, pp. 47–62, at 58.

<sup>21</sup> *People ex rel. Nonhuman Rights Project, Inc., on behalf of Tommy v. Lavery*, 31 N.Y. 3d 1054 (2018), concurring opinion of Judge Fahey.

Since ... we have not yet proved sufficient similarity between humans and great apes – with whom we share the closest evolutionary relationship – just how likely is it that we will prove sufficient similarity between humans and cows, humans and pigs, humans and sheep, humans and rabbits, humans and chickens, or humans and fish?<sup>22</sup>

Also, the emphasis on cognitive ability as the basis for legal personhood might endanger the legal protection of humans with limited cognitive abilities.<sup>23</sup> More generally, the sameness logic underlying the traditional view is increasingly challenged, as it inevitably builds upon a particular perception of a rational and intelligent being as a standard against which the value of others is measured.<sup>24</sup>

Lastly, the traditional view is premised largely on the capacity of judges to develop the law in a way that changes the status of animals from property to person. In reality, the way in which the Nonhuman Rights Project portrays this road might be too optimistic. A judicial acknowledgement that an animal is a person may or may not have binding force, depending on the court that issued it and the context in which it was issued. Some judicial pronouncements by lower courts to the effect that animals are not ‘merely property’ have largely been ignored or disregarded.<sup>25</sup> Furthermore, in the legal cases that have been brought to date, a frequent counter-argument by judges is that the decision to make such a change, if at all, should be left to the legislature<sup>26</sup> and supported by a democratic majority.

Besides, in many legal contexts the judicial route is simply not available. In the civil law tradition of continental Europe, judges would arguably not have the same interpretative freedom to decide on a change of animal status: instead, such arguments would most likely be dismissed as incorrect, as animals are mostly treated as ‘goods’ under statutory law. The recognition of personhood for animals thus would need at least to be backed by legislation in order to have substantive legal effect.

In summary, the portrayal of legal personhood for animals as a binary ‘either/or’ proposition has its deficits and might limit the perceived ways in which the status of animals can be improved. However, the idea that legal personhood and possessing legal rights are synonymous is deeply entrenched in legal thinking. The traditional view thus remains at the core of animal law scholarship.<sup>27</sup> It is only in recent years that this assumption has been systematically questioned, most notably, in Kurki’s Bundle Theory of Legal Personhood.<sup>28</sup>

<sup>22</sup> T.L. Bryant, ‘Similarity or Difference as a Basis for Justice: Must Animals Be Like Humans To Be Legally Protected from Humans?’ (2007) 70(1) *Law and Contemporary Problems*, pp. 207–54, at 216.

<sup>23</sup> R.L. Cupp, ‘Cognitively Impaired Humans, Intelligent Animals, and Legal Personhood’ (2017) 69(2) *Florida Law Review*, pp. 465–517.

<sup>24</sup> For a recent critique see M. Deckha, *Animals as Legal Beings: Contesting Anthropocentric Legal Orders* (University of Toronto Press, 2021).

<sup>25</sup> See D. Favre, ‘Living Property: A New Status for Animals within the Legal System’ (2010) 93(3) *Marquette Law Review*, pp. 1021–71; T.G. Kelch, ‘Toward a Non-Property Status for Animals’ (1998) 6(3) *New York University Environmental Law Journal*, pp. 531–85.

<sup>26</sup> As stated by the First Department in the case of Lavery: *In re Nonhuman Rights Project, Inc. on behalf of Tommy v. Lavery*, New York Supreme Court Appellate Division, 8 June 2017, 54 N.Y. S. 3d 392, p. 397, which was later cited in the case of Happy: *The Nonhuman Rights Project, Inc., on behalf of Happy v. Breheny*, New York Supreme Court, 18 Feb. 2020, No. 260441/19, p. 16.

<sup>27</sup> With some exceptions that give a more nuanced picture, such as Fernandez, n. 19 above.

<sup>28</sup> Kurki, n. 5 above.

In the next section I will draw on this theory and Stucki's theory of rights in order to sketch an alternative approach to animal legal personhood. The road towards animal legal personhood, in this alternative approach, takes the form of a gradual legislative process, rather than a binary change from rightlessness to full personhood.

### 3. TRANSITIONING FROM PROPERTY TO PERSON: THE ALTERNATIVE ANIMAL RIGHTS PYRAMID

The alternative approach to animal personhood that I propose differs significantly from the traditional view. In this approach an independent status as legal personhood (or equivalent) is located not at the basic level – the condition to ever possess rights – but at the highest level of the pyramid, representing the (possible) last stage of the gradually increasing visibility of animals in law. The alternative approach to animal legal personhood can be visualized with the help of the pyramid in [Figure 2](#), the Alternative Animal Rights Pyramid (the Alternative Pyramid). I will discuss the different levels consecutively in this section.

It should be noted at the outset that the four levels of the Alternative Pyramid are not as clearly separable as they might seem in this representation. Rather than consisting of discrete levels, the pyramid should be regarded more as a gradual scale, with the different levels overlapping slightly. Nevertheless, in general terms this pyramid represents the potential development of the legal status of an animal from being indistinguishable from legal things towards a status that is more like that of the human person: at level 4, the animal is fully visible as an individual in law. The point in the upward transition when animals are regarded as possessing a (limited) form of personhood would depend on the jurisdiction in question; some legal scholars would do so already at level 2. Nevertheless, only level 4 represents an independent status that is similar to the full legal personhood of human beings.

At level 1 of the Alternative Pyramid we find 'simple rights', a term that was coined by Stucki.<sup>29</sup> Simple rights constitute a so-called Hohfeldian relation between two legal entities, the 'other side of the coin' of a legal duty.<sup>30</sup> Even though they are not currently framed as rights, they have all the ingredients to be rights in a doctrinal or conceptual sense. As Stucki argues, '[a]ccording to a standard delimiting criterion, beneficial duties generate rights only in the intended beneficiaries of such duties, that is, those who are supposed to benefit from duties'.<sup>31</sup> A simple animal right is thus brought into existence at the moment that a legal duty exists of which animals are intended to be the beneficiary (regardless of whether or not they are classified as legal persons).<sup>32</sup> The most

<sup>29</sup> Stucki, n. 6 above.

<sup>30</sup> See P. Schlag, 'How To Do Things with Hohfeld' (2015) 78(1/2) *Law and Contemporary Problems*, pp. 185–234; and the original paper, W.N. Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 26 *Yale Law Journal*, pp. 710–56.

<sup>31</sup> Stucki, n. 6 above, p. 545.

<sup>32</sup> I choose to follow Stucki's definition of simple rights as dependent on the intention of the legislator. Animals have simple rights when they are the intended beneficiaries of legal obligations.

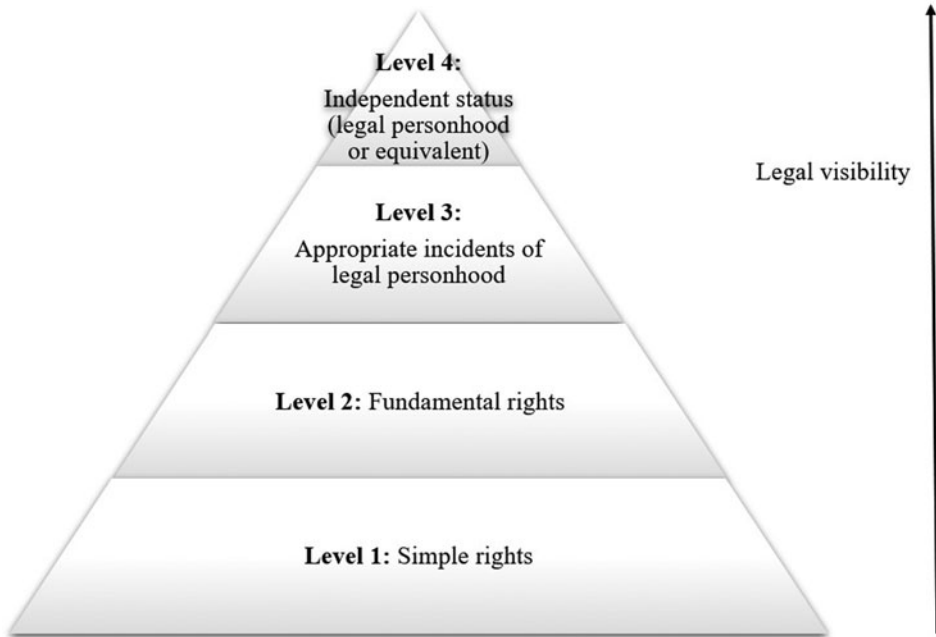


Figure 2 The Alternative Animal Rights Pyramid

straightforward examples are duties towards animals laid down in animal protection legislation, such as the duty not to harm an animal unnecessarily.

However, simple rights are only a very weak form of legal rights. First of all, they are quite inefficient as they do not entail the ability to initiate legal action or be legally injured: they are generally not recognized as ‘rights’ by the courts.<sup>33</sup> Additionally, they often represent only minor ameliorations compared with the treatment of animals as mere objects. Animals might thus possess a simple right not to have their tail cut without sedation, without having their substantial interests in life or bodily integrity legally protected. Nevertheless, ascribing simple rights to animals represents a first small step towards their legal visibility; animals are distinguished from inanimate things by the fact that they are intended beneficiaries of duties, included in the Hohfeldian scheme, while remaining objects of rights for most purposes.

Fundamental rights, located at level 2 of the Alternative Pyramid, are, according to Stucki, distinguished from simple rights by (i) the fact that they protect substantial interests, and (ii) their normative force.<sup>34</sup> This type of animal right resembles what is usually understood by the term ‘legal rights’, comparable with the rights of humans. Hence,

<sup>33</sup> For an exception see *Tilikum et al., ex. Rel. People for the Ethical Treatment of Animals Inc. v. Sea World Parks & Entertainment Inc.*, 842 F. Supp. 2d 1259 (S.D. Cal. 2012) in which the court stated that animals already have rights.

<sup>34</sup> Stucki, n. 6 above, p. 552.



fundamental animal rights are closer to the kind of rights that animal advocates aim to establish, which would ensure adequate protection of animals.

We can imagine different ways in which animals can have fundamental rights as a matter of positive law. Firstly, as Stucki points out, some simple rights have the potential to become fundamental rights.<sup>35</sup> This is conceptually possible only for those (very few) simple rights that protect substantial interests. Secondly, absolute prohibitions on certain harmful animal uses may also be regarded as fundamental rights.<sup>36</sup> Such prohibitions grant certain groups of animals a right not to be used for a specific purpose, such as the right of minks not to be used for fur farming. Thirdly, fundamental rights could, in the future, be enshrined in an international convention for animal rights and function as international standards as in the case of human rights, or be codified in constitutions.<sup>37</sup> However, even fundamental animal rights remain merely formal constructs unless their possessors are able to initiate legal action or are considered legally injured when their rights are breached. Therefore, some procedural aspects would need to be added in order to duly protect the rights. Nevertheless, it is possible to reach level 2 of the Alternative Pyramid without first declaring animals to be legal persons, which clearly distinguishes the alternative approach from the traditional view.<sup>38</sup>

One step closer to legal personhood is the situation in which animals hold the appropriate incidents of legal personhood, located at level 3 of the Alternative Pyramid. I draw here on Kurki's Bundle Theory of Legal Personhood, which construes legal personhood as a cluster property consisting of numerous elements, of which various entities can possess incidents to a differing degree.<sup>39</sup> Perceived as such, there is no binary division between things and persons; non-persons can gradually acquire personhood-related burdens and benefits, even before they are recognized as legal persons by the legal system. To some extent, the legal status of women and children developed in a similar manner, from having only a very limited set of incidents of legal personhood to, eventually, full inclusion in the category of legal person, gaining an increasing number of incidents along the way. Examples of incidents are the capacity to own property, the ability to initiate court proceedings, to be party to contracts, or to be accountable for crime.<sup>40</sup> Level 3 of the Alternative Pyramid makes reference to

<sup>35</sup> Ibid.

<sup>36</sup> Ibid. See also J. Wills, 'The Legal Regulation of Non-Stun Slaughter: Balancing Religious Freedom, Non-Discrimination and Animal Welfare' (2020) 41(2) *Liverpool Law Review*, pp. 145–71 (stating that 'prohibiting non-stun slaughter on animal welfare grounds is best understood as bestowing a legal right on animals not to be slaughtered without prior stunning': *ibid.*, p. 156).

<sup>37</sup> See, e.g., K. Ash, 'International Animal Rights: Speciesism and Exclusionary Human Dignity' (2005) 11 *Animal Law*, pp. 195–214. A proposal has recently been made for an international convention; see E. Verniers & S. Brels, 'UNCAHP, One Health, and the Sustainable Development Goals' (2021) 24(1) *Journal of International Wildlife Law and Policy*, pp. 38–56.

<sup>38</sup> B. Wahlberg, 'Animal Law in General and Animal Rights in Particular', in M. Zamboni & V. Kurki (eds), *Animal Law and Animal Rights* (Jure, 2021), pp. 1–13. A 2019 case in Switzerland seems to imply that having legal personhood status is not necessary for animals to possess fundamental rights: Constitutional Court of Basel-Stadt, 15 Jan. 2019, VG.2018.1, discussed by C.E. Blattner & R. Fasel, 'The Swiss Primate Case: How Courts Have Paved the Way for the First Direct Democratic Vote on Animal Rights' (2021) 11(1) *Transnational Environmental Law*, pp. 201–14.

<sup>39</sup> Kurki, n. 5 above.

<sup>40</sup> *Ibid.*, pp. 91–150.

‘appropriate’ incidents, in that the question of which incidents would be appropriate for certain animals would depend on their relation to humans, and their existing set of rights. Some concrete examples will be given in the next section.

An important implication of the Bundle Theory of Legal Personhood is the fact that animals, in theory, would be able to possess those incidents of personhood that ensure that their rights are duly protected even when they remain classified as property. Indeed, as Kurki states, one entity ‘can simultaneously be the property of someone else and endowed with numerous incidents of legal personhood’.<sup>41</sup> Incidents connected with the initiation of court proceedings, suffering legal injury and obtaining compensation seem especially relevant for most animals, as they would increase the efficacy of existing animal rights. In essence, this would help the legal rights of animals to be justiciable in practice, by adding the procedural aspects to their legal platform (which, for Kurki, is the bundle of legal positions that is connected to an entity).<sup>42</sup> With the binary lens of the traditional view on animal personhood, having standing or being legally injured would be possible for animals only if they are recognized as persons. With the non-binary lens of the Bundle Theory in the alternative approach, such incidents could be established within the current property paradigm.

It is only at the last level of the pyramid that an independent status, equivalent to that of the human person, would be reached. Instead of a condition to possess legal rights, in the Alternative Pyramid this status would be the final step in the increasing visibility of the animal via legislative developments by which animals are ascribed certain rights and incidents. It is probable that animals need to possess a significant set of fundamental rights and incidents of legal personhood before they would be considered ‘full’ legal persons.<sup>43</sup> Importantly, this last step would not necessarily be the end goal; as animals could already possess an extensive set of rights and incidents at level 3, legal personhood might not be necessary for all animals. In any case, the alternative approach suggests that it is more likely and analytically correct to state that an equivalent of legal personhood for animals would be reached only at the very end of the evolving status of animals rather than as a first step towards legal visibility. Legal personhood could be ascribed to animals by legislative act, that is, through some kind of law. An example of a proposal for such a law is the Declaration of Toulon, formulated by French scholars Cédric Riot and Caroline Regad, which sets out to create a new category of natural person (different from artificial persons) of ‘non-human natural personhood’.<sup>44</sup>

In any event, the level 4 status of animals would not be entirely equal to the legal personhood of humans. As animals would never need all incidents (‘active’ incidents of legal personhood, such as those related to criminal and civil liability or the ability to

<sup>41</sup> Ibid., p. 95.

<sup>42</sup> Ibid., pp. 133–7.

<sup>43</sup> Described as ‘legal personhood *tout court*’: *ibid.*, p. 121.

<sup>44</sup> Toulon (France), 29 Mar. 2019, available at: <https://www.univ-tln.fr/Declaration-de-Toulon.html> (for now, this remains a declaration without legal force). See also C. Regad, C. Riot & S. Schmitt (eds), *La Personnalité Juridique de l’Animal : L’Animal de Compagnie* (LexisNexis, 2018); and C. Regad, ‘Genèse d’une Doctrine: l’Animal, Personne Physique Non-Humaine’ (2019) 10(1) *Derecho Animal (Forum of Animal Law Studies)*, pp. 201–4.

enter into contracts, are relevant primarily to humans and companies) their status could, in theory, also be conceptualized in a different manner. Some proposals to this effect have already been made. Tomasz Pietrzykowski, for instance, proposes regarding animals as non-personal subjects of law, distinguished from natural persons as well as from corporations with legal personhood.<sup>45</sup> Pablo Pérez Castelló regards ‘legal animalhood’ as the most adequate status for animals in law,<sup>46</sup> while Angela Fernandez proposes the idea of ‘quasi-property/quasi-personhood’: animals would not need to be placed in either one or the other category, but possess attributes of both.<sup>47</sup> Maneesha Deckha proposes the status of ‘legal beingness’ for the common law context.<sup>48</sup>

Such new types of status could be conceptualized in ways that are more attentive to the ways of being of animals than is the traditional perception of legal personhood. Moreover, different types of status for animals could be distinguished on the basis of their relation with humans. For instance, we could imagine separate level 4 types of status for wild animals (centred around their right not to be interfered with by humans), domesticated animals (centred around their right to human care) and so-called ‘liminal’ animals that enter human settlements occasionally (centred around their right to free movement), along the lines of the three categories proposed by Sue Donaldson and Will Kymlicka.<sup>49</sup> What seems crucial, however, is that the intrinsic value of animals at this level can no longer be denied; their fundamental interests are protected by rights, and their individuality and interests are visible in law to a similar degree as those of humans.

An apparent difference between the traditional view of animal legal personhood and the alternative approach proposed here is the lack of a specific normative grounding for level 4 status. Whereas the traditional view is built largely upon the idea that it is morally required to recognize animals as persons based on their real-life characteristics, the alternative approach employs an essentially legalistic notion of legal personhood, maintaining that, in theory, it could be ascribed to everything.<sup>50</sup> This is in line with the ‘intended beneficiaries’ approach taken towards rights in this article. Who or what is a legal person or bears rights is decided by the positive law; it is a policy determination, independent of the actual ontological characteristics of entities.

This view offers distinct advantages over the traditional view, as no normative claims with regard to who or what *can* have rights need firstly to be agreed. Moreover, it circumvents the need for the sameness logic and incorporates the observation that,

<sup>45</sup> T. Pietrzykowski, ‘The Idea of Non-Personal Subjects of Law’, in V.A. Kurki & T. Pietrzykowski (eds), *Legal Personhood: Animals, Artificial Intelligence and the Unborn* (Springer, 2017), pp. 49–67.

<sup>46</sup> P. Pérez Castelló, ‘Legal Animalhood: The Constitutional Recognition of Wild Animals in Australia’, presentation given during the ‘Talking Animals Series’ by the Cambridge Centre for Animal Rights Law, Cambridge (UK), 17 Mar. 2021, available at: <https://animalrightslaw.org/talkinganimals>. See also ‘legal animalhood’, proposed by S. Stucki, *Gründrechte für Tiere* (Nomos, 2016).

<sup>47</sup> Fernandez, n. 19 above.

<sup>48</sup> Deckha, n. 24 above.

<sup>49</sup> S. Donaldson & W. Kymlicka, *Zoopolis: A Political Theory of Animal Rights* (Oxford University Press, 2011).

<sup>50</sup> N. Naffine, ‘Who are Law’s Persons? From Cheshire Cats to Responsible Subjects’ (2003) 66(3) *The Modern Law Review*, pp. 346–67, at 350–4. See also Deckha, n. 24 above, Ch. 5.

throughout the world, several natural objects (including some rivers, national parks and parts of the Amazon) have been recognized as rights-bearing entities without any need to prove their similarity to humans.<sup>51</sup> Hence, the legalistic ascription is capable of being applied to a wider range of animals. It might therefore be more adequate than the realist conception of personhood that the traditional view employs, which remains dependent on the characteristics of beings.

#### 4. ANIMALS IN THE CIVIL LAW TRADITION: APPLYING THE PYRAMID

In order to illustrate how a gradual road towards personhood can help to explain the current status of animals in law, in this section I will apply the pyramid to the civil law traditions of Western Europe. Most of these jurisdictions do not have an equivalent of the habeas corpus writ and, in this context, it is unlikely that judges would further develop the law by reinterpreting the legal status of animals, as they tend to rely on existing statutes more than their common law counterparts and generally do not engage in sweeping policy debates in their judgments and justifications. The gradual road towards legal personhood through legislative change, therefore, might be more appropriate in this context than the traditional view.

With regard to level 1, there is hardly any doubt that most animals have simple rights as a matter of positive law in most civil law jurisdictions. These simple rights are already embodied in existing animal welfare laws. However, this has not always been the case. A teleological analysis of the parliamentary debates and explanatory notes preceding the animal protection acts in certain European countries shows that animal protection legislation before the second half of the twentieth century was, in fact, guided by anthropocentric concerns.<sup>52</sup> Animals were protected as property of the person, or only in so far as their abuse would be offensive to humans.<sup>53</sup> According to Stucki's criterion, the duties laid down in such acts would not be regarded as simple rights, as animals are not the intended beneficiaries.

Contrarily, it is clear that nowadays in many jurisdictions the protection of animals is a legitimate aim in itself. It is now increasingly common for legislators to take animal interests into account as an independent, intrinsically relevant concern; in some animal protection acts, animals are even recognized as sentient, fellow beings, or dignified creatures.<sup>54</sup> In the Netherlands, for instance, the notion of the 'intrinsic value' of

<sup>51</sup> L. Cano Pecharroman, 'Rights of Nature: Rivers that Can Stand in Court' (2018) 7(1) *Resources*, available at: <https://www.mdpi.com/2079-9276/7/1/13>.

<sup>52</sup> S. Brels, 'Le Droit du Bien-être Animal dans le Monde : Évolution et Universalisation' (PhD thesis, Université Laval (France), 2016), available at : <https://corpus.ulaval.ca/jspui/bitstream/20.500.11794/32964/1/32265.pdf>.

<sup>53</sup> A. Peters, 'Liberté, Égalité, Animalité: Human-Animal Comparisons in Law' (2016) 5(1) *Transnational Environmental Law*, pp. 25–53, at 40–1; E.C. De Bordes, 'Dieren in het Geding' (PhD thesis, Utrecht University (The Netherlands), 2010), available at: <https://dspace.library.uu.nl/bitstream/handle/1874/188407/bordes.pdf?sequence=1>.

<sup>54</sup> E. Bernet Kempers, 'Neither Persons nor Things : The Changing Status of Animals in Private Law' (2021) 29(1) *European Review of Private Law*, pp. 39–70.

animals has guided the drafting of legislation since 1981.<sup>55</sup> This is clarified in preparatory works as meaning that ‘before deciding the legitimacy of any action involving animals, the interest of the animal should be taken into account in a conscious balancing process’.<sup>56</sup> With the Alternative Pyramid in mind, the duties laid down in such acts can be described as simple rights because they are directed towards, and for the benefit of, animals, even where animals are not regarded as rights holders in these jurisdictions.

An illustrative example of a simple right that many animals have as a matter of positive law stems from the duty not to harm animals unnecessarily. This duty is codified in the animal protection legislation of all European civil law jurisdictions. However, it should clearly be qualified as a level 1 simple right (which, according to most advocates of the traditional view, should not be regarded as a form of ‘animal right’) for the following reasons. Firstly, the normative force of the protection is very low. When weighed against human interests, the simple right not to suffer unnecessarily generally loses out. Secondly, the simple right does not protect any fundamental interest; it is translated into the prohibition on slaughtering animals without prior stunning, but does not preclude slaughtering them. Thus, it is clear that the duty not to make animals suffer unnecessarily is only a level 1 right that is not as strong as most legal rights that humans possess.

Even though simple rights for animals thus exist in the civil law tradition of continental Europe, not all animals have an equal claim to simple rights. The duties that give rise to such rights are often confined to certain groups of animals on the basis of the way in which they are used by humans.<sup>57</sup> For instance, animals used for production purposes are regulated mainly by the general minimum norms derived from European Union (EU) Directives.<sup>58</sup> These animals are regarded not as individuals but as units of production to which certain standards apply – standards that are generally much lower than those established in animal protection legislation. As a result, certain practices that would be regarded as animal abuse in the domestic context are common practice in industry.<sup>59</sup> In an illustrative case before a Dutch higher court in 2019, the defendant was found to have abused her three chickens by keeping them in a cage of 1.3 square metres. The court held that this was not in line with their ‘ethological and

<sup>55</sup> F.W.A. Brom, ‘The Use of “Intrinsic Value of Animals” in the Netherlands’, in M. Dol (ed.), *Recognizing the Intrinsic Value of Animals: Beyond Animal Welfare* (Van Gorcum, 1999), pp. 15–28.

<sup>56</sup> Memorandum on Animal Protection and the Government (1981) [Nota Rijksoverheid en Dierenbescherming], Tweede Kamer II, 16 996, nr. 2. The current Dutch Animal Protection Act [Wet Dieren] recognizes the intrinsic value of animals in Art. 1(3). The Explanatory Note states that the intrinsic value is ‘the own, independent value, which is unconnected to the use-value that humans attach to animals’: Explanatory Note to the Dutch Animal Protection Act (2007–2008) Tweede Kamer [Memorie van Toelichting Wet Dieren], 31389 nr. 3, p. 19, available at: <https://zoek.officielebekendmakingen.nl/kst-31389-3.html>.

<sup>57</sup> W. Kymlicka, ‘Social Membership: Animal Law beyond the Property/Personhood Impasse’ (2017) 40(1) *Dalhousie Law Journal*, pp. 123–55. See also A.B. Satz, ‘Animals as Vulnerable Subjects: Beyond Interest Convergence, Hierarchy, and Property’ (2010) 16 *Animal Law*, pp. 65–122.

<sup>58</sup> See, e.g., Directive 2007/43/EC laying down Minimum Rules for the Protection of Chickens Kept for Meat Production [2007] OJ L 182/19, Art. 3(2): ‘Member States shall ensure that the maximum stocking density in a holding or a house of a holding does not at any time exceed 33 kg/m<sup>2</sup>.’

<sup>59</sup> See, e.g., J. Kotzmann & G. Nip, ‘Bringing Animal Protection Legislation into Line with its Purported Purposes: A Proposal for Equality amongst Non-Human Animals’ (2020) 37(2) *Pace Environmental Law Review*, pp. 247–317.

physiological needs’ as required by the animal protection legislation. However, in the industry up to nine chickens can be kept in 1 square metre of space.<sup>60</sup> In that case, however, it is not legally considered animal abuse. This ‘agricultural exceptionalism’, as Jessica Eisen refers to it, is also widespread in a common law context, and results in a form of discrimination against animals used for production compared with companion animals.<sup>61</sup>

It is debatable whether animals possess any level 2 fundamental rights under the law as it stands today. Arguably, if they do possess such rights, it is only to a very limited extent. The duty of care, which is codified in all animal protection acts of European civil law jurisdictions and provides a fairly high standard of care, might some day become a fundamental right of animals that are owned. Furthermore, certain absolute prohibitions that are in force today, such as the ban on the use of minks for fur production in some countries, can be regarded as fundamental rights for those specific animals covered by the law.<sup>62</sup> Additionally, some scholars have argued that wild animals listed in the most strictly protected annexes, such as the grey wolf, do possess a fundamental right not to be killed by humans, at least in theory.<sup>63</sup> Indeed, Article 12 of EU Directive 92/43/EEC on the Conservation of Natural Habitats and of Wild Fauna and Flora (Habitats Directive) requires states to prohibit the killing of the specimens of such species, thus translating the general prohibition to a duty towards individual animals.<sup>64</sup>

In a June 2020 decision, the Court of Justice of the EU (CJEU) confirmed that such prohibition against killing wolves, derived from the Habitats Directive, remains intact even when a wolf enters a human settlement.<sup>65</sup> This implies that the potential right complies with both characteristics of fundamental rights: it protects a fundamental interest, and seems to be given substantial weight when balanced against human interests. Nevertheless, it remains debatable whether individual wolves are the intended beneficiaries of the provision, as the underlying motivation is the conservation of the species and not the protection of individual animals.<sup>66</sup> Even if we were to describe the prohibition against killing wolves as a level 2 right, it would furthermore still lack some important aspects that we usually associate with strong legal rights, namely their procedural aspects. Most importantly, there is no actor that can access the courts in the event that the wolf’s right is infringed, or claim damages on the animal’s behalf. It is in this respect that the importance of level 3 incidents of personhood becomes apparent.

<sup>60</sup> See the Dutch Court of Appeal for Business, *College van Beroep voor het Bedrijfsleven*, 12 Dec. 2019, ECLI:NL:CBB:2019:685.

<sup>61</sup> See J. Eisen, ‘Down on the Farm: Status, Exploitation, and Agricultural Exceptionalism’, in C.E. Blattner, K. Coulter & W. Kymlicka (eds), *Animal Labour: A New Frontier of Interspecies Justice?* (Oxford University Press, 2019), pp. 139–59.

<sup>62</sup> Cf. Wills, n. 36 above, p. 156.

<sup>63</sup> H. Schoukens, ‘Killing Wolves To Save Them: Over Finse Wolvenjacht, de Moord op Naya en het EU-recht na het Tapiola-arrest van 10 Oktober 2019’ (2020) 1 *Tijdschrift Voor Milieurecht*, pp. 3–27.

<sup>64</sup> [1992] OJ L 206/7, Art. 12(a): Member states are required to prohibit ‘all forms of deliberate capture or killing of specimens of these species in the wild’.

<sup>65</sup> Case C-88/19, *Asociația ‘Alianța pentru combaterea abuzurilor’ v. TM and Others*, Request for a Preliminary Ruling from the Judecătoria Zărnești, 11 June 2020, ECLI:EU:C:2020:458.

<sup>66</sup> See J. Linnell, A. Trouwborst & F. Fleurke, ‘When Is It Acceptable to Kill a Strictly Protected Carnivore? Exploring the Legal Constraints on Wildlife Management within Europe’s Bern Convention Launched to Accelerate Biodiversity Conservation’ (2017) 21 *Nature Conservation*, pp. 129–57, at 138–9.

Even though animals generally do not possess many incidents of legal personhood, there are some signs that individual animals are becoming increasingly visible in law as something different from things also in a procedural sense, and that they sometimes even approach a level 3 status. In some civil law jurisdictions, for instance, it is possible for organizations to represent animals in court to some extent, even when no direct link between the organization and the animal can be established.

Article 2(13) of the French Code of Penal Procedure creates the possibility for animal protection organizations in France to become a civil party to criminal suits against individuals accused of animal abuse. Such organizations indirectly represent the animal victim against its owner, exercising those rights that human victims are usually able to exercise.<sup>67</sup> In practice, this means that animal organizations can obtain compensation on behalf of animals, or lodge an appeal when they do not agree with the outcome of the case. Even though compensation is thus not paid to the animal directly, it is remarkable that non-owners are able to obtain monetary damages when animal protection provisions are breached. In a 2018 case before the Court of Appeal of Nîmes, for instance, €1,000 for material damage and €500 for moral damage was awarded to the Société Protectrice des Animaux (SPA) for the abuse of a dog.<sup>68</sup>

No similar provision exists in Belgium, but in practice the same kind of mechanism is present: through the general article that contains the liability rule, animal protection organizations can access the courts and obtain (moral) compensation for harm to individual animals through the interests they aim to protect, according to their organizational statutes in which they state their purposes.<sup>69</sup> In a 2019 case before the Belgian Council of State, the animal protection organization GAIA was awarded €3,750 as compensation from a slaughterhouse, which killed animals without the prior stunning that was required by law.<sup>70</sup> The court confirmed that when the interests that an organization is protecting are infringed, it is possible to determine the amount of compensation that the organization may receive, taking into account the ‘seriousness’ of the harm caused to the animals.<sup>71</sup> However, the option for organizations to claim compensation when an animal is harmed by its owner exists only in a limited number of jurisdictions.<sup>72</sup>

<sup>67</sup> French Code of Penal Procedure, Art. 2(13). See also L. Boisseau-Sowinski, ‘La Représentation des Individus d’une Espèce Animale devant le Juge Français’ (2015) (Hors-série 22) *Vertigo*, available at: <https://doi.org/10.4000/vertigo.16234>.

<sup>68</sup> Court of Nîmes, 19 June 2018, discussion of the case available at: [https://www.droit-spav.fr/Jurisprudence\\_protection\\_animale.qI/b19983a/Appreciation\\_du\\_prejudice\\_d\\_un\\_mauvais\\_traitement](https://www.droit-spav.fr/Jurisprudence_protection_animale.qI/b19983a/Appreciation_du_prejudice_d_un_mauvais_traitement).

<sup>69</sup> Belgian Civil Code, Art. 1382 [Burgerlijk Wetboek]. See also ‘Proposal for an Act regarding the Possibility of Animal Protection Organizations to Initiate Proceedings’ [‘Wetsvoorstel teneinde de dierenbeschermingsverenigingen de bevoegdheid toe te kennen om in rechte op te treden’], Belgische Kamer van Volksvertegenwoordigers, wetsvoorstel, 29 June 2020, Doc. 55 1397/001, available at: <https://www.lachambre.be/FLWB/PDF/55/1397/55K1397001.pdf>.

<sup>70</sup> Belgian Council of State [Raad van State], 24 Oct. 2019, Arrest nr. 245.872, A. 220.659/VII-39.825.

<sup>71</sup> *Ibid.*, para. 11.

<sup>72</sup> US courts sometimes take the opposite approach: if monetary compensation goes to the animal protection organization itself, the good faith of the organization may be questioned; see, e.g., *Naruto v. Slater*, US District Court, N.D. California, 2016 WL 362231; A. Fernandez, ‘Legal History and Rights for Nonhuman Animals: An Interview with Steven M. Wise’ (2018) 41(1) *Dalhousie Law Journal*, pp. 197–218, at 212.

Yet, can these isolated examples be regarded as establishing level 3 incidents of legal personhood for animals related to standing? That remains very questionable. Even though organizations do initiate proceedings and obtain compensation as if they *de facto* represent the animal individuals, animals themselves are still not regarded as victims. The animal is not considered an entity that is capable of suffering legal harm or obtaining compensation; it is the abstract value of ‘animal protection’ that is relevant in this respect, as the formulation of the organizational purpose determines whether an organization has standing.<sup>73</sup> Nevertheless, it is clear that as animals (generally) do not speak any human language, they will, in the foreseeable future, inevitably need human representation in the courtroom. Therefore, the most suitable solution may be to allow organizations to represent animals indirectly, making sure that the compensation assigned to them is actually used for the benefit of the animal. Not all incidents of personhood need to be attached to the animal individual itself; the procedural incidents, in particular, might be better established in those human actors that represent animals in practice.

With regard to the last level, it is clear that in the civil law tradition animals do not possess a level 4 status. Wild animals are classified as *res nullius*, things that are not owned by anyone (although one could argue that they are owned by the state), whereas domesticated animals are generally still regarded as the property of legal persons. Nevertheless, in most civil law jurisdictions today the Civil Code now distinguishes between animals and legal things. Among others, Austria, Germany, Switzerland, the Czech Republic, France, the Netherlands, Belgium and Spain have introduced a provision referring specifically to animals.<sup>74</sup> Animals are defined in some of these provisions as a separate category of ‘living beings’ with ‘sentience’ or ‘biological needs’ that ‘are to be distinguished from things’.<sup>75</sup> In Belgium, preparatory works for new books on property in the Civil Code show that the legislature indeed intended to create an in-between category (albeit without the intention to attach normative consequences to this creation). It is stated:

Objects need, in an introducing *summa divisio*, to be distinguished from persons, but also from a third category, that of the animals. In view of the scientific and societal progress, the special characteristics of the latter have become clear, with the result that they can be classified neither as objects, nor as subjects of law.<sup>76</sup>

<sup>73</sup> See Kurki, n. 5 above, p. 108.

<sup>74</sup> Austria, s. 285a Allgemeines Bürgerliches Gesetzbuch (ABGB) since 1988; Germany, s. 90a Bürgerliches Gesetzbuch (BGB) since 1990; Switzerland, Art. 641a Zivilgesetzbuch (ZGB) since 2002; Moldova, Art. 458 Codul Civil (CC) since 2002; Czech Republic, Art. 494 Občanský Zákoník (OZ) since 2012; France, Arts 515–14 Code Civil (CC) since 2015; The Netherlands, Art. 3(2a) Burgerlijk Wetboek (BW) since 2016; Belgium, Art. 3(38)–(39) Burgerlijk Wetboek (BW) since 2021; Spain, Art. 333bis Código Civil (CC) since 2022. A similar provision exists in non-European civil law jurisdictions such as Quebec: s. 898(1) Civil Code (CC) since 2015. See also J. Van de Voorde, ‘Dieren als quasi-goederen: Beschouwingen over de Juridisch-technische Wenselijkheid van een Bijzonder Statuut voor Dieren tussen Goederen en Rechtssubjecten’ (2016) 138(6) *Rechtskundig Weekblad*, pp. 203–19.

<sup>75</sup> Ibid. See, e.g., in Belgium, Art. 3(39) BW; and in Spain, Art. 333bis CC. Some of these provisions, however, merely state that ‘animals are not things’ without giving a positive definition; see The Netherlands, Art. 3(2a) BW.

<sup>76</sup> Proposal concerning the Book on Property Law in the new Civil Code [Wetsvoorstel houdende invoeging van boek 3 ‘Goederen’ in het nieuw Burgerlijk Wetboek], Kamer, 16 July 2019, Doc. 55 0173/001, p. 97.



Furthermore, private law judges in these jurisdictions seem increasingly attentive to the fact that companion animals are not like other property.<sup>77</sup> For instance, in a case concerning the ownership over a dog after divorce, a Dutch court pointed out that:

[f]irst of all, the court considers that, in the context of balancing interests, apart from the interest of the parties, the interest of the dog should also be taken into account. The dog is a living creature that is dependent on the parties, for whose welfare the parties are responsible.<sup>78</sup>

Similarly, the Court of Appeal of Brussels stated that:

[t]aking into account the changing position of animals in general, and dogs especially, in our society and in law, in the determination [about which party can have the dog] it is not only the affectional bond between humans – in this case both parties – and the dog that should be considered, but also the interest and welfare of the dog.<sup>79</sup>

In France, a dog was assigned to one of the parties because they had a larger garden, explicitly taking into account the interest of the dog as a determinative factor in the decision.<sup>80</sup> In Switzerland as well as in Spain, the Civil Code requires the welfare interests of animals to be taken as guiding factors when deciding on the question of custody, treating them more like family members than property.<sup>81</sup> Such developments are often disregarded in the literature as merely symbolic changes.<sup>82</sup> With the Alternative Pyramid in mind, they could, however, be construed as a promising catalyst towards an independent legal status for animals, increasing their legal visibility as individuals and moving them up in the pyramid.

## 5. STRENGTHS AND SHORTCOMINGS OF THE ALTERNATIVE APPROACH

As the analysis in the previous section shows, the gradual road towards legal personhood envisioned by the alternative approach can offer a framework to help us to understand in a different light recent legal developments in the civil law traditions of Western Europe. Animals are increasingly visible as individuals. As their legal existence becomes

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See also J. Van de Voorde, 'Juridisch Statuut van het Dier (Art. 3.38-3.39 BW)', in V. Sagaert et al. (eds), *Het Nieuwe Goederenrecht* (Intersentia, 2021), pp. 77–99.

<sup>77</sup> Bernet Kempers, n. 54 above.

<sup>78</sup> The Netherlands, Court of Limburg, 15 May 2013, ECLI:NL:RBLIM:2013:CA0058.

<sup>79</sup> Belgium, Court of Appeal Brussels, 22 June 2021, 2021/FA/177.

<sup>80</sup> France, Court of Versailles, 13 Jan. 2011, ch. 2, sect. 1, n° 10/00572. See also Court of Appeal Bastia (France), 15 Jan. 2014, 12/00848; F. Marchadier, 'L'Animal du Point de Vue du Droit Civil des Personnes et de la Famille après l'Article 515-14 du Code Civil' (2015) 1 *Revue Semestrielle de Droit Animalier*, pp. 433–43.

<sup>81</sup> Switzerland, Art. 651a CC. For Spain, see Ley 17/2021, de 15 de diciembre, de modificación del Código Civil, la Ley Hipotecaria y la Ley de Enjuiciamiento Civil, sobre el régimen jurídico de los animales, BOE-A-2021-20727, pp. 154134-43. See 'Los animales de compañía serán jurídicamente miembros de la familia desde este miércoles en España', *El Mundo*, 2 Jan. 2021, available at: <https://www.elmundo.es/espana/2022/01/02/61d1818021efa0502d8b4575.html>.

<sup>82</sup> J.E. Jansen, 'Over de Ontzakelijking van Dieren en de Grenzen van het Zaaksbegrip' (2011) 172(5) *Rechtsgeleerd Magazijn Themis*, pp. 187–201.

distinct from that of legal things, they slowly move up the pyramid towards a level that is the equivalent of the legal personhood of humans, or which gives them significant rights.

Arguably, the Alternative Pyramid can also serve as a helpful lens in the common law context. Even though the judiciary, in theory, may be able to change the status of animals from property to person in a specific case, such change would need to be backed by statutory law in order to have broad application. Thus, also in common law the alternative approach can help in understanding and shaping the changing status of animals in a way that goes beyond a binary categorization into persons and things. At the same time, there are possible objections which could be made against the alternative approach to animal legal personhood. I will address some of these in this section, while also summarizing its strengths.

Firstly, one could question whether the level 4 status in the Alternative Pyramid has any added value. If all the appropriate incidents can be acquired at level 3, why would an independent status that is the equivalent of personhood still be necessary? The reason for the existence of level 4, however, is to make clear that level 3 could, in theory, be reached for some animals without any judicial or doctrinal confirmation that animals are persons (or an equivalent). Even when fundamental rights are recognized (such as in an international convention) and incidents of legal personhood attached to animals (for instance, by making it possible to initiate court proceedings directly in the names of animals), courts or legal scholars could still deny that they are legal persons in any meaningful sense. Level 4 thus represents the symbolic moment at which the legal status of animals as persons, living beings or any other equivalent (strong) legal status would become a widely acknowledged fact. The point of the Alternative Pyramid, however, is precisely to show that it is more likely that this would be the *consequence* of legislative change (their personhood would, at some point, be an institutional fact that can no longer be denied) rather than the *reason* why such change should take place. It follows that the abolition of the status of property would not need to be the first concern of animal activists. Small incremental changes, in fact, can bring animals closer to a personhood-like status by increasing their individual visibility, overcoming the debate between welfarism and abolitionism.<sup>83</sup>

As a second objection, one could argue that the Alternative Pyramid is, in fact, nothing more than a description of the status quo and that the levels up to and including level 3 have just proved to be ineffective and inadequate. Perceived in this way, only level 4 would constitute meaningful change, which would render the Alternative Pyramid superfluous, as we could just employ the traditional approach. The very reason that Steven Wise puts personhood at the base of the pyramid (from this viewpoint) is to make clear that without it, animal protection will remain limited, whether or not we describe their protections as rights; personhood is an absolute necessity.

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<sup>83</sup> G. Francione & R. Garner, *The Animal Rights Debate: Abolition or Regulation?* (Columbia University Press, 2010). For another very successful attempt to overcome this dichotomy, see Fernandez, n. 19 above. See also W. Kymlicka, 'Social Membership: Animal Law beyond the Property/Personhood Impasse' (2017) 40(1) *Dalhousie Law Journal*, pp. 123–55.

I would argue, however, that this position overestimates the normative power of personhood. As Raimo Siltala states, the concept of ‘legal person’ in itself does not mean much as no directly valid legal inference may be made as to the extent of legal protection the entity thereby enjoys. A corporation is a legal person, yet it cannot marry, nor enjoy a right to bodily integrity. Hence, ‘irrespective of whether some [...] entity is granted the status of legal personhood, the individual facts and the legal consequences attached to them need to be considered on distinct terms’.<sup>84</sup> This means that having the status of legal personhood cannot always guarantee that animals would automatically possess the appropriate (procedural) incidents of personhood in practice. Under the alternative approach, the concept of legal personhood in relation to animals (as consisting of incidents) should be regarded not as a tool for legal argumentation but primarily as an analytical tool with which to give shape to the legal existence of animals in law. In this respect the Alternative Pyramid offers several advantages to the traditional view.

Firstly, as we have seen already, the Alternative Pyramid helps to obtain a nuanced picture of the status of animals in positive law, overcoming the need to define their status solely in terms of their thinghood. With the proposed lens it becomes clear that some animals (primarily companion animals) have a broad set of simple rights and are already approaching a status similar to that of humans, whereas for others (mainly farmed animals) their simple rights are not even applied to them in practice.

Furthermore, the emphasis shifts away from aiming to establish legal personhood *per se* towards aiming to establish those incidents of legal personhood that are most relevant for specific animals, which may be possible without needing to acknowledge that animals are legal persons. The alternative approach thus fosters a pluralized picture of the legal sphere by moving attention away from the legal person as the only valuable legal entity, which is sometimes referred to as the ‘Anthropos’ of law.<sup>85</sup> As Anna Grear has pointed out, the fact that ‘the human subject stands at the centre of the juridical order as its only true agent and beneficiary’ is intensely problematic, as it translates into a hierarchy based on a certain image of the rational, disembodied subject.<sup>86</sup> By maintaining that animals should first be persons before they can have rights, the traditional view essentially leaves this structure intact, merely including a broader range of entities in the category of ‘person’ when they are ‘sufficiently’ like humans.<sup>87</sup> The alternative approach, in contrast, challenges the premise that the dichotomy between persons and things is an invariable given of our legal ontology, suggesting that the existing simple rights of animals can be strengthened into fundamental rights, and at least some of the appropriate incidents of personhood can be established for

<sup>84</sup> R. Siltala, ‘Earth, Wind, and Fire, and Other Dilemmas in *A Theory of Legal Personhood: A Vindication of Legal Conventionalism*’ (2021) Symposium (44) *Revus*, available at: <https://doi.org/10.4000/revus.6974>.

<sup>85</sup> A. Grear, ‘Deconstructing Anthropos: A Critical Legal Reflection on “Anthropocentric” Law and Anthropocene “Humanity”’ (2015) 26(3) *Law and Critique*, pp. 225–49.

<sup>86</sup> *Ibid.*, p. 225.

<sup>87</sup> Deckha, n. 24 above, p. 98.

them through legislative change, without the need to change their status to persons first.<sup>88</sup>

The more pluralized image of the legal sphere – as consisting of a range of various legal entities that hold rights and incidents of personhood in differing degrees – might also be relevant for legal approaches to other non-humans. One could imagine that, for artificial intelligence or robots, a legal status might be envisioned that encompasses several incidents of legal personhood (such as the capacity to be held accountable) and simple rights, while excluding some of the fundamental protections that humans and animals might need (such as the protection of bodily integrity).<sup>89</sup> Contrarily, the legal platform of natural objects that are vulnerable to human influence might need to encompass only the procedural incidents of personhood in order to secure their effectiveness. Hence, for other non-human entities, different roads towards better protection could be envisioned (potentially by drafting other alternative pyramids), contributing to a further pluralization of law. The portrayal of the legal sphere as populated by entities that possess rights and incidents in differing degrees (as opposed to a select group of persons with rights in opposition to mere objects) fits well with the recent realization that we are living in the Anthropocene, in which the dialectical binary divisions that are based upon the opposition of nature versus culture are no longer tenable.<sup>90</sup>

Relatedly, the alternative approach to animal legal personhood implies a diversification of the traditional view by emphasizing that not all animals would be in need of the same kind of legal status. Animals that live in close proximity to humans might need to have their interests recognized in private law and have a fundamental right to human care, whereas for wild animals this might not be necessary. Instead, one could imagine that wild animals would benefit more from the incident of personhood that makes it possible to own property, in such a way that they could own the territories on which they live.<sup>91</sup> Moreover, animals used in harmful activities might not need legal personhood as soon as they have been granted the fundamental right not to be used for such harmful activities, simply because they will no longer be bred for such purposes. Hence, the traditional image is replaced with a more diversified account in which, before we can say anything about the (desired) legal status of that animal, it should first be specified which animal we are considering, which rights the animal has as a matter of positive law, and which incidents of legal personhood would be needed for the effective protection of such rights. At the same time, the legalistic basis of their eventual independent status makes it possible to include a wider range of animals, without

<sup>88</sup> B. Favre, 'Is There a Need for a New, an Ecological, Understanding of Legal Animal Rights?' (2020) 11(2) *Journal of Human Rights and the Environment*, pp. 297–319, at 307.

<sup>89</sup> S.M. Solaiman, 'Legal Personality of Robots, Corporations, Idols and Chimpanzees: A Quest for Legitimacy' (2017) 25(2) *Artificial Intelligence and Law*, pp. 155–79; J.C. Gellers, *Rights for Robots: Artificial Intelligence, Animal and Environmental Law* (Routledge, 2020).

<sup>90</sup> See, e.g., P.D. Burdon, 'Ecological Law in the Anthropocene' (2020) 11(1–2) *Transnational Legal Theory*, pp. 1–14; B. Latour, *Facing Gaia* (Polity Press, 2017).

<sup>91</sup> K. Bradshaw, *Wildlife as Property Owners: A New Conception of Animal Rights* (University of Chicago Press, 2020).

necessarily needing to prove their similarity to humans. In essence, this means that law would be reshaped in order to accommodate the different modes of existence and agency in the world, rather than requiring these other life forms to comply with the humanistic notion of the ‘person’ in order to be ‘seen’ by law.<sup>92</sup>

## 6. CONCLUSION

The traditional view of animal legal personhood assumes that the status of animals needs to change to that of persons before they can possess legal rights. However, this view, which is defended by organizations such as the Nonhuman Rights Project, has certain shortcomings: it represents a binary conceptualization of the legal sphere, is potentially relevant for only a small group of animals, and arguably can be effectively implemented only in a limited number of jurisdictions.<sup>93</sup> This article has proposed an alternative approach, which regards the road to animal legal personhood as a gradual transition through the legislature. According to this approach, animal legal personhood is regarded not as a condition for holding rights, but as the possible consequence of it. This approach starts by recognizing that many animals already have simple animal rights as a matter of positive law, and suggests that it is possible to strengthen these rights in such a way that they might one day be regarded as fundamental rights, establishing those incidents of legal personhood necessary to ensure their efficient function.

In place of the traditional Animal Rights Pyramid, I have proposed an Alternative Animal Rights Pyramid through which this alternative approach can be visualized. In this Alternative Pyramid, legal personhood is located not at the first level – the capacity to bear rights – but at the very top. Perceived as such, legal personhood would no longer be a first necessity. Rather, different animals might need just those incidents of personhood that are appropriate for them, depending on their relationship with humans.

A basic structure to establish incidents of personhood is already present in some jurisdictions, especially with regard to access to courts for organizations and the possibility of obtaining damages. Moreover, we have seen that animals increasingly are distinguished explicitly from other property in civil codes and in case law. Instead of dismissing these developments as merely symbolic as long as they do not explicitly endorse the traditional animal rights perspective, I propose to see them as important catalysts that might raise animals to higher levels of the pyramid, towards a status that approaches that of the human person.

In the final part of the article, I discussed some strengths and shortcomings of the alternative approach. While the Alternative Pyramid may seem less ‘revolutionary’ than the traditional version, I have argued that it has several advantages. Conceptualizing the status of animals through the proposed lens would mean a

<sup>92</sup> For a critique along these lines, see Deckha, n. 24 above (developing the status of legal beingness as ‘a legal response to animals that does not ask them to comply with (dominant) human norms’: *ibid.*, p. 98).

<sup>93</sup> A. Fernandez, ‘Already Artificial: Legal Personality and Animal Rights’, in J. Greene & S. Youssef (eds), *Human Rights after Corporate Personhood: An Uneasy Merger?* (University of Toronto Press, 2020), pp. 211–58, at 228–32; Fernandez, n. 19 above, pp. 207–9.

pluralization of the legal realm, moving away from emphasis on the person (as legal persons are no longer the only valuable entities with rights) and questioning the assumption that we can decide on ‘rights’ of ‘the animal’ in a general manner (as there is a need to specify the animals in question, in order to determine which rights and incidents of personhood are appropriate for them). A practical advantage that the alternative approach offers is that there is no longer a need firstly to reach consensus about those ‘hard’ questions that often obscure the quest for animal legal personhood, such as the question of which animals would be included and which would not. Instead, the focus shifts to determining those positive and negative obligations (from which rights would arise gradually) that ensure the flourishing of humans and other animals in the Anthropocene condition.