

# PRZEGLĄD PRAWA ADMINISTRACYJNEGO

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## Animals' Mental Suffering Paradigm in Estonian Judicial and Media Environment

*Paradygmat psychicznego cierpienia zwierząt w estońskim  
orzecznictwie sądowym i relacjach medialnych*

### Introduction

Ever since in 1781 Jeremy Bentham introduced the idea of a moral dimension in the treatment of animals, the matter of suffering has remained one of the central issues in animal rights legislation<sup>1</sup>, scholarship<sup>2</sup> and activism<sup>3</sup>. Bentham's general statements – “The question is not, can they reason? Nor, Can they talk?

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<sup>1</sup> See the legislation related to the reduction of farm animals suffering, referred to below.

<sup>2</sup> See the holistic works of Martha Nussbaum, referred to below.

<sup>3</sup> See, for example, advocacy group faunalitycs, which is focusing on the need to raise awareness of wild animal suffering, which may increase as a trade-off against appeals to reduce farm animals suffering.

but, Can they suffer?”<sup>4</sup> – coupled with the findings of modern science about the complexity of the animals’ suffering capability, can lead to the argument that if animals can mentally suffer, then the obligation to avert such suffering is not a humanistic obligation, but belongs to the sphere of fundamental rights.

From the general theoretical perspective, the evolution of human rights is “gradual and largely incremental”<sup>5</sup>. This evolution has both a social and legal component. One needs to distinguish between a fundamental right claim and the recognition of such a claimed fundamental right. The claim of a new right (or the expansion of an existing right) usually originates from the society, promoted by an interest group, and only thereafter finds recognition by the policy organs and application by the courts. Repeated promotion in different forums by a variety of actors is a hallmark of the process of securing international recognition of a claimed right, as Simma and Alston have observed that “in the development of human rights law principles have always preceded practice”<sup>6</sup>. These principles are usually taken up by various social actors, who seek their recognition in law. Evidence of actual supportive practice remains an indispensable part of any credible argument that a given claim has matured into a general international legal right<sup>7</sup>. This article will explore, whether there is sufficient empirical evidence and theoretical justification to make the case that (some) animal fundamental rights should be recognized because they can mentally suffer. On the example of Estonian judicial practice and media coverage it appears that the practice of recognizing animal fundamental rights due to their ability to mentally suffer has either preceded development of animal protection law, or exists separately from the development of legal principles. Therefore, Simma and Alston’s explanation how human rights law develops may not seem universally applicable, since in case of animal fundamental rights practice may have preceded principles.

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<sup>4</sup> J. Bentham, *An Introduction to the Principles of Morals and Legislation*, “Courier Corporation” 2012, p. 311.

<sup>5</sup> J. Donnelly, *Universal Human Rights in Theory and Practice*, Ithaca–London 1989, p. 223.

<sup>6</sup> B. Simma, P. Alston, *The Sources of Human Rights Law: Custom, Ius Cogens, and General Principles*, “Australian Year Book of International Law” 1992, Vol. 12, p. 107.

<sup>7</sup> See: O. Schachter, *International Law in Theory and Practice*, Dordrecht 1991, p. 336; I. Brownlie, *The Rights of Peoples in Modern International Law*, [in:] *The Rights of Peoples*, ed. by J. Crawford, Oxford 1988, pp. 12–16; or see General Assembly Resolution 41/120, Doc. A/RES/41/120, 4 December 1986, para. 4(e), which lists among the criteria for the development of human rights instruments “broad international support”.

## Animals' mental suffering paradigm

*Evidence of the capacity to suffer*

There are hardly any animal rights scholars or activists who would doubt that animals feel physical pain<sup>8</sup>. Panzera confirms that pain perception in animals, in terms of physiological mechanisms of pain detection, has been indirectly confirmed by using central and peripheral analgesics on experimental animals in pharmaceutical research<sup>9</sup>. Tomasik writes about fear of predators which may cause long-term psychological trauma<sup>10</sup>. In his view, emotional stress and intense suffering lead to the view that most animals have lives not worth living<sup>11</sup>. Many writings confirm that animals' emotional and psychological suffering can lead to "abnormal behavior"<sup>12</sup>. Bekoff has shown that animals have the possibility of suffering from various psychological disorders<sup>13</sup>, Ferdowsian *et al.* have concluded, that chimpanzees display behavioral clusters similar to PTSD and depression in their key diagnostic criteria<sup>14</sup>. The ability of mental suffering is an intrinsic part also of Nussbaum's capabilities theory: "Human beings have a lot of evidence that many types of animals are person-like – capable of intelligence and planning, capable of emotion and responsiveness, capable of awareness of another animal's feelings, capable of recognizing one another and members of other species as individuals, capable of joy, humor, and delight"<sup>15</sup>.

<sup>8</sup> For references of authors who write about the ability of animals to feel physical pain, see: S.F. Sapontzis, *Predation*, "Ethics and Animals" 1984, Vol. 5(2), pp. 27–38; J.K. Kirkwood, AW. Sainsbury, *Ethics of Interventions for the Welfare of Free-Living Wild Animals*, "Animal Welfare" 1996, Vol. 5, pp. 235–243; T. Cowen, *Policing Nature*, "Environmental Ethics" 2003, Vol. 25(2), pp. 169–182; M.C. Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*, Cambridge 2006; B.I. Sozmen, *Harm in the Wild: Facing Non-Human Suffering in Nature*, "Ethical Theory and Moral Practice" 2013, Vol. 16(5), pp. 1075–1088.

<sup>9</sup> M. Panzera, *Sickness and Abnormal Behaviors as Indicators of Animal Suffering*, "Relations Beyond Anthropocentrism" 2013, Vol. 1(1), p. 23. He lists elements of possible mental suffering of animals as well: thirst, hunger, weakness, debility, breathlessness, nausea, sickness, pain, distress, fear, anxiety, helplessness, boredom.

<sup>10</sup> B. Tomasik, *The Importance of Wild-Animal Suffering*, "Relations: Beyond Anthropocentrism" 2015, Vol. 3(2), pp. 133–152, 136.

<sup>11</sup> *Ibidem*, p. 139.

<sup>12</sup> M. Panzera, *op. cit.*, p. 28.

<sup>13</sup> M. Bekoff, *The Emotional Lives of Animals*, Novato 2007.

<sup>14</sup> H.R. Ferdowsian *et al.*, *Signs of Mood and Anxiety Disorders in Chimpanzees*, "PLoS ONE" 2011, Vol. 6(6).

<sup>15</sup> M.C. Nussbaum, *Animal Rights: The Need for a Theoretical Basis*, "Harvard Law Review" 2001, Vol. 114(5), p. 1507.

Against this background one should ask, whether all animals have the ability to experience mental suffering? Some authors' writings about animal suffering suggest that animals can indeed be distinguished on this basis, some authors do not address the matter. In the first group is Singer, who argues that individual capabilities of animals affect assessments of pain and suffering<sup>16</sup>. The latter group primarily relies on the matters of vulnerability or moral considerations, as opposed to the matter of suffering, which means, that all animals are vulnerable, but not all vulnerable animals are capable of mental suffering<sup>17</sup>. When Francione writes that: "The theory of animal rights maintains that at least some non-humans possess rights that function in a manner substantially similar to human rights. Animal rights ensure that relevant animal interests are absolutely protected and may not be sacrificed even if it would benefit humans to do so, or if the animals whose interests are at stake are exploited «humanely» and without «unnecessary» suffering"<sup>18</sup>, he clearly has in mind the principle that all animals deserve the recognition of some fundamental rights without the qualification of the capability of mental suffering or suffering in general. Thus, in his view, inclusion of the element of suffering into animals' rights discourse would blur the focus.

*The matter of animal suffering in the context of main animal rights theories*

For both the abolitionist<sup>19</sup> and welfarist<sup>20</sup> positions the matter of animal suffering is of central conceptual importance. DeCoux has generalized these positions regarding the matter of animal suffering by suggesting that the welfarists use proper tools – narratives of animal suffering – but are satisfied to classify animals as property, whereas the abolitionists work towards the outcome of

<sup>16</sup> P. Singer, *Ethics and Animals*, "Behavioral & Brain Sciences" 1990, Vol. 13, p. 45, 46.

<sup>17</sup> For example, Christopher Stone argues that the inherent value of non-humans could be recognized and protected by guardians just as are the rights (basic rights and non-basic rights) of children or the mentally disabled – see: C.D. Stone, *Should Trees Have Standing? – Toward Legal Rights for Natural Objects*, "Southern California Law Review" 1972, Vol. 45, p. 450, 464–467.

<sup>18</sup> G.L. Francione, *Animal Rights and Animal Welfare*, "Rutgers Law Review" 1996, Vol. 48, p. 397, 398.

<sup>19</sup> Francione, as one of the best-known advocates of the abolitionist position, believes that the abolitionists should be hesitant to describe animal suffering, since it could easily lead the reader to adopt an easier path for alleviating animal suffering, which would be the welfarist path – see for discussion G.L. Francione, *The Use of Nonhuman Animals in Biomedical Research: Necessity and Justification*, "The Journal of Law, Medicine & Ethics" 2007, Vol. 35(2), p. 241, 242.

<sup>20</sup> The welfarist position is concentrating on ending animal exploitation. It is suggested that through the work of welfarists various legal instruments have been adopted for such goal, for example, the Animal Welfare Act in the United States in 1966. Cass Sunstein argues, that "if the Animal Welfare Act were taken seriously, we could accomplish a great deal to reduce animal suffering" – C.R. Sunstein, *Enforcing Existing Rights*, "Animal Law" 2002, Vol. 8.

abolishing the property status of animals, but refrain from using a powerful tool – description of animal suffering<sup>21</sup>. The framework of the difference between the welfarists and abolitionists is the one of a rights holder versus welfare object<sup>22</sup>, but the element of suffering in both has been used as an argument to argue for the need of a paradigmatic change.

A common characteristic of both the welfarist and abolitionist position is their approach to human rights language – both refer to the process of “giving” or “not giving” some fundamental rights to animals, as opposed to the understanding that such fundamental rights may exist irrespective whether the global community has recognized such rights or decided whether to “give” or “not to give” fundamental rights to some animals. The approach of “giving” also constitutes the framework of Nussbaum’s capabilities approach. When addressing the question which fundamental rights should be given to whom, she explains: “Giving apes legal rights does not mean giving them the same rights as adult humans. As with mentally disabled humans, a right may be qualified in certain ways in keeping with the creature’s level of understanding. Apes may have fewer rights in certain areas, and the rights they have may be more narrowly conceived. Finally, they may be given only certain elements of a complex right”<sup>23</sup>.

Within legal theory, the criticism of the rhetoric of “giving” some animals some fundamental rights is perhaps more clearly present in the critical animal studies. When searching for concepts how to evaluate human-animal relations and adopt a tool for de-hierarching human and non-human animal relations, thereby affording animals the subjectivity<sup>24</sup>, the critical animal studies approach wishes to recognize an animal as a subject and relocate an animal from the margins of legal protection literally and theoretically<sup>25</sup>. This animal then becomes entitled to respect, dignity, autonomy and all the other normal markers of personhood status in western societies<sup>26</sup>. The logical consequence from this approach is that,

<sup>21</sup> E.L. DeCoux, *Speaking for the Modern Prometheus: The Significance of Animal Suffering to the Abolition Movement*, “Animal Law” 2009, Vol. 16(9), p. 44.

<sup>22</sup> For discussion, see N.D. Hamilton, *One Bad Day: Thoughts on the Difference Between Animal Rights and Animal Welfare*, “Michigan Law Review. First Impressions” 2008, Vol. 106, p. 138; R. Payne, *Animal Welfare, Animal Rights, and the Path to Social Reform: One Movement’s Struggle for Coherency in the Quest for Change*, “Virginia Journal of Social Policy & the Law” 2002, Vol. 9, p. 587.

<sup>23</sup> M.C. Nussbaum, *Animal Rights: The...*, p. 1548.

<sup>24</sup> M. Deckha, *Critical Animal Studies and Animal Law*, “Animal Law” 2012, Vol. 18(207), p. 42.

<sup>25</sup> G. Deleuze, F. Guattari, *A Thousand Plateaus: Capitalism and Schizophrenia*, transl. B. Massumi, Minneapolis–London 1987, p. 239; see also for discussion: A. Beaulieu, *The Status of Animality in Deleuze’s Thought*, “Journal for Critical Animal Studies” 2011, Vol. 9(1/2), p. 69, 73–78.

<sup>26</sup> M. Deckha, *The Subhuman as a Cultural Agent of Violence*, “Journal for Critical Animal Studies” 2010, Vol. 8(3), pp. 28–30.

if *prima facie* mental suffering is to be avoided whenever not justified due to a limitation of a fundamental right of a legal subject, the same applies to animals capable of mental suffering. The difference from the approach of “giving” animals fundamental rights then is, because of the argument of mental suffering capability, that when the society condemns mental suffering through fundamental rights approach to humans, there is no logic not to apply this to the animals likewise.

### Courts and law on the matter of animal mental suffering

International courts have scarce case-law where animal rights are evoked. *The Whaling in the Antarctic* case<sup>27</sup> perhaps is the most widely known international judicial decision where the matter of animal suffering was touched. Here the International Court of Justice stated that scientific research and other forms of animal exploitation should generally seek to minimize unnecessary suffering or harm to animals, recognizing their status as sentient beings unable to advocate for their protection<sup>28</sup>. There are relatively little internationally published analysis of domestic court cases dealing with animal cruelty. It appears, that the matter of mistreatment of animals is criminalized in most countries mainly in the same formulations – either as animal cruelty<sup>29</sup> or animal abuse<sup>30</sup>. These analyses are primarily concerned with profiling the abusers<sup>31</sup> and do not raise the matter of why animal cruelty or animal abuse is criminalized. The matter of mental suffering has been raised in such an analysis regarding the damage caused to the owner of pets, but not to the pets themselves<sup>32</sup>.

The EU strategy for animal welfare 2012–2015 sets as one of the goals the keeping of farm animals under conditions that do not subject them to pain or suffering<sup>33</sup>. The EU new animal welfare regulation is based on the recognition of

<sup>27</sup> International Court of Justice case *Whaling in the Antarctic*, Australia v. Japan, New Zealand intervening, judgment of 31 March 2014.

<sup>28</sup> *Ibidem*, para. 133–144.

<sup>29</sup> P.G. Saluja, *Judicial review of prosecutorial decisions: Implications for animal welfare in Scotland*, “Journal of Animal Welfare Law” 2014, pp. 1–4.

<sup>30</sup> A. van Wijk, M. Hardeman, N. Endenburg, *Animal abuse: Offender and offence characteristics. A descriptive study*, “Journal of Investigative Psychology and Offender Profiling” 2018, Vol. 15(2)

<sup>31</sup> *Ibidem*, for example, van Wijk and others report that 25% of animal abusers had one or more psychological disorders.

<sup>32</sup> A.N. Palizzi, *Torts – Damages – Owner Entitled to Recover for Mental Suffering Based on Sentimental Value of a Pet*, “Wayne Law Review” 1965, Vol. 11, p. 586; Palizzi demonstrates how courts allow compensation in the event of severe mental damage to owner for injury caused to dog.

<sup>33</sup> The strategy does not differentiate mental suffering.

the five freedoms<sup>34</sup> of animal welfare, among those the freedom from fear and distress, e.g. the freedom to be kept in conditions and treatment which avoids mental suffering. The European Convention on the Protection of Animals kept for Farming Purposes<sup>35</sup> obliges countries to avoid unnecessary suffering of animals<sup>36</sup>. The explanatory report to this Convention is vague on the matter of suffering, e.g. it does not address at all the choices of terminology of “unnecessary” suffering or using “suffering” as a general category, as opposed to distinguishing various forms of suffering<sup>37</sup>.

The EU Directive on the protection of animals used for scientific purposes<sup>38</sup> is “loaded” with the expressions of suffering and distress, used in the context of an expression to avoid unnecessary suffering. The European Convention for the Protection of Pet Animals<sup>39</sup> uses the expression of “mental suffering”, requiring that killing and reduction in numbers of animals should be undertaken with the goal of minimum mental suffering. The EU Regulation on the protection of animals at the time of killing<sup>40</sup> does not include the term of “mental suffering”, but nevertheless sets out in Art. 3 as the general requirement for killing and related operations: “Animals shall be spared any avoidable pain, distress or suffering during their killing and related operations”.

These examples of the legal instruments may suffice to make two conclusions. First, the capability of animals to experience mental suffering is to be assumed, there being no substantive difference between mental suffering and experiencing distress. Second, all instruments contain a qualification making such suffering lawful under certain conditions, when suffering is “unavoidable” or “necessary”. The reasoning for setting the obligation to avoid mental suffering of animals is present in some of the documents referred to above: “(...) there is scientific evidence of their [animals – M.-A.S.] ability to experience pain, suffering, distress and lasting harm”<sup>41</sup> or “[k]illing animals may induce pain, distress, fear or

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<sup>34</sup> In the 1960s, the British Farm Animal Welfare Council formulated five freedoms for animals: freedom from hunger and thirst; freedom from discomfort; freedom from injury, pain and disease; freedom to express normal behaviour; freedom from fear and distress.

<sup>35</sup> Treaty No. 087, adopted in Strasbourg on 10 March 1976.

<sup>36</sup> Reference to “unnecessary” suffering is in three articles – 4, 6 and 7.

<sup>37</sup> Paragraph 11 of the explanatory report is merely stating that “The underlying idea is to avoid any unnecessary suffering or injury and to secure conditions that shall be in conformity with physiological and ethological needs of the individual animals”.

<sup>38</sup> EU Directive of 22 September 2010, 2010/63/EU.

<sup>39</sup> The Council of Europe instrument, adopted in Strasbourg on 13 November 1987.

<sup>40</sup> EU regulation No. 1099/2009, adopted on 24 September 2009.

<sup>41</sup> Directive on the protection of animals used for scientific purposes, *supra* note 57, preamble para. (8).

other forms of suffering to the animals even under the best available technical conditions”<sup>42</sup>.

These reasons are built upon the ability of animals to experience suffering, including mental suffering. This is fundamental rights reasoning – e.g. related to the obligation of the state to avert suffering whenever possible. The terms “unnecessary” suffering and “avoidable” suffering by themselves do not lead to the rejection of the proposition that fundamental rights language or rhetoric is used to extend the obligation to refrain from causing suffering also towards animals capable of experiencing the suffering. This is so because not all mental suffering is automatically a violation of such subject’s fundamental rights. For example, a human subject in prison is held in conditions, where mental suffering is a result of the “practical” requirements of detention. The recognition of the ability of animals to suffer at the same time recognizes them as actors on the social stage<sup>43</sup>.

Such reasoning is missing from the penal law of the Nordic countries. The law in these countries includes norms criminalizing cruelty against animals, which is understood either as causing suffering in general terms, or merely placing animals in danger. Finnish Penal Code protects animals from anguish, which is the closest the Nordic countries get in protecting animals from mental suffering<sup>44</sup>. Swedish law criminalizes exposure of animals to unnecessary suffering<sup>45</sup>. Norwegian penal law does not contain provisions against animal cruelty, its Animal Welfare Act entails a duty to alert if someone becomes aware of an animal’s abnormal suffering. Danish and Icelandic penal codes criminalize placing an animal in a situation of danger to life, whereas any reference to suffering is missing<sup>46</sup>. These examples may be insufficient to allow broader comparative conclusions, but may indicate the phenomenon that international law stands at the forefront of fundamental rights

<sup>42</sup> Council regulation on the protection of animals at the time of killing, *supra* note 59 preamble para. (2).

<sup>43</sup> See for the discussion of an ability to be a social actor: G. Duckler, *The Economic Value of Companion Animals: A Legal and Anthropological Argument for Special Valuation*, “Animal Law” 2002, Vol. 8(199), pp. 199–200. Duckler uses eloquently an argument of absurdity, suggesting that an actor in the social stage is not expected to be able to write poetry and software, since the term of such an actor is linked to the ability of mental suffering.

<sup>44</sup> See Finnish Penal Code, section 14, *Animal welfare offence* (adopted in 2013): “A person who intentionally or through gross negligence, by violence, excessive burdening, failure to provide the necessary care or food or otherwise (...) treats an animal cruelly or inflicts unnecessary suffering, pain or anguish on an animal, shall be sentenced for an animal welfare offence to a fine or to imprisonment for at most two years”.

<sup>45</sup> See Swedish Penal Code, chapter 16 section 13: “A person who, with intent or through gross carelessness, by maltreating, overworking, neglecting or in some other way unjustifiably exposes an animal to suffering, shall be sentenced for cruelty to animals to a fine or imprisonment for at most two years”.

<sup>46</sup> Respectively in Art. 190 and 174 of the penal codes.



development, since it included conceptualization – at least in general terms – of the need to protect animals from mental suffering.

Estonian Penal Code defines in Art. 264 an offence of cruel treatment of animals, which is defined as commission of prohibited act with respect to animals in a public space or in a cruel manner. Animal Protection Act further specifies in Art. 4 (1) what constitutes a prohibited act – here the elements of mental suffering and animal capabilities are mentioned as well<sup>47</sup>.

### Public opinion on the matter of animals' mental suffering

The influence of public opinion and pressure from interest groups may be a cause for legislative developments – the formal expansion of the existing fundamental rights to new areas or subjects or the emergence of new human/fundamental rights or principles. The history of human rights has seen how various groups, which were previously not covered by the protection of human rights, achieved this through social activity – for example, women suffrage<sup>48</sup>. The efforts in the European Union to pass legislation for improving the welfare of farm animals may be seen as a result of a survey released in March 2007 by the European Commission “Attitudes of EU Citizens Towards Animal Welfare”, where it was indicated that more than 34% of the individuals questioned felt that animal welfare was of the highest possible importance (a score of 10 out of 10 points)<sup>49</sup>. Special Eurobarometer 225 “Social Values, Science and Technology” established that in 2005, about 82% of the European Union citizens uphold our duty to protect the animals whatever the cost may be<sup>50</sup>. Park and Singer report that in the United States, about 64% of individuals responding to the 2008 Gallup survey favored strict laws governing the farm treatment of animals<sup>51</sup>, and in China, a 2005 poll of the International Fund

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<sup>47</sup> The text is the following: “A prohibited act with respect to an animal is an act causing the death or injury of an animal, or an act causing pain or avoidable physical or mental suffering to an animal, such as forcing an animal to undertake efforts beyond its capabilities, organising animal fights, abandoning or leaving an animal in a helpless state, breeding activities that cause suffering to an animal, and other acts with similar consequences that are not caused by the medical treatment of an animal, another veterinary procedure or an emergency”.

<sup>48</sup> J.M. Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure*, “Suffolk Law Review” 2005, Vol. 39(27), p. 49.

<sup>49</sup> Eurobarometer, Attitudes of EU Citizens Towards Animal Welfare, published in March 2007.

<sup>50</sup> Special Eurobarometer 225: “Social Values, Science and Technology”, p. 26.

<sup>51</sup> M. Park, P. Singer, *The Globalization of Animal Welfare: More Food Does Not Require More Suffering*, “Foreign Affairs” 2012, Vol. 91(122), p. 129.

for Animal Welfare found that 90% of respondents believed that they had a moral duty to minimize animal suffering, and 77% favored legislation for doing so<sup>52</sup>.

In the 2005 Eurobarometer, Estonia stands in the thirteenth place on the question of whether we have a duty to protect animals regardless of the cost. 83% of the respondents in Estonia upheld this view, the EU average being just 1 percentage point lower at 82%<sup>53</sup>. Thus, Estonia should represent a European average, which means that perhaps the findings of the short study reported below would not appear in the margin in the European context.

### Social and judicial responses to animal cruelty in Estonia in 2014–2016

The cases in this study are a sample of all court cases decided in Estonian courts in the period of 2013–2016 and about which information is available in the public database Riigi Teataja (State Official Bulletin)<sup>54</sup>. These court judgments were analyzed on the basis of key human rights words, such as “mental” and “suffering”. The media coverage analysis uses as data stories in electronic media platforms which report on the same court cases decided during this period. The majority of cases were not reported in the media, but for some there were more than one electronic piece of information. These media stories were analyzed on the same basis as the court judgments – first, analyzing quantitative data on how often the words “mental” and “suffering” were used, and secondly, interpreting the evaluations of the stories given by the reporting journalists. Then both sets of outcomes were compared.

#### *The court judgments in 2013–2016*

The judgments were coded on the following basis:

- What animal was subject to cruelty;
- What concrete act constituted cruelty;
- How the court judgments contained reference to cruelty, namely, whether the judgments:
  - Without any reasoning referred to cruelty (in the table as “cruelty”);

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<sup>52</sup> *Ibidem*.

<sup>53</sup> The highest percentage (91%) was in Greece and the lowest (68%) in Slovakia.

<sup>54</sup> All court cases should be contained in this database and include at minimal the qualification of the offence and the judicial decision. This database is the main online search tool for all academics and practitioners in Estonia interested in domestic case-law. However, it cannot be excluded that some judgments may not have been detected in the course of this study. However, the sample should reveal common characteristics and thus enable to make conclusions.

- Without any reasoning also referred to mental suffering of the animal (in the table as “mental suffering”);
- Contained at least some reasoning what constitutes mental suffering (in the table as “elaboration of mental suffering”).

It has to be noted that the majority of judgments during this period were made in settlement proceedings, which means that they do not contain a motivating part from the court, but still contain the reasoning from the statement of charges. All judgments were made according to Penal Code, Art. 264, which criminalized cruelty against animals. I will present the tables for the years 2013, 2014, 2015 and 2016 and then the cumulative table of these years.

For the purposes of personal data protection, the author will not refer to concrete court judgments by their registration number or defendant's name, although this information is publicly accessible. For the purposes of this study the author obtained permission from different first instance courts in Estonia to study case files. Due to the confidentiality condition of this access, the author has to refer to information from these files without permitting the possibility to identify the case.

Estonian court judgments in 2013			
Number	6		
Settlement procedure	5		
Conviction	5		
Acquittal/termination	1		
Type of animal	Pet (6)	Domestic (0)	Bird (0)
Nature of offence	Killing (3)	Beating (1)	Other cruelty (2)
Court judgment reasoning	Cruelty (4)	Mental suffering (1)	Elaboration of mental suffering (1)

Estonian court judgments in 2014			
Number	3		
Settlement procedure	2		
Conviction	3		
Acquittal/termination	0		
Type of animal	Pet (2)	Domestic (1)	Bird (0)
Nature of offence	Killing (3)	Beating (0)	Other cruelty (0)
Court judgment reasoning	Cruelty (3)	Mental suffering (0)	Elaboration of mental suffering (0)

Estonian court judgments in 2015			
Number	7		
Settlement procedure	5		
Conviction	7		
Acquittal/termination	0		
Type of animal	Pet (6)	Domestic (0)	Bird (1)
Nature of offence	Killing (3)	Beating (2)	Other cruelty (2)
Court judgment reasoning	Cruelty (4)	Mental suffering (2)	Elaboration of mental suffering (1)

Estonian court judgments in 2016			
Number	11		
Settlement procedure	10		
Conviction	10		
Acquittal/termination	1		
Type of animal	Pet (9)	Domestic (0)	Bird (2)
Nature of offence	Killing (7)	Beating (0)	Other cruelty (4)
Court judgment reasoning	Cruelty (5)	Mental suffering (3)	Elaboration of mental suffering (3)

These four years do not exhibit noticeable dynamics in the approaches towards animal cruelty adjudication. The cumulative table is the following:

Total for Estonian court judgments in 2013–2016			
Number	27		
Settlement procedure	22		
Conviction	25		
Acquittal/termination	2		
Type of animal	Pet (23)	Domestic (1)	Bird (3)
Nature of offence	Killing (16)	Beating (3)	Other cruelty (8)
Court judgment reasoning	Cruelty (16)	Mental suffering (6)	Elaboration of mental suffering (5)

The following conclusions can be made from the judgments for the purposes of this article:

- the majority of criminal cases were decided in settlement proceedings (22 out of 27);
- the majority of criminal cases resulted in conviction (25 out of 27);
- the majority of offences occurred towards a pet animal (23 out of 27);
- the substance of the majority of offences was the killing of the animal (16 out of 27);
- the majority of court judgments made just a general referral to Penal Code, Art. 264 without specifically mentioning the element of mental suffering (16 out of 27);

- mental suffering was mentioned in without any reasoning in 6 out of 27 judgments – the courts merely stated that the offence of cruelty against an animal caused the animal mental suffering without additional elaboration;
- in 5 out of 27 judgments the courts wrote at least some arguments what constitutes mental suffering.

Of particular interest were the arguments of the courts when opening the meaning of animals mental suffering. All these judgments referred to Animal Protection Act, Art. 4 and repeated in the judgment text of the respective legal provision and then indicated which of the actions listed in this provision occurred in the concrete offence<sup>55</sup>. There are no court judgments where the court would critically analyse the matter of animals' capability of mental suffering. All these judgments were made in non-settlement proceedings, which constitutes 100% of such proceedings.

It can be concluded from the above, that the Estonian judicial system has accepted the idea that animals are capable of mental suffering and there is a general obligation to protect the animals from unnecessary mental suffering. There is no contestation of this obligation at the expense of some general public interest. Estonian judicial practice endorses the idea that some animals have some fundamental rights.

#### *Media coverage*

The author of this article has identified 10 articles in mainstream media in 2013–2016 (both online and offline) which concern the animal cruelty cases reported in the judgments' analysis above. These articles are from newspapers such as "Eesti Päevaleht", "Postimees", "Õhtuleht", "Pärnu Postimees" and online platforms Delfi and Eesti Rahvusringhääling.

Seven of these articles only report the facts of the cases without additional moral assessment on the part of the reporter. Three articles contain additional observations. One article contains the recommendation of the police officer that when someone is forced to give away the pet animal, the background of the new owner should be checked. Another article reports that in one case it was the grandparents who notified the police about the cruel treatment towards animals of their grandchild. The third article included the statement by the police that animal cruelty creates the sense of injustice and insecurity in the society. In this same article, the attorney of the defendant reflected that animals have emotions. None of the articles analyses the matter of animals' capability of mental suffering.

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<sup>55</sup> The courts list the following actions as those which lead to the mental suffering of the particular animal who was subject to cruelty: leaving the animals in a state of helplessness, forcing the animal for actions which are above its abilities, abandoning the animal.

Recent social media has featured some statements in relation to animal cruelty<sup>56</sup>. In relation to the 2017 “scandal” in Estonia concerning the cruel killing of chicken in the main chicken farm, the lawyer of the Estonian Animal Protection Association stated that the slaughter of chicken causes them mental suffering. Another social media site has featured criticism by an activist towards a prosecutor who refused to initiate criminal proceedings, since in the view of the prosecutor the abandonment on an animal did not cause this animal mental suffering. There are some sites which present findings of well-known animal rights scholars, like Peter Singer<sup>57</sup>.

It is still possible to conclude that there is no discussion about the matter of animals’ mental suffering in the mainstream media. Both the mainstream media and social media are engaged in what the welfarist position is advocating – raise awareness in the society about cruelty against animals by reporting on individual cases. It is equally important to indicate, that there were no articles in the mainstream media, nor postings in the social media which would have contested the view that animals deserve protection. It is not to be expected that media uses direct human rights language.

## Conclusions

At least in the European context, animal rights legislation is relying on human rights language, since it aims to protect the animals from mental suffering. The fact that a legal norm is not labelled as a human rights norm does not alter its content. This article has also shown that in the Estonian judicial system the concept of animals deserving protection of their fundamental rights is accepted by default. The reasoning of court judgments indicates that the main reason for criminal sanction is the violation of animals fundamental right not to be killed or tortured.

From the perspective of social views, the vigor of mainstream and social media to keep in the public eye the cases of cruelty against animals serves the function of public awareness of the need to protect the vulnerable from fundamental rights abuse. This was verified in relation to the Estonian media overview, where the public was informed of instances of cruelty and occasionally the matter of animals’ mental suffering was raised.

The argument of animals’ fundamental rights recognition in law and judicial practices and social acceptance can therefore be raised. Would the recognition

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<sup>56</sup> Because of the nature of social media, it is impossible to refer to these statements, as they may have disappeared.

<sup>57</sup> For example, blog [loomadenimel.ee/et/blogi/miks-loomaoiguslus](http://loomadenimel.ee/et/blogi/miks-loomaoiguslus) [access: 10.04.2019].

of fundamental rights of animals capable of mental suffering pass Alston's quality control (appellation *contrôlée*) test<sup>58</sup>? By applying Alston's criteria to this practical question, we see that the extension of fundamental rights to animals reflects:

- a fundamentally important social value (recognizing the moral duty to prevent suffering of beings capable of suffering);
- it is relevant throughout the world of different value systems (animal rights movements exist in different continents, it is no longer a matter of importing "European" views to the rest of the world, there appears a general social view that animals need to be protected from killing and torture);
- it is an interpretation of UN Charter obligation to avert killings and torture;
- it introduces a new aspect into the existing body of international human rights law regarding the public obligations to avert killings and torture;
- there is already a high degree of international consensus about the claim that some animals are capable of mental suffering and should therefore be protected from (unnecessary) killings and torture;
- states already have a practice of enforcing the right of animals not to be killed and tortured through responses in their legal and judicial systems;
- and it is sufficiently precise to give raise to identifiable rights and corresponding obligations (extending some fundamental rights to some animals with corresponding obligations for legal responses).

Given the above, is it not time to accept that silently the animal rights revolution has happened – animals' fundamental rights claims have led to their acceptance in the society and judicial systems? Quick recognition in international law is the last missing link. Perhaps the paradigmatic elements which need articulation in this process towards quick recognition in international law are: whether the global community needs to recognize some specific fundamental rights which are applicable only for animals, and what is the definition of an animal for the purpose of fundamental rights law, e.g. whether the capability of mental suffering is a sufficient criterion for determining which beings are identified as animals for the purpose of a fundamental right holder.

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<sup>58</sup> *Supra* note 3. At page 615, Alston presents the criteria for satisfying the conditions of a new human right. P. Alston, *Conjuring Up New Human Rights: A Proposal for Quality Control*, "American Journal of International Law" 1984, Vol. 78, p. 607, 615–616, 620. According to his criteria, a new human right is ready to be recognized by an international organ if the following conditions apply: the right reflects a fundamentally important social value, is relevant throughout the world in different value systems, it is an interpretation of UN Charter obligation, it introduces a new aspect into the existing body of international human rights law, there is already a high degree of international consensus about the claim, states have already a practice enforcing the right, and it is sufficiently precise to give raise to identifiable rights and corresponding obligations.

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**Abstract:** In the European context, animal rights legislation is relying on human rights language, since it aims to protect the animals from mental suffering. The fact that a legal norm is not labelled as a human rights norm does not alter its content. This article also shows that in the Estonian judicial system the concept of animals deserving protection of their fundamental rights is accepted by default. The reasoning of court judgments indicates that the main reason for criminal sanction is the violation of animals fundamental right not to be killed or tortured. The article supports the thesis that it is clear that there is an urgent need to recognize the animal rights in legislation directly and the need of such application of these laws by courts; altogether with placing such conviction in public awareness.

**Keywords:** animal rights; animal protection; application of laws; right not to be killed or tortured; public awareness

**Streszczenie:** W prawodawstwie Unii Europejskiej regulacje dotyczące praw zwierząt tworzy się z użyciem tego samego języka, którym opisuje się prawa człowieka. Dzieje się tak, ponieważ celem tychże regulacji jest ochrona zwierząt przed cierpieniem psychicznym właściwym istotom ludzkim. W orzecznictwie estońskich sądów koncepcja podstawowych praw zwierząt jest akceptowana. Analiza treści uzasadnień wyroków wskazuje, że najczęstszą przyczyną nakładania kar jest pogwałcenie podstawowych praw zwierząt, tj. prawa do życia i wolności od tortur. W artykule postawiono tezę, że istnieje pilna potrzeba szerokiego uznania praw zwierząt, dotyczy to zarówno prawodawstwa, praktyki orzeczniczej oraz powszechnej świadomości społecznej.

**Słowa kluczowe:** prawa zwierząt; ochrona zwierząt; stosowanie prawa; prawo do życia; wolność od tortur; świadomość społeczna