REVISTA CATALANA DE DRET AMBIENTAL Vol. XIV Núm. 2 (2023): 1 – 36
-Monogràfic-

EXPLORING THE FOUNDATIONS OF ANIMAL LEGAL RIGHTS: TOWARDS A SENTIENCE-INTEREST PRAGMATIC VIEW[1]

EXPLORANDO LOS FUNDAMENTOS DE LOS DERECHOS JURÍDICOS DE LOS ANIMALES: HACIA UNA VISIÓN PRAGMÁTICA DE LA SINTIENCIA-INTERÉS

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Recibido: 26 de julio de 2023 / **Aceptado:** 23 de octubre de 2023

ABSTRACT: The longstanding assertion that 'only legal persons can be rights holders, and that they are so because they are capable of holding duties', implies that other entities – as nonhuman animals – cannot be legal rights holders. In addition, the various proposals, fruitfully delivered from several scholars to ascribe legal rights to animals, have not yet been attended among most legal systems. Hence, to determine why this assertion remains strongly rooted, and to explain why the proposals offered by the literature have not yet achieved to overpass it, this article carries out a critical study on the theoretical framework offered on the matters of 'legal personhood' and on 'legal rights', analysing them and examining their capability to ascribe legal rights to animals. Hereby, two general approaches are distinguished and tested on their ability to overcome the assertion: on the one hand, one sustaining that 'only legal persons can be rights holders', identified as '*Personism*'; and on the other, one

[1] This article was developed during my *Visiting Fellowship* at the *Cambridge Centre for Animal Rights Law*, Cambridge, Lent Term 2022. Specially, I would like to thank to Sean Butler and Raffael Fasel for their insightful guide, and to Visa Kurki and Oliver Le Bot for their very helpful comments. Finally, I would like to thank to Campbell Foubister, for his generous language review.

sustaining that ‘non-legal persons can, as well, be rights holders’, identified as ‘*non-Personism*’. Finally, based on the results of this examination, and by extracting some crucial elements from both approaches – notably from the groundworks offered by authors based on the ‘Interest Theory of Rights’, such as Feinberg, Kramer, Kurki and Pietrzykowski – this work suggests a new understanding, so called the *‘sentience-interest pragmatic view’*, a proposal which aims to simplify some of the already existing arguments to make them effective on legal grounds, this is, theoretically solid, as well as pragmatically feasible, for the ascription of rights to animals among our current legal systems.

RESUMEN: La antigua afirmación de que "sólo las personas en sentido jurídicos pueden ser titulares de derechos, y lo son porque son a la vez capaces de ser titulares de deberes", implica que otras entidades -como los animales no humanos- no pueden ser titulares de derechos en sentido jurídico. Asimismo, es un hecho que las diversas propuestas, fructíferamente aportadas por varios autores para atribuir derechos a los animales en sentido jurídico, no han encontrado aún cabida en la mayoría de los ordenamientos jurídicos. Por lo tanto, para determinar por qué esta afirmación sigue fuertemente arraigada, y para explicar por qué las propuestas ofrecidas por la literatura aún no han logrado superarla, este artículo lleva a cabo un estudio crítico del marco teórico sobre las cuestiones de la "personalidad en sentido jurídico" y sobre los "derechos en sentido jurídico", analizándolos y examinando su capacidad para atribuir derechos a los animales. Para ello, se distinguen dos enfoques generales y se comprueba su capacidad para superar la afirmación: por un lado, el que sostiene que "sólo las personas jurídicas pueden ser titulares de derechos", identificado como *"Personismo"*; y por otro, el que sostiene que "las personas no jurídicas también pueden ser titulares de derechos", identificado como *"no Personismo"*. Finalmente, basándose en los resultados del examen, y extrayendo algunos elementos cruciales de ambos enfoques – en particular, a partir de los planteamientos ofrecidos por autores que se basan en la "Teoría del interés ", tales como Feinberg, Kramer, Kurki y Pietrzykowski – este trabajo sugiere una nueva interpretación, la denominada "visión pragmática de la sintiencia y el interés", una propuesta que pretende simplificar algunos de los

argumentos ya existentes para hacerlos eficaces desde el punto de vista jurídico, es decir, teóricamente sólidos, así como pragmáticamente viables, para la adscripción de derechos a los animales entre nuestros sistemas jurídicos actuales.

RESUM: L'antiga afirmació que "només les persones en sentit jurídics poden ser titulars de drets, i ho són perquè són alhora capaços de ser titulars de deures", implica que altres entitats -com els animals no humans- no poden ser titulars de drets en sentit jurídic. Així mateix, és un fet que les diverses propostes, fructíferament aportades per diversos autors per a atribuir drets als animals en sentit jurídic, no han trobat encara cabuda en la majoria dels ordenaments jurídics. Per tant, per a determinar per què aquesta afirmació segueix fortament arrelada, i per a explicar per què les propostes ofertes per la literatura encara no han aconseguit superar-la, aquest article duu a terme un estudi crític del marc teòric sobre les qüestions de la "personalitat en sentit jurídic" i sobre els "drets en sentit jurídic", analitzant-los i examinant la seva capacitat per a atribuir drets als animals. Per a això, es distingeixen dos enfocaments generals i es comprova la seva capacitat per a superar l'afirmació: d'una banda, el que sosté que "només les persones jurídiques poden ser titulars de drets", identificat com "*Personismo"; i per un altre, el que sosté que "les persones no jurídiques també poden ser titulars de drets", identificat com "no *Personismo". Finalment, basant-se en els resultats de l'examen, i extraient alguns elements crucials de tots dos enfocaments – en particular, a partir dels plantejaments oferts per autors que es basen en la "Teoria de l'interès ", com ara Feinberg, Kramer, Kurki i Pietrzykowski – aquest treball suggereix una nova interpretació, la denominada "visió pragmàtica de la *sintiencia i l'interès", una proposta que pretén simplificar alguns dels arguments ja existents per a fer-los eficaços des del punt de vista jurídic, és a dir, teòricament sòlids, així com pragmàticament viables, per a l'adscripció de drets als animals entre els nostres sistemes jurídics actuals.

KEYWORDS: Legal personhood – Legal Rights – Legal Status – Animals – Sentience – Interests.

PALABRAS CLAVE: Persona en sentido jurídico – Derechos en sentido jurídico – Estatus jurídico – Animales – Sintiencia – Intereses.

PARAULES CLAU: Persona en sentit jurídic – Drets en sentit jurídic – Estatus jurídic – Animals – Sintiencia –Interessos.

I. INTRODUCTION

The assertion that only persons, whether natural or artificial, can be rights holders, and that they are so because they are, in turn, capable of holding duties, has become one of the main obstacles to the ascription of legal rights to entities other than the individual human being (the natural person) and the legally organised collectivities (the artificial legal persons). Consequently, any other entity – not fitting within the natural and the artificial person – remains relegated to the category of 'things', implying that they are incapable of holding rights in a legal sense. In this precise situation, among other entities confined to the so called '*thinghood*'[2], is where nonhuman animals are placed[3]: as mere *things,* or *property,* and, therefore, incapable of holding rights[4].

[2] Understood as 'the quality of being a thing', in Visa A.J. Kurki, "Animals, Slaves, and Corporations: Analyzing Legal Thinghood", in *German Law Journal*. Vol 18 No 0, p. 1069-1090, 2017.

[3] Through this article, I will use the terms *nonhuman animals* or *animals* as interchangeable concepts.

[4] However, it should be noted that some legal systems have ascribed, either judicially or legislatively, certain legal rights to animals – or, at least, to some animals. Examples of the former can be found in the cases of Estrellita (Ecuador) and Cecilia (Argentina) – See Sean Butler and Raffael Fasel, *Animal Rights Law*, Hart Publishing. Oxford, 2023. An example of the latter can be found in the recent Spanish Law 7/2023 (28 March), "On the protection of the rights and welfare of animals", which establishes in its article 1, number 2, that "*Animal rights*

Moreover, this is so despite the various efforts that different scholars and advocates have made to favour animal legal rights. Among these, it is possible to identify two types of solutions offered so far: on one side, we can find the sort of approach which suggests including animals within the category of 'legal persons', in order to potentially grant them certain legal rights; and on the other side, the kind of approach that, on the contrary, aims no longer for incorporating animals within the category of legal persons but, instead, proposing a direct ascription of legal rights, notwithstanding the fact of being 'something other' than persons. However, neither of these solutions have demonstrate, so far as we will see, being adequate to peacefully ascribe legal rights to animals among our legal systems. Why is this so?

Accordingly, the purpose of this work is, through detecting and understanding the reasons why those proposals have not yet fully succeeded, to propose possible paths to advance on the ascription of animal legal rights.

To this, I firstly identify and expose the '*paradigm of subjecthood*' rulling nowadays, and the two senses in which it can be understood, namely, as the *'person/thing'* sense of the paradigm, and the *'human/nonhuman'* sense of the paradigm. Afterwards, I carry out a brief study – descriptive, and critical – among the two kinds of proposals thus announced. Through this analysis, I outline a theoretical framework by classifying the two general approaches as '*Personism*' and '*non-Personism*' – depending on whether they consider legal personhood as a necessary condition to hold legal rights, or not –, as well as identifying, within each of them, several accounts, divergent from each other on what they consider as the necessary condition for rights holding.

After examining the different approaches, I determine and demonstrate how, and why, they exhibit themselves inadequate to overcome the main obstacles set by the '*paradigm of subjecthood*'. To overtake this state of affairs, I offer a new understanding to favour legal animal rights, one adequate to defeat the paradigms by means of being 'effective on legal grounds', namely, theoretically solid, as well as pragmatically feasible. This is, the so called '*sentience-interest*

are understood to be their right to good treatment, respect and protection, inherent in and derived from their nature as sentient beings, and with the obligations that the legal system imposes on them. Particularly, on those who maintain contact or relations with them" (translated from Spanish to English by the author).

pragmatic view', proposal that builds on those previously offered by authors such as Feinberg, Kramer and Kurki – privileging the Interest Theory of rights, and sentience as a necessary and sufficient condition for the possession of interests – although this time validated by the previous exploratory work and presented in a much more simplified and straightforward manner.

II. THE QUESTION AND THE PROBLEM

As advance, in this work I am addressing the question if animals can be legal rights holders, and I am doing so with theoretical, as well as pragmatic, purposes. In the following, I will tackle this question and the problem(s) that arouses from the standard response(s) given to it.

1. The Question: Can animals hold legal rights?

The question is: can nonhuman animals be legal rights holders?[5]. More than probably, one would likely be thinking that it is not an innovative question, considering the various previous works of many conspicuous scholars[6]. Nonetheless, my approach to this question comes with a special aim: the answer must be theoretically solid, as well as practically feasible, features that the existing responses do not fully exhibit, as shown later in this paper. Put differently, the answer I am searching for must be *strictly pragmatic*.

Indeed, the answer shall respond to a primal origin, which is my own professional experience as an attorney in Law, as a legal adviser in law-making as well as an adviser to several NGOs involved in animal protection[7]. Actually, during my practice I personally experienced the practical and legal problems arising from the fact that animals are placed in a sort of a '*legal limbo'*, namely,

[5] This question urges my attention in the context of a broader, and at the same time, more specific research, concerning the capability of nonhuman animals to be considers as *victims* in criminal offences, such as the ones contemplated on anticruelty laws.

[6] And, aditionally, the positivization of declarations such as the one contained within the Spanish Legal System, as advanced in footnote 4.

[7] In fact, between 2015 and 2018 I served as legislative advisor to a cross-cutting group of members of the Chilean Congress on animal protection issues (the "PARDA" bench). I also advised the "Te Protejo" (I protect you) Foundation in the drafting and passing of a bill on the prohibition of the use of animals for cosmetic product testing, in addition, I conducted litigation in criminal and civil case law related to animal protection.

while they are protected by several legal provisions – which could be seen as a sort of 'subjectivization'[8] – they are at the same time still considered as 'things' for most of legal purposes, despite all the efforts developed by the literature on the matter and the timid existence of some judicial and legal declarations[9].

Being this so, the perplexity that reigns among diverse stake holders is not at all rare[10]. For instance, in most legal systems animals cannot be considered as 'victims' on the commission of penal offences – which in some cases have been clearly enacted to protect their own well-being and integrity[11] – and, therefore, they cannot hold the victims' rights and participate, *via* representation, in the criminal process[12]. In the same line, as animals are considered 'property', the theft of an animal is regularly considered an offence that affects the property of the animal's owner, regardless any possible harm that the act could cause to the animal itself[13]. Same predicaments and understandings rules among other branches of Law, as it is the case of the administrative dispositions regulating responsible ownership of companion animals; farm production; animal testing, and so on[14].

The task is, therefore, to find an answer that can beat this dichotomy and its derived confusions, by means of being theoretically strong as well as practically feasible. To this, I add a third demand: the answer must move away from responses sustaining animal consideration, animal status and/or animals' rights holding, exclusively on moral and/or political grounds. Put differently, the answer must withdraw from the kind of reasons that imposes animals'

[8] I use this term in opposition to the term 'reification' or 'objectification'.

[9] *Ibidem* footnote 6.

[10] Among others, I am referring here to lawyers, Law professors, judges, law makers, governments and municipalities.

[11] As can be seen, for instance, in the Preamble of the Organic Law 3/2023, of 28 March, amending Organic Law 10/1995, of 23 November, of the Criminal Code, on the 10/1995, of 23 November, of the Penal Code, in the matter of animal abuse, stating that it takes into account "*the legal good to be protected in crimes against animals, which is none other than their life, health and integrity, both physical and mental*" (p. 1). Translation conducted by the author.

[12] Luis Chiesa, "Why it is a Crime to stomp on a Goldfish? – Harm, Victimhood and the Structure of Anti-Cruelty Offenses", in *Mississippi Law Journal*, num. 78.1, p. 1-67, 2008.

[13] David Favre, "Living Property: A New Status for Animals within the Legal System", in *93 Marq. L. Rev*. *1021,* 2009-2010, p. 1021-1072.

[14] See Gary Francione, *Animals, Property and the Law,* Temple University Press. Philadelphia, 1995, and *Personhood Beyond Humanism. Animal, Chimeras, Autonomous Agents and the Law*, Springer Briefs in Law. Switzerland, 2018.

consideration or animals' rights holding just as *the right thing to do*, purely from a normative/deontological perspective. The present work intends to be strictly legal and theoretical, towards delivering a straightforwardly pragmatic response. Put differently, this article is not about political philosophy - even though, naturally, it is linked to ideas stemming from that discipline.

2. The problem: The Paradigm(s) of subjecthood

As advanced, the first issue to face when dealing with legal animal rights is, as well, one of the main problems: the assertion that *only persons, whether natural or artificial, can be rights holders, and that they are so because they are, in turn, capable of holding duties*[15]*.* Evidently, no other entities but the ones consider 'persons' can be rights holders[16], which is the actual situation of animals, historically – and currently – considered 'objects', and not persons. Moreover, this is still the case among the few legal systems that have removed animals from the category of 'goods', by declaring them '*not-things'* – as it is, for instance, the case of France (2015) and, more recently, Spain (2021)[17].

As this assertion – and the animal status going along with it – has been so long-standing and deeply rooted in Western societies and legal systems, it can be properly considered as a *paradigm*, in Kuhnian terms[18]. In principle, this paradigm admits to be understood in two slightly different senses:

In first place, as the *'person/thing'* sense of the paradigm, strongly embedded in Western legal systems and which inspiration can be traced, *mutatis mutandi*, to ancient Roman Law. As is to be expected, the main characteristic of this sense is the division of entities in Law between *persons* and *things*, rooting the

[15] An extensive account about this assertion, identified as the 'Orthodox View', in Visa Kurki, *A Theory of Legal personhood*, Oxford University Press. Oxford, 2019.

[16] Among this triad of *person, rights* and *duties*, 'reciprocity' and 'agency' appears to be key features for any possibility of rights holding. See Hillel Steiner. 1998. 'Working Rights', in Mathew Kramer, N.E. Simmonds, and H. Steiner *A debate over Rights. Philosophical Enquiries.* Oxford University Press. Oxford, 1998, p. 233-301.

[17] Article 515-14, Code Civil, France (2015) <https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000030250342/>; Law 17/21, December 15 2021, Spain (2021)<https://www.boe.es/buscar/doc.php?id=BOE-A-2021-20727> [last consultation April 20, 2023].

[18] Thomas Khun, *The Structure of Scientific Revolutions,* University of Chicago Press. Chicago, 1968.

capacity for rights holding only in the former – as has been explained largely by Stagl[19]; Naffine[20]; Kurki[21], and also Wise[22]. The evident outcome of this sense of the paradigm is, naturally, that *only legal persons can hold legal rights*.

Secondly, there is a sense that imposes a faintly different bifurcation, not between *persons* and *things,* but between *humans* and the rest of *nonhumans:* the *'human/nonhuman'* sense of the paradigm. Noticeably, this sense largely exceeds legal grounds being, therefore, significantly more comprehensive than the former. It focuses on 'species membership', sharply separating human beings from all other existing beings, particularly, from any other animal species. The outcome of this paradigm is that only humans, and entities composed somehow by humans, can be rights holders.

Concretely, this is the sense in which many Animal Law scholars have understood the paradigm. Francione, for instance, identifies it as the 'animals-as-property paradigm' which parallels to what he calls 'legal welfarism', a view that emphasise 'property' as the only status where animals can be situated. In his words, the outcome of this view is that

'[…] it is morally acceptable, at least under some circumstances, to kill animals or subject them to suffering as long as precautions are taken to ensure that the animal is treated as "humanely" as possible'[23].

Pietrzykowski[24], in turn, identifies this paradigm as 'Juridical Humanism', composed by several assumptions, deeply rooted in the notion of 'human dignity'. Through this notion, the author sustains, humans have been recognized as the only beings capable of reasoning and of performing moral

[19] Jakob Stagl, "De cómo el hombre llegó a ser persona: Los orígenes de un concepto jurídico-filosófico en el derecho romano", in *Revista de Derecho de la Pontificia Universidad Católica de Valparaíso*, XLV (Valparaíso, Chile, 2nd semestre), p. 373-401, 2015.

[20] Ngaire Naffine, Law's Meanings of Life. Philosophy, Religion, Darwin and the Legal Person, Hart Publishing. London, 2009.

[21] Visa Kurki, "Animals, Slaves, and Corporations: Analyzing Legal Thinghood", in *German Law Journal*. Vol 18 No 0, p. 1069-1090, 2017.

[22] Steven Wise, *Rattling the Cage. Towards Legal Rights for Animals,* Merloyd Lawrence Book, Da Capo Press. Philadelphia, 2009.

[23] Francione, *Animals, Property*… cit.

[24] Tomasz Pietrzykowski, "Towards Modest Naturalization of Personhood in Law", in *Revus Journal for Constitutional Theory and Philosophy of Law* / Revija za ustavno teorijo in filozofijo prava. 2017.

actions, because they are, as well, endowed with 'will' and 'autonomy' – in a Kantian sense – or because they have been 'created *imago dei'* – in a Christian sense[25].

Similarly, Deckha [26] argues that our 'anthropocentric legal systems' are embedded in a cultural narrative of 'human exceptionalism', strongly rooted on an understanding which differentiates humans from animals on the basis of the formers' superior capacities for reasoning, use of language, of tools, etc. These 'anthropocentric legal systems' can be identified, she points out, by their consideration of animals as 'property', the status which permits animal exploitation. Moreover, she also identifies a sort of 'legal mind', that emphasizes human uniqueness by highlighting our capacity to organize ourselves by Law, making this way the Law, in itself, an argument to favour this separation.

Additionally, it must be notice that these two senses of the paradigm are not mutually exclusionary: on the contrary, they usually overlap. However, the importance of distinguishing both senses relates to the fact that it permits to identify and isolate the two main objections that the idea of animal legal rights usually encounter, namely: '*animals cannot hold rights because they are not persons*', and '*animals cannot hold rights because they are not humans or human-related*'. Nonetheless, and despite which sense of the paradigm we face in a given situation, the key question is *how to overcome it*. On this regard, at least three possibilities have been proposed by Animal Law scholars and advocates, namely:

- The possibility of including animals within the category of persons,
- The possibility of demonstrating that the assertion that *only persons can hold rights* is false by proving that 'things' can, as well, be right holders, and

[25] Tomasz Pietrzykowski, "The Idea of Non – Personal Subjects of Law" in Visa A.J. Kurki and Tomasz Pietrzykowski (dir), *Legal Personhood: Animals, Artificial Intelligence and the Unborn*, p. 49-68. Springer International Publishing AG, Law and Philosophy Library. New York, 2017.

[26] Maneesha Deckha, *Animals as Legal Beings: Contesting Anthropocentric Legal Orders*, University of Toronto Press. Toronto, 2021.

- The possibility of creating a third, new category, which breaks the *principium tertii exclusi* that has ruled for centuries – to which, as advanced, everything can only be divided into 'persons' and 'things'.

Unfortunately, and despite the many efforts displayed in academia, as much as in legal practice, these proposals have not succeeded on the task of overcoming the paradigm, in neither of its two senses. To determine why this is so, and to propose a possible solution to it, becomes crucial to firstly explore the various approaches supporting each of the possibilities outlined *supra* by focusing, in particular, on identifying the reasons laying behind their lack of effective results on legal grounds.

To this task, in the following I will explore the different proposals that several scholars and advocates have offered to construct each of the possibilities outlined *supra*. For methodological purposes, I have divided the possibilities in two general approaches: in first place, an approach which states that *only persons can hold rights*, highlighting the concept of personhood and its unbreakable bond to the concept of rights, supporting, therefore, possibility (1), and secondly, an approach which states that *not only persons can hold rights,* implying that entities different than persons can qualify as right holders, supporting, therefore, possibilities (2) and (3). For practical reasons, I identify the first one as *'Personism'*, and the second one as *'non-Personism'*.

Both general approaches, and the several variants which are identifiable among them, will be in the following examined on their capability of overcoming the paradigm on its two senses, certainly along with accomplishing the requirement of being *theoretically solid*, as well as *powerful* regarding their feasibility[27].

III. PERSONISM, NON-PERSONISM, AND THEIR PITFALLS

As advanced, in this section I will review the two general approaches thus identified; the several variants existing among them, and how they perform on the task of overcoming the paradigm.

[27] Specifically, by the term *solid* I mean theoretically convincing and, hopefully, analytically robust. By the term *powerful*, however, I mean feasible on practical legal grounds, suitable to influence among the legal and political community. Having this clear, in the following I will address to these features just as *solid* and *powerful*.

1. The Personism

This general approach sustains that *only* persons, whether natural or artificial, can be rights holders, in accordance with the 'orthodox view' thus identified by Kurki[28]. Nonetheless, it is possible to recognise several variants among this view, concerning to what they identify as the necessary and sufficient condition to be consider a person. Therefore, in the following I will briefly explore the most salient variants of *Personism*, namely, a) *Valueism*; b) *Realism*, and C) *Conventionalism*[29].

a) Valueism

This particular variant of *Personism* ponders that the necessary condition to be consider a person and, therefore, to be a rights holder, is the fact of being an 'end-in-it-self' or, similarly, being endowed with 'intrinsic value'. To identify its salient arguments, I will briefly review the proposals of two authors

In first place, Kant sustained, broadly speaking – certainly, from a moral discourse – that: a) Only 'persons' can hold rights and duties; b) Only human beings can be considered 'persons' as they are, in turn, ends-in-them-selves, and c) Only human beings are ends-in-themselves, because they are endowed with 'dignity' and 'rationality', being the latter an exclusive human attribute[30]. Rationality, in particular, results crucial on shaping humans' normative capacity to order actions, even thoughts, to the moral imperatives of virtue, enhanced by their freedom and autonomy to submit their actions to the normativity of morals[31]. In other words, humans are full *moral agents*. Animals, on the

[28] Kurki, *A Theory of*, cit.

[29] It is crucial to notice that, while some of them focus on legal grounds, some others focus, instead, exclusively on moral grounds. Notwithstanding I have stated that my focus of this work is strictly legal, I have decided to include hereby some contributions that are focus purely on moral grounds as they still are strongly influent in legal discourse.

[30] Immanuel Kant, *Groundwork for the Metaphysics of Morals* (1785), New Haven University Press. New Haven, 2018, and *The Metaphysics of Morals* (1797), Cambridge University Press. Cambridge,1991.

[31] About 'rationality' in Kant, in Oswaldo Market, "Ética y racionalidad en Kant", in *Anales del Seminario historia de la filosofía, 9, Editorial Complutense*, Madrid, 1992, p. 59-75.

contrary, and precisely because they lack of those features, are not ends-in-them-selves but mere means, and they have no dignity, but a price[32].

Korsgaard, in turn and also from moral grounds (though dealing as well with Law), likewise roots 'personhood' on the ultimate value condition but, differs from Kant's account by postulating different attributes to qualify a given entity as an 'end-in-it-self', making possible to include animals among them[33].

Indeed, Korsgaard argues that animals are endowed with intrinsic value because of their capacity for 'sentience', feature that supports their possession of 'interests' and, therefore, their consideration as *moral patients*. For the author, even though animals lack rationality and autonomy, in a Kantian sense, it is however possible to sustain that animals possess 'welfare' or 'interests', which is a sufficient basis to consider animals as 'ends' and, therefore, to hold rights by means of being beneficiaries of people's direct duties[34].

b) Realism

Differently from the Valueism, this variant rests on the assumption that the necessary and sufficient conditions to be a 'person' is being in the possession of certain mental or biological attributes, such as 'reason', or the capacity of 'sentience' which are, generally speaking, the kind of attributes that are explored and explained through natural sciences[35]. In terms thus expressed by Brozek, this variants can be identified as *descriptivist* [36] or, according to Naffine's distinction, as *metaphysical realists[37].*

[32] More recently, also defended by Adela Cortina, *Las Fronteras de la Persona. El valor de los animales, la dignidad de los humanos,* Editorial Santilla, Ediciones Generales, Taurus Pensamiento. Madrid, 2009.

[33] Christine Korsgaard, "Personhood, Animals and the Law", in *The Royal Institute of Philosophy. Think* 34, Vol 12, Summer 2013.

[34] Christine Korsgaard, *Fellow Creatures. Our Obligations to the Other Animals*, Oxford University Press. Oxford, 2018.

[35] Foundational on the consideration of sentience as an attribute that suffices for moral consideration, Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation (1781)*, Batoche Books, Kitchener. London, 2000.

[36] Brozec identifies the descriptivist, in opposition to the 'axiological positions' – as the one sustained by Kant – as focused on mental attributes such as understanding, self-awareness and autonomy, not considering sentience directly. Nevertheless, I include sentience as I consider it to be the biological precondition for those other mental attributes. In Bartosz Brozec.

Examples of these accounts can be found, initially, in Descartes[38] and Locke[39], both rooted on religious backgrounds[40], and each excluding any possibility of including animals within the category of person: Descartes, by the assertion that 'only human beings possess reason', and Locke, by considering that only human beings possess the 'level of intelligence' that allows thinking, reasoning, and reflecting – altogether, the capability of self-awareness or self-consciousness, as Palazzani puts it[41].

Sharply different, arguing in favour of the inclusion of animals within the category of persons by means of possessing some of these attributes, we can find authors as Francione[42], and Wise[43]. Although these authors differ from each other on the paths they take to postulate animal personhood – especially concerning the legal and political outcomes that derives from their proposals – they both coincide on the fact that animals could/should be incorporated into the status of person through some of these attributes, in concrete and mostly, through their capacity of sentience.

At this point, one could fairly wonder why the variant Valueism is not included here as well, as Kant and Korsgaard also resort their accounts in capacities as reasoning, or sentience. Actually, I have decided to keep Valueism as a different variant because it doesn't connect, straightforwardly, the mental or biological capacities with personhood or rights holding but, instead, the connection is stablished through the mediation of the axiological attribute of

"The Troublesom Person", in Visa A.J. Kurki and Tomasz Pietrzykowski (dir), *Legal Personhood: Animals, Artificial Intelligence and the Unborn*, p. 3-14. Springer International Publishing AG, Law and Philosophy Library. New York, 2017.

[37] Among which, she also distinguishes between the *Rationalists*, the *Religionists*, and the *Naturalists*. In Nafinne, *Law's Meanings of Life* … cit.

[38] René Descartes, *Discours de la Méthode : suivi de la dioptrique (1637)*, Ed. Frédéric de Buzon. Éditions Gallimard. Paris, 1997.

[39] John Locke, *An Essay concerning Human Understanding with the Second Treatise of Government (1689)*, Wordsworth Classic of World Literature. Hertfordshire, 2014.

[40] Particularly, on Locke's account as a religiously founded one, see Jeremy Waldron, *God, Locke and Equality, Christian Foundations in Locke's Political Thought*, Cambridge University Press. Cambridge, 2002.

[41] Laura Palazzani, "Person and Human Being in Bioethics and Biolaw", in Visa A.J. Kurki and Tomasz Pietrzykowski (dir), *Legal Personhood: Animals, Artificial Intelligence and the Unborn*. Springer International Publishing AG, Law and Philosophy Library. New York, 2017.

[42] Francione, *Animals, Property and*… cit.

[43] Wise, *Rattling the Cage*… cit.

'having intrinsic value', a metaphysical feature which is not demanded by the Realists.

c) Conventionalism

Radically different from the two previous variants, this one is composed by accounts which sustains that the attribution of legal personhood comes, necessarily and uniquely, from a convention or declaration. To this group, a 'person' can be anything that the decision makers wants it to be, therefore, Law makers can enact a provision, or judges deliver a judgement, stating that animals, AI, foetuses, or rocks – among other entities nowadays consider as' things' – are 'persons', hence transforming their status, performatively. To this group, 'legal personhood' is a legal fiction, a legal device. As Naffine puts it[44],

When it is an acknowledged legal fiction, the legal person is arguably at its most abstract and in its most legal form. It consists of shifting constellations of formal and abstract rights and duties.

This variant is consistent with what the author identifies as 'the legalists', a group that does not engage with natural, ontological nor metaphysical questions, remaining only on the sphere of the institutional decisions, to consider one a 'legal person[45]'.

2. The *non-Personism*

This general approach sustains that *not only* persons can be rights holders, allowing the possibility that entities considers as non-persons can, as well, be consider as such. As in the previous general approach, here is also possible to distinguish several accounts, concerning to what they identify as the necessary and sufficient condition to be consider capable of holding legal rights.

[44] Ngaire Naffine, "Legal Persons as Abstractions: The Extrapolation of Persons from the Male Case", in Visa A.J. Kurki and Tomasz Pietrzykowski (dir), *Legal Personhood: Animals, Artificial Intelligence and the Unborn*, p. 15-28. Springer International Publishing AG, Law and Philosophy Library. New York, 2017.

[45] Naffine, *Law's Meanings of Life*… cit.

Accordingly, in the following I will shortly explore the two most relevant variants, which are, a) *Things as right holders*, and b) *Third category*.

a) Things as rights holders

This variant sustain that 'non-persons' or, more straightforwardly, entities consider in Law as 'things' or 'property' can, and in some cases should, be rights holders.

Favre, for instance, proposes the creation of a new category called the 'Living Property', to include on it – at least some – nonhuman animals[46]. According to the author, even though animals are not persons, they can, *de lege lata*, hold and exercise legal rights, basing this assertion on the fact that most legal systems already provide protection to animals' interests through, i.e., enacting anticruelty laws and civil institutions as the 'pets trusts'[47]. Given the incoherence that this fact could bring to the systems, which still consider animals as 'things', the author advises the creation of a fourth category of property, the so called '*living property'*[48], which rests on their capacity for 'sentience', necessary condition for the possession of interest. Likewise, Cochrane favours what he identifies as 'rights of property'[49], sustaining that there is no need to abolish all forms of animal ownership in order to protect their interest, highlighting the fact that 'property' is not an absolute, as it can be restricted, limited, and even deprived.

Similarly, Kurki argues that the so called *thinghood*, this is, 'the quality of being a thing', permits rights holding. On the case of animals, the author bases this assertion on the current existence of animal welfare laws and other animal protection prescriptions[50]. According to the author, the current ruling of these provisions – drawing parallels with the ones ruling in the past, concerning

[46] Favre, "Living Property…" cit.

[47] On Pets Trusts, see Thomas Dickinson, "Detailed Discussion of Pet Trusts", in *Michigan State University College of Law: Animal, Legal and Historical Center*. Michigan, 2017.

[48] A fourth category following the three, according to the author, already existing categories of property: 'real', 'personal', and 'intellectual'.

[49] Alasdair Cochrane, "Ownership and Justice for Animals", in *Utilitas,* Vol. 21, num. 4, 2009. Cambridge University Press, p. 424-442.

[50] Kurki, "Why Things Can Hold Rights…" cit.

slavery in ancient Rome, and during the Antebellum period in the US – shows that entities which are legally consider as *things* can hold rights and, in some cases, even duties[51].

More recently, through his 'Bundle Theory of Legal Person'[52], the author enforces these ideas by showing that 'personhood' is a *cluster concept,* composed by several incidents, actives, and passives. According to Kurki, as nonhuman animals are in possession of some of these incidents – especially the passive ones – even though they do not possess all the incidents that makes someone a 'person', they still possess the necessary ones to be right holders (sustaining, of course, rights holding on the Interest Theory of Rights).

Deeply related to Kurki's account, we can find the foundational works of Kramer who, through developing his account of the Interest Theory of Rights, recognises 'sentient beings' as the primary group of possessors of interests and, therefore, as potential right holders[53].

b) Third Category

In this variant, it is possible to locate diverse accounts which suggests ending the classic person/thing bifurcation, through the creation of a third category.

Among this group, stands out Pietrzykowski's 'Non-Personal Subject of Law' which, departing also from the capacity of sentience – as well as the empirical data showing that animals are in possession of structures responsible for basic forms of consciousness, emotional reactions, memory, learning, pain and many others (generally, neurobiological activities of the nervous system) – proposes the creation of a new category, whose members would be recognise as

[51] Kurki, "Animals, Slaves, and Corporations…" cit.

[52] Kurki, *A Theory of…* cit.

[53] See, particularly, Matthew Kramer. "Rights without Trimmings", in Mathew Kramer, N.E. Simmonds, and H. Steiner *A debate over Rights. Philosophical Enquiries.* Oxford University Press. Oxford, 1998, p. 7-111; "Getting Rights Right" in Mathew Kramer (dir.) *Rights, Wrongs and Responsibilities,* Palgrave Macmillan, Basingstoke. London, 2001, and "Do Animals and Dead People Have Legal Rights?" in *Canadian Journal of Law and Jurisprudence*, Vol. XIV, Num. 1. January 2001.

possessors of one subjective right, namely, the right to 'have their interests considered relevant in any decision that could affect their fulfilment'[54].

Deckha, in turn, also propose the creation of a new category, called the 'legal beingness', arguing that 'personhood is not the appropriate legal status for animals, not because animals don't deserve the same legal protection as humans, but because personhood is not an animal friendly category'[55]. Farjat as well, through his account 'Centres of interests', aims to include entities that do not fit among the existing categories of 'persons' and 'things'. In this new category, the author proposes to include, besides animals, other entities as families, networks, foetuses, ships, and vessels, among others[56].

Having reviewed the two general approaches hereby identified, and their most representative variants, in the following I will trial their capability to respond to the question raised here to, therefore, see how they perform at the time of facing the paradigm, on its two senses.

III. THE TEST

As it has been stated *supra,* the two general approaches hereby identified have not – at least, not yet – been successful on the task of overcoming the paradigm, in neither of its two senses. To determine why this is so, it is crucial to identify and examine the causes of their lack of effectiveness on legal grounds. Consequently, on the following both approaches will be scrutinized on their capability of overcoming the paradigm(s), having as a milestone the accomplishment of being, as advanced, 'effective on legal grounds', namely, the requirements of being theoretically *solid*, as well as *powerful* on regard of their feasibility.

[54] For a complete understand of his account, see Tomasz Pietrzykowski, 'Towards Modest Naturalization of Personhood …', cit; "The Idea of …" cit; *Personhood Beyond Humanism. Animal, Chimeras, Autonomous Agents and the Law*, Springer Briefs in Law. Switzerland, 2018, and *Foundations of Animal Law. Concepts – Principles – Dilemmas,* Wydawnictwo Uniwersytetu ´Slakiego. Katowice, 2023.

[55] Deckha, *Animals as Legal Beings*… cit.

[56] Gérard Farjat, "Entre les personnes et les choses, les centres d'intérêts. Prolégomènes pour une recherche ", in *RTD Civ*, 2002.

1. Testing *Personism*

According to what has been exposed in section I, along with the question comes the problem, represented by the paradigm in any of its two senses: as the *person/thing* sense, which outcome is the assertion that *only persons can hold rights*, and the *human/nonhuman* sense, which outcome is the assertion that *only humans and entities composed by humans can be right holders.*

Personism, *prima facie* seems to be *powerful* when it faces the *person/thing* sense of the paradigm, not only because it does not challenge it, but also because it stands by it through suggesting that animal rights comes, necessarily, by including animals into the category of persons.

Moreover, it is as well *powerful* when considering that this is the current ruling understanding among most legal systems, either through several legal prescriptions, and/or though the way on which Courts responds to the issue of granting legal rights to animals: namely, through stating that animals need to be 'persons' to be right holders. Moreover, this approach can also be seen among the allegations of some notorious animal rights advocates. For instance, this is the way the Nonhuman Rights Project (NhRP) have, lengthily, sustained their arguments. Specifically, they have claimed that:

- As certain animals possess certain characteristics, same characteristics that permits the consideration of humans as persons (such as sentience, consciousness, self-determination, self-awareness, among others),
- Animals should be declared as persons and, therefore,
- Animals should hold, at least some, some legal rights.

As it results clear, the arguments of this advocates pass, decidedly, through personhood, demanding the consideration of animals as persons as the necessary condition for rights holding[57].

However, as advanced, they are not succeeding[58]. Quite likely, because *Personism* is *not powerful* by the time of confronting the *human/nonhuman*

[57] Notwithstanding the fact that authors who supports *Personism*, as Francione and Wise, have elsewhere recognize that animals already hold rights through animal welfare laws – 'thin rights', as Fasel indicates in Raffael Fasel, 'Shaving Ockham. A Review of Visa A.J. Kurki's "A Theory of Legal Personhood"', in *Revus*, num. 44, 2021, p. 113-126.

sense of the paradigm. Indeed, it seems to be problematic for judges, executive authorities, and law makers to deal with the idea of placing animals in a sort of 'similar position' as humans, as it is the case of including them among the status of legal persons[59]. Put differently, *Personism* seems not adequate enough to pass the 'smell test' carried out by the authorities, who react reluctantly to the idea of animals as 'persons', mostly grounded on human uniqueness, human rights, and human dignity[60].

McMahan exemplifies this problem stating that the recognition of certain common characteristics between humans and animals, although it could permit animals to have a status close to that of humans, could also arise the setback of levelling certain humans to the status of animals, precisely because they possess the same characteristics, or because they lack some human characteristics [61] – i.e., some cognitive capabilities, consciousness, or sentience.

The second problem that *Personism* faces is its lack of *solid* theoretical grounds. Indeed, its argument sustaining that 'only persons can hold legal rights' falls when confronted by the assertion that, *de lege lata*, animals can be considered nowadays as rights holders, by means of the existence of animal welfare laws and criminal provisions that sanctions animal cruelty, among others. If only persons can hold rights, how is it possible that animals, not being persons, actually do hold claim-rights?

In conclusion, the test shows that *Personism* is:

- Powerful facing the *person/things* sense of the paradigm,
- Not powerful facing the *human/nonhuman* sense of the paradigm, and

[58] As Butler and Fasel points out, the NhRP has lost all their cases, which could be, in a great deal, explained due to the exaggeration of a personhood/property binary view. See Butler and Fasel, *Animal Rights …* cit.

[59] Similarly, Deckha, *Animals as Legal Beings*… cit.

[60] Examples of how arguments comparing animal suffering with the holocaust or with slavery outrages a large part of society, can be found in Deckha, *Animals as Legal Beings…* cit, as well as in Butler and Fasel, *Animal Rights* … cit.

[61] Jeff McMahan, "Our Fellow Creatures", in *The Journal of Ethics*, Vol. 9, Num. ¾, Devoted to James Rachels, p. 353-380, 2005. Similarly, Jean Pierre Marguénaud, « La Personalité Juridique des Animaux », in *Recueil Dalloz*. Paris, 1998.

- Not *solid* when facing the fact that, *de lege lata*, animals, not being persons, already hold legal rights.

2. Testing *non-Personism*

Differently, *non-Personism* seems to face bigger difficulties when facing the *person/thing* sense of the paradigm. Indeed, the challenge of shifting this through ascribing legal rights to 'things', or by creating a new category that breaks the *tertium non datur* axioma, seems problematic.

Nonetheless, this approach seems to successfully avoid two problems that where not properly address by *Personism*, and this is so by merit of its theoretical solidness.

Actually, from an Interest or Benefit Theory of Rights perspective (in opposition to the Will or Choice Theory of Rights[62]) such as the one proposed by Kramer[63], it is possible to sustain that nonhuman animals *already* hold legal rights, regardless of any change on their legal status. Certainly, getting into Kramer's account on legal animal rights exceeds the purposes of this work, although, it is worth quoting what the author identifies as the core of any Interest Theory, namely:

'Necessary but insufficient for the actual holding of a right by a person X is that the right, when actual, preserves one or more of X's interests'

'X's being competent and authorized to demand or waive the enforcement of a right is nether sufficient nor necessary to X to be endowed with that right'[64].

This, in addition to the fact that animals are in fact interests' possessors – as we can learn from the inputs coming from biological and behavioural sciences[65] –,

[62] On the Will Theory of Rights, seminal Bernhard Windscheid, *Lehrbuch des Pandektenrechts* (1900), in Rudolf von Ihering. 1883. *La dogmática Jurídica,* Editorial Losada S.A. Buenos Aires, 1946. Also, see H.L.A Hart, "Are there any Natural Rights" in *Philosophical Review*, num. LXIV, April 1955; N. E. Simmonds, "Rights at the Cutting Edge", in Mathew Kramer, N.E. Simmonds, and H. Steiner *A debate over Rights. Philosophical Enquiries.* Oxford University Press. Oxford, 1998, p. 113-232, and Steiner, 'Working…', cit.

[63] Kramer, "Rights without …" cit; "Getting Rights …" cit, and "Do Animals…" cit.

[64] Kramer, "Rights without …" cit.

[65] For a complete account on 'interests', and their possession by animals, see Joel Feinberg, "The Rights of Animals and Unborn Generations", in Joel Feinberg, *Rights, Justice, and the*

it becomes possible to suggest that animals are rights holders *de lege lata,* which is consistent with what we can find in most of current legal systems regarding the existing animal welfare laws, animal protection provisions, and anti-cruelty laws.

Moreover, the assertion that animals already have legal rights shows that the paradigm, at least the *person/thing* sense, has already lost its strength, making much easier to further reinforce the protection of their fundamental interests. Indeed, the falling of the *person/thing* sense makes animals' legal rights theoretically possible today, leaving a large room for political work to increasement and enforcement.

In the same line, *non-Personism* succeeds on passing the 'smell test' that comes with the *human/nonhuman* sense of the paradigm, by means of not insisting in including animals into the category of persons. Notwithstanding, this approach lacks power when facing the *person/thing* sense, to a large extent due to its high theoretical sophistication. Certainly, their arguments are not easy to explain, which is not necessarily a problem among academic panels, but it can definitely be problematic by the time of addressing judges, law makers and other authorities who are, in most of the cases, too busy with what *they have on their plates* to reconsider a whole theoretical apparatus in light of these new tendencies.

In conclusion, the test shows that *non-Personism* is:

- Non powerful facing the *person/thing* paradigm,
- Powerful facing the *human/nonhuman* paradigm, and
- Theoretically solid when facing the fact that, *de lege lata*, animals, not being persons, already hold legal rights.

At this point, we find ourselves in a zero-sum situation: stuck between two approaches that are either not powerful or solid as needed. How, subsequently, can we move forward?

Bunds of Liberty, Princeton University Press. New Jersey, 1980, and in *The Moral Limits of Criminal Law. Volume one: Harm to others*, Oxford University Press. Oxford, 1984.

IV. THE PROPOSAL: THE SENTIENCE-INTEREST PRAGMATIC VIEW

1. A view, not an account

In the previous section it has been demonstrated how, and why, both general approaches exhibit themselves not enough adequate to overcome the '*paradigm of subjecthood*', on its two senses. To overtake this, in the following I offer a fresh look into the ascription of legal rights to animals, one that aspires to be adequate to overpass the paradigm by means of being 'effective on legal grounds', this is, theoretically solid, as well as pragmatically feasible. This is the *sentience-interest pragmatic view.*

Why a *view*, and not an account? Basically, because it is a new way to interpret, understand, explain, and present the main tenets that appears suitable to sustain animal legal rights. It does not offer a new theory but, instead, reorganizes some of the key elements provided from the two general approaches, to deliver them in a powerful and solid manner, aiming to avoid the problems faced by them.

To this task, and from the tests carried out *supra*, I have found, as the most compelling argument from both general approaches, what I identify as the *sentience-interest core*.

Indeed, despite the many differences existing between *Personism* and *non-Personism*, in both approaches it is possible to find – as the arguments that more strongly suggests that animals can be rights holders – the following statement: because animals are *sentient*, they possess *interests*; and because of this possession of interests, they can be rights holders. Particularly, this is the way it has been understood by the representatives of *Personism* who argues in favour of legal animal rights, as it is the case of Korsgaard, Wise, and Francione. Similarly, the equivalent can be stated about the whole pool of representatives of *non-Personism*, as we saw on the accounts of Favre, Kurki, Kramer and Pietrzykowski. In short, where *Personism* argues that from the *sentience/interest core* comes personhood, and with personhood comes rights, *non-Personism* argues, directly and not passing though personhood, that from the *sentience/interest core* comes rights.

From this finding, I suggest favouring a view which decidedly embraces the core, for the following reasons:

First, because resorting on *sentience*, and not in other features or capacities as 'consciousness' or 'self-awareness', seems to be advisable for a scientific reason, as well as for a political/pragmatic reason:

The scientific reason is that, nowadays, we can comfortably rely on the neurological findings that supports the capacity of sentience of many animal species. Moreover, this is the path that most legal systems [66] , and communitarian systems[67], have followed by the time of removing animals from the status of mere things: they have legally stated that animals are sentient beings, or sensible beings (and not that they possess other, more sophisticated, attributes). Therefore, being the capacity for sentience sufficient for rights holding – as it is from an Interest Theory of Rights-based approach – there is no need to resort to more sophisticated capacities as consciousness or self-awareness[68], and certainly there is no need to demand any kind of agency. More sophisticated features can be certainly important, and useful, by the time of determining *what kind of rights* should be ascribe to animals, but that is a different question than the one proposed in this article.

The politic/pragmatic reason, on the other hand – closely related to the scientific reason – is that, as the capacity for sentience is a scientific fact, the chances to be disputed are considerably lower, as opposed to what usually happens with some other metaphysical features as, for instance, having intrinsic value or dignity[69]. The political motive, therefore, lays on the advantage that represents sentience as a normative reason[70].

[66] As pointed out before, like the cases of France and Spain, among others.

[67] As it is the case of the Treaty on the Functioning of the European Union, article 13.

[68] For accounts of this sort, see John R. Searle, "Animal Minds", in *Midwest Studies in Philosophy*, p. 206-219, 1984, and Juan Pablo Mañalich, "Animalhood, interests and rights", in *Journal of Human Rights and the Environment*, Vol. 11 Num. 2, 2020.

[69] I.e., about 'dignity' as a problematic feature to be predicated from animals, in Carolina Leiva Ilabaca, "Animales y dignidad. Un análisis crítico", in *Revista Latino-Americana de Direitos da Natureza e dos Animais*, v. 4, num. 1, p. 95-114. Salvador de Bahía 2021.

[70] Certainly, I am aware that what makes our organized communities to decide whether to protect the *sentience/interest core* are not scientific reasons, but moral reasons, based on our set of moral beliefs and values. Therefore, the scientific fact that reveals the presence of sentience is, by no means, the normative reason *per se*, but on the contrary, the normative

Moreover, unlike other attributes, sentience does not need to be measure in levels. Only matters if a given entity has it or not, vis-à-vis if it possesses a nervous central system, or it doesn't. Put differently, even if someday could be possible to sharply measure sentience and to classify it in different levels – which, for now, isn't –, just having the capacity, even at low levels, should be sufficient to be considered an interest holder. Contrarily, more sophisticated attributes as consciousness; self-awareness; agency; the capacity to have beliefs, and so on, are much more difficult to identify and to measure in a way that can be consider legally significant, making particularly problematic to adopt general rules.

Second, resorting on the concept of *interests* helps, in the best possible way, to sustain animal rights on the basis of the Interest Theory of Rights, which conceptualizes rights, roughly speaking, as *legally protected interests* [71] . Through this, it is possible to neutralize the sort of arguments sustaining that 'animals cannot hold rights because they cannot hold duties'; that 'animals cannot hold rights because they are not agents'; or that 'animals cannot hold rights because rights are based on reciprocity', all arguments that normally accompany a Will or Choice-based approach to rights[72].

Addressing the question about what kind of interest can be considered legally protectable, the emphasis should be placed, as Kramer sustains, on well-being. In Kramer's own words,

[…] to say that some interest(s) of X will be advance through the occurrence of an event or the emergence of a state of affairs is to say that X will be benefit in

reasons derive from the outcomes of the scientific fact, As Kramer states on the matter, '[…] for the Interest Theory, then, the essence of a right consists in the normative protection of some aspect(s) of the right holder's well-being'. Subsequently, I suggest, what we shall determine is the moral weight of the interest, which is different to determine the moral weight of sentience – In Kramer. "Rights without…" cit. p. 21.

[71] On the origins of the Interest Theory of Rights, see Rudolf von Ihering, *La dogmática Jurídica* (1883). Spanish traduction by Enrique Príncipe y Santorres, Editorial Losada S.A. Buenos Aires, 1946.

[72] Certainly, the adoption of an interest-based approach to rights implies embracing Hohfeld's proposal concerning the existence of a claim/right as the other side of the coin of a duty, assuming, therefore, that animals can hold claim-rights, as has been vastly sustained by, i.e., Kramer and Kurki. In Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions. As Applied in Judicial Reasoning* (1919), The Lawbook Exchange, Ltd. Clark. New Jersey, 2001.

some way(s) from the specified event or state of affairs. That is, the event or state of affairs will improve X's condition or will avert a deterioration therein[73].

As the author emphasizes, this is an '*expansive conception'* of what an interest is, therefore, by this understanding entities that are not even sentient could qualify as interests' bearers. Nonetheless, a way to narrow the scope is, as he suggests, through differentiating between the *existence* and the moral *significance* of interests[74]. Evidently, not every interest matters morally, and certainly the same occurs on legal grounds. It needs to be an interest related to one's well-being and, therefore, *significant*. Similarly, Feinberg identifies interests as miscellaneous collections, composed by the things on which *one has a stake* and, as Kramer, relates them to the entities' well-being[75]. Differently, the determination of which particular well-being interests deserves legal protection and, therefore, can constitute a legal right, is a political task,.

Thus, the *Sentience-Interest Pragmatic View* is based on the following tenets:

- *Sentience* is a necessary and sufficient condition for the possession of interests.
- The possession of *interests* is a necessary but insufficient condition for rights holding.
- To consider an interest as a necessary and sufficient condition for rights holding, the interest in question must be *significant*, this is, related to one's *well-being*, in the way suggested by Kramer and Feinberg.
- Animals are *sentient beings*, and, therefore, they possess i*nterests*.
- As sentient beings, animals possess interests related to their *well-being*, therefore, interests that are *significant*.
- Some animals' interests are currently protected by some legal systems.
- It is possible to sustain that animals already hold legal rights, *de lege lata*.

[73] Kramer, "Rights without…" cit. p. 33.

[74] Kramer. "Rights without…" cit. p. 34.

[75] Feinberg, *The Moral Limits…* cit.

In summary, this view suggests that animals can be, and actually are, rights holders, on the basis of two arguments: a) Animals *are potential* rights holders, insofar they are sentient beings and possessors of significant interest (responding to the question concerning if they *can be* rights holders), and b) Animals *are currently* rights holders, insofar as their significant interests are already legally protected, in the form of claim-rights, by several legal systems (responding to the question concerning if they *are* rights holder).

As it results clear, this view does not tackle animals' status. On the contrary, it sustains that there is no need to change the current status of animals to consider them as rights holders. Moreover, there is no need to address to any status at all.

2. Testing the *Sentience-Interest Pragmatic View*

On regard of the *person/thing* sense of the paradigm, this view succeeds by avoiding the necessity of changing the status of animals, therefore, it doesn't antagonize the *person-thing* bifurcation. Indeed, this view understands rights holding outside the bifurcation. As well, it succeeds on being theoretically solid, as the *non-Personism* is, by demonstrating that animals, not being persons, can be rights holders and, moreover, that they are so *de lege lata*.

Concerning the *human/nonhuman* sense of the paradigm, this view also passes the 'smell test', by means of not getting involved, at least not at first, with posing humans and animals within the same status. What this view suggests is that, independently of the status, they all hold rights.

As advanced, the view is also strong as it resorts on the solid theoretical grounds provided by the Interest Theory of Rights, in addition to the analytical developments that have derived from it. The assertion that 'rights are legally protected interests', together with the fact that animals possess legally protectable interests that are, moreover, already legally protected, is compelling.

In conclusion, the test shows that the *Sentience-interest pragmatic view* can be:

- Powerful facing the *person/thing* sense of the paradigm,

- Powerful facing the *human/nonhuman* sense of the paradigm, and
- Theoretically solid when facing the fact that animals, de *lege lata*, already hold legal rights, despite not being persons.

3. Possible objections

Having passed the standard test, lets stress a little more this view. Besides the issues already trialled, I foresee two other possible objections: on one hand, the objection about *fundamental rights*, and on the other hand, an objection about the *novelty* of the view.

In first place, a possible objection could come by what many authors have addressed as the *thin/thick*; *strong/weak*, or *simple/fundamental* rights distinction. As authors like Fasel[76] and Stucki[77] have pointed out, even though the assertion that 'animals already hold legal rights by means of the duties impose by welfare laws and anticruelty laws' may be correct, still, those are only 'thin', 'weak', or 'simple' rights, but not strong as fundamental human rights are. As Fasel summarises, fundamental legal rights, different to 'thin' rights, are the kind of rights which protect basic interests of their holders in a way that cannot easily be infringed by countervailing interests, providing their holders or representatives with standing to enforce them in Court. Thus understood, however animals do hold legal rights, those rights are weak, mere welfare rules which are easy to disregard by the time of confronting them with human interests or, moreover, with human rights.

Concretely, for authors as Francione and Wise[78], in turn, what separates animals from fundamental rights is animals' legal status, sustaining, therefore, that to ascribe fundamental rights to animals, they must be granted with legal personhood. Moreover, according to this view, if animal rights are not fundamental rights, they will always be submitted to a balancing exercise with

[76] Raffael Fasel, "Shaving Ockham…", cit.

[77] Saskia Stucki, "Towards a Theory of Legal Animal Rights: Simple and Fundamental Rights", in *The Oxford Journal of Legal Studies*, 2020, Vol. 0, Num. 0, p. 1-28.

[78] Francione, *Animals, Property* … cit. and Wise, *Rattling the Cage*… cit.

human rights, remaining in pure welfarism and, consequently, leaving the paradigm, in both senses, intact[79].

However, even though granting fundamental legal rights to animals could be seen as a – or the – way to move forward, nonetheless, it does not necessarily imply that the rights that they point out as 'thin' or 'weak', are not real or genuine rights. Put differently, sustain that 'thin' rights are not genuine rights because they lack the enforcement of fundamental rights is to confuse a matter of *degree* with a matter of *existence*.

Accordingly, three issues must be differentiated hereby: a) if animals *can* hold rights; b) if animals *do* hold rights, and c) which rights animals *should* hold. The issues about if they *can* and if they *do,* have been already successfully answered by *non-Personism*, as well as taken and supported by the *Sentience-Interest Pragmatic View*. The issue about which rights they *should* have, on the contrary, is an ongoing political task, concerning the pursuit for enforcement and increasement of animal interests' legal protection. The gap between 'thin' and 'thick' rights is not the paradigm itself but, instead, is just about a degree of legal enforcement.

Nevertheless, I am aware that none of the views and accounts sustaining that animals already hold rights have yet succeed challenging the *human/nonhuman* sense of the paradigm. Although, the fundamental rights view does not just also face the same problem, but it is also condemned to get stuck on it, by means of revisiting and facing over and over the paradigm and to, therefore, not passing the 'smell test'.

On the contrary, it seems to be more effective, and even easier, to work on increasing and reinforcing this already existing animal rights, than to display efforts to turn animals into persons to, afterwards, granting them fundamental rights. As Kurki states,

'[…] a more fruitful path would be to focus on the specifics: What particular rights are particular animals entitled to? Instead of concentrating whether animals are persons'[80].

[79] Stucki, "Towards a Theory of…" cit.

[80] Visa Kurki, "'Legal Personhood and Animal Rights", in *Journal of Animal Ethics,* num. 11 (1),

Moreover, fundamental rights will neither succeed avoiding the interest balancing process. Even fundamental human rights are as well limited, and regularly and daily submitted to restrictions and balancing process. Granting fundamental rights to animals can, surely, have more weight, but will not, *per se*, equates the balance.

In second place, one could be fairly asking about the novelty of the *Sentience-Interest Pragmatic View.* On what this view differs from the accounts previously offered by authors as Feinberg, Kramer or Kurki? The answer is simple: as advanced, this view does not differ substantially from those accounts. Actually, as I have already stated, those accounts are, beyond any doubt, the strongest in theoretical grounds, nonetheless, they face some pitfalls. In this sense, at least two problems can be clearly identified. In first place, those accounts are highly sophisticated, requiring an important bulk of theoretical knowledge to be understood, skills and tools that not all the incumbents manage – notably, decision makers as judges, legislators, administrative authorities, and so on. In second place, they have not overcome the important critics coming from authors sustaining that rights rising from welfare and anticruelty laws are not actual 'thick' rights, as they are poorly enforced.

This view, on the contrary, succeeds by means of building on the sentience-interest core to present those strong arguments in a much easier and clearer manner. At the same time, it does not imply that the existing legal rights held by animals are enough or strong but, conversely, this view recognises that the expansion, improvement, and reinforcement is desirable, as well as possible, considering precisely that some legal rights already exists, which allows to build upon them. Put differently, this pragmatic view is a simplified, and more effective, view over the strong theoretical developments delivered before, a view which helps enhancing their strengths, as well as diminishing their weaknesses.

V. CONCLUSION

p. 47-62, 2021.

It this article I have questioned the assertion that only *legal persons* can hold legal rights and, therefore, that animals cannot hold rights because they are *things*. To that, I have proposed what I have called the *Sentience-interest pragmatic view* sustaining, lastly, that the assertion is not correct.

To arrive to this view, I have firstly identified the 'question' and the 'problem', namely, the '*paradigm of subjecthood*', understood in two slightly different senses: the *person/thing* and the *human/nonhuman* senses. Afterwards, I have carried out a brief study – descriptive, and critical – of the theoretical framework on the matters of personhood and rights, by identifying two general approaches, namely, '*Personism*' and '*non-Personism*' – depending on whether they consider legal personhood as a necessary condition to hold legal rights, or not. Among them, I have also identified several accounts, different from each other according to what they consider as the necessary condition for the ascription of legal rights. Within *Personism*, I have identified *Valueism*; *Realism*, and *Conventionalism*, while within *non-Personism*, I have identified the variants *Things as right holders*, and *Third category*.

After examining the different approaches, I have determined and demonstrated how, and why, both approaches exhibit themselves inadequate to overcome the main obstacles set by the '*paradigm of subjecthood*'. To overtake this state of affairs, and by taking what I have considered the most compelling argument from the different approaches reviewed – composed by the *sentience-interest core* –, I have offered a new understanding to favour animal legal rights. This fresh understanding, called the S*entience-interest pragmatic view,* relies on the strong background provided by *non-Personism*, but manages to present it in a much simpler and efficient way, aspiring to be adequate to take down the assertion by being 'effective on legal grounds', this is, theoretically solid, as well as pragmatically feasible.

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