Journal of Ethics and Legal Technologies – Volume 5(1) – June 2023

The Entrance of Animal Beings in the Italian Constitution. The Still Incomplete Path of Animal Subjectivity.

Francesca Rescigno

Dipartimento di Scienze Politiche e Sociali
Università di Bologna – Alma Mater Studiorum
francesca.rescigno@unibo.it

Abstract: Frequently, legal discussions on crucial questions greatly benefit of intuitions and findings deriving from other sciences. The attribution of moral value to non-human animal beings is the gradual achievement of a millennial evolution occurred within the Western philosophical thought. After the Second World War, the entry into force of the Italian Constitution seemed not to affect substantially the domestic legal approach towards animal rights. The principle of equality did not trigger a rapid and radical transformation to a more biocentric legal paradigm. In 2022, a major constitutional amendment on the protection of animal rights happened. Despite its expressed provision in the Treaty of Lisbon, no reference to animal sensitivity was made in the Italian Constitution. However, it was established that animal protection shall be regulated by a specific parliamentary act. The effects of this constitutional reform are still widely unknown. Nonetheless, the recognition of animal beings as legal subjects appears to be a distant goal to reach in the Italian legal system.

Keywords: Animal Rights, Legal Subjectivity, Constitutional Amendment, Italy

1. Animal subjectivity between philosophy and science: the roots of anthropocentrism and the path towards biocentrism.

The animal question can no longer be considered as a marginal topic reserved for few eccentric scholars; in fact, this question has accompanied human thought for a long time, perhaps always, and today it represents one of the fundamental points of the political-global environmental agenda.[1]

In the course of time philosophy, science and law have addressed the animal question by developing different attitudes even if it is evident a common trait represented by the desire to evolve from closed and substantially anthropocentric positions towards a new and different consideration of animal beings, although this path has developed differently depending on the historical period and the sector.

It was precisely philosophy that first confronted the animal question, and although I will not carry out a thorough reconstruction that is beyond my competence, it is important to outline, at least in its essential features, the evolution of philosophical thought on animal subjectivity. The fundamentally anthropocentric philosophical approach finds its justification first of all in purely physical data, as only human animals can stand, are planted on the feet and possess hands (Plato); but also in psychological-rational data, such as rationality (Aristotle). Moreover, the anthropocentric ideal is supported by Christian reflection and a strongly humanistic reading of the *Bible*, whereby the alleged human superiority is sanctioned by the fact that God created «man in his own image» (Genesis 1, 26, 28) and that only man is endowed with a fundamental requirement which is the soul, testimony of his superiority over all other creatures (Thomas Aquinas).[2] These are precisely the assumptions on which Descartes bases his well-known definition

[1] Attempts to discipline the relationship between human beings and animals are found in all ages. Even Socrates asked in the agorà for a heavy punishment for a young man who had enjoyed blinding a swallow saying that he would never be a good Athenian citizen, because those who show cruel instincts towards weaker creatures potentially lack the ability to live together and respect civil life even with their fellow men. In Roman law a provision of 316 A.D. testifies the relevance of the legal interest in animal beings. It established *"Equos, qui pubblico cursui deputati sunt, non lignis vel fustibus, sed flagellis tantummodo agitari decernimus: poena non defutura contra eum qui aliter fecerit"*. Still, in the Middle Ages, animals could even be considered punishable for the crimes committed, it is said that in January 1457, in Saigny-sur Etang, in Burgundy a sow and six piglets were tried for killing and devouring a child. The piglets in consideration of their young age, as well as the corruptive influence of the mother, were "pardoned", while the sow was found guilty and hanged. On this fact see Regan, Singer, 1987, p. 7.

[2] It is worth remembering that even in remote times some intellectuals dissociated themselves from the majority in affirming the sensitivity of animal beings, in this sense see Plutarch, *About eating meat*, 1820, p. 207 ff.; Indelli, 1995; Zinato, 1995; Inglese, Giuseppina, 1999.

of animal beings as «thoughtless brutes», creatures considered as automata, machines devoid of intelligence and awareness.

Descartes probably represents the *acme* of philosophical anthropocentrism, though fortunately this attitude of animal reification has been progressively disavowed by a reflection capable of evolving and understanding that a totally anthropocentric and self-referential viewpoint does not necessarily suit the human person, since it is certainly true that man creates ethics, as well as any other system of values (including the regulatory system); however, such "creations" must not necessarily be anthropocentric, as nothing prevents the extension of moral consideration beyond the human being, in order to promote a vision in which human integrity and natural integrity call upon each other to improve human existence itself.

The first step towards a more biocentric vision was taken by the so called *"morality of sympathy"*, a theory developed in the middle of the '700 and aimed at emphasizing how animal beings, in carrying out daily actions, seem guided by a certain degree of rationality that, while differing from that of humans, is to be recognized as reason and not only as a mere instinct. Even animals, in fact, are able to direct their actions to avoiding pain and harm and try to put in place behaviors aimed at contentment and serenity so that humans should limit themselves to actions that give joy to animal beings when dealing with them.[3]

It is this first possibilist approach to animal *sentience* that constitutes the basis for the so called *"theory of utility"* that surpasses rationalistic and abstract enlightenment and replaces the criterion of reason with the more concrete one of utility, so that the main purpose of morality, but also of law, should be to try and bring as much happiness as possible to as many people as possible, or rather trying to avoid as many people as possible any unjustified suffering. Moreover, considering that also animal beings, as well as human beings, can suffer, utilitarianism claims that it is a moral duty also to worry about the pleasures and sufferings of animal beings.[4]

From utilitarianism to the so called *"neo-utilitarianism"*[5] there is a short distance and it is this school of thought that theorizes the application of the principle of equality to the relationship between man and animal, starting from the ability of animals to experience pleasant or painful sensations as it happens to humans, and, considering this substantial equality of feelings and behavior, it stigmatizes that animals are not given a status assimilated to that of humans, that is, a position that protects them from unnecessary

[3] Hume, 1987, p. 73.
[4] Bentham, 1789.
[5] Singer, 1987; Singer, 2003.

suffering. The implications of neo-utilitarianism are a sheer revolution in the relationship between man and animals, a revolution linked to the application of the principle of equality -which in itself is a revolutionary principle- to the animal issue. Only by rethinking the human-animal relationship from a perspective of equality can we avoid that subtle form of discrimination known as *"speciesism"*.[6] We should not forget that equality, even before it becomes a juridical concept, is a moral one because in order to consider humans equal to each other we need a sense of "equal" that does not require a true analytical equality of talents or abilities: "equal" is the lowest common denominator found in all humans. If it were not so, if equality were only the corollary of possessing reason, or the wise use of language or other such qualities, then also a good part of the human race itself (namely the so called "non-paradigmatic" human beings) would be excluded from the application of this fundamental principle. As a matter of fact, a strict interpretation of equality would lead to the exclusion not only of animals, but of newborn children, of adult human beings with serious illnesses or deficits, of people in deep and irreversible coma, but also, more simply, of the less physically or intellectually gifted.[7] Fortunately, however, it is not sustainable that these

[6] Speciesism marks the ultimate boundary of morality, the limit beyond which no living creature has importance for man. Just as the racist attributes more weight to the interests of his race members and the sexist favors the interests of his own sex, so the "speciesist" allows the interests of his species to prevail over the interests of members of other species. The term *"speciesism"* was coined by Ryder. As early as 1970 he had published a pamphlet entitled Speciesism, a term taken up in his later works for which see: Ryder, 1979; Ryder, 1989. A very interesting reconstruction of the various types of speciesism was carried out by Van De Veer, 1988, p. 91, where the author distinguishes between "*radical* speciesism" according to which it is morally permissible to act towards animals as one wishes because there is no intrinsic aspect of any animal that can raise moral limits to the way it can be treated; "extreme speciesism" which assumes that in the event of a conflict of interest between an animal and a human being, action may be taken so that the animal's interest is sacrificed in the name of human interest; and, finally, "interest-sensitive speciesism" under which, in the event of a conflict of interest between an animal and a human being, it is morally permissible to act in such a way that animal interest is subordinated to the human interest, but one cannot subordinate a vital interest of an animal to promote a non-vital interest of the human.

[7] It is interesting to reflect, for example, on the judgment n. 84 of 2016 in which the Italian Constitutional Court declares the inadmissibility of the questions of legitimacy raised *versus* article 6, paragraph 3, of Law n. 40 of 2004 (prohibition of withdrawal of the applicants' consent to the MAP after the formation of the embryo) and Article 13 (prohibition of testing on human embryos). On this occasion, the Council appears unprepared for the possible ethical dilemma between the right of science (and the advantages of research into the right to health linked to it) and the right of the embryo and takes a step back, recalling the competence of the Legislator, on the premise that the embryo *"whatever the more or less wide, recognizable degree of subjectivity related to the genesis of life, is certainly not reducible to mere biological material"* and on the basis of the consideration that *"the vulnus to the protection of the dignity of the embryo (even if) sick, as it would derive from its suppression tamquam res, does not find [...] justification, in terms of counterweight , in the protection*

subjects be considered less "equal" than the rest, and therefore deprived of rights. Indeed, the principle of equality guarantees them special protection, as well as differentiated treatments allowing them to be an integral part of society thanks to the existence of particular positions such as guardians and curators.[8]

The argumentation of marginal cases is used, perhaps to the limit of paradox, by neo-utilitarians who claim that either one agrees to use the humans who lack certain human qualities, newborns,[9] and comatoses for scientific experiments or as food resources (!), or the implication is that it is not intelligence, the ability to speak or self-determination that distinguish humans from animals, but that there must be some other quality, possessed only by the human race, which guarantees its superiority and allows the indiscriminate exploitation of animals. However, this alleged additional quality is neither identified nor enlightened even by the most ardent supporters of anthropocentrism, who merely state, tautologically, that humans are to be preferred because they are human and have a value in themselves that is absolutely superior to that of any other living being, while humanity does not belong to animals which therefore have a lower value. Such a viewpoint leads to speciesism: one species -the human one- is privileged over the others without this having a real logical, moral or juridical justification. The existence of marginal cases could therefore constitute the basis for the affirmation of a certain number of rights also for the animals because the neoutilitarians do not try to hide the profound difference in rank between men

of other antagonistic interest". Although it is undeniable that the issues underlying a possible decision of illegitimacy would have been very sensitive ethical issues concerning the uncertain qualification of the embryo, it is equally true that the allocation of this overproduction of embryos to the "eternal cryopreservation" means decreeing their death without any benefit for the progress of science, *as "if it is true that allowing scientific research on embryos inevitably means authorizing their destruction, it is also true that leaving them for a long time cryopreserved means still condemning them to a slow but inexorable extinction"*. In this sense, see Ricciardi 2016. For the pronunciation see Judgment no. 84 of 2016, in *Giurisprudenza costituzionale*, 2016, 750 with the observation of Cossiri, 2016, p. 763 ff. On this pronunciation see: Tigano, 2016; Chieregato, 2016.

[8] On "marginal cases" see Singer, 1987, p. 162; Castignone, 1996, p. 127; Singer, 2003.

[9] Singer speaks expressly of *"orphan babies"* specifying that the characteristic of being an orphan avoids the complication of parental feelings, *"... even if I use too much regard towards the experimenter, since non-human guinea pigs are not orphans..."*. Singer, 1987, p. 158.
[I]n support of the theory of "marginal cases" can be cited the provocation of Swift who in his *"A modest proposal"* suggests to breed newborns in order to make up for the problem of hunger, and claims: *"... An American, my acquaintance in London, a very educated man, assured me that a healthy and well-breastfed infant at the age of one year is the most delicious, healthy and nutritious food that can be found, whether stewed, roasted, baked, or boiled; and I do not doubt that I can do the same great service in fricassee or sauce ... I am not so tenaciously attached to my idea as to reject any proposal that is made by people of common sense, that is equally innocent, easy to put into practice, effective and cheap..."*. Swift, 1977.

and animals with respect to reason and the ability to express themselves, diversity that prevents animals from applying that principle of universalisation that moral rules imply; however, in their view, the feelings of pleasure and suffering that animals show make their exclusion from the enjoyment of at least some rights no longer justifiable. This approach does not aim to total human-animal equalization. Rather, it seeks to achieve, as far as possible, the elimination of any kind of suffering for both humans and animals on the basis of a simple assumption: if a living being can feel pleasure and pain, we all have a duty not to cause unnecessary pain to it. One does not come to the extreme consequence that it is always wrong to kill an animal in order to obtain food or inflict pain on it in the course of scientific research, since such events can be considered necessary, but it would be deplorable if the pain suffered by animals exceeded by far the benefit thereby enjoyed by humans. In short, it is right to wonder whether, every time you harm a life, this behavior is actually necessary and ethically justifiable.[10]

Applying the revolution of equality to the relationship between human beings and animals could represent the ultimate frontier of animalism, however philosophical reflection has gone further, theorizing the need to recognize specific subjective rights to animal beings which correspond to real obligations of mankind, this is the "theory of value" based on the fact that rights are founded on the inherent value of the being we intend to include in the moral sphere, a value that constitutes an objective characteristic of that being. According to this approach, the known Kantian proposition reserved for humans considered as an end and not a means[11] should also be extended to animals. In this way it can be affirmed that rights are based on the inherent value of the being that we intend to include in the moral sphere, a value

[10] In this sense, Albert Schweitzer arguments: *"... Whenever I harm a life I must be sure whether this is necessary or not. I should never cross the limits of the inevitable, even in seemingly insignificant cases ... Those who experiment with operating techniques or medicines on animals or inject them with diseases to help humans with the results obtained, should never reassure their conscience with the general excuse that their terrible deeds are done for a noble purpose. It is their duty to reflect in every single case whether it is really and truly so necessary to sacrifice an animal for humanity. They should be anxious to relieve the pain they cause as much as possible... How many crimes are committed by making animals suffer the tortures of agony only to prove to students of scientific truths that are already perfectly known! ... The ethics of respect for life ... leads us to join in the search for opportunities that give some help to other animals, to compensate for the great amount of suffering they receive from us, and thus escape for a moment from the inconceivable horrors of existence"*. Schweitzer, 1957, p. 322 ff.

[11] Kant believes that man, but not the animal, exists as an *"end in itself", men and animals are different beings and have different value because only men are autonomous beings endowed with a free will, and have the ability to act according to the representation of laws, instead of acting purely according to the laws. Animals are not autonomous because they don't have an ego, they don't have self-consciousness and that's why they can't discern how they should act because they don't conceive of any "I"*. Kant, 1971, p. 273.

that constitutes an objective characteristic of that being, such as to make it not only worthy of respect but holder of rights in itself.[12]

The idea behind this evolution is the assumption that any individual, "human animal" or "non-human animal", is entitled to equal respect as it is equally endowed with inherent value. That is, each being has a fundamental value, independent of the evaluations or desires, interests or preferences of others; in short, everyone is an end in itself, not a means or a resource for others; as a consequence, any treatment violating the principle of equal respect due to beings of equal value is morally objectionable because we all possess an inherent value in equal measure and we all have the right to be treated with respect and not as simple objects useful for some purpose. The inherent value of an individual is independent of the utility that these can have for others and vice versa.

This value theory, therefore, moves away from Singerian neoutilitarianism, linking the principle of respect with the innovative concept of "subject of a life" in which animal beings are also included. Thus *"all individuals who possess inherent value possess it in equal measure, be they agents or moral patients"*,[13] animal beings, as well as human beings, are endowed with intellectual faculties, as well as beliefs and desires, that is to say, genuine interests deserving protection.

The recognition of the intrinsic value of animals implies the existence of a patrimony of fundamental rights which must be respected by "moral agents", who must necessarily change their attitude towards animals. The theory of value elaborated by the philosopher Regan is actually a general theory of fundamental moral rights within which, among others, the rights of animals fall; affirming the existence of animal rights does not therefore mean taking a conflicting attitude towards the interests and needs of the human being, but is a matter of justice: the recognition that the fundamental moral rights of animals deserve protection falls within the concept of respect for and protection of fundamental moral rights *tout court*.

The reconstruction of the theory of value is decidedly complex because in order to provide animals with a patrimony of rights empowered by reciprocal, precise human obligations it is necessary to overcome some hurdles: first of all, one should define the nature of the animal beings, rejecting the Cartesian idea of animals as machines, and acknowledge that they indeed have desires, preferences, self-awareness; in short, recognize that animals are subjects, have purposes and reasons that guide their actions, suffer and enjoy as sentient beings. The theory of intrinsic value surpasses previous

[12] The theory of value was born and developed with the work by Regan, 1990.
[13] Regan, 2006.

conceptions by affirming the inherent equal value of individuals (humans and animals) thereby applying the principle of equality beyond any discriminating prejudice.[14]

The evolution of animalist philosophical thought, however, did not stop at the elaboration of the theory of inherent value, but tried to affirm new paradigms of equality involving animal beings. In this sense a part of more modern philosophical thought has focused on the eminently juridical question of the property of animal beings, stressing that occidental law manifests a sort of legal schizophrenia when it protects certain animals to which, however, it continues to recognize the legal status of mere properties.[15] What is controversial is the view of the animal as an object and the fact that animals have been considered by man among the indicators of wealth as mere properties like any other material good but, at the same time, we move away from the s.c. "welfare theory" which, behind a compassionate approach, actually continues to exploit animal beings for human purposes in the most disparate contexts: from feeding, to fun, to dress, to experimentation, not guaranteeing them any real and effective protection.

This approach supports the total abolition of the use of animal beings by man, since animals must be considered as subjects and not as objects.[16] Beside this radical, almost fundamentalist approach stands a softer one, namely the s.c. "animal protectionism", that still admits the use of animals in some circumstances, as far as we proceed constantly in the sense of implementing a science-based right actually built on animal welfare.[17]

[14] The analysis of the theory of inherent value could lead one to think that the affirmation of moral rights and corresponding duties does not admit any exception; however, the reconstruction of Regan identifies a passage, albeit narrow, to the possibility of exceptions. The animal-rights philosopher explains, in fact, that individuals with inherent value have the fundamental right to respectful treatment, that is, the prima facie fundamental right not to be harmed. In saying that it is a prima facie right, he stresses that it is always morally relevant and for this reason those who harm other subjects or allow them to be harmed, must be able to justify such behavior by appealing to superior moral principles considered valid to the extent that they morally prevail over the victims' right not to be harmed. We are not therefore faced with absolute rights that can never be disregarded, as there are some limited exceptions that may justify their compression. Regan, 1990, p. 376.

[15] Francione, 1995.

[16] Francione, Charlton, 2015, in which it is stated very firmly that: *"…we have a moral obligation not to impose unnecessary suffering on animals… we all agree that suffering inflicted on animals only because it gives us pleasure, or because we find it fun or convenient, is not necessary"*. The authors therefore argue that it is not necessary to be an animal activist to demonstrate that veganism is a moral obligation, the only need is to recognize animals as bearers of moral value.

[17] With this in mind, see Fraser et al., 1997, p. 187: *"Scientific research on animal welfare stems primarily from ethical concerns about the quality of animal life and public opinion regards scientific research on animal welfare as an important reference point. The concept of animal welfare used must therefore closely reflect this interest"*.

It is certainly interesting to emphasize, as we have tried to do, the long philosophical reflection that revolves around animal subjectivity, and it is likely that the latest schools of thought outlined do not constitute the point of arrival, as philosophical thought will be able to elaborate other solutions to accompany the journey of the human being and the animal being.[18]

It seems appropriate at least to mention how, besides philosophical reflection, medical science in general and ethology in particular have proved over time to be able to overcome the anthropocentric presumption and even to recognize to animal beings different levels of subjectivity, starting from a minimum level based on sensitivity as an area of the cognitive dimension, which is no longer mere sensation but involves emotionality, up to levels of true self-awareness.[19] It has now been scientifically proven that animal beings are intelligent and, above all, they are able to modify their behaviour in order to protect themselves from dangers and to gain better living conditions, just as human beings have always done. The animals identify and recognize danger, are able to think about the future and organize themselves according to the result they want to achieve. In addition to demonstrating the intelligence of animals, Darwinism has shown that they differ on the basis of specializations, so each species has built its own way of processing information and solving problems. In this perspective it is correct to speak of differences at the intellectual level, but more qualitatively than quantitatively; intelligence is not "one-fits-all", there are different types depending on the species considered.[20] What seems necessary is to investigate and evaluate animal intelligence avoiding the use of purely "human" parameters, because the human being can no longer be considered as a universal paradigm. For a long time, science has recognized animal intelligence only when animal beings have proven capable of performing actions typical of humans (for ex-

[18] The reconstruction carried out, albeit without pretense of exhaustiveness, points out that the debate on animal beings has long been dominated almost exclusively by the observations of moral philosophers and substantially neglected by political philosophy that only recently began to deal with the issue by developing a kind of "political turn" in animal ethics in order to highlight the boundaries of the animal question and to understand if there is a political system more suitable for the protection of animal beings and possibly their recognition as subjects of law. This path is just at its beginning, but it could be of great help for the construction of a sensitive legislation, respectful of the animal question without embracing the abolitionist fundamentalism, which would be difficult to reconcile with the centrality of the human being in the legal construction. On the turning point of political philosophy with regard to the animal question see Garner, O'Sullivan, 2016.

[19] Experiments have shown that dogs also have emotions and feelings, which reside in the same area of the brain -the caudal nucleus- as those of "superior" humans. See Cyrulnik et al., 2013.

[20] On the contribution of science and ethology to the evolution of the concept of being animal see Darwin, 1926; Lorenz, 1967; Midgley, 1985; Cavalieri, Singer, 1994.

ample, chimpanzees can even outsmart humans in remembering a sequence of numbers shown for a fraction of a second, an octopus can open pill bottles closed by child-proof caps) but the intelligence of each species depends on the type of activity to be carried out and on the link of this activity with the very survival of the species in question, so that the comparisons between one and the other seem inappropriate and completely useless.[21]

Thanks to the progress of philosophy and science it is possible to say that for animal beings, as well as for human beings, life is not only mere corporeity and that animals also participate in social life, have rules, behaviors induced by the needs of the moment, social contexts and, in this sense, animal beings are characterized by a value of their own, an inherent value that should be recognized by legal systems.[22]

2. The legal approach and Italian positive law.

The reconstruction carried out on philosophical thought and scientific approach, although not exhaustive, seems appropriate to verify how the law has addressed the animal question, whereas legal systems are influenced by doctrinal and scientific reconstructions.

In this regard it is undeniable that the law has long demonstrated a "defensive" attitude essentially attributable to the Cartesian consideration of animals as beings lacking in reason, able to act only on the basis of instinct, beings which cannot understand and use for their own benefit any legal recognition because they lack the typical human intellectual faculties and especially language ability. This choice, however, appears very superficial, and, as already mentioned, possibly dangerous even for those humans not really "paradigmatic", although they are not able to claim all or even part of their rights nor to make claims at all, these subjects are nevertheless endowed with legal capacity, holders of legal situations and assisted, where necessary, by appropriate positions such as guardians and curators. In this sense, if the law states that being a non-paradigmatic subject (an animal) is equivalent to not having any legal capacity, then it should explain why this assumption does not apply to human beings, to dispel any suspicion of speciesist discrimination.

The legal uncertainties about animal subjectivity have also been caused by the alleged difficulty of identifying any rights attributable to animals, an obstacle that can be easily overcome if one focuses on the rights of the person-

[21] In this matter, the writings of F. de Waal are really precious, including: de Waal, 2016; de Waal, 2020.

[22] With this in mind, allow me to refer to my: Rescigno, 2021, p. 91.

ality -that is, those related to the interests of which both non-paradigmatic human beings and animal beings are bearers- rights that are numerically limited and easy to define, including the right to life, at the basis of which lie the desires, purposes and different propensities and preferences of each living being. It is undeniable that the right to life of animal beings is presented as a *relative right*, a right that is *prima facie*, not absolute, since there are circumstances in which it may be disregarded in the context of a balance with certain human interests that leads to the subjection of the former to the latter, but the relativization of the animals' right to life should not result in putting animal existence back to full human discretion; rather, it should lead to the determination of a minimum, inviolable content which is in no case expendable, clearly establishing which human interests in conflict with those of animals are destined to prevail, thus ensuring that animal beings have a dignified life, free as much as possible from unnecessary suffering and in keeping with their ethological characteristics.

A balance between human interests and animal subjectivity is not a legal hazard considering that the balance between rights and the relativization of legal positions are typical of the normal expression of human legal subjectivity: even the human right to life, though it is considered to be the first of the fundamental rights, and as such proclaimed in the international and supranational Charters, is not an absolute right as is clear if we think of institutions such as the death penalty, the exercise of the right of defence, the interruption of pregnancy, and also the exercise of self-determination to put an end to an existence no longer considered dignified and consonant with human nature. The right to life of the human being, first among the inviolable rights, has indeed profiles of legalized *"violability"*. Hence, to affirm a right to life *prima facie* for animal beings does not mean to upset the established order and threaten human beings, nor to nullify the antispeciesist effort, rather it simply means applying to the animal question the "golden rule" of the balance of interests.

The law, therefore, would have the tools to overcome the anthropocentric interpretation and build an innovative regulatory system, in which alongside human juridical subjectivity it is also supported, even partially, that of the animals, since it is fundamental to remember that only the existence of a subjective right can warrant true legal protection.

It remains therefore to be seen what the attitude of jurists has been in relation to the animal question.

While it is true that legal systems are mainly anthropocentric and created for the exclusive benefit of the human being, with animal beings essentially relegated to the role of *"res"* available to man, it is equally true that legal reflection has made a slow but constant evolution in this field, progressively

developing a vision more attentive to the needs of animal beings, without, however, achieving the affirmation of a real animal legal subjectivity.

Within the Italian legal system, this juridical evolution starts from the first anthropocentric statements of Article 491 of the Zanardelli Code of 1889 in which the Legislator's concern was to protect human sensitivity, as is evident when it states:

> "Anyone who blinds animals or, without necessity, mistreats them or forces them to manifestly excessive toil, is punished with a fine. (...) The same penalty also applies to those who, for the sole purpose of science or teaching, but out of places intended for teaching, submit animals to experiments such as to arouse disgust".

The subsequent Rocco Code of 1930,[23] in article 727, proposed this provision again, placing it among crimes against public morality, while it should have concerned the protection of animals. However, Article 727 of the Penal Code has been the subject of a continuous and constant doctrinal, jurisprudential and even legislative elaboration. In this regard, it is worth recalling Law No. 473 of 1993, [24] which was responsible for defining the crime of mistreatment of animals more precisely, establishing a link between abusive behaviour and the ethological characteristics of different animals, so that each one must be considered in relation to its behaviour, depending on its specific characteristics and, consequently, there is no longer a theoretical general concept of mistreatment because the act affecting an animal must be evaluated in light of the effects it produces on the specific animal.

The legal consideration of animal beings has further changed with the approval of Law No. 189 of 2004,[25] containing *"Provisions concerning the prohibition of the mistreatment of animals and the use of animals in clandestine combat or unauthorised competition"*, which remains, at present, the principal normative reference in the definition of the status of animals in our legal system. It was this law that introduced the principle that offences committed against animals no longer fall within the field of crimes against property nor involve the customs' police, but have their own specific object and require a specific title which is indexed as: *"Crimes against feeling for animals"*, a title that still implies an anthropocentric approach also because Article 727 of the

[23] Regio Decreto 19 ottobre 1930, n. 1398 (G.U. n. 251 del 26-10-1930).

[24] Legge 22 novembre 1993, n. 473 "Nuove norme contro il maltrattamento degli animali" [New rules against the mistreatment of animals]. (G.U. n. 278 del 26-11-1993)

[25] Legge 20 luglio 2004, n.189, "Disposizioni concernenti il divieto di maltrattamento degli animali, nonché di impiego degli stessi in combattimenti clandestini o competizioni non autorizzate" [Provisions concerning the prohibition of the mistreatment of animals and the use of animals in clandestine combat or unauthorised competition] (G.U. n. 178 del 31 luglio 2004).

Penal Code remains within the scope of the *"Contraventions concerning the Customs Police"*, though the new Title, in addition to separating part of the previous Art. 727, introduces a case of considerable interest, overcoming, for example, the distinction between killing other people's animals versus mistreating or killing one's own animals, also filling the gap related to the killing of no one's animals (or *res nullius*).[26] In this way the animal being effectively becomes the passive subject of the crime and no longer just a mere indirect referent of the rights of others, even if the conduct sanctioned by the new provision must -unlike what is established for the "human" discipline- be characterised by the elements of cruelty and lack of necessity.

The promulgation of the 2004 Law represents a decisive step forward but, at the same time, it also constitutes a setback in the path of Italian positive law on the animal question. As a matter of fact, following its approval the legislative measures in this field have been scarce and mainly aimed at the implementation or application of European legislation, which has always been sensitive to the subject. The Italian Legislator has therefore preferred to "agree" with European solicitations rather than independently complete the path of animal legal subjectivity, or at least this is what happened until the recent constitutional revision.

Before examining the recent constitutional reform, it is necessary to mention the requests coming from the European Union about which Article 13 of the Treaty of Lisbon appears decidedly significant, even though more theoretically than practically. The treaty, signed in Lisbon in December 2007,[27] ratified by Italy with Law No. 130 of 2008 and entered into force in 2009,[28] is aimed to amending the Treaty on European Union and the Treaty establishing the European Community, and states the following:

[26] Art. 727, Italian Penal Code, entitled "Abbandono di animali" [Abandonment of animals], states that: "Chiunque abbandona animali domestici o che abbiano acquisito abitudini della cattività è punito con l'arresto fino ad un anno o con l'ammenda da 1.000 a 10.000 euro. Alla stessa pena soggiace chiunque detiene animali in condizioni incompatibili con la loro natura, e produttive di gravi sofferenze" [Anyone who abandons domesticated animals or animals that have acquired the habits of captivity shall be punished by a term of imprisonment of up to one year or a fine of between EUR 1,000 and EUR 10,000. The same punishment shall apply to anyone who keeps animals in conditions that are incompatible with their nature and result in severe suffering].

[27] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, in OJEU 306,17.12.2007, p. 1-271.

[28] Legge 2 agosto 2008, n. 130, "Ratifica ed esecuzione del Trattato di Lisbona che modifica il Trattato sull'Unione europea e il Trattato che istituisce la Comunità europea e alcuni atti connessi, con atto finale, protocolli e dichiarazioni, fatto a Lisbona il 13 dicembre 2007" [Ratification and execution of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community and certain related acts, with final act, protocols and declarations, done at Lisbon on 13 December 2007] (G.U. n. 185 del 08.08.2008).

> "In formulating and implementing Union policies in the fields of agriculture, fisheries, transport, the internal market, research and technological development and space, the Union and the Member States shall take full account of the welfare needs of animals as sentient beings, while respecting the legislative or administrative provisions and customs of the Member States as regards, in particular, religious rites, cultural traditions and regional heritage".

Animal beings were therefore defined, in a European treaty, as "sentient beings", and this recognition could not fail to arouse strong expectations. However, at a careful reading, the article in question appears to be no more than the result of a compromise, since the affirmation of "animal sentience" is combined with the maintenance of questionable and highly problematic phenomena, such as, for example, religious ritual slaughter or folkloristic activities and customs, leaving the Member States substantially free to interpret the "animal sentience" at will, without ensuring well defined legal landmarks. In 2009, Europe also adopted the EC Regulation No. 1223,[29] which is responsible for the progressive elimination of the possibility of tests on animals for cosmetic products in Europe, up to the total prohibition of any type of such testing.

In 2010, however, the Union dealt with another major area involving animal beings, namely the testing of medicines, medical treatments, food or chemicals, approving the European Directive n. 63 of 2010 on the protection of animals used for scientific purposes,[30] transposed by my Country - after some debate- into Legislative Decree n. 26 of March 2014.[31] The new European regulation of 2010 aims at implementing the protection of animals

[29] Regulation (EC) No 1223/2009 of the European Parliament and of the Council of 30 November 2009 on cosmetic products (recast), OJ L 342, 22.12.2009, p. 59–209.

[30] Directive 2010/63/EU of the European Parliament and of the Council of 22 September 2010 on the protection of animals used for scientific purposes, OJ L 276, 20.10.2010, p. 33–79.

[31] Decreto legislativo 4 marzo 2014, n. 26, "Attuazione della direttiva 2010/63/UE sulla protezione degli animali utilizzati a fini scientifici" [Implementation of the Directive 2010/63/EU on the protection of animals used for scientific purposes] (G.U. n.61 del 14-03-2014). It is noted that in this area Italy has always demonstrated a strong protectionist vocation towards animal beings, as evidenced by the precious Law n. 413 of 1993, entitled "Norms on conscientious objection to animal experimentation" legislation that put my country at the forefront by establishing that the right to refrain from experimentation practices is guaranteed, allowing doctors, researchers and all graduate health professionals, technicians and nurses in public and private facilities, as well as all university students concerned, to declare their conscientious objection in order not to directly take part in activities and interventions specifically involving animal testing. The possibility of refusing to take part in experiments involving animals also concerns students, who cannot be penalized for their choice, so it is clear that in the case of conscientious objection it will be up to the teacher to activate alternative methods enabling the student to achieve the best preparation possible, without the use of animal experiments.

used for scientific and experimental purposes by improving their well-being through enforcing the well-known *principle of the three Rs: Replacement, Reduction and Refinement.*[32]

The subject of animal testing is still a very controversial one and it is difficult for a jurist to have a well-founded opinion about it, considering the variety of judgements made by doctors and scientists over time. To date, it can be assumed that there are some sectors, albeit limited, in which animal experimentation can still be justified by medical needs. Once again, however, an effective "balancing of interests" should engage the researchers in the preventive identification of the need for the use of animals, if this can substantially benefit the human species.[33] At the same time, they should reject any experimentation that cannot be effectively linked to primary human interests not otherwise attainable.

The legal framework outlined is the background to the recent constitutional revision.

3. Constitutional reform: are animals still res or subjects?

The reconstruction carried out, albeit without pretense of exhaustiveness, leads to the constitutional reform that came into force in February 2022.

A few years ago I had proposed the possible entry of animal beings into our Constitutional Charter in order to confer juridical value on their dignity as living beings.[34] This hypothesis of mine attracted some criticism by fellow jurists who believed that the issue was not worthy of attention when compared to "much more relevant" ones. My proposal was not aimed at opposing animal versus human interests, as I had not assumed an equalization, nor a flattening of legal situations; my point was rather the affirmation of a partial equality that, through a careful use of the principle of proportionality, could mediate between human "interests" and certain animal "interests". I believe this idea still stands today. The transformation does not concern the catalogue of rights, nor that of their owners, but rather the concept of subjectivity underlying the entire constitutional structure: a concept no longer taken apodictically as an exclusive human prerogative, but welcomed in its intrinsic complexity as articulated on different levels of sensitivity.

Seventeen years after my first reflections on this subject, the Constitution has been revised and animal beings have entered our fundamental Charter.

[32] On the 3 Rs principle see Russel, Burch, 1959. This principle was enunciated in 1959 by Russel and Burch and in 1992 a special edition of the original text was reprinted, due to the considerable interest raised in the scientific community by the ideas it conveyed.

[33] As required also by the abovementioned Decreto legislativo 4 marzo 2014, n. 26 (note 31).

[34] The reference is to: Rescigno, 2005.

For this reason, it seems necessary to examine whether the constitutional reform can be considered as the final result of a legal evolution or merely another step towards animal subjectivity.

First and foremost, it should be clearly stated that the existence of a constitutional provision is not always effective in itself to ensure real legal changes. The Constitution does not in fact represent the cure for any legal distortion. It has no miraculous powers and so, unfortunately, there are many constitutional provisions that remain substantially unaccomplished, just think of the principle of equality between women and men. The lack of "super powers" of the Constitutional Charter means that a formal revision, if not accompanied by a real cultural-legislative and social effort, risks being translated into an abstract formulation that needs complicated legal balances and a number of court cases to find an *ubi consistam*. Despite this limitation, the constitutional revision is still a promising way to affirm the animal legal subjectivity and a valid instrument to indicate a precise direction to the Legislator.

The reform of Article 9 is particularly significant, also because it breaks a kind of "constitutional taboo" by amending for the first time a provision included in the first twelve articles of the Charter, the fundamental principles that represent the foundations of the Charter itself. The amendment does not concern only the fate of animal beings but focuses particularly on the protection of the environment by institutionalizing what has already been practically established at the level of jurisprudence in the last forty years. It would be wrong to presume that previously there had been no constitutional right to the environment; such right, however, was the result of many rulings by the constitutional jurisprudence, entailing all the characteristics and defects of case law.[35] This is not the place to focus particularly on the environmental aspects of the reform; however, it seems at least necessary to consider some aspects of this part of the review and in particular the identification of the three new subjects protected by the Republic, namely: environment, biodiversity and ecosystems, subjects containing each other

[35] The jurisprudence from the Consulta had enlightened and promoted at least three main topics which, thereby, had become part of the "material constitution". Firstly, the constitutional importance of the environmental interest, meaning landscape and ecological protection, founded on the combined provisions of Articles 9 (in its original wording) and Article 32 concerning the right to health; then, the qualification of the environment not as the object of a subjective legal situation, but, more widely, as a constitutional value, an objective of fundamental importance that, while not enjoying absolute primacy, has an intrinsic value, so that its essential core must always be saved; finally, the last aspect that emerged thanks to the efforts of the Court concerned the transversal attitude of protection, which is part of the complex of sectors, subjects and areas in which public policies intervene and in which competences are shared among the constituent bodies of the Republic, namely the State and the Regions.

as a kind of matryoshka, so that mentioning them as different cases seems, paradoxically, more reductive than explanatory. One can wonder what the environment is, as it could be simplistically defined as a complex system of physical, chemical and biological factors, of living and non-living elements and the relationships in which all the organisms that inhabit the Planet are immersed. This simple definition already includes biodiversity and ecosystems. Biodiversity indicates in fact the *ecosystem variety* (natural patrimony), specific and genetic at a global level or maybe compared to a particular *habitat*. Finally, ecosystems are those ecological units made up of living organisms that can interact with each other and adapt to the environment in which they are located. They can be natural, and in this case the balance is achieved without the intervention of the human being, but also artificial (and the question is whether the reform affects both) i.e. characterized by the intervention of human beings. This is how the three words contained in the revised article 9 are misleading, unclear and a possible source of future interpretative debate. Sometimes, when you say too much, you risk to say nothing. However, the least convincing aspect of the reform concerning the environment is represented by the address *"also to the interest of future generations"*. This is rather vague, *also* compared to what? The current generations or the environment itself? What future generations? It is an ambiguity that causes confusion as to human interests themselves and demonstrates the substantial persistence of a markedly anthropocentric approach.

Going beyond the environmental aspects of the new Art. 9, it is appropriate to verify in what form the entry of animal beings takes place. First of all, animal beings enter our Constitution not once, but four times: as animals (all), as an essential part of the environment, as biodiversity - that does not exist without animals- and, finally, as protagonists of ecosystems. The mention of animals as such seems relevant, overcoming the hideous distinction between pets and other types of animals often considered, inexplicably, as second-rate. The new constitutional provision, however, refers to animals without further qualifying them, thereby overlooking the definition of "sentient beings" introduced by the European Union. This choice may give rise to doubts linked not so much to the fact that the *"sentience"* introduced by the Treaty of Lisbon had actually led to substantial changes in the legal status of animal beings, as to the possibility that not having re-proposed the characteristic of sentience may, in the near future, constitute a *diminutio* that may justify the lack of animal legal subjectivity. Therefore, following the European path could represent an additional guarantee for the affirmation of a new biocentric relationship between animals and humans.

Beyond its failing to mention sentience, it is necessary to highlight what the new Article 9 affirms, to dwell on what is specifically dedicated to animal

beings, namely the phrase: *"the law of the State rules the ways and forms of animal protection"*. Our Constitution thus opens up to animal beings, providing for their protection an absolute reserve of law[36] by entrusting the State Legislator with the task of establishing disciplinary methods and forms. The placing of this kind of legal reserve within the framework of the fundamental principles seems peculiar especially considering the matter, so it would probably have been more consistent to intervene under article 117 Cost. Yet, it should be noted that the novel legal reserve introduced in Article 9 is not only a guarantee value, but could also represent a partial limitation on regional legislative competence. The position in the constitutional topography, in fact, has in itself a significant interpretative significance, so it is in the light of Article 9 that the other constitutional provisions, including those of Title V, will have to be read. In this sense the revision intervention, which sets aside a mode of discipline reserved exclusively to the State legislature, will have the effect of restricting regional jurisdiction in competing and residual matters, also in light of the fact that the protection of animals can be divided into a very wide range of sectoral disciplines, which cover a large number of areas (from agriculture, health, social policies, the government of the territory) with a potentially very powerful projection capability.

The instrument of the reserve has an important significance not only because it leaves to the State Legislator a strong responsibility for discipline and coordination of the matter, but above all because the institution of the reserve of law possesses an intrinsic and specific value of guarantee and safeguard, constituting the fundamental instrument that protects the rights of freedom of human beings and that today, for the first time, is also addressed to animal beings. In this sense, the reform presents a truly unprecedented profile, if not revolutionary, perhaps even exceeding what the proponents of the revision themselves could imagine, because we move away from the typical legal anthropocentrism to extend the audience of subjects protected by precise and incontrovertible instruments such as the reserve of law.

It is precisely the meaning of the prediction of reserve that deserves to be particularly valued, even if, unfortunately, it still does not seem sufficient to affirm the legal subjectivity of animal beings, that are not yet considered as true subjects of the law nor as holders of at least some rights. Thus, just as it has not been possible to confuse the sentience provided for in the Lisbon Treaty with legal subjectivity, it is not even possible to assume that the determination of the legal reserve coincides with the affirmation of animal subjectivity, but at the same time it is undeniable that the constitutional revision and the debate behind it have put the animal question in a new light.

[36] Legal provision requiring that certain matters only be governed by Parliament.

The constitutional revision of Article 9 therefore does not, in my opinion, represent a point of arrival, as an explicit recognition of dignity and, above all, of animal subjectivity continues to be lacking. Nevertheless, this reform must be considered as a positive one because it represents a concrete step, after many years of legislative silence, towards a new and necessary eco-centric awareness, today increasingly felt as essential in civil society and at least by some political forces.

One year after the approval of the reform, however, we can state that nothing has happened. As a matter of fact, some questions seem still unresolved, such as, in particular, the relationship between state legislation and regional legislation, with regard to which greater local activism could be envisaged by exploiting the first part of the new paragraph, namely the "protection" of the environment, biodiversity and ecosystems in which animal beings naturally fall, so that the presence of the legal reserve should not be used, as seems to be the case, to endorse legislative *inertia* in this area.

In summary, we should be vigilant spectators to verify if this "timid reform" but with great potential, will finally be able to achieve the legal subjectivity of animal beings. Let's just hope we don't have to wait too long.

References

Bentham, J. (1789). *Introduction to the Principles of Morals and Legislation*. London: T. Payne and Son.

Castignone, S. (1996). *Nuovi diritti e nuovi soggetti. Appunti di bioetica e biodiritto*. Genova: ECIG.

Cavalieri, P., & Singer, P. (1994). *Il progetto Grande scimmia. Eguaglianza oltre i confini della specie umana*. Napoli: Theoria.

Chieregato, E. (2016, June 4). 'La resistenza del divieto di donazione di embrioni alla ricerca scientifica tra margine di apprezzamento europeo e deferenza al legislatore' in *Forum Quaderni Costituzionali*.

Cossiri, A. G. (2016). 'La legge n. 40/2004 ancora di fronte alla Corte: l'inammissibilità delle questioni sui divieti di revoca del consenso e di ricerca sugli embrioni' in *Giurisprudenza costituzionale* 2: 763 – 773.

Cyrulnik, B., de Fontenay, E., Singer, P., & Matignon, K. L. (2013). *Les animaux aussi ont des droits*. Paris: Points.

Darwin, C. (1926). 'Paragone fra le facoltà mentali dell'uomo e quelle dei sottostanti animali' in C. Darwin, *L'origine dell'uomo e la scelta in rapporto col sesso*. Milano: A. Barion.

de Waal, F. (2016). *Siamo così intelligenti da capire l'intelligenza degli animali?* Milano: Raffaello Cortina.

de Waal, F. (2020). *L'ultimo abbraccio. Cosa dicono di noi le emozioni degli animali.* Milano: Raffaello Cortina.

Francione, G. L. (1995). *Animals, Property, and the Law.* Philadelphia: Temple University Press.

Francione, G. L., & Charlton, A. E. (2015). *Eat Like You Care: An Examination of the Morality of Eating Animals.* Lexington, Kentucky: Exempla Press.

Fraser, D., Weary, D. M., Pajor, E. A., & Milligan, B. N. (1997, August). 'A Scientific Conception of Animal Welfare that Reflflects Ethical Concerns' in *Animal Welfare* 6, 3: 187-205.

Garner, R., & O'Sullivan, S. (2016). *The Political Turn in Animal Ethics.* Lanham: Rowman & Littlefield International Ltd.

Hume, D. (1987). 'Della ragione degli animali' in T. Regan, & P. Singer, *Diritti animali, obblighi umani.* Torino: Abele.

Indelli, G. (ed.). (1995). Plutarco. *Le bestie sono esseri razionali.* Napoli: M. D'Auria.

Inglese, L., & Giuseppina, S. (eds.). (1999). *Plutarco. Il cibarsi di carne.* Napoli: M. D'Auria.

Kant, I. (1971). 'Doveri verso gli animali' in I. Kant, *Lezioni di Etica.* Bari: Laterza.

Lorenz, K. (1967). *L'anello di Re Salomone.* Milano: Adelphi.

Midgley, M. (1985). *Perchè gli animali. Una visione più umana dei nostri rapporti con le altre specie.* Milano: Feltrinelli.

Mill, J. S. (1987). 'In difesa di Bentham' in T. Regan, & P. Singer, *Diritti animali, obblighi umani.* Torino: Abele.

Plutarch. (1820). *Del mangiare carne* (Vols. Brochure Morali, IV). Florence.

Plutarch. (1820). 'Del mangiare carne' in *Opuscoli morali* (Vol. IV). Firenze.

Plutarch. (1995). *Le virtù degli animali.* (Zinato, Ed.) Venezia.

Plutarch. (1995). *The beasts are rational beings.* (Indelli, Ed.) Napoli.

Regan, T. (1990). *I diritti animali.* Milano: Garzanti.

Regan, T. (2006). *Defending Animal Rights'*. Urbana: University of Illinois Press.

Regan, T., & Singer, P. (eds.). (1987). *Diritti animali, obblighi umani.* Torino: Abele.

Rescigno, F. (2005). *I diritti degli animali. Da res a soggetti.* Torino: Giappichelli.

Rescigno, F. (2021). "Bios" e "Zoe" nel diritto. Per una tutela giuridica del vivente non umano' in *Bioetica e Biodiritto* (Vol. 1). Scuola Superiore della Magistratura.

Ricciardi, A. (2016). 'La Corte costituzionale, decidendo di non decidere, lascia aperta la questione degli embrioni crioconservati. Nota a Corte costituzionale, 22 marzo 2016, n. 84' in *Osservatorio costituzionale* 2: 1-6.

Russel, W. M., & Burch, R. L. (1959). *The Principles of Human Experimental Technique*. London: Methuen.

Ryder, R. D. (1979). 'The Struggle against Speciesism' in D. Paterson, & R. D. Ryder, *Animal Rights*. A symposium. Fontwell Sussex: Centaur Press Ltd.

Ryder, R. D. (1989). *Animal revolution: changing attitudes towards speciesism*. Oxford: Blackwell.

Schweitzer, A. (1957). 'Etica del rispetto per la vita' in A. Schweitzer, *Rispetto per la vita*. Milano: Ed. di comunità.

Singer, P. (1987). *In difesa degli animali*. Roma: Lucarini.

Singer, P. (1987). 'Tutti gli animali sono uguali' in T. Regan, & P. Singer, *Diritti animali, obblighi umani*. Torino: Abele.

Singer, P. (2003). *Liberazione animale*. Milano: Il Saggiatore.

Swift, J. (1977). *Una modesta proposta e altre satire*. Milano: BUR.

Tigano, V. (2016, May 8). 'De Dignitate non disputandum est? La decisione della Consulta sui divieti di sperimentazione sugli embrioni e di revoca del consenso alla PMA' in *Diritto penale contemporaneo*.

Van De Veer, D. (1988). 'La giustizia interspecifica' in S. Castignone, *I diritti degli animali: prospettive bioetiche e giuridiche*. Bologna: Il Mulino.