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**The mask of the beast.
The Human/Animal border in the meshes of the law**

ABSTRACT: This essay highlights the fault lines that arise when human otherness meets the non-human. Throughout European history, the idea of the human being has been expressed in contradistinction to the animal. The animal issue immediately enters the scene as a reinforcing element of an opposition that becomes all the more radical the more the Other escapes the meshes of recognition. The fault lines in which human otherness meets with the non-human have produced a substantial body of knowledge from civil and criminal lawyers: from the social imaginary of the heretic in the Middle Ages to zoomorphism in the physiognomy of the Renaissance; and from the madmen of Bicêtre put on display like exotic beasts to the *enfant sauvages* of the 18th century. Nowadays, even in the field of international humanitarian law it remains difficult to define the idea of respect for human dignity without having to resort to the human/animal semantic space.

KEY WORDS: Human/Animal; identity/otherness/recognition; dehumanization; Jehring; Savatier; Freud; theoretical racism; Nazi zoomorphism; international law; inhuman treatments

The Animal is directly involved, together with the Divine, when philosophical reflection pushes against its own limits, and encounters the problem of non-human otherness – a sort of reflection-extroflexion that was ingrained in primitive thought¹. In all thought systems, animals have had a fundamental mediation role within the sphere of the sacred in the construction of the myth; this has performed a vital function in the attempt to interpret the sealed book of the universe². The animal issue immediately enters the scene as a reinforcing element of an opposition that becomes all the more radical the more the Other escapes the meshes of recognition. In this way, the animal plays an important role in the various definitions of the human: it is the counter model, the ontological negative. The descriptive approach to classification has often been intertwined with the normative one, making taxonomy a fully-fledged branch of law.

According to Horkheimer and Adorno, “throughout European history the idea of the human being has been expressed in contradistinction to the animal”, to the extent that also “in popular fairy tales the metamorphosis of humans into animals is a recurring punishment”. In the animal, we find not only the negative (the bestial side) but also the phantom of a negativity that is disconcerting and threatening³.

¹ See N. Perullo, *Bestie e bestioni. Il problema dell'animale in Vico*, Napoli 2002, p. 19.

² See C. Sini, *Il simbolo e l'uomo*, Milano 1991, p. 13 ff., on the review of the symbolic field operated by René Aléau.

³ M.Horkheimer - T.W. Adorno, *Dialectic of enlightenment* (1944), trans. E. Jephcott, Stanford CA 2002,

There is an actual anthropological mechanism at work, that belongs to the inalienable fund of Western human thought. It has driven darkness and disorder back to their hellhole by expunging the animal from man. This is a typically paranoid procedure that, unaware of the inner society of man, claims to attribute to others (people or animals) attitudes and thoughts that instead belong to us as humans. It is easier (and less painful) to remove them than to recognize them.

Levy-Strauss (1962) describes this as a “cercle vicieux”, introduced by western man

avec la séparation radicale entre l’humanité et l’animalité, qui aurait servi plus tard à exclure de la première d’autres hommes et à construire un humanisme réservé à des minorités toujours plus restreintes⁴.

Animalization is often used as a strategy to dehumanize the other, but this in turn is possible because a preliminary bestialization of the animal world has already been made, with the weapons of domination and reification. Moreover, the domestication of animals has been a formidable testing ground for the enslavement of other men. In the words of Edgar Morin, “l’asservissement du monde animal a créé les modèles de l’asservissement de l’homme par l’homme”⁵. For Jean-François Lyotard, the animal that suffers random, indifferent cruelty, not having “the possibility of bearing witness according to the human rules for establishing damage” has functioned as a portentous “paradigm of the victim”⁶.

The fault lines that arise from the meeting of human otherness with the non-human have produced a substantial body of knowledge from civil and criminal lawyers, forming a metaphorical space in which juridical discourse (even more than the medical one) has produced multiple variations of the non-human. These range from the *errata corpora*, freaks born with bestial features, to the moral monsters that kill with keen savagery. On a symbolic level, we can find amazing fictitious creatures in literature. Consider the automaton of Descartes, with no feelings or conscience, unable to reason, suffer or rejoice, yet so pretentious as to be assumed as an icon of the forms of domination and annihilation of man over every other non-human living being⁷. It is an animal

pp. 203, 206.

⁴ A. Rivera, *Humains et animaux: la construction de la nature e de la culture, de l’identité et de l’altérité*, in G. Bartheleyns et al. (eds.), *Adam et l’Astragale. Essais d’anthropologie et d’histoire sur les limites de l’humain*, Paris 2014, p. 314 ff.

⁵ Yet there is more, because “aujourd’hui l’asservissement des artefacts cybernétiques prélude peut-être à un nouveau type d’asservissement informationnel de l’homme par l’homme”: E. Morin, *La Méthode*, I, *La nature de la nature*, Paris 1977, p. 247.

⁶ See J.-F. Lyotard, *The differend: Phrases in dispute* (1983), trans. G. Van Den Abbeele, Minneapolis MN 1989, p. 28; on which the considerations of A. Rivera, *Humains et animaux*, cit., p. 322.

⁷ M.T. Marcialis, *Sensibilità e materia. Uomo e animali nel Settecento*, in A. Di Meo - S. Tagliagambe (eds.), *Teorie e filosofie della materia nel Settecento*, Roma 1993, p. 91 f. For the genealogy of an ecological

that never existed, a creature that left no trace in the sources and fossil finds - not unlike the Bovigus by Eduard Huschke, the most learned among the scholars of Roman law (as Jhering describes him in a tone that is trenchant to say the least!). Yet that imaginary animal must have existed, because - for a sort of absolutism of reason - a class of census could not have been deprived of its animal to be considered as *res mancipi*. For the ineffable jurist of Göttingen, in ploughing operations, man must perform bodily movements that are in contrast with his universal nature, and for this very reason, he must not have originally had the need to perform. As we can see, the Roman law professors in the second half of the 19th century - supported by a rational-natural law - end up encroaching upon the territory of zoology, and give life to an extra animal for the sole purpose of making a metahistorical law work⁸.

At the boundary between human and inhuman, there are two distinct strategies: analogy and opposition. However, it would be a mistake, to think of them as procedures that are mutually exclusive. Lawyers have always been very good at combining them, now proposing one, now the other - not in order to remove the *uncanny*⁹, but to name it and capture it in the meshes of law. After all, it was Aristotle who inaugurated the scale of definitions of the living with an analogical procedure, giving slaves, barbarians, women, dwarves and, (for our purposes) beasts their rightful place¹⁰.

In the Middle Ages, the relationships between humans and beasts “became multiple, complex and ambiguous, since animal life is necessarily represented in terms of social relationships similar to those of human society”¹¹. The sexual fantasy that associates animals with impurity and lust has remained. Regarding the physical union, the natural animal position (“*quomodo de animalibus*”) was called into question, to bring the sinner to account for having been carnally joined “*cum alia aliqua retro, canino more*”. Sometimes, in festivities and games, a judicial process was invented for animals guilty of certain crimes. We can take the example of the sow in a Normandy village in 1386 that was first “wrapped

humanism, see the complex essay by L. Battaglia, *Alle origini dell'etica ambientale: uomo, natura, animali in Voltaire, Michelet, Thoreau, Gandhi*, Bari 2002; in particular the chapter dedicated to “Voltaire e la comunità terrestre”, p. 43 ff.

⁸ R. von Jhering, *Scherz und Ernst in der Jurisprudenz* (1884), Neu herausgegeben von Max Leitner, Wien 2009, p. 191 f.: “In seiner ‘Verfassung des Servius Tullius’ (Heidelberg 1838) gelangt Huschke zu der Überzeugung, daß den fünf Censusklassen fünf zu den *res mancipi* gehörige Thiere entsprochen haben müssen, so daß jede das ihrige hatte, wie jeder der vier Evangelisten das seinige. Allerdings kennen die Römer nur vier, was aber Huschke nicht genirt, indem er dem Mangel durch Erfindung des fehlenden fünften abhilft”.

⁹ S. Freud, *The ‘Uncanny’* (1919), in J. Strachey (ed.), *The Standard Edition of the Complete Psychological Works of Sigmund Freud*, XVII, London 1955, p. 220: “the uncanny is that class of the frightening which leads back to what is known of old and long familiar”.

¹⁰ See Perullo, *Bestie e bestioni*, cit., p. 20.

¹¹ F. Moretti, *Dal ‘ludus’ alla laude. Giochi di uomini, santi e animali dall’Alto Medioevo a Francesco d’Assisi*, Santo Spirito (Ba) 2007, p. 37 (my translation).

up with a kind of human figure mask” and then left hanging upside down by the gallows. It had been judged guilty of leaving a child alone in the cradle¹².

Even the social imaginary of the heretic is constructed analogously when it likens those who deviate from the right faith to the beasts that the Scriptures draw from a mythical past: Idria, the filthy animal that feeds on the wounds that the righteous inflict on it; foxes, which create underground lairs for themselves, remaining hidden and protected; and the serpent, which in a prophetic sense symbolizes the poison of the Manichaeans and the Donatists¹³. As Giovanni Cazzetta would say, *unknown enemies*, “ferocious beasts who men cannot trust or socialize with”¹⁴.

Therefore, we should certainly not be surprised that even in the 1960s a French civil lawyer, René Savatier, explained the contractualization of marriage and the falling into oblivion of the conjugal debt from the *Code Civil* as the outcome of an effort to definitively remove the conjugal union from the sphere of bestiality¹⁵.

There was a sort of long-lasting zoomorphism that reached its most sublime aesthetic version in the Renaissance treatises of physiognomy, such as in the anonymous *De diversa hominum natura* (Lyon 1549)¹⁶ or in the more well-known *De humana physiognomonia* by Giovan Battista Della Porta (1584)¹⁷. We can see a construction of human types whose somatic features show animal characteristics: the defiant, rearing horse; the shy, irascible deer; the greedy, irritable lion; the ugly, malicious monkey; and the ambiguous, effeminate peacock. This follows a widely-held episteme that prefers equivalence and likeness¹⁸.

On the other hand, in the eighteenth century it was madness that borrowed the mask of the beast. For Michel Foucault, “the men chained to the walls of the cells were not seen as people who had lost their reason, but as beasts filled with snarling, natural rage”. In those menageries and pigsties, madness “was revealed in all its immediate, animal violence”. In short, it was a form of

¹² Ivi, p. 35 ff. (my translation of quotation).

¹³ See F. Migliorino, *Materiali per l'immaginario del nemico interno. Il trattato "De haereticis" di Konrad Braun*, in A. Melloni (ed.), *Tutto è Grazia. In omaggio a Giuseppe Ruggieri*, Milano 2010, pp. 329-344.

¹⁴ G. Cazzetta, “*Qui delinquit amat poenam*”. *Il nemico e la coscienza dell'ordine in età moderna*, in “Quaderni fiorentini per la storia del pensiero giuridico moderno”, XXXVIII (2009), p. 494 (my translation).

¹⁵ See R. Savatier, *Le droit, l'amour et la liberté*, 2^e édition, Paris 1963, p. 24 f.: “Et il a raison de penser aussi que, comme par tout contrat, l'homme libre s'y engage. Parce qu'il est libre et raisonnable, il ne peut se contenter de 'vivre sa vie' comme le bêtes. [...] La promotion sur l'animal est capitale!”.

¹⁶ See F. Caroli, *Storia della fisiognomica. Arte e psicologia da Leonardo a Freud*, Milano 2007, p. 42. The Italian version (for the printer Giovan di Tournes, Lyon 1550), edited by Paolo Pinzio, had a considerable influence on Renaissance pictorial culture.

¹⁷ See Caroli, *Storia della fisiognomica*, cit., p. 68 ff. For the Italian translation see, G.B. Della Porta, *Della fisionomia dell'uomo*, Napoli 1598.

¹⁸ To get a broader idea: *Fisionomia con grandissima brevità raccolta da i libri di antichi Filosofi, Nuovamente fatta volgare per Paolo Pinzio. Et per la diligenza di M. Antonio De Moulin messa in luce*, Lione 1550, p. 41 ff.

madness which was related to nothing but itself. Crowds of onlookers gathered around this extreme analogy. The madmen of Bicêtre were put on display like exotic beasts, for the amusement of the first lout to come along with some money to spend¹⁹.

The curiosity of the masses did not spare those four or five *enfant sauvages* with typically animal ways and features, that were found and captured on the edge of forests of Europe in the same years. They walked on all fours, they were covered with hair all over their bodies, and above all they did not speak. That meant they were deprived of the most human of attributes: language. Yet there was a vital distinction. The madmen-animals were locked in their cages with no means of escape. The *homines ferri*, as Linnaeus classified them, were an unexpected resource of enlightenment to test the auroral *Grammaire des civilisations*²⁰. Commitment, re-education, and experimentation combined to show that with the learning of good manners, the “subhuman” could access the full and complete civil condition (i.e. human).

Even the Aveyron savage remained prey to the insatiable wonder of the curious. Unlike the mad people, however, the little lost boy was welcomed into the salons; he was given a living allowance and - in our days - even a film by François Truffaut. Despite Dr. Itard’s commendable efforts, the willing savage never left his small, insignificant zoological enclosure. In the end, a completely different explanation was provided by 19th century psychiatry: he had a congenital form of imbecility²¹.

Modernity gives this polarity a different and far more radical curve. The emergence of the human sciences, between the 19th and 20th centuries, functioned as a sort of essential switch to the Human/Inhuman dichotomy, with all the retroactive effects that the so-called liminal space made possible. Theories of degeneration are built on the idea of falling into the condition of ferocity from which man has laboriously elevated himself. Galtonian eugenics aims to cleanse the race, freeing it from the deadly agents that tend to push it back into its bestial past. Le Bon’s theory of crowd psychology incorporates the new phenomenon of “mass” within the bloodthirsty ferocity of the herd. For Etienne Balibar, the “bestialization of individuals” was the most formidable tool of modern “theoretical racism”²². Moreover, Nazi zoomorphism, was enriched

¹⁹ See M. Foucault, *History of Madness* (1961), trans. J. Murphy and J. Khalfa, New York and London 2006, p.144 ff., who, regarding the presumed therapeutic effects of madmen being made to labour like beasts of burden, observed: “In this reduction to bestiality, madness found its truth and its cure. When the madman became a beast, the animal presence in him removed the scandal of madness, not because the beast had been silenced but because all humanity had been evacuated” (150).

²⁰ The expression is from Fernand Braudel’s classic work, *Grammaire des civilisations*, Paris 1987.

²¹ See at least L. Malson, *I ragazzi selvaggi* (1964) (in the appendix: *Il ragazzo selvaggio*, di Jean Itard), trans. P.V. Molinaro, Milano 1971; A. Curran, R.P. Maccubin, D.F. Morrill, *Faces of monstrosity in Eighteenth-Century thought*, in “Eighteenth-Century Life”, n.s., XXI, n. 2 (May 1997), pp. 176-202.

²² E. Balibar, *Race, Nation, Class. Ambiguous Identities* (1988), trans. C. Turner, London and New York 1991, p. 57.

by a “vast range of metaphors related to the Jews as parasites”: they were “maggots in a decomposing body”, drones, spiders, rats, scroungers, leeches and vampires. According to Werner Bohleber the massive destructiveness of the anti-semitic ideas of purity had a lethal outcome: “Via their dehumanization as repulsive, nauseating vermin, the Jews were also excluded from human society”²³.

Even nowadays it is quite astonishing that even in the field of international humanitarian law it remains difficult to define the Human /Inhuman dichotomy without having to resort to the human/animal semantic space. Of course, the notion of inhuman or *inhumain* treatment is always linked to the idea of respect for human dignity and is derived from the comprehensive formula (typical of the international lexicon of human rights) of torture and inhuman or degrading treatment or punishment.

The commentary on art. 130 of the third Geneva Convention describes the idea of *humanité* in the treatment of prisoners fallen into enemy hands: “une protection telle qu’ils conservent leur dignité humaine et ne soient pas ravalés au niveau de la bête”. The bestial condition is therefore the antithesis of a life worth living with dignity. The violation of this rule is a war crime (Article 8 of the founding Statute of Rome regarding the International Criminal Court: “(II) Torture or inhuman treatment, including biological experiments”. International criminal law also includes general conduct relating to “inhuman acts” in the various crimes against humanity (article 7) and genocide (article 6, Rome Statute).

Regarding the semantics of inhuman treatment, the judgment of the European Court of Human Rights in the case of Ireland v. The United Kingdom, originating from an inter-state appeal of the 1970s, offers us the interesting separate opinion left in the records by the judge Gerald Fitzmaurice:

For my part, I consider that the concept of “inhuman” treatment should be confined to the kind of treatment that (taking some account of the circumstances) no member of the human species ought to inflict on another, or could so inflict without doing grave violence to the human, as opposed to the animal [sic], element in his or her make-up²⁴.

This shows the extent of the problematic use of the terms.

The issue is handled with scholarly arguments by Jeremy Waldron²⁵, who lists four kinds of “degradation”: *Bestialization* (“It is treatment that is more fit for an animal than for a human, treatment of a person as though he were an animal”);

²³ W. Bohleber, *Destructiveness, Intersubjectivity and Trauma. The Identity Crisis of Modern Psychoanalysis*, London 2010, pp. 165, 166.

²⁴ European Court of Human Rights (Plenary), Case of Ireland v. The United Kingdom (Application no. 5310/71), Judgment of 18 January 1978, Series A, no. 25, Separate Opinion of Judge Sir Gerald Fitzmaurice, § 22.

²⁵ See J. Waldron, *The Coxford Lecture. Inhuman and degrading treatment: the words themselves*, in “The Canadian Journal of Law and Jurisprudence”, XXIII, n. 2 (July 2010), p. 282.

Instrumentalization (“We exploit animals as though they were mere means, objects to be manipulated for our purposes”); *Infantilization* (“A third type of degradation might have to do with the special dignity associated with human adulthood: an adult has achieved full human status and is capable of standing upright on his or her own account, in a way that (say) an infant is not”); *Demonization* (“in the way we treat our enemies or terrorists or criminals, those we have most reason to fear and despise”).

Here are two more examples. In a trial before the International Criminal Court (defendant: Jean-Pierre Bemba, former vice-president of the Democratic Republic of the Congo), a victim bore witness, reporting on the bestiality of the executioner: “I was treated like an animal, and I cannot live normally. I was a woman with dignity, but I lost my dignity. I suffered inhuman treatment”. With the additional punishment of infamy, the woman suffered the ostracism of the community. In the same trial, another witness reported that his sister had been killed “like an animal, like a dog”²⁶.

The ruling of the Chamber of First Instance of the Tribunal for the former Yugoslavia (16 November 1998, Celebici case), begins with the commentary on Article 147 of the Fourth Geneva Convention:

The aim of the Convention is certainly to grant civilians in enemy hands a protection which will preserve their human dignity and prevent them from being brought down to the level of animals²⁷.

Some years later, in the Kvočka trial, of 2 Novembre 2001, Drazenko Predojevi, a guard of Radic, was described by a witness as being so violent that he was like a “raging animal”²⁸.

In defence of human rights (what a paradox!), we still draw on the alleged base nature of animals. As Étienne Balibar said, men insist on removing the bad side of history out of human reality²⁹.

Finally, biotechnologies strengthen the ties that bind human references and non-human otherness, “whether biological or mechanical”. There are even those - like Roberto Marchesini - who observe that *hybridizing sin* is finally

²⁶ International Criminal Court, The Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05 – 01/08. The dossier on the case can be consulted on the Court website <www.icc-cpi.int>. For a reference to the testimony quoted in the text, see the weekly report of 2 December 2011, retrieved September 18, 2018 from: <http://www.bembatrial.org/2011/12/last-overview-witness-in-bemba-trial-recounts-murders-rapes-and-pillaging>.

²⁷ International Criminal Tribunal for the former Yugoslavia, sentence of 16 Novembre 1998 in the case Celebici, ICTY, Prosecutor v. Zejnil Delalic, Zdravko Mucic, also known as “Pavo”, Hazim Delic Esam Landzo, also known as “Zenga”, case no. IT-96-21-T, par. 521-522, 532.

²⁸ International Criminal Tribunal for the former Yugoslavia, sentence of 2 November 2001 in the case of Kvočka, ICTY, Prosecutor v. Kvočka et al., case no. IT 98-30/1-T, par. 569 (Witness B, T. 2428-2429).

²⁹ E. Balibar, *Razzismo e nazionalismo* (1987), in E. Balibar - I. Wallerstein (eds.), *Razza, nazione, classe. Le identità ambigue*, trans. O. Vasile, Rome 1990, p. 82.

pushing the boundaries, sowing its temptations and opening “a new season of awareness that it would not be wrong to call post-humanistic”. It is a transitive conjugation that dismantles anthropocentrism with the same effectiveness as the admirable *Mille plateaux* of Deleuze and Guattari. In the end, one wonders if we should admit that our humanity is really a hybrid fruit, so as not to run the risk that the fear of the different (*teratos*) and the horrific (*deinos*) is removed (and not resolved), to the advantage of new, terrifying, liquid utopias³⁰.

³⁰ See R. Marchesini, *Post-human. Verso nuovi modelli di esistenza*, Torino 2002, pp. 179, 510 ff. (my translation of the quotations).