



CORE ANALYSIS

Fenced Europe: A more-than-human perspective to border control. The case of Białowieża

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Abstract

Belarus willingly uses migrants as a tool for political pressure, sending them into forests bordering the EU. This prompted Poland to secure its territory with additional troops and, first, to build a razor wire fence, and, second, to build an entire wall made of steel and concrete. The humanitarian situation of migrants stuck in the Białowieża forest has been dire. An underexposed theme is how not only people were hurt by the border policies, but non-human animals were also affected. As the effects of fencing ‘fortress Europe’ on wildlife are widespread (spatial behaviour, movements and gene flow), this paper uses the Polish–Belarusian border as a case study of a conflict between human border policies and non-human interests. We argue that the plans for the Polish wall are illegal, politically unjust and unethical, also from a more-than-human perspective. The wall is illegal because requirements under EU environmental law, in particular Article 6 of the Habitats Directive, were not met. The wall is unjust because it painfully demonstrates how animals’ communal or even liminal status is far from being recognised. Finally, the wall is unethical because it fails to account for the vulnerability of both humans and non-humans.

Keywords: Border control; interspecies justice; animal law; European Union; Poland

1. Introduction

In the spring of 2021, Ryanair Flight 4978 received a false bomb threat on its way from Lithuania to Athens, and was stopped in Minsk, Belarus. Two passengers were taken out and arrested: the political dissident and journalist Roman Protasevich and his partner. This was one of many actions taken by the Belarusian government after the rigged 2020 elections sparked public protests. The incident, as well as the unfair elections and brutal repression of democratic opposition that followed, were widely condemned. The European Union established sanctions: European airlines were forbidden to fly over Belarusian airspace and Belarus airlines were banned from the European airspace; restrictions on import and export were enacted, and further economic sanctions against Belarusian government officials and state-owned companies followed. Belarus, a dictatorship regularly infringing on human rights, answered with military provocations, causing a massive influx of refugees from the Middle East into the European Union, and engaging in

trafficking of migrants from the Middle East and Africa.¹ Thus, it willingly uses migrants as a tool for political pressure, sending them into forests bordering the EU.

Although Latvia, Lithuania and Poland declared the crisis a hybrid warfare,² the European Union, lacking legal power to act,³ only assisted through sending additional Frontex officers and equipment (and only in cases when such help was accepted).⁴ Thus, the management of the crisis fell, either purposefully or out of necessity, mostly on the Member States.

The case of Poland was perhaps the most distinct. Poland introduced the state of emergency,⁵ refused assistance from the European Union, and prevented or hindered medics, journalists and NGOs workers from entering the 3-kilometer-wide border zone. Migrants attempting to cross the border in the wilderness in harsh Autumn and Winter conditions, risked being pushed back by Polish guards or harassed by Belarusian military, but concerns over their fate were mostly ignored by officials.⁶ Instead, the decision was made to build a 60-kilometers long barbed wire fence, and later on – a 180-kilometers long (and 5 meters high) concrete-metal wall, to stop the migration. As of January 2023, the zone no longer exists, and the construction of the wall is finished. The Military and the Border Guard are still active in the region, though, patrolling the streets and wild areas, stopping and detaining all migrants, who – contrary to declarations of policy-makers – are still coming.⁷ Indeed, the wall does not meet its aim to a full extent, as refugees use ladders and dig tunnels to circumvent it. At the same time, though, it unintendedly affects non-human animals' spatial behaviour, movements and gene flow, dividing hundreds of species living in the Białowieża ecosystem.

¹See eg: Amnesty International, 'Human Rights in Belarus 2022', <www.amnesty.org/en/location/europe-and-central-asia/belarus/report-belarus> accessed 21 February 2022; European Commission, 'EU Further Steps Up Its Support to the People of Belarus' (*Press Release*, 12 December 2021), <ec.europa.eu/commission/presscorner/api/files/document/print/en/ip_21_6794/IP_21_6794_EN.pdf> accessed 21 February 2022; R Denber, 'Belarus's Shocking New Low in Crushing Dissent' (*Human Rights Watch*, 2021) <www.hrw.org/news/2021/05/24/belarus-shocking-new-low-crushing-dissent> accessed 21 February 2022; ICAO, Fact-Finding Investigation, 'Event Involving Ryanair Flight FR4978 in Belarus Airspace on 23 May 2021' (Report of January 2022) <www.politico.eu/wp-content/uploads/2022/01/19/ICAO-Fact-Finding-Investigation-Report_FR497849.pdf> accessed 21 February 2022.

²O Ignatov, 'Behind the Frictions at the Belarus-Poland Border' (*Crisis Group* 2021) <www.crisisgroup.org/europe-central-asia/eastern-europe/belarus/behind-frictions-belarus-poland-border> accessed 21 February 2022.

³See Art 3.2 and Art 67.2 of the Treaty of the European Union; Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the Union governing the movement of persons across borders (2016) OJ UE L 77/1.

⁴See eg 'Belarusian Hybrid Attack on the EU' (Serwis Rzeczypospolitej Polskiej 2021) <www.gov.pl/web/sluzby-specjalne/belarusian-hybrid-attack-on-the-eu> accessed 21 February 2022.

⁵Regulation of the President of the Republic of Poland from 2 September 2021 declaring a state of emergency in certain towns and villages in the Podlaskie and Lubelskie Voivodeships (Dz.U. 2021.1612). After the elapse of the initial state of emergency (30 days), it was extended for another 60 days – the longest art 230 of the Constitution of the Republic of Poland allows. Later, a similar effect was achieved outside of the constitutional procedure of the state of emergency, through an ordinary act of law: Act of 17 November 2021 on the amendment of the Act on Protection of the State Border and other acts of law (Dz.U. 2021.2191).

⁶'In Poland, where is Frontex?' (*Politico* 2021) <www.politico.eu/article/poland-frontex-belarus-border-migration-crisis> accessed 21 February 2022; 'Belarus and Poland: Stop Sacrificing Migrant Lives to Political Dispute' (*UN Special Rapporteurs Office of the High Commissioner* 2021) <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27615&LangID=E> accessed 21 February 2022; 'Poland/Belarus Border. A Protection Crisis' (*Amnesty International* 2021) <www.amnesty.org/en/latest/research/2021/09/poland-belarus-border-crisis> accessed 21 February 2022; Third party intervention by the Council of Europe Commissioner for Human Rights under Art 36, paragraph 3, of the European Convention on Human Rights R.A. and others v. Poland (no. 42120/21); 'Belarus/Poland. Abuse, Pushbacks at Border, Human Rights' (*Human Rights Watch* 2021) <www.hrw.org/news/2021/11/24/belarus/poland-abuse-pushbacks-border> accessed 21 February 2022.

⁷M Chodolowski, 'Kryzys na granicy polsko-białoruskiej. Przez zaporę bez trudu można dostać się do Polski. Wystarczy się wdrapać' (*Gazeta Wyborcza* 2022) <bialystok.wyborcza.pl/bialystok/7,35241,28651070,kryzys-na-granicy-z-bialorusia-przez-zapore-bez-trudu-mozna.html> accessed 8 July 2022.

Granted, the harm done to the refugees in the cold forests and the treatment of these human beings as instruments of politics is very problematic and merits attention from both academic and non-academic perspectives. In this paper, however, we focus on a different and underexposed aspect of the border barring and its direct consequence, that is, the harm done to non-human beings. While some may feel uneasy with this focus because it could give the impression that we value non-human life more than human lives, one of our main points is precisely that, a priori, there is no such hierarchy. Moreover, in our view, comparing humans with animals as if such is something pejorative is unethical towards humans as well as non-human animals.⁸

Thus, we acknowledge the ‘animal problem’ to be a consequence of anti-refugee border policy adopted by Poland, which is harmful in many ways to human migrants. In Section 3 below, we argue that the harm to non-human beings is enough to argue that the wall is illegal – even without considering the harm done to the affected human beings. Moreover, even if the wall were to be legal, we argue in Section 4 that it cannot be politically just and ethical. Here we build on the call of animal rights scholars to recognise non-human animals as members of our political communities, which did not happen at all in the wall’s case. We introduce a more than human perspective, which ought to serve as standards for a just law.⁹ In Section 5, we turn from the critical to constructive thinking and propose two, non-exclusive, approaches to the problem which may help overturn current speciesism: political justice inclusive of non-human animals and vulnerability approaches.

Hence, methodologically speaking, in this paper we reflect on a case-study – the construction of the wall in the Białowieża forest – in three different contexts: firstly, a doctrinal legal one; secondly, one informed by political theory on what makes a liberal democracy ‘just’; and thirdly, one informed by post-humanist, more-than-human ethics. The wall is a case-study of the wider practice of fencing Europe and its effects on non-human animals. Ultimately, we argue that fencing Europe is excluding (othering) humans and non-human animals from outside Europe as well as non-human Europeans, whereas interspecies democracy combined with an ethics based on the vulnerability of these othered beings would require to take them into account.

2. The wall and its consequences

The enterprise started in January 2022,¹⁰ upon a special act of law,¹¹ which excluded the construction of the wall from the ordinary procedures of the public investments and controlling institutions. As of October 2022, it is finished, even though various critiques and comments were voiced from the very beginning of the construction (all of them were ignored). For example, a number of concerns were expressed by the Ombudsman of the Republic of Poland and the Senate,¹² pointing out that the adopted law and government policies stand in direct contradiction with the constitutional values and principles of protection of life and health, environmental law, right to information and safe work conditions. Moreover, the statutory restrictions concerning the

⁸See also D Merskin, ‘Species Traitor?: Foundations and Tensions in Human/Animal Scholarship and Advocacy’ in N Khazaal and N Almiron (eds), *Like an Animal: Critical Animal Studies Approaches to Borders, Displacement, and Othering* (Brill 2019) 125–59.

⁹Throughout the paper we use the terms “ethics” and “morality” interchangeably as synonyms, being aware that some authors chose to differentiate between them.

¹⁰Ruszyła budowa bariery na granicy polsko-białoruskiej (Komenda Główna Straży Granicznej 2022) <www.strazgraniczna.pl/pl/aktualnosci/9752,Ruszyła-budowa-bariery-na-granicy-polsko-białoruskiej.html> accessed 21 February 2022.

¹¹Act of 29 October 2021 on Building Fortification on the State Border (Dz.U. 2021.1992).

¹²The Senate is the upper chamber of the Parliament, where the opposition has a majority, although insufficient to successfully obstruct every initiative of the Sejm (the lower chamber of the Parliament).

border seemed to work around the constitutional limit on term of the state of emergency.¹³ From the beginning of border fencing in the Autumn of 2021, the situation at the border was protested by scientists, social activists and local communities.¹⁴ Finally, in January 2022, the Polish academic community presented an open letter to the European Commission urging it to intervene in the matter.¹⁵

The critique of the academic community is three-fold. First, securitisation was conducted with a rule of law deficit. Second, policies either ignored or infringed upon international law, human rights and basic humanitarianism towards migrants. Third, animal welfare and environment conservation were to be severely harmed. As mentioned, in this paper, we focus on the latter.

Hence, the debate on the proper and efficient means of security and migratory policies falls out of the scope of this paper. Nevertheless, it is important to stress here that the construction of the wall presents itself as a very political act. After all, administration of a territory and marking its borders, including a control over cross-border flows, is considered to be one of the most fundamental functions of a state. It is an expression of state sovereignty. Today, border constructions (especially fences) are becoming more and more common, dividing natural areas and forcing both human and non-human animals to adapt to the new spatial limits. Recent geopolitical developments, including the Russian aggression against Ukraine, have only fitted in the trend of a halt of globalisation processes and further securitisation of policies.¹⁶ Fencing the borders in Europe is also a consequence of the (mis)management of the European migrant crisis (either a fence or a wall has been built on the borders of Bulgaria, Hungary, Austria, Slovenia, Croatia, Greece, and Latvia, and not only on the external borders of the Schengen Area, but also between the Member States as in the case of Austria-Slovenia and Hungary-Croatia fences).¹⁷

Naturally, we do not want to downplay the importance of security. Opening all borders is probably an all too utopian suggestion,¹⁸ especially when they separate democracies from non-democratic jurisdictions. *Hardening* borders may (but not necessarily has to) support territorial defense.¹⁹ Directed against migrants and not hostile armies, however, it tends to produce

¹³Ustawa o budowie muru na granicy częściowo niekonstytucyjna' (Uwagi RPO dla Senatu, *Biuro Rzecznika Praw Obywatelskich* 2021) <bip.brpo.gov.pl/pl/content/rpo-granica-budowa-muru-senat> accessed 22 February 2022.

¹⁴See eg Szpila Collective & Helsinki Foundation for Human Rights, 'Humanitarian Crisis at the Polish-Belarusian Border' <<https://hfhf.pl/en/news/report-on-the-anti-repression-activities-of-the-Grupa-Granica>> accessed 5 March 2024; The 'Appeal of Non-Governmental Organizations to Stop the Construction of a Wall on the Polish-Belarusian Border' can be found at <<https://pracownia.org.pl/upload/filemanager/pracownia.org.pl/Dokumenty/Apel-organizacji-pozarządowych-i-ruchow-społecznych-o-wstrzymanie-budowy-muru-na-polsko-białoruskiej-granicy.pdf>> accessed 21 May 2022.

¹⁵'Powstaje zaporę na granicy polsko-białoruskiej' (*Ministerstwo Spraw Wewnętrznych i Administracji Rzeczypospolitej Polskiej*) <www.gov.pl/web/mswia/powstaje-zapora-na-granicy-polsko-białoruskiej> accessed 21 February 2022; Komunikat MSWiA, 'Ministerstwo Spraw Wewnętrznych i Administracji Rzeczypospolitej Polskiej' <www.gov.pl/web/mswia/komunikat-mswia8> accessed 21 February 2022. The open letter from the scientific community concerning the construction of a wall along the Polish-Belarusian border can be found at <naukadlaprzyrody.pl/2022/01/31/list-srodowiska-naukowego-do-ke-ws-budowy-muru-na-granicy-polsko-białoruskiej> accessed 21 February 2022; B Jaroszewicz, K Nowak and M Żmichorski, 'Poland's Border Wall Threatens Ancient Forest' 374 (2021) *Science* 1063.

¹⁶See eg SD Watson, *The Securitization of Humanitarian Migration. Digging Moats and Sinking Boats* (first published 2006, Routledge 2013); Z Bauman, *Strangers at Our Door* (Polity Press 2016), 1253–1269.

¹⁷K Kojzar, *Rysie i żubry bez dróg migracji, rozjechane żaby i węże. Puszcza zapłaczę przecięta przez mur* (Oko Press 2022) <oko.press/puszcza-zaplace-przecieta-przez-mur> accessed 21 February 2022; K Kojzar *Budując zapory nie rozwiążemy kryzysu humanitarnego. Naukowcy i miłośnicy Puszczy przeciwko murowi* (Oko Press 2022) <oko.press/naukowcy-i-miłośnicy-puszczy-przeciwko-murowi-na-granicy> accessed 21 February 2022; I Nazaruk, *W sercu Puszczy Białowieskiej ma powstać wielki magazyn materiałów do budowy muru* (Oko Press 2022) <oko.press/w-sercu-puszczy-białowieskiej-ma-powstac-wielki-magazyn-materialow-do-budowy-muru> accessed 21 February 2022; 'Polish-Belarus Border Wall Threatens Primeval Forest, Environmentalists Say' (*Reuters* 2022) <www.reuters.com/world/europe/polish-belarus-border-wall-threatens-primeval-forest-environmentalists-say-2022-01-28> accessed 21 February 2022.

¹⁸T de Waal, 'Als je om arbeiders vraagt, krijg je mensen' (*De Correspondent* 2013) <<https://decorrespondent.nl/288/als-je-om-arbeiders-vraagt-krijg-je-mensen/17078437728-bae82586>> accessed 15 June 2022.

¹⁹Indeed, democracy arguably needs to be 'militant', see J-W Müller, 'Militant Democracy' in M Rosenfeld and A Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012), 1253–1269.

humanitarian crises and exclude others from supposedly democratic communities. This in turn provokes fundamental questions of international justice. Looking at this problem from a post-humanist position, border policies express conscious and subconscious beliefs on whom we are ready to accept as members of a community, or even as a human and thus as equipped with basic rights and freedoms, as we will further expand on in sections 4 and 5 below.

Indeed, the internal contradictions of European democracy present themselves clearly not only in the case of human migrants, but also regarding non-human animals. Human-created national borders are meaningless to boars, birds and other non-human animals. Yet fencing and walling prevents the flow of all bodies and disrupts ecosystems in the border zone. Individuals may get entangled in a razor wire fence or get electrocuted by an electric fence and die instantly. They may get hurt, either with a fatal or crippling effect. Their migration may stop to a halt, whereas their survival depends on it. These are grave instances, conflicting with the aims of European, international, and national regulations on conservation of nature and humanitarian protection of non-human animals, as we will set out in the following section.

3. The illegality of the wall

The Polish border with Belarus runs through wild areas, many of them protected, including several Natura 2000 nature protection areas (ia Knyszyn Forest, Augustów Primeval Forest, Upper Narew River Valley) and, most importantly, the Białowieża Forest. This primeval forest stretches over the Poland-Belarus border and covers about 1.400.00 km². Białowieża is recognised as a UNESCO World Heritage site and it is home to many endangered or recultivated species, such as the European bison, wolf, bear, and lynx, protected both by European and Polish law.

Possible violations of the law arose at two stages: firstly, during the construction and secondly, after the wall was finished. In the process of building the wall, large parts of the forest were devastated and non-human animals living there were either hurt or scared, as in the case of breeding birds. The barrier required construction of access roads, sheltering the workers, making boreholes deep into the ground, laying concrete and installing metal components in a 24/7 scheme for 6 months. The 15-metre strip along the 186-kilometre border was completely cut and ploughed.

Furthermore, once finished, the wall cut wildlife population in two, depriving species of existing migration and breeding practices. Surely, 22 animal gates were built, but these will be opened only when the border tensions and people migrations halt, and they are too small for the large mammals protected by law (10–20 cm. in width). Moreover, the workers probably introduced invasive plant species to the Białowieża ecosystem, such as *Impatiens parviflora* and *Erechtites hieracifolia*, which will continue to flourish and threaten the indigenous species of the forest. Lastly, there is no confirmation that all of the barbed wire already laid will be disassembled and removed from the forests – thus presenting a dangerous hazard for any animal walking by.

In what follows, we reflect on how the construction of the wall violates environmental provisions at three levels: Polish domestic law, European law and international law. We use the Białowieża forest as illustrative for how the wall can violate environmental provisions across its whole length. Because of the scope of the paper, we do not discuss possible violations of acts of law outside of environmental, wildlife and animal protection, such as the 1951 (Geneva) Convention relating to the Status of Refugees or constitutional and human or fundamental rights protection of property.

A. Polish domestic law

The Polish parliament agreed to construct the wall adopting a so-called special act of law,²⁰ following the normal legislative procedure, but in this case – because of the special situation – explicitly excluding application of other laws. Therefore, the provisions of the Polish

²⁰Act of 29 October 2021 on Building Fortification on the State Border (Dz.U. 2021.1992).

Environmental Protection Law,²¹ the Act on the Protection of Nature,²² the Water Law,²³ the Building Law,²⁴ and many other acts of law protecting the environment, wildlife or regulating planning were said not to apply to the project. Moreover, the transparency of the process was disturbed, as the Public Procurement Law,²⁵ and provisions on a right to information on the environment,²⁶ and a right to public information²⁷ were explicitly proclaimed as not applying by the special act of law in its Articles 6, 7 and 9. What is more, Article 8(1) of the act enabled local *voivodes* (governors) to introduce a ban on entry in the area of 200 meters from the wall; Article 10 allows them to limit rights of use of any (!) real estate interfering with the construction; and Article 11 further provided a right of public authorities to expropriate a real estate owner.

Consequently, the construction of the wall was exempted from the application of almost any legal standard required by construction, water and environmental regulations (including an environmental permit), not to mention standards regarding public participation and social control of public administration. Clearly, it conflicts with environmental and public safety and at the same time infringes on individuals' rights and freedoms. From our perspective, the key flaw of the regulation is not only the disregard of the disastrous outcome of the construction to the wildlife, but also refraining from even assessing this outcome. It is perhaps best illustrated by the statement of the Polish General Directorate for Environmental Protection, which claimed that all 'natural' aspects were to be taken into consideration, and all interests of 'nature' would be respected (whereas it was obvious it is not possible by the very fact that the construction is situated in the protected areas).²⁸ This was to be further guaranteed by the special Group for the preparation and building of the fortification at the state border, which, the Directorate's statement forgot to mention, consists of the relevant members of the governmental administration.²⁹

Importantly, the lack of an assessment of the project's implications on the local ecosystem resulted in violations of Article 33(1) of the Act on the Protection of Nature, which implements Article 6(3) of the Habitats Directive – see also Section B below.

Even at the level of Polish domestic law, the construction of the border wall seems problematic. Because it will likely significantly affect the environment, the public should have been consulted about the decision, as required by Article 71(2) of the Act of 3 October 2008 on the Provision of Information on the Environment and its Protection, Public Participation in Environmental Protection and on Environmental Impact Assessments.³⁰ However, this did not happen.

Moreover, limitation of rights and freedoms or general principles of the Polish constitutional system which relate to wildlife and the environment are most likely unconstitutional. Polish constitutional law requires all statutes, thus including the special act of law on building fortification on the state border, to be compliant with both the Constitution,³¹ and the international agreements ratified with prior consent granted by a statute (in a negative sense, ie requiring to not infringe, and a positive sense, ie requiring to fulfil principles). According to Article 31(3) of the Constitution of the Republic of Poland, any limitation upon the exercise of

²¹Act of 27 April 2001 Environmental Protection Law (Dz.U. 2022.2556, amended).

²²Act of 16 April 2004 on the Protection of Nature (Dz.U. 2022.916, amended).

²³Act of 20 July 2017 Water Law (Dz.U. 2022.2625, amended).

²⁴Act of 7 July 1994 Building Law (Dz.U. 2021.2351, amended).

²⁵Act of 11 September 2019 Public Procurement Law (Dz.U. 2022.1710, amended).

²⁶Act of 3 October 2008 on the Provision of Information on the Environment and its Protection, Public Participation in Environmental Protection and on Environmental Impact Assessments (Dz.U. 2022.2185, amended).

²⁷Act of 6 September 2001 on Access to Public Information (Dz.U. 2022.902, cons.).

²⁸'Nie mur, a nowoczesna zaporą czyli bezpieczeństwo z poszanowaniem przyrody' (Generalna Dyrekcja Ochrony Środowiska 2022) <www.gov.pl/web/gdosc/nie-mur-a-nowoczesna-zapora-czyli-bezpieczenstwo-z-poszanowaniem-przyrody> accessed 21 February 2022.

²⁹The Group for the preparation and building of the fortification at the state border is envisaged by the Arts 5 and 12 of the special act of law and the Order no. 256 of the Prime Minister of 9 November 2021 (M.P. 2021.1042).

³⁰Dz.U. 2022.902 (n 27)

³¹Constitution of the Republic of Poland made on 2 April 1997 (Dz.U. 1997.78.483, amended).

constitutional freedoms and rights may be imposed only by a statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. However, such limitations shall not violate the essence of freedoms and rights, and they need to be necessary and proportional.

It is therefore impossible to accommodate with these frames the complete statutory exclusion of the constitutional policy of ensuring the ecological security of current and future generations and principles of sustainable development and protection of the environment, plus individuals' right to be informed of the quality of the environment and its protection established by Articles 5 and 74 of the Constitution. The complete disregard of environmental and wildlife conditions by the legislator ruled out the possibility of any realisation of constitutional principles and rights, instead of balancing between the safety and environment considerations in line with constitutional requirements. The prevalence of the essence of constitutional principles, freedoms and rights does not only rely on explicit interpretation of the Constitution but has been continually upheld by the Polish Constitutional Tribunal.³²

Finally, no provision of the special act of law excuses those acts of individuals against non-human animals that are prohibited and criminalised by the Penal Code,³³ the Act of 21 August 1997 on the protection of animals,³⁴ and the abovementioned Act on the Protection of Nature. According to Article 181 §§ 1, 3, 4 and 5 of the Penal Code, causing substantial destruction to animal life or 'destroying it' when protected, even unintentionally, is subject to a fine, limitation of liberty or the deprivation of liberty up to 2 years, while Articles 35 (1) and (1a) penalise intentional killing or abuse of an animal individual. These crimes may be committed during the construction phase of the wall, because the very presence of people in normally wild areas of primeval forest gives chances and increases the probability of morbid human-non-human interactions, even if, according to the justification of the special act of law, the wall would be 'safe' for the wildlife.³⁵

B. EU law

In principle, building a wall does not violate EU border laws. The Schengen Borders Code is silent on the matter.³⁶ Thus, it does not prevent Member States from fencing and walling the external borders of the European Union, although, as said, building the wall arguably infringes upon several human rights documents as well as the Habitats Directive.³⁷ Here, we zoom into the latter.

The Habitats Directive, together with the Birds Directive, forms the basis for the EU-wide 'Natura 2000 network' of protected habitats for birds and other species. It establishes a framework necessary for fulfilling the European Union goals in the sphere of protection of biodiversity. Article 6(2) of the Habitats Directive stipulates that 'Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated'. The Białowieża forest is such a special area of conservation, and the wall construction will result its deterioration, as set out above.

A priori, thus, the construction of the wall is to be avoided. Whether this is indeed the case should be tested pursuant to Article 6(3) Habitats Directive, which orders to assess appropriately what the implications are for a natural site of every project that is not directly connected with or

³²See eg Judgement of the Constitutional Tribunal of 12 January 1999 (P 2/98, OTK 1999 1.2).

³³Act of 6 June 1997 Penal Code (Dz.U. 2022.1138, amended).

³⁴Act of 21 August 1997 on the Protection of Animals (Dz.U. 2022.572, cons.).

³⁵Uzasadnienie do projektu ustawy o budowie zabezpieczenia granicy państwowej, druk nr 1657, 12 października 2021 r.

³⁶Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders, OJ L 77/1.

³⁷Council Directive 92/43/EEC of 21 May 1992 on the Conservation of Natural Habitats and of Wild Fauna and Flora, OJ L 206/7.

necessary to the management of the site. The wall in the Białowieża forest is such a project. This means that, according to the second sentence in Article 6(3) Habitats Directive, the Polish authorities cannot authorise the wall, unless they have ascertained that it will not adversely affect the integrity of the forest (and, if appropriate, after having obtained the opinion of the general public). These adverse effects should be absent in both the phase of construction as well as in the phase after the wall is built.

Importantly, under Article 6(4) of the Habitats Directive,³⁸ a plan or project can be carried out ‘for imperative reasons of overriding public interest’, even if an environmental impact assessment shows negative implications for the nature reserve in question. Poland considers the wall to be imperative for reasons of overriding public interests of public safety and human health: firstly, the interest to protect its sovereign state against an undesired influx of refugees; and secondly, also the interest to protect the human migrants by making it more difficult for Belarus to use these people as an instrument for political pressure. However, for the exemption of Article 6(4) to apply, three cumulative conditions have to be met. Sadly, they are not met in the present case. Firstly, the exemption only applies *after* an assessment of implications for the site has been carried out, whereas this assessment has not been made up until this day.³⁹ This alone makes the decision to build the wall illegal.

Secondly, Article 6(4) makes clear that a project can only be carried out for reasons of overriding public interests ‘in the absence of alternative solutions’. It is questionable whether there are no alternative solutions in this case: we think, in particular, of increased diplomatic efforts, but one could also think of building a refugee shelter in the borderland between Poland and Belarus outside the forest.⁴⁰

Thirdly, Article 6(4) requires that the Member State takes ‘all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected’. No such compensatory measures were taken in this case. Even if a proper impact assessment had been made (*quod non*) and even if there would be no alternative solution, this lack of compensatory measures causes the wall construction to violate the Habitats Directive.

The provision on compensatory measures ought to be interpreted in accordance with the precautionary principle. It is, after all, the exception to the general principle of inadmissibility of plans and projects with a negative effect on a special area of conservation.⁴¹ In this context, it is good to note that it is hardly possible, if not impossible, to compensate the damage done to the Białowieża forest. After all, this forest is one of the oldest in entire Europe – it is one of the last sites left of a forest that covered the entire European plain, a lowland area stretching from the coasts of France and Denmark to the Black Sea and far into Finland and Russia. Białowieża is one of the few parts of this ancient continental forest that still exists, thanks to a long history of preservation dating back to the 1300s.⁴² In the context of a project where trees need to be cut, compensation usually means planting new trees elsewhere. However, these young trees cannot be seen as proper compensation because it will cost hundreds of years to grow back a forest similar to Białowieża. The parts of the primeval forest that will be cut for the wall will be lost forever.

It does not help the case of the Polish authorities that they adopted the special act of law, exempting the construction of the wall from provisions of the environmental law. Both legislation and the decision to bar the border are legally defective since they infringe upon the Habitats

³⁸Implemented in Arts 33(2) and 34 of the national Act on the Protection of Nature.

³⁹We write this in January 2023.

⁴⁰Indeed, building roads towards and in the forest can actually increase military danger for Poland, because such roads can be used by military vehicles. Also assessing the public interest itself, therefore, it could be argued that no wall is better than building one.

⁴¹See Commission Notice, ‘Managing Natura 2000 Sites – The Provisions of Art 6 of the Habitats Directive’ 92/43/EEC (C(2018) 7261).

⁴²A Bobiec, ‘Białowieża Primeval Forest; The Largest Area of Natural Deciduous Lowland Forest in Europe’ 8 (2002) *International Journal of Wilderness* 33.

Directive. Articles 288 and 291 of the Treaty of the Functioning of the European Union specify clearly that a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, and Member States shall adopt all measures of national law necessary to implement legally binding Union acts.⁴³

C. International law

Furthermore, the barrier likely infringes upon the provisions of the World Heritage Convention,⁴⁴ and the Bern Convention on the Conservation of European Wildlife and Natural Habitats.⁴⁵

The World Heritage Convention was adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organisation (UNESCO) in 1972. The Convention defines what kind of sites can be put on the so-called world heritage list. Once a site is on the list, States may ask international assistance for activities like doing research and training staff in the fields of protection and rehabilitation of the heritage. The parties to the Convention may nominate sites to be granted the ‘world heritage’ status.⁴⁶ The Białowieża forest is on this list, meaning that Poland has, under Article 4 of the Convention, pledged to ‘do all it can’ to protect the forest and transmit it to future generations. This effort seems not to be made in the present case. Polish experts underline that the consequence of the construction might be that Białowieża is removed from the UNESCO World Heritage List.⁴⁷

The Bern Convention was adopted within the Council of Europe in 1972. Poland ratified it in 1995. The Convention aims to protect habitats and migratory species, particularly endangered species. The parties have the obligation to take appropriate measures to ensure their special protection, including the prohibition of significantly disturbing wild fauna, ‘particularly during the period of breeding, rearing and hibernation’.⁴⁸ Exceptions to these provisions in case of ‘overriding public interests’ can only be made under conditions very similar to those of Article 6(4) Habitats Directive: that is, Article 9 of the Bern Convention stipulates that there has to be no other satisfactory solution *and* the exception cannot be detrimental to the survival of the population. It is at the very least questionable whether these conditions will be met in the case of the wall. Cutting in two the area where many migratory species live likely has detrimental effects on their survival.

D. Violations of the law and disregard for the animals

The blindness for the fate of non-human animals in Białowieża could be remedied, at least to some extent, through simple compliance with the existing environmental law, respecting constitutional rights and freedoms in Poland, and fulfilling existing international obligations. That the law should be interpreted in this case in favour of non-human animals’ protection, is only further supported when considering political justice and ethics, as we will do in the next sections.

However, compensating non-human animals for the effects of human border policies seems to lack real balancing of human and non-human interests and inherently favour the former. And

⁴³Treaty on the Functioning of the European Union (OJ 2016 C 202/47, cons.).

⁴⁴Convention Concerning the Protection of the World Cultural and Natural Heritage, Adopted by the General Conference at its seventeenth session Paris, 16 November 1972.

⁴⁵Convention on the Conservation of European Wildlife and Natural Habitats (ETS No. 104), made in Bern, 19 September 1979 <rm.coe.int/1680078aff> accessed 21 February 2022, 15. For a comparable analysis on a number of agreements including the Bonn Convention that was adopted in the same year, see A Trouwborst, F Fleurke, and J Dubrulle, ‘Border Fences and their Impacts on Large Carnivores, Large Herbivores and Biodiversity: An International Wildlife Law Perspective’ 25 (2016) RECIEL 291–306.

⁴⁶See Art 11 of the World Heritage Convention.

⁴⁷B Jaroszewicz, K Nowak and M Żmichorski, ‘Poland’s Border Wall Threatens Ancient Forest’ 374 (2021) *Science* 1063, n 15.

⁴⁸Art 6 Bern Convention.

since law serves in a society rather as an instrument of seeking justice and realisation of interests than an inherent value, we believe the wall deserves a deeper critique, conducted in the political context.

4. The limits of law: the injustice and immorality of the wall

Apart from being illegal, the construction of the wall is also, or perhaps, primarily, unjust and unethical for failing to take into account a non-human perspective. Building on the observations above, in what follows, we argue that the injustice of the wall goes deeper and cannot be fully overcome through law, due to its inherent speciesist basis. By reproducing the exclusion of the more-than-human at three levels, certain human groups and animals are being ‘othered’ in the process. Speciesism, in this context, is understood as the ideology that belonging to a species is morally relevant, which translates into a prejudice against members of other species. It is used to justify and perpetuate forms of oppression against nonhuman animals, but more than that, as we will see, it is ‘an underlying framework for the support of other forms of oppression, specifically anti-immigrant and anti-refugee racism.’⁴⁹

A. Three levels of speciesism

In addressing issues such as the construction of the wall, the law has its limits. Law operates in the context of a society that perpetuates a speciesist ideology. We argue that speciesism manifests itself at three levels. First, at the most superficial level of legislation, speciesism translates in the classification of animals as ‘objects’ or ‘things’. Second, it translates, at the ‘deep structure of the law’, in the construction of a ‘paradigmatic human person’ as the template against which other beings are measured, hereby pushing non-paradigmatic persons to the periphery. Third, speciesism manifests itself in the exclusion of non-human animals from political institutions and decision-making processes.

At the first level, speciesism translates in the exclusion of non-human beings from the possibility of being subjects of rights, by classifying them as ‘objects’ or ‘things’. Even though many civil codes or statutes, including Article 1(1) of the The Polish Act of 21 August 1997 on the Protection of Animals, stipulate that animals are ‘not a thing’, it remains unclear in what legal category they do fall and most of the legal provisions applying to things apply accordingly to animals also. Since they are clearly not a ‘subject of law’, they must be an object, or at least law that applies to objects also applies to them. This contention undermines the very idea of consideration of animals and their legal protection. For example, an animal is considered a ‘product’ in European consumer law. Or, in the case of the Polish border wall, animals are wildlife, an element of nature, that is to be *conserved* as a kind of resource – along with trees, water reservoirs, or stones (and their protection goes only as far as is necessary for the protection of the nature, which – as we mentioned – is rather modest). Consequently, the interests of individual animals – capable of feeling pain and having desires – are ignored.

At the second level, speciesism translates into a privileged position for the ‘paradigmatic human being’ in society and law. Even today, in a society that purports to ensure rights to every member of the human species, many human individuals that are not like the paradigmatic and human person do not enjoy such rights in practice. This is partly due to the mechanism through which it is determined who is the ‘proper’ human, the ‘paradigmatic’ standard against which other individuals are measured. As Maneesha Deckha points out, historically, it is clear that ‘personhood was reserved for an elite sector of humanity: white, able-bodied, cisgender heterosexual men of

⁴⁹N Khazaal, ‘Introduction’ in N Khazaal and N Almiron (eds), *Like an Animal: Critical Animal Studies Approaches to Borders, Displacement, and Othering* (Brill 2019) 6.

property.⁵⁰ As Anna Grear explains, it is these ‘human hierarchies of being’, disavowing the feminine and the embodied that form the central subject of law.⁵¹ Wynter argues that such a concept of the human implicitly includes a particular way of being, a code of conduct that acts as a conceptual marker for European whiteness as the ideal human, granting individuals moral status only to the extent that they conform to this ideal.⁵²

At the third level, speciesism is present in the very fabric of society due to the anthropocentric basis of the institutions through which the law is created. In the liberal paradigm of present-day European constitutional democracies, political justice requires taking a procedural approach and/or taking into account the interests all of the subjects of law (being fair).⁵³ This *inclusiveness* is necessary, because contemporary pluralistic societies cannot form an order around a single set of values and norms. Therefore, where the law ignores the substantive interests of non-human animals, an appeal to *political* justice seems in place: only when non-human animals would be recognised as full actors in the political process, would their substantive interests be properly considered and they would be treated justly, as we will further expand on below in Section 5A.⁵⁴ It is the very act of political empowerment that counteracts ‘othering’ leading to unfair treatment. Take slavery, for example, perhaps the most obvious case of political injustice. In the past, certain groups of *hominum sapientium* were treated as non-humans – as legal objects – and it was deemed legally and culturally acceptable because they were deemed as existing outside of the political community. As the post-humanist philosophy teaches us, a critique of such ‘othering’ may be applied to non-human animals as well, who are deprived of political (hence also legal, at least partially) status.

Politicisation of the problem is further justified by at least two other factors. First, as pointed out in Section 2, the construction of a border wall, or even the very existence of borders, is a political phenomenon. Borders separate one community from another and securing it allows a society to defend itself against a genuine or an imagined threat. Walls are supposed to fend off attacks, bar access to vital supplies, or simply distance *the cultured* from *the barbarians*. They affirm a sovereign power over a territory and reaffirm a certain people’s collective sovereign agency. With the onset of the Enlightenment and the birth of the mass society, the control over border-flows (rather than borders in themselves) enabled governmentality – a phenomenon depicted by Michel Foucault as governing through managing people’s behaviour rather than simple disciplining the disobedient.⁵⁵

Hence, dividing space and population is and always will be a manifestation of power or rather a means of power.⁵⁶ Sometimes it is a matter of producing either an open or a closed society, as Karl Popper famously pointed out.⁵⁷ Interestingly, it was wildlife conservationists who first identified the phenomena of mass fencing borders in the post 9/11 world – more than a decade before political scientists and foreign affairs experts noticed the end of the globalisation era.⁵⁸

⁵⁰M Deckha, *Animals as Legal Beings: Contesting Anthropocentric Legal Orders* (University of Toronto Press 2021) 88.

⁵¹A Grear, ‘Deconstructing Anthropos: A Critical Legal Reflection on “Anthropocentric” Law and Anthropocene “Humanity”’ 26 (2015) *Law and Critique* 225, 231.

⁵²S Wynter, *No Humans Involved* (Studio Hudson & Moor’s Head Press 2015). See also K Syl, ‘Emphasizing Similarities Does Nothing for the Oppressed’ in A Ko and S Ko (eds), *Aphro-ism: Essays on Pop Culture, Feminism, and Black Veganism from Two Sisters* (New York: Lantern Books 2017) 37–43.

⁵³J Rawls, *A Theory of Justice. Revised Edition* (first published 1971, The Belknap Press of Harvard University Press 1999).

⁵⁴Consequently, in this paper we speak of political justice.

⁵⁵M Foucault, *The Birth of Biopolitics. Lectures at the Collège de France, 1978–1979* (first published 1979, Palgrave Macmillan 2008) 15 et seq.

⁵⁶J Volner, *The Great Wall. Along the Borders of History from China to Mexico* (Abrams Press 2019); D Frye, *Walls. A History of Civilization in Blood and Brick* (Scribner 2019); H Lefebvre, *The Production of Space* (first published 1974, Blackwell 1991).

⁵⁷K Popper, *Open Society & Its Enemies* (first published 1945, Princeton University Press 2013) 265 et seq.

⁵⁸JDC Linnell et al., ‘Border Security Fencing and Wildlife. The End of the Transboundary Paradigm in Eurasia?’ 14 (2016) *PLOS 1*; JDC Linnell, ‘Border Controls: Refugee Fences Fragment Wildlife’ 529 (2016) *Nature* 156; B Pokorny et al., ‘Border Fence: A New Ecological Obstacle for Wildlife in Southeast Europe’ 63 (2017) *European Journal of Wildlife Research* 1.

Second, politics is also biopolitics and biopower. With the advancement of the modern state and universal sovereignty, management of people as bodies belonging to the population became relevant to power. These bodies were not only directed and punished, but also administered. The idea formulated by Michel Foucault in his famous *Collège de France* lectures allows us to understand that one does not have to be recognised as a citizen, or even as a person for that matter, to be affected by a law.⁵⁹ Without getting into deeper analysis of Foucault's social theory, which is partially relevant here, the conclusion drawn from application of biopolitics to our case study is interspecies-democratic in a sense: animals fulfil the main requirement to be the subject of law and politics – as bodies, they may be of interest to a state wanting to manage space. The more-than-human approach to politics is further implied by the basic conclusions of the already mentioned posthumanism. To sum up this philosophical discourse, being a human, or a person endowed with rights is dependent upon recognition. Only those who are considered members of a moral, or perhaps an explicitly political community, are considered as subjects of rights and their interests are respected. Contrastingly, the others rely on grace, which is – by definition – applied arbitrarily to a bare life, as Giorgio Agamben famously put it.⁶⁰ According to Carl Schmitt, the division between *us* and *them* is essential to politics. If so, a truly inclusive democracy would not only be impossible, but also a-political.⁶¹

Prima facie this assertion seems to serve as a good argument against giving serious consideration to the questions of non-human animals, or even humans. If safety of the political community is at hand, humanitarianism is an ethical luxury that states can hardly afford. Hence, the welfare of animals (resp. refugees) may be taken care of only to the extent, and only if, it does not prevent realisation of the fundamental needs of the political community engaging in the process of securitisation. To paraphrase the famous statement of Robert Nozick, 'utilitarianism for animals and "others", Kantianism for us'.⁶²

At the same time, however, there are several authors who protest against presenting the historic deficiencies of social life as necessary and unchangeable. These include Giorgio Agamben and Hannah Arendt, who demand universal political justice. If human rights are truly human – natural and inalienable, they ought to be recognised in every human, not only in a citizen, a compatriot, or a member of another 'imagined community'.⁶³

B. 'Othering' humans and other animals

Speciesism thus penetrates our society and efficiently 'others' not only animals, but also human groups, pushing them to the periphery of society. In 'Like an Animal', Natalie Khazaal sets out how 'speciesism plays a formative role in questions of refuge, borders, displacement, migration, and dehumanization'.⁶⁴ According to her, 'speciesism is an underlying framework for the support of other forms of oppression, specifically anti-immigrant and anti-refugee racism'.⁶⁵ Essentially, speciesism translates into a way of seeing the world that 'allows a dominant group to subjugate a vulnerable group and to justify its oppression'.⁶⁶ The oppressed group is then defined by their 'animality', whereas the oppressors are the example of 'humanity'.

⁵⁹M Foucault, *Society Must Be Defended* (first published 1976, Penguin Books 2020) 239 *et seq.*

⁶⁰G Agamben, *Homo Sacer* (first published 1995, Stanford University Press 1998).

⁶¹C Schmitt, *The Concept of the Political* (first published 1932, The University of Chicago Press 2007).

⁶²R Nozick, *Anarchy, State, and Utopia* (first published 1974, Blackwell 1999) 39.

⁶³Agamben (n 60); H Arendt, *The Origins of Totalitarianism* (first published 1951, Harcourt Brace & Company 1979), 291 *et seq.*; H Arendt, *We Refugees*, in H Arendt (ed), *The Jewish Writings* (first published 1943, Schocken Books 2013) 264–74.

⁶⁴N Khazaal, Introduction, in N Khazaal and N Almiron (eds.), *Like an Animal. Critical Animal Studies Approaches to Borders, Displacement, and Othering* (Brill 2021) p. 5–6.

⁶⁵*Ibid.* 6.

⁶⁶Pedersen and Stănescu (n 64).

A helpful concept in this regard is the idea of the anthropological machine that was developed by Giorgio Agamben, through which the distinction between the proper human and the animal as ‘other’ is maintained.⁶⁷ Those found insufficiently human are vulnerable to being ‘dehumanized’ or ‘animalized’, whereas those individuals that are deemed sufficiently human are, in their turn, shaped in deeply questionable ways. This anthropological machine not only victimises animals, but also marginalised human beings and human animality, working ‘to institute, maintain and reproduce an entire world that rotates around the privilege of those most fully associated with “the human”, a grouping that has never included the entire human species and that has only ever included the tiniest fragments of the animal world’.⁶⁸ Here we see a deeply embedded form of anthropocentrism at work, with the paradigmatic subject as ‘Anthropos’.⁶⁹ Minority groups today also suffer from this limited representation of what constitutes humanity. As Vaughan-Williams states, this is even more the case for migrants and foreigners. She regards animalisation as ‘a powerful and recurring discourse—understood as an assemblage of linguistic and material phenomena—that structures many ‘irregular’ migrants’ testimonies of their embodied encounter with diverse aspects of European border security at various sites.’⁷⁰

Challenging the anthropological machine and the way in which it separates human from animal, would therefore not only be a positive development for animals, but also for equality between people, since other binary hierarchies (male–female, white–black, culture–nature) make use of the human–animal opposition.⁷¹ In other words, as long as the portrayal of certain individuals as ‘animal’ is a legitimisation of poor treatment, the anthropological machine will continue to work and the hierarchical distribution of power in which the human dominates the animal will remain intact. In extension thereof, practices such as the construction of the Białowieża border wall will continue to be based in a narrow anthropocentric worldview that reproduces oppression of those that are ‘othered’ by denying their relevance to ethical decision-making.

The problematic effect of the anthropological machine as an exercise of power through a representation of a superior ‘human’ versus reprehensible ‘animal’ seems to be confirmed by empirical evidence concerning the dehumanisation of certain groups of people. We can cite a large number of historical examples of situations in which the comparison of humans to animals was constructed as a legitimisation for ill-treatment or even torture. As Anne Peters argues, comparing humans to animals is a ‘standard discursive strategy to prepare, instigate, facilitate, and exculpate violence committed by humans against other humans throughout history’.⁷² One infamous example is the treatment of the Jewish population during the Second World War: the process of dehumanisation in which comparison with animals was the standard is frequently recorded.⁷³ Also during the genocide in Rwanda, the idea that Tutsis were like cockroaches played a major role in facilitating violence against this group.⁷⁴ Sometimes, animalistic descriptions that contribute to disrespectful treatment are also used towards women.⁷⁵ A similar process took place historically with regard to enslaved individuals, who were constantly portrayed as less than human beings and

⁶⁷G Agamben, *The Open: Man and Animal* (Stanford University Press 2002).

⁶⁸M Calarco, *Thinking through Animals* (Stanford University Press 2015) 64.

⁶⁹Grear (n 51).

⁷⁰N Vaughan-Williams, ‘“We Are Not Animals!” Humanitarian Border Security and Zoopolitical Spaces in Europe’ 45 (2015) *Political Geography* 1, 2.

⁷¹I Braverman, ‘More-than-Human Legalities Advocating an “Animal Turn” in Law and Society’ in A Sarat and P Ewick (eds), *The Wiley Handbook of Law and Society* (John Wiley & Sons, Inc 2015) 307–321.

⁷²A Peters, ‘Rights of Human and Nonhuman Animals: Complementing the Universal Declaration of Human Rights’ 112 (2018) *AJIL Unbound* 355.

⁷³J Steizinger, ‘The Significance of Dehumanization: Nazi Ideology and Its Psychological Consequences’ 19 (2018) *Politics, Religion & Ideology* 139.

⁷⁴WA Schabas, ‘Hate Speech in Rwanda: The Road to Genocide’ 46 (2000) *McGill Law Journal* 231–261.

⁷⁵LA Rudman and K Mescher, ‘Of Animals and Objects: Men’s Implicit Dehumanization of Women and Likelihood of Sexual Aggression’ 38 (2012) *Personality and Social Psychology Bulletin* 734.

compared to animals,⁷⁶ and in today's society, similar examples can be seen. In May 2018, for example, President Donald Trump made the following statement about migrants from Central America: 'We have people coming into the country, or trying to come in [. . .]. You wouldn't believe how bad these people are. These aren't people. These are animals.'⁷⁷ These examples show how the mechanism of animalising others legitimises their unequal treatment. We now see again such dynamic in the case of the construction of the wall. Whereas Belarus makes instrumental use of references to migrants in legitimising its construction, animals are no consideration at all when Poland enacted the special act on the wall. Thus, both animals and migrants are marginalised in the decision-making processes.

Here we clearly see the anthropological machine at work. As Maneesha Deckha states, 'animalization operates as an ongoing threat of dehumanization into a fully abject ethical and legal Other'.⁷⁸ The process by which, under the influence of the anthropological machine, the animal becomes the symbol of the inferior, functions in fact as a kind of archetype for all other forms of othering: 'animal' is an available category into which marginalised groups can simply be assimilated.⁷⁹ The negative association with animality thus seems to be related, at least to some extent, to the dehumanisation of minorities and migrants. We see that in the application of Agamben's framework, it is no longer about the separation between different (biological) species, but about the separation between the (social) construction of 'humanity' versus a construction of 'animality'. This separation acts as a mechanism through which power is exercised: those who do not have enough in common with the paradigmatic subject are pushed to the margins. This theoretical concept thus explains the dynamics underlying the construction of the wall, as both animals and marginalised human groups are not regarded as agents with a voice in the matter, but as objectified 'others' that are under mercy of the laws of nature. As Vaughan-Williams states, 'the animalisation of some "irregular" migrants [...] should be understood as a symptom of the zoopolitical operations of sovereign power.'⁸⁰

C. The biopolitics of the Białowieża border wall construction

Interactions of different species are political *per se*. That is, even an adequate application of fair political institutions might not be enough in case of human-non-human interactions, especially in the case of individuals living in the wild, outside of the political community. These are still othered and rely on grace, usually motivated by the recognition of human/non-human universal rights. In the case of Białowieża, not only was the law violated in relation to the animals living on the territory of the European Union, the Habitats Directive, and the Polish Acts of law on the Protection of Nature and the Protection of Animals, these laws would never have been applied to the individuals living in Belarus, even by the most law-abiding government. Moreover, in times of international tensions and conflicts, animals cannot rely on bilateral agreements regulating treatment of species living on both sides of a border.

In conclusion, when it comes to interspecies relations, fencing the Polish border in Białowieża is not only illegal, but also politically unjust and immoral. The injustice goes deeper than mere defiance of laws. Even if the wall was built in compliance with statutes and conventions, it would still be an effect of exclusion of Białowieża animals from the political community and failure to recognise them as sovereign beings with their basic rights and interests (which cannot be justified).

⁷⁶K Bradley, 'Animalizing the Slave: The Truth of Fiction' 90 (2000) *Journal of Roman Studies* 110.

⁷⁷Remarks by President Trump at a California Sanctuary State Roundtable (May 16, 2018), <www.voanews.com/usa/us-politics/remarks-president-trump-california-sanctuary-state-roundtable> accessed 21 May 2022.

⁷⁸M Deckha, 'Toward a Postcolonial, Posthumanist Feminist Theory: Centralizing Race and Culture in Feminist Work on Nonhuman Animals' 27 (2012) *Hypatia* 527, 219.

⁷⁹C Wolfe, 'In the Shadow of Wittgenstein's Lion: Language, Ethics, and the Question of the Animal' in C Wolfe (ed), *Zoontologies: The Question of the Animal* (University of Minnesota Press 2003) 44–94.

⁸⁰Vaughan-Williams (n 70) 9.

As unfolded above, the animals were violated, and their habitat has been clearly invaded by humans without any restraint. Finally, the very humanistic nature of politics results in a difficulty of even imagining a truly balanced human border policy. Even the most justice-oriented government is limited in its capacity to consider a shared sovereignty over a land due to the inherent anthropocentrism of human societies.

5. Beyond speciesism: potential paths towards interspecies justice

How to overcome this immoral and unjust situation? In the upcoming section, we present two alternative frameworks that are rooted in a more-than-human approach, as a way in which the hierarchical speciesist logic behind the construction of the wall can be challenged at its very core.

A. The path of political interspecies justice

The first framework we would like to explore builds on the recognition of animals as members of the political community. To cite Alasdair Cochrane, ‘each and every political community has important social interactions with animals (. . .) [and has to] make important decisions about whether those interactions should be regulated, how, for what reasons and for what ends’.⁸¹ The notion that animals are political beings was already fully expressed by Henry Salt in 1892.⁸² There is an unjust hegemony of humans over other species, which can be remedied only through a combination of public education, legislation, and direct political activity, as problems of legal subjugation, moral corruption, and economic exploitation are intertwined – and not only in the case of non-human animals, but also in that of workers, women, and minorities. Not coincidentally, in the 19th and early 20th centuries across the Anglo-Saxon world, the agenda of abolitionists, suffragists and sometimes even socialist organisations included the animal question; their strategies included co-operation with animal organisations, and often the people involved in abolitionist, suffragist, and socialist organisations were also members of animal organisations. Consequently, the idea that the animal question is to a large degree political is widely represented in contemporary philosophy, with authors such as Peter Singer⁸³ or Mark Rowlands⁸⁴ providing various political theories to support recognition of animal rights.

In Cary Wolfe’s ‘Before the Law’,⁸⁵ he analyses how law and politics express hegemony and subjectification, especially of non-human animals. The current order ‘others’ wildlife, exempting it from full legal protection.

An author like Wolfe may prefer to seek emancipation of animals through a biopolitical frame, criticising the Western paradigm for its reliance on contractualism, which traditionally involves an idea of reciprocity that would be possible between human actors only. However, interspecies relations *can* be translated into a more conventional political frame. This is where ‘Zoopolis’, the seminal work by Sue Donaldson and Will Kymlicka, comes in, which we present as an example of animal inclusive theory of politics.⁸⁶

According to Donaldson and Kymlicka, interspecies relations cannot rely solely on universal, inviolable, and natural basic individual rights like the right to life or the right to be free from torture or inhumane treatment. Whereas such negatively formulated rights might end human exploitation of animals, they do not make clear what non-exploitative relations might look like. Therefore, the authors continue to discuss ‘bounded’ citizenship.

⁸¹A Cochrane, *An Introduction to Animals and Political Theory* (Palgrave Macmillan 2010) 1.

⁸²H Salt, *Animals’ Rights. Considered in Relation to Social Progress* (first published 1892, Macmillan 1894) 83 *et seq.*

⁸³P Singer, *Animal Liberation* (first published 1975, Ecco 2002) 1 *et seq.*

⁸⁴M Rowlands, *Animal Rights. Moral Theory and Practice* (first published 1989, Palgrave Macmillan 2009) 118 *et seq.*

⁸⁵C Wolfe, *Before the Law. Humans and Other Animals in a Biopolitical Frame* (The University of Chicago Press 2013).

⁸⁶S Donaldson and W Kymlicka, *Zoopolis. A Political Theory of Animal Rights* (Oxford University Press 2011).

They call this citizenship bounded because it has the following three functions: (1) ‘nationality’: to allocate nationality to individuals, thus linking them to a territorial state; (2) ‘popular sovereignty’: to confirm that certain individuals are members of the sovereign people; (3) ‘democratic political agency’: to make individuals co-authors of the law. Every function adds to the ‘thickness’ of citizenship; an enslaved person may be considered a national but not a member of the sovereign people and in certain societies members of the sovereign people do not participate in the law-making process. Moreover, even in democratic societies, children and severely mentally disabled are not citizens in the third sense, which proves that ‘[t]he capacity for political agency is neither necessary nor sufficient for citizenship in these first two senses’.⁸⁷ Hence, citizenship status can (and should) be accorded to certain animals as well, namely to domestic animals, whom we have brought into our societies and who cannot live without humans because of how we bred them.

Zoopolis goes even further by arguing that domestic animals can and should be citizens in the third sense. Because domestic animals are linked to specific human beings, the latter could act as representatives. In this way, domestic animals could participate politically within a model of ‘dependent agency’ similar to dependent agency models developed for mentally disabled people.⁸⁸ More research is needed to find out individual preferences of animals and their full potential to engage politically, Donaldson and Kymlicka note.⁸⁹

Apart from 1) domestic animals, Donaldson and Kymlicka distinguish two other type of animals: 2) the animals living in the wild – to whom we should accord sovereignty status on their own territory; and 3) what they call liminal animals: non-domestic animals that nonetheless live among humans, such as pigeons, rats, or squirrels. They argue that these animals should be accorded the in-between status of denizens, similar to seasonal workers or members in communities that opt out of full citizenship status like the Amish. Fair and adequate treatment of all three categories of animals is a matter of political justice, not grace.⁹⁰

This paper focuses on wild animals, who should be treated, following *Zoopolis*, as citizens of foreign sovereign communities. They may enter into contact with people, eg when they enter neighbourhoods due to the lack of clear borders between their habitats and human settlements, or when people enter their habitats even if they should not. Just as in case of human foreigners, animals’ interests and rights should be included in human laws, stipulating respect for their liberty and life, and providing for their assistance when necessary. But most importantly, animals living in the wild should be treated as sovereign, free from human colonisation and invasion. Respect for territorial boundaries ought to be supplemented by a limitation of spillover costs (eg by ensuring environmental protection) and shared control of key international corridors including migratory routes.⁹¹ For instance, highways cutting through nature reserves should be redesigned to prevent collisions with animals.⁹²

These corridors are essential. They require ‘abandoning the idea that sovereignty must be univocal and absolute’, as Donaldson and Kymlicka write.⁹³ Hence, human sovereignty over the land – expressed in securing a border – and animal sovereignty – expressed in their legal status – are to be understood as parallel. Roads and fenced borders ought to include free and safe passages for animals in quality and quantity, necessary not only for their preservation, but also continuation of their migratory practices. One should not forget that similar precautions must be taken for nomadic peoples such as the Roma or Bedouin, clearly deprived of their rights in the face of the divisive nature of international order.

⁸⁷*Ibid.*, 57.

⁸⁸*Ibid.*, 59.

⁸⁹*Ibid.*, 122.

⁹⁰*Ibid.*, 62 *et seq.*

⁹¹*Ibid.*, 252 *et seq.*

⁹²*Ibid.*, 189.

⁹³*Ibid.*, 190.

From this perspective, in the Białowieża forest, the wall is an unjust intrusion upon the wildlife's sovereignty even if the planned 22 gates are fully realised and functional. After all, the construction of the wall itself is already devastating for the habitat of wildlife and for the forest itself. Moreover, the gates are not functional – in the case when they would have been big enough for bison to pass they would surely not stop human beings, and indeed, the 'gates' constructed are round holes with a diameter between 10 and 20 centimetres, far too small for animals like bison or wolves.

The idea of interspecies democracy is further pursued by Eva Meijer in her book 'When Animals Speak – Towards an Interspecies Democracy'.⁹⁴ She concentrates on the possibility of interspecies communication and, thus, *direct* agency of domestic and liminal animals, leading to an inclusive and deliberative democracy; she also comments on cases of migrating and wild animals. Her findings are further reaffirmed by the mere existence of another research field called more-than-human geographies, or animal geography, which is founded upon a claim that space and communities filling it are formed not only by human, but also human–non-human and non-human–non-human interactions. Animals (but also plants, objects, technologies) are agents.⁹⁵

According to Meijer, migrating animals, such as traveling geese, modify their routes analogically to people who 'vote by feet', ie in reaction to economic, geographical and social conditions in a given region. If geese are treated negatively, they try to avoid further contact – similar to humans who flee from political violence or discrimination. When initially not welcomed in a place of their migration, they claim the space by squatting, although trying to fit in the existing ecosystem. Consequently, says the author, there is no reason to ignore the interests of the geese, and deny them agency.⁹⁶ In the case of the border wall, one can only invoke the instances of animals being startled by the construction machines, or species tangled in the barbed wire (used before the wall), not to mention a disruption of the routes that land species took before. Animals living in Białowieża were neither heard, nor allowed to speak.

What is important about Meijer's perspective is the belief in the possibility of a direct interspecies political community, the notion set deeply in the continental postmodern political tradition, with its deliberative democracy, participation, and the theory of discourse. At the same time, her book takes a stance against the classical (Aristotelian) argument for political 'othering': that animals could not speak and barbarians could not speak the language, hence they were apolitical, left out of the community and at best put to work for the civilised.

In open societies, the wildlife origin of migrating animals does not really matter: they are to be included in policies just as in the case of domestic and domesticated species. This, in turn, indicates towards which type of the Popperian society Poland is moving. Walls and fences enclose, and do not allow contact and apprehension.

Finally, the political approach towards the construction of the wall in Białowieża invokes the ideas of international justice and transnational community, or, to put it simply, democracy across borders. If this is the ideal towards which the European Union aspires, one must examine the compliance of Polish border policies with domestic and European law to assess the rate of inclusiveness of European democracy. The fair law of peoples, to paraphrase John Rawls, ought to become the law of species. Unfortunately, the Białowieża border wall construction cannot be described as fair.

B. The path of vulnerability

In the case at hand, policies are construed not only against 'foreign others', but also (even if only through omission) against 'non-human others'. Traditionally, this process of othering has been

⁹⁴E Meijer, *When Animals Speak. Toward and Interspecies Democracy* (New York University Press 2019).

⁹⁵K Hobson, 'Political Animals? On Animals as Subjects in an Enlarged Political Geography', 26 (2007) *Political Geography* 250.

⁹⁶Meijer (n 94) 170 *et seq.*

countered in animal ethics by arguing that animals are sufficiently *like* humans in order to be included in the circle of consideration. Pointing to the rational capacities of animals, their intelligence, self-awareness, and ability to recognise themselves in a mirror, the traditional argument for ethical consideration of animals aims to demonstrate that excluding animals is a form of speciesism that is comparable to racism and sexism.⁹⁷ In doing so, the traditional argument however reproduces a form of (second-level) anthropocentrism, creating an abstract identity of ‘the animal’ that has a certain capacity in common with humans which renders it morally relevant. Such an approach does not challenge the underlying speciesist mechanism through which different marginalised groups are being ‘othered’ and excluded from decision-making processes. Hence, the process of othering cannot simply be undone by including animals in the scope of political concern because they are sufficiently ‘like’ humans, as the traditional argument for animal rights assumed.⁹⁸ As Natalie Khazaal states, ‘simply moving the speciesist line in the sand a little farther, as the critics suggest, won’t make the intended difference’.⁹⁹ The anthropological machine can never be challenged effectively by merely expanding the scope of what counts as human. Instead, we will have to look for ways to delink entirely from anthropocentric criteria of inclusion, recognising that we are like animals in fundamental ways.¹⁰⁰

Instead of asserting the human-ness of the ‘othered’ group of animals as traditional arguments for animal rights aimed to do, such reconceptualisation should aim to revalue ‘animality’ per se through a more-than-human approach. According to Gilles Deleuze, this means a ‘refusal to enact the ideals and subjectivity that the dominant culture associates with being a full human subject and to enter into a relation with the various minor, or nondominant, modes of existence that are commonly viewed as being the “other” of the human’.¹⁰¹ The aim should be to stop or even reverse the process of distinguishing between animal and human: to look for a way of thinking in which ‘human’ and ‘animal’ are no longer opposed and the paradigmatic human subject loses its privileged position. Such an approach strikes at the very heart of the anthropological machine. Thus, within this framework, we would revalue the animality that humans share with other animals through the concept of ‘vulnerability’ as the basis for ethical theory. This lens can then be used to look at the construction of the wall from a new perspective.

Vulnerability is not a new principle in ethics – it has been argued that without vulnerability, there would be no ethics at all – yet the concept is not often put central. To the extent that the vulnerability approach has gained ground, it has done so primarily in the context of feminist literature, as a critique of the dominant liberal ideology.¹⁰² Under the influence of the vulnerability approach, attention is shifted from the isolated individual to the concrete relationships between different beings in their actual context. It is no longer the isolated capacities of animals, but rather their relations, dependency and embeddedness in human society that forms the justification for their inclusion in ethical decision-making. Nothing prevents us from applying this vulnerability approach to animals as well,¹⁰³ or to nature at large.¹⁰⁴ Indeed, the vulnerability approach seems ideally suited to serve as a starting point for an ethics that applies equally to the relationships

⁹⁷S Wise, ‘Animal Rights, One Step at a Time’ in M C Nussbaum and C R Sunstein (eds), *Animal Rights: Current Debates and New Directions* (Oxford University Press 2004) 19–50; P Singer, *The Expanding Circle: Ethics, Evolution, and Moral Progress* (Princeton University Press 2011).

⁹⁸Such as T Regan, *The Case for Animal Rights* (University of California Press 1983).

⁹⁹Pedersen and Stănescu (n 64) 7.

¹⁰⁰C Wolfe, *Before the Law: Humans and Other Animals in a Biopolitical Frame* (University of Chicago Press 2012).

¹⁰¹F Guattari and G Deleuze, *A Thousand Plateaus* (University of Minnesota Press 1987); Calarco (n 68) 57.

¹⁰²D Dinner, ‘Vulnerability as a Category of Historical Analysis: Initial Thoughts in Tribute to Martha Albertson Fineman’ 1149 (6) (2018) *Emory Law Journal* 1149–1163; C. Bendall, Martha Albertson Fineman and Anna Grear, *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* 49 (2) (2015) *The Law Teacher* 266.

¹⁰³AB Satz, ‘Animals as Vulnerable Subjects: Beyond Interest Convergence, Hierarchy, and Property’ 16 (1) (2009) *Animal Law Review* 65.

¹⁰⁴See also LJ Kotzé, ‘The Anthropocene, Earth System Vulnerability and Socio-Ecological Injustice in an Age of Human Rights’ 10 (1) (2019) *Journal of Human Rights and the Environment* 85, 84.

between humans and non-humans and circumvents the destructive effect of the anthropological machine, showing how the process of othering continues the oppression and exclusion of those who are not sufficiently like the paradigmatic human person. The need to identify human traits in animals is removed: it is the state of vulnerability that we share with all life that is now central. As Martha Nussbaum states, '[h]uman beings are vulnerable animals, naked, needy, and weak. They are threatened both by an indifferent nature and by their own hostilities'.¹⁰⁵ It is not because humans are *like* animals that they count, but because essentially, humans *are* vulnerable animals themselves.

By thinking in terms of the state of vulnerability, we can thus move away from the limited interpretation of an abstract human standard against which we measure the value of others. The vulnerability approach gives us a handle on valuing this diversity for what it is, and bypasses the criticisms regarding the tyranny of intelligence, the abstract and disembodied thinking of moral individualism, and the meagre focus on one particular trait as a reason to view a being as a moral subject: a trait that is inevitably prejudiced by a certain portrayal of humanness.¹⁰⁶ There is no longer a need to designate a group of moral subjects who 'count' in exclusion of any group outside it; instead, we shift the focus towards the question of what the desired ethical response is to the shared vulnerability of all beings in the context of a rapidly warming planet. Louis Kotzé expresses this beautifully in the following quote:

Through the vulnerability lens and its focus on material embodiment, it is thus possible to value the non-human world and its diverse entities, not for their proximity to humans, but because the non-human world is itself materially vulnerable – a universal vulnerability that is intimately shared with the human world. Just like humans, non-humans are vulnerable as a result of internal biological/chemical/geological processes, and as a result of factors such as anthropogenic climate change – as is the living planetary order more broadly.¹⁰⁷

Understood as such, the vulnerability-lens makes it possible to look at the construction of the wall without starting from the human experience, enlarging the perspective to include a more-than-human awareness.

C. *Where the two paths cross*

In short, in our anthropocentric societies, we tend to look at issues from a very human perspective. Traditional animal ethics challenged this perspective by arguing that animals are sufficiently similar to humans to be included in the moral circle as 'person' with 'fundamental rights'. However, this only targets the first and most superficial form of speciesism. In this section, a different way of thinking has been proposed that gives rise to a more-than-human understanding of the border wall construction through the concept of vulnerability. The vulnerability lens changes our evaluation of the situation. As became clear, the more-than-human perspective is not so much about taking animal interests into account because animals have certain capacities in common with humans, but rather about reconsidering the situation through a different ethical lens by which both animals and other (human) groups are seen as vulnerable beings that can be victimised by the harmful agency of others. The construction of the wall is problematic as it impacts upon vulnerable beings, whether human or animal, without taking their voices into account, separating the worthy humans at the centre while 'othering' migrants and

¹⁰⁵MC Nussbaum, 'Political Animals: Luck, Love and Dignity' 29 (4) (1998) *Metaphilosophy* 273.

¹⁰⁶S Thierman, 'The Vulnerability of Other Animals' 1/2 (2011) *Journal for Critical Animal Studies* 182; M Deckha, 'Vulnerability, Equality, and Animals' 27 (1) (2015) *Canadian Journal of Women and the Law* 47.

¹⁰⁷Kotzé (n 104) 84.

animals as irrelevant to decision-making processes. It is immoral as it disregards these individuals' aim to flourish as the beings they are in the context of our multispecies society.

Naming the two approaches, political and ethical, as 'paths' does not mean that they are exclusive and separate. Rather, they are interconnected and reinforce each other, leading to a truly – both formally and substantively – just political system. It is no coincidence that Donaldson and Kymlicka built their theory upon the Rawlsian idea of justice – one cannot construe a political system without axiological choices since formal equality and freedom may be used to impose inequality and restrict freedom. Pluralism allows for universalisability of such a system and ensures the criteria for justice are not biased and partial. However, this might prove difficult in a human political community as non-human voices of protest against the injustice may be inaudible or hard to hear. This is where the ethical approach comes in. Interspecies empathy ensures that the reforms of the institutions be interspecies sensitive. A political and legal system is never abstract but always exists in a social context and realises itself through *praxis*. Thus, an ideal place for this system likely lies at the point where the two paths cross.

6. Concluding remarks: a 'more-than-human'-perspective to fencing borders

International relations and security policies could and should be examined in terms of human–non-human relations. This poses a challenge, though, as anthropocentrism is embedded in law and politics – and not only in practice, but also in the methodological background of the theories underpinning them, leading to a speciesist lens. Therefore, our assessment of the Białowieża case in the legal and political contexts led first to a dogmatic analysis, and second to a rather conventional (but applied to non-human animals) – social-contractarian analysis of interspecies relations. A reader of this piece may object that pluralism is one of the most important principles of the European Union and that we, the authors, should not impose our view of justice inclusive of the more than human world. However, we aimed to demonstrate that without taking into account a more-than-human perspective, the European Union cannot be truly pluralistic and just. This we supported further by looking at the Białowieża through an ethical lens, as this allowed us to escape the anthropological machine, to consider vulnerability rather than 'human-likeness' as the yardstick for political and legal inclusion. Only through the moral critique can the human preference of law and politics be understood, and perhaps, remedied in the future.

Thus, we claim that there can be law that includes a more-than-human perspective, as evidenced by the current Constitution of India.¹⁰⁸ Its Article 21, laying down the right to life, is interpreted extensively, applying at least to some non-human animals,¹⁰⁹ but most importantly, fundamental duties of the citizens of India enshrined in Article 51A of the Constitution include a duty 'to protect and improve the natural environment including forests, lakes, rivers and wildlife, and to have compassion for living creatures' and 'develop the scientific temper, humanism and the spirit of inquiry and reform'. Does the compassion for living creatures resemble the vulnerability we discuss above? It certainly could be interpreted in this manner.¹¹⁰

Surely, the Indian constitution does not apply to Białowieża in particular and the fences around fortress Europe in general,¹¹¹ but also in the European legal system there are already hooks for a vulnerability approach. The Habitats Directive is one of them, another is the recognition of the sentience of non-human animals in many European legal systems, including the Polish.¹¹² We would applaud the usage of vulnerability as a principle and value which is to be applied in

¹⁰⁸Constitution of India of 1949 (9.9.2020, cons.).

¹⁰⁹Animal Welfare Board of India v A. Nagaraja & Ors. (2014, CA 5387).

¹¹⁰See eg G Tarabout, 'Compassion for Living Creatures in Indian Law Courts' 10 (6) (2019) Religions 383.

¹¹¹Moreover, it is poorly enforced in India – legal reality does not always translate into material reality. See eg S Divan and A Rosencranz, *Environmental Law and Policy in India: Cases and Materials* (Oxford University Press 2022) 2.

¹¹²See also E Bernet Kempers 'Transition rather than Revolution: The Gradual Road towards Animal Legal Personhood through the Legislature' 11 (3) (2022) Transnational Environmental Law 581.

policies and practice of law. To avoid it being compromised by other principles, it ought to be prioritised. Were that the case, no walls would be built like the one that is now finalised in the Białowieża forest.

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