

Choses in Vie : A Reconsideration of Animal Rights Discourse

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Introduction

There are two dominant themes in animal law discourse. One has, as its central concern animal rights, the other, animal welfare. The first is essentially motivated by moral and normative precepts while the second is grounded in more pragmatic concerns. Animal rights theorists and activists focus attention on the status of animals as property, 'choses in possession', and argue for change in the social status of animals in general. In many ways this aspect of the debate parallels that articulated in early debates over human rights. By contrast, animal welfarists appear to accept the legal status of animals as a given and concentrate on the treatment of animals. While this is also motivated by normative concerns over cruelty and mistreatment of animals it manifests in a more grounded approach to statutory and regulatory reform.

Animal Rights & Human Rights

The pivotal concept that informs both human and animal rights discourse is that of 'inherence', whether rights are an ontological given or an epistemological prerogative. Medieval tracts that address the question of human rights affirm them as 'given by God' or 'natural'¹.

¹ Tierney argues that in medieval thought "there existed, not just some vague idea of natural right, but many of the specific themes that we encounter in modern works on rights" B. Tierney, *The Idea of Natural Rights* (1997) 7. By contrast Minogue claims that the very idea of human rights "is as modern as the internal combustion engine"¹, while others identify Locke as the founder. Bobbio, however argues that "the theory of natural rights is born with Hobbes".

From a genealogical perspective the history of discussions on human rights from the Decretists to Grotius could be situated as a 'discursive formation' that found its manifest expression in the French Revolution and its production of a discourse object 'human rights'. Cathartic events in both the US and France precipitated out of the 'great sea of medieval discourse' a codified legal order of prescriptive human rights. These events articulated an epistemological break from classicism to modernism.²

This new epistemological order contained the embryonic conditions for a universal declaration of human rights. If the French Revolution was the cathartic event that ushered in modernism and domestic specifications of human rights the atrocities of World War 2 brought with it another epistemological shift and a genealogical break into postmodernism. There are essentially two moments to this 'break'. One, the holocaust, precipitating a global response to questions of human rights. The other, the dropping of two atomic bombs, crystallising a global recognition of the fragility and interdependence of the planet as a whole.

It is significant to note that while both the French and American Bills of Rights adhere to the Divine formula of God-given (and therefore inherent or natural) rights, the Universal Declaration of Human Rights is an entirely secular document thus implying that rights are conferred by law and do not have an ontological existence within themselves.

² S. Marks, 'From The Single Confused Page to the Decalogue for Six Billion Persons: The Roots of the Universal Declaration of Human Rights in the French Revolution', (1998) 20 *Human Rights Quarterly* 460. Marks argues that the French Revolution is the genealogical break "from which most historians date the beginning of the modern era". Habermas observed that "revolutionary consciousness gave birth to a new mentality, which was shaped by a new time consciousness, a new concept of political practice, and a new notion of legitimization". J. Habermas, *Between facts and Norms: A Contribution to a Discourse Theory of Law and Democracy*, (1996) 465 quoted in S. Marks Ibid 474.

It can be argued that the contemporary discourse on animal rights coheres at the level of the medieval discourses on human rights but is carried out almost entirely by scholars rather than clerics. The debate parallels, in many ways, the content of the ancient discourse but has not crystallised into a legislative or declarative form. That is, contemporary animal rights remain at the level of discourse.

Animal Rights in Focus

Contemporary debates on animal rights draw from numerous philosophic discourses. The starting point in animal rights discourse is with philosophies dating back to ancient Greece. Socrates, Aristotle and Plato formulated the notion of “the great chain of being”³ in which the Universe is hierarchically ordered with every being having a specified place and use within the cosmic order.⁴ In Aristotle’s *Politics* he places “the slave as property and tool”⁵, together with women and children, below the “males, free men and adults” and above the animal in the chain. Above the man was the sphere of the spirit, inhabited by the Gods.⁶ Fusing both Aristotle and Plato’s formulations the great chain of being emerges as a timeless perfection in which everything has its place and meaning.⁷

³ S.M. Wise, ‘How Non Human Animals Were Trapped in a Non –Existent Universe’, (1995) 1 (15) *Animal Law* 24.

⁴ The ‘great chain of being’ became “one of the half dozen most potent and persistent presuppositions in Western thought” Ibid 24.

⁵ Aristotle, *The Politics*, (1979) 31.

⁶ Together with Plato’s ‘principles of plenitude’, that everything in the visible world is harmonious and perfect includes the ordering of the soul. Plato states “our world is a visible living creature. it contains all creatures that are visible and is itself an image of the intelligible”, Plato, *Timaeus and Critias*, (1971) 122.

⁷ This projection of reality was also reinforced by St Augustine. In this chain animals, like slaves, existed for the use of adult males as property.

Christian theology also regarded animals as inferior to humans, to be ruled over by their human masters⁸. Later the Darwinian revolution identifying the origins of species “destroyed” the comfortable paradigm that the universe was the product of a design specifically created for human beings.⁹

Wise suggests that current (American) jurisprudence has enlivened itself to the implications of this revolutionary epistemological paradigm shift but despite this, the entrenched principles of Emperor Justinian’s Code¹⁰ still holds sway in much of judicial reasoning today. He is, none the less, optimistic that there will dawn a “recognition that some non human animals may possess fundamental common law rights”¹¹. However he offers no suggestions as to a reformist strategy or jurisprudential insights as potential guides to judicial decision making.¹²

⁸ St Augustine, proclaiming the ‘irrationality’ of animals also argued that lack of reason excluded them from concepts of justice and participation in the human community A full discussion of the theological position is beyond the scope of this paper but reference to S. Wise 31-35 provides a good introduction.

⁹ Ibid 41. “The Great Chain of Being, that grand master metaphor [that had] dominated, perverted, and obstructed European efforts to discover man’s place in nature was destroyed”.

¹⁰ Based in precepts derived from the great chain of being metaphor.

¹¹ Ibid 45.

¹²As well, he reimports the very chain of being implications that he has been at pains to demolish throughout his work. Suggesting that ‘some’ non-human animals ought to be accorded common law rights would simply redeploy the notion of a hierarchy of beings. In a further article he does argue that “on one side every human is a person with legal rights, on the other every non-human is a thing with no legal rights. Every animal rights lawyer knows that this barrier must be breached”, S.M Wise, ‘Animal Thing to Animal Person - Thoughts on Time, Place, and Theories’, (1999) 5 *Animal Law* 61. This is essentially the central guiding principle of animal rights discourse and Wise does put forward a strategy for changing judicial practice in relation to the treatment and place of animals in society.

The Liberal Tradition in Animal Rights Discourse

Descartes' famous dictum 'cogito ergo sum' implicitly places animals on a different continuum from humans. Decartes took language as the attribute of humans that indicated their capacity to reason and, for him, it therefore followed axiomatically that animals were incapable of reason as they were incapable of speech. Decartes believed that animals were basically 'natural machines', automatons that moved to unreflective instinct.¹³

Locke, however, was willing to give to animals a range of activities that were held in common with humans but he reserved to humans the ability for abstract thought. As it is this ability that permits humans to develop as moral beings it would follow that morality and moral action would be beyond the capacity of animals. This very point emerges in contemporary discourse as a strong theme in arguments against granting animals rights. Locke admitted that animals might have feelings, but, lacking the capacity to reason abstractly the responsibility to treat them without cruelty lay with owners. There is no suggestion that animals are anything other than chattels.

Rousseau introduced the notion of sentience, arguing that "being destitute of intelligence and liberty, [animals] cannot recognize law; as they partake however, in some measure of our nature, in consequence of sensibility with which they are endowed, they ought to

¹³ From this view it was claimed that the "[Animals] eat without pleasure, cry without pain, grow without knowing it; they desire nothing, fear nothing, know nothing" N. Malebranche, *Oeuvres Completes*. (1958) quoted in P Harrison, 'Pain and Morality' (2005) 22 (1) *Journal of Applied Philosophy* 17-22. Similarly Kant, following Decartes, argued that human's ability to reason, to engage in "metaphysical speculation" sets humans apart from animals in a qualitatively differentiated order K, Ash, 'International Animal Rights, Speciesism and Exclusionary Human Dignity', (2005) 11 *Animal Law* 202.

partake of natural right; so that mankind is subjected to a kind of obligation even towards the brutes. It appears, in fact, that if I am bound to do no injury to my fellow humans this is less because they are rational than because they are sentient beings”¹⁴.

Two themes emerge from Rousseau’s *Discourse on Inequality*, both of which reappear in contemporary works. One hinges on the concept of ‘natural right’ that has its place in the debate over animal rights, the other concerns sentience rather than reason as the guiding principle in relation to the treatment of animals. The latter is relevant to both debates on animal rights and the discourse on animal welfare.

Utilitarianism & Animal Rights

Utilitarianism as a philosophical movement grew out of the liberal tradition.

The two main figures of utilitarianism are Jeremy Bentham and John Stuart Mill.

Bentham advocates rights for animals but these are *legal* rights.¹⁵ He states “the question is not, can they reason, nor can they talk, but can they suffer”¹⁶. Bentham’s dismissal of rights is the dismissal of a concept of right as an inalienable quality inherent in either humans or animals while his affirmation of rights is essentially an affirmation of legal rights that are socially conferred and may just as easily be withdrawn.¹⁷ Bentham turns his pleasure/pain calculus around so that humans would suffer by seeing animals die

¹⁴ J.J Rousseau, *The Social Contract and Discourses*, GDH Cole (trans) (1978) 42.

¹⁵ Not rights that are ontologically given in nature or by God.

¹⁶ In an argument that resonates with that of Rousseau, that sentience not rationality is the core question in relation to legal rights for animals Bentham J. Burns & H. Hart (eds) *The Collected Works of Jeremy Bentham* (1996) 283.

¹⁷ He claimed that “the very idea of rights is not just nonsense but nonsense on stilts” and continued that “there is no right which, when the abolition of it is advantageous to society, should not be abolished” Quoted in S. Lukes, ‘Five Fables About Human Rights’ in S. Shute and S. Hurley *On Human Right: The Oxford Amnesty Lectures* (1993) 28.

naturally while the animals themselves are “never worse off when they are dead”¹⁸.

From this perspective we are actually doing animals a favour by killing and eating them.

In large part Mill follows Bentham’s direction and was “adamantly opposed to the treatment of other animals as slaves and objects”¹⁹.

The significance of the utilitarian discourse is the introduction into the debate of a concept of sentience as a major variable in approaching animal welfare and animal legal rights. This emphasis displaces reasoning ability, rationality and cognitive complexity as the sole arbiters of human’s place in relation to animals.

Contemporary Approaches to Animal Rights

Contemporary debate attempts to ravel up the threads that have been examined above. As well, a new category, ‘animal liberation’, has emerged, notably in the work of Singer. He argues that neither humans nor animals have rights and he directs attention to the liberation of animals and to the treatment of animals in the way that humans themselves would be treated. This explicitly requires a reversal of the status of animals as property.

¹⁸This is in line with his ‘hedonistic calculus’ that prescribes ‘the greatest good for the greatest number’. Ibid 311.

¹⁹ K. Ash, ‘International Animal Rights: Speciesism and Exclusionary Human Dignity’, (2005) 11 *Animal Law* 202.

Francione indicates that a strict application of the precepts outlined by Singer would lead to the abolition of animal killing altogether, an outcome “*much* more controversial than he recognizes”²⁰.

Francione then turns to animal rights theory and in particular to the arguments put forward by Tom Regan²¹. Regan’s position is at the extreme end of animal rights and he advocates the end of all forms of institutionalized animal exploitation. This advocacy effectively proposes a global condition of vegetarianism.²²

Francione further argues that “if animal rights means anything, it means that, as a society *and as individuals*, we can no longer countenance the institutionalized killings of animals for food as a matter of individual moral choice, anymore than we can justify performing experiments ourselves or wearing clothing made from animal skins or pelts”²³. Finally Francione indicates that “put in legal language, rights theory seeks the eradication of the property status of non humans”²⁴.

Running counter to the discourse on animal rights is that of contemporary liberalism.

John Rawls argues that, as animal have no moral sense then it follows that they can have

²⁰ Ibid 81.

²¹ T. Regan, *The Case For Animal Rights* (1983).

²² A project applauded by Julian Franklin who argues that there is no clash of rights in so far as humans eating animals. Animals do not consent to be slaughtered and are consequently the sacrificial victims of a practice that should be abolished, J. Franklin, *Animal Rights and Moral Philosophy* (2005) xiv.

²³ G. Francione, ‘Animal Rights Theory and Utilitarianism: Relative Normative Guidance’ (1997) 3 *Animal Law* 77-78.

²⁴ Ibid 98.

no sense of justice and consequently would not be eligible to receive justice as they could not reciprocate it²⁵.

The central tenets of contemporary discourse on animal rights remain the abolition of the exploitation of animals and the reformulation of the legal status of animals as things into animals as persons. What is not consistently addressed in this discourse is the possibility that the very legal concept of a 'thing' could itself be elaborated. A new category of thing could be developed that did not share the traditional overtones of ownership and control. A potential category that could be developed is that of 'choses in vie' in which specified, even if limited rights could be attributed to this category of property as a strategy for inhibiting cruelty to animals and providing animals with a status above that of a mere object. This particular category is *sui generis* and would stand outside the conventions embedded in the notion of a chain a being. Such a category would stand outside the old hierarchical order as a being in itself that afforded animals particular rights within which the problematic of differentiating among animals could be addressed. This would also afford animals a protection that would be voided if animals were simply freed.

A secondary theme emerging from postmodern discourse is a concern with the planet as a whole. The epistemological shift created by World War 2 was the enlivening of a global awareness of the fragility of the planet and this is now leading to arguments that regard the planet holistically. Included in this vision are animals, plants, the environment and humans in an interdependent unity.

²⁵ J. Rawls, *A Theory of Justice* (1999). Rawls is probably the most influential contemporary writer in the field of liberal theory.

'Cosmic holism' identifies a different referent in early philosophical discourse. Steiner points to Schopenhauer and Hegel as the philosophical progenitors. Schopenhauer eschewed rationality as the guiding principle of social life. He also championed animal rights and criticized the notion of a great chain of being while applauding changes in England, at that time, towards a recognition of animal rights.²⁶

The Welfare Perspective

Welfarism is a more pragmatic and gradualist approach. It has been criticized by animal rights activists who regard, as the only solution, the complete transformation of the system. From this perspective animal rights appears as abstracted while animal welfare appears as a more grounded discourse that suggests specific legal remedies to prevent the maltreatment of animals and to bring to bear legal repercussions on those who are cruel. In contrast Francione calls the animal rights project an 'all or nothing' approach. Francione, identifies animals as 'moral patients' and humans as 'moral agents' and considers that the view taken by legal welfarism is that "animals, which are the property of people, may be treated solely as means to ends by humans as long as this exploitation does not result in the infliction of 'unnecessary pain, suffering or death'²⁷.

²⁶He argued that the movement in English thought indicated that it was an "awakening more and more to a sense that beasts have rights, in proportion as the strange notion is being gradually overcome and outgrown, that the animal kingdom came into existence solely for the benefit and pleasure of man". A. Schopenhauer, *On the Basis of Morality* quoted in N. Phelps, *The longest struggle: Animal Advocacy From Pythagoras to PETA* (2007) 153-154.

²⁷ G. Francione, *Animals Property and the Law* (1995) 18.

At the heart of welfarism is the enforcement of the rights and duties that are already embodied in the existing statutes and regulations and provisions to minimize animal suffering.²⁸ Sinstein suggests four strategies - that humans can bring suits concerning animals, that private persons can sue for violations of regulations (that implied causes of action in the courts be expanded), that citizens be allowed the right to a mandamus action to force a court to hear a case and that an animal can bring a private action through individuals acting as trustees of animals in general.

A number of international organizations are concerned with animal welfare but there is no authoritative body comparable to the United Nations that is concerned with animal welfare. The logical place for an animal rights initiative would be the United Nations. It is not inconceivable that an arm of the United Nations could be devoted to questions of animal rights in the same way that it is concerned with human rights. Perhaps this is the appropriate forum towards which animal rights activists and theorists should direct their attention if they wish to have an animal rights agenda proclaimed as a universal document.

²⁸ C.R. Sinstein argues that “there is a great deal of work to be done... to expand the category of rights to ensure that animals are used less cruelly, or less frequently, or maybe much less, as food, in entertainment, or in scientific experiments” in C. Sinstein, ‘Enforcing Existing Rights’, (2002) 8 *Animal Law* i.

Conclusion

The discourse on animal rights is varied and decentred. The major schism is that between animal rights and animal welfare. However even within these divisions there are confusions and a lack of specificity. Animal rights suffers from an inadequately formulated theory of exactly what constitutes the term 'animal' and vacillates between a generic concept of animal in abstraction and a distinction within the animal kingdom itself between primates and other species. The breadth of the discourse is itself a hindrance to any specific focus and this may be why there has not emerged something that may resemble a Universal Declaration of Animal Rights. Just as the early debates over human rights did not crystallize into a centred document until prompted by cathartic events, perhaps the discourse of animal rights is in the same state. Global environmental change may provide such an impetus but this is essentially speculative. Nevertheless there is a groundswell, as discourses and debates proliferate, to at least consider animal rights from a legal perspective and this may, of itself, precipitate some legislative or declaratory action. There is also a problem for animal rights activists as there is no appropriate global forum through which such a declaration could be made.

Animal welfare is well served by legislative and regulatory regimes. However, the critical process in the implementation of these regimes lies in their enforcement. Without a determined focus on this aspect of the process as a whole animal welfare will languish as a prescriptive duty upheld by the courts. It is the role of animal lawyers in this context to

ensure that the courts are made aware of and respond to social concerns regarding cruelty to animals.

An antidote to both these problematics, both at the level of animal rights and welfare discourse may be the establishment of a new category within which animals as legal possessions are redefined. It is imperative that in order to protect animals within the current social structure that they be awarded a status above that of property.