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Animal Rights



Saskia Stucki¹ and Visa Kurki²

¹Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany

²Faculty of Law, University of Helsinki, Helsinki, Finland

The Idea of Animal Rights: Historical and Philosophical Background

Do nonhuman animals have – or should they have – certain moral and/or legal rights that entitle them to protection of their basic interests and intrinsic value or “selfhood”? Animal rights are evoked in a wide variety of contexts, generally concerning the normatively appropriate moral and/or legal status of, entitlements of and obligations toward animals. The envisaged class of animal right-holders rarely includes all biological animals, and is most commonly limited either to animals that possess human-like cognitive capacities (e.g., great apes, whales, and elephants) or to sentient animals (vertebrates and some invertebrates). The phrase “animal rights” typically refers to basic rights such as the right to life and bodily integrity, but is sometimes – especially colloquially – used to cover a more expansive range of normative protections afforded to animals.

The idea of animal rights is not novel and finds mention in the works of philosophers and social reformers such as Bentham (1789), Krause (1874),

Salt (1892), and Nelson (1932). Since the advent of modern animal ethics in the late 1970s, sparked notably by Singer (1975), animal rights have become more widely theorized and popularized. Accounts of animal rights have originally and primarily been developed in moral philosophy, based on diverse theoretical frameworks such as utilitarianism, Kantianism, social contract theory, or the capabilities approach (Regan 1983; Rowlands 1998; Cavalieri 2001; Nussbaum 2007). The topic has gradually also become the subject of political philosophy, which is concerned with questions such as citizenship, political representation, and social membership of animals (Donaldson and Kymlicka 2011), as well as of legal scholarship that deals with the preconditions and possibilities of the legal institutionalization of animal rights (Francione 1995; Wise 2000).

The idea of animal rights is controversial and has attracted both “anthropocentric” critiques (objecting to the notion of *animal* rights, e.g., Carruthers 1992) as well as non-anthropocentric, for example, “welfarist” or “progressive” (feminist, Marxist) critiques (objecting to the notion of *animal rights*, e.g., Benton 1996).

Conceptual Issues and Distinctions

To begin with, a number of conceptual clarifications need to be made. First, even though they are intimately connected, moral and legal animal rights need to be distinguished. Roughly put, the

moral rights of animals pertain to the treatment of animals that morality requires of moral agents. Legal rights, on the other hand, are generally conferred by legal systems and pertain to what is due to animals as a matter of law. In what follows, this entry will focus on legal animal rights.

Theories of Rights

What are the structural and/or functional features of rights? The main theories seeking to answer this question are the will (or choice) theory and the interest (or benefit) theory. Both theories come in various formulations. According to a typical will theory, *X*'s holding of a right toward *Y* consists in *X*'s being empowered to waive or enforce *Y*'s duty (e.g., Hart 1955; Wellman 1995; Steiner 1998). Interest theories typically take *X*'s right to result from a duty that protects *X*'s interests (e.g., MacCormick 1977; Raz 1984; Kramer 1998).

Will theorists are generally skeptical of animal rights, given that nonhuman animals are not mentally capable of, for example, deciding to sue in order to enforce their rights. Many will theorists might deem any putative ascription of rights to animals as merely a sloppy or incorrect use of the word "right." However, some will theorists maintain that rights can also be exercised by representatives (e.g., Hart 1982). Such "soft" will theories might accommodate animal rights. A legal application of this view would hold that an animal must have legal standing – that is, an entitlement must be enforceable in the animal's name – in order to count as a right-holder. Interest theories typically allow for animal rights, though some interest theorists (e.g., Raz 1984) think that animals are not of ultimate moral value, rendering them ineligible to hold rights.

Both will and interest theorists typically take claim-rights – the correlatives of duties – to be the most central type of rights. However, many theorists accept that fundamental rights, enshrined in constitutions and human rights instruments, are not merely correlatives of duties. This is because a significant component of fundamental rights is the restriction of the powers of the legislator. Thus, the enactment of fundamental animal rights would not only entail the duty to respect (and protect) these rights but also disempower the

legislator from enacting legislation that would infringe upon a fundamental animal right. In the terminology of the Hohfeldian analysis of rights, this aspect of fundamental rights can be analyzed as immunities (Hohfeld 1913; for an application of the Hohfeldian categories to animal rights, see Wise 1998).

Assuming that animals are conceptually capable of holding legal rights does not mean that they do in fact hold legal rights. In order to assess whether animals have legal rights, there are still a number of issues that must be addressed.

Legal Personhood and Animal Rights

Legal personhood and right-holding are often taken to be connected. Many think that legal personhood is a precondition for right-holding: only beings that have been declared legal persons can hold legal rights (e.g. Wise 1996). Adherents of this notion often equate legal personhood with "legal capacity," the capacity to have legal rights and duties. On the other hand, some think that right-holding entails legal personhood: if an entity holds at least one legal right, then it is a legal person (Bilchitz 2009). Yet others reject this connection between rights and personhood, either implicitly (Sunstein 2004) or explicitly (Kurki 2019; Pietrzykowski 2017). These authors claim that animals can – and in fact do – already hold legal rights despite not being legal persons.

The view that legal personhood is a precondition for or corollary of right-holding seems somewhat more popular in civilian jurisdictions (e.g., courts in Argentina and Colombia that have granted rights to animals have concurrently recognized animals' legal personhood) than in common-law jurisdictions, where judges have occasionally been more liberal with regard to the ascription of rights to animals, independently of the matter of legal personhood.

"Weak" and "Strong" Rights

A final question is whether any kind of legal protection that meets certain structural requirements is properly classifiable as a right. Thus, under the interest theory, does any duty imposed upon humans to refrain from the ill-treatment of animals constitute a right for the affected animals –

even if the duty is merely a prohibition of some particularly grueling forms of torture? Some would say that such entitlements are too “weak” or insignificant to be classified as rights. Opinions differ on what would render an entitlement “strong” enough to be classified as a right. For instance, Gary Francione has famously argued that as long as animals retain their current status as property, their “rights” are subject to being balanced away (Francione 1995). Thus, abolishing their status as property would be a precondition for animal rights proper.

Animal Rights *de lege lata*

Apart from the aforementioned conceptual issues relating to whether animals *can* have rights, a further question is whether animals *do* already hold some legal rights under positive law.

Legal Status of Animals

In virtually all legal orders, animals are neither explicitly designated as legal persons nor endowed with legal capacity. Within the person/thing and subject/object dualism that is fundamental to Western legal thought, animals have traditionally been and continue to be classified as things, property, and objects of rights. Nonetheless, most (at least most Western) jurisdictions have animal welfare laws that institute some special protection for animals against cruelty and inflictions of unnecessary pain or suffering – thus implicitly acknowledging that animals are not mere things. Moreover, a number of Continental European jurisdictions have enacted special civil code provisions explicitly stating that animals are not things. However, this “dereification” does not per se reassign animals to the category of legal persons or right-holders. Furthermore, some jurisdictions recognize and protect the intrinsic value or dignity of animals. Overall, considering the special legal protections afforded to animals as living or sentient beings, animals have emerged as a distinct legal category in between persons and things, or subjects and objects (see Stucki 2016, 118ff).

Statutory Animal Rights

The predominant legal opinion is that animals do not have rights as a matter of positive law. However, some commentators contend that the duties imposed on humans by existing animal welfare statutes confer corresponding rights on animals (e.g., Kurki 2017). These purportedly rights-generating statutory duties can roughly be divided into three groups. They typically include (1) a range of general negative duties not to treat animals cruelly and to not inflict unnecessary pain or suffering on them, (2) specific prescriptions or prohibitions of certain behaviors (e.g., a duty to stun animals before slaughter or to anesthetize animals before inflicting severe injuries on them), and (3) some positive duties of care (e.g., duties to provide animals with food, shelter or medical assistance). Such duties are imposed on humans for the benefit of animals, to protect their interests and aspects of their well-being, and can thus be read as correlatives of animal rights on an interest-theoretical analysis.

Several objections may be raised against such a rights-based interpretation of existing animal welfare laws. Notably, some authors assert that not all duties entail correlative rights. Moreover, following HLA Hart’s redundancy critique, it may be said that animal rights, understood as flowing from animal welfare statutes, amount to nothing more than mere reflexes of beneficial duties. Furthermore, some authors insist that only legal persons can hold actual rights, and that animal welfare laws therefore do not confer any rights on animals by definition (see Wise 1998, 911). Finally, some authors maintain that the legal protection afforded to animals by statutory law is in effect too weak for them to constitute rights (e.g., Francione 1995).

A further issue is whether legal protections that can theoretically be interpreted as constituting “rights” need some form of legal recognition *as rights* in order to count as actual legal rights. To date, animal rights have not been explicitly enacted in legislation. Furthermore, while there are a few isolated instances of judicial recognition of animal rights, overall, unwritten animal rights have not been recognized by courts so far. To generalize somewhat, legal scholars and judges

in common-law systems tend to speak more liberally of “animal rights” in an actual (but often vague) sense, while especially Continental European voices are less inclined to acknowledge existing legal animal rights, not least due to a lack of legislative recognition of such rights (e.g., Stucki 2016).

Regardless of whether one holds the view that animals have rights as a matter of positive law, the discussion on statutory animal rights *de lege lata* underscores the usefulness of drawing a conceptual distinction between different types of (potential or actual) animal rights, based on the content and weight of such rights. Simple “animal welfare rights” (e.g., the “right to be stunned before slaughter”), such as may be derived from existing animal welfare laws, generally provide for a narrow scope of protection and/or are weak due to their high susceptibility to being overridden by less important human interests. “Fundamental animal rights” (e.g., the right to life, including the “right not to be slaughtered”), by contrast, are strong rights along the lines of human rights that protect important interests and demand a high burden of justification for infringements (see Stucki 2020).

Constitutional Animal Rights

Even though there is a growing global trend toward constitutionalizing animal welfare matters, with an increasing number of states having enacted constitutional provisions on animal protection (see Eisen and Stilt 2016), this does not automatically translate to constitutional rights for animals. Notwithstanding the general lack of constitutional recognition of animal rights, there is some noteworthy case law that has essentially produced fundamental constitutional animal rights.

Courts in Argentina and Colombia have applied constitutional human rights – in particular the fundamental right to habeas corpus and the inalienable or “supralegal” right to freedom – to animals held captive in zoos (Stucki and Herrera 2017).

Furthermore, high courts in India have developed case law recognizing the fundamental rights of animals. Notably, the Supreme Court of India (2014), by undertaking a rights-based

interpretation of statutory animal welfare law in light of the constitution, has constitutionalized statutory animal rights and elevated them to the status of fundamental rights.

Enforcement and Legal Representation

A final question having to do with the existing legal rights of animals is that of enforcement. Do animals only hold legal rights if these rights or protections are enforceable in some specific way? The most obvious example is that of legal standing: do the putative rights of animals only constitute genuine rights if they are enforceable in the name of the animal? A will-theoretical understanding of rights would likely connect rights with standing. Interest theorists, on the other hand, are often prepared to grant the status of a right to entitlements enforceable by, for example, a public prosecutor in the name of the state, or even protections that are altogether unenforceable (see Kramer 1998).

A related issue – which has more to do with the legal status of animals *de lege ferenda* – is how animal rights *should* be enforced. Given today’s implementation gap, means to improve the enforcement and enforceability of animals’ legal protections through private parties (rather than only public authorities) have been in the focus of legal scholarship. For instance, Christopher Stone has famously argued that environmental protection would be enhanced if natural objects were given standing, enabling human beings to sue on behalf of, for example, trees (Stone 2010). In a somewhat similar vein, Cass Sunstein has argued for an arrangement where any private party would be empowered to sue on behalf of an animal (Sunstein 2004).

Animal Rights *de lege ferenda*

As regards the rights that animals *should* potentially have, different groups of rights, designed to protect different goods and interests of animals (e.g., welfare, life, liberty, dignity), are discussed in animal rights scholarship.

On the welfarist view, animals should have rights relating to their well-being and protecting

them against cruelty and unnecessary pain or suffering. These rights would however not generally preclude the use and killing of animals for human purposes, such as for food production and scientific research. Some argue in favor of a more stringent set of rights relating to the interests of animals as sentient beings (e.g., rights protecting against suffering and death), but not liberty-related rights, since (most) animals are not autonomous agents that possess an intrinsic interest in freedom and autonomy (Cochrane 2012).

According to the abolitionist view, animals should not be put to harmful use at all, and should first and foremost have the right not to be property (Regan 1983; Francione 2000). There are increasing voices advancing the view that animals should have “human rights,” that is, some of the same fundamental rights as humans (e.g., Cavalieri 2001). In this vein, the traditional animal rights position suggests a range of *basic rights* along the lines of core human rights, notably:

- The right to life
- The right to bodily (and mental) integrity
- The right to liberty and freedom of movement
- The right to freedom from torture and inhumane treatment

Further possible human-rights-like fundamental animal rights include:

- The right to *legal personality*: that is, the right to recognition as a person before the law. Insofar as one holds the view that only entities deemed legal persons by the legal system can hold rights, this right creates the legal precondition for having any (other) rights at all.
- The right to *dignity*: analogous to human dignity, this right would preclude treating animals solely as means to ulterior ends, rather than as ends in themselves as well. One example would be the prohibition of extreme instrumentalization and reification.
- The right to *equal treatment and non-discrimination*: corresponding with and institutionalizing the principle of equal consideration of interests, this right would

protect against discrimination based on species membership (“speciesism”).

- The right to *habeas corpus*: this fundamental procedural right to the judicial review of deprivations of freedom, and a safeguard of the substantive right to liberty, would provide a legal remedy for representatives of animals to challenge the legality of their captivity and request their release.
- *Procedural guarantees* such as the right to access to justice: complementary procedural rights would be important in order to facilitate the judicial enforceability of animals’ substantive rights.

In addition to such universal basic rights for all (sentient) animals, some authors propose certain complementary, differentiated *relational rights* for specific groups of animals, depending on the specific context and their relationship to humans. For example, in the *Zoopolis*, domesticated animals who are members of human society would have citizenship rights, and wild populations of animals would have sovereignty rights (Donaldson and Kymlicka 2011). Finally, some authors are discussing *labor rights* for animals as workers (Cochrane 2016; Shaw 2018).

Lastly, in legal practice, there have been legislative and litigation efforts in recent years to institute some of the animal rights discussed here. In the United States, the Nonhuman Rights Project has filed several habeas corpus lawsuits for captive chimpanzees and elephants – so far without ultimately achieving legal recognition of any animal rights. In the Swiss canton of Basel-Stadt, a popular initiative demands constitutional fundamental rights for primates (as of April 2019, the validity of the popular initiative is subject to review before the Federal Supreme Court). In Finland, the Society for Animal Rights Law has prepared a proposal that would enshrine certain fundamental animal rights in the Finnish Constitution. According to the proposal, animals would receive legal standing as well as a number of rights depending on whether they are wild animals or dependent on humans (Finnish Animal Rights Law Society 2019).

Cross-References

- ▶ [Fundamental Rights](#)
- ▶ [Human Rights](#)
- ▶ [Moral and Legal Rights](#)
- ▶ [Theories of Rights](#)

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