3 Law and Animals

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3.1 Challenges to the Legal Status of Domestic and Captive Animals

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3.1.1 The property status of domestic and captive animals

The law distinguishes between ‘persons’ and ‘things’. Human beings are legal persons and in consequence enjoy certain fundamental

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rights, such as freedom from torture and slavery. Domestic and captive animals are legal things and in consequence lack the capacity to possess legal rights. Legal personhood is not synonymous with human beings; it identifies those entities that are capable of having legal rights. Legal personhood can be a more restrictive category than 'humans' and has sometimes been denied to certain humans; for example, slaves, women, indigenous peoples. In other instances it can be a wider category, which allows non-human entities to enjoy legal personhood. For example, a private company is a legal person and, under English Law, enjoys a right to the protection of its property under the Human Rights Act (HRA) 1998. The question that has been asked recently in a number of courts across the globe is whether a captive animal such as an adult chimpanzee or orang-utan can be classed as a legal person. This is clearly a direct challenge to the current legal status of animals.

There are also more indirect challenges arising in the courts: cases which highlight the fact that the current property status of domestic animals is inadequate to resolve certain disputes. Pet custody cases, to decide the residency of a family dog or cat following the breakdown of a relationship between a married or co-habiting couple, are an example of this. Using pure property law principles to decide the question of where the dog or cat lives is often inappropriate. Increasingly civil courts are being asked to recognize dogs and cats as a unique form of living and sentient property, different from inanimate property, and to thereby take the interests of the animal (not just the owners) into account. This also constitutes a challenge to the current legal status of domestic animals, but it is a more subtle and indirect challenge.

3.1.2 Pet custody cases

Cases to decide the residency of family pets, following the breakdown in a couple's relationship, have been reported in a number of countries, including the USA and Israel (Rook, 2014). What is so interesting about these cases is that they highlight the difficulty in applying pure property law to determine the question of a pet's residency. Since the pet is property, the question of who gets to keep the pet will be decided on the same principles as who gets to keep the family TV or kitchen table. In some cases the courts have done this, but in other cases the courts have recognized the unique nature of this living and sentient property and have taken other considerations into account. For example, in the case of *Raymond versus Lachman* in 1999 the appeal court in New York reversed the earlier decision of the trial court, which had awarded custody of a pet cat to the person with the better claim to property title, the cat's owner. Instead the appeal court took into consideration the age and life expectancy of the ten-year-old cat and allowed it to 'remain where he has lived, prospered, loved and been loved for the past four years' (695 N.Y.S.2d 308, 309 (N.Y, App.Div. 1999)). This case appears to take into account the interests of the animal itself and not merely the status of the animal as property. Although the outcome of the case may seem reasonable and just to a layperson, the case has significant implications at law because of its challenge to the pure property status of domestic animals. There have been a number of cases since 1999 adopting a similar approach, and Switzerland has even gone so far as to amend its Civil Code to provide a test that takes the interests of the animal into account in pet custody cases (Michel and Schneider Kayasseh, 2011).

3.1.3 Direct legal challenges to the property status of animals

Law, ethics and science are intricately linked in the question of the legal status of animals. The law reflects, or in some cases helps to lead, changes in moral thinking about animals. Changes in moral thinking can arise from our greater understanding of animal behaviour and welfare through scientific discovery. For example, science has given humans a greater understanding of the cognitive and behavioural characteristics of chimpanzees, which in turn led to concerns over whether the use of great apes in research was ethical.

In 2010 the EU banned the use of great apes in scientific research (Directive 2010/63/EU).

Progress in scientific research has led to calls for a change in the legal status of some animals, such as great apes, from property to persons (Rook, 2009). However, others call for caution as the ramifications of granting some animals legal personhood will be significant. Wise (2000) supports a change in legal status and advocates that any being with mental abilities adding up to what he calls ‘practical autonomy’ should be entitled to the basic legal rights of bodily integrity and bodily liberty (freedom from torture and slavery). A legal thing does not enjoy rights so this change would involve granting legal personhood to the relevant being so that they become a legal person.

Wise defines practical autonomy as evident where a being ‘can desire; and can intentionally try to fulfil her desires; and possesses a sense of self-sufficiency to allow her to understand, even dimly, that it is she who wants something and it is she who is trying to get it’ (Wise, 2000). He examines scientific research findings in relation to the cognitive abilities of great apes (chimpanzee, bonobo, gorilla and orang-utan) as well as Atlantic bottle-nosed dolphins and discovers that they are self-conscious, possess some of, or all, the elements required for a theory of mind and can solve complex problems (Wise, 2002). He concludes that these animals possess sufficient practical autonomy to be entitled to basic legal rights of bodily integrity and bodily liberty. Wise has put his theory into practice and in 2013 the Nonhuman Rights Project (a group founded by Wise) filed three lawsuits in the USA in relation to four captive adult chimpanzees in the hope that the courts will recognize the chimpanzees as legal persons. The case of *Nonhuman Rights Project versus Lavery* concerns a chimpanzee called Tommy who is privately owned by Mr Lavery and lives alone in a cage at a used trailer lot. The Project seeks a court order to have him removed to a sanctuary where chimpanzees live in groups on a number of islands in an artificial lake. To be able to remove Tommy from his owner (who is not in breach of any state or federal laws) requires the court to grant a writ of habeas corpus. This court order can only be given in relation to a legal person and is not available for a legal thing. We should remember that in law a ‘person’ is not synonymous with a human being; it is a legal concept, not a biological one. Under English law a private company is a legal person and enjoys a right to the protection of its property under the HRA 1998.

The case was rejected at trial, but went on appeal to the Supreme Court, Appellate Division, which in 2014 also declined to grant a habeas corpus in respect of Tommy. The Supreme Court adopted a Contractualist approach, which explains rights in terms of a social contract; a person enjoys the benefit of rights in return for submitting to societally imposed responsibilities. Relying on the work of Cupp, the court held that ‘unlike human beings, chimpanzees cannot bear any legal duties, submit to societal responsibilities or be held legally accountable for their actions’ (Cupp, 2013). This is only one interpretation of legal rights and other theories do not rely on the reciprocity of rights and responsibilities. The Nonhuman Rights Project is pursuing an appeal to New York’s highest court – the Court of Appeals. Wise draws hope from historical cases on the African slave trade to demonstrate how judges can make a decision to break the mould and permit the law to adapt to changing moral climates.

Tilikum is a bull orca whale who was captured off the East coast of Iceland in 1983. He was born wild and therefore was not property at birth; however, he became someone’s property when he was captured by humans for the purpose of providing entertainment in captivity. Tilikum has lived in captivity for over 30 years and in 2012, when living at SeaWorld Orlando in Florida, he became the subject of a court case. The case alleged that five wild-captured orcas, including Tilikum, were being held by SeaWorld in violation of the Thirteenth Amendment to the Constitution of the USA, which prohibits slavery and involuntary servitude. It was argued that orca whales engage in complex social, communicative and cognitive behaviours and that their confinement in unnatural

conditions at SeaWorld negatively impacts on their welfare. The court examined the wording of the Constitution in its historical setting to ascertain the purpose of those who drafted it. On this basis the court rejected the plaintiff's argument and stated that the Thirteenth Amendment only applies to humans because 'slavery' and 'involuntary servitude' are uniquely human activities, which do not apply to nonhumans (*Tilikum, Katina, Corky, Kasatka and Ulises, five orcas by their Next Friends, People for the Ethical Treatment of Animals, Inc. versus Sea World Parks & Entertainment Inc.* (2012) 842 F. Supp. 2d.1259).

The recent proliferation of cases making a direct challenge to the current legal status of captive animals demonstrates the strength of feeling driving this debate, and indicates that there are interesting times ahead in deciding whether an animal can ever be a legal person.

3.1.4 The basis of a challenge to the legal status of animals – autonomy versus sentiency

The USA is not the only country in which there have been legal challenges to the property status of animals. There have also been significant cases in Brazil, Argentina and Austria. Interestingly, the cases so far have all been in relation to animals that possess what Wise calls 'practical autonomy' (Wise, 2000). It seems that the complex cognitive abilities of these animals may engender stronger feelings in humans of the need to ensure justice for these intelligent animals. Wise takes a pragmatic approach and argues that we are more likely to dismantle the thick legal wall that separates humans and animals if the animal has practical autonomy. For Wise, it is the cognitive abilities of the animal that are crucial. Whereas for others, sentiency is enough. For Singer it is the sentiency of the animal, the fact that it can experience pleasure and pain, which is crucial (Singer, 1995). According to Singer, sentiency is sufficient to require a rethink of how we treat animals. He develops the work of the famous 18th-century philosopher, Jeremy Bentham, who advocated the better treatment of animals and wrote: 'the question is not, Can they reason? Nor, Can they talk? But, Can they suffer?' (Burns and Hart, 1970, p. 283). Like Bentham before him, Singer is a utilitarian. In simple terms, a utilitarian makes moral decisions by weighing the costs of a particular action against the benefits or satisfactions, and then takes the option which brings the best balance of total benefits over total costs. The principle of equal consideration is an important concept for utilitarians. It requires that the interests of everyone affected by an action are taken into account and given the same weight as the *like interests* of any other being. This principle of equality prescribes how we should treat each other; it is a moral idea, not a factual occurrence. Singer applies the principle of equal consideration to animals. Just as a person's IQ is irrelevant to their moral treatment – we don't give less consideration to the interests of those with a low IQ compared to those with a higher IQ – Singer argues that the cognitive abilities of animals should also be irrelevant to how we treat them. It doesn't matter whether an animal has complex intellectual abilities or not, what matters is whether it can suffer pain. Sentiency is a prerequisite to having interests; if a being suffers, Singer argues that 'there can be no moral justification for refusing to take any suffering into consideration'.

3.1.5 Utilitarianism in practice

Let's consider a simple practical example to illustrate this theory. Should someone living in the affluent West eat pig meat? This is a moral decision because the pig is sentient and has interests that can be harmed by being raised for meat, killed and eaten. For a utilitarian, making the decision of whether or not to eat pig meat involves weighing up the costs against the benefits to see if the benefits outweigh the costs. A difficulty soon becomes apparent: which costs and benefits are considered? The suffering of the pig is relevant; there is evidence that pigs suffer due to intensive farming practices, transport and pre-slaughter handling at the abattoir.

But are there wider considerations, such as the significant environmental costs of eating meat highlighted in the United Nations' report, *Livestock's Long Shadow* (Steinfeld *et al.*, 2006)? Is this a relevant factor to be weighed in the balance when someone is deciding whether or not to eat meat, or is this cost too far removed? What are the benefits of eating the pig? Where there are healthy alternatives to meat, as in the West, thereby removing the need to eat meat for a balanced diet, then the benefits appear to be taste and cost; a person enjoys the taste of meat and, where it is produced by intensive farming methods, it is relatively cheap. For Singer the suffering of the pig in terms of physical pain, stress and the frustration of not being able to display natural behaviours all outweigh the benefit to the human and consequently a utilitarian will be likely to decide not to eat pig meat. For Singer, the sentiency of the pig is sufficient to require equal consideration to be given to the suffering of the pig as would be given to the suffering of a person. Wise, however, would focus on the cognitive capacity of the pig and examine scientific research findings to ascertain whether a pig has practical autonomy deserving of the rights to freedom from torture and slavery.

Singer and Wise have their critics, and one of the arguments against their theories is the idea that humans and animals are different and we are justified in treating animals differently and favouring our own kind (Posner, 2004). Imagine seeing a polar bear in Alaska about to kill a young seal. If we had the means to do so, would we intervene to save the seal? Most people would not intervene but would accept it as a natural event. The polar bear must eat the seal to survive. But what would happen if we saw a polar bear about to kill a human child? Now our response is likely to be very different. We would intervene to save the child, even though polar bears must eat meat to survive. What accounts for this different response? This scenario illustrates the extent to which we favour our own species and will act to prevent harm to other humans, even at the expense of animal suffering.

3.1.6 The concept of unnecessary suffering

The law faces a dilemma. How to deal with what Francione calls our 'moral schizophrenia' (Francione, 2004). On the one hand, humans now recognize the sentiency of animals and there is a desire to protect animals from pain and suffering. But on the other hand, humans feel justified to use animals for our own benefit, and as a consequence we accept what Francione calls 'the institutionalized exploitation' of millions of animals; for example, in factory farms, entertainment and scientific procedures. The law has developed a clever concept to deal with this dilemma; a concept whose success is demonstrated by the fact that it spans international boundaries. It is the concept of 'unnecessary suffering' and it is a pivotal concept in animal protection law across the world. Many countries have criminalized cruelty to animals, making it an offence to cause domestic and captive animals unnecessary suffering. The concept of 'unnecessary suffering' prohibits suffering that is unnecessary but permits necessary suffering. Thus the test of necessity is crucial, as it determines whether an offence has been committed. The act of hitting an animal may be an offence if it is unnecessary but a legal act if it is necessary; for example, in the English case in 1999 in which it was alleged that Mary Chipperfield (of the then-famous Chipperfield's Circus) had caused cruelty to a camel by hitting it with a broom handle, the Magistrate said that the force Mary had used was necessary to train the camel to perform. Notably, in assessing necessity the Magistrate was not prepared to consider whether it was necessary for the camel to perform in a circus in the first place. It was held that no offence was committed on the facts because the suffering caused to the camel was deemed necessary to train it to perform.

3.1.6.1 Necessity as a balancing exercise

In England and Wales, the Animal Welfare Act 2006 governs the offence of cruelty to domestic animals. Under Section 4 a person is guilty of the criminal offence of cruelty if their

act (or failure to act) causes a protected animal to suffer unnecessarily and he/she knew or ought reasonably to have known that it would have that effect. Vets and lawyers both have a part to play in the concept of unnecessary suffering; it is for the vet to decide whether suffering has occurred and it is for the judge to determine the question of necessity. Suffering is a prerequisite to the offence; without it there can be no offence, so the role of the vet is crucial. Once suffering has been established by the vet, there are a number of statutory considerations set out in the Act for the court to consider, such as whether the suffering could reasonably have been avoided or reduced and whether the conduct was that of a reasonably competent and humane person. These statutory considerations encapsulate a test that had been developed through case law under the Protection of Animals Act 1911, which preceded the Animal Welfare Act 2006. Case law established that there must be a legitimate purpose for the act which caused the animal suffering, but a purpose on its own was not sufficient. There must also be proportionality between the purpose to be achieved and the means of achieving it. Proportionality is an important legal concept used in human rights law which involves a balancing exercise. In the case of *Ford versus Wiley* in 1889 a farmer was alleged to have been cruel to his young cattle by cutting off their horns, close to the head, with a common saw. It was accepted by the court that the cattle suffered extreme and prolonged pain as a result of this procedure. The farmer justified his actions on the basis of cost and convenience. The court accepted that there was a legitimate purpose, but nevertheless cruelty was established because the purpose did not justify the means of achieving it. The court held that the suffering was completely disproportionate to the purpose and the practice was consequently found to be cruel and illegal. The problem with the concept of necessity is that it is subjective; it is for the court to decide on the respective weight to attach to the conflicting interests of humans and animals. In most cases a court is likely to give greater weight to the interests of humans.

The Israeli case in 2002 of *Noah versus The Attorney General et al.* is an excellent example of the subjectivity involved in assessing necessity (HCJ 9232/01, 215 Israeli Supreme Court). This case is unusual because, in the balancing exercise to decide necessity, the interests of the animals ultimately outweighed those of the humans; in practice this is rare. The case concerned the practice of producing foie gras by inserting a tube into the oesophagus of geese and force-feeding them until their livers become abnormally large and fatty. The court had to consider whether this caused unnecessary suffering. Interestingly, in reaching its decision the court was willing to examine the literature on the ethical theories applied to our treatment of animals, and referred to the work of Singer and Francione. The court weighed in the balance the suffering caused to the geese by the method of force-feeding against the benefit to humans of a food delicacy. The majority view of the court was that the suffering was not justifiable for a delicacy and therefore the suffering outweighed the benefit. The minority of the court felt that the suffering was necessary because of the suffering that any ban on foie gras production would cause to the farmers who would lose their livelihoods. More than 500 t of foie gras was produced in Israel every year at that time and hundreds of farmers were dependent on the industry. This is a significant case for the promotion of animal welfare in agriculture. The English courts have been less willing to attach weight to the suffering of the animal. The case of *Roberts versus Ruggerio* in 1985 concerned the use of the veal calf crate system. Under this system of intensive farming, calves were individually confined in a narrow stall, chained at the neck and denied access to roughage in their diet. Roberts was the director of Compassion in World Farming, which advocated that the use of veal crates caused the animals' unnecessary suffering and consequently the farmer was guilty of the offence of cruelty. The court took the view that it would only consider suffering beyond that which is to be expected from the use of the veal crate. It would not challenge the use of the veal crate itself, even though there was evidence that it caused the calves suffering, and that alternative practices were available to produce veal that caused the animals less suffering. Fortunately, the

veal crate has since been banned as being cruel, first in England and Wales, and more recently in Europe.

3.1.6.2 Property status and proportionality

For Francione, the property status of animals is the root of the problem. He advocates that the concept of unnecessary suffering does not protect animals because the weighting to be attached to the respective interests of the animals and humans has already been predetermined by the property status of the animals. He states that:

> The property status of animals renders meaningless any balancing that is supposedly required under the humane treatment principle or animal welfare laws, because what we really balance are the interests of property owners against the interests of their animal property.
>
> (Francione, 2004)

Therefore, for Francione, the dilemma can only be solved by giving animals the right not to be treated as our property. The Israeli foie gras case shows that the interests of animals can sometimes trump humans; however, this is relatively rare.

3.1.7 Conclusion

Law, ethics and science are intricately linked in the debate surrounding the legal status of domestic and captive animals, especially in relation to animals with higher cognitive abilities, such as the great apes. There has been a wealth of scientific discovery about the cognitive and social abilities of great apes since the pioneering work of Jane Goodall in the 1960s in the Gombe National Park, Tanzania (Goodall, 2010). And, since Singer's groundbreaking book, *Animal Liberation* (Singer, 1995), there has been an explosion of ethical theories relating to our treatment of animals. The recent appearance and growth of legal challenges in the courts, both direct and indirect, to the property status of domestic and captive animals suggests that it is time for the law to respond and adapt to the developments in science and philosophy. It would seem that exciting times lie ahead for animal law.

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