

Can Animals Have 'Human Rights' Too?

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This question seems absurd until one thinks of it as a deliberately contrived way of putting a deeper point, one that I will argue in what follows is difficult easily to dismiss: what makes human beings so special that they – and they alone among the animals – warrant the protection that flows from being entitled to rights? The usual stock responses to this are not as satisfactory as once they were. In this essay I shall review these orthodox explanations for the species-specificity of human rights, and in doing so will develop an argument for the justification of rights which is not necessarily limited to humans alone. This then takes us into a new field, the terrain of animal (including human) rights. The paper will end with some brief reflections on what might be entailed in such a (revolutionary?) approach to our subject.

It is clear that the development of the idea of human rights has indeed been tied up with the story of the human. It starts with the Greeks (Plato; Aristotle; Epictectus), picks up some Roman pedigree on its way (Cicero) via the Catholic Church (from St Paul through Plotinus to Saint Thomas Aquinas) to northern Europe, where it settles down in England (Hobbes; Locke) and France (Rousseau), before setting up further outposts in the United States.¹ The hit list of early human rights documents is a hymn to the civilising progress of what we now think of as western statehood: Magna Carta in 1215, the American Declaration of Independence in 1776, the French Declaration of the Rights of Man and of the Citizen in 1789, and so on. The emphasis is on the rights of humans of course but I want to note here is that it is about the control of power as well: each of these documents reflects a trend in the culture from which it emerged which is assertive of a right to resist abusive authority: Magna Carta was concerned with limiting the power of King John; the 1776 Declaration with establishing the freedom from external coercion of the American colonies; and the French Declaration with overthrowing an entire system of magisterial rule. These examples could be expanded to include other documents, such as the English bill of rights of 1688. The important point for present purposes is that while to a greater or lesser extent the drafters of these fundamental texts were alighting upon the language of (human) rights to make their point, they were doing so as rhetoricians of revolt, as liberation philosophers whose focus was more on the first than the second

¹ J Mahoney, *The Challenge of Human Rights* (Basil Blackwell Publishing, Oxford, 2007); M R Ishay, *The Human Rights Reader* 2nd edn (Routledge, London, 2007).

of these two words. To put this another way, they were activist opponents of the abuse of power first and 'human rights' campaigners second. The language of human rights was either deployed at the time (as with the French and the Americans) or imposed later (as with Magna Carta and the English bill of rights) as a way of capturing in words the essence of what the drafters were about, and what they were doing was opposing the abuse of power in a series of acts of revolutionary solidarity; what they were not engaged in was pondering the essential features of the human species. On this analysis, 'human rights' stop being a description of some essential truth about a species and becomes a subset of a larger idea – resistance to abusive power.

The same underlying theme can be detected in later developments in the philosophy of human rights.² The concept of objective right, the idea of a natural law determining right behaviour which stood above the people of the world and ordered their conduct, is an old one, having found expression through the intellectual work done in the first centuries of the Christian era and then in the early medieval period; the writings of St Paul, St Augustine and St Thomas Aquinas remain embedded within western culture to this day (and indeed more widely than that through the reach of the universal Catholic Church). Gradually, even in the period prior to what is routinely called 'the Enlightenment' (a term to which I shall return), there emerged the notion of a subjective human right, a right that individuals could have in view of their humanity and which required of others that they behave in a certain way towards them. This idea has paved the way for our modern version of rights as entitlements each of us has as persons and which are inherent in us on account of our humanity. Where does this notion of subjective rights come from? What purpose did it serve? Is the species restriction necessary to its coherence? Let me take each of these questions in turn.

First, the origins of subjective right. In the 16th century at the highpoint of Spanish imperial expansion, regal power required – and secured – various theoretical and theological justifications as to why it was right to wage war with the Indians, or as we would call them today the indigenous people of the Americas. One such apologist was Ginés de Sepúlveda, whose great contribution to progress has not been his own reactionary writings but rather the response he provoked from Bartolomé de las Casas. An early pioneer who had known Columbus, de las Casas was so repelled by Spanish excesses that he became a Dominican priest and dedicated his life to what we would now call anti-imperialist and anti-racist work. Searching for a way to express his opposition to the attitudes of his fellow nationals towards the natives, he found it in the language of human rights,

² For a good recent study see M J Perry, *Towards a Theory of Human Rights. Religion, Law, Courts* (Cambridge University Press, New York, 2007), ch 2.

rooted in the religion which he shared with the oppressors. His *In Defence of the Indians* published in 1584 stands as an early human rights classic³ in which the emphasis is on the shared, God-ordained humanity of the colonialist and the local, and how this should make ethically impossible the barbarism of the wars against the latter. Taking such a line was certainly a good tactic at the time, but it came at a high price for the rest of the animal kingdom. de las Casas contrasted the native Americans with animals to the advantage of the former (and naturally therefore the disadvantage of the latter). The natives were 'not ignorant, inhuman or bestial'.⁴ Rather it was the 'merciless man acting against human reason' who was the barbarian, plunging 'blindly into crimes that only the wildest beasts of the forests would commit'.⁵ Quoting Aristotle, de las Casas noted that 'just as the man who obeys right reason and excellent laws is superior to all the animals, so too, if he leaves the path of right reason and law, he is the wickedest, worst, and most inhuman of animals'.⁶

The intention here is not to abandon the animals, just as it was not to jettison the Jews and Saracens whose informed unbelief was for de las Casas 'much more serious and damnable than the unbelief of [the] idolaters [ie Indians]'⁷ who had not had the chance to hear the word of God. Rather the argument was opportunistic, drawing on religious texts and on rights arguments as instruments to achieve the desired outcome, which was that the natives should be treated better by the imperialists. All theology and philosophy was subjugated to this goal. So in identifying this reason for this idea of subjective right, we can see also that the species boundary is not a necessary one. Just as had been the case with the drafters of Magna Carta and the various other revolutionaries that were to follow this Dominican radical, de las Casas was concerned primarily with the abuse of power and how both to stop and then to prevent it. His focus was on marginalised and exploited humans, but this species restriction was not necessitated by his governing position which was about the prevention of the kind of cruelty that he saw seemed necessarily to be entailed in the abuse of power.

³ See M R Ishay, *The Human Rights Reader* 2nd edn (Routledge, New York, 2007) 165-68.

⁴ Ibid 166.

⁵ Ibid 165.

⁶ Ibid, the reference to Aristotle is to *Politics* Book 1 ch 2.

⁷ Ibid 168

Let me now return to the 'Enlightenment', among whose most prominent thinkers for human rights purposes is Immanuel Kant (1724-1804). The achievement here was once again at a price to other animals: Kant reconfigured our understanding of the human so as to maintain the specialness of the species, but now without the need for any kind of immaterial soul which was what had hitherto been believed to have rendered these human creatures different from the many other animals on the planet. Following the theme of the present discussion, we can characterise this as primarily an act of revolt against the power of the Church, and in particular the control Rome had hitherto exercised over the individual mind, telling it what to think, what to believe and (especially) what not to say.⁸ While this rebellion manifested itself in a rejection of Church authority, however, it did not go so far as to deny an underlying premise of Christian thinking, namely the uniqueness of man (and woman) in the world. Rather it merely shifted the basis for this belief away from the heavens and into the human person itself. Our species was special not any longer because we had a soul but because of our capacity for autonomous decision-making about the world around us. Our consciousness enabled us to reason and to reflect, to make life plans and sort out the kind of projects upon which we wished to embark. Our rights flowed out of this interest in freedom and liberty which in turn hinged upon our remarkable autonomy, with the mind replacing the soul as the fount of our uniqueness.

But how species-specific are these Enlightenment ideas? My colleague at LSE Dr Alasdair Cochrane has analysed this question from the perspective of animal rights, asking the important question of the extent to which the 'intrinsic interest in liberty that humans possess ... founded upon their status as autonomous agents' can be translated across the species.⁹ To start with, Cochrane 'rules out as possessors of autonomous agency those animals that lack any conscious experience at all.' To be able to have goals and pursue them, 'some conscious experience will undoubtedly be necessary'. The relevant distinction in the non-human animal world is probably between 'vertebrates who possess complex nervous systems, and invertebrates who do not'.¹⁰ It would seem to be the case that 'the physiological structure of animals such as mammals, birds, reptiles,

⁸ See generally A C Grayling, *Towards the Light. The Story of the Struggles for Liberty & Rights That Made the Modern West* (Bloomsbury, London, 2007). Also of interest is L Hunt, *Inventing Human Rights: A History* (W W Norton, New York, 2007).

⁹ 'Do Animals Have an interest in Liberty' copy with author, p 8.

¹⁰ Ibid citing D DeGrazia, *Taking Animal Seriously: Mental Life and Moral Status* (Cambridge University Press, Cambridge, 1996), M Rowlands, *Animals Like Us* (Verso, London, 2002) and R Garner, *Animal Ethics* (Polity, Cambridge, 2005).

amphibians and fish strongly suggests that they have the capacity for conscious experience, whereas that of insects, molluscs, crustaceans, arachnids and so on suggests that they do not.¹¹ If these animals have a capacity for conscious experience then they – like humans – will have a capacity to feel pleasure and pain. Furthermore a number of them will feel desire and then a sub-category of these may well be able to act on their desire, to reflect on the feeling of desire and make choices accordingly, in other words to display autonomy. Now it may well be the case that only a very few animals can do this, great apes for example (chimpanzees and gorillas) and cetaceans (whales and dolphins): Cochrane is agnostic on this and he is right when he says that further research is required, both with regard to these animals and generally. But the goal here is not to build a case for animal rights as such; it is to challenge the species-specificity of autonomy. So if we can establish even a single analogous capacity for autonomy outside the human species, in which direction the literature (at least as regards the higher mammals) does tilt, then we will have shown that this state of consciousness is not unique to humans, and by doing this we will have demonstrated that the emergence of a philosophy of subjective rights in the 18th Century is not *necessarily* restricted to the human species and that species alone. Armed with this insight, we can more confidently return to our starting point for human rights talk in this period of world history, namely the role of the idea as an emancipatory force against the abuse of power: clearly at this level of generality there is no inhibiting species barrier in play at all.

The contention that the true basis for human rights in the Enlightenment is concern about the abuse of power rather than a foundational commitment to a uniquely human autonomy draws further strength from the difficulty that non-autonomous humans have always posed for this theory of rights. Plenty of (particularly powerless) humans fail the test of engagement with the world that Kant and his followers have determined to be the key to personhood. The most obvious and by far the largest categories are babies and very young persons, but here the sensible answer is to point to their potential for autonomy and then to say that by protecting them now we are investing in their future success as ‘real’ (ie autonomous) people. While this is the case, what about an anencephalic baby which though a live human organism is simply without the bits of matter (in particular the brain) which would ever allow it to pass Kant’s test? Or other ‘ex-persons’ whose capacity to reason and engage in autonomous decision-making has been irretrievably destroyed by injury, the patient in a permanent vegetative state for example? There is debate about these marginal persons, with some theorists following the logic of their commitment to autonomy and recognising that the

¹¹ Ibid.

implication of their restricted approach to personhood is that such human creatures have either never lived as true persons (the anencephalic baby) or have died as persons in advance of the body to which they remain uselessly tethered. But other proponents of human rights strongly deny this, claiming the need to protect such humans remains, indeed is stronger than ever, while the law (in the United Kingdom at least) muddies the water by allowing death to follow from the (mere) withdrawal of treatment but insisting at the same time that nothing should be done deliberately to bring such an end-result about.¹² This dispute over the reach of autonomy as the organising principle of rights even in relation to human creatures further demonstrates that it cannot be an exclusive foundation for rights, that there are other values jostling for attention, the (religious) sanctity of human life certainly, but also I would suggest here some strong sense of the need to protect the weak from the abuse of power, in other words the meta-idea behind rights for which this essay is contending.

So far we have said little about non-human animals as such. The move towards compassion for animals which was reflected in the enactment of animal welfare legislation in the UK and elsewhere in the 19th century flowed from a different ethical stream than that which had produced the human rights language of earlier generations, but it was not very different in sentiment from the feelings which produced the anti-slavery and humanitarian movements of the same period. As far as the first of these is concerned, the unfinished business of de las Casas focused on convincing opinion that mattered that those unlucky men and women who were in law the mere property of others were in fact – and despite this proprietorial complication – truly members of the human species. Bizarre though it seems to modern opinion, in many ways this leap of understanding in the nature of the slave, from mere chattel into full member of the species (and therefore no longer property, being necessarily free), required a larger job of persuasion than any equivalent effort today to convince the public of the entitlement of at least certain animals to a limited range of rights. As late as 1857, the United States Supreme Court could confidently assert the property status of the slave,¹³ and as is well known in that jurisdiction it took more than the verbal persuasive powers of the anti-slave-holding North to win the day. As far as the humanitarian advances of the 19th century were concerned, the effort to develop a more humane attitude to one's opponents in the battlefield, which began in the 1850s received a major impetus with the formation of the Lieber Code during the civil war of 1860-65 that followed the 1857 US court decision on slaves. The persuasive challenge

¹² *Airedale National Health Trust v Bland* [1993] AC 789. Cf Mental Capacity Act 2005, s 4(5).

¹³ *Dred Scott v Sandford* 60 US 393 (1857).

facing the proponents of the Code, one that to this day remains controversial, was to get military forces to see that their opponents in the field had not forfeited their right to be treated with respect as humans merely on account of the hostile activity in which they were engaged. Whereas the slaves had had to be argued into membership of the human species, the soldiers in conflict had to be protected from de facto expulsion from humanity, with all the cruelty and unnecessary killing that would result. The underlying idea behind each of these progressive movements was a strong commitment to the protection of the vulnerable (slaves/captured soldiers) from abuse of power (by their owners/captors). The analogy with the animal welfare movement which was building a strong momentum at the same time is clear.¹⁴

Let me sum up where the argument has taken us so far. Our historical survey reveals a fundamental idea which lies behind the various elaborations of human rights down the ages, elaborations which encompass specific rights-talk but also go beyond such discourse to include events and documents which have long been – and rightly been – claimed by human rights protagonists as belonging to their story. This idea is the familiar one that power should not be abused and that those who are victims of abuse of this nature should have an entitlement to resist, and that such resistance can be (perhaps even – depending on the particular culture and moment – ought to be) phrased in the language of human rights. The various religious and philosophical explanations of human rights are, on this analysis, not complete in themselves, but are rather reflections of this underlying sensitivity to the abuse of power.

And where in turn does this attitude to power come from? Here once again the 19th century provides a critical contribution albeit this time of a destabilising sort. The pioneering work of Darwin and Nietzsche (and the 20th century followers of each) has shown us that the difference between man and the other animals is no more than one of kind (Darwin) and furthermore may even be merely the result of how we use words and phrases to organise our world into created rather than objective categories (Nietzsche). If these 19th century thinkers did indeed teach us that we are now merely clever animals who are ‘beyond good and evil’, how can we form an adverse opinion of any sort on the abuse of power, much less call resistance to such abuse a matter of asserting our human rights? And if ‘abuse of power’ is neither good nor bad for inter-relationships within the human species, how can it be different for the human in his or her interaction with other animals?

¹⁴ H Kean, *Animal Rights. Political and Social Change in Britain since 1800* (Reaktion, Chicago, 1998).

It is certainly the case that some post-modern philosophers draw from these Nietzschean observations the conclusion that while the abuse of power remains a bad thing, there can nevertheless be no such thing as 'human rights' through which to articulate our disapproval of such conduct, since there are no foundations outside language capable of underpinning the kind of universal ethical judgement inherent in use of the term.¹⁵ Not surprisingly this is usually not good enough for people who think of themselves as human rights scholars. Among this group are those who acknowledge the force but desire to avoid the implications of such anti-foundationalism, and who therefore seek to locate their objections to the abuse of power in something more grounded than neutral observation or unspoken assumption. From such a perspective, it is tempting to draw out of the human inclination to do 'good', in other words to avoid abuses of power but rather to act with hospitality towards the stranger, a new kind of natural law based on compassion and empathy which can then sensibly and without difficulty be said to find contemporary expression in the language of human rights, as a kind of 'Esperanto of the virtuous'.¹⁶ This approach allows the activist/scholar who adopts it to ground his or her commitment to human rights as opposition to the abuse of power in a set of basic (and therefore universal) observations about the nature of that animal that he or she is happy to classify as human for the purpose of organising the living world into (among other categories) species.

It should be said immediately that the implication of this is not to separate the human from other animals who might show similar characteristics or to rule out natural reactions to animals that might similarly be given linguistic expression in terms of rights. The approach set out above does not insist that because humans can be observed to act altruistically/ compassionately/ empathetically towards their fellows, it therefore follows that as a matter of moral obligation they ought to act only or ever in this way: there is no incoherent deduction of an ought from an is in this reading of the foundations of human rights, and therefore no insistence upon a moral attitude than only humans can understand and act upon. Rather the language of human rights is being used to describe a thread of behaviour that is natural and, from the point of view of the flourishing of the species, valuable. It is because we intuit the latter that we bolster our tendency to do this kind of good with

¹⁵ See especially R Rorty, 'Human Rights, Rationality and Sentimentality' in S Shute and S Hurley (eds), *On Human Rights* (Basic Books, New York, 1993) and for a more general perspective the same author's *Contingency, Irony and Solidarity* (Cambridge University Press, Cambridge, 1989). Cf the work of C Douzinas, *The End of Human Rights* (Hart Publishing, Oxford, 2000) and *Human Rights and Empire. The Political Philosophy of Cosmopolitanism* (Routledge-Cavendish, Abingdon, 2007).

¹⁶ These points are explored further in C A Gearty, *Can Human Rights Survive?* (Cambridge University Press, Cambridge, 2006), ch 2.

the language of moral obligation, to persuade ourselves of its general rightness and to bolster us against irresolution, the tendency to go for short-term selfishness at the expense of medium to long term species-gain. The moral obligation apparently inherent in the term 'human rights' is not a moral truth as such; rather it is a kind of mask we assume to help keep us on the right long-term path for our species. (It is worth noting that 'human rights' is only one of many varieties of language engaged in this kind of word-game, today's 'natural/homeland security' or (in past ages) 'racial purity' fulfil similar linguistic functions albeit deducing very different conclusions from observations of other, darker elements of human nature.)

Where does all this leave animal rights? The collapse of intellectual confidence in the specialness of the human, the decline in arguments for human uniqueness vis-a-vis the rest of the living things on the planet, now offers a window of opportunity for other animals, or rather to be accurate for their human protagonists, to be able to say much more convincingly than in the past that certain animals deserve to fit within the world of right behaviour and of entitlement to proper treatment that hitherto has been the preserve of the human alone. The usual stock responses as to why this should not be so (the human soul; the autonomy of the human person) are not as readily available as they once were, while the contemporary answers that tend to convince on the foundations of human rights (the need to protect the vulnerable from the abuse of power; the importance of compassion) are not necessarily limited to the human species at all, indeed can have a special relevance to the non-human animal whose life chances are so entirely in the hands of its human master (or mistress). The strength of human rights language has always lain in its power to expand its net of solicitude ever outwards towards categories of humans (women; slaves; prisoners-of-war; also children, prisoners, those with mental and physical disabilities and many others) previously invisible to the powerful: there is no reason in principle why this outward momentum should be permanently blocked at a species barrier that is after all only a human construct.

The kind of reflections about nature that produce observable conduct classifiable as reflecting a 'human rights approach' might be replicated by similar observations producing a more general language of animal rights. What this entails in terms of exact rights would need to be worked through; which rights are available to each kind of animal (including the human) would naturally depend on the nature of the species under discussion, its capacity to feel pain, its ability to engage with the world around it, its conscious involvement with the world outside itself, and many other factors. But in this the sixtieth anniversary year of the Universal Declaration of Human Rights, those who are truly dedicated to human rights should not be afraid of characterising their subject as a subset of a wider topic, that of animal rights, albeit a subset without whose existence the larger

category would never have been effectively articulated as such. This does not diminish the importance of *human* rights, which would inevitably remain more sophisticated and complete than their animal counterparts, but it might well do long term good to the subject by putting its intellectual foundations on a firmer basis than they presently enjoy.

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