

BEYOND HUMAN RIGHTS:

AN INTERNATIONAL AGREEMENT ON ANIMAL RIGHTS?

For over 150 years we have seen debates, battles, demonstrations and activism around the world which have led to massive changes in legal rights for many people including indigenous peoples, people of different races, women and people with a disability. We have the great UN Rights documents, the Declaration of Human Rights, the International Convention on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, Convention on the Elimination of All Forms of Discrimination against Women, Convention on the Rights of Persons with Disabilities, Declaration on the Rights of Indigenous people etc. But if I were to tell you that the next great rights frontier would be in relation to animals you may well be sceptical. Animals can't have rights. But could they? Or should they? Is there a place for an International Convention on Animal Rights?

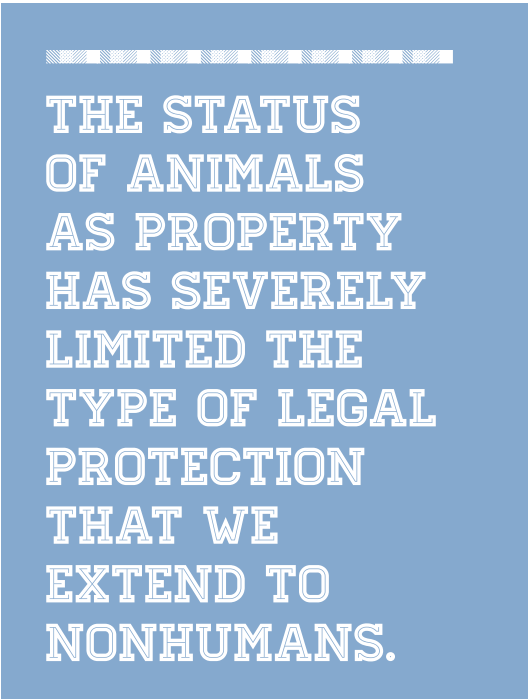
Animal law as a field of study is new to Australia. It was only in 2005 that UNSW offered the first animal law course taught in Australia. It is difficult to envisage legal changes to the Constitution in Australia to benefit animals, or a government being a signatory to an animal rights convention but there are many advocates working on animal rights issues both from a rights perspective and an animal welfare approach and ultimately, judging by developments in other social movements, change will come.

As any good law student knows, animals are categorised in our legal systems as property. Halsbury's states that '[d]omestic animals, like other personal and moveable chattels, are the subject of absolute property.'¹ Historically, animals have been classified as 'domestic' or 'wild', and many of the common law principles of ownership, property and theft depend upon this classification. Domestic animals in law are the subject of absolute property.² Wild animals will be public property when in their natural state not under human control, or the object of qualified property when they are under direct human control if tamed, confined etc.³

The absolute right of ownership of animals as property is, of course, affected by animal welfare legislation which has been said to originate in the courts 'safeguarding the inviolability of a person's possessions.'⁴ Legislation and policy in this area has had an impact on how animals are treated however not to their status under the law. As Gary Francione states:

The status of animals as property has severely limited the type of legal protection that we extend to nonhumans. As a general matter, whenever we seek to resolve a perceived human-animal conflict, we balance our assessments of the human benefits to be derived from the animal use against the interests of the animal(s) that will be 'sacrificed' in the process. The limiting principle of this balancing process is that we treat animals 'humanely' and that we not subject them to 'unnecessary' suffering. The problem is that the balancing process is nothing more than an

illusion in which the outcome has been predetermined in light of the very different status of the supposedly competing parties. It is simply not possible to balance meaningfully human interests, which are protected by claims of right in general and of a right to own property in particular, against the interests of property, which exist only as a means to the ends of persons. This balancing is particularly unrealistic where, as here, the assessment is almost always sought to be made in the context of a human property owner seeking to act upon her animal property.⁵



THE STATUS
OF ANIMALS
AS PROPERTY
HAS SEVERELY
LIMITED THE
TYPE OF LEGAL
PROTECTION
THAT WE
EXTEND TO
NONHUMANS.

So animals are property under the law, and always have been. Should we then regard that as the end of the matter?

Perhaps not. As we all know, the law can be changed. Slaves were previously seen by the law as being the property of their owners.⁶ In the 1772 case of James Somersett mentioned by Blackstone,⁷ Mr Somersett had been made a slave in Africa, was sold then carried to Virginia where he was bought and brought by his master to England. He ran away from his master, who seized him and carried him on board a ship, where he was confined in order

to be sent to Jamaica to be sold as a slave. Under a habeas corpus writ instigated by friends, Mr Somersett was brought to the court and eventually freed.

As Steven Wise has pointed out:

The defining moment for the eighteenth century slave James Somersett was when he became legally visible. He was a legal thing when he landed in England in 1769, having been captured as a boy in Africa, then sold to a merchant in Virginia, Charles Steuart, for whom he slaved for two decades. As a legal thing, James Somersett existed in law for the sake of Charles Steuart, for legal things, living and inanimate, exist in law solely for the sake of legal persons. They are invisible to civil judges in their own rights. Only legal persons count in courtrooms, or can be legally seen, for only they exist in law for their own benefits. Legal personhood is the capacity to possess at least one legal right; accordingly, one who possesses at least one legal right is a legal person. James Somersett's legal transubstantiation from thing to person at the hands of Lord Mansfield in 1772 marked the beginning of the end of human slavery.⁸

Wise has set up the Nonhuman Rights Project, which aims to persuading an American state higher court to similarly transform a non-human animal.⁹

To many people the idea of giving animals legal rights seems absurd or dangerous. Many people believe that the planet and animals on it exist for the benefit of humans. Most humans eat animals and point to the fact that animals eat other animals. This is seen as the natural order of things. The strongest win out and humans are the most powerful and the most intelligent. The idea of animal rights is threatening to the way the humans generally conduct their business. Medical researchers have long been concerned about activities of animal rights activists and their potential effect on research activities designed to benefit humans.¹⁰ Even some of the most passionate

of social justice and rights advocates eye the animal rights debates with dismay. Why are we thinking about animals when there is so much to do to alleviate human distress and misery through legal advocacy? But there are other ways to look at the issue.

The term 'speciesism' refers to a widely held belief 'that the human species is inherently superior to other species and so has rights or privileges that are denied to other sentient animals.'¹¹ But what is the basis for this professed superiority? We like to distinguish ourselves from animals by saying that only humans are rational, can use language, are self-aware, or are autonomous. But these abilities, significant as they are, do not enable us to draw the requisite line between all humans and nonhuman animals. For there are many humans who are not rational, self-aware, or autonomous, and who have no language - all humans under three months of age, for a start. And even if they are excluded, on the grounds that they have the potential to develop these capacities, there are other human beings who do not have this potential. Sadly, some humans are born with or develop disabilities so severe that they will never be able to reason, see themselves as an independent being, existing over time, make their own decisions, or learn any form of language. It is perhaps a better view to see all animals as part of life on the planet and it is no great leap of imagination to see animals as being something more than property of humans.

So is there any capacity to achieve change in the law in respect of animal status? This does not mean that animals should have the same legal rights as humans, but as Peter Singer says:

The fundamental form of equality is equal consideration of interests, and it is this that we should extend beyond the boundaries of our own species. Essentially this means that if an animal feels pain, the pain matters as much as it does when a human feels pain - if the pains hurt just as much. How bad pain and suffering are does not

ONE INTERPRETATION OF RESPECT FOR ANIMALS IS TAKING THE ANIMALS' INTEGRITY – AND NOT ONLY WELFARE – INTO ACCOUNT.

depend on the species of being that experiences it.¹²

Paola Cavalieri sees the property status of animals as the basic obstacle to non human rights. Basic rights that are sought for animals include a right to life, right to habitat, right to liberty; even a right to property (in that honey could not be taken from bees, or milk from cows).¹³

Although animals are still regarded as property, there are some indications that legal change is possible and may be coming. In the last three years there has been a plethora of legislation regarding animal welfare in many countries. For example, in 2002, the German constitution was amended to add the words 'and animals' into this provision.

ARTICLE 20A

Protection of the natural foundations of life and animals

Mindful also of its responsibility toward future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order.¹⁴

In March 2010, a referendum was held in Switzerland proposing that a State lawyer be appointed in each canton to run animal abuse cases. This measure was defeated but Switzerland now has probably the strictest rules anywhere when it comes to caring for pets and farm animals. The country's 160-page

animal protection law states exactly how much space owners must give Mongolian gerbils (233 square inches) and what water temperature is required for African clawed frogs (18-22 degrees Celsius; 64-72 degrees Fahrenheit). It stipulates that pigs, budgies, goldfish and other social animals cannot be kept alone. Horses and cows must have regular exercise outside their stalls and dog owners have to take a training course to learn how to properly look after their pets.¹⁵ In Norway, new animal legislation has an explicit intention to promote respect for animals and its recognition of animals' intrinsic value. Whereas intrinsic value is only given a symbolic function, the notion of respect is intended to have practical consequences. One interpretation of respect for animals is taking the animals' integrity – and not only welfare – into account.¹⁶

INTERNATIONAL AGREEMENTS

There is no general convention for the protection of animals on an international basis though a few moves in this direction have been made.

The first draft of a *Universal Declaration of Animal Rights* was presented on 15 October 1978 in the UNESCO House in Paris. The text was then revised in 1989 by the International League of Animal Rights and submitted to the UNESCO Director General in 1990.¹⁷ Among the Declaration's pronouncements were that all animals have the same rights to existence, no animal shall be ill-treated or subject to cruelty, animals shall command the protection

of law, and dead animals shall be treated with respect. The Declaration has never reached any significant level of international agreement.

More recently, some of the world's leading animal welfare organisations started campaigning for the United Nations to adopt a new declaration. This time the declaration is on the welfare of animals rather than on animal rights: the *Universal Declaration on Animal Welfare* ('UDAW').¹⁸ According to the World Society for the Protection of Animals, UDAW is an attempt to secure international legal recognition for the principles of animal welfare. It is an 'agreement among people and nations to recognise that animals are sentient and can suffer, to respect their welfare needs, and to end animal cruelty – for good.'¹⁹ The UDAW arose from the Manila Conference on Animal Welfare in 2003, and is underpinned by four foundational principles:

- a the welfare of animals is a common objective for all;
- b the standards of animal welfare attained by each state shall be promoted, recognized, and observed by improved measures nationally and internationally;
- c all appropriate steps shall be taken to prevent cruelty to animals and to reduce their suffering; and
- d appropriate standards on the welfare of animals shall be developed.²⁰

Most attempts to give protection to animals on the international scene have been 'ad hoc and focused upon individual species'²¹, such as the Great Apes and whales, which have been seen as being special cases.

There has been recognition, however, of the need for protection for endangered species. The *Convention on International Trade in Endangered Species of Wild Fauna and Flora* ('CITES') subjects international trade in specimens of selected species to controls. All import, export, re-export and introduction from the sea of species covered by the Convention has to be authorised through a licensing system and the effects of trade on the status of the species must be monitored.²² The *Convention on the Conservation of Migra-*



tory Species of Wild Animals (also known as CMS or the Bonn Convention) aims to conserve terrestrial, aquatic and avian migratory species throughout their range.²³

Obviously, we are a long way from recognising that animals have legal rights in international and domestic spheres. No declaration of rights will have immediate results and there are still many humans who suffer even where there are legally enforceable rights. Recognition of animal rights will no doubt be a long process but, given the history of social change, it seems inevitable. Creative and passionate lawyers will be needed to effect change in this area. While animals are seen as merely property, they will always be subject to the needs of their owners above all. As rapid and far-reaching developments in public awareness of animal welfare occur we move step by step closer to community acceptance of recognition of rights.

REFERENCES

- 1 LexisNexis, *Halsbury's Laws of Australia*, (at 15 June 2012) 20 Animals, '1 Property in Animals' [20-50].
- 2 *Saltoon v Lake* [1978] 1 NSWLR 52.
- 3 Deborah Cao, *Animal Law in Australia and New Zealand* (Thomson Reuters, 2010) 73.
- 4 Mike Radford, *Animal Welfare in Britain: Regulation and Responsibility* (Oxford University Press, 2001) 101.
- 5 Gary L Francione, *Animals as Property (Animal Legal & Historical Center, 1996)* <http://www.animallaw.info/articles/arusgfrancione1996.htm>.
- 6 See, eg, *Scott v Sanford* 60 US 393 (1856), where it was held that 'Negroes' were 'property' and not 'citizens': at 451. The Court cited the United States Constitution as support for its holding, stating that 'the right of property in a slave is distinctly and expressly affirmed in the Constitution': at 451; see also Marjorie Spiegel, *The Dreaded Comparison: Human and Animal Slavery* (Mirror Books, 3rd ed, 1996).
- 7 William Blackstone and Thomas Cooley, *Blackstone's Commentaries on the Laws of England: Four Books in 2 Volumes* (Lawbook Exchange, 3rd ed, 2003) vol 1, 334.
- 8 Steven M Wise, 'Legal Personhood and the Nonhuman Rights Project' (2010) 717 *Animal Law* 1, 2.
- 9 The common law transformation of a nonhuman animal from 'legal thing' to 'legal person' is a primary objective of the Nonhuman Rights Project. For information on the Non Human Rights Project, see <http://www.nonhumanrightsproject.org/>.
- 10 See, eg, Richard P Vance, 'An Introduction to the Philosophical Presuppositions of the Animal Liberation/Rights Movement' (1992) 268 *Journal of the American Medical Association* 1715, 1715.
- 11 Richard D Ryder, *Speciesism* <http://www.richardryder.co.uk/speciesism.html>.
- 12 Debate between Richard Posner and Peter Singer, June 11–15 2001 <http://www.utilitarian.net/singer/interviews-debates/200106--.htm>.
- 13 See Paola Cavalieri, *The Animal Question: Why Nonhuman Animals Deserve Human Rights* (Oxford, 2004) 142.
- 14 *Grundgesetz fur die Bundesrepublik Deutschland* Basic Law of the Federal Republic of Germany art 20(a).
- 15 Frank Jordans, 'Swiss Say No to Animal Lawyers', *The Independent* (online), 5 September 2012 <http://www.independent.co.uk/news/world/europe/swiss-say-no-to-animal-lawyers-1917809.html>.
- 16 Ellen-Marie Forsberg, 'Inspiring Respect for Animals Through the Law? Current Development in the Norwegian Animal Welfare Legislation' 24 (2011) *Journal of Agricultural and Environmental Ethics* 351.
- 17 Text of the Declaration is at http://jose.kersten.free.fr/aap/pages/uk/UDAR_uk.html at 14 June 2012.
- 18 For discussion of this proposal, see Miah Gibson, 'The Universal Declaration of Animal Welfare' (2011) 16 *Deakin Law Review* 539, 546.
- 19 Michael C Appleby and Lorna Sherwood, *Animal Welfare Matters to Animals, People and the Environment: the Case for a Universal Declaration on Animal Welfare* (Lobby Brochure, WSPA, 2007) http://www.wspa.org.au/Images/UDAWLobbyBrochure_tcm30-3534.pdf.
- 20 Caley Otter, Siobhan O'Sullivan and Sandy Ross, 'Laying the Foundations for an International Animal Protection Regime' (2012) 2 *Journal of Animal Ethics* 53, 66.
- 21 Al Gillespie, 'Animals Ethics and International Law' in Peter Sankoff and Steven White (eds), *Animal Law in Australasia: A New Dialogue* (Federation Press, 2009) 333, 334.
- 22 CITES 27 UST.1087. TIAS No 8226. Article II < <http://www.cites.org/eng/disc/how.php> > at 12 June 2012.
- 23 CMS Convention on Migratory Species 19 International Legal Materials (1980) 15. Article III. 4 (c).