

# Some Implications for Legal Personhood of Extending Legal Rights to Non-Human Animals

STEVEN TUDOR<sup>†</sup>

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Professor Naffine's *Law's Meaning of Life*<sup>1</sup> provides a very rich and stimulating jurisprudence of the nature of the legal person. She has brought together a wide array of sources and skilfully deploys them in showing the various ways that the law, lawyers and others have understood 'who law is for'. Her book will undoubtedly be an essential reference point in future debates on this central jurisprudential question. In my comments here, I am going to focus on a particular question that intrigued me as I was reading the book, namely: if non-human animals were given legal rights, what sort of legal persons would they be? I am not addressing this question because I think it uncovers a weak point in the book and so might be a good place to start a critique. Rather, I want to pick up a particular thread in Naffine's discussion and engage with it in a dialogical spirit in an effort to understand more about the possibilities of the concept of a legal person. I shall proceed by considering five more specific questions:

1. Why aren't animal protection laws enough to grant animals legal personhood?
2. How revolutionary is the idea of granting legal personhood to animals?
3. Can animals be legal persons if they have no legal duties?
4. Would granting animals legal personhood level the concept of the legal person?
5. What minimal rights would animals as legal persons have?

## I. Why aren't animal protection laws enough to grant animals legal personhood?

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<sup>†</sup> Lecturer, School of Law, La Trobe University.

<sup>1</sup> Ngaire Naffine, *Law's Meaning of Life: Philosophy, Religion, Darwin and the Legal Person* (2009).

Some non-human animals (whom I shall simply call ‘animals’ for convenience) are already the beneficiaries of various laws that impose duties on humans (and indeed artificial persons) not to harm them. Just one example is found in the Prevention of Cruelty to Animals Act 1986 (Vic), s 9, which makes it a criminal offence to commit an act of cruelty upon an animal. However, from my brief reading of the law, there appears to be no private action available (for example, in tort) whereby the animal victim of cruelty could seek its own legal remedy in the absence of criminal prosecution. Animals thus remain merely passive beneficiaries of the duties imposed on others.

As Naffine notes,<sup>2</sup> Cass Sunstein argues<sup>3</sup> that by being the beneficiaries of such legal duties, animals already enjoy legal rights of a sort. I think he is right, but is that minimal sort of right enough for legal personhood? On one view of legal personhood, the holder of any right, no matter how limited that right is, will, by definition, be a legal person. This strikes me, however, as insufficient. Legal personhood, to my ear at least, requires more, namely the legal capacity to seek enforcement of one’s right. That is to say, merely being the beneficiary of another’s duty does not seem to amount to legal personhood if the beneficiary lacks standing to bring legal actions in its own name to enforce its rights.

However, if legal personhood *is* to be treated as attaching to the holder of *any* right, then I suspect we will need to distinguish between those legal persons with standing and those without, and the focus of the discussion will then simply shift to the boundary between these two as opposed to the boundary between legal persons and non-persons.

## II. How revolutionary is the idea of granting legal personhood to animals?

Some might ridicule the idea of granting animals standing to enforce their rights, on the basis that even the most intelligent and sentient among them would be completely unaware of their rights and have no actual mental capacity to exercise their legal capacity to enforce them. Here the assumption is that a creature cannot be a legal person if it could not know that it was.

The obvious answer here is that this situation is already well-known to the law. The law already recognises as legal persons certain human

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<sup>2</sup> Ibid 138.

<sup>3</sup> Cass R. Sunstein, ‘Standing for Animals (with Notes on Animal Rights)’, (2000) 47 *UCLA Law Review* 1333, and ‘The Rights of Animals’, (2003) 70 *University of Chicago Law Review* 387.

beings who lack the mental capacity to exercise their legal capacity themselves: the very young and certain kinds of disabled or infirm people. We have little trouble, conceptually, with the idea that such legal persons will need a guardian to act for them in legal contexts.

Similarly, there seems to be little conceptual difficulty with the idea that the exercise of an animal's right to enforce its rights would need to be carried out by a guardian. As Steven Wise puts it in the title of one of his articles, 'hardly a revolution' is needed here.<sup>4</sup> Of course, the world of legal practice would likely be very different, at least in some fields, but there need be no jurisprudential convulsion involved in admitting animals as legal persons. This is no doubt partly due to the abstractness and consequent flexibility of the notion of the legal person, something championed by Naffine's Legalists.

### III. Can animals be legal persons if they have no legal duties?

The standard definition of 'legal person' seems to be that legal persons are bearers of both rights *and* duties; the law both confers rights and at the same time imposes duties on legal persons. This reflects a familiar moral principle, namely that the feature that allows a person to assert rights, such as practical reason, at the same time attracts duties. As Roger Scruton puts it, 'a creature with rights is duty-bound to respect the rights of others'.<sup>5</sup> However, animals as legal persons (thus far conceived) appear to have no legal duties. Moreover, it seems reasonably clear that even the highest functioning non-human animal could not and should not be made the subject of any legal or moral duty.

Of course, in the past some animals *have* been treated as having legal duties, and as being prosecutable when they have breached them.<sup>6</sup> But I am assuming that it is no longer reasonable to treat animals so. This is because they lack the kind of communicative practical reasoning which should form the basis of the legitimate imposition of obligations. (I take this to be the kind of reasoning that offers, seeks and requires reasons for action in dialogue or negotiation with other reasoners). I am careful not to say that animals lack reason as such, for that would, I am sure, be false in relation to some species. However, as a contingent fact, the kind of communicative

<sup>4</sup> Steven M. Wise, 'Hardly a Revolution – The Eligibility of Nonhuman Animals for Dignity-Rights in a Liberal Democracy', (1998) 22 *Vermont Law Review* 794.

<sup>5</sup> Roger Scruton, *Animal Rights and Wrongs* (3<sup>rd</sup> ed., 2000), 80.

<sup>6</sup> For some cases see Tom Regan, *All That Dwell Therein* (1982), 150–2, and the references cited at 163 n 1.

practical reasoning that should be a condition of bearing obligations is, so far as we know, only found within the human species.

The choice, then, seems to be that we either modify the definition of legal person so that it becomes ‘a rights *and/or* duties bearer’, or stick to the ‘rights-*and*-duties’ definition and deny legal personhood to animals. My preference is to broaden the definition of legal person. This is because, again, we are in fact quite familiar with duty-less legal persons in the form of the very young and certain kinds of disabled or infirm people. But even if we were to stick to the rights-*and*-duties model, I think we would at least need to treat the creature who bore only rights as a ‘quasi’ legal person.

As an aside, the ‘*and/or*’ approach opens up the possibility that some legal persons — slaves, for example — may be in the reverse position and have only duties and no (or next to no) rights. Slaves are usually said to be mere property, but we could readily understand (while deploring) a legal system that treated some humans not as property but as legally responsible persons who are duty-bound to obey their masters, but with no legal rights. Of course, the practical difference to the slave may be minimal, but such an approach may help make better sense of the transition (if it is available) from slavery to freedom, in that it is easier to see how a duty-bearer (as opposed to a true thing) may later come to enjoy rights.

Defenders of the ‘rights-*and*-duties’ conception of legal personhood may argue that I have missed the fact that the supposed legal persons who have only rights and no duties will all need a legal guardian to act for them, and that it is at this point that duty does in fact come back into the picture. This is because, it could be said, no guardian will be free of duties. It seems fair to say that guardians must have a duty to protect the best interests of those they guard, but it would seem that the duty needed here for legal personhood must be more than this and must include duties to others and not just to the one guarded. At a minimum, the guardian’s duty to obey the law, including court orders, would seem to do at least part of the job here. On this view, then, the legal personhood of animals, which requires rights-*and*-duties, is only ‘completed’ once a guardian is in place to provide the duty-bearing component. Perhaps nothing much hangs on these differences, but my hunch is that there is not much to be gained in steadfastly hanging on to the duty part of the definition of legal person.

#### **IV. Would granting animals legal personhood level the concept of the legal person?**

Some people might fear that granting legal personhood to animals would involve a lowering of the status implied by ‘legal person’. This seems to be

because it is assumed that the criterion for *granting* legal personhood to animals would become the sole content of the *meaning* of legal personhood, such that all legal persons would be conceived of in terms of the lowest common denominator, such as sentience. The idea seems to be that where the boundary of a concept is extended, all those who are encompassed within the boundary will be treated as if they were *just inside* the boundary. Thus, human dignity, human sanctity, human reason and so on, which Naffine's Religionists and Rationalists have championed, would be sidelined, and human beings 'reduced' to being just another species of 'sentient creature.'

This, however, strikes me as not at all obvious. We can quite readily allow for *various* reasons for extending the scope of 'legal person' in *various* directions. That is to say, the reasons for extending legal personhood to animals, new born children, humans in a persistent vegetative state, ships, idols, corporations and so on, need not be the same or even significantly overlap. Thus there may in fact be no common denominator at all to the various criteria for admission to the class 'legal person'. This can then allow for various types of legal persons. Moreover, it can even allow for *hierarchies* within the circle of legal persons. The law already draws various hierarchical distinctions between types of legal person. For example, the privilege against self-incrimination extends only to human beings and not corporations.<sup>7</sup> Perhaps I am just being a Legalist here in saying that, from a legal taxonomic point of view, there need be no fixed or common criteria for admission to the class 'legal person'. I prefer to think of it as a pragmatist approach, but perhaps pragmatism's flexibility becomes indistinguishable at times from Legalism's abstractness.

## V. What minimal rights would animals as legal persons have?

If animals were granted legal personhood, what legal rights must that entail? A strict Legalist would say that no particular right is entailed, only that there be at least some right (or duty). But it would be perverse to say that animals should be treated as legal persons because they can suffer, and then go on to say that the only right that animals should be afforded as legal persons is the right to worship whichever gods they please. That is to say, I think it is reasonable to argue that the criteria used as the basis for admission to legal personhood should have some direct connection with at least some of the rights thereby gained (and so I suppose I am a Realist to that extent).

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<sup>7</sup> See *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 504.

If sentience is the most plausible basis for admitting certain animal species to legal personhood, what rights would follow? Many would argue that the right to life is clearly the most fundamental right, and should be accorded to sentient animals, since if they are not alive, they cannot remain sentient. However, the criterion of sentience does not mean that animals have a right to *be* sentient. Rather, I would suggest that it means they have a prima facie right not to feel pain. This means that they would not necessarily have a right to life, only a right to be slaughtered *humanely*, if they are killed. Moreover, they may have to yield some of the right to be free from pain where it is over-ridden by a competing right (such as human well-being).

But what about those ‘higher order’ species where we would base their legal personhood on their intelligence or reason or, as Steven Wise argues, ‘practical autonomy’<sup>8</sup>? I would indeed argue that such animals *should* be accorded a right to life, since there does appear to be a clearer connection between their having ‘mental lives’ and the need to preserve such life. Nonetheless, the kind of life they have need not be wholly equated with human life; it may be that even such intelligent animals’ lives are more *zoe* than *bios*, to borrow the Greek terms Ronald Dworkin makes use of in a related context.<sup>9</sup> Perhaps this may be partly why many of us would more readily allow active euthanasia for a mortally ill chimpanzee than for a mortally ill human being. Though we might strongly argue that both should be legal persons, we might be less inclined to say that they both ‘lead lives’ and that the sense of the ‘ending’ of such lives is the same.

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<sup>8</sup> Steven M. Wise, *Drawing the Line: Science and the Case for Animal Rights* (2002), 33–4.

<sup>9</sup> Ronald Dworkin, *Life’s Dominion: An Argument about Abortion and Euthanasia* (1993), 82–3.