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*Animals: Freedom, Justice, Welfare,
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Animals and Justice

The Unfinished Journey¹

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1. INTRODUCTION

The theme of justice for all animals is very stimulating and very topical, given the recent steps that are being taken to change our legal system to be able to guarantee greater protection for non-human animals. Before addressing the issue, I would first go over the meaning of the word “justice”, to make sure to focus on the most pertinent aspects of the journey animals are taking towards this goal and the most significant milestones already achieved. In fact, the idea of justice applies both to ethics and to law, and it occupies centre stage in public policies, as well as in legal and political philosophy. These are core features that can drive the discussion of the different forms of justice that (should) affect all forms of life.

According to the definition from the *Oxford English Dictionary*, the word *justice* means: “The virtue represented by the willingness to recognize and respect everyone’s right by giving them their due according to reason and law; one of the four cardinal virtues according to Christian doctrine”. Such a concept deals with how individual people are treated. But the idea of justice can also be applied to groups (e.g., categories of citizens or other categories of people) and institutions. Regarding the latter and their fairness, to quote a well-known philosopher’s statement, justice could be described as “the first virtue of social institutions” (Rawls 1971, 1999). But we can assume that it can apply to other institutions too, as a concept that takes different forms in various practical contexts. For this very reason, also, recipients of justice are diverse. This leads to the question of whether the principles of justice can be applied

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to non-human animals and, conversely, whether only human people can be subjects of justice.

Going back to the literal definition of the concept, it appears to be directly linked to those of *respect* and *rights*, referring to each individual and to mutual relations. Two other elements are, then, interesting to emphasize because they relate to the ways in which justice is exercised. They are the words *reason* and *law*, which are two keywords, because, while it is necessary for man to be rational enough to understand what kind of relationship he should have with animals and how much he owes to animals, the law is fundamental as the instrument through which binding rules can be established, on which rights depend on and through which compliance can be ensured.

Respect and law are therefore two closely related concepts. If we respect someone, we recognize his or her rights, and, vice versa, through the rights (granted and ensured by the law) we can allow there to be respect. It might even be pointed out that talking about respect also means recognizing someone's dignity and personhood. This deals with justice, as, for an individual, it can be understood as being properly recognized. While misrecognition may deal with injustice, which, in some cases, involves the kind of inappropriate treatment that stems from this attitude. Failures of recognition often lead to a lower value being attributed to individuals and groups and make them placed in a category or assigned an identity that is not their own (Honneth 2004).

The question of justice embedded in the way individuals and groups are treated and in determining what is due to each of them or what is the best way to pursue some common purpose has to do with the scope of justice itself. In this regard, a crucial issue to which attention must be drawn on is the identification of the target of justice. That entails answering the question of who and under what conditions the principles of justice apply. This premise is strictly linked with the recognition of who is entitled to make claims of justice (or to be represented at this end) and who should meet them.

So, are there any features or other reasons not to "recognize" someone or not to include someone within the scope of justice? It is a fact that there is not a comprehensive theory of justice since this concept does not correspond to an overarching framework into which convictions about it can all be fitted (Walzer 1983). What justice requires to be done depends on the different practical contexts in which it is applied, and on the codification that the law gives of it. But it also depends on the relative weight attached to the recipients, which is strictly connected with the way their relative position is considered worthy of justice.

Referring to living beings, this deals with the question of whether some of them can be excluded from the scope of principles of justice, in whole or in part. That is if all creatures are entitled to be “someone” in front of (human) justice (Nussbaum 2006; Garner 2013). It is well-known that the law still has some trouble fully recognizing non-human animals as “someone”, but still looks at them as if they were just “something”, and this continues to be an obstacle along the animals’ journey to justice. Does one therefore have to deduce that the principles of justice are not applicable to non-human animals? But, if justice is about respect and rights, why shouldn’t it apply to animals? If so, how do you guarantee respect for animals?

These and other questions arise when one addresses the issue. For example, what about animal rights? And again, what rights can be identified? Above all, even if rights were recognized that could be extended to non-humans, should or could they be enjoyed by everyone, i.e., non-human animals of all species and categories? Let us remember that even the categories into which animals are classified have been constructed and decided by man, just as it is always the man who can decide whether or not to grant rights to non-human animals, since they cannot claim them for themselves (Garner 2002). Moreover, the law itself has a human basis, and the laws are developed by people, even when it comes to “animal law”.

Thus, we must keep in mind that the process and success of the animals’ journey to justice depends on human willingness to recognize that even those who are not humans deserve to be respected and to have prerogatives that allow them to satisfy their own interests. This is a challenge for man, and it is interesting to analyze it through the prism of justice.

2. LESSONS FROM A PAINTING

A quite famous painting by P. Mathews (1838) depicts the Trial of Bill Burns that is considered to be the world’s first known case of conviction for cruelty to animals, handed down by a U.K. court after a man (Bill Burns) was found beating his donkey (*Fig 1*). The prosecution was brought by Richard Martin, a U.K. MP and animal rights campaigner, and the case became memorable because the donkey was physically brought into the courtroom as if he himself wanted to plead his case, thus as if he already had legal subjectivity as well. The ruling was made under the so-called Martin’s Act, enacted in 1822, which was one of the first animal protection laws in recorded history. The Act was focused against

the cruel treatment of livestock and was initially limited to certain species, but it was later repealed by a broader law against cruelty to animals (Cruelty to Animals Act 1849). In the end, a verdict of condemnation was obtained for the abuser, and this was a historical moment that is deemed the emblem of a turning point in the consideration given to animals in the legal framework for animal protection. The picture includes several significant elements that are interesting to analyze.

Firstly, the initiation of this court process carries along the evidence that one can be prosecuted for unjust acts against animals (in the literal sense, since in the painting the scene takes place in a court of law). Moreover, it already foreshadows that they might be legal entities. Furthermore, the existence of a national law on the protection of livestock was particularly significant for the very reason of its subject matter. Indeed, the term “livestock” refers to the species that were, and still are, considered among the least deserving of respect and rights.

The painting also depicts the image of a person making a mockery of the donkey. This picture within the picture is interesting because it is a metaphor of the mentality and of the fears of the time.



Figure 1. – By P. Mathews
<https://commons.wikimedia.org/w/index.php?curid=4177701>.

On one hand, it seems to emphasize that the affair had some ridicule, thus recalling the incredulous laughter that had until then accompanied the efforts made to change the position of animals before society and before the law. On the other hand, it also wants to express the desire to belittle the idea of taking on the defenses of an animal, which was considered with hostility also because it was seen as the risk of establishing a kind of “precedent” that could undermine the condition of supremacy of human beings over non-human animals.

Apparently, with the ruling in favor of the donkey, these prejudices have been defeated, and this is another important symbolic element which corresponds to a stage in the journey towards a fundamental cultural change, which can also influence the law.

3. THE CURRENT STAGE OF THE ANIMALS’ JOURNEY TOWARDS JUSTICE

Now, two centuries later, the question is how far along the animals are on their journey to justice.

In order to make an assessment, we need to take into account both the current cultural climate and the current legislation as well as the existing legislative proposals concerning animal welfare, while bearing in mind that law and culture are closely intertwined and that the law plays a central role in defining behaviors and distinguishing between lawful and acceptable ones and prohibited ones. Indeed, social attitudes towards animals are still conflicting, since they range from having pro-animal attitudes (e.g., to the point of treating companion animals as members of the family) to accepting and justifying the instrumental treatment of other animals and their exploitation for human purposes, in all sorts of contexts (as a source of food, source of skins, research models, circus “performers”, etc.).

The legal system, that is a central factor in ending disrespectful behavior towards animals, is, paradoxically, the essential element in continuing to allow their exploitation and oppression. The law as it now stands, which includes anti-cruelty provisions and creates the duty to treat animals at least “humanely”, on the other hand, allows inflicting pain and suffering on non-humans when “necessary” and, above all, it treats non-human animals as things and as properties (Francione 1995; Favre 2004).

Conversely, it is important to take into account what is made available by science, on which both culture and law draw a lot. To date, it has

taken us further in understanding the characteristics of animals and has informed us about their capacity to suffer and about their cognitive and relational abilities that are highly developed (Proctor *et al.* 2013).

So, it is important that the legislature is open to incorporating both the new understanding of animals and the changes in sensitivity to animals, which it is fostering, and new input about their capabilities that comes from scientific research.

Over the centuries, we have moved from a totally anthropocentric conviction, which nurtured a law made only for humans, to a re-evaluation of the animal-human relationship. Signs of a change in sensitivity towards animals have started to appear in society. However, one thing remains unchanged, while is the key to the success of the journey of animals towards justice: nonhumans are still treated as objects before the law, and the true recognition of their legal personhood has not yet been achieved. This not only slows down the changes in favor of animals, but in fact, it does not prevent the emergence of new forms of exploitation and oppression of the animals themselves (for example, consider the case of invertebrates seen as being novel food; they will be managed with no chance of being considered individuals).

For years, the battle for the recognition of animals as subjects before the law has been going on, but so far, only partial results have been achieved, especially with reference to certain categories of animals; in any case, there are obvious differences among species (Epstein 2004).

For example, behaviors towards companion animals come very close to considering them as subjects and not as objects to be exploited. By contrast, farm and laboratory animals, or in general working animals, remain in a context of commodification despite the enactment of specific, higher standards of protection from the force of human desires. On the other hand, when it comes to the impact of a possible change in the legal status of animals, the consequences would be so challenging and revolutionary that it is not really possible to foresee them in the near future (they would mean no more slaughtering animals, breeding them, transporting them in cattle trucks, using them in research as now, etc.).

Thus, are we at a standstill, so must we assume that the animals' journey to justice will not have an end?

Actually, as the Italian philosopher Norberto Bobbio wrote, we live in the "age of rights", which is characterized precisely by the phenomenon of the multiplication of the rights that are claimed, recognized, and protected, in correspondence with the emergence of new interests (Bobbio 1996). And it cannot be denied that the interests of animals are becoming a paradigm of analysis in an increasingly wide-ranging and

argued way, as well as duties towards them have become the subject of discussion by legislators, making the objectives of a broader rights and justice system more tangible.

Influential legal experts and scholars have already highlighted this while stating the reasons why the subjectivity of animals should be recognized along with animal rights. There are very significant examples of ambitious judicial battles being fought in the world in this regard. Some of them are egregious, such as the common law writs of *habeas corpus* (*habeas corpus*, meaning “show me the body”, is an institution which historically has been used to grant freedom to people from arbitrary detention and deprivation of liberty) that aim at expressly affirming legal personhood for non-human animals, or at least for cognitively advanced animals that face inadequate and indefinite detention in zoological structures². This is a new legal frontier where these animals are recognized as non-human legal persons, enjoying the guarantees traditionally provided by law in favor of human beings.

In Italy, too, there are noteworthy examples of steps taken in the direction of extension of legal rights to animals. They are perhaps more limited in scope, but nonetheless significant as they are part of an undertaken path that is reaching important stages. Among them, we can mention the case law that demonstrates that agrees on the principle that animals possess “inherent” qualities and deserve consideration as “subjects of life”. In 2007, the Italian Supreme Court stated that animals and children should be taken care of with equal diligence³. Following this principle, the judgment led to the conviction of a man who had dragged his dog by car for several dozen meters before realizing that the leash was entangled in the door and that the animal was not inside the car.

In recent years, several judgments on the separation of couples have established that the rules for the custody of children should apply to companion animals in order to protect their own interests instead of including them in the property distribution (Fossati 2020).

Other evidence that the interest of at least companion animals is given some measure of weight that is comparable to that of people can

² See the process that, in 2016, led to a successful writ of habeas corpus on behalf of a chimpanzee (Cecilia) in Argentina, which was followed by a similar judgement in favour of the bear Chuco. More recently, on May 4, 2021, the New York Court of Appeals agreed for the first time to hear the habeas corpus case of a non-human animal, Happy the elephant.

³ Cass. Pen., Sez. III, 05/06/2007, n. 21805, available online at <https://www.altalex.com/documents/massimario/2007/06/11/maltrattamento-degli-animali-diligenza-chenormalmente-si-usa-verso-un-minore>.

be found in the Italian Civil Code (C.C.), which prohibits preventing the presence of domestic animals in condominiums (art. 1138 C.C.). Furthermore, it is compulsory under the Codice della Strada (Traffic Code) in force to assist animals (both domestic and wild ones) when they are victims of accidents. While the Italian Penal Code (C.P.) guarantees the punishment of crimes against animals such as unnecessary and cruel killings, mistreatment, and the use of animals in prohibited fights or shows.

If one were to examine further the case law sources, one would be presented with a picture regarding the recognition of the relationship with a companion animal as a “subjective right” of the person, guaranteed by the Italian Constitution (Art. 2), as it contributes to the realization of the person. Such an approach has been confirmed for the elderly hospitalized in social and healthcare facilities, and also for prisoners in jail, who must be allowed at least one visit from their animals. It also emerges where the judges award compensation for the non-material loss suffered because of the loss of a companion animal. These decisions give meaning and value to the bond that develops between humans and animals, while confirming that it creates a sense of empathy and emotional, psychological, and physical connections, which undoubtedly create a relationship between sentient beings on both sides. Italy is a civil law country; thus, case law is not a direct source of law.

Nevertheless, the Italian Constitution is now one step away from the amendment of Article 9 that will include the protection of animals as a fundamental principle of the state of law. This step will assign constitutional significance to non-human animals in Italy after other countries in the European area, such as Germany, Austria, and Switzerland (the latter also went so far in this ambit, by introducing an express reference to the dignity of animals, see Swiss Constitution of 18 April 1999, Art. 120.2⁴) that have already attempted a reform of the legal status towards their de-objectification, even if a complete recognition of the animal subjectivity has not been achieved yet.

This is, in any case, expected to give a boost to the adoption of more significant legislation in the field of animal protection and to the separation of non-human animals from the realm of property.

⁴ Bundesverfassung des Schweizerischen Eigenossenschaft, Art. 120.2: “Der Bund erlässt Vorschriften über den Umgang mit Keim- und Erbgut von Tieren, Pflanzen und anderen Organismen. Er trägt dabei der Würde der Kreatur sowie der Sicherheit von Mensch, Tier und Umwelt Rechnung und schützt die genetische Vielfalt der Tier- und Pflanzenarten” (<https://www.admin.ch/opc/de/classifiedcompilation/19995395/index.html>).

The path of inclusion of animal protection in the Constitution must also be seen in conjunction with the step taken by the European Union with the inclusion of the concept of animal as a sentient being in Article 13 of the TFEU, which, albeit with many limitations, legally binds Member States to pay full regard to animals' welfare requirements, as sentient beings. It is expected that such a supranational legal instrument, despite the limitations that it imposes in the second part of its composition⁵, can be the buttress for granting greater consistency in the classification of animals in the civil law systems and in their position before the law, and therefore before human justice.

In sum, the condition of animals in the legal system is indubitably fluid and evolving. Unfortunately, it is also still firmly anchored to an anthropocentric and economic perspective.

In support of this, a fairly recent ruling by the Italian Civil Court of Cassation can be mentioned, which is in contrast with the trends of case law cited before, and also with the cogency of the Lisbon Treaty constraint and the duty to refer to the animal as a sentient being. With the judgment of 25 September 2018, n. 22728, a sick dog was compared to a defective consumer good; that is to say, for instance, a broken toaster, to which the rules governing chattels apply. This approach might be interpreted as the consequence of the lack of a clear qualification of animals before the law, which results in legal uncertainty and allows different interpretations and solutions.

4. STILL, A LONG PATH AHEAD

This brief excursus, which is certainly not complete, on the difficulties of looking at animals as the living, sentient beings that they are, should lead to thinking about the need to assess whether it is actually necessary to achieve this goal in order to guarantee their full protection.

If we are going to talk about a path to justice for animals, we need to make sure we are clear about what we want to offer and grant them

⁵ When the Lisbon Treaty came into force in 2009 it amended the Treaty on the Functioning of the European Union (TFEU) and introduced the recognition that animals are sentient beings. Article 13 of Title II states that: "In formulating and implementing the Union's agriculture, fisheries, transport, internal market, research and technological development and space policies, the Union and the Member States shall, since animals are sentient beings, pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the EU countries relating in particular to religious rites, cultural traditions and regional heritage".

along with subjectivity. Subjectivity for animals must not mean falling back into anthropomorphisation, i.e., to strive to humanize the needs of animals, ending up treating them as if they were people, at the expense of their actual needs and the respect for their dignity. It would, then, be more appropriate and perhaps even more just to talk about developing a more suitable system of duties of protection and respect to be placed on human society (Posner 2000).

Considering these issues would also lead the human society to clarify what it is prepared to give up or pay for the establishment of a new consideration of animals. Because there is no doubt that as the legal protection offered to animals grows, the legal duties of humanity towards them will also increase. And this will result in a burden on humans and will make it difficult to implement the rights granted to animals in practice. Be that as it may, these observations make it necessary to bear in mind that the road that can lead to justice for animals is open, but it is quite tortuous and, above all, it will have to be traveled in its last stretch with the awareness that the guarantees and prerogatives that will be granted to animals will cost mankind.

Recognizing animals as subjects because they are living, sentient beings, seems to many people to be a right and proper action, and even an ethical and legal necessity. We can also expect and accept that this should happen gradually and by degrees, beginning with some species that have been part of the human community for longer and then extending the consideration to more non-human species. We already have several demonstrations of how the time seems ripe enough to take advantage of what has already been done and to envisage steps forward, offering ever greater legal protection to animal beings. It will be important, however, to have respect for animals, with the progressive abandonment of the anthropocentric dimension while raising the animal protection threshold.

The case law has already started to broaden the boundaries of legal subjectivity, and the legislator is offering greater legal protection to animal beings in several countries. Nevertheless, the recognition of animal rights should avoid some risks, such as being a process of “humanization” and of anthropomorphizing. Furthermore, since the granting of rights to animals will result in a “burden” for humans, the possibility that the protection process may come to a standstill or be “rethought” because of human egoism should not be underestimated. The key to success might be a shift of attention from anthropocentrism to biocentrism, which will lead to considering the particular connection of all forms of non-human lives with the life of human beings.

REFERENCES

- Bobbio, Norberto. 1996. *The Age of Rights*, translated by Allan Cameron. Cambridge (MA): Polity Press.
- Epstein, Richard A. 2004. "Animals as Objects, or Subjects, of Rights". In *Animal Rights: Current Debates and New Direction*, edited by Cass R. Sustein and Martha C. Nussbaum, 143-161. New York: Oxford University Press.
- Favre, David. 2004. "A New Property Status for Animals: Equitable Self-Ownership". In *Animal Rights: Current Debates and New Direction*, edited by Cass R. Sustein and Martha C. Nussbaum, 234-250. New York: Oxford University Press.
- Fossati, Paola. 2020. "Protecting Interests of Animals in Custody Disputes: Italian Caselaw Outpaces Italian and European Union Legislation". *Society & Animals. Journal of Human-Animal Studies* 24: 1-18.
- Francione, Gary L. 1995. *Animals, Property and the Law*. Philadelphia: Temple University Press.
- Garner, Robert. 2002. "Political Ideology and the Legal Status of Animals". *Animal Law* 8: 77-91.
- Garner, Robert. 2013. *A Theory of Justice for Animals*. Oxford: Oxford University Press.
- Honneth, Axel. 2004. "Recognition and Justice: Outline of a Plural Theory of Justice". *Acta Sociologica* 47: 351-364. <http://www.jstor.org/stable/4195049>
- Nussbaum, Martha. 2006. *Frontiers of Justice: Disability, Nationality, Species Membership*. Cambridge (MA): Harvard University Press.
- Posner, Richard A. 2000. "Animals Rights". *Yale Law Journal* 110: 527-541.
- Proctor, Helen S., Gemma Carder, and Amelia R. Cornish. 2013. "Searching for Animal Sentience: A Systematic Review of the Scientific Literature". *Animals: An Open Access Journal from MDPI* 3: 882-906. <https://doi.org/10.3390/ani3030882>
- Rawls, John. 1971. *A Theory of Justice*. Cambridge (MA): Harvard University Press.
- Rawls, John. 1999. *A Theory of Justice. Revised Edition*. Cambridge (MA): Harvard University Press.
- Walzer, Michael. 1983. *Spheres of Justice: A Defence of Pluralism and Equality*. New York: Basic Books.