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The open society and its animals

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Introduction

This book finds its origin in an honest concern for both liberal democracies and animals. As such, it brings together the progressive aim of improving the political and legal position of animals and the conservative aim of sustaining the basic stability of open societies. At first glance, combining these two goals seems a rather paradoxical endeavour. Improving the political and legal position of non-human animals seems to hint at leaving behind as much as possible of the political systems that the world has known thus far, deeply impregnated with anthropocentrism (human-centeredness) as they are and considering that they have facilitated large-scale, systematic abuse of animals for centuries. On the other hand, preserving the basic stability of the established institutions that form the prerequisite for well-functioning open societies seems to hint at precisely the opposite: leaving them untouched. Releasing a revolutionary beast on these ancient institutions seems to put all at risk.

This book argues, however, that there is nothing paradoxical in bringing together these seeming strangers. Rather, it argues that they must engage with one another. It is time to start thinking about the proper relationship between the open society and its animals. This book asserts that the basic institutions of liberal democracies are worth preserving because they are the best way to sustain open societies and the peace, freedom, and respect for individuality and autonomy that they have to offer. However, the book also subscribes to the famous belief of the father of conservatism, Edmund Burke (1729–1797), that conservation sometimes requires reform, albeit prudent.¹ The political-legal frameworks of liberal democracies around the world currently fail to reflect the fact that many non-human animals have interests which make them morally, politically, and legally relevant entities. This book claims that liberal democracies cannot continue to ignore the scientific findings and moral progress with regard to non-human animals without losing credibility. Ultimately, it will be argued, this

¹ Edmund Burke, *Reflections on the Revolution in France* (Oxford: Oxford University Press, 2009/1790), 21–22, 248–249.

negligence of important scientific and moral insights may not only cause credibility problems, but may even raise legitimacy concerns and lead liberal democracies to undermine their own core values. From the perspective of this book, opening the political-legal gates to non-human animals is not necessarily a risky endeavour, but refusing to do so and thus facing the challenges that the modern perception of animals poses to the institutions of the open society *is*.

Current liberal democratic institutions still reflect the ancient anthropocentric conjecture that politics and law have nothing to do with non-human animals. Non-human animals are not recognized as entities that have independent political and legal significance, and their interests are merely contingently pursued, that is: to the extent that humans see fit. This harmful underlying conjecture that animals have no independent role to play in politics and law goes as far back as documented history, and it is deeply rooted in Western cultures and philosophy. It was only a few centuries ago that some of history's brightest minds initiated what could today be called the scientific and moral progression that finally began to nibble away at this ancient anthropocentric conjecture.

In 1789, philosopher and legal thinker Jeremy Bentham (1748–1832), in one famous footnote, called into question the validity of humankind's traditional moral disqualification of other animals, and in the same pen stroke suggested an alternative ethical standard which we now know would gain great support. He initiated what could be called the *interests revolution*. More precisely, Bentham pointed out that there is not necessarily a relationship between having certain complex mental capacities (reason and speech) and being of moral significance. Instead, relevant to moral considerability is *sentience*, the capacity to have subjective experiences, such as joy and suffering.² Bentham's suggestion would eventually turn out to be the spark that ignited an intense debate on the moral significance of non-human animals two centuries later. This debate would eventually lead most people to accept that other sentient animals are morally significant too,

² Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Mineola: Dover Publications Inc., 2007/1789), 310–311 (footnote 1).

because they also have interests, including, at minimum, an interest in not being made to suffer.³

Before this important moral insight could take hold and the common moral conception of sentient animals could drastically change, however, people's minds first had to be made ripe to the ideas that humans *are* animals, and that other animals, as well as humans, could have interests of their own and were not, to paraphrase philosopher René Descartes (1596–1650), mechanical bodies without a soul and feeling.⁴ This unenviable task befell evolutionary biologist Charles R. Darwin (1809–1882) and his scientific successors. *The Origin of Species* was published in 1859, and it is no secret that this book shocked the highly religious society at that time and that Darwin was ridiculed.⁵ The reason, as concisely expressed in one of Darwin's notebooks, was that “Man in his arrogance thinks himself a great work, worthy the interposition of a deity, more humble & I believe true [is] to consider him created from animals.”⁶

The controversy intensified when, in 1871, Darwin published his subsequent work, *The Descent of Man*, in which he not only explicitly stated that the human species must have evolved from other animals—from an aquatic wormlike organism, in fact—but also straightforwardly called into question the uniqueness of humans.⁷ The theory of evolution implies that humans are, from a biological perspective, no more special than other animals. Darwin illustrates this with regard to intelligence, which was commonly thought to be one of the unique capacities of humans that distinguished them from “the beasts”: “There is no fundamental difference between man and the higher mammals in their mental faculties.”⁸ Instead, Darwin claimed, the mental difference between man and the higher animals is “certainly one of degree and not of kind.”⁹ Just like other capacities,

³ Peter Singer, *Animal Liberation* (New York: HarperCollins Publishers, 2009/1975).

⁴ Cited in: Tom Regan, *The Case for Animal Rights* (Berkeley: University of California Press, 2004/1983), 5; Tom Sorell, *Descartes*, trans. Willemien de Leeuw (Rotterdam: Lemniscaat, 2001/1987), 98–104.

⁵ Charles R. Darwin, *The Origin of Species* (London: J. M. Dent & Sons Ltd., 1971/1859).

⁶ Charles R. Darwin, *Charles Darwin's Notebooks (1836–1844)*, eds. Paul H. Barrett, Peter J. Gautrey, Sandra Herbert, David Kohn and Sydney Smith (New York: Cambridge University Press, 1987), 300.

⁷ Charles R. Darwin, *The Descent of Man* (Ware: Wordsworth Editions Limited, 2013/1871).

⁸ Darwin, *The Descent of Man*, 29–30.

⁹ Darwin, *The Descent of Man*, 80.

intelligence should not be viewed as a static given, but as a scale, a continuum. Each individual animal, humans included, can be pinned down somewhere on this scale, and there is no radical line that divides humans from all other animals. Darwin effectively challenged the idea of human categorical superiority, and essentially put “the beasts” in the same category as humans. Darwin’s important insight was the starting point of a scientific era in which one scientific discovery after the other would emphasize our similarities with other animals, instead of our distinctiveness from them. Most importantly, due to this scientific progress, it is now considered a scientific fact that many non-human animals are sentient and that they thus have intrinsic interests.¹⁰

Combined, these important moral and scientific insights fundamentally changed the common-sense view of non-human animals into what it is today. Whereas Darwin and his scientific successors began to nibble away at the distinctiveness of humans from other animals (and do not seem to be done with that anytime soon), Bentham and his moral successors paved a parallel road, arguing that even if there are important scientific differences between humans and other animals, these are not relevant when it comes to how animals are to be treated. Relevant to ethics is the already discovered similarity between humans and other sentient animals: they all have interests.

The central purpose of this book is to investigate whether the fundamental structures of liberal democracies should reflect the fact that many non-human animals are individuals with interests, and whether this is possible without undermining or destabilizing their institutions. The book argues that the insight that many non-human animals have interests is not only relevant to their moral status but also to their political and legal status. The modern insight that sentient animals have interests challenges the ancient anthropocentric conjecture that politics and law have nothing to do with non-human animals, a conjecture that is still embodied in the institutions of our open societies. The book argues that these institutions are

¹⁰ See for example: Philip Low, “The Cambridge Declaration on Consciousness,” eds. Jaak Panksepp, Diana Reiss, David Edelman, Bruno Van Swinderen, Philip Low and Christof Koch, publicly proclaimed on July 7, 2012, at Churchill College, University of Cambridge, Cambridge (United Kingdom).

in need of an update that aligns them with modern scientific and moral insights. This also explains the obvious wink that the title of this book gives to Karl Popper's (1902–1994) famous *The Open Society and Its Enemies*. In that book, Popper straightforwardly defends the open society and stresses the importance of adjusting its institutions to new insights through piecemeal engineering.¹¹ The current book is also about the open society, but it suggests that Popper's open society was still closed to many of its most vulnerable members. It argues that the modern open society should have its institutions updated insofar as they still rely on the ancient anthropocentric conjecture for their justification, and that it should become more inclusive and open up to non-human animals. As such, the “enemies” of the enhanced type of open society envisioned in this book are not only Plato, Hegel, and Marx, as classically identified by Popper, but all philosophers who have, on arbitrary grounds, tried to preserve the fruits of the open society exclusively for humans.

In search of adequate reform, this book considers it imperative to respect certain typical liberal democratic features: liberal democracies typically enable popular control over governance by elections of a reasonable number of political competitors, they secure limitations on the exercise of power in accordance with prescriptions of the rule of law, they institutionalize the separation of powers and secure the independent position of the judiciary, they have checks and balances which prevent perilous centralizations of power and uncontrolled exercise of power, and they ensure the equal protection of individual rights. While working out how the ancient anthropocentric conjecture can be removed from the institutions that constitute liberal democracies, this book is devoted to leaving these distinctive features intact.

The book also aims to illustrate, however, that even though the principles that ground liberal democratic institutions have been anthropocentrically applied in the past, they are not essentially infected with anthropocentrism, and thus can be preserved. If interpreted in a modern sense, the equality principle, for example, need not necessarily have

¹¹ Karl Popper, *The Open Society and Its Enemies* (London: Routledge & Kegan Paul Ltd, 1999/1945).

“humanness” at its core, but individuals’ interests, regardless of species. It will be illustrated that liberal democracies can be reconceived of as political orders that tend to give the highest priority to individuals and their interests and that their foundational principles allow for such a conception. Liberal democracies are, in other words, depicted as *interests weighing mechanisms*. A political position, in the sense that one’s interests ought to be considered by the state, is then not merely owed to humans, but to all entities that have interests that can be affected by the state. Similarly, a legal position, in the sense that one is entitled to legal protection of one’s independent interests, is not merely owed to humans, but to all entities that have fundamental interests that are vulnerable to being trampled upon in society, in the democratic process, or in the exercise of state power. This book thus argues that liberal democratic principles already have this focus on individuals’ interests at their core, but have up to this day been arbitrarily applied only to humans. This exclusionary application of important political-legal principles is untenable in a world that widely recognizes that many non-human animals have interests too. Since interests play such a central role in the foundational principles of liberal democracies, it is alienating that the political-legal position of non-human animals has not fundamentally changed as a result of Darwinian and Benthamian insights.

Research question, methodology, and chapter outline

The main research question of this book is: *Should the fundamental structures of liberal democracies reflect the fact that many non-human animals are individuals with interests, and is this possible without undermining or destabilizing their institutions?* This question contains two different aspects, which will be addressed in a total of five chapters. The first two chapters focus on the first part of the research question and address whether the fact that many animals have interests should have consequences for the fundamental structures of liberal democracies, and if so, what criteria the new political-legal position of animals should meet. The subsequent three chapters focus on the second part of the research question and address whether this reform is possible without undermining or destabilizing liberal democratic institutions. As a whole, this book is an interdisciplinary project, and as such

it aims to make a contribution to political philosophy, legal philosophy, law, and constitutional theory. The research method used is one common in political and legal philosophy: existing ideas in the literature relevant to the research question at hand are discussed, interpreted, and analysed within the framework of the research question. Based on these analyses, I develop a vision regarding the reform of law and political institutions. Now follows a more detailed description of the separate chapters of this book.

The first chapter explores how classic democratic theory and principles, if non-arbitrarily interpreted, support the claim that sentient non-human animals have a right to be considered by the democratic state. It first discusses three possible arguments against enfranchising¹² animals in democracies, and whether they are convincing enough for an *a priori* dismissal of the case for political animal rights. Subsequently, it is conceded that non-human animals are not political agents, which means that they cannot meaningfully engage in political activities themselves. It is also argued, however, that it would be inaccurate to deduce from this mere fact that animals have no political rights at all. It is argued that sentient animals have a political right to have their interests considered by the state: the *consideration right*. This claim rests on the centrality of interests in a democracy, and as such is underpinned by several classic democratic principles which focus on interests. James Mill's idea of democracy as a type of governance that should attain an "identity of interests" between the governing and the governed, but also the principle of affected interests, strengthen the case for accepting sentient animals' right to have their interests considered in a democracy. It follows from this chapter that sentient non-human animals on the territory of a democratic state have a right to have their interests considered in the decision-making processes of that democratic state.

In the second chapter, what this interspecies democratic theory means for the normatively required position of non-human animals in liberal democracies is elucidated. In other words, if the purpose is to respect

¹² This book uses the term "enfranchising" in the broad sense, indicating some type of political or legal recognition of non-human animals in basic institutional structures, not in the narrow sense of extending voting rights to non-human animals, for obvious reasons.

animals' right to consideration, what criteria must be met? It is argued that liberal democracies must reserve an institutional place (*legitimacy requirement*) in which humans (*human assistance requirement*) are institutionally bound (*non-contingency requirement*) to consider the independent interests (*independence requirement*) of sentient non-human animals who reside on the territory of the state (*residency requirement*). Subsequently, the political-legal position of non-human animals in current liberal democracies is analysed and examined in the context of these enfranchisement criteria. The chapter concludes that there is currently too much discrepancy between norm and reality, and articulates the need to find institutional means of improving the political-legal position of non-human animals, for the sake of both animals and the open society itself. In anticipating institutional reform, the chapter also defends the methodology of looking into some models that have been proposed for the enfranchisement of future people.

The third chapter investigates whether the *political* institutions of liberal democracies can be adjusted so that they facilitate the required consideration of animals' interests. The chapter finds that there are considerable difficulties with politically enfranchising animals, which are almost all related to the fact that animals cannot act politically and thus cannot instruct and control hypothetical representatives. Several proposals aimed at working around this difficulty are considered but rejected on different grounds, mostly because their democratic costs are too high. After a recapitulation of the findings, the chapter concludes that it is not likely that a normatively defensible enfranchisement of animals can be achieved in the political institutions due to the fact that this seems to involve requiring mutually exclusive things of political institutions and due to the deeper nature of the political sphere, which seems to resist the type of enfranchisement sought in this book.

The fourth and fifth chapters investigate the two most obvious options of *legally* facilitating the required consideration of animals' interests. The fourth chapter focusses on the option of introducing a so-called state objective (policy principle) on animal welfare in the constitutions of liberal democracies. It first sets out the four most important effects such a provision

would have on both the legal system and on politics. Subsequently, it clarifies the differences between a state objective and legal rights, and conducts a case study on how the state objective on animal welfare in Switzerland currently functions. After that, the constitutional state objective's capacity to meet the enfranchisement criteria is assessed. It follows that the necessary discretionary room that a state objective typically allows for political acting is a crucial obstacle in meeting the enfranchisement criteria and that this cannot be remedied because discretion is a necessary feature of the state objective. It is argued, however, that despite this normative deficiency, the state objective may be an important intermediate model to keep in the back of our minds for piecemeal engineering, because it can only have positive effects on the position of animals in liberal democracies, without compromising on liberal democratic values.

In the fifth chapter, the option of assigning sentient animals fundamental legal rights is assessed. First, it is elucidated that, despite spectacular reports in the media and even in some scholarly work, non-human animals around the world have not yet been granted legal rights. Subsequently, it is defined what type of legal rights is considered and what the effects of these rights would be. Due to the fact that legal animal rights would have a significant impact on society and could have significant economic, democratic, and liberty costs, a robust, threefold justification for these rights is also given. It is argued that the interspecies democratic theory in this book is not the only ground for assigning animals legal rights; an interest-based account of rights also offers such a justification, as well as the fact that animal rights would significantly improve the legal systems in liberal democracies. Subsequently, it is investigated whether legal animal rights could meet the enfranchisement criteria. It follows that assigning animals rights would improve the legitimacy of liberal democracies considerably, that it would make the consideration of their most fundamental interests in liberal democratic institutions non-contingent, and that their interests would have to be considered independently as a result of their rights. Furthermore, it is argued that there are many ways in which humans could assist animals in the realisation of their rights, and that these

rights could be residency-dependent. The chapter concludes that the option of assigning fundamental legal rights to animals has good normative papers, since this institutional setup would bring all enfranchisement criteria into view, while also respecting liberal democratic principles and even improving liberal democracies.

In sum, *The Open Society and Its Animals* calls for a revaluation of classic liberal democratic principles and for their non-discriminatory application. The focus on individuals and their interests that is so characteristic of liberal democracies is a highly suitable foundation on which to build a political-legal status for sentient non-human animals. While the book normatively argues for legal animal rights, it also values care being taken when it comes to reform, and resists recklessly diving into revolutionary projects that may risk it all. Instead, it suggests that introducing constitutional state objectives in liberal democracies is an appropriate first step in the direction of giving animals their political-legal due. Because of their dynamic character and progressive demands, constitutional state objectives on animal welfare seem an attractive option of guiding liberal democracies gradually into a more animal-friendly future and preparing them for fundamental legal animal rights. The book maintains that, normatively speaking, it is only fundamental legal animal rights that can ultimately make liberal democracies live up to their full potential of being the most ingenious interest-weighting mechanisms in the history of animalkind.