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The open society and its animals

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Conclusion

The central purpose of this book has been 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. This investigation has been carried out in two stages. First, the normative stage, focussing on the question whether liberal democracies should engage with the fact that many animals are individuals with interests. Second, the stage concerning institutional design. This stage involved an inquiry into the current position of animals in the institutional outlook of liberal democracies and how this could be improved in a responsible manner.

In investigating whether the fundamental structures of liberal democracies should reflect the fact that many non-human animals are individuals with interests, the point of departure was the principles that already lie at the basis of liberal democracies, such as the principle of affected interests and the principle of political equality. It was argued that these principles need not necessarily exclude non-human animals, but rather focus on individuals and their interests, which implies that other animals must be incorporated in them as well, now that we know that they are individuals with interests too. In other words, sentient non-human animals on the territory of the state have a consideration right. It was argued that if liberal democracies are to truly honour their foundational principles, they ought to give recognition to the fact that sentient animals have politically and legally relevant interests too, which should translate into assigning them a political-legal status and embedding this status in the basic institutions of the state. It logically followed from the interspecies democratic theory in this book that the enfranchisement of sentient non-human animals must meet five criteria. Ideally, 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*).

The second stage involved an inquiry into the current political-legal position of non-human animals in liberal democracies and the extent to which this position meets the enfranchisement criteria. It was found that the basic 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 politically and legally relevant entities. In other words, liberal democratic institutions still reflect the ancient conjecture that politics and law have nothing to do with non-human animals, a notion that can be seriously contested from the perspective of modern scientific findings and modern moral insights. We thus had to conclude that the institutions in current liberal democracies are unacceptably anthropocentric and outdated.

The fact that current liberal democracies fail to institutionalize animals' consideration right was considered problematic for two reasons. First, structurally disregarding the interests of sentient animals in liberal democracies constitutes an injustice with regard to these animals, because they have a rightful democratic claim to have their interests duly considered. Second, the fact that liberal democracies fail to give animals their due harms the legitimacy and defensibility of this political model as such. The longer liberal democracies continue to stubbornly ignore the scientific findings and moral progress when it comes to non-human animals, the more they lose credibility and the more they undermine their own core values. It was argued that a democratic deficit is kept intact so long as sentient animals' consideration right is not institutionalized, and that from an interspecies perspective, current liberal democracies not only have a legitimacy problem, but can even be said to have tyrannical and totalitarian traits. Furthermore, by categorically refusing sentient animals entry into the sphere of rights, liberal democracies uphold arbitrary, inconsistent, and irrational legal systems which are based on an outdated scientific worldview. These are all very serious problems which are rooted in the systematic and arbitrary exclusion of non-human animals from liberal democratic institutions. As such, they can be remedied by giving animals a political-legal status that meets the enfranchisement criteria, which would not only do justice to animals, but also improve the defensibility and sustainability of liberal democracies.

The next challenge was to assess whether and how the institutional structures of liberal democracies could be reformed so as to give due recognition to sentient animals' consideration right without undermining liberal democratic values or unbalancing the system as a whole. It followed that merely adapting the political institutions is not likely to lead to a solution here, because several difficulties would prevent a normatively defensible enfranchisement of animals from being established in the political sphere. More fundamentally, the political sphere seemed to have some inherent deeper characteristics which make it unlikely that a satisfying enfranchisement of the interests of sentient animals can be achieved in that context at all. More promising seemed to be the two adaptations to legal institutions that were investigated: introducing a constitutional state objective on animal welfare and introducing fundamental legal rights for sentient animals. The book has argued that, from a normative perspective, only introducing fundamental legal rights for sentient animals would be an acceptable institutionalization of animals' consideration right. Put differently, among the investigated options, only legal animal rights can establish an institutional outlook that meets all five enfranchisement criteria. As such, this book has argued that sentient animals on the territories of liberal democratic states ought, eventually, to be assigned fundamental legal rights which protect their most important interests. Which rights ought to be established for which animals is an issue that must ultimately be decided after a thorough investigation of the interests of animals. Given the indisputably strong interests that all sentient animals by definition have in life and in not suffering, however, this book has argued that rights which protect these interests must be among the rights that ought to be established (such as the right to life, the right not to be tortured, or the right to bodily integrity). Importantly, however, what these rights are called is of secondary importance; what matters is that the rights of sentient animals should cover their most fundamental interests, regardless of their label.

Even though *The Open Society and Its Animals* thus advocates the eventual introduction of legal sentient-animal rights on normative grounds, it has not offered a blueprint on how such rights are to be specifically embedded in

practice. Also, although this book offers a vision of where liberal democracies should, in the long run, be heading, it does not specifically lay out a path that must be followed in order to get there, or a corresponding time schedule. Obviously, these details are omitted on purpose, as the amount and velocity of change that institutions can bear differs from society to society and from time to time, and such change thus cannot be planned in the abstract and far in advance. This book has discussed some general ideas on how legal animal rights *could* eventually be embedded in practice though, such as introducing animal attorneys, the *actio popularis*, animal rights courts, and a scientific forum with expertise on animal interests. The primary purpose of envisioning these practical constructs was, however, to illustrate that an effective embedding of animal rights in liberal democracies should be possible without causing new problems that could affect basic liberal democratic structures. Whether it is, on balance, desirable to actually introduce animal attorneys, the *actio popularis*, animal rights courts, and scientific forums must be re-examined in each specific context if and when a liberal democratic state decides to actually introduce legal animal rights.

Despite the fact that the exact path that must be taken in order to realize interspecies liberal democracies cannot be specified, it is possible to say something about what liberal democracies of today can and cannot do in the short term in working their way toward that goal. This book has argued that, despite the normative rightness of fundamental legal animal rights, it would be unwise to introduce such rights overnight in today's liberal democracies. Obviously, from the perspective of normative rightness, legal animal rights should be introduced sooner rather than later. Every day liberal democracies continue their disregard for the interests of non-human animals, the injustice with regard to animals is kept intact. Giving animals their due thus seems to require introducing legal animal rights as soon as possible. From the perspectives of practicality, effectivity, and harbouring the stability of liberal democracies, however, introducing such a high impact instrument into the current anthropocentric institutions overnight seems undesirable. For several reasons, it seems more prudent to gradually work towards this goal via piecemeal engineering. For one, many sectors in liberal democratic societies currently rely heavily on the (ab)use of animals, and

outlawing these sectors overnight may have unpredictable economic effects. One may argue, of course, that this is the price of justice that we have to pay. There are, however, better arguments for piecemeal engineering our way to animal rights instead of introducing them overnight which relate to effectiveness and the stability of liberal democracies.

From the perspectives of effectiveness and the stability of liberal democracies, it seems wiser to carefully and gradually embed these rights into the respective institutions when the time is ripe. Two things are of special importance in this context: gaining societal support for this change, and the gradual prior adjustment of adjacent law, regulations, and institutions so as to prepare them for the introduction of actual legal rights and for making these rights work adequately in practice. If radical changes in the law are established without adequate institutional anticipation and without sufficient societal support, they are more likely to be ignored than to actually bring about the sought-after (legal) change. It is plausible that the ground-breaking legal change would be neutralized by reductive legal interpretation, and that society would not accept this disruptive change and resist its implications in practice. Illustrative is the introduction of the recognition of animal dignity in the Swiss Constitution. Instead of actually bringing about a radical legal change, the provision is reductively interpreted so as to mean only insignificant minor legal adjustments. Importantly, this “radical legal change” so recklessly instigated is not only ineffective, it is even counterproductive and harmful. It harms the Constitution, because the more constitutions make meaningless promises, the more they lose credibility and societal respect. In effect, the Swiss dignity provision fuels scepticism about the Constitution while having little practical effect for animals. In the long term, scepticism about a constitution and loss of credibility and societal respect for a constitution can be serious liabilities to liberal democracies’ stability. Additionally, we have seen that the sudden legal change in Switzerland has also harmed the legal system by polluting it with inconsistency when it comes to the important term “dignity.” The same could happen if legal animal rights were introduced without the appropriate institutional anticipation and societal support: these rights could be reductively interpreted to only mean minor legal changes

and to be fundamentally different from the fundamental rights of humans we know today. This would render this change ineffective; might make the introduction of real animal rights more difficult in the future; and could even bring additional harm to constitutions, the fundamental rights of humans in it, and to the legal system at large.

For all of these reasons, it seems imperative that legal animal rights are not introduced overnight, but gradually, with sufficient concern for societal support and institutional anticipation and embedding. Obviously, this does not imply that we can just sit back and wait for it to happen. The normative position of this book implies that we must be serious about terminating the tyrannical traits that liberal democracies currently have in relation to non-human animals as soon as possible, and this process can be sped up by various forms of social action. What I have argued, however, is that we must be careful not to do more harm than good to liberal democracies in this process, especially if animals are not even benefitted by it in practice. The position of this book thus is, in short, that it is imperative that liberal democracies work their way towards introducing legal animal rights in a *responsible* manner. This implies that, in the short term, states should start making more animal-friendly policy and legislative choices, such as cutting public subsidies for sectors which evidently harm animals and improving the enforcement of existing animal welfare rules. They could also loosen standing regulations in the short term so that they allow for a legal defence of the animals' interests already covered in current legislation. Apart from such small reform in policy and legislation choices, however, deeper institutional reform is obviously also required. An institutional instrument extensively investigated in this book might be helpful in setting the first more significant step towards the goal of responsibly working our way towards legal animal rights: the constitutional state objective.

Even though the constitutional state objective was criticized in this book for being unable to establish a political-legal status for animals that is normatively sufficient, this legal instrument has also been praised for being able to improve the status of animals somewhat nonetheless. Importantly, this book has noted that this instrument can do this without harmful side-effects to liberal democratic institutions and values. As such, the state

objective is an appealing candidate for piecemeal engineering our way towards legal animal rights.

A constitutional state objective has the potential to improve the position of non-human animals when it comes to the non-contingency and independence requirements. Most importantly, a constitutional state objective expresses that animal welfare is not an arbitrary hobby that liberal democratic governments may pursue or not, but an important task that ought to be given serious attention. Recognizing this seems to be a crucial first step towards eventually assigning non-human animal citizens actual legal rights. Furthermore, the constitutional state objective encourages state authorities to make serious work of improving the legal standards of animal welfare, or to initiate animal welfare laws insofar as they were absent before (as was the effect of the Swiss state objective on animal welfare). The locking effect of the state objective puts pressure on state officials to constantly improve animal welfare norms.

In addition, the constitutional state objective can help to “lift” the status of statutory animal welfare laws in the hierarchy of law, so that they can remain effective even if they come into conflict with the peripheral fundamental rights protection of humans. It can also be a basis for introducing new statutory legislation containing prohibitions on certain harmful treatments of animals which are now still protected by the fundamental rights of humans, such as the rights to religious freedom, scientific freedom, and the freedom of speech. As such, the state objective can serve to keep or put the legal protection of animals in alignment with the societal opinion on what protections animals deserve, insofar as this was previously legally frustrated due to the fundamental legal rights of humans.

The book has noted that a constitutional state objective typically allows for a large discretionary space for politicians. In light of the enfranchisement criteria, this feature was considered disadvantageous, because it frustrated meeting the non-contingency requirement. From the perspective of piecemeal engineering, however, the discretionary space that the state objective typically allows for is interesting. It allows state officials to interpret the state objective dynamically, while the locking effect suggests that these interpretations should be more and more progressive. Even

though we have seen that there is reason to doubt whether existing checks and balances can be effective in enforcing the locking effect, the constitutional state objective is nonetheless an interesting instrument because it adds an additional hurdle for lowering animal welfare norms, because this would imply unconstitutional action by the government. Additionally, even if the locking effect were to fail to safeguard the state objective being interpreted in an ever more progressive direction, the fact that politicians have quite some freedom in deciding how to give effect to the state objective could still turn out well if society itself has an increasing concern for animal welfare. With its constitutional basis, the state objective would give state officials a firm mandate to instigate significant political and legal changes which benefit animals if society supported that.

There are some indications to believe that there is indeed a general trend towards increasing concern for animal welfare. Since Bentham's time, moral concern for animal welfare and the amount and quality of animal welfare legislation have only increased. More recently, the rise and growth of animal advocacy parties also gives reason to assert that people find animals' well-being increasingly important. There even seems to be some increase in people's willingness to assign animals legal rights, from twenty-five percent of people wanting to assign animals the rights to be free from harm and exploitation (exactly similar to those of humans) in 2003, to thirty-two percent in 2015.⁵⁶³ Obviously, this is not to say that there is a secured upward path to increasing concern for animals, but it nonetheless suggests that it is possible to eventually attain the goal pursued in this book through democratic piecemeal engineering, if only moral enlightenment continues and if we persist in rationally defending the case that sentient animals have a claim to legal rights. *The Open Society and Its Animals* has attempted to do its part by arguing that sentient animals have a democratic claim to legal rights, by visualising what the animal-inclusive open society of the future could look like, and by showing that it truly is a viable option that would not only benefit animals and serve justice, but also improve the open society itself.

⁵⁶³ Jeff Jones and Lydia Saad, "Gallup Poll Social Series: Values and Beliefs," May 2015, https://cdn.cnsnews.com/attachments/gallup_animals-poll.pdf.

