



Law and the Question of the (Nonhuman) Animal

Yoriko Otomo¹

Institute for International Law and the Humanities; the University of Melbourne
yotomo@unimelb.edu.au

Abstract

The turn of the millennium has witnessed an extraordinary paradox—one identified by Jacques Derrida as a simultaneous increase in violence against nonhuman animals and compassion toward them. This article turns to critical legal theory as well as to recent work by continental philosophers on the human/animal distinction in order to make sense of the ways the paradox manifests in law, arguing that so-called animal welfare laws that appear to be politically progressive are, in fact, iterations of the very violence they purport to redress. What legislation designates as “animal” has neither language nor a recognized image, which not only renders this singular object of law voiceless but also denies that object access to any experience of death, and thus, to life. Through a deconstruction of recently enacted Japanese “animal welfare” legislation, this article proposes that the inability of the legislator to think the animal as having a relation to death belies a deeper struggle at the heart of law itself, to constitute its subjects through language.

Keywords

animal welfare law, Derrida, Japan

I. [Nonhuman] Animal Life

The regulation of so-called “animal life” by law takes many forms. By “animal life,” “animals,” or “the animal,” I refer both to individual nonhuman animals *and* the discursive, philosophical constructs of “animal” as something against which what we call “human” is defined. Law constructs, defines, and regulates animal life at local, state, and international levels. It entrenches a division that has persisted, more or less, in the Western philosophical canon for over 2,000 years—between human and animal, human and nature, and nature and law. The purpose of this article is to undertake a preliminary investigation into how we can begin to apply the insights of critical legal theory and posthumanist philosophy to the burgeoning field of “animal law.”

II. The Question of the [Nonhuman] Animal

Animal law, broadly speaking, can include regulation of subjects as wide-ranging as endangered species, biodiversity conservation, industrial farming, and vivisection. What comes to mind first in terms of animal law, however, is animal welfare. From India's third-century BCE King Ashoka to Pythagoras (552-496 BCE); Aristotle (384-322 BCE); Plutarch (ca. AD 46-120); and Plotinus (ca. AD 204/5-270), legislation specifically regulating or prohibiting animal slaughter or sacrifice has a long history. While there was a marked lack of "animal protection" legislation enacted after the Middle Ages,² interest in animal (and particularly livestock) welfare increased across Europe and the United States in the 19th century, and a range of animal protection laws was enacted after the Second World War, following the adoption of the Universal Declaration of Human Rights in 1948.

More recently, at the turn of the millennium, there has been a flurry of national legislative enactments and amendments relating to animal welfare around the world. This activity has coincided with the abandonment by mainstream philosophical scholarship of the idea that consciousness is unique to humans. With this shift in the philosophy of consciousness emerged two major approaches to legislating the animal: a welfare-based approach that deals with animals as objects (the property of legal persons) that are to be protected, and a rights-based approach that sees animals as sentient beings who should be protected through designated legal rights. These two approaches are reflected in the recent publication *Animal Law in Australasia* (Sankoff & White, 2008).

They have achieved much of what first- and second-wave feminism, queer theory, race studies, and human rights discourse have achieved: some contestation of the hierarchies of violence that would otherwise operate unquestioned, and the creation of a vocabulary through which common problems may be addressed. Welfare and rights approaches to legislating the animal, however, are based upon humanist ethical theory, which is haunted by a deep anthropocentrism. Such anthropocentrism is based upon taxonomical differentiation which, rather than calling into account human subjectivity to find a different kind of ethics, reproduces a hierarchical and subject-centric moral framework.³ The unfortunate result of relying upon liberal humanism has been the creation of a divisive identity politics (seen also in feminist, queer, and subaltern arguments for rights) "constrained to determine animality and animal identity according to anthropocentric norms and ideals" (Calarco, 2008, p. 8). The civil and political capacity to engender a greater paradigm shift is thus facing a looming challenge, as yet little noticed by those who identify themselves with the emerging field of animal law.

While there has as yet been little posthumanist writing within animal law, posthumanism itself—an attempt at thinking through the anthropocentric tropes that permeate everyday writing and speech—has been developed through a long line of inquiry, including (in the 20th century) by such thinkers as Martin Heidegger (1995), Donna Haraway (1989), Bernard Stiegler (1998), Giorgio Agamben (2004), Matthew Calarco (2008), Mark Rowlands (2002), and Carey Wolfe (2003). The most notable intervention to date may be that of Jacques Derrida, who famously framed the limits of humanism as “the question of the animal” (2008). Such thinkers advocate paying attention to the economic, historical, linguistic, and social forces that engender the separation of “human” from “animal,” and broadly interrogate the technologies and discourses through which the “human” is constructed.

In therefore attempting to identify some useful sites of further investigation at the interface of law and the question of the animal, the following section of this article presents a deconstruction of the Japanese welfare law. Specifically, I will be asking how contemporary discourse on animal welfare could result in the production of such an Orwellian piece of legislation. The final section addresses in more detail the danger of looking to rights discourse to provide a politics or ethics of living with other species by examining legislation’s discursive constructions in terms of what Derrida calls the sacrificial economy of “carnophallogocentrism” (Derrida, 1990, p. 953).

III. Law for the Humane Treatment and Management of Nonhuman Animals

After much lobbying by Japanese civil society groups, the Law for the Humane Treatment and Management of Animals, originally passed in 1973, was amended in June 2005, and the amendments became enforceable a year later. This move has been mirrored in jurisdictions all over the world. While the first animal protection laws in the 20th century were enacted shortly after World War II following the adoption of the Universal Declaration of Human Rights in 1948, animal protection legislation and policies spread across the world in the 1970s. Many of these laws and policies were then amended around the turn of the millennium. The Philippines, Costa Rica, and Germany, for example, passed animal welfare acts in 1998; Croatia and New Zealand in 1999; Peru and Uruguay in 2000; Malta, France, Australia, Romania, and Taiwan in 2004; the United Kingdom in 2006, and South Korea in 2007.

The Japanese Law for the Humane Treatment and Management of Animals (“the Act”) is a relatively short piece of legislation that lays out principles of education on animal protection; of animal ownership and sale; the prevention

of harm to human life and property; prefectural responsibility, and the scientific use of animals. The object of the Act is stated as follows:

The purpose of this Act is to engender a spirit for animal welfare among citizens and contribute to the development of a respect for life and sentiments of amity and peace by providing for the prevention of cruelty to animals, the proper handling of animals and other matters concerning animal welfare, as well as to prevent animals from causing an infringement on the life, body or property of humans...⁴

The “fundamental principle” of the Act recognizes that:

In light of the fact that animals are living beings, no person shall kill, injure, or inflict cruelty on animals without due cause, and every person shall treat animals properly by taking into account their natural habits and giving consideration to the symbiosis between humans and animals.

Animals are stipulated as being “protected” and are defined at the end of the Act under article 27(4) as constituting:

- i. Cattle, horses, pigs, sheep, goats, dogs, cats, domestic rabbits, chickens, domestic pigeons and domestic ducks.
- ii. Animals in the possession of persons where such animals are categorized as mammals, birds or reptiles, other than those listed in the preceding item.

If we look at all three articles, then, some significant issues emerge. The purpose of the Act is stated as being the prevention of killing and of cruelty to animals; love for animals; respect for life; amity and peace; and symbiosis between animals and people. This seems all well and good, at least in the sense that the Act appears to foreground a benevolent attitude toward nonhuman life. What is included in the definition of this nonhuman life, however, is revealed at the end of the Act as being only those nonhumans who are in the possession of a person—i.e., objects (and mostly domestic objects, at that) which are the property of a subject who is recognized by, and can enter into a relation with, law. Excluded from entry into this Act’s sociopolitical sphere are all other forms of nonhuman life.

Not only are animals defined implicitly as property, but despite acknowledging them in the Act as “living beings” (Calarco, 2008, p. 3), the law cannot imagine animals as having any relation to death. This is demonstrated in the Act itself, which in large part outlines not love for animals, but regulations for the prevention of animals from “creating a public nuisance” (Art. 7) and causing “an infringement on the life, body and property of humans” (Art. 1). In

line with such regulations, Article 7 stipulates that local public bodies may “take other action where necessary”; Article 15 provides for “necessary action” to “end... situation[s] within a fixed period”; Article 20 states that “when animals breed promiscuously” owners should “render reproduction impossible or take other measures” and that “when an animal must be destroyed [it should be done] by methods that cause the animal the minimum pain possible.” Finally, Article 24 provides:

1. Where an animal is used for the purposes of education, experimental research, manufacture of biotics or other scientific purposes, it shall be so used by methods that cause the animal in question the minimum pain possible within the limits imposed by the said purposes.
2. When an animal is beyond recovery after use for scientific purposes, the person who used the animal for such scientific purposes must immediately dispose of the animal in question by a method that causes the animal the minimum pain possible.

Necessary actions. Destruction. Disposal. These dry euphemisms for killing seem entirely divorced from the amity and peace declared at the beginning of the Act, and nonhuman animals, while acknowledged as being able to feel pain, become objects of law when it comes to death and to dying. This Act reveals, in other words, law’s inability to figure the nonhuman animal as having any relation to death. Nonhuman life is not brought within any kind of symbiotic economy with human life but remains estranged in an entirely different order. The Judeo-Christian prohibition “thou shalt not kill” encapsulates this violent separation, in that it stipulates a prohibition against killing, not living beings in general but he who appears as a recognizable image within the onto-theological structure: man . . . or at most, human.

The utilitarian philosopher Jeremy Bentham once said that “the question [in relation to animals] is, not, can they reason? nor, can they speak? but, can they suffer?” (Burns & Hart, 1996, p. 283). Bentham’s intervention has been critical to the development of the modern animal welfare movement, but in reading contemporary animal welfare law it is perhaps more pertinent to ask, not “Can animals suffer?” but rather, “Can they die?” We should, in other words, be looking at whether legislative discourse of the animal provides any possibility for nonhumans beings to have any relation to their own mortality. The short answer, at least from a reading of the Japanese legislation, is that it does not. This is due to the double violence that is enacted upon animals in the writing of such legislation: first, in their de-subjectivization through propertization, and second, in their designation as “things” in the eyes of the law.

IV. Posthumanist Politics and the Limits of Rights Discourse

This violent enactment of species difference, then, lies at the heart of the problem, where beings designated “animal” are precluded from recognition as subjects to whom ethics or politics inhere. A solution that comes to mind would be the commonly advocated legal provision of rights to nonhuman animals, by recognizing them as having some kind of “personhood.” While this may be strategically the most useful option in terms of improving the everyday living conditions of institutionalized animals, using the discourse of rights may not be a viable political tool in the long term or in practical terms, for the simple reason that it relies upon anthropocentric concepts that have historically served to justify the oppression of nonhuman animals (Calarco, 2008).

To explain, the subject of the modern human rights movement is figured as a free, whole, and delineated individual, equal in its presence to others who reflect back its clean-and-proper image. The immortality of this reflection is guaranteed by the all-seeing gaze of the law, with which the subject has a contractual relation. Such a relation with the law can only be realized through language and the exchange of words, from which nonspeaking beings are excluded. This onto-theological structure is further maintained through a sacrificial economy of exclusionary relations: what Jacques Derrida describes as “carnophallogocentrism” (Derrida, 1990, p. 953). Through the symbolic act of eating and speaking, those identified as they-who-are-eaten (animals) and they-who-do-not-speak, or those who do not have language (historically “women” and “animals”), enable the founding of a masculinized, rights-bearing, speaking subject of law. The use of such an oppressive logic to argue for so-called “animal rights” risks perpetuating an identity politics that at best leads to an endless exercise in line-drawing. This is perhaps most clearly seen in the (unhelpful) proliferation of legal hierarchies based on species, with, for example, great apes granted some rights over rabbits, who receive more mention than worms, and so on.

At this point in our analysis, the text of the Act appears impervious to critique. It seems to entrench an anthropocentric and carnophallic economy, cutting off the possibility of any call for improved living conditions for animals, let alone a reevaluation of political subjectivity. Can such an economy be transformed? Is posthumanist thinking really possible? And possible within Law, which is another name for the social symbolic order?⁵ What does it mean, in other words, to be a nonanimal human subject of the law? Furthermore, if the human/animal distinction should not or cannot be retained as a legal one, is there any possibility of founding a posthumanist ethics and politics within the law itself?

A starting point for thinking about these questions lies within the text of the law. While Derrida is skeptical of the “miracle of legislation” (Derrida, 1990, p. 198), we must believe in, or make-believe, the miracle, since there is, in the ontological sense, no outside of law as such. A posthumanist politics or ethics must be engendered by first making evident the anthropocentric and phallogocentric dimensions of humanism, through deconstruction of legal relations between humans and nonhumans (as we have begun to do), and then by returning to first philosophy to think a nonanthropocentric ontology of life-death (Calarco, 2008). Such a nonanthropocentric ontology might conceive of Being in a way that does not seek to define subjectivity in terms of a human/nonhuman binary. The primary obstacle to imagining such a definition lies in the fact that subjectivity has traditionally been discussed by philosophers in terms of cognition, which in turn has maintained as its keystone the capacity for language (Wolfe, 2003, pp. xv-xvi). Furthermore, philosophers throughout the Western metaphysical canon (Aristotle, Kant, Heidegger, Levinas) have argued or assumed that the animal is without language, thus entrenching a separation between the orders of “human” and “animal.”

Cary Wolfe suggests that one way of approaching this problem of language is to argue that “if animals never quite possessed it, neither do we, with the result that language, rather than simplifying the question of ethics by securing the boundary between the human and the rest of creation, instead now reopens it—permanently, as it were—by embedding us in a world to which the human is subject” (Wolfe, 2003, pp. xvii-xx). This is indeed Derrida’s strategy of thinking the question of the animal (Cadava, Connor, & Nancy, 1991). Highlighting the conditional nature of human subjectivity through a deconstruction of legal text, in other words, may offer a different topology in which to trace the relation between ethics, law, and the subjects of law.

Thinking the question of the animal through a deconstruction of two characters that recur throughout the Act “人間” (*hito / ningen* = human) and “動物” (*doubutsu* = animal), for example, offers the possibility of understanding subjectivity in terms of animism and animation. Remaining with language, we can see that while the word “human” in English derives from the Latin *humanus*, which can be translated as “man of the earth” (as opposed to God), the word for “human” in Japanese represents more immediately the onto-theological structure that shores up this concept. *Ningen* (“人間”) or “human” is made up of two characters: *hito* (“人”) (human or person), and *gen* (“間”) (between). The infinite caesura of what we call “human” is reflected here in the first image, made up of two people propped up against one another, and in the second image, which emphasises the in-betweenness, conditionality, or reciprocity of the first. The impossibility of representing subjectivity

through the figure of a single, immutable “human” remains explicit here and thus holds open the question of what “humanity” (and therefore “animality”) is.

While it is not immediately evident in official public texts such as contemporary legislation, modern Japan inherits an animist culture that emphasizes immanence (of divinity, nature, and people), as opposed to transcendence, and that lingers in everyday stories of metamorphosis: women transforming into foxes, cranes transforming into girls, and so on. The recurring character of “animal” in the Japanese legislation is written as “動物,” meaning “moving” and “form.” The characters reveal how “animal” cannot be figured in terms of an image (as with the character for “human”), but here, rather than being phrased in terms of an onto-theological economy of recognition, the animal subject is figured in terms of movement. This very movement or oscillation of the *anima* suggests another way of imagining beings: as animated subjects for whom politics, or a polis, emerges out of the aporia of the human/animal binary.

Such an animated and ambivalent subject offers the possibility of being and of reading otherwise. For lawyers and legislative drafters, this brief reflection shows how returning to the language of the land to which law speaks may throw open radically new ways of thinking and writing. Furthermore, by bypassing the intractable problems of rights and reason altogether, we might invent new legal grammars for animating our subjects.

Notes

1. Thanks go to the anonymous referees who reviewed an earlier draft of this article.
2. Japan witnessed an exception to this, with the introduction of numerous animal welfare laws by the so-called “dog shogun,” Tokugawa Tsunayoshi, from 1680-1709.
3. This is borne out in dominant models of animal rights philosophy espoused, for example, by Tom Regan (1989) and Peter Singer (2005).
4. Article 1, Law No. 105, October 1, 1973, revised December 22, 2000.
5. I refer here to the psychoanalytic “orders” (Imaginary, Symbolic, and Real) identified by Jacques Lacan and widely used in psychoanalytic writings. To describe them briefly, the Imaginary is a space where the ego is constituted through images that prophesy a whole, clean-and-proper body. The Symbolic describes the semantic process whereby that body is determined as a subject, through language. Kristeva’s account of the imaginary focuses on the failure or fear of loss of a connection to origin at the moment of the subject’s constitution. The Imaginary is structured by the Symbolic order: in *The Four Fundamental Concepts of Psychoanalysis* Lacan argues that the visual field is structured by symbolic laws (Miller, 1998). Thus the Imaginary involves a linguistic dimension. If the signifier is the foundation of the Symbolic, the signified and signification are part of the Imaginary order.

References

- Agamben, G. (2004). *The open: Man and animal* (K. Attell, Trans.). Palo Alto, CA: Stanford University Press.
- Burns, J. H., & Hart, H. L. A. (Eds.). (1996). *The collected works of Jeremy Bentham*. New York: Oxford University Press.
- Cadava, E., Connor, P., Nancy, J. L. (Eds.). (1991). *Who comes after the subject?* London: Routledge.
- Calarco, M. (2008). *Zoographies: The question of the animal from Heidegger to Derrida*. New York: Columbia University Press.
- Derrida, J. (1990). The force of law: The mystical foundation of authority. *Cardozo Law Review*, 11, 911.
- Derrida, J. (2008). *The animal that therefore I am (more to follow)* (M. L. Mallet, Ed., D. Wills, Trans.) (Original work published 2006).
- Haraway, D. (1989). *Primate visions: Gender, race, and nature in the world of modern science*. New York: Routledge.
- Heidegger, M. (1995). *The fundamental concepts of metaphysics: World, solitude, finitude* [lecture course, 1929-1930] (W. McNeill & N. Walker, Trans.). Bloomington: Indiana University Press.
- Miller, J. A. (Ed). *The Four Fundamental Concepts of Psychoanalysis: The Seminar of Jacques Lacan: Book XI*. (A. Sheridan, Trans.) New York: W. W. Norton. (Original work published 1973)
- Regan, T. (1989). The case for animal rights. In T. Regan, & P. Singer (Eds.), *Animal rights and human obligations*. Berkeley: University of California Press.
- Rowlands, M. (2002). *Animals like us*. London: Verso.
- Sankoff, P., & White, S. (2008). *Animal law in Australasia: A new dialogue*. Sydney: The Federation Press.
- Singer, P. (Ed.). (2005). *In defense of animals: The second wave*. Malden, MA: Blackwell.
- Stiegler, B. (1998). *Technics and time: Vol. 1. The fault of Epimetheus* (G. Collins & R. Beardsworth, Trans.). Stanford: Stanford University Press. (Original work published 1994)
- Sunstein, C., & Nussbaum, M. (Eds.). (2005). *Animal rights: Current debates and new directions*. Oxford: Oxford University Press.
- Wolfe, C. (2003). *Zoontologies: The question of the animal*. Minneapolis: University of Minnesota Press.

Copyright of *Society & Animals* is the property of Brill Academic Publishers and its content may not be copied or emailed to multiple sites or posted to a listserv without the copyright holder's express written permission. However, users may print, download, or email articles for individual use.