

Original article

Justice and Non-Human Animals

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Part I

Abstract: It is widely held that moral obligations to non-human beings do not involve considerations of justice. For such a view, nonhuman interests are always prone to be trumped by human interests. Rawlsian contractarianism comprises an example of such a view. Through analysis of such theories, this essay highlights the problem of reconciling the claim that humans have obligations to non-humans with the claim that our treatment of the latter is not a matter of justice. We argue that if it is granted that the basic interests of non-human beings sometimes count for more than the peripheral interests of humans, then our understandings of obligation and of justice must be aligned, so that what we say about obligation is not countered by assumptions about the invariable priority of humans in matters of justice. We further consider whether such a conclusion can be endorsed by those who adopt certain alternative theories to contractarianism. We conclude that adherents of a range of theories including sentientism and biocentrism must accept that human interests can sometimes be superseded by animal interests, and that this applies not least in matters of justice.

Keywords: justice, contractarianism, animal interests, moral theory, Rawls, moral agency

Note: This essay is being published in two parts, Part I in the current number and Part II in the next number (BJB 2017, vol. 8, issue 1) of this journal.

Introduction: It is widely held that human beings alone are beneficiaries of principles of justice, even if moral agents can have obligations with regard to non-human beings. This stance prioritises (sometimes even trivial) human interests in matters of distributive justice, making other interests pale into insignificance. The theory of justice of John Rawls supplies one example of this stance, and the works of many living writers supply further examples. Our aim in this essay is to cast doubt on the assertion that justice does not apply to non-human beings, claiming instead that non-human animals (like other creatures temporarily or permanently lacking a sense of justice) are to be included in, rather than excluded from, the realm of justice. In particular and in the light of this aim, our discussions will focus on an analysis of contractarianism as a theory which tends to exclude animals from principles of justice, whilst giving animals some moral weight. Our objective is to highlight the problem of

reconciling the claim that moral agents have moral obligations with regard to non-human beings with the claim that our treatment of non-human animals is *not* a matter of justice.

Anthropocentrism, Justice and Animals: Most people agree that it is possible to be cruel towards non-human animals, to neglect them, and to cause them to suffer, but is it possible to be unfair or unjust to them? Could it be unfair (say) to a goat to sacrifice it in order to film a Comoro dragon having a meal, and unfair to (say) a chicken to keep it cramped in a cage so small that it cannot spread its wings, and could it even be unfair to (say) flightless birds to allow them to go extinct by introducing predators such as cats to their last remaining habitats?

Justice is commonly taken to be about treating individuals fairly, taking into account what they are due (for examples, see the next two sections); conceptualised as such, justice seems readily applicable to animals, for they have interests the fulfilment of which is conducive to their own good and which are capable of being unfairly overridden. Nevertheless, it is widely held that justice relates to inter-human dealings and relationships, but not to humans' relations with non-human beings, for the latter beings, it is claimed, are not (and cannot be) recipients of justice. The theory of justice of John Rawls supplies one example¹ as does the work of Brian Barry, and many other writers, such as Tim Scanlon and Darrel Möllendorf, say much the same^{2 3 4 5}. Some of them say that only humans have rights, and can thus be owed justice, while others either maintain that deserving justice depends on having a capacity for a sense of justice or depends on whether one can be classed as an autonomous, rational person who has relations with other such persons. In this way many writers tie their theory of obligation to a Kantian conception of personhood such that animals are excluded from being beneficiaries of certain obligations associated with justice. Others make justice depend on being able to enter into a contract, however hypothetical, something that non-human animals cannot do, with many claiming that duties of justice comprise a narrow part of morality that applies to moral persons only, both as recipients of and as deliberators employing principles of justice.

Indeed, Möllendorf claims that 'Duties of justice are a subset of all moral duties. Justice is not the whole of morality; its objects and scope are narrower. In order for one to be bound by a duty of justice to another, that other must be the right sort of thing and must be in the right relation to the one bound' (Möllendorf, *Cosmopolitan Justice*, p. 31). The right sort of things in question here are moral persons, and the right sort of relations in question are 'associational' relations arising from certain social and political activities (*Cosmopolitan Justice*, pp. 19-21, and 31-3). Indeed, the seriousness many philosophers attach to matters of justice compared to other moral matters is expressed by Mary Midgley when she states that 'if one concentrates one's attention on justice, everything outside it begins to look slight and optional. The boundary of justice becomes that of morality itself. Duties like mercy and compassion then begin to seem like mere matters of taste, aesthetic preference, luxuries, delightful and desirable no doubt in times of leisure, but not serious'⁶. But, as will be shown in the next section, far from accepting such a conception of justice, there are reasons to consider it to be a distortion of the truth.

Brian Barry is another philosopher who regards non-human animals as part of the wider moral sphere, and thus as beings to which we have obligations, yet at the same time, like Rawls, he excludes animals from the sphere of justice. As he says, 'I take it that it is uncontroversial that we can act wrongly in relation to non-human animals... In contrast, it does not seem to me that the concept of justice can be employed intelligibly outside the context of relations between human beings. The reason for this, I suggest, is that justice and injustice can be predicated only of relations among creatures who are regarded as moral equals in the sense that they weigh equally in the moral scales' (Barry, 'Sustainability and Intergenerational Justice', p. 95). His exclusion of animals, then, from principles of justice is based on a theory of obligation that assumes that human beings are somehow weightier in a moral sense than non-human beings.

Further discussion of issues related to the claim that animals weigh less on the 'moral scale' will be reserved for the sections below (particularly the section 'Contractarianism and Animals'). Suffice it to say here that this, in itself, is not a sufficient reason for excluding animals from fair treatment, or from the scope of justice more generally. Indeed, some traditional ethicists who (similarly to Barry) consider humans to be more morally important than animals plausibly argue (contrary to Barry) that animals (both wild and domesticated) *are* proper candidates for consideration in matters of justice. Marcel Wissenburg is one such ethicist; he argues that 'sentience... is the emotional basis of morality and justice', and on this basis '[sentient] animals can legitimately be called recipients of distributive justice'⁷. The very fact that sentient animals can be harmed and benefited provides a good reason for including such animals in the sphere of justice, since they can be affected for better or for worse by human deliberations in matters of justice, including the distribution of goods and benefits.

That said, so firm is the acceptance of the claim that while animals are owed some obligations, they are not entitled to fair treatment *as a matter of justice*, that even some philosophers who are sympathetic to Peter Singer's claim that equal interests should be given like consideration (whether they belong to humans or non-humans), and to its implication that some interests of non-human animals should be prioritised over lesser human interests⁸ sometimes still hold a theory of justice that relegates non-humans to a wider and less demanding domain of morality than justice, such as that of less stringent obligations or that of compassion, taking the view that justice still relates strictly to inter-human relationships only. Thus their theory of moral obligation, neutral between species as it is, can end up with the proper treatment of animals being overridden by an unquestioned traditionalist theory of justice, for obligations of justice appear to override both other moral obligations and other moral considerations such as ones of compassion. We have no inclination to deny that there are moral requirements to act or to forbear that are not normally regarded as requirements of justice; examples include obligations to keep promises, tell the truth, and to refrain from neglect and cruelty. The problem is that the requirements of justice are widely held to trump moral requirements such as these, as well as moral expectations such as those based on compassion, love and sensitivity.

But this problem is most strongly encapsulated in Rawls's theory of justice, to which we now turn. Rawls's contractarianism excludes animals from deserving fair treatment on the basis that they are unable to enter into a contract, whereby questions of justice are answered by those who are rational in their decision-making, and can make deliberations behind 'a veil of ignorance' (*Theory of Justice*, pp. 118-23). For Rawls, only humans can be included in the sphere of justice, humans being the only species capable of moral agency. Moral agents are defined as those persons who have 'a capacity for a sense of justice and for a conception of the good'⁹. (See also his *Theory of Justice*, p. 442.) Given that animals lack a sense of justice, they are excluded from being beneficiaries of principles of justice (*Theory of Justice*, pp. 442 and 448).

Contractarianism and Animals: Certainly, for Rawls the capacity for a sense of justice is not a necessary condition for being entitled to just treatment, but a sufficient one. However, while he states that 'I have not maintained that the capacity for a sense of justice is necessary in order to be owed the duties of justice', he still excludes animals as candidates for recipients of justice, claiming that 'we are not required to give strict justice anyway to creatures lacking this capacity' (*Theory of Justice*, p. 448). Nevertheless, Rawls certainly believes that we have at least some duties towards animals, including ones of 'compassion and humanity', and that we should not treat them in any way we please, but he also claims (in the same passage) that the moral treatment of animals is an area of inquiry outside the scope of a theory of justice:

A conception of justice is but one part of a moral view... Certainly it is wrong to be cruel to animals... The capacity for feelings of pleasure and pain and for the forms of life of which animals are capable clearly imposes duties of compassion and humanity in their case. I shall not attempt to explain these considered beliefs. They are outside the scope of the theory of justice, and it does not seem possible to extend the contract doctrine so as to include them (*Theory of Justice*, p. 448).

As we have seen above, Rawls is not alone in his view that obligations of justice comprise a small or narrow part of a wider moral field, which latter incorporates what are usually deemed to be weaker duties of compassion, mercy, care and the like. However, it is far from clear that such a conception of justice should be accepted, for, while this narrow sense of justice may sometimes be useful, justice is best examined against a background of a range of moral virtues, some of which may well conflict with justice (thereby suggesting that obligations of justice, at least in this limited sense, may not always override other moral obligations). Certainly though, duties of justice are usually regarded as more binding on moral agents and as morally weightier than those duties or obligations that are thought to be bound to notions of care and to moral sentiments such as mercy and compassion.

However, Rawls's exclusion of animals from principles of justice is not without its problems, and has implications for animals and their treatment. Rawls's theory is a liberal one, and liberalism is standardly committed to the idea that each person should have the freedom to form their own conception of the good, as long as that conception does not harm other

humans^{10 11}. Now, if our treatment of animals is an area of inquiry precluded from principles of justice and relegated to a broader sphere of morality where (other obligations aside) people are free to pursue their own conception of the good with minimum interference, then it could be that, as Robert Garner points out, ‘the treatment of animals becomes a matter of individual moral choice rather than a matter of justice. Thus, my conception of the good might include a commitment to the well-being of animals, but I am not entitled to impose it upon others, and likewise, others must respect my conception of the good whilst not having to follow it themselves’ (Garner, ‘Political Ideology and the Legal Status of Animals’, p. 88). The agent’s liberty to pursue her own conception of the good, as long as doing so does not harm the interests of other humans, is ‘always likely to trump attempts to protect the interests of animals, where such attempts conflict with the liberty of humans’ (Garner, *Theory of Justice for Animals*, p. 26).

It appears then that there may well be a tension between Rawls’s liberalism and his belief that we should not treat animals in any way we please. On the one hand, animals are due moral consideration, at least in terms of considerations arising from feelings of compassion and empathy, yet on the other, animals’ interests, even vital ones, could be (are often are) overridden where such interests conflict with those of humans; for consideration of the latter’s interests is considered to be a matter of justice, and obligations of justice are thought to supersede our weaker obligations toward animals. As such, liberal theories may not be able to offer sufficient restrictions on the way animals are treated, restrictions, that is, which could secure the proper protection of animals’ interests (where that which is in a being’s interests is taken to mean that which is conducive to that being’s own good), as well as promote the fair treatment of animals in general. Even if there is a moral case for such restrictions, the obligation to respect them may not be strong enough to override the entitlements arising from liberal freedoms of a Rawlsian kind (see Garner, *Theory of Justice for Animals*, ch. 2)^{12 13}.

As we have seen in the previous section, the exclusion of animals from the sphere of justice is in part based not only on a particular understanding of justice, but also on a particular value assumption regarding animals; that assumption being that animals ‘weigh less’ on the moral scales than humans. However, saying that humans are more morally important than animals, although problematic, is very different from saying that the vital or basic interests of animals should be overridden when they clash with the interests of humans, no matter how trivial those human interests may be, and few would want to endorse the claim that the peripheral interests of humans should in general override the vital or basic interests of animals. (Not even Rawlsian contractualists would subscribe to this claim as a general principle.) And yet one of the implications of Rawlsian liberalism (in excluding animals from the sphere of justice) seems to be that where an animal’s interests clash with a human’s interests (where the furthering of the latter’s interests is considered a matter of justice), then the animal’s interests could indeed be overridden by the human’s even where the human interests in question are less weighty than those of the animals, unless further human interests intervene and supplement the weight of the animal’s interests. (Such an implication is reflected in commercial practices which use animals to such an extent that their basic interests—such as

an interest in not suffering, in functioning, and in well-being—are overridden by arguably less weighty human interests.)

Besides, to say that humans' interests are always more important than animals' interests is not a neutral assumption, and no one could reasonably hold that, say, my interest in using a particular detergent (if it can be described as an 'interest' in the philosophical sense; indeed 'preference' may be a better word than 'interest' here) is more important than the interests of animals, despite their lack of a sense of justice, in not being subjected to suffering in toxicity tests. That said animals' basic interests, including their interest in not suffering, *are* commonly overridden by less weighty ones (such as the 'interest' in using a new cosmetic or detergent). Indeed, the practice of animal experimentation provides numerous examples of cases in which animals are routinely burnt, poisoned and mutilated for relatively insignificant purposes, and while the justifiability of this practice is debatable, the fact that the practice *is* widely accepted even though experiments often involve sacrificing the vital interests of animals for peripheral human ones (despite statutory laws against cruelty to animals and laws which provide some, albeit limited, protection for animals) exemplifies the problem with which Garner is concerned in relation to liberalism.

However, in spite of the fact that animals' basic interests are routinely overridden by less basic human ones, when the conflicting interests of humans and animals are considered, such as in the aforementioned example, it is reasonable to say that sometimes the relevant animals' interests may be morally more significant than the human interests at stake, especially when the human interests under consideration are of a trivial kind or better described as preferences, wants or desires, rather than interests of a basic kind (such as an interest in not suffering, or an interest in continued existence). Basic interests do not become less basic, or less significant, when not harnessed to a capacity for a sense of justice. But if we take the view that the basic interests of non-human animals sometimes count for more than the peripheral or trivial interests of humans, then our understandings of obligation and of justice need to be brought into line, so that what we say about obligation is not countered by assumptions about the invariable priority of humans in matters of justice.

For justice, at least in our view, concerns the satisfaction of needs among sets of individuals capable of affecting such satisfaction in others, with basic needs as a priority^{14 15}, and this means that human interests cannot in matters of justice take invariable priority, where animal needs and interests are of equal or greater significance (an implication which warrants acceptance in any case even by those reluctant to endorse our theory of justice in general). Nor does justice always require reciprocation, for there can be justice between different generations even where no reciprocation is possible. Similarly, we contend, there can be justice between members of different sentient species (even in the absence of reciprocation), requiring the basic needs and interests of non-human animals to be heeded and not to be neglected. Indeed those who grant that animal needs and interests sometimes take priority over human interests, and that we therefore sometimes have overriding obligations to animals, are in danger of appearing inconsistent if they proceed to deny that these are obligations of justice.

Such, at any rate, is the theory of justice proposed in this essay. While the implications of such a theory are beyond the scope of this essay (focusing as it does on a critique of contractarianism and on bringing to light the problem of reconciling the claim that humans have obligations to non-humans animals with the claim that our treatment of the latter is not a matter of justice), some practical implications are worthy of mention here (but it is the authors' intention to reserve a fuller discussion of this for another time).

In matters of justice we should bear in mind that different animals have different interests and, therefore, will require different treatment. Domestic animals will need to be treated differently from wild animals, and where we have made ourselves responsible for the quality of life livable by particular animals (by making them captive or by using them as a means for our own purposes), then treating them fairly will involve giving their interests due consideration, arduous as the implications may be.

With regard to those beings who have interests the fulfilment of which is dependent on human beings giving those interests due consideration, areas of most obvious concern include the practice of factory farming—a practice which involves vast amounts of humanly generated and avoidable suffering, as writers such as Peter Singer have brought to attention (Peter Singer, *Animal Liberation*) — and the long-distance transport of live animals for slaughter, as well as the practice of animal experimentation. In relation to the latter (and as suggested above), while some of this is thought to be indispensable for discovering and testing medicines intended for human use, much of it is conducted rather to test cosmetics and cleaning products, and could be discarded without significant loss to human interests. From the perspective of justice, the non-intensive rearing of domestic animals for food is less clearly unjustified, as long as these animals are allowed to enjoy a good life (unlike veal calves), although it may be held unjust to deprive self-conscious animals (as pigs may well be) of the futures they were capable of entertaining. As far as the suffering of wild animals in captivity is concerned (for example, bears in bear-bile farms, and wild animals kept in barren conditions in zoos), such suffering is also avoidable, as well as morally significant, and in such cases there are obligations to assist the relevant animals, by, for example, putting pressure on governments for change, and calling for the release of these animals into an environment or sanctuary that will allow them to exercise their species-specific tendencies.

But the position is very different where the treatment of wild animals (other than those in captivity) is concerned, for the quality of life livable by such creatures is, contrary to domestic animals, usually dependent on interference being minimal if not absent altogether. (We are assuming that the quality of life of wild animals is not characteristically negative.) Treating them fairly would involve, for example, ensuring that their habitats are sufficiently protected at least to the extent that they are able to fulfill their basic needs and further their own interests, and could involve refraining from acting in ways which may be considered to undermine their significant interests, even when our own interests are at stake, although this is not to say that comparative judgments of moral weight cannot be made. Justice towards wild animals does not, in any case, involve protecting them from predation, even when this

would be possible, and despite such protection seeming to be implied, since such a policy would undermine the entire pattern of life of both predators and prey alike. Although there will be occasions on which injured animals, such as whales stranded on beaches, can and should be rescued, no comprehensive policy of intervention is remotely justifiable, nor, for that matter, seriously possible. Indeed, Singer suggests that, as far as wild animals are concerned, we should adopt a policy of noninterference ('except in a few very limited cases'), and should not attempt to 'police all of nature' (Singer, *Animal Liberation*, pp. 225-26). Justice towards wild animals involves avoidance of human cruelty towards them, and of culpable neglect, but not attempts to subvert the very system of evolution through which they have evolved.

A further practical implication arising from the claim that deliberations of justice are owed to non-human beings is that we should make more strenuous efforts than would otherwise be required to mitigate carbon emissions and stabilise levels of greenhouse gases in the atmosphere. Strong efforts are in any case required to do all this for the sake of human interests. But humanity may well be outlived on this planet by many non-human beings, possibly for billions of years, as long as we curtail greenhouse gases in the present. Even if we do not, some non-human beings would probably survive, but a great many would not, since these emissions are already driving many to extinction. If taking seriously the interests of non-human beings is a matter of justice, then facilitating the survival of species that are in danger of being driven to extinction, both for the duration of the survival of humanity and for the period beyond, is itself a matter of justice.

Those who believe in animal rights will usually have no difficulties accepting at least many of these implications or the conclusion that animals are proper recipients of justice, as long as these rights are regarded as of comparable strength to at least some human rights. But many ethicists hesitate to affirm animal rights, in some cases because rights characteristically can be claimed and non-human animals are almost entirely unable to make claims, and in some cases because they reserve the language of rights for the relations of parties who can enter into agreements with each other, something that, once again, animals cannot do. In other cases, ethicists are hesitant to affirm animal rights because they are reluctant to base everything in morality on rights in the first place. Rights, they may hold, figure in moral conclusions, rather than comprising moral presuppositions. Or they may argue that the claim that animals deserve moral consideration does not imply that we should treat them in the same way as we treat humans, recognise that they have the same rights as humans, or, indeed, recognise that they have any rights at all. This, however, makes them potentially vulnerable to those who claim that justice applies to human beings only. Yet it remains possible to affirm that non-human animals deserve fair and just treatment without endorsing animal rights, for having (or being capable of having) rights is not necessary for deserving such treatment.

As an aside, it is worth noting here that many writers express either reservations or scepticism regarding moral rights, including Peter Singer who considers rights talk to be valuable but merely rhetorical (*Animal Liberation*, pp. 6-8), R. J. Frey who doubts whether there are

rights¹⁶, and Raymond Gaita who suggests that talk of rights adds little in terms of enabling one to determine what makes an action just or unjust¹⁷. (And of course Jeremy Bentham famously declared rights to be ‘nonsense upon stilts’¹⁸.) But it is beyond the scope of this essay to address the details of these authors’ claims. It is sufficient to explain here why the authors emphasise that matters of justice are not dependent on rights claims.

We distinguish between a weak and strong sense of rights (as at Attfield, *Value Obligation and Meta-Ethics*, pp. 142-44). While there are certainly rights in a weak sense—in the sense of a being having interests which are deserving of moral consideration—the strong sense may be said to refer to an overriding or inviolable reason to take a being’s interests into account, and since the authors believe that interests should be weighed appropriately and given *due* consideration, they are hesitant to accept the latter sense of rights (the sense that most philosophers use when appealing to rights).

Besides this, one could claim that animals’ interests should be given serious if not equal consideration without anything about their rights being held to follow. In talking of those beings that deserve moral consideration one here is talking of those beings ‘to whom principles of morality apply’¹⁹, where moral consideration should be taken to include, as Kenneth Goodpaster claims, ‘the most basic forms of practical respect (and so is not restricted to “possession of rights”)’²⁰. In relation to the example of animal experimentation above and to the case against experimenting on animals for trivial purposes, no reference to rights is required for this case to be made. The practice of animal experimentation causes animals to suffer acutely and chronically; animals are subjected to sufferings and pains that would be considered immoral and barbaric if inflicted upon humans. The very fact that animals are made to endure such sufferings requires that we take experimental animals’ interests seriously and give them due consideration. Doing this would no doubt mean that, at the very least, many experiments should be abolished, but such an implication need not be construed as dependent on the claim that animals have rights²¹.

Returning to Rawls’s contractarianism, we have thus far outlined a tension within the liberal moral and political theory. However, Rawls’ exclusion of animals poses a further problem; a problem which relates to the idea that only those with either the capacity for moral agency or the potential to develop it are to be included in the contract. Obviously, in line with such an idea, it would initially seem that Rawls has to exclude not only non-human beings, but many humans who lack such a capacity. As such and as a human-centred theory with regards to matters of justice, it could be argued that it undermines itself, for not only does it exclude some humans, but it would seem that it has to exclude those very human beings that we usually consider to be most vulnerable (permanently and severely mentally-disabled people, for example, who lack the potential to develop moral personhood) and consider to be capable of being recipients of justice. Admittedly, Rawls is aware that the exclusion of such humans is not without its problems. As he says, ‘those more or less permanently deprived of moral personality may present a difficulty’ (Rawls, *Theory of Justice*, p. 446. Similarly, Rawls later claimed, ‘there is the question of what is owed to those who fail to meet this condition’ (*Political Liberalism*, p. 21), while some of his followers have made efforts to tackle this

problem from the contractualist perspective). That said, Rawls includes some humans that lack moral agency, such as babies and infants, on the basis that they have the potential for moral agency, and yet animals, many of which have more developed cognitive capacities than babies and arguably some infants, are excluded. The latter's exclusion then appears inconsistent in the light of Rawls' inclusion of most humans, many of whom possess what might be called 'lesser' mental powers than some animals²².

However, it could be claimed that some animals do indeed possess the capacity for moral agency, implying that they can be included in the contract, albeit with some revisions. However, as will be outlined in the following section and further discussed in the section on 'Contractarianism Revised', problems with contractarianism as a theory of justice cannot be resolved by merely trying to overcome its apparent inconsistency—they cannot be resolved by, for example, either including those animals who are at least as cognitively developed as babies and infants, or by excluding marginal humans along with animals. Nevertheless, insofar as claims regarding the capacity of some nonhuman animals for moral agency may be thought to overcome at least this issue of inconsistency, they are worthy of attention, even though the resulting revision would still make no provision for the just treatment of millions of other sentient animals.

This essay is due to be completed by the publication of Part II in the next issue of the *Bangladesh Journal of Bioethics* (volume 8, issue 1, 2017).

Authors' contributions: The first author presented a related paper at a conference, and the second author expanded the argument of that paper significantly in the light of the recent literature. Both authors then contributed revisions, and the first author adjusted the references in line with the journal's requirements and added responses to the comments of an anonymous referee.

Conflict of Interests: No conflict of interests arises in connection with this essay.

Acknowledgement: The authors would like to acknowledge the helpful academic advice of Simon Robertson, Jan Deckers and an anonymous referee of *Bangladesh Journal of Bioethics*, and the practical assistance and encouragement of David Lockwood and of Steven Goundrey.

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