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Should great apes have 'human rights'?

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Summary

Celebrating 60 years of the Universal Declaration of Human Rights provides an opportune moment to ask whether it is time for the other great apes to be granted 'human rights'. Nonhuman great apes are not human beings and therefore 'human rights' is inappropriate terminology in this context. Nevertheless there is a strong argument for granting great apes fundamental legal rights such as bodily liberty (freedom from slavery) and bodily integrity (freedom from torture). For some readers this suggestion may seem odd or laughable. But John Stuart Mill astutely recognised that "each time there is a movement to confer rights upon some new 'entity,' the proposal is bound to sound odd or frightening or laughable. This is partly because until the rightless thing receives its rights, we cannot see it as anything but a *thing* for the use of 'us'—those who are holding rights at the time" (Mill J (1859) p.126). Although Mill's words related to the controversial debate of his time – whether women were rational beings deserving of a legal right to vote – the wisdom of his words ring true to the current controversial debate – whether great apes are rational and emotional beings deserving of a legal right to freedom from torture and slavery. This debate is not pure academic speculation. Questions as to the legal personhood of chimpanzees have recently arisen in international cases.

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Can a chimpanzee be the subject of a Habeas Corpus writ?

In 2005 a Brazilian court was asked to grant an order of Habeas Corpus in respect of a chimpanzee, Suica, living in Salvador's Zoo (9th Criminal Court, Habeas Corpus 833085-3/2005 available at www.animallaw.info/nonus/cases/cabrsuicaeng2005.htm). In the eyes of the law a captive chimpanzee is a legal thing and not a legal person. Granting a Habeas Corpus writ in respect of a thing is a legal impossibility and it was expected that Judge Lucio da Cruz would dismiss the case. Unexpectedly he didn't. He felt that the case raised a highly complex issue deserving of an in-depth examination. Those acting for the zoo were unprepared for this outcome and requested a 72 hour postponement in order to prepare their case. This was granted and was followed by another request for a further 72 hours which was also granted. However, during this second extension Suica mysteriously died. The judge commented upon the fact that he had covertly visited the zoo the previous weekend and Suica appeared in good health. Whilst the chimpanzee's untimely death put an end to the case, the case itself brought into the lime light arguments that have been simmering beneath the surface for years. This case has fuelled the controversial debate as to whether fundamental legal rights such as freedom from torture and slavery should be extended to certain non-human animals, in particular, the great apes.

Fundamental legal rights for chimpanzees

Steven Wise advocates an extension of the fundamental legal rights of bodily integrity and bodily liberty to certain non-human animals, beginning with chimpanzees and bonobos (Wise S (2000)). Wise argues that mental abilities that constitute what he terms 'practical autonomy' entitle any being (whatever species) to basic liberty rights (freedom from torture and slavery). According to Wise a being has practical autonomy if it can desire, intentionally try to fulfil those desires and possesses a sense of self-sufficiency to understand that it is he who wants something and is trying to get it. Wise relies upon current scientific knowledge about the minds of chimpanzees to illustrate that they are autonomous beings with sufficient practical autonomy to entitle them to basic liberty rights.

Chimpanzees are self-conscious; use insight to solve problems; understand cause and effect; can imitate, teach and deceive and have even demonstrated empathy. They are capable of complex mental representations – holding two mental representations simultaneously to compare them. In one test the chimpanzees were shown a toy can of drink hidden in a scale model of a real room. When taken to the actual room the chimpanzees were able to go straight to where the can of drink was hiding. Most of the 3-year old humans who undertook this test were unable to do this (Kuhlmeier et al, (1999)). In 2007 researchers at Kyoto University discovered that young chimpanzees demonstrate an extraordinary working memory for numerical

recollection. The chimpanzees performed better than the adult university student volunteers who participated in the tasks. In some cases the chimpanzee's success rate was double that of the students (Matsuzawa T (2007)).

In addition to cognitive ability, there is evidence that chimpanzees experience emotions. There are abundant examples of chimpanzees experiencing joy, fear, frustration, anxiety and grief. The primatologist, Dr Jane Goodall observed the sad decline of an 8-year old male chimpanzee, Flint, who lived in the wild and was abnormally dependent on his mother, Flo. When Flo died naturally from old age, Flint fell into a state of despondency, refusing to eat and quickly became ill. Jane wrote,

"The last time I saw him alive, he was hollow-eyed, gaunt and utterly depressed, huddled in the vegetation close to where Flo had died. The last short journey he made, pausing to rest every few feet, was to the very place where Flo's body had lain. There he stayed for several hours, sometimes staring into the water. He struggled on a little further, then curled up – and never moved again" (Goodall J (2000)).

As an 8 year old male, Flint was physically capable of living many more years, but it seems that he grieved the loss of his mother and effectively gave up.

There are examples of gorilla emotions that have received a very public airing. In August 2008 people throughout the world witnessed the grief of a gorilla living in Munster Zoo, Germany whose 3-month old baby had died. The mother, Gana, spent many hours gently stroking her dead baby as if to try to restore movement to the limp arms and lolling head. Many people who watched were moved to tears. In 1996 a gorilla, Binti Jua, at a zoo in Illinois demonstrated compassion and altruism for another species. A 3-year old human child accidentally fell 24 feet to the cement floor of the gorilla enclosure. Binti, who was herself a mother and was carrying her own infant on her back, lifted the unconscious child and carefully carried him to the entrance where the zoo staff were waiting. Roger Fouts commented on Binti's actions: *"Binti clearly demonstrates that, just as some humans are capable of compassion, caring, and altruistic acts, so too are some members of the gorilla species"* (Fouts R (1997)). Altruism, especially when shown towards another species, is generally believed to be exclusive to humans.

These are just a handful of examples to illustrate, in the limited space available, the complex intellectual and emotional lives of great apes. But what can we deduce from this? Was the gorilla, Gana, really in a state of mental anguish at the loss of her baby or are we 'anthropomorphising' her actions – imbuing her actions with human emotions? Even if we accept that great apes are intelligent, social and emotional beings how does this translate, if at all, to the granting of legal personhood? Now we move into the fascinating realms of what constitutes legal personhood with its consequent entitlement to rights. What are rights and is it even possible for a non-human animal to possess rights?

The legal wall

At present there is a thick legal wall between humans and non-human animals. Humans enjoy the status of 'legal persons' and all benefit from fundamental rights

such as those incorporated in the Universal Declaration of Human Rights. On the other side of the legal wall are legal things, which, by definition, enjoy no legal rights. A million species of animal from an adult gorilla to a slug are lumped together behind that legal wall existing as 'things'. In 2000 the Kerala High Court, when deciding a case involving the welfare of circus animals, suggested that it was time to dismantle this wall,

“If humans are entitled to fundamental rights, why not animals? In our considered opinion, legal rights shall not be the exclusive preserve of the humans which has to be extended beyond people thereby dismantling the thick legal wall with humans all on one side and all non-humans on the other side”
(*N. R. Nair v UOI*, 6th June 2000, Kerala High Court).

What are the justifications for this legal wall? How can we justify treating an adult chimpanzee as a legal thing and consequently deny it the right to freedom from torture or slavery? Is it possible to identify a characteristic possessed by all humans and no animals to justify this significant differential treatment? Many academics, both lawyers and philosophers alike, have struggled with this question. But there are no clear answers. An adult chimpanzee is more rational than some severely mentally disabled human adults. Dolphins have demonstrated a greater understanding of language (including syntax, especially word order) than a one-day old human baby. The mentally disabled adult and the one day old baby benefit from fundamental legal rights that they do not understand and cannot assert or claim. As human beings they are, quite rightly in my opinion, entitled to that protection. But how do we justify denying this protection to the chimpanzee? We have to be able to justify drawing the line between us and the other great apes. If not, we are sanctioning arbitrarily drawn lines to permit differential treatment. Arbitrarily drawn lines should be avoided. We need to justify our actions in order to prevent discrimination. The term 'speciesism' has been coined to describe the practice of discriminating on the grounds of species membership alone.

Opponents to granting legal rights to animals rely on the link between rights and responsibilities. They argue that one cannot enjoy the benefit of rights without also accepting the corresponding burden of responsibility. The geneticist Professor Steve Jones argues that, "Rights and responsibilities go together and I've yet to see a chimp imprisoned for stealing a banana because they don't have a moral sense of what's right and wrong" (<http://news.bbc.co.uk/1/hi/magazine/6505691.stm>). However, many humans also lack the capacity for moral responsibility but nevertheless enjoy rights to freedom from torture and slavery. Very young children, senile adults and severely mentally disabled people may all be unable to appreciate the difference between right and wrong but nevertheless they benefit from the protection of legal rights. Moreover if their human rights are violated, representatives or guardians will act on their behalf to assert those rights. Their own inability to assert or claim their rights does not preclude them from having those rights in the first place.

Personhood – philosophy and law

Philosophers distinguish between 'humans' and 'persons'. Humans are those that fall within the biological classification *homo sapiens*, whereas a person refers to those with certain traits or characteristics. John Locke defined a person as a "*thinking*

intelligent being that has reason and reflection and can consider itself as itself, the same thinking thing, in different times and places" (1690) chapter 9, p.29). The criteria for personhood includes self-awareness, self-control, a number of sophisticated cognitive capacities such as problem solving and analytical thought, a sense of past and future, the ability to relate to others, demonstrate concern for others and to communicate with others. Using these criteria philosophers grapple with the difficult question of whether every human is also a person. Is a human who is in a coma and being kept alive on a life support machine a person? From the legal perspective this is less problematic since *all* humans are entitled to be recognised as *legal* persons and consequently enjoy the benefit of the rights and protections that flow from that recognition (The Universal Declaration of Human Rights, Article 6, 'Everyone has the right to recognition everywhere as a person before the law'). Therefore all humans are persons in the eyes of the law but there is, nevertheless, a distinction between humans and persons. The category of legal persons is not limited to humans. A legal fiction exists that allows companies to benefit from certain human rights, for example, a company may enjoy a right to the protection of its property under Article 1, Protocol 1 of the European Convention of Human Rights as given effect to in English law by the Human Rights Act 1998. It is important to appreciate that the rights and duties that a company has as a legal person differs from that of a human being. A company does not benefit from the right to education or freedom of religion under the Human Rights Act 1998. This illustrates that the concept of legal personhood is already flexible enough to bend according to the nature of the entity. Recognising a nonhuman such as a chimpanzee as a legal person and tailoring its legal rights in accordance to the nature of this being is not therefore without precedent. Just as a company benefits from the right to the protection of its property but doesn't need a right to education, a chimpanzee could enjoy freedom from torture and slavery without acquiring a right to freedom of expression or religion.

The recent bicentenary of the 1807 act of parliament that abolished the Transatlantic Slave Trade was a timely reminder that the category of legal persons is not closed. Over the years, it has had to adapt to changing times to encapsulate new entities. Slavery in the former colonies of the British Empire existed because some humans were deemed to be property. They were classified as legal things and not persons. In 1772 Lord Mansfield was asked to grant an order of habeas corpus in respect of an enslaved African, James Somerset. Somerset had run away from his master whilst in England but was later apprehended and forced onto a ship bound for Jamaica. Lord Mansfield granted the writ uttering the now famous words "*Let justice be done, though the Heavens may fall*" (*Somerset v Stewart* (1772) 1 K.B). It was held that a slave owner had no right under English law to forcibly remove a slave from Britain. Whilst this case was significant in fuelling growing support for the abolition of slavery, it was not abolished in the British Colonies until 1834, sixty-two years after the Somerset case. After many years of arduous campaigning by an enlightened few, public perception changed and it was seen as morally abhorrent to treat humans as property. Eventually the law followed suit thereby reclassifying those who had previously been things into persons.

Legal personhood is not the same as being human

There appears to be a deep seated fear of equating animals with humans which is hindering progress. This fear was evident when Darwin published his theory of

human evolution in 1871 (Darwin C (1871)). His theory, especially the idea that humans have descended from apes, met with fierce opposition. Even now there are some who do not accept that humans share a common ancestor with chimpanzees. But in the context of the extension of legal personhood to apes, this fear is based on a fundamental misunderstanding. Granting some non-human animals basic fundamental legal rights does not equate them with humans. A chimpanzee is not a human and does not need 'human rights' but nevertheless there is a strong argument for granting him legal personhood so that he can enjoy the rights to freedom from torture and slavery. This fear of equating animals with humans was apparent in reasoning recently given in an Austrian court. In 2007 the court was asked to appoint a legal guardian for Hiasl, a chimpanzee living in an Austrian animal sanctuary (www.bioedonline.org/news/news.cfm?art=3289). For the court to appoint Hiasl a legal guardian, it would have to first recognise the chimpanzee as a legal person. The judge denied the request on the basis that to grant a chimpanzee a legal guardian might create a public perception that humans with court appointed legal guardians are at the same level as animals. This is an unfortunate decision which clearly rests on the fear of equating apes with humans. The case has gone on appeal and the decision is awaited with great interest.

A Declaration of the Rights of Great Apes

The Great Ape Project is an international organisation which aims to achieve legal personhood for non-human great apes (www.greatapeproject.org). The project has drawn up a declaration of rights in the following terms:

“We demand the extension of the community of equals to include all great apes: human beings, chimpanzees, bonobos, gorillas and orang-utans. The community of equals is the moral community within which we accept certain basic moral principles or rights as governing our relations with each other and enforceable at law. Among these principles or rights are the following:

I. The Right to Life

The lives of members of the community of equals are to be protected. Members of the community of equals may not be killed except in very strictly defined circumstances, for example, self-defence.

II. The Protection of Individual Liberty

Members of the community of equals are not to be arbitrarily deprived of their liberty; if they should be imprisoned without due legal process, they have the right to immediate release. The detention of those who have not been convicted of any crime, or of those who are not criminally liable, should be allowed only where it can be shown to be for their own good, or necessary to protect the public from a member of the community who would clearly be a danger to others if at liberty. In such cases, members of the community of equals must have the right to appeal, either directly or, if they lack the relevant capacity, through an advocate, to a judicial tribunal.

III. The Prohibition of Torture

The deliberate infliction of severe pain on a member of the community of equals, either wantonly or for an alleged benefit to others, is regarded as torture, and is wrong.”

(Cavaliere P and Singer P (eds) (1993)).

The Great Ape Project campaigns for a United Nations Declaration of the rights of Great Apes. Its first step towards reaching this goal came in March 2007 when the Balearic Parliament announced its approval of the Great Ape Project declaration. Then in June 2008 the Spanish Parliament’s environmental committee approved resolutions supporting the Great Ape Project’s mission to attain legal rights for non-human great apes. Dr Pedro Y. Ynterian, president of the Great Ape Project International, recognised the significance of this achievement, “*This is the first time in the history of Humanity that an important Parliament has announced its approval of rights for Great Primates*” (www.greatapeproject.org/news.php). It is expected that the Spanish Government will pass legislation within a year in line with the committee’s resolutions. If and when this happens it will constitute a ground-breaking event as it will be the first piece of legislation in the world granting non-human great apes fundamental legal rights, thereby treating them as legal persons and not legal things.

Whilst Britain has not yet taken the bold step of recognising non-human great apes as legal persons, it has granted them a special status in relation to scientific procedures conducted on animals. Home Office Guidelines state that no licence will be granted by the Secretary of State for the use of great apes in animal experimentation in England and Wales (<http://scienceandresearch.homeoffice.gov.uk/animal-research/animal-testing-faqs/>). The impetus for this prohibition came from the growing scientific evidence that great apes are intelligent and self-aware with complex emotional lives. Lord Williams of Mostyn said, “*This is a matter of morality. The cognitive and behavioural characteristics and qualities of these animals means it is unethical to treat them as expendable for research*” (quoted in ‘UK Bans Experiments on Great Apes’ Bridging the GAP: Newsletter of the Great Ape Project International, Autumn/Winter 1997 as cited in Hall L and Water A ‘From Property to Person, the case of Evelyn Hart’ A model brief for non-human personhood (<http://www.personhood.org/personhood/lawreview/>)).

New Zealand has taken this one step further with the first legislative breakthrough for great apes. The Animal Welfare Act 1999 prohibits the use of all great apes in research, testing and teaching unless such use is in the best interests of the non-human hominid or its species. This legislation does not grant great apes any legal rights but it does give them special protection under the law.

In 2002 Germany became the first country in Europe to include animal welfare in its constitution. The constitution was amended by adding the words “and animals” to a clause that obliges the state to respect and protect the dignity of humans. Interestingly the change came about as a result of a case on the religious slaughter of farm animals. In 1995 a German court ruled that the Muslim slaughter of animals, which involves slitting the throat of the animal and letting it bleed to death without the use of any prior stunning, was illegal. This decision was challenged in Germany’s Constitutional court in 2002 and was overturned (*Bundesverfassungsgericht 1 B v R 1783/99*). It was

held that the ban on religious slaughter amounted to an unacceptable interference with professional freedom as Muslims were effectively prevented from working as butchers. Professional freedom is protected by the German constitution but, at that time, animal welfare was not a constitutional consideration and therefore could not be weighed in the balance. The change in the constitution sought to rectify this. Consequently, including 'animal welfare' in the German constitution had, and has, nothing to do with granting animals 'rights'. Animals are not legal persons in Germany. However, the welfare of animals is now a factor to be taken into account and weighed in the balance whenever the Constitutional court is deciding what action to take in a given case. For example, if a case were to come before the court concerning animal experimentation, the court may be required to balance the right to freedom of scientific inquiry against the responsibility to protect animal welfare.

In the context of animal experimentation in Europe, there has been another recent breakthrough for the great apes. In 2008 the European Commission proposed a ban on the use of the great apes in scientific procedures throughout Europe (COM (2008) 543/5). Once again it stops short of granting them any rights as a legal person but instead seeks to grant them a special status in recognition of their advanced cognitive abilities and complex social and emotional lives. The significance of this proposal lies not in its practical implementation (since great apes are no longer used in experiments in Europe) but in its promotion of the great apes as deserving of a special legal status – could this be one small step away from granting them legal personhood per se?

Conclusion

This article has sought to advocate the case for extending some of the fundamental legal rights, which are currently the exclusive preserve of humans, to nonhuman great apes. It is a bold case to make but one which is increasingly moving into the public domain as Parliaments and courts around the world are tackling issues as to the legal status of great apes. I believe that it is only a matter of time before we recognise great apes as rational and emotional beings deserving of a legal right to freedom from torture and slavery.

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