

Prompt: Whether autonomous, nonhuman animals have rights that ought to be ‘recognized by law’ is precisely the question [courts] are called upon to answer ... The immensity of that question does not place it exclusively within the domain of the legislature”. Discuss.

A Winning Pleading for Animals?

On feathered legal subjects and more

Introduction

"However, all of this no longer has a rational foundation; it occurs out of the blind bloodlust that unfortunately overtakes the human species as soon as it seems to be legitimised by authority. The same government that has long neglected to restrain the excesses of the bio-industry is now transforming itself into a well-oiled killing machine where no animal is spared."

Animals have played a significant role throughout my entire existence. I grew up on a hobby farm in a small Dutch village. As a child, I frequently played outdoors with my sister. We ran around with the dogs, brushed the horses, fed the geese, and cuddled with our favourite chicken named Knuffelkip.¹ Knuffelkip was always open to be petted. She was not aloof and welcomed all of our attention.

One Human Life ≠ 30 Million Animal Lives?

This all changed in 2003, a year marked by events such as the avian flu (bird flu) outbreak in the Netherlands. During this outbreak, 89 individuals were infected with the virus, and one person succumbed to its effects. In a bid to prevent further *human* casualties, the solution was found in the pre-emptive 'culling' of a staggering 30 million chickens, ducks, and geese. Culling, a euphemistic term, denotes the unceremonious extermination of animals. Both the feathered inhabitants of large-scale poultry farms and those of modest hobby farms were eradicated under the orders of the State. This occurred despite the absence of compelling evidence demonstrating that the healthy animals kept by hobbyist animal owners posed any real threat to public health.

¹ The literal translation of 'Knuffelkip' would be: Cuddly Chicken.

Oosterbaan vs The State of The Netherlands

Many hobby farmers resisted the State's draconian measures. Letters were sent to the Queen, petitions were submitted to parliament, and newspaper reports highlighted the bewilderment of hobby farmers regarding the necessity of such drastic measures. Not only animal enthusiasts, but also veterinarians and scientists did not support the State's ill-considered approach, especially given the scarcity of infections among pet chickens.²

Suddenly, the 29 chickens, 2 geese, and 3 goslings owned by my parents found themselves on the government's blacklist. It was only a matter of time before someone would come to our house to cull these animals. My parents were however not inclined to obediently comply and surrender their perfectly healthy animals to the State. Rather, they decided to file a lawsuit against the State of the Netherlands. The excerpt I quoted in the opening paragraph of this essay comes directly from the written pleading presented by my parents' lawyer. They asked the court to impose a temporary halt to the culling, considering the measure to be excessively invasive. If the court were to order a temporary suspension, the State could explore alternative strategies for combating avian flu in collaboration with other stakeholders.

Despite widespread support for my parents' cause across the country, the case unfortunately hit a roadblock. The death sentence for the chickens and geese was sealed. The rationale? The judge indicated that he must exercise great restraint when assessing the legal acceptability of a state measure, as respecting the separation of powers is of paramount importance. Therefore, on May 13, 2003, approximately ten men in hazmat suits stood outside the gate of our house. That was the day we had to bid farewell to our animals.

Interests of animals?

Notably, in the 2003 written pleading, all arguments presented by the attorney revolve around the interests of my parents, with minimal consideration for the interests of the animals themselves. The written pleading posited that the animals held a fictitious value for my parents, thereby making it impermissible for the State to arbitrarily confiscate them. Alternatively, it argued that the right to property, as stipulated in the First Protocol of the

² *De Volkskrant*, 'Minister dupeert pluimveesector', May 14, 2003.

ECHR, would be violated if the animals were culled. However, the interests of the millions of animals—whether to live or roam freely—remained conspicuously unaddressed.

Is it surprising that the attorney said nothing about the animals themselves? I don't believe so. If, in 2003, he had argued on behalf of Knuffelkip, asserting her right to life, I think this would have done little good for his reputation as a lawyer or the case. Advocating for the interests of an animal? That would have been *absurd* for the society of that time.

Hopeful Developments

As of 2024, an increasing number of individuals seem to no longer regard this idea as absurd. Globally, numerous hopeful legal developments for animals are unfolding. Organisations such as the Nonhuman Rights Project, PETA, and Animal Rights dedicate themselves daily to the legal advancement of animal rights. Here, it is often argued that animals should be recognised as legal subjects. Moreover, the inclusion of animals in constitutions is becoming a common practice.³ A groundbreaking milestone occurred in February 2024, when the European Court of Human Rights (EHRM) recognised for the first time that the protection of animal welfare constitutes an element of public morality and plays a role in assessing cases related to fundamental human rights.⁴

Moreover, we have learned much more about animals in recent decades. The extensive knowledge demonstrates that, like humans, they can experience joy, fear, pain, love, anger, and wonder. They show concern for their fellow beings, exhibit autonomy, and display intelligence.

These developments inspire optimism for a more animal-friendly world in the future. However, there is still a long way to go. While the interests of animals are now very modestly considered in the courtroom, the injustice inflicted upon animals by humanity remains staggering. Each day, hundreds of millions of animals are slaughtered, consumed, worn, confined, and used for entertainment or experiments. An astonishing 100 billion (!) animals

³ See, for example, the recent constitutional developments in Finland, Belgium and Italy. Finland: [Citizens' initiative on protecting animal rights moves to Parliament | Yle News | Yle](#); Belgium: [Belgische Senaat stemt in met dierenrechten in de grondwet | Leidsch Dagblad](#); Italy: ['Historic' vote means Italian state must now protect animals and ecosystems | Euronews](#).

⁴ Case of Executief van de Moslims van België and Others v. Belgium, 02/13/2024 [Judgment Executief van de Moslims van België and Others v. Belgium - Ban on ritual slaughter of animals without prior stunning in Flemish and Walloon Regions \(coe.int\)](#).

are killed annually to meet the dietary needs of (only a portion of) the global population. Thereby, the excesses of the bioindustry are far from being curbed by states. A simple drive on the highway reveals trucks packed with pigs, and a visit to any random supermarket showcases countless pieces of meat. Entering a city exposes one to advertisements for the local zoo. The injustice against animals is omnipresent in our world.

Fortunately, there are also judges who acknowledge this injustice. Judges Rivera and Wilson, in the case of *Happy vs. James Breheny*, assert that there is no justification for excluding animals from the legal framework.⁵ They consider the recognition of animals in the legal system to be a necessary step. While other judges, in this case, position themselves as *une bouche de la loi* by stating that it is the legislator's responsibility to acknowledge animals in the legal system, Rivera and Wilson dare to think beyond. They recognise that it is not solely the legislative branch that should address this question but believe it is time for the judiciary to play a role in this matter as well. In my view, the question is not whether animals *will ever* be recognised, but rather *when* this will happen.

A New Written Pleading

Given the developments between 2003 and 2024, it is intriguing to consider whether my parents' lawsuit would have had a better chance of success if the same variant of avian influenza had occurred in the present.

How, in 2024, could a lawyer convince a judge that the recognition of animals in law is (also) an issue for the judiciary? I will attempt to outline this in a hypothetical pleading for the lawsuit Oosterbaan/The State of the Netherlands.⁶

⁵ New York Court of Appeal, *Nonhuman Rights Project (Happy) v James Breheny*, No 52, 14 June 2022.

⁶ It should be noted that I come from a country with a civil law tradition. The pleading therefore focuses on a judge in a civil law country, as I know this system best. For a common law country, other arguments may be better suited to its legal traditions.

WRITTEN PLEADING OOSTERBAAN/THE STATE OF THE
NETHERLANDS (2024)

Honourable Judge,

1. Today, I stand before you as an advocate, representing the chickens and geese of the Oosterbaan family. The State has decided to cull these vulnerable creatures due to a virus, but I will argue, firstly, that the interests of these animals should be considered by you in this courtroom and, secondly that this intended action is not only unjust but also contrary to the fundamental values of our legal system.

2. Animals deserve recognition and thus protection within our legal framework. They experience pain, love, wonder, anger, fear, and joy—just like us. Their voices may sound different, but they deserve the same rights as any other living being. What I want to point out is that humans and animals share the most essential properties. It is therefore not right that only humans are entitled to enjoy certain moral rights simply because they share the same characteristics, while animals possess these characteristics just as well. Chickens may not cast ballots, yet their lives are equally precious.

The Duty of a Judge

3. As guardians of justice and ethics, judges, such as yourself, bear the responsibility of safeguarding the vulnerable in our society. In this way, the courts ensure that the voice of the political majority does not drown out the interests of vulnerable minorities.⁷ These vulnerable entities include not only human animals but also animals. Chickens, for instance, depend on us just as children, the elderly, and the sick do. It is our moral and legal obligation as a society to shield them from arbitrary destruction.

4. The judiciary has always played a pivotal role in ensuring equality and justice. By recognising the rights of these chickens, we not only demonstrate compassion but also uphold the integrity of our legal system. Where the legislature fails to protect the weakest of the weak, the courts should prevent further injustice.

⁷ See also Ely's theory on this subject. J.H. Ely, *Democracy and Distrust: A Theory of Judicial Review*, Cambridge: Harvard University Press 1980, p. 103.

Legislator versus Judge

5. Some argue that it is the legislator's responsibility to acknowledge animals as subjects within our legal system, not the judge's. The legislature is democratically elected, the courts are not. This would stem from Montesquieu's thinking, which speaks of a separation of powers. Yet today, instead of a *separation* of powers, people speak more often of a *balance* of powers, where the powers have to keep each other in balance.⁸ To maintain this balance, it may be that from time to time, the court must, actively, engage with the legislature.

While legislators perform crucial work in crafting laws, it is essential to remember that legislation often occurs in a political arena. Courts, on the other hand, are places where individual cases are adjudicated based on the law and the constitution. They are less susceptible to political pressure and can render more independent judgments. It is their duty to explore and interpret the boundaries of the law, even if it means forging new paths. This therefore means that the court is the right body to deal with the issue of recognition of animal rights.

6. The enormity of the question concerning animal rights demands a profound analysis of ethics, science, and philosophy. Courts should not shy away from this challenge. They must be aware of their role as custodians of justice and should not hesitate to create new precedents when necessary. Moreover, law holds a promise of renewal: This is precisely the promise of legal evolution: what is not yet law may become so in the future. Those who are currently unprotected may eventually find shelter in the law.
7. The judiciary can, and indeed should, play a more substantial role in providing legal advancements for animals, which are currently denied to them. We cannot simply wait with expectation for the legislator to eventually pay attention to the plight of animals while injustice persists. The judiciary is in a position to act; it is the appropriate institution to offer legal protection to those currently deprived of it.

⁸ L.B.J. Davies & R.B.J. Tinnevelt, 'De rol van de rechter: terughoudend of voortvarend?', in: R.J.B. Schutgens a.o., *Toetsingsintensiteit*, Deventer: Wolters Kluwer 2022, p. 77.

Political Choice? Yes, Always!

8. If a judge is hesitant to make what may be deemed a (too) political choice, it is essential to acknowledge the following. Do politically charged cases not *always* call for a politically charged verdict? The indeterminacy of the law means that every decision — whether it explicitly considers animal interests or not — is infused with political ideas. Even choosing not to acknowledge animals within the legal framework constitutes a political choice. The marginal review by a passive judge is thus as much a *normative* choice as intensive review by an active judge.

Therefore, when faced with the question of whether animals should be recognised in the legal system, a judge may as well choose to acknowledge animals, thereby providing the moral progress where the legislator falls short. To echo the words of Jane Goodall in this context: "*What you do makes a difference, and you have to decide what kind of difference you want to make.*"⁹

The proposed measure by the State must be prohibited

9. On the State of the Netherlands' proposed action, I can be brief after the above. The lives of these feathered animals deserve as much protection as those of humans. That the State now intends to exterminate my clients' animals, as well as 30 million other feathered animals, without considering alternatives, is therefore in stark contrast to the moral values we hold in a modern society.

In Conclusion

10. As a judge, you now stand at a crossroads of values and interests. By protecting millions of feathered creatures, the judge is making a statement about our collective priorities. It is not merely a political choice but a **moral imperative**. Let us not forget that history honours those who stood up for the weakest.
11. Esteemed Judge, I therefore have two pleas for you:
 1. to recognise the rights of my client's animals and, consequently,
 2. to prohibit the state from culling the Oosterbaan family's animals for the time

⁹ [What We Do - Jane Goodall : Jane Goodall.](#)

being. Instead, it should investigate what other animal-friendly or ethical alternatives are still available to combat avian flu.

Thank you for your time.

An Alternative Outcome for Knuffelkip?

With the arguments presented in this written pleading, I hope that the judge recognises that they can and indeed *should* acknowledge animals in the legal system. In addition to the legislator, there is an important role for the courts to recognise the rights of animals in law.

Would the judge in 2024 have rendered a different verdict in the case of my parents? Would they have recognised that they do not necessarily have to act solely as *une bouche de la loi*, but also bear the responsibility to provide legal protection to those entitled to it? Would they have considered the intrinsic value of my parents' chickens and geese? Would they have contemplated their intrinsic value, pondering whether the State's drastic measures are proportionate to the dignity of the animals?

I would like to believe so. Although resistance persists regarding the idea of animals being recognised in the law, it seems that an increasing number of people realise the deficiencies of the current legal system concerning animals. If we, as humanity, were truly honest, we would acknowledge that it is not right to exploit animals for human purposes. Therefore, I hold great hope that the efforts of numerous animal rights advocates will not be in vain.

Conclusion

I hope for a future in which it cannot be acceptable for the judge to unquestioningly consent to the culling of 30 million feathered animals. Instead, I expect judges to conduct a highly careful balancing of interests between human and animal concerns simply because animals also have a role in the law. Human interests will no longer automatically take precedence over the lives of animals. But before we reach this point, it is crucial for judges to realise that they too have the capacity to contribute to the moral progress for the animals in this world.

To conclude with the call from Clara Wichmann in 1920 (!) to society - and thereby to judges - to finally give animals the treatment they deserve: *"It involves a thorough and inner transformation of human relations with animals. A revolution of that old habit, considering*

animals as property given to Adam for his benefit and convenience."¹⁰ Judges: make your contribution; the time to recognise animals' rights is now.

¹⁰ Clara Wichmann, *Bevrijding. Opstellen van Clara Meijer - Wichmann*, Arnhem: N.V. Uitgevers-Maatschappij Van Lochem Slaterus en Visser 1924, p. 162.