

## **Consent, Animals, and the Other**

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In factory farms, laboratories and even in the wild nonhuman animals suffer atrocities at the hands of human animals. Nevertheless, the question ‘is it lawful to enslave the unconsenting’ throws legal scholars and animal advocates into a quandary. Paradigm shifting reforms are desperately needed in animal law. Against this backdrop, it is tempting to draw on human rights theory and practice to achieve this goal. Yet, to what extent can we apply ‘human law’ concepts to animals? Is consent an appropriate tool to navigate interspecies interactions?

The notion of consent is but one example of legal categories that fail to accommodate for other animals. Applying it faces not only practical challenges of how to interpret animals’ expressions. We will also find intractable conceptual problems; most animals are unable to understand the contexts and some implications of their exercising of agency. If we apply the notion of consent to human-animal interactions, we risk disregarding other animals’ experiences and disserving their cause.

### **I. Animals as the Paradigmatic ‘Unconsenting’**

Consent is a quintessential concept in every area of modern law and its liberal underpinnings. Assumed, hypothetical, verbal, non-verbal, informed and free – from criminal law to contract law, domestic to international, consent shapes the law and determines its normative foundations. For example, consent is required and often sufficient to enter into a contract, be it between individuals, companies or states. But more importantly, consent marks the difference between the violation of someone’s most basic rights, such as the right to bodily integrity, and e.g. a lawful standard medical procedure. Depending on how severe the matter concerned is, the law can make demands to ensure that consent is free, informed and unmistakably communicated. In other words, consent is pivotal to moral, social and legal relations.

I am interested in the broadest possible legal notion of consent, transgressing boundaries between different jurisdictions and areas of law. No legal system is perfect in its appraisal of consent. In some cases, the law and those applying it might fail – some would argue systematically – to give adequate consideration to the notion of consent. This is salient in the legislation and jurisprudence on sexual violence. However, this issue plays a subsidiary role here. For the purpose of this essay, we can think of consent as a principle in the sense of an

‘optimization requirement,’<sup>1</sup> a concept with exponential legal force that can both determine the application of the law and be constitutive for its very substance.

The law attaches great importance to consent and strives to be sensitive to it. Yet, consent has never been applied to animals. Not only is it alien to animal welfare law, consent is also rarely present in animal rights discourse.<sup>2</sup> Although few would doubt that nonhuman animals have interests and preferences, it seems that we rarely think of human-animal interactions in terms of consent. Animals are the epitome of the ‘unconsenting.’ Not only do we fail to acknowledge signs of rejection in their behavior; our social and legal norms also deny most other animals’ expressions any relevance.

There is more than one explanation for this inclination. Some would argue that it is entrenched in Judeo-Christian culture, as god in Genesis 1:26 conferred to men dominion over animals.<sup>3</sup> Many scholars criticize that we conceive of animals as mute;<sup>4</sup> we fail to listen to them and attach importance to their needs, mental states and ultimately consent. However, it seems that it is first and foremost a practical consideration that prevents us from conceptualizing animals in terms of consent. Many of us might want to continue benefiting from nonhuman animals in one way or another. If not from their flesh as a source of protein, then perhaps from their milk, eggs and wool - or simply as loyal companions. Of course, the first and the last of these examples are very different. However, even a veterinary appointment becomes a much more complex moral issues if I ask myself whether my feline companion consents to being spayed. Against this backdrop, it is conceivable that consent does not feature prominently in animal ethics.

## II. Shifting Paradigms

The above-mentioned reasons for treating animals as ‘unconsenting’ are explanatory at best. However, we also have legitimate reasons to be cautious in ascribing the ability to consent to

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<sup>1</sup> Robert Alexy, *A Theory of Constitutional Rights* (OUP Oxford 2002).

<sup>2</sup> Although the political turn in animal ethics engages with animal agency and resistance. See Sue Donaldson, ‘Animal Agora: Animal Citizens and the Democratic Challenge’ (2020) 46 *Social Theory and Practice* 709; Aylon Cohen, “‘We Support Circus Animals Who Kill Their Captors’: Nonhuman Resistance, Animal Subjectivity, and the Politics of Democracy’ in Spannring et al. (eds) *Tiere – Texte – Transformationen: Kritische Perspektiven der Human-Animal Studies* (Transcript 2015).

<sup>3</sup> Carol J Adams, *The Sexual Politics of Meat: A Feminist-Vegetarian Critical Theory* (Bloomsbury Academic 2015) 46-7.

<sup>4</sup> Carol J Adams (n 3) 45; Sue Donaldson (n 2) 6; Eva Meijer, *When Animals Speak* (New York University Press 2019) 185.

non-human animals. One of them is the problem of unequal power relations. This issue is most pertinent in the context of bestiality and notably farming practices that involve sexual elements, but it also applies to human-animal relationships more broadly.<sup>5</sup> Given the entrenched exploitative relationship between humans and other animals, is free consent even possible? This question casts a shadow over accounts of seemingly harmonious human-animal interactions in micro-contexts, such as Donna Haraway's writings on dog training<sup>6</sup> or Clemens Driessen's account of interspecies 'deliberation' with dairy cows.<sup>7</sup> In both examples, there are power structures at play that might render an animal unable to exercise agency and express her preferences. Applying a theory of consent modelled after the human paradigm to animals risks deeming such instances of human-animal interactions legitimate while ignoring exploitative underlying structures.<sup>8</sup> Consent in those situations will always be a problematic concept, for humans assume the role of determining the broader context of a given interaction. Against this backdrop, it appears questionable whether animals can consent *freely*.

In addition, humans arrogated to themselves the role of interpreting animal expressions. Although we are making remarkable progress in learning about animal behavior, there is a high risk of misinterpretation. Misinterpretation does not require bad intentions; quite the opposite.<sup>9</sup> Having lived with a companion animal for years, one might assume that one can tell what the companion wants. But in other cases, especially with regard to farm animals, our assumptions about what an animal wants, what her 'nature' is, might be distorted by longstanding cultural beliefs or stereotypes of animals. In order to avoid misinterpretation, we need to (re-)learn to listen to animals and take their expressions seriously.<sup>10</sup> This includes accepting their exercise of autonomy and rejection when they, in the words of Catharine MacKinnon, 'vote with their feed by running away.'<sup>11</sup> This is another challenge we might be bound to accept if animals are capable of consent.

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<sup>5</sup> In the context of bestiality see Piers Beirne, *Confronting Animal Abuse: Law, Criminology, and Human-Animal Relationships* (Rowman & Littlefield Publishers 2009).

<sup>6</sup> Donna Haraway, *Companion Species Manifesto: Dogs, People, and Significant Otherness* (2nd ed., University of Chicago Press 2003).

<sup>7</sup> Clemens Driessen, 'Animal Deliberation' in Marcel Wissenburg and David Schlosberg (eds), *Political Animals and Animal Politics* (Palgrave Macmillan UK 2014) 90.

<sup>8</sup> Meijer (n 4) 281 et seq.

<sup>9</sup> Erica von Essen and Michael P Allen, 'Solidarity Between Human and Non-Human Animals: Representing Animal Voices in Policy Deliberations' (2017) 11 *Environmental Communication* 641, 648.

<sup>10</sup> von Essen and Allen (n 9) 644.

<sup>11</sup> Catharine MacKinnon, 'Of Mice and Men' in Cass R Sunstein and Martha C Nussbaum (eds), *Animal Rights: Current Debates and New Directions* (OUP 2005) 270.

However, practical challenges posed by the idea of animals being capable of meaningful consent should not deter us from assuming the challenge of pondering the possibility that animals can consent. While consent has rarely featured in animal ethics, accounts of animal resistance are gaining traction.<sup>12</sup> Jason Hribal and Aylon Cohen tell us the stories of Tatjana, a Siberian tiger held captive at the San Francisco zoo.<sup>13</sup> She broke out of her enclosure, likely as a result of being provoked by three young men.<sup>14</sup> After killing one of the teenagers, she went to search and kill the other two, ignoring other possible prey on the way. Hribal and Cohen frame this as an act of animal resistance against oppression.<sup>15</sup> But is resistance against oppression possible, if one does not have a conception of the system one is resisting against?<sup>16</sup> Tatjana's act is objectively relevant, but it is we who conceptualize it as resistance. The same applies with regard to other accounts of political agency in animals,<sup>17</sup> and to consent: we assume the role of ascribing a normative meaning to animal expressions.

An alternative way of approaching the matter of consent in animals accepts these conceptual objections and instead takes legal reality as a starting point. Legal reality does not portray consent and the ability to consent as an all or nothing matter. This is evident in the case of adolescents, who may be free to enter into contracts and spend their pocket money, but not to move houses without their parents' consent. Guardians can assume the function to consent to legal agreements involving children. Similarly, animal consent could be construed in a way that secures benefits without putting them at risk. For example, other animals might be at liberty to consent to being pet and going for walks, without being in charge of making decisions over whether they want to get vaccinated. Decisions over these latter issues might be left to guardians or institutions designed to protect animal wellbeing. For consent to perform its legal function, it is not necessary that the individual concerned consents herself.

Yet, proxy consent remains the exception from the rule. Its possibility does not address the underlying conceptual challenges. Consent is a powerful tool, it can create obligations and justify otherwise unlawful inferences with one's rights. Legal reality teaches us that for consent to enfold its legal function it has to be given by someone who possesses certain mental capacities. This threshold is meant to be a safeguard: someone who is ascribed the capacity to

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<sup>12</sup> Jason Hribal, *Fear of the Animal Planet: The Hidden History of Animal Resistance* (AK Press 2010); Jason Hribal, "'Animals Are Part of the Working Class': A Challenge to Labor History" (2003) 44 *Labor History* 435, 448 et seq; Cohen (n 2); Meijer (n 4) 186 et seq.

<sup>13</sup> Hribal, *Fear of the Animal Planet* (n 12) 21-31; Cohen (n 2) 284.

<sup>14</sup> Hribal (n 13); Cohen (n 2) 284.

<sup>15</sup> Hribal (n 13); Cohen (n 2) 284.

<sup>16</sup> Bernd Ladwig, *Politische Philosophie der Tierrechte* (Suhrkamp 2020) 305 et seq.

<sup>17</sup> See e.g. Donaldson (n 2); critical of political agency in animals: Angie Pepper, 'Political Agency in Humans and Other Animals' *Contemporary Political Theory* (forthcoming); Ladwig (n 16).

consent can be expected to bear the consequences of her consent, or the concept loses its legal and normative force. For consent to be applicable to other animals, they would have to be able to broadly foresee, understand and accept its consequences. Few authors would argue that these reflective capacities are necessary for having rights. Yet, in their absence meaningful consent is not conceivable.

As we have seen above, animal consent could be implemented in existing human-animal interactions in micro-contexts. Humans can contribute to creating an environment in which animal consent is respected. Further, human guardians can be entrusted with making medical decisions for other animals. Lawyers can represent them in court and human proxies can represent them in political debates. In these examples, humans consenting for other non-human animals is conceivable, as long as we remain vigilant towards the broader structures in which a certain situation arises. But jumping right to exceptions and ways of replacing consent fails to pay due regard to the theoretical question of whether the notion of consent can be applied to animals in the first place. If the exceptions of consent become the norm, there is little value in using the concept at all. Instead we might then develop new concepts better suiting the needs of non-human animals.

My thinking is subject to a compelling objection: the common legal assumptions about consent might be flagrantly wrong. Dominant legal assumptions about consent are increasingly being challenged by the social sciences. Perhaps we are wrong in assuming that free and informed consent is possible in capitalist societies, or under the influence of the mass media. We might be inclined to overestimate our own agency and capacity for consent. Legal notions of consent require scrutiny through the lens of critical theory. A theory of consent informed by these approaches might bring human and animal consent closer together.

However, when working with the notion of consent as it is currently employed in the law, we must conclude that this notion cannot be meaningfully applied to most other animals. If we ascribe the capacity to consent to animals, we overburden them with corresponding obligations that might harm rather than protect them. If we instead employ a minimalist notion of consent, oriented at the examples of children, we will find that little is left of the concept in the first place.<sup>18</sup> There is no way around it: including animals in our moral and legal community requires us to think further. We need new categories, based on the needs of animals rather than our own desire for conceptual clarity.

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<sup>18</sup> Similar arguments have been made against ascribing political agency to animals, see Pepper (n 17); Ladwig (n 16).

### III. The Limits of Consent and other Anachronistic Experiments

Regardless of one might feel about the possibility of ascribing the capacity for consent to animals, there are more important lessons to learn from this experiment. Most importantly, legal reality teaches us that the power of consent has its limits. In the human rights context, some interferences with rights are not open to justification by consent. This is typically the case when human dignity or the right to life are at stake. French and German Courts have prohibited so-called ‘dwarf-throwing,’ despite the consent of the involved.<sup>19</sup> This practice, so the courts, is incompatible with human dignity and thus not at the disposition of the individual through consent. Similarly, it is widely accepted that consent cannot be invoked to justify the taking of life or the infliction of serious bodily injury. Considering the moral rights of animals, we cannot but conclude that most of what we do to them is not open for consent. To come to this conclusion, we do not need to agree on an exhaustive list of moral animal rights, or their philosophical basis. Whether we ascribe to animals dignity, a right to life, or merely a right to be free from torture: factory farms touch the core and deny the very existence of all the above. Raising other animals to be slaughtered for the culinary preferences of humans denies their right to life and - if one will - their dignity in such a fundamental way, that consent could hardly enfold a justifying function.

Finally, the finding that animals are incapable of meaningful consent should not leave them unprotected. Rather, this finding should sharpen our understanding of why they need a particularly strong legal protection of their moral rights. The vulnerability that humans and other animals share is all the more acute for the latter, who can neither consent to, nor refute claims made on their behalf.<sup>20</sup>

One of those claims made on behalf of animals is that the right they need the most is the right not to be property.<sup>21</sup> This corresponds to another predicament invited by the question posed above: is the property status of animals as ‘enslavement’ constitutive for their plight? Considering the dichotomy between legal persons and things, one might be inclined to answer this question in the positive. But again, it already is one hallmark of existing animal welfare laws as well as other areas of law that property rights do not confer to anyone absolute power

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<sup>19</sup> Conseil d’Etat (Assemblée), 27 October 1995, Cases no. 136727, 143578; Verwaltungsgericht Neustadt, 21 May 1992, 7 L 1271/92.

<sup>20</sup> Tom Regan, *The Case for Animal Rights* (2nd ed., University of California 2004) Iiv.

<sup>21</sup> Gary L Francione, ‘Animals – Property or Persons?’ in Sunstein and Nussbaum (n 12) 108.

over an entity – be it a house or an animal.<sup>22</sup> Property should always be linked to responsibilities. The moral responsibilities we have towards non-human animals can certainly be more easily recognized if they are considered legal persons. Nevertheless, the legal dichotomy between persons and things obscures the moral duties we have to domesticated animals bred by humans over centuries, and wild animals who we cause to suffer the loss of their habitats without claiming property rights over them. None of this is to say that property status is *good* for other animals; but simply abolishing it is not the key to their flourishing. Again, what the law dictates, the dichotomy between persons and things, drives us to forcing animals into a category modelled after the human example. This is illustrative of the view that animals count because they are *like us*,<sup>23</sup> rather than in virtue of being animals. Against this backdrop, debates over the property status or ‘enslavement’ of animals run danger of clouding rather than clearing our vision of their needs.

#### IV. Conclusion

Anachronistic quandaries are invaluable for animal rights theory. We need to test the boundaries of existing concepts in order to understand not only *how* and *why* humans fail to do justice to other animals, but also how and why legal systems do so in equal measure. However, employing the ‘pedigree of [human] rights’<sup>24</sup> will only take us thus far. We might be tempted to portray animal rights as a continuation of other justice-seeking movements and borrow from their legitimacy toolkits.<sup>25</sup> As we have seen above, doing so falls short of acknowledging the needs of animals. Consent is but one of the concepts that drives this systemic failure. If we are blind to the differences, we fail to do justice to other animals on their terms.

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<sup>22</sup> See also Anne Peters, ‘Global Animal Law’ Max Planck Law Class, 28 January 2021.

<sup>23</sup> For a critique of this standard see MacKinnon (n 11) 276.

<sup>24</sup> Anne Peters, ‘Animals in International Law’ in *Collected Courses of the Hague Academy of International Law - Recueil des Cours* Vol. 401 (Leiden: Brill 2020) 385.

<sup>25</sup> For a more comprehensive discussion of this issue see Peters (n 24).

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