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A Rawlsian Theory of Human and Animal Rights

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1. Introduction

John Rawls's theory of justice is a political theory. That is to say, it is a theory of justice within a political community. It does not tell us how to deal with outsiders of our political community, for example foreigners and animals.¹ Thus what I want to do in this paper is to extend his theory of justice to animals². The motivation for my doing so is that very many animals suffer at human hands, for example in factory farming and medical experiments. Specifically speaking, over 1 million cows, over 15 million pigs, and over 840 million chickens are slaughtered in Japan in 2016.³ Almost all of them are raised in factory farms.⁴ Over 4.2 million experimental animals are sold to research institutions in Japan in 2016.⁵ As we can presume, at least that many animals are subjected to experiments and killed each year. We need to give justice to them. For that purpose, we need a theory of justice to cover them. In the first half of the paper (Sections 2, 3 and 4), I outline Rawls's theory of justice, extend it to animals, and describe practical implications of the new Rawlsian theory of animal rights.

In the latter half of the paper (Sections 5 and 6), I deal with one major theoretical problem that the Rawlsian theory of animal rights has to face. The problem is one of predation. It is a

¹ By animals I mean those living beings which can experience pain and pleasure. How do we know that a living being can experience pain and pleasure? In the case of human beings, it is reasonably known that the mechanism consisting of nociceptors (sensory receptors), peripheral nerves and brains (and spinal cord) can generate the qualia of pain and pleasure which we experience. Thus if a living being has a similar mechanism to ours, we can be reasonably sure that it can experience pain and pleasure. Since plants have nothing like our central nervous system, they experience neither pain nor pleasure. However, some living beings have no central nervous system, yet they move around and they have some nervous system. So they may somehow feel pain and pleasure, but we do not know. In such a case, we can give the benefit of doubt to them, regarding them as perhaps experiencing pain and pleasure.

² The term "animals" can mean non-human animals in the narrow sense. However, human beings are animals, too. Thus, "animals" can also mean animals in general including human animals. The meaning of the term would be fairly obvious from the context in which it is used.

³ Cf. Food and Agriculture Organization of the United Nations, *FAOSTAT Statistics Database*.

⁴ For details of factory farming, see Kozi Asano, "Development of Factory Farming (in Japanese)."

⁵ Japanese Society for Laboratory Animal Resources, "2016 Annual Sales of Laboratory Animals (in Japanese)." The figure here includes only mammals and birds. A majority of those animals are mice and rats. The figure does not include animals bred in-house, nor imported animals.

very difficult problem. As Jeff McMahan suggests, it is a problem for Christian theodicy, utilitarianism, and any moral theory that incorporates an intuitive idea that suffering is bad in itself.⁶ I will critically examine a few possible responses to the problem of predation, and then will present my own response from a Rawlsian point of view.

2. John Rawls's Two Principles of Justice

John Rawls's theory of justice is well known. I do not mean his later version of overlapping consensus, but earlier version of social contract in *A Theory of Justice*. Its main ideas are original position and veil of ignorance. The original position is a hypothetical condition, similar to, but different from, the state of nature in the traditional social contract theory. The state of nature is a condition of people prior to the creation of a political community. Thus it suggests a historical fiction. By contrast, the original position is a metaphysical fiction, a kind of counterfactual conditional. We all live in nation states. Notwithstanding this fact, we can imagine what it would be like if there were not a political community. More accurately speaking, we can imagine what principles of justice we would choose if we were to create a political community anew. Principles of justice are principles by which we evaluate basic structures of society. Basic structures of society would be various according as particular societies are found in various situations. Thus various basic structures can be just. However, principles of justice are common to them all.

What principles of justice would we choose in the original position? We also know that there are many different people and that we are self-interested. Different people have different worldviews, different values, different religions and so on. Not only that but also people have different characteristics. People differ in sex, race, class, wealth, education, talents, health, tastes and so on. Thus we would be driven by our self-interests in choosing principles of justice. That is to say, different people would propose different principles of justice which are advantageous to themselves. As a consequence, people would fail to reach an agreement and fail to create a

⁶ Jeff McMahan, "The Moral Problem of Predation."

political community.

The next key idea is veil of ignorance. We forget particular information about ourselves for a while. We know what we are, what values we have, etc. but we put aside particular facts about ourselves for a theoretical purpose. However, we still keep our general knowledge of human beings, social and natural sciences. Thus we think, as if we were purely rational agents, from an impartial point of view. Then each of us comes to the same principles of justice. What are they? Here are the two principles of justice, according to Rawls.

First Principle

Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.

Second Principle

Social and economic inequalities are to be arranged so that they are both:

- (a) to the greatest benefit of the least advantaged, consistent with the just savings principle, and
- (b) attached to offices and positions open to all under conditions of fair equality of opportunity.⁷

The first principle is prior to the second principle, not only in the order of presentation but also in the order of priority. This means that the first principle must be satisfied before the second principle is satisfied.

What interests me is the first principle rather than the second one. So let us see specifically what basic liberty rights we should have. They are political liberty (the right to vote and to be eligible for public office), freedom of speech and assembly, liberty of conscience, freedom of thought, freedom of the person, the right to hold (personal) property, and freedom from arbitrary arrest and seizure.⁸ Some of those liberty rights are moral and political. They concern us in so far as we are moral and political beings.

Freedom of the person needs explication. It can mean a few things. For one it includes

⁷ John Rawls, *A Theory of Justice, Revised Edition*, 266.

⁸ *Ibid.*, 53.

“freedom from psychological oppression and physical assault and dismemberment (integrity of the person)”⁹ Then what is freedom of the person as distinct from integrity of the person? It is violated by slavery and serfdom, and it includes freedom of movement and occupation.¹⁰ Thus freedom of the person can be better named liberty and integrity of the person as in *Political Liberalism*.¹¹ Integrity of the person means that you are not to be harmed. Liberty of the person means that you can move and use your body as you like. These rights along with the right to property concern us in so far as we are material beings. The lastly mentioned freedom from arbitrary arrest and seizure simply means the rule of law.

Under the veil of ignorance we all agree on those basic liberty rights. So far so good.

3. Arbitrary from a Moral Point of View

Moral and political liberty rights are of fundamental interests. Rawls is much concerned with the development and exercise of our moral powers. Also his theory is one of social justice. A society is people’s cooperating enterprise. That is why justice matters for people.

Now here are questions. What about people outside one’s society? What about other beings like dogs and cats? Well justice in dealing with them is of secondary importance for Rawls. He can think about them later when he has discussed social justice sufficiently. That is where we can develop a Rawlsian theory. I want to do so in our relation with non-human animals.

Certainly non-human animals may live in a different space from ours. We may have no contact with them. However, we sometimes encounter and do something to them. Then we can talk about whether we are just or not in our dealing with them. Why? It is because they are not simply things. They are living creatures with their own sensation, pleasures and pains, feelings and emotions. So nobody would say that it is morally O.K. to do anything to them. In other words, we should not do certain things to them.

⁹ Ibid.

¹⁰ John Rawls, *Political Liberalism: with a New Introduction and the “Reply to Habermas,”* 335.

¹¹ Ibid., 291.

Now what is striking and distinctive of Rawls is his idea of “arbitrary from a moral point of view”.¹² For example, it is arbitrary from a moral point of view that somebody was born white, was born into a wealthy family, was born talented, etc. They are the factors that greatly influence one’s life prospect, and yet they are morally arbitrary. So we should not use our personal information on them when we propose principles of justice. This means that we can imagine what it would be like if we were born untalented, for example. Then we can stretch our imagination a little bit further. We can imagine what it would be like if we were born as a dog or as a pig. In other words, we can make our veil of ignorance a little bit thicker and forget our species. Then we can acquire species-neutral perspective rather than humanism or anthropocentrism.

Certainly most of us do not believe in the transmigration of souls or anything metaphysical like that; but this is simply a matter of imagination. We can imagine how we would feel if we were a dog or a pig. Then what principle of justice would we choose? It would be like this.¹³

New First Principle

Every sentient creature is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.

This principle looks like Rawls’s first principle, but it differs in that its basic liberties do not include moral or political liberty rights. For non-human animals do not have rationality that make them moral and political beings. Thus the essential liberty rights every animal should have are the ones to life, freedom and integrity of the body.¹⁴ Those liberty rights are of fundamental interests for non-human as well as human animals.

¹² Rawls, *A Theory of Justice, Revised Edition*, 63.

¹³ This time we choose no second principle because we are choosing a principle of justice by which we can evaluate a basic order of the world including, but not limited to, a political community. A political community is a cooperative enterprise while the world is not, so we need no second principle which is concerned with the way of cooperation.

¹⁴ Perhaps the right to hold property, too. Such a possibility is suggested by James Rachels, *Can Ethics Provide Answers?: And Others Essays in Moral Philosophy*, 83. As a matter of fact, the above rights to life, freedom and integrity of the body amount to self-ownership; and if animals have self-ownership, it is reasonable to suppose that they too have a right to property.

4. Practical Implications of the New First Principle of Justice

When we forget our own species membership, we would choose the above new first principle of justice under the supposition that we might be a dog or a pig. The new first principle gives every sentient creature the rights to life, freedom and integrity of the body. So those are basic animal rights. Corresponding to them, we have the duties not to kill, harm or deprive animals of their freedom. There are several practical implications of our duties to animals.

First, we should not kill animals to eat their meat. As a consequence, slaughter houses, hunting and fishery should be prohibited. Secondly, we should not kill animals for scientific purposes. Hence, most animal experiments should be banned. Thirdly, we should not kill animals for any other purposes. For example, Spanish-style bullfighting and sport hunting are both wrong.

Fourthly, we should not confine animals. Thus zoos and aquariums should be prohibited. Animal husbandry is wrong, too. Fifthly, we should not force animals to do something. Forcing them to do something is against their freedom. So horse race, animal circus and dolphin show should be banned. It is also wrong to artificially inseminate animals. It is nothing different from rape. Sixthly, we should not abuse or harm animals in any other way. For example, catch-and-release fishing is wrong.

If we take the above implications seriously, we must release the animals we keep. Then they would ideally recover their freedom. However, they may have lost the ability to live in the wild. In that case, we have to give them the rehabilitation program that will enable them to survive in the wild. If they have forever lost their ability to live in the wild, then we have to take care of them in animal sanctuaries until the end of their life.¹⁵

¹⁵ When there is a next generation of animals in the sanctuaries, we must help them develop their abilities to live in the wild and help their actual transition to wild life. For we should not keep generations of animals in the sanctuaries forever. We should help them become independent.

5. The Problem of Predation

By making the veil of ignorance a little bit thicker, we would choose the new first principle of justice, which gives every animal the rights to life, freedom and integrity of the body. Here is a problem. Suppose that a wolf is about to capture and kill a deer. What should we do? If the deer has the right to life, we have the duty to respect it. Then we have to prevent the wolf from killing the deer. In general, we have to police the natural world so that no animal's rights are violated. However, this is an impossible task. At least it is seemingly impossible because there are so many predators and prey animals out in the wild. Predation is such a common occurrence in the natural world. For example, a cat would catch and kill a mouse. How can we follow every cat and every predator in the world? It seems impossible. So something must be wrong.¹⁶ We should revise the new first principle of justice. Here is the revised version.

Revised New First Principle

Every person is to have the duty not to kill or injure animals nor deprive them of freedom.¹⁷

In the revised principle we focus on our duty rather than animals' rights. And the point of the revised principle is that the duty we have to animals is a negative one, not a positive one. Thus the duty enjoins us, for example, from killing animals, but it does not command us to help or rescue them.

Are we happy now with the revised principle? Not quite. Does our negative duty to animals presuppose their right not to be killed, for example? If it does not, it implies that animals have no rights and our duty is not based on their rights. Then our duty becomes an incomplete duty and not a complete duty of justice. That is to say, if we observe our duty, it is nice and praiseworthy. However, it is up to us when and where we observe our duty, and we are not strictly required to observe our duty all the time. So it is sometimes permissible for us not to observe our duty, for even if we do not observe our duty, we do not violate animals' rights. This conclusion is

¹⁶ Actually, from here opponents of animal rights infer that animal rights theory is wrong. Their logic is *reductio ad absurdum*. But we do not make that inference.

¹⁷ Here animals include human animals. Hence we human beings are protected, too.

not acceptable.

Thus our negative duty to animals presupposes their rights and it is based on those rights. That is to say, their rights are prior to our duty. Therefore, the revised principle does not solve the above problem of impossible task.

Should we rather accept the impossible task? After all, the ideal world in which we prevent predation is a prelapsarian state in which no animals prey upon other animals. It is a Christian vision told by the prophet Isaiah, as well. Here is a quote from Isaiah.

The wolf shall live with the lamb,
the leopard shall lie down with the kid,
the calf and the lion and the fatling together,
and a little child shall lead them.
The cow and the bear shall graze,
their young shall lie down together;
and the lion shall eat straw like the ox.¹⁸

Perhaps we can change the genetic makeup of predators so that they can survive eating plants. Perhaps we can protect prey animals from predators while leading the latter to extinction. For example, here is what McMahan says.

There are two ways in which the incidence of predation could be significantly reduced, perhaps eventually to none. One is to bring about the gradual extinction of some or all predatory species, preferably through sterilization The other, which is not yet technically possible, is to introduce germ-line (that is, heritable) genetic modifications into existing carnivorous species so that their progeny would gradually evolve into herbivores¹⁹

Then we may be able to realize an ideal world of animal rights.²⁰

However, that is not Rawlsian. What Rawls aims at is a realistic ideal, but the above ideal

¹⁸ Isaiah 11:6-7.

¹⁹ McMahan, "The Moral Problem of Predation," 273-4.

²⁰ Not quite so as a matter of fact. In the world without predators, we face an additional problem of explosion of prey animals; and that is likely to be disastrous to the eco-system. So this additional problem also makes McMahan's proposal unrealistic.

world is too unrealistic. When thinking about principles of justice, Rawls accepts and presupposes the facts of the natural world. So we should not change the genetic makeup of animals. Neither should we make some animals extinct. We should be realistic. Some animals are carnivorous.

6. Rawlsian Solutions

Mark Rowlands suggests a Rawlsian solution to the above problem.²¹ According to him, under the thicker veil of ignorance, we do not know whether we are going to be a predator or prey. So we would not choose a principle of justice which entails that we have a positive duty of assistance to prey animals. For such a principle would be disastrous for us if we happen to be a predator. Under such a principle, predators would starve to death. This is what Rowlands says.

In the original position, one of the things one does not know is whether one is going to be incarnated as a predatory animal or as a prey animal, as a carnivore or a herbivore. Given that this is so, to opt for any moral principle which entailed that moral agents have duties of assistance to prey animals would be potentially disastrous. It potentially condemns one to a slow death of starvation.²²

Thus, according to Rowlands, the principle of justice which we choose in the original position would not include our positive duty of assistance to prey animals.

However, Rowlands' suggestion is not convincing. For even if we have no duty of assistance to prey animals, they still have a negative right not to be killed. Then they can appeal to a hypothetical court, claiming that their negative right should not be violated. Then the court can tell us to prevent their right from being violated. In order to negate this court order, we have to forgo their right not to be killed. Then our duty not to kill animals becomes an incomplete one. This conclusion is not acceptable once again.

Here is another Rawlsian suggestion to solve the above problem. A Rawlsian theory is a theory of our political community. Thus it applies to human and non-human animals within our political community, and other animals who encounter us from outside. Human animals within

²¹ Mark Rowlands, *Animal Rights: Moral Theory and Practice, Second Edition*, 169.

²² Ibid.

our political community are our fellow citizens, and non-human animals within our political community are non-human animals we keep, for example, companion animals.²³ So we have to protect our human and non-human animals from potential infringement of their rights. Thus we should not allow our wolf to prey upon our deer. The same thing goes for any other animals whom we come to deal with. We have to respect their rights to life, freedom and integrity of the body. On the other hand, our moral and political order does not extend to other animals who stay outside our community. They are simply outside of the scope of our contract.

The above suggestion is certainly Rawlsian. However, it is not in accord with the spirit of animal rights theory. For just as basic human rights are universal, basic animal rights are universal, too. Animals have rights not because they belong to a particular political community but simply because they are animals.²⁴ Thus we still have to deal with the problem of predation.

My last suggestion is Rawlsian in the sense that it is realistic. We can go back to the new first principle of justice. There we find a word “compatible.” So animals have basic rights only in so far as those rights are compatible with similar basic rights of other animals. But in reality, animal rights are sometimes in conflict with each other. In such a case, rights are annulled. For example, if a bear attacks us, it is morally permissible for us to kill the bear in our act of self-defense. When there were not sufficient plant-based foods for people in a very cold climate, it was morally permissible for them to kill and eat animals because it was the only means for their survival. Similarly, predators cannot survive without killing and eating prey animals. So it is morally permissible for them to do so. At the same time, it is also morally permissible for prey animals to escape predators’ attack.

²³ As I have said, we should not confine animals. Perhaps, however, it can be morally justified to keep companion animals at home. For such arguments, see Tzachi Zamir, *Ethics and the Beast* and Alasdair Cochrane, *Animal Rights Without Liberation: Applied Ethics and Human Obligations*. I am not so sure of the moral permissibility of pet keeping, but I am here assuming that permissibility for the sake of argument.

²⁴ When we choose the principle of justice so as to cover animals, we are envisioning the justice of the universal world beyond a political community.

When prey animals' right to life is incompatible with predators' right to life, what can we do? We cannot and should not do anything. If we try to protect prey animals' right to life, we drive predators into a corner of starvation. If we respect predators' right to life, we sacrifice prey animals. So what we should do practically speaking is to abstain from doing anything. This amounts to laissez faire attitude to wild animals.

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