The Cambridge Centre for Animal Rights Law Essay Competition

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"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**

Taken from the judgement of Judge Jenny Rivera, New York Court of Appeals, in *Nonhuman Rights Project (Happy) v James Breheny*, No 52, 14 June 2022

Introduction

The judgement of the New York Court of Appeals in *Happy* concerned a question which, according to the majority in the case, was of "enormous" importance to modern society:[1] namely, whether or not nonhuman animals (known hereafter as 'animals') should be afforded rights of habeas corpus in order to challenge "illegal confinement".[2]

It will be argued in this essay that the constitutional theory underpinning the role of the courts supports the view that the question in hand does fall within the jurisdiction of the courts. Moreover, it will be contended that for practical reasons, having the court adjudicate on this question is more effective in securing adequate rights protection. Because these arguments are ideally suited for consideration in a court of law, the arguments of the Nonhuman Rights Project in *Happy* will be critically analysed, and alternative – more effective – arguments will be proposed.

The appropriate arena for the development of common law individual rights

Judge Rivera's statement in *Happy* – that the "immensity" of the question of the recognition of animal rights is what removes it from the exclusive "domain of the legislature" – necessitates a discussion of the proper venue for law reform when individual rights are concerned. Habeas corpus, the principle of individual liberty at the core of the *Happy* litigation, is rooted firmly in the common law.[3] Given the English origins of the common law, much of the most influential thought on this subject has come from England and Wales. Therefore, it is using literature from this jurisdiction that the appropriate arena for the development of common law individual rights will be critically analysed.

Firstly, it is necessary to outline the debate in constitutional theory concerning the role of the courts. The orthodox view, as expounded by Lord Diplock in *Duport Steels Ltd v Sirs*, is that "the role of the judiciary is confined to ascertaining from the words that Parliament has approved as expressing its intention what that intention was, and to giving effect to it."[4] To do otherwise – to "make laws instead of administering them" would be "autocratic", posed Willes J in *Lee v Bude and Torrington Junction Railway*.[5] This view therefore takes the side of political constitutionalism. On the other hand, the counterargument here is perhaps best expounded by Allan, who argues that it is not the case that the courts must "merely … accept, on grounds of expediency, whatever the politicians decide".[6] Indeed, the orthodox view appears to take a rather superficial interpretation of the role of the court, leaving no room for the judiciary to utilise the rule of law to keep the legislature in check (but a great deal of room for the legislature to utilise parliamentary sovereignty to potentially abuse their power). Nevertheless, it is clear that both views accept that it is entirely uncontroversial that the role of the

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[1] DiFiore, Chief Judge in *In the Matter of Nonhuman Rights Project, Inc., &c. v. James J. Breheny, &c., et al.* No. 52, 2022 WL 2122141 (N.Y. June 14, 2022) 12

[2] William Blackstone, *Commentaries on the Laws of England: A facsimile of the first edition of 1765–1769,* vol 3 (first published 1768, UCP 1979) 129-137

[3] Amanda L. Tyler, *Habeas Corpus: A Very Short Introduction, Very Short Introduction* (OUP 2021) 7

[4] *Duport Steels Ltd. and Others v Sirs and Others* [1980] 1 W.L.R. 142 [157C]

[5] *Lee v Bude & Torrington Junction Railway Co* (1871) L.R. 6 C.P. 576 [582]

[6] TRS Allan, 'Parliamentary Sovereignty: Law, Politics and Revolution' [1997] 113 LQR 443, 451

judiciary includes the interpretation of the law. This interpretation, no doubt, must take account of changing societal conditions and beliefs: as put by Lord Nicholls in *Re Spectrum Plus*, such conditions can determine that an area of the law "should have a different and wider meaning than when enacted".[7]

Against this backdrop, the theoretical validity of the courts extending the application of individual common law rights will be considered. Here, even the orthodox view requires the court to take account of the presumption of liberty in their interpretation.[8] Moreover, though the scope of the role of the courts in recognising the existence of common law rights remains uncertain,[9] it is submitted that this poses no barrier to affirming the validity of Judge Rivera's argument that the question of "[w]hether autonomous, nonhuman animals have rights that ought to be 'recognized by law'" necessitates the involvement of the judiciary. This is because the extension of habeas corpus to animals does not require the recognition of new rights, or, as Willes J put it, judges "mak[ing] laws" – it merely requires an examination of whether an *existing* right should apply to a new subset of potential individuals (here, animals). Indeed, habeas corpus has existed in English law since at least the 1600s,[10] and was the only English common law writ referenced in the United States Constitution of 1789.[11] It should be noted therefore, that Judge Rivera's argument that the need to involve the courts in the question of the potential development of habeas corpus to animals owes to the "immensity" of this question is somewhat flawed: in any question concerning the interpretation of law – and especially in any question concerning the application of common law rights – the courts have an undisputable role to play. This role does not owe to the magnitude of the question, but instead the mere fact that common law rights are being put under the microscope.

The floodgates argument

The majority in *Happy* invoked a 'floodgates' argument in determining that the issue of extending rights traditionally seen only to apply to humans, such as habeas corpus, to animals should be left to the legislature. Otherwise, argued the majority, owners of animals such as "farmers, pet owners, military and police forces, researchers, and zoos" would face claims similar to those levied against the owners of Happy – claims which the courts would have "grave difficulty" in resolving.[12] This being a practical complaint, it has no bearing on the aforementioned theoretical role of the courts to play a part in such cases concerning the interpretation of common law rights. Moreover, the argument of the majority faces issues of its own: firstly, the mere possibility of numerous similar ('difficult') claims is not alone a sufficient argument for the court to abandon its constitutional role in ensuring adequate rights protection for individuals. As the Latin maxim reads, *Fīat iūstitia ruat cælum* (let justice be done though the heavens fall). Indeed, the use of the floodgates argument here can be seen as an example of the court attempting to "avoid creating or contributing to what they see to be an excessive workload" for themselves.[13] In such cases, this paper agrees with the suggestion of Levy that there should exist a presumption against such "court-centred" floodgates arguments, with the increase in petitions instead being dealt with through procedural rules and case management methods.[14]

[7] *National Westminster Bank plc v. Spectrum Plus Limited & Ors* [2005] UKHL 41 [36]
[8] Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9th edn, OUP 2019) 65
[9] ibid
[10] Amanda L. Tyler, *Habeas Corpus: A Very Short Introduction, Very Short Introduction* (OUP 2021) 7
[11] Eric C. Sands, 'Produce the Body: A History of Habeas Corpus' (Teaching American History, 21 July 2022) <https://teachingamericanhistory.org/blog/produce-the-body-a-history-of-habeas-corpus/> accessed 5 January 2024
[12] DiFiore, Chief Judge in *In the Matter of Nonhuman Rights Project, Inc., &c. v. James J. Breheny, &c., et al.* No. 52, 2022 WL 2122141 (N.Y. June 14, 2022) 13
[13] Marin K. Levy, 'Judging the Flood of Litigation' [2013] 80 University of Chicago Law Review 1007, 1012
[14] ibid 1072

The practical benefits of involving the judiciary

Beyond merely overcoming practical difficulties (such as the aforementioned 'opening of the floodgates'), it is submitted here that including the judiciary in determining whether animals should be afforded rights also brings practical benefits. In Judge Rivera's dissenting judgement in *Happy,* it is argued that "[t]he difficulty of the task—i.e., determining the reach of a substantive common law right whose existence pre-dates any legislative enactment on the subject and whose core guarantees are unalterable by the legislature—is no basis to shrink from our judicial obligation by recasting it as the exclusive purview of the legislative branch."[15] This supplementation of Rivera's argument in favour of the role of the courts in discerning whether animals are afforded rights touches upon an important question concerning the nature of rights adjudication: namely, whether the adjudication of rights is better carried out in the political sphere, or whether it benefits from the involvement of the judiciary. It will be argued below that the most effective answer for rights protection is the latter.

It is contended, for example, by Loughlin that "[r]ights adjudication is intrinsically political".[16] Some accuracy can be derived from this statement given the major social or moral issues courts often have to consider in such adjudication. For this very reason, in *Nicklinson,* Lord Sumption declined to consider the compatibility of a ban on assisted suicide with Article 8 of the European Convention on Human Rights (the right to private and family life), arguing that it was more appropriate for Parliament to decide on this issue.[17] However, Lord Sumption's view here seems to glorify political constitutionalism in a way it cannot bear out – if these issues were left to Parliament, we must query whether there would be adequate rights protection and accountability of the executive. The answer here is doubtful, especially when applied to the issue at the heart of the *Happy* litigation – namely, whether or not Happy the elephant should be afforded the right of habeas corpus.

Indeed, in Lord Sumption's judgement in *Nicklinson*, it appears that it was simply accepted that if the political process does not resolve contentious matters in a way that offers protections to certain marginalised groups, this is the price one pays for living in a democracy. It is proposed that if this were the case, without the necessity to draw any (potentially problematic) comparison between the rights at stake in *Nicklinson* and those considered in *Happy*, the electorate would be grossly under-protected by the judiciary, who must have the teeth to bite against potential lacunae in the rights protection provided by the legislature; otherwise, in short , there is no guarantee that these lacunae would ever be filled. Indeed, in *Steinfeld,* another contentious case, the court presented the argument that if they did not issue a declaration of incompatibility under section 4 of the Human Rights Act 1998 (regarding a topic many believed to be a political matter), there was no guarantee that the government would remedy the discrimination at hand.[18] This decision of the court had no bearing on the supremacy of the legislature, however – such declarations have no effect on the validity of legislation, and thus do not encroach on the jurisdiction of the legislature.

It is submitted, therefore, that one logical fallacy Rivera is arguing against in her judgement is the idea that decisions on rights are binary, and therefore either political or legal. As put by Spano, "[l]egal adjudication and political debate are not mutually exclusive. They are complementary parts of an inclusive democratic structure…".[19] This quotation seems to aptly sum up the appropriate role of the courts in rights adjudication in practice – to pay deference to the political decision makers by taking

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[15] Rivera, J in *In the Matter of Nonhuman Rights Project, Inc., &c. v. James J. Breheny, &c., et al.* No. 52, 2022 WL 2122141 (N.Y. June 14, 2022) 11

[16] Martin Loughlin, *The Idea of Public Law* (OUP 2010) 129

[17] *R (on the application of Nicklinson and another) (AP) (Appellants) v Ministry of Justice (Respondent)* [2014] UKSC 38 [234]

[18] *R (on the application of Steinfeld and Keidan) (Appellants) v Secretary of State for the International Development (in substitution for the Home Secretary and the Education Secretary) (Respondent)* [2018] UKSC 32 [58]

[19] Rosalind English, 'Vice-President of the Strasbourg Court Robert Spano's response to Jonathan Sumption's Reith Lectures' (UK Human Rights Blog, 20 February 2020) <https://ukhumanrightsblog.com/2020/02/20/vice-president-of-the-strasbourg-court-robert-spanos-response-to-jonathan-sumptions-reith-lectures/> accessed 5 January 2024

their reasoning into account, whilst by their own initiative only playing a *legal* role to consider whether such reasons are adequate in upholding the rule of law. Furthermore, given the extensive legal history of the writ of habeas corpus (especially its common law nature and bearing on individual rights), it is submitted here that the expertise of the court means that it may in fact be better suited to deal with a question of its extension to animals than the legislature. As put by Rivera in her judgement, speaking for the judiciary as a whole, "[t]he common law is our bailiwick."[20]

Both from a theoretical and a practical standpoint therefore, it appears that Judge Rivera was justified in her judgement in *Happy* in arguing that the question of whether rights should be extended to animals is one which can rightly be considered by the courts.

Alternative arguments which could have been levied in *Happy*

Having determined that the court is an appropriate venue for discussion on "[w]hether autonomous, nonhuman animals have rights that ought to be 'recognized by law'", this section will briefly consider the issues with the arguments levied by the Nonhuman Rights Project in *Happy*. Moreover, this section will suggest an alternative argument which would have been more effective, especially in convincing the majority that the issue of animal rights was one which should have been dealt with by the legislature. It will furthermore be illustrated that such an argument is ideally suited for consideration in a court of law.

In *Happy,* the Nonhuman Rights Project sought to analogise the plight of animal captivity with the horrors of slavery.[21] In doing so, as put by the majority, the organisation created an "odious comparison with concerning implications."[22] It is submitted here that such arguments are entirely unhelpful to the goal of achieving rights for animals: given the lack of "biological basis" for denials of personhood based on race,[23] the attempted analogy fails. Moreover, the racial harm encouraged by such comparisons[24] taints the arguments made by the Nonhuman Rights Project, to the extent that any court accepting such arguments would face mass public backlash.

The more effective argument for the extension of habeas corpus rights to animals, it is submitted, takes the starting point that animals already do have some – albeit 'thin' – rights. As argued by Sunstein,"[i]f we understand 'rights' to be legal protection against harm, then many animals already do have rights."[25] A valuable example here is section 4 of the 2006 Animal Welfare Act in England and Wales, which creates a duty upon humans not to cause unnecessary suffering to animals. If this duty is interpreted as having a correlative right, then animals have the *right* not to be caused unnecessary suffering. Strategically adopting viewpoints such as this can go a significant way towards arguing that "the idea of animal rights is not at all controversial",[26] and therefore can indicate to the judiciary that granting *further* rights to animals is not a matter of 'enormity', as it was considered by the majority in *Happy.*

The benefit of the courts considering such an argument harks back to the aforementioned point that the courts should act when the legislature will not necessarily guarantee full protection of individual rights. Indeed, an independent and impartial judiciary (as is required by the doctrine of the separation of powers) would consider such arguments with attention only on the outcome which best supports the protection of individual rights under law – including the expansion of the rights of animals beyond

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[20] Rivera, J in *In the Matter of Nonhuman Rights Project, Inc., &c. v. James J. Breheny, &c., et al.* No. 52, 2022 WL 2122141 (N.Y. June 14, 2022) 11
[21] 'Nonhuman Rights Project, Inc., ex rel. Happy v. Breheny' (note) [2023] 136 Harv. L. Rev. 1292, 1295
[22] DiFiore, Chief Judge in *In the Matter of Nonhuman Rights Project, Inc., &c. v. James J. Breheny, &c., et al.* No. 52, 2022 WL 2122141 (N.Y. June 14, 2022) 10
[23] Ian Haney López (1994) quoted in 'Nonhuman Rights Project, Inc., ex rel. Happy v. Breheny' (note) [2023] 136 Harv. L. Rev. 1292, 1297
[24] 'Nonhuman Rights Project, Inc., ex rel. Happy v. Breheny' (note) [2023] 136 Harv. L. Rev. 1292, 1296
[25] Cass R. Sunstein, 'The Rights of Animals' [2003] The University of Chicago Law Review. 70(1), 387, 389
[26] ibid

correlative rights to more substantive rights, such as habeas corpus. The legislature, by comparison, will always be encumbered by public policy concerns when faced with such arguments, and may be lulled into a false sense of security through the idea that animals already have some rights, concluding that this is enough to determine that they do not require any more.

Though brief, the above displays that were alternative, more strategic arguments levied by the Nonhuman Rights Project in *Happy,* these could have gone some way to allaying the fears of the majority that the subject was not one for discussion in the courts by exposing the fallacy of the idea that rights for animals is a revolutionary idea. Moreover, in terms of achieving adequate rights protection, such an argument would have been ideally suited for deliberation in a court of law.

Conclusion

In essence, Judge Rivera is correct in *Happy* that the question of [w]hether autonomous, nonhuman animals have rights that ought to be 'recognized by law' does not fall "exclusively within the domain of the legislature". However, this is not due to the "immensity" of the question, but because of the undisputable part the judiciary has to play in the interpretation of the law, especially common law derived individual rights. Moreover, involvement of the courts in such questions provides a greater chance that individual rights will be protected.

Furthermore, it is contended that were an alternative argument taking a 'thin' conception of animal rights levied in the *Happy* litigation, any fears of the majority that the court was not the proper arena for the deliberation of such questions could have been allayed. This alternative argument will also illuminate the argument that courts are more likely to provide full protection of individual rights than the legislature.

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