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SHOULD THE SCOPE OF ARTICLE 21 BE EXTENDED TO ANIMALS: AN ANALYSIS

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ABSTRACT

The harmonious co-existence of human beings and non-human animals is crucial for maintaining the balance in the ecosystem. However, humans have formed a society and have placed themselves in a central and superior position. This has led to acts of cruelty against animals. At present the need of the hour requires a pragmatic approach towards the welfare of the animals. In India, there has always been a welfare-based approach that is driven and focussed towards the protection of animals, however in the recent times the judiciary has begun inclining towards an approach that is based on rights. This approach lacks enough support from the jurisprudential perspective. This paper explores the consequences of adopting a perspective based on rights and aims to explain how the notion of absolute duty is better in promoting animal welfare rather than bestowing them with fundamental right to life, as it has its own religious, socio- legal repercussions. There are numerous other ways to guard animals, uphold their dignity and discourage cruelty and one of the means is to strengthen the existing legislative framework and impose stringent penalties.

INTRODUCTION:

Animals need to be protected and cared not just for themselves but for the sake of humans because they are vital to our existence. Therefore, realising their importance many laws were formulated by the Indian government. Our Country has rich wildlife, it is necessary for us to conserve them and offer an environment that is essential to their development. Over the years we have seen several instances of animal violence, abuse. These instances are very horrific. One of the news in Kerala, where a pregnant elephant was fed with pineapple filled with explosives is one example as to how we are treating animals and how they have become the victims of our thoughtless actions. Despite this we have also evidences where animals are harassed and subjected to cruelty for our aesthetic games. All of these actions are taken

note by the Judiciary and they have constantly stepped in to protect and amplify the welfare of the animals. However, in the recent judgement of Jallikattu Case the SC has extended the scope of Article 21 and has included animals within it. It has drawn attention to the fact that animals also deserve to live honourably with dignity. The SC has moved ahead from a welfare-based approach to a rights-based approach. But the SC has not completely considered the implications of this approach. Including animals within the ambit of 'person' is not a solution for protecting the animals. The impact of such an inclusion and a transition to a rights-based approach is analysed within the paper by drawing a comprehensive understanding from the jurisprudential perspective.

There are several enactments focussed on the welfare of animals, all that is required is the

effective implementation of the same. If we do not construe the thoughts of duty that we owe towards animals then prime facie granting rights doesn't mean that we are focussing on the welfare of animals.

Key words: Person, Right, Right-based approach, welfare- based approach.

OBJECTIVES OF THE PAPER:

1. To analyse the relationship between the word 'person' and 'rights' from a jurisprudential perspective.
2. To analyse the implications of the right based approach in protecting animals.
3. To analyse the requirement of a welfare approach to protect the interests and freedoms of animals.

RESEARCH QUESTIONS:

1. Whether animals can be included within the ambit of 'person'?
2. Whether granting rights is the only way to secure the interests of animals?
3. Whether a duty- based alternative is sufficient to protect animals?

REASON FOR SELECTING THE TOPIC:

The judiciary's shift in attitude towards guaranteeing and ensuring the welfare of animals is the primary factor for choosing this topic. The judiciary has expanded the scope of Article 21 to include animals in the modern period. The legal system is heavily emphasizing animal rights rather than our collective responsibility to treat animals with respect. Furthermore, from a jurisprudential standpoint, it is categorically unjustified to broaden the application of art. 21 in this context. The same is delved in detail throughout the paper.

A JUDICIAL INCLINATION FROM A WELFARE-BASED TO A RIGHTS-BASED APPROACH:

By and far whenever the animals have been victims of torture and cruelty, the Judiciary has always stepped in and addressed the concern. Various petitions had been filed in the High

Courts and Supreme Courts addressing animal welfare, protection of animals from torture and abuse, use of animals in religious practise, including animals as a part of violent games, all of these have been duly addressed by the judiciary. In the recent times the Judiciary has completely shifted its ideology and have delivered judgements highlighting the aspects that animals must be granted fundamental rights.

Due to the inhumane living conditions, certain animals were prohibited from usage in circuses by a notification from the Ministry of Environment and Forests. Though they are not humans, the court ruled that they should be given the opportunity to live with dignity and petitioner's argument that his constitutional right had been violated was denied by the court.

In one of the leading cases,⁶⁶¹ The petitioner argued that the state of Bihar's ban on cow slaughtering infringed both their constitutionally protected rights under article 19(1)(g) and their freedom to exercise their religion. The court considered the practice and came to the conclusion that cow slaughter was not an essential component of the religious practice and upheld article 48 of the constitution.

In one of the famous cases,⁶⁶² the court emphasised that art 48 of the Constitution, outrightly forbids the slaughter of cows and calves, this ought not to be interpreted narrowly because its goal is to stop such customs. The Court concluded that persons must respect animals fundamental right to life and act with compassion by taking into account articles 48 and 51 A (g).

Animal Welfare Board of India v. A. Nagaraja & Ors,⁶⁶³ The SC was considering whether Jallikattu constituted an animal rights violation in this case. A ban on Jallikattu was requested by the petitioners because this practice frequently involved violence, inflicting of pain, and torturing animals. The Ministry of Environment and Forests

⁶⁶¹ Abdul Hakim Quraishi v. State of Bihar ,1961 AIR 448

⁶⁶² State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamat, (2005) 8 SCC 534

⁶⁶³ Animal Welfare Board of India v. A. Nagaraja & Ors , (2014) 7 SCC 547

prohibited this game due to the presence of wild game. The SC also upheld the ban. The SC outlaid the 5 freedoms that are conferred on all animals, they are: freedom from discomfort, freedom from hunger and thirst, freedom from pain and disease, freedom to express normal behaviour and freedom from fear and distress. These liberties are comparable to the fundamental rights protected by the constitution. Additionally, the Court expanded the purview of Article 21 to include animals, ruling that animals have right to life and deserve to be treated with respect. It was said that animals likewise have the right not to suffer unnecessarily from human abuse and suffering. As a result, the SC upheld the prohibition on this game because it was bad for animal interests. Due of the great uproar that the SC order caused in the state, the governor was forced to issue an ordinance allowing jallikattu to continue.

Thus, from all the above judgements it can be inferred that the courts are extending the scope of Article 21 and are bringing the animals within its ambit. The Courts have failed to appreciate that granting of rights upon animals is not the only way to protect them, and in fact granting of rights will only bring more chaos between human and animal rights.

INTERPRETING THE WORD 'PERSON':

The term "person" is derived from the Latin term *persona*.⁶⁶⁴ Black's Law Dictionary defines *persona* as in the context of civil law as a character, "in virtue of which certain rights belong to a man, and certain duties are imposed upon him". Article 21 of the Constitution clearly implies that to claim the benefit of the article, any living being should fall within the ambit of 'person'. The courts by and large have extended the scope of this word by including both natural and juristic persons such as deities, rivers, corporations etc. Thus, In the present era, person

refers to anything that possesses rights as well as duties as stipulated by the state.⁶⁶⁵

According to Jurisprudence, the only natural persons are human beings. Beasts are not to be considered either as natural or legal persons. They are in fact considered to be mere things and they are perceived to be the objects of legal rights, duties and never the subjects of it. Though beasts are capable enough to act and have interests like men, but their actions cannot be categorised as that which is lawful or unlawful, this is because the domain of law can neither give permissions to their acts nor impose prohibitions upon them.⁶⁶⁶

CONCEPT OF RIGHT:

It is implied when a man is said to have a right to something, he also has a right to get it. This implies that other people should either provide him that privilege or not interfere with his enjoyment of it. As interests are frequently concerned with rights, which are either safeguarded by moral or legal rules.⁶⁶⁷ For an interest to be a legal right it should possess both legal protection and legal recognition. The interest of beasts is to some extent protected by law, by confirming on the notion that cruelty upon animals constitutes a criminal offence. This doesn't imply that they possess legal rights. The duty that law considers towards beasts in fact a duty in respect of humanity in itself.

Jospeh Raz contends that only beings with 'ultimate non-derivative value' and not just instrumental worth can be given rights. He goes on to say that animals are appreciated and included in society for human use and not for their intrinsic value.⁶⁶⁸ The reason animals are not given much of a value is because they lack mental development. They do not have the potential to form interests. Any interests imposed on animals are only relative and not absolute, because they exist for the benefit of humans.

⁶⁶⁴ VD MAHAJAN, JURISPRUDENCE AND LEGAL THEORY, 331 (Eastern Book Company 2016)

⁶⁶⁵ Aishwarya, *A critical analysis of Fundamental rights granted to non-human animals*, 4(1) IJLSI 356 (2022), <https://doi.org/10.10000/IJLSI.111303>

⁶⁶⁶ PJ FITZGERALD, SALMOND ON JURISPRUDENCE, 300 (Sweet & Maxwell 2021)

⁶⁶⁷ Id at page 220

⁶⁶⁸ J Raz, *On the Nature of Rights*, 93 OXFORD UNIVERSITY PRESS, 194 (1984), <http://www.jstor.org/stable/2254002>

Therefore, this approach which is mostly driven towards value, does not truly indicate why animals should not possess rights.⁶⁶⁹

The next widely accepted viewpoint is that of Jeremy Bentham, who claims that animals have rights regardless of whether they can speak or use reason, and that their need for protection stems from the fact that their inability to perform certain tasks does not allow them to suffer by various human acts, they require protection through rights.⁶⁷⁰

THE RELATION BETWEEN LEGAL PERSONHOOD AND RIGHTS:

There is no definite view on what constitutes the characteristics of a person. According to philosophy, a person is a free, thinking being whose existence is a goal in and of itself. According to the Roman law, A person refers to being that possess rights. However, in the Indian context person refers to a being who is bounded by obligations.⁶⁷¹

Hohfeld Analysis

This theory gives a better understanding as to who are capable of holding rights. According to this theory, Rights and duties are co-existent, they cannot exist independently according to this theory.⁶⁷² Hohfeld has conceived a rights-based approach in defining a legal person. In his matrix he expresses that the correlative of right is a duty. He states that every right that a person possess implies a duty upon another so as to not infringe that right. Any person who asserts a right should also be capable of fulfilling a duty. A human being can fulfil his duties towards others but it would be most irrelevant to expect an animal to perform duties, according this theory they are incapable of possessing any rights, and

thus they do not fall under the ambit of ' legal personhood'.⁶⁷³

Will Theory

HLA Hart affirmed that rights should not be considered as mere correlatives of duties. It brings in itself an element of control, and thereby he asserted in his writings that an infant could not have a right because they have no ability to exercise control over it.⁶⁷⁴

Interest Theory

The Interest theory asserts that rights are also to be held by those who are considered as nonpersons. These include fetuses, animals, slaves. The rights of animals can be protected by enacting animal welfare laws.⁶⁷⁵

Under this theory, it is necessary for animals to meet two conditions, they are (a) Animals must have interests (b) Animals' well-being is valued, therefore protecting them is necessary for their own sake.⁶⁷⁶

Thus, it is evident that the Hohfeld theory rejects the idea of granting rights to animals, in contrast with Will and Interest theory.

State recognition⁶⁷⁷

The state follows certain criteria, which when entity satisfies acquires the status of a legal person,⁶⁷⁸ it being:

(a) The entity must have the ability to initiate legal proceedings on its own behalf, it clearly implies that animals are not capable of filing suits when their interests are violated, it is usually individual or organisation who file case on their behalf.⁶⁷⁹ Thus the first criteria is duly not met by animals.

⁶⁶⁹ Id

⁶⁷⁰ Jessamine Therese Mathew & Ira Chadha-Sridhar, *Granting animals rights under the Constitution: A misplaced approach? An analysis in light of Animal Welfare Board of India v. A Nagaraja*, 7 NUJS L.Rev, 349 (2014) <https://docs.manupatra.in/newsline/articles/Upload/F6A0FB5A-88EF-4DF0-9583-3CBE36BDB956.pdf>, Also see JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (Kitchener 2000)

⁶⁷¹ Id

⁶⁷² Supra note 5

⁶⁷³ Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 Yale L.J 710 (1917), <https://doi.org/10.2307/786270>

⁶⁷⁴ VISA AJ KURKI, A THEORY OF LEGAL PERSONHOOD, 55 -87 (Oxford 2019)

⁶⁷⁵ Id at page 62

⁶⁷⁶ Saskia Stucki, *Towards a Theory of Legal Animal Rights: Simple and Fundamental Rights*, 40, Oxf. J.Leg.Stud, 533 (2020), <https://doi.org/10.1093/ojls/gqaa007>

⁶⁷⁷ Supra note 10

⁶⁷⁸ Christopher D. Stone, *Should Trees Have Standing? – Toward Legal Rights for Natural Objects*, 45 S. Cal. L. Rev 450 (1972) <https://iseethics.files.wordpress.com/2013/02/stone-christopher-d-should-trees-have-standing.pdf>

⁶⁷⁹ Akhil Bharatiya Soshit Karamchari Sangh (Railway) v. Union of India, (1981) 1 SCC 246

(b) The court must evaluate the entity's injury when determining the appropriate remedy. It is not completely possible for the court to estimate the injury suffered upon by animals. Even if the injury is estimated it is not in compliance with the animal interests but on human interests.⁶⁸⁰

(c) The remedy should benefit the entity. Majority of times these remedies do not benefit the animals, as it is not possible to estimate their pain and plight. An example in this context is, In India testing of cosmetics on animals is not allowed, but testing of medicines is allowed. This clearly shows that the protection of animals is purely based on assessing the relative human interests with the concerned activity.

At present the state has not directly included animals under the ambit of person, as they do not have the ability to articulate the rights and duties that will be adjoined with such a status.

PROBLEM WITH THE RIGHTS BASED APPROACH:

Granting fundamental rights to animals, would grant a vast range of benefits to animals and would result in damage to human existence. If animals are conferred upon a right, then humans have a duty to respect them. Moreover, if animals are granted rights, they are not in a situation to protect human rights. This would result in a huge clash of rights. Ultimately the rights of human beings would prevail.⁶⁸¹ Also the notion of granting fundamental rights upon animals would definitely disturb the welfare of human beings.

Applying the Social Contract Theory to the issue of animal rights, it becomes clear that non-human animals cannot enter into social contracts since they are unable to convey rationality. It is useless to set any regulations with them for our mutual advantage. Also, to claim the benefit of rights the entity must know the concept of good and should be able to perform it diligently, only then they can be vested with rights. But in the case of animals, they lack the cognitive thinking to determine the quality of

their acts. Thus, they cannot be vested with rights.⁶⁸²

Iredell Jenkins has adopted three questions to determine whether granting of rights are effective in a particular context. They are:

- (a) Rights can be created when it is possible to form a real and legitimate value.⁶⁸³ Animals have a great deal of value to people, and we have a responsibility to protect them. It should be identified that the duty to protect them does not really does not rise upon an ideology that they should have rights.
- (b) If the rights are sufficient to serve as means to the end. It should be understood that there are several ways to reach the ultimate end i.e., protection of animals and implying rights upon them is not the only way to reach the end
- (c) The operation of the right should do good than the harm. If a right based model is adopted for the welfare of animals, it would conflict with the rights of humans and in the end the rights of humans would prevail.

Moreover, granting of fundamental rights to animals, implies that animals cannot be killed without the authorization of law. This leads to a plethora of problems in a socially diverse country like India. The country has various religious practises that require animal sacrifices and all of this would be affected, if fundamental rights are recognised. Further it empowers the animals with the right to sue and be sued just like a human.

The Indian Constitution is a reminder that every right is bound by a duty, and no person can have the rights without being bound by a duty towards the nation. Every citizen enjoying the rights have certain duties to be obliged with. The entire ideology differs when animals are granted with fundamental rights, as they cannot perform any duty and they are mere beneficiaries of rights. Moreover, if rights are granted, the scope

⁶⁸⁰ Supra note 10

⁶⁸¹ Supra note 6

⁶⁸² Stephen C. Sanders, *Applying the Social Contract Theory in Opposing Animal Rights*, (2016) (Oct 5, 2023, 6:15PM) <https://philarchive.org/rec/SANATS-2>

⁶⁸³ Supra note 10

of these rights will be gradually extended with numerous interpretations, this may also result in a situation where human welfare can be ignored.

DUTY BASED APPROACH FOCUSES MORE ON ANIMAL WELFARE:

There is always a constant debate on whether rights and duties were correlative. The general view is that a duty cannot exist in isolation from a right, nor can a right exist without a corresponding duty. However, another school of thought, clearly opposes the old school of thought. All of these brings us to one common conclusion that duties when perceived in a strict sense have corresponding rights and duties when perceived in a wider sense have no corresponding rights. A similar analogy can be extended to animals where they cannot have rights, but we owe a duty towards them.⁶⁸⁴

Some people have differences in the duty-based ideology for the benefit of animals. Some claim that the duty arises out of compassion, some perceive that the duty towards animals exist as a result of justice. In the Indian context, the latter is preferred as the ancient teachings emphasised on the inter relation between man and animals. It even prohibited the culling of animals.⁶⁸⁵ Religions like Hinduism, Jainism, Buddhism prohibited insane treatment towards animals, they worshipped animals as part of culture. A similar ideology is reflected in the Indian Constitution where emphasis of a positive duty towards animals is highlighted in the Directive Principles of the State Policy⁶⁸⁶ and the Fundamental Duties.⁶⁸⁷

Thus, it can be understood that the welfare of animals cannot be brought by conferring rights upon them, as this only leads to clashes between the rights of human and animals and by far no good. Instead, we must perceive the thought that we should owe duty towards these animals rather than inculcating the idea of giving charity to them.

LEGAL RIGHTS OF ANIMALS ARE STILL RECOGNISED:

Though initially animal rights were perceived to be moral rights, over time they have gained recognition of legal rights, as a result of which many animal protection laws were formulated. A mere granting of moral rights did not protect the animals as a result there was a need to have a much stronger enforceability thus awakening the notion of legal rights. The idea of legal rights on animals, creates an intrinsic value upon them. It upholds their dignity. They are considered as beings who possess valuable interests. Thereby the animal welfare legislations aim at providing well-being of animals mentally and physically.⁶⁸⁸

It should be understood that our Country India has never contended on aspects as to whether animals should be given rights, the moral rights and the legal rights are very well considered in the Constitution as well as other statutory enactments. The article 48A, 51A (g) in the constitution focus upon the welfare of wildlife and the numerous legislations like Wildlife Protection Act, 1972, The Prevention of cruelty act, 1960, Indian Penal code, 1860, Animal Birth Control (Dogs) Rule 2001, Slaughterhouse Rules, 2001.

Though the Constitution has not guaranteed fundamental rights to animals, The Indian context has approved the ideology of Interest theory and has recognised legal rights of animals. At present it is not about granting more rights or fundamental rights for protecting animals but it is the need to realise that the already formulated laws should be better implemented, and that we should realise our duties towards protecting animals.

A DIRECT AND POSITIVE DUTY IS REQUIRED:

To legal entities that are unable to hold rights, humans owe absolute duties. Austin originally used the term "absolute duty", where he asserts that they exist irrespective of a co-relative right.⁶⁸⁹ Duties can be positive, negative, direct

⁶⁸⁴ Supra note 6

⁶⁸⁵ Supra note 10

⁶⁸⁶ INDIA CONST. art 48 A

⁶⁸⁷ INDIA CONST. art 51A(g)

⁶⁸⁸ Saskia Stucki, *Towards a Theory of Legal Animal Rights: Simple and Fundamental Rights*, 40, Oxf. J.Leg.Stud, 533 (2020), <https://doi.org/10.1093/ojls/gqaa007>

⁶⁸⁹ Supra note 10

and indirect. Most of the animal welfare legislations stipulate a negative and indirect duty in protecting the animals. It is the need of the hour to shift the duties from negative to positive and indirect to direct. This is possible by bringing change in the existing provisions of law. Creating positive duties does not imply restriction freedom, but acts as a constant reminder that we owe a duty to our counter parts animals.⁶⁹⁰ Even in India, the acts have always focussed on the idea as to what human beings are not supposed to do, this approach has to be changed so as to ensure a better living for animals.

SUGGESTIONS:

1. The inclination towards a rights-based model should be resisted.
2. There should be collective awareness and participation to curb the violent atrocities against animals.
3. The punishments imposed for subjecting animals to violence, abuse, cruelty should be stringent.
4. It is per se not enough if the laws are violent, but there should be an effective implementation of the same. In this regard the executive and the Judiciary should play a major role to bring out positive results.
5. Cruel practices and games, where animals are subjected to torture should be banned and the state governments should ensure the same through appropriate legislations.
6. Create channels for reporting instances of animal abuse or neglect and make sure that the authorities can act quickly on such reports.
7. Support and provide financial assistance to groups that rescue, treat, and rehome animals that are in need.
8. Public can collaborate with NGOs to raise awareness on the importance of animals, and deepen their thinking on the pain and suffering faced by animals when they are tortured and mistreated. Change in the attitude of human beings is the most

important part to secure the dignity of animals. To ensure this participation of government, non-governmental organisations, companies, public all are required as it is a collective responsibility of each one of us.

CONCLUSION:

It can be concluded that a right based approach is not a good idea in protecting animals, this merely gives rise to conflicts and further only uplifts the rights of human beings as more superior than that of animals, thereby the purpose of granting rights would be futile. A duty-based approach would overcome the drawbacks of right based approach, it would create a positive and direct duty towards welfare of animals. Also, if the duties are not fulfilled properly, it can be questioned through PIL's which have been effective in the Indian scenario.⁶⁹¹

Thus, animals are an integral part of human existence, they should be protected, provided with dignity and honour and the means to achieve this is definitely not by granting rights upon them. It's time we adopt duties that focus on the welfare of animals. The existing laws should be strengthened and also it should be ensured they operate effectively; the executive should come up with ways for the effective operation of the acts. The punishment in the act should be made deterrent and the wrong doers must be punished. Thus imposing 'duties' on human beings is an effective and efficient model to protect animals rather than granting 'rights.'

⁶⁹⁰ Id

⁶⁹¹ Ramesh Sharma v. State of H.P, 2014 SCC OnLine HP 4679



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