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THE UNDERSTANDING OF ANIMAL RIGHTS: Advancing a New Approach

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Notes and Comments

THE UNDERSTANDING OF ANIMAL RIGHTS: Advancing a New Approach

Sanchit Sharma*

[Abstract: *There are, in recent years, public discourse, legislative debate judicial pronouncements, on the rights of animals. In this article, I intend to explore what do we mean by the terms 'right' and 'animal rights'.? That there are three postulates which govern and structure any debate on the subject. The paper is a critique of the current understanding of animal rights on the tenets of morality and the erroneous inferences of Hohfeld's correlativity axiom. The existing understanding of an animal's right is merely a 'claim' within Hohfeld's framework (which is enforced by a human) and not a 'stricto sensu right'. And second, there can nevertheless arise a situation where, if we feel an animal (or a class of animals) deserve protection, they can have a stricto sensu right and in such cases, a new understanding of the nature of such animals must be developed.*]

I

Introduction

Any idea to ascribe rights beyond the anthropocentric understanding of the word 'right' reeks of absurdity. Indeed, *prima facie*, it appears ridiculous to vest right into rocks, plants, vegetables, or animals and one suspects that an author writing in favour of such rights is merely conducting a conceptual meta-physical inquiry or has abundance of time.[1] But an inquiry of this nature is an indispensable necessity for several reasons. *Firstly*, the rights of an animal, or for that matter, other non-sentient beings have far reaching consequences on every aspect of law and life. This is because rights of any beneficiary in positive law or natural law are based on identifying the duty owed by one to the other.[2] *Secondly*, there is validity in the argument that until we do not check the spatial delimitation of the rights beyond

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1 *See* Lawrence C. Becker, *Three Types of Rights*, 13 Ga. L. 1197, 1205 (1980).

2 Alan D. Cullison, *A Review of Hohfeld's Fundamental Legal Concepts*, 16 Clev.-Marshall L. Rev. 559, 562 (1967). See also: Dworkin, R. TAKING RIGHTS SERIOUSLY 14 (1977).

humans, we cannot fully grasp the concept of 'right' itself.[3] The effect would be in the form of reluctance to say decisively that *if* the beneficiary has a right because of the conceptual confusion about the notion of a 'right' itself.[4] To that extent, I must also suggest that if the notion of 'right' remains obscure, so will the notion of 'Justice'. And lastly, in a society 'right' is predominantly based on positive law and positive law is based on—or more accurately, motivated by collective morality of people.[5] Since morality itself is a product of varied elements, animals being one of them, any law is made for *them* is an understanding of *our* own morality. It, thus, amounts to seeing our reflection in the mirror.

This inquiry is in the backdrop of the recently decided case of *Animal Welfare Board* v. *Union of India*[6] by the Hon'ble Supreme Court of India (SC). In this case, the petitioners appealed against the Government of Tamil Nadu when it made several amendments to the state legislation preventing animal cruelty, allowing the event of *Jallikattu* to be organised in the state. Their contention was that the SC, in a previous decision on the matter, had banned, by declaring the Tamil Nadu Regulation of Jallikattu Act, 2009, as invalid. The Court held that the event inflicted cruelty against bulls and other animals used for the sport.[7] Further, the petitioners in *Animal Welfare Board* also contended that animal rights should be considered fundamental rights under article 21 (Right to life) of the Indian Constitution.[8] The court, responding to these contentions, observed that it was within the power of the State of Tamil Nadu to promulgate the new law and refused to ban the event since in the new law, the suffering of animals was 'substantially diluted'.[9]

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[3] Feinberg, Joel., *The Rights of Animals and Unborn Generations* in PHILOSOPHY & ENVIRONMENTAL CRISIS 44 (William T. Blackstone, ed., 1974); Becker, *Supra* note 1 at 1197.

[4] *Id*. Feinberg, at 51.

[5] Joseph Raz, THE MORALITY OF FREEDOM 166 (1988) (A successful philosophical definition of rights illuminates a tradition of political and moral discourse in which different theories offer incompatible views as to what rights there are and why). *See also*: Reginald Walter Michael Dias, JURISPRUDENCE 228 (1985) (Every obligation is a normative judgement, and normative judgement imply social rules.); Joseph W. Bingham, *Nature of Legal Rights and Duties*, 12 MICH. L. REV. 1, 3 (1913-1914) (It is true that some sorts of conduct would be condemned and accordingly labelled universally by respectable opinion. It is true also that there is a predominant and potent public opinion on the "morality" of a large proportion of ordinary sorts of conduct, that this public opinion may be vouched in support of an individual as- sertion, and that our common knowledge of it furnishes a starting plane, a check, and a balance to all discussions of moral right and wrong.); Merton L. Ferson, *The Nature of Law and Rights*, 1 U. CIN. L. REV. 158, 154 & 164 (1927).

[6] *Animal Welfare Board of India* v. *Union of India*, 2023 SCC OnLine SC 661 (Hereinafter *Animal Board*).

[7] *Animal Welfare Board of India* v. *A. Nagaraja*, (2014) 7 SCC 547 (Hereinafter *Nagaraja*).

[8] *Supra* note 6, Animal Board, para 14.

[9] *Id*, Animal Board, para 30.

Thus, even as the court acknowledged that pain is caused to the animals in the event, the finding was conditioned by observing that the pain caused has been reduced. As for the argument of fundamental rights, the court noted that it should not venture into 'judicial adventurism' to bring the rights of an animal within the framework of article 21.[10] Evidently, the court did not undertake any jurisprudential analysis of the matter and delivered the verdict on the basis of legislative technicalities.[11]

Since this essay is a philosophical undertaking, it will be stipulative where I postulate a few things. In this essay, I intend to illustrate two points: *first,* the pre-existing understanding of an animal's right is merely a 'claim' within Hohfeld's framework (which is enforced by a human) and not a '*stricto sensu* right'. And *second*, there can nevertheless arise a situation where, if we feel an animal (or a class of animals) deserve protection, they can have a *stricto sensu* right and in such cases, a new understanding of the nature of such animals must be developed.

Thus, the paper is divided into three parts. In the first part, I begin with establishing what we mean by the terms 'right' and 'animal rights'. Accordingly, I argue that there are three postulates which will govern the structure of this essay. Then, in part *two,* based on the postulates, I attempt a critique of the current understanding of animal rights on the tenants of morality and the erroneous inferences of Hohfeld's correlativity axiom, post which I bring to fore the consequences of such understanding on animal's right. *Lastly,* in part three, I propose a new understanding of animal rights and argue that an 'immunity-disability' relationship is suitable for a class of animals which have been given a *stricto sensu* right and this right and the relationship can coexist in the previous understanding of 'claim-duty' relationship.

II

Establishing the Modalities

In this part of the essay, I will lay down two foundational aspects of our discussion, upon which our scrutiny shall be grounded; namely: I will first elucidate what we mean when we use the word 'right' and then explicate a general concept of animal rights against the background of three postulates.

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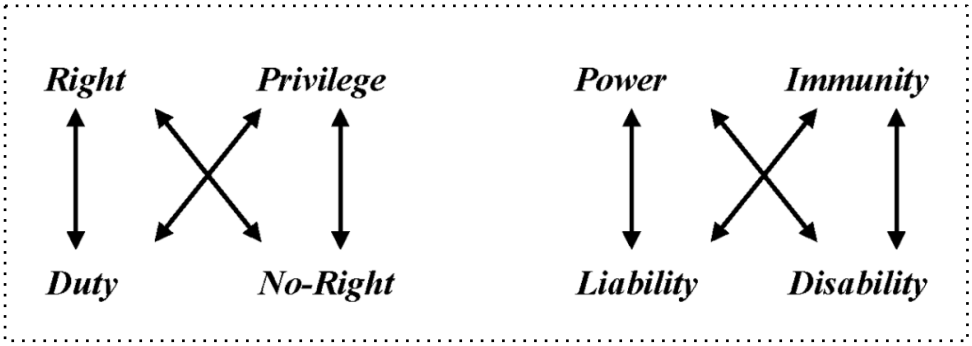
[10] *Id*, Animal Board, para 24.

[11] *Id*, Animal Board, para 40.

What is a 'Right'?

To answer this question, I, like others who have tussled here, will employ the use of *Holfheld's* conception of rights.[12] The notions of *Hohfeld* could be best understood by employing a slightly modified version of *Glanville Williams'* table:[13]



The vertical lines denote a Jural Correlative, while the diagonals are referred to as Jural Opposites. Thus, if X has a right to be free from any interference by Y in his project, then Y has a duty to abstain from interfering with his project. Inversely, if Y has a duty to abstain from interfering with X's project, then X has a right to be free from such interference by Y. This is a Jural Correlative. A Jural Opposite, on the other hand, is simply a negation. Meaning, if X has a right to be free from any interference by Y in his project, then he does not have a 'No-Right' with regard to any interference; in other words, he has a right. Inversely, if X has a 'No-right' to be free from Z's interference, he does not have a 'Right'.[14]

Holfheld argued that the appropriate meaning of the word 'right' lies in its correlative: a duty.[15] A duty is a conduct towards the achievement of some end.[16] Meaning, a 'right' is an entitlement or claim against someone derived legally (or morally) to do, or refrain from doing, some act, making the act a duty and the result

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[12] Hohfeld, Wesley Newcomb. *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26(8) Yale Law J 710 (1917).

[13] Williams, Glanville, *The Concept of Legal Liberty*, 56 Colum. L. Rev 1129, 1135 (1956) as cited in Ivana Tucak, *Rethinking the Hohfeld's Analysis of Legal Rights*, 25 PRAVNI Vjesnik 31, 33 (2009).

[14] *See* Matthew H. Kramer *et. al*, A DEBATE OVER RIGHTS 9, 12 & 13 (2003).

[15] Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale LJ 16, 16 (1913); *Id*. Matthew H. Kramer *et. al* at 24.; Raz, *Supra* note 5 at 16. *See also*: Bingham, *Supra* note 5 at 7 (The phrases *legal right* and *legal duty,* when they are used in a technical legal sense, always refer to the potentialities of legal remedies consequential to assumed or predicated events and conditions. That is-said justifiably to be "legally right,"...); Cass R. Sunstein, *Rights and Their Critics*, 70 NOTRE DAME L. REV. 727 746 (1995); Hart, H. L. A., *Are There Any Natural Rights?*, 64(2) Philos Rev 175, 179 (1955); Immanuel Kant, THE PHILOSOPHY OF LAW 44, 85 (2022).

[16] Reginald Walter Michael Dias, *Supra* note 5 at 229.

of the act's deliverance a 'right'.[17] For example, I have the right of free speech. The act of speaking my mind, thus, is a right. And I can exercise my right which creates a correlative duty on the state to protect my right.[18] That, in essence, and bearing in mind the strictness of analysis (on account of numerous theories on rights) and discounting a myriad of jural relations (which are infinite), is what we mean by the word 'right': an *entitlement* ('a right to. . . ' where the dots stand for an abstract noun).[19] The next question is, what is an animal's right? And, what is the nature of such a right?

A General Concept of Animal Rights

I do not seek to propose a new definition *of* Animal Rights or of *what* they must *entail*. That, I suspect, is a quest of profound and extensive philosophical, sociological, and legal consideration and could be dispensed with for the moment. Regardless, we must determine the footings upon which this perusal of philosophical thought must be conducted. In doing so, I heed to *Dias* who recommends it is convenient and necessary to retain a general concept of 'right' since *Holfheld's* work distinguishes between claims, liberties, powers, and immunities.[20] Thus, we begin with three postulates. Firstly, the general concept of rights for the purpose of this essay are: right against unnecessary suffering or cruel treatment[21] and the right of protection against hunting.[22] I specifically employ these two (which are, in fact, found in different sets of legislations) since they are the

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[17] This definition is from a strict understanding of the term 'right', because as Becker notes: there is a disarray at a philosophical and practical level, on account of various theories of rights, (and indeed the complexity of jural relations) which obscures the real meaning of right—if there is indeed any. *See* Becker, *Supra* note 1 at 1203-1205; Leif Wenar, The Nature of Rights, 33(3) Philos Public Aff. 223, 248 (2005) (Rights have no fundamental normative purpose…rather, rights play a number of different roles in our lives. Some rights give the rightholder discretion over others' duties, some rights protect the rightholder from harm, some rights do neither of these things but something else altogether. *All rights perform some function, but there is no one function that all rights have.*) (emphasis supplied) But the essence of the word 'right' remains constant: it tells others what to do or not to do. *See* Matthew H. Kramer et. al., A DEBATE OVER RIGHTS 14 (2003); Hart, H. L. A. *Are There Any Natural Rights?* 64(2) Philos Rev 175, 187-188 (1955), thus making the duty to be followed a right *See* Max Radin, A Restatement of Hohfeld, 51 HARV. L. REV. 1141, 1150 (1938) which, then, allows the beneficiary to enforce this conduct. *See* Isaac Husik, *Hohfeld's Jurisprudence*, 72 U. PA. L. REV. 263, 264 (1923-1924).

[18] However, this is not to say that a 'right', so as to be realised, must have the act of 'duty' behind it. For instance, my Right to speech is independent of the duty of the state. It exists by the virtue of the constitution and does not necessarily require me doing a positive act for it to be realised.

[19] Raz, *Supra* note 5 at 167; Neil MacCormick, INSTITUTIONS OF LAW 130 (2007); Ferson, *Supra* note 5 at 176.

[20] Dias, *Supra* note, at 42.

[21] The Prevention of Cruelty to Animals Act, 1960 S. 3.

[22] Wild life (Protection) Act, 1972, S. 9.

umbrella provisions, revealing in spirit, the purpose of both the legislations. Secondly, I shall use the word 'claim' instead of 'right' (of the first jural relation) to show a 'Claim-duty' relationship within *Hohfeld's* framework to avoid confusion and bring clarity to my analysis.[23] More so, I use the word 'claim' since it is a species of 'right'. Lastly, my usage of 'claim', instead of 'right' is in alignment to the will theory where a 'right' is a 'claim' when the claim holder lacks power of enforcement and waiver.[24] I reckon an explanation for the second postulate is vital here. Admittedly, there is, as always will be, some reservation in looking at the concept of jural relations from a purely *Hohfeldian* analysis, because of its semantic conceptualization and considerable oversimplification.[25] Yet, at the minimum, *Hohfeld's* table makes one thing intelligible: if right exists as the genus, there will always exist species of right like claim, privilege, power, and immunity.[26] And every species of the genus, albeit, has the central characteristic of the genus, *viz.* holding a title against someone,[27] will be slightly different owing to the difference in the very nature of the species and on account of changes created by law in jural relations. In other words, while claim, privilege, power, and immunity might synonymously denote the same thing, *i.e.*, a 'right', their actual import changes when they are read against their co-relatives or put to use in law.[28] For example, the right of self-defence

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[23] H. J. Randall, *Hohfeld on Jurisprudence* , 41 L. Q. REV. 86 (1925). (This [right] is the largest and most important of the categories of legal relationships..the only question is whether it would tend to clarity that the ambiguous word 'right' should be dropped entirely, and some such word as 'claim' substituted for it.)

[24] Matthew H. Kramer *et. al*., *Supra* note 14 at 64 (Unlike Hohfeld, they [Will theorists] apply the label of 'rights' only to claims that are coupled with the genuine powers of enforcement/waiver on the part of the claim-holders; *they do not attach the label of 'rights' to claims that are unaccompanied by genuine powers of enforcement/waiver on the part of the claim-holders*.) (emphasis supplied).

[25] Chhatrapati Singh, *The Inadequacy of Hohfeld's Scheme: Towards A More Fundamental Analysis of Jural Relations*, 27(1) JILI 117 (1985); A. K. W. Halpin, *Hohfeld's Conceptions: From Eight to Two*, 44 CAMBRIDGE L.J. 435 (1985).

[26] L. H. LaRue, Hohfeldian Rights and Fundamental Rights, 35 UTLJ 86, 87 (1985) See also: HLA Hart, THE CONCEPT OF LAW 170-171 (1961) ('Very often the vocabulary of 'rights', 'obligations', and 'duties' used to express the requirements of legal rules is used with the addition of 'moral', to express the acts or forbearances required by these rules.).

[27] Wenar, *Supra* note 17 at 223-253 (All rights are Hohfeldian incidents.). *See also*: Matthew H. Kramer *et. al*, *Supra* note 14 at 29 (One's entitlement to behave in a certain way or to adopt a certain attitude is always a liberty rather than a right *(albeit, of course, one's actions in accordance with the liberty might be protected by a right or a set of rights.)*) (emphasis supplied); *See* Dias, *Supra* note 5 at 23 ('Claims, liberties, powers and immunities are subsumed under the term 'rights' in ordinary speech…).

[28] *See* Carl Wellman, *A THEORY OF RIGHTS: PERSONS UNDER LAWS, INSTITUTIONS AND MORALS* 81 (1985); George W. Rainbolt, THE CONCEPT OF RIGHTS 105 (2006). (The core of every right involves one Hohfeldian element which determines the essential content of that right.); Réka Markovich, *Understanding Hohfeld and Formalizing Legal Rights: The Hohfeldian*

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and the right *not* to be assaulted by another are both rights but have different nature, that is to say, of different species, yet have at their centre, the same genus: right to life.[29] Similarly, the right *of* free speech and the right *to* move are both rights of different species, but have at their centre one genus: liberty. My use of 'claim' instead of 'right' is to show that the right of an animal is a 'claim-right' and not a '*stricto sensu* right' (right in a strict sense).[30] A *stricto sensu* right, within will theory framework, must mean a right where the beneficiary has power of waiver and enforcement. On the other hand, in a claim-right, the beneficiary is not required have said powers. But apart from the aspect of 'will', I intend to argue that there are other fundamental differences between the two. First, the value of a right insofar its significance for the society is concerned, serves as a factor to decide the nature of such right. Thus, a *stricto sensu* right will show an exalted degree of societal and cultural significance. For example, the Right to employment. On the other hand, a 'claim-right' will not show any similar magnitude of significance. For example, a claim of 'A' to enforce a contract (between 'B' & 'C'), on the basis of his interest, when he is not a party to the contract. The first interest, in this case, would remain to protect and enforce the rights and duties of the original contract-holders ('B' & 'C') due to a *stricto sensu* right-duty relationship, and then any residuary entitlement might come in the form of a 'claim-right'. Second, the former right will have a core which will give rise to other supplementary rights. For example, if 'A' has a Right to Property, it follows that he will have other supplementary rights like the right to buy a property, or sell it, right against trespass, and right to secure an income from it. A 'claim-right', on the other hand, would be devoid of any such relation. Continuing with the previous example, if 'A' has a claim to enforce a contract between 'B' and 'C', any supplementary right which might follow would *only* be *for* 'B' and 'C'. Thus, in *stricto sensu* right, the interest of its beneficiary is central to the right; whereas, in a claim-right, the interest of the beneficiary is only the outcome of duties of the duty bearer, where the interest of the beneficiary is only supplementary and subsists on account of the duty. Therefore, the differences between the two are not merely terminological but exists in substance.

Conceptions and Their Conditional Consequences, 108 Stud Logica 129 (2020); Husik, *Supra* note 17 at 264 (...the generic term "right," as thus defined, is subject to subdivision and differentiation. Thus, what Hohfeld calls "power" may be regarded as a specific kind of right.). *See also*: Ivana Tucak, *Rethinking the Hohfeld's Analysis of Legal Rights*, 25 PRAVNI Vjesnik 31, 34 (2009).

[29] The example is borrowed from Walter Wheeler Cook, *Hohfeld's Contributions to The Science of Law*, 28 Yale Law J. 721, 724 (1919).

[30] Indeed, Hart has echoed this point where he believed that a right *stricto sensu* cannot be vested to an animal or an infant. But he never explicitly mentioned what species of right serves this function best. (If common usage sanctions talk of the rights of animals or babies it makes an idle use of the expression "a right," which will confuse the situation with other different moral situations where the expression "a right" has a specific force and cannot be replaced by the other moral expressions which I have mentioned.) *See* Hart, *Supra* note 17 at 181.

Finally, the last postulate, I will analyse within the framework of jural correlatives of 'claim-right' and 'immunity-right' since they are logical counterparts.[31] Moreover, at the time of analysis in section four of this essay, I will refer to the 'claim-duty' relationship as the 'correlativity axiom'.

Therefore, based upon the postulates, the right of an animal, simply put, is a right vested in favour of an animal which could be exercised to entail certain benefit or protection, that is to say, right against unnecessary suffering or cruel treatment[32] and the right of protection against hunting.[33] Notwithstanding the narrow understanding of *what* an animal's right is (and if, in fact, it is a right in the strict sense of the word 'right', as we shall see momentarily), there is but one predicament to this conceptualization: an animal is neither aware of its right, nor can they enforce it. Thus, leaving their right, so called, to *our* whimsies. This ineluctable fact, rudimentary as it is, raises a pertinent question: if a human being enforces the right of an animal, that is to say, since the element of 'will' stands missing, what is the correct understanding of an animal's right?

Admittedly, facilitation of rights *for* someone, like an unborn child, a minor, a dead person, or a comatose, the right vests *in* the subject and duty *in* us.[34] For example, the right of a minor for education vests the 'right' in *him* and the facilitation of such right, that is to say, the duty *unto us*. Thus, the right, in the end, remains in the subject. But this reasoning for rights cannot adequately be applied to the rights of an animal since it suffers from a caveat: an animal cannot be equated with a human due to our current anthropocentric understanding of the term 'right' in law.[35] Because, the very nature of the rights which are currently ascribed to animals (and

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[31] ('The connections between the two dyads of second-order legal positions (the immunity/disability axis and the power/liability axis are precisely similar to the connections between the two first-order dyads (the right/duty axis and the liberty/no-right axis)...*immunities are the second-order counterparts of rights*.) (emphasis supplied) Matthew H. Kramer et. al., Supra note 14 at 21 *cf*. Husik, *Supra* note 17 at 268.

[32] The Prevention of Cruelty to Animals Act, 1960 S. 3.

[33] Wild life (Protection) Act, 1972, S. 9.

[34] This conclusion is from a strict understanding of Hohfeld's Jural Correlatives. *See* Matthew H. Kramer *et. al*., Supra note 14 at 31-32 (In so far as we adhere to Hohfeld's definitions of 'duty' and 'right', our acknowledging that we have duties to dead people is tantamount to acknowledging that they have rights against us. *Either acknowledgement entails the other*.) (emphasis supplied). MacCormick, *Supra* note 19 at 122. See also: Kant, Supra note 15 at 115 *cf*. Bailey Soderberg, *Reassessing Animals and Potential Legal Personhood: Do Animals Have Rights or Duties?*, 24 VT. J. ENV't L. 171, 185 (2022).

[35] *See* Kristen Stilt, *Rights of Nature, Rights of Animals*, 134 HARV. L. REV. F. 276, 285 (2021). (...difference in the issue of remedies and their enforcement may be significant and may project back onto the fundamental question of whether humans will recognize animal rights at all.).

could perhaps be granted to them in future) limits the nature of their rights.[36] In other words, ascribing rights to an animal will pose a dilemma in the correlative (and opposite) understanding of jural relations as well as in their relation between an animal and a human. For example, if a right of partition is facilitated by a parent on behalf of the child, there is no doubt that the child is the bearer of the proceeds when he matures, thereby he has a right. However, a decision taken on behalf of an animal cannot be considered as the animal's right since, first, the animal would never be aware of it; second, decisions taken can be retracted, fulfilling our own interest, as opposed to when the interest was fulfilled for the child; and third, to equate the reasoning for a child's right to that of an animal is utterly absurd. Admittedly, some humans are capable of loving an animal more than a child, but this does not warrant a conclusion of equating the two. To the extent of this point, I cannot agree with *MacCormick* who claims that the reasoning for a child's right can apply squarely to animals.[37]

The conundrum of correlativity is acknowledged by *Stucki*.[38] This is countered by suggesting that it is the protected interests of an animal which gives rise to a duty.[39] To this understanding *Kramer* asks a rather interesting question. He prefaces it by noting that anyone to whom legal mandates are addressed will bear some duties.[40]

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[36] ('*It is..the duty to give due weight to the interests of persons. And it is grounded on the intrinsic desirability of the well-being of persons.* To that extent it can give rise to rights: it serves as the basis of people's right that others shall give due weight to their interest. *Being a very abstract right, nothing very concrete about how people should be treated follows from it without additional premises. This explains why it is invoked not as a claim for any specific benefit, but as an assertion of status.*') (emphasis supplied) Raz, *Supra* note 5 at 190.

[37] MacCormick, *Supra* 19 at page 121. (Consider the case of a serious and permanently disabling injury inflicted on a month-old child by some careless act of a medical practitioner. In such a case, the law would grant two distinct remedies against the doctor. On the one hand, the parents, who would incur both extra costs in rearing and looking after the child and grief over their child's disability would have a right to compensation and whatever compensation the law allows for distress and other emotional damage— '*solatium*' in civilian terminology. On the other hand, there would be payable in respect of the child compensation for damage done and *solatium* for pain and suffering and loss of the normal amenities of life. But these damages are not merely 'in respect of the child'—that phrase better characterizes the rights of the parents to their reparation for their losses and suffering *in respect of* their child, as an object of their obligations and their affections. *One could get similar damages in respect of one's domestic animals or even one's land or house. No. These dam ages and solatium are due to the child, and have to be held on trust for him or her. They compensate the child's suffering for its sake, not as a ground for someone else's suffering.*) (emphasis supplied)

[38] She calls this Simple co-relativity. Saskia Stucki, *Towards a Theory of Legal Animal Rights: Simple and Fundamental Rights*, 40(3) Oxf. J. Leg. Stud. 533, 544-46 (2020).

[39] *Id*. Stucki at 547.

[40] Matthew H. Kramer, *Do Animals and Dead People Have Legal Rights*, 14 Can J L & Jurisprudence

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Now, borrowing from *Kramer's* postulate, derived strictly from *Hohfeld* himself, and applying it within the framework of Indian laws (which, I argue, could also apply elsewhere), I seek the liberty to ask *Kramer's* question with the following illustrations which overshadow our scrutiny and mires academic literature: right to property is a legal right in India and includes animals.[41] *Does this mean that an animal has a 'duty' to be our property?* Conversely, since our constitution bestows fundamental duties upon our citizens under Article 51A, *does this correspond to a fundamental right of (or even a legal right) animals?*[42] A case can also exist where an animal is put on trial, thereby, imposing on him some duty.[43] Putting an animal on trial (much like giving him a right) would amount to the same conundrum: imposing our will, our morality or interest, on the animal. Moreover, the readers will notice that human individuals will have both a 'right' and a 'duty' against an animal in both of the cases. The questions posed put us in a terrible dilemma. Thus, the field, as could be seen, is fraught with confrontations of the most challenging kind: philosophical and metaphysical inquiries. Let us begin. [44]

III

The Nature of Animal Rights

In this section of the essay, I intend to elucidate how the prevailing notion of animal's rights (and its nature) is not a *stricto sensu* right within the first correlative of *Hohfeld*. Rather, I contend that this 'right' is, in fact, a 'claim'[45], making the nature of an animal's rights a claim-duty relationship. To justify my contention, and to demonstrate the pre-existing erroneous understanding of animal rights', I base my

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29, 43 (2001). *See also*: People ex rel. Nonhuman Rights Project, Inc.v.Lavery*(Lavery*1),998N.Y.S.2d248,248 (App. Div. 2014).

41 *Supra* note 7, *Rangarajan*, at para 55.

42 *Supra* note 6, Animal Board, para 14

43 Bailey Soderberg, *Reassessing Animals and Potential Legal Personhood: Do Animals Have Rights or Duties?* 24 Vt J Env't L 177 (2022).

44 Standing upon such a pedestal, I cannot help but be reminded of a quote by Satyajit Ray in 'The Odds against Us': "*And there is something about creating beauty in the circumstances of shoddiness and privation that is truly exciting*." In the same spirit, I must also quote Nani Palikhiwala in 'The CourtRoom Genius': "*I take pains over whatever I say or write; and I am always dissatisfied with the quality of my speeches and my writings. It is the creative dissatisfaction which makes me try harder all the time*." Last, but not least, a quote from Plato's Republic: δύσβατος γέ τις ο τόπος φαίνεται καὶ ἐπίσκιος· ἔστι γοῦν σκοτεινός και δυσδιερεύνητος. ἀλλὰ γὰρ ὅμως ἰτέον. (Republic, 432c.) "It looks a very rough and shadowy kind of place, and it is certainly difficult to peer through its murk. Never mind; we must go ahead." With this spirit we must proceed.

45 *See* the Second postulate.

arguments on the tenets of morality and the erroneous understanding of the correlativity axioms of *Hohfeld*. I begin with keeping in view the classification of rights done by *Becker*.[46]

Nature of Animals Rights: A Critique of Our Current Understanding

As per the current understanding, when a duty is imposed on a human being, a right is created in the animal, thus, any normative protection is putatively considered as a 'right' *for* the animal. A right of this nature is seen as a derivative right; that is to say, a right vested in an animal by the way of a prior-existence of duties in humans which results into a right.[47] In other words, law presupposes a duty in humans which leads to a right in an animal. For example, if the law presupposes a duty in 'A' to protect his dog, it is a right of his dog to be protected. That, in brief, is our current understanding. Admittedly, the two general concepts of rights established in the second postulate follow the same deontic logic and grant derivative rights to an animal. Thus, the current framework of granting rights is the nature of an *entitlement*.[48] Moreover, it appears that the current basis of this framework lies in the 'interest theory'.[49] Inasmuch the elucidation or critique on merits of interest or will theory are concerned, I must not broach the topic here since it would mean to go beyond the conceptual framework of the essay. Despite that, it is imperative to briefly comment on both. According to will theory, the essence of a 'right' consists in opportunities for the right-holder to make normatively significant choices relating to the behaviour of someone else. Conversely, in interest theory, the essence of a 'right' consists in the normative protection of some aspect(s) of the right-holder's well-being.[50] For example, if 'X' contracts with 'Y' for the delivery of flowers for 'Z''s wedding, as per will theory, 'X' will have a right enforceable against 'Y' and 'Y' will have a corresponding duty. In this case, 'Z' has no right. On the other hand, as per interest theory, since 'Z' has an interest in this transaction (that is, it is her wedding for which flowers are bought), she will also have a right.

Reverting to the discussion now, the right of an animal by the pre-existence of a duty in *us* is merely a reflection of *our* duty towards the animal[51], where the duty is

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46 Becker, *Supra* note 1 at 1197-220.

47 *Id*., Becker at 1203-1205. *See also*: Stucki, *Supra* note 38 at 544.

48 *Id*., Becker at 1201-1202.

49 Feinberg, *Supra* note 3 at 51; Matthew H. Kramer, 'Do Animals and Dead People Have Legal Rights' 14 Can J L & Jurisprudence 29 (2001).

50 Kramer, *Supra* note 40 at 473-474.

51 As cited in DN MacCormick in Stucki, *Supra* note 38 at 546. *See also*: Wenar, *Supra* note 17 at 244 (Wenar points out, while arguing against a proponent in favour of Interest theory that, when the interest of a judge is boosted for her to exercise her power as judge to protect the interest of the public, it merely highlights the fact that the judge's interest is insufficient to be a right, *sui generis*.) (emphasis supplied). *See also*: HLA Hart (Legal Rights, 181-2) as cited in Matthew H.

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based on moral principles[52], and admittedly, on law (albeit, not as a fundamental duty).[53] But this notion of vesting rights to an animal, which is buoyed with morals and law, does not give rise to a *stricto sensu* right. The reasons, as I understand, are two. First, reliance on morality for an animals' right leads to a weaker, if not an entirely inadequate, form of normative protection. Second, the notion of 'duties emanating *from* rights' is based on a misguided inference of Hohfeld's correlativity axiom, whereby enforcement of duty by law is assumed to mean the deliverance of a *stricto sensu* right, which, I argue, is not the case.

Rights Based on Morality Lead to a Weaker Normative Protection

First is the tenets of morality. At the outset, I must note that people *do* follow moral duties, not only because such duties have been legislated, but also because such duties form part of social morality,[54] and besides, as Kant would point out, reason compels us to follow them.[55] Having noted this, we must consider those epochs of morality when the moral code of a human (or of the society) for a condemnable action supersedes the forbearance written in law.[56] Because any law, just as it may be, cannot fully exhaust the tenets of morality[57] and must be investigated on its anvil. Thus, on first count, when the duty to secure an animal's right is based on *our* morality (and the morality itself keeps changing, or at least, changes on account of

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Kramer *et. al*, Supra at 27 ('if to say that an individual has…a right means no more than that he is the unintended beneficiary of a duty, then "a right" in this sense may be an unnecessary, and perhaps confusing, term in the description of the law; since all that can be said in a terminology of such rights can be and indeed is best said in the indispensable terminology of duty').

52 Raz, *Supra* note 5 at 171.

53 There is no notion of Fundamental Duties in India, insofar as their enforceability is concerned.

54 ('The connection between the justice and injustice of the compensation for injury, and the principle 'Treat like cases alike and different cases differently', lies in the fact that *outside the law there is a moral conviction that those with whom the law is concerned have a right to mutual forbearance from certain kinds of harmful conduct. Such a structure of reciprocal rights and obligations*…constitutes the basis, though not the whole, of the morality of every social group.') (emphasis supplied) *See* Hart, *Supra* note 26 at 164-165.

55 Singh, *Supra* note 26 at 122-123.

56 (Some conceive morality not as immutable principles of conduct or as discoverable by reason, but as expressions of human attitudes to conduct which may vary from society to society or from individual to individual. Theories of this form usually also hold that *conflict between law and even the most fundamental requirements of morality is not sufficient to deprive a rule of its status as law*; they interpret the 'necessary' connection between law and morality in a different way. They claim that *for a legal system to exist there must be a widely diffused, though not necessarily universal, recognition of a moral obligation to obey the law, even though this may be overridden in particular cases by a stronger moral obligation not to obey particular morally iniquitous laws.*) (emphasis supplied) *See* Hart, *Supra* note 26 at 156-157.

57 Hart, *Supra* note 26 at 167.

social, historical, and cultural significance[58] or at a personal level), the argument of an animal's right based on moral principles loses much of its momentum and force even before one takes up the discussion. This is especially true for any class of animals whose protection is solely based on moral code and lacks legal protection. On the second count, every moral question has vagueness to it.[59] Hence, where legal duty is a result of individual morality, we are left with an arduous task of deciding the justness of any action. For example, how must one determine a man's fundamental duty of 'compassion'[60] or 'spirit of inquiry'?[61] These questions are, and shall forever remain, subjective. As for the previous claim of subjectivity. One should note that inquiries of the previous kind remain shrouded in a veil of subjectivity. But I must bring to light, as Hart, himself, has done considerably on several occasions, that subjective morality, more often, bends and ultimately gives way to collective morality. Moreover, morality gone estranged can always be brought back to path by the enactment of law.[62] But this should not be the basis for the scrutiny to stop, since even in collective morality there exists indifference in masses.

And on the third count, when Hart notes that an individual's morality is guided by social morality; thus, any act of the individual has to be within its confines.[63] For example, if it is socially frowned upon to exploit poor people, then, I mustn't exploit poor people. Having said that, the real concern to Hart's claim lurks, ever so slightly, in a society where collective morality is causing hurt to people (or in this case, animals), whatever the justification might be. Take, for instance, the collective and

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[58] *Supra* note 7, Nagarajan, para 8. *See also*: Hart, *Supra* note 26 at 171 ('The obligations and duties recognized in moral rules of this most fundamental kind may vary from society to society or within a single society at different times…There is a diversity among moral codes which may spring either from the peculiar but real needs of a given society, or from superstition or ignorance.)

[59] Hart, *Supra* note 26 at 168.

[60] INDIA CONST. art. 51A, cl. h. ('*Good examples of duties that can never be legal duties but less occur in a legal code are to be found in the Indian Constitution. In article 51-A of the Constitution, concerning "Fundamental Duties"*...one finds: It is a duty to have compassion for living creatures develop the scientific temper, humanism and the spirit of in reform. As we have seen, *compassion falls in the realm of et which concern an autonomous will. Since law pertains to external and binds heteronomous will, compassion can never be legislated even if in ignorance one puts it in legal codes.*') (Emphasis supplied) Singh, *Supra* note 25 at 126.

[61] INDIA CONST. art. 51A, cl. h.

[62] Hart, *Supra* note 26 at 176-177 (The fact that morals and traditions cannot be directly changed, as laws may be, by legislative enactment must not be mistaken for immunity from other forms of change. Indeed though a moral rule or tradition cannot be repealed or changed by deliberate choice or enactment, the enactment or repeal of laws may well be among the causes of a change or decay of some moral standard or some tradition…*legal enactments may set standards of honesty and humanity, which ultimately alter and raise the current morality*…).

[63] Hart, *Supra* note 26 at 181-184.

morbid morality of people of Germany under the Nazi Regime. In that case, any decision taken for people or against people, cannot represent the justness of collective morality.

Thus, when protection could be extinguished *at will*, the danger to rest the conception of rights on *our* moral code become evident and frightening. Because admittedly, I do not see a reason to negate why some people (or in fact, a class of people) might *never* share the same noble moral principles as others may have towards an animal.[64] Moreover, apart from the philosophical concerns, a moral duty cannot equate, at least in the *Hohfeldian* sense, to a legal right.[65] For example, it is my moral duty, so I feel *and* I have been told, to help my sibling at the gym. Thus, *my* moral duty vests a right in *him*. But it would be absurd for him to claim this as a legal right and seek enforcement.

That being said, it is imperative to investigate the other side of the morality spectrum. Thus, I must also acknowledge the circumstance where human beings continue to fulfil their moral duty towards an animal, so as to ensure its protection. This duty, then, would be of two types: first, owing to an internal moral code of a human being, motivated by selfish concern, where the animal, itself, serves little, or no, value. Say, for example, a liberal vigilante to protect cattle. And second, where a human being feels that the value of an animal is not only intrinsic *qua* animal, but also intrinsic to *his* well being. The caveat, then, in either case is this: if a human being protects an animal based on his own moral code for a selfish concern, the right which must follow has its foundation not in the value or well-being of the animal; but rather, protection of the value of his own concerns. Simply put, he cannot be said to be interested in having any duty towards the animal since it might barely matter if the duty really existed or not. Thus, whenever the protection of animals, it will be based on the human being's own interest, it will beg the question: why must there be a right for an animal? Or put in other words, a right given to an animal would be of diminutive value since the motivation to protect the animal will be based on one's own stake, and not the animals'. For example, if 'A' takes care of an animal because a mystic has promised good returns for doing so, why would it

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[64] *See* GW Patton, A TEXTBOOK OF JURISPRUDENCE 290 (2007) (If we define rights as interests, it is easier to effect a reconciliation on paper, since true interests do not always conflict; but such an approach often leads to abstract solutions which neglect the fact that men are not entirely rational in their behaviour or choice of ends.). *See also*: Raz, *Supra* note 5 at 189-190 (The interest in being respected is but an element of the interest one has in one's interest. If respecting people is giving proper weight to their interests, then clearly we respect people by respecting their rights.); R. Dworkin, TAKING RIGHTS SERIOUSLY 187 (1977); Raz, *Supra* note 5 at 177; Singh, *Supra* note 25 at 122.

[65] (...'the grounding relationship between the abstract right and *correlation* duties is not a correlation between them. The abstract right correlates only with an abstract duty, while each concrete duty correlates only with a matching concrete right—a concrete right that has been generated by the abstract right.) Matthew H. Kramer *et. al, Supra* note 14 at 43.

matter to 'A' if the animal is hurt? Could he not simply get a new animal to take care of? It cannot be said that 'A' is motivated to protect the animal anymore than he is ready to protect a book.

Conversely, whenever an animal is valuable to a human being, that is to say, an animal's instrumentality contributes to the ultimate value of a human being, it is desirable to conclude that an animal *must* have a right.[66] Perhaps readers of this essay will agree that domestic animals like dogs and cats serve this purpose, and thus, a right must be granted to them. But there is some hesitancy to reach such a conclusion for two reasons: first, we must forever be weary of reducing the value of something in a human's life to grant it a 'right'. For example, my laptop is an indispensable part of my academic endeavours; it gives me value. But it would be absurd, even for me, to claim a legal right for my laptop. The reader might suspect that the positions might differ when we take into consideration a sentient being in the previous example. I think that wouldn't necessarily be the case, but can become one in a very special circumstance. Which, then, brings us to the second point: having noted the first reason, I suspect, furthering Raz's contention, that there is some merit in the argument that an animal which gives us value *can* have a 'right'. But the threshold for this to be decided will be two folds, not to mention, exponentially high. Thus, when the being in question has an intrinsic value as a being, and fulfils a collective societal interest in it, such being can be said to have a right.[67]

Erroneous Inferences of Hohfeld's Correlativity Axiom Leads to an Atypically Weak Legal Protection

Now let us examine, the allegedly, erroneous inferences of *Hohfelds'* co-relativity axiom. The assumption that a duty in a human being must necessarily mean a co-relative right, is erroneous. The existence of a duty in law, which, if enforced, can give rise to a legal protection. But this does not invariably create a corresponding right.[68] For example, if 'X' has a duty to do something for 'Y' then 'Y' has a right. But this inference, albeit, correct in the *Hohfeldian* sense, is merely a restatement of a correlative fact which lacks legal basis. In reality, 'Y' could have a power, a privilege, a claim, a moral right or, in fact, some other species of right which must be protected in law, but it doesn't mean that 'Y' has a right *stricto sensu*. For example, consider

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[66] Raz propounds that an animal's non-instrumentality contributes to the well-being of the human (which is the ultimate value). The logic of his argument is: an animal, on its own, could have an intrinsic value and, then, it can also have an instrumental value depending on the consequence it is likely to have. For example, a parrot, by itself, has value. But a parrot will *also* have an instrumental value to *its owner* where the owner has the ultimate value. But he does not conclude that this must mean that an animal has a right. *See* Raz, *Supra* note 5 at 178.

[67] *Id*., Raz, at 179-180.

[68] *Id*., Raz at 181.

that 'A' and 'B' is a couple that has eloped. Is it the duty of the state to protect them and recognize their marriage under Article 21 of the Indian Constitution (Right to life)?[69] Evidently, yes. Their right to marriage and protection from harassment are covered under Right to life, and thus, their rights become grounds of duties.[70] But if 'A1' and 'B1', a queer-couple, seek such protection, is it still the duty of the state to protect them? A resounding yes! But from this must we also infer that 'A1' and 'B1' have a right to marriage? Proponents of interest theory might hesitantly conclude yes. But such inference would be erroneous. Admittedly, 'A1' and 'B1' can claim legal protection from harassment, under article 21 as a Right to Life, and the state, then, has a duty. But this does not oblige the state to protect their right of marriage as a queer couple since the right of marriage as a queer couple simply does not exist.[71] In other words, a duty to protect them from harassment caused on the basis of their marriage will not mean a right of marriage. The duty of state will be limited to the rights 'A1' and 'B1' have been granted or rights which have been recognized. Thus, the duty of a human being to protect an animal when the right of the animal does not exist cannot entail a *stricto sensu* right. The purport of this notion in the context of animal rights could be illustrated in the form of following two statements:

'An (xyz animal) has a right a, b, & c against its owner' -- *(r)*

'Owner of an (xyz animal) has a duty to treat the animal without cruelty' -- *(d)*

Here, (*r*) represents the core right (as the genus of protection) from which supplementary rights can flow, that is to say, every right and supplementary rights the owner must fulfil to ensure protection from cruel treatment, which, then, would clearly delineate the duties to ensure protection of supplementary and core rights. Additionally, if (*r*) identifies a class of animals who ought to be protected, it wouldn't be a ground for duty which could be counteracted by conflicting considerations[72], duties remain vague.[73] This is a *stricto sensu* right. On the contrary, any protection which will flow from (*d*) cannot mean a right for the animal, let alone core right, since it would be a condition precedent on the owner's interest, making (*d*) an abstract moral duty and any right which will exist, supposing it does, will also be an abstract moral right. Thus, this would create a situation where the realisation

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[69] 21. Protection of life and personal liberty No person shall be deprived of his life or personal liberty except according to procedure established by law.

[70] ('*Rights ground duties*. To say this is not to endorse the thesis that all duties derive from rights or that morality is right-based. *It merely highlights the precedence of rights over some duties and the dynamic aspect of rights, their capacity to generate new duties with changing circumstances*.') (emphasis supplied) Raz, *Supra* note 5 at 186.

[71] Interest theory maintains that every right-holder is a beneficiary of a duty, but they do not maintain that every beneficiary of a duty is a right holder. Matthew H. Kramer *et. al, Supra* note 14 at 67.

[72] Raz, *Supra* note 5 at 171.

[73] MacCormick, *Supra* note 19 at 131. *See also*: Singh, *Supra* note 25 at 127.

of (*r*) would be interest based and left at the discretion of the owner. More so, an argument will prevail that the owner did all that he could do for the realisation of (*r*) by fulfilling (*d*), as his acts of protection are limited by the aforementioned duty. This would not be the case when protection flows from (*r*) since its realisation must mean fulfilment not only of duties enumerated, but not enumerated.[74] Thus, an inspection of (*r*) for its existence, from footing of human duties, is bound by obscurity and confusion, if not complete and utter failure in its realisation. Besides, a moral duty cannot be equated, at least in the *Hohfeldian* sense, to a legal right.[75]

Moreover, even if an animal is deemed to accept it's right *through* a human, even in such a case, there can be no *stricto sensu* right. For example, if a group feels offended by cruelty done against an animal and seeks to stop or condemn it, the genesis of such action, obviously, lies *in them* and *not* in the animal.[76] Clearly, in their effort, this group will seek to establish a right of an animal under the constitutional scheme by invoking article 21, (as was done in *Welfare Board*)[77], striving, thus, to cover animal rights, legal and fundamental, under the same umbrella. But there is a serious caveat to this approach: the rights of an animal, in such a case, would be deemed to have been derived from the core. But the core, itself, is silent on such a claim; that is to say, since article 21 does not include, at least thus far, any animal, the argument would amount to merely stating a conclusion instead of giving a cogent justification.[78] Which in reality, again, would be an argument without legal

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[74] ('There is a difference between the idea that you have a duty not to lie to me because I have a right not to be lied to, and the idea that I have a right that you not lie to me because you have a duty not to tell lies. *In the first case I justify a duty by calling attention to a right; if I intend any further justification it is the right that I must justify, and I cannot do so by calling attention to the duty.*) (emphasis supplied) *See* Dworkin, *Supra* note 63 at 171. (When an animal will enjoy protection generated from (*r*), it wouldn't mean that the interest of the owner serves no longer a function. It remains there. But now the protection will unite interest (or lack thereof), necessitating both stakeholders to do (or refrain from doing) acts of cruelty.)

[75] (...'the grounding relationship between the abstract right and *correlation* duties is not a correlation between them. The abstract right correlates only with an abstract duty, while each concrete duty correlates only with a matching concrete right—a concrete right that has been generated by the abstract right.) Matthew H. Kramer *et. al, Supra* note 14 at 43.

[76] *See* O'Rourke, *Refuge from a jurisprudence of Doubt: Hohfeldian Analysis of Constitutional Law*, 61 S. C. Law Rev. 141, 168 (2009). (A Constitutional right may refer to any legal position arising from the constitution, which in Hohfeld's analysis appears as a claim-right, liberty, power or immunity.); *Justice* v. *Vercher Washington County Circuit Court,* 18CV17601; A169933 (Animal Legal Defense Fund sued Vercher on behalf of Justice (a horse) where Vercher left Justice without shelter or food for months, leading to his extreme emaciation and prolapsed genitals after severe frostbite.)

[77] *Supra* note 6, Animal Board, para 24.

[78] Raz, *Supra* note 5 at 169-171 (The statement that the derivative right exists must be a conclusion of a sound argument (non-redundantly) including a statement entailing the existence of the core

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basis.[79] Besides, it appears implicit in this line of argument that the conception of an animal's right is being held on a similar footing to that of human beings, and the claim to *their* right finds origin from the core of article 21. But when the core is silent on this, as is the judiciary, any justification to include the right of animals, as a derivative of the core, fails.[80]

Such an approach to animal rights also takes interest theory a notch further and assumes, mistakenly, perhaps, that interest in an animal must equate to a right or legal protection. Interest theory allows certain beneficiaries, in whom we have our interest, to have some legal protection. But, evidently, this conclusion is either mechanical or does not capture the true purport of interest theory[81], because interest theory does not oblige us to assume that every being is a potential right holder.[82] In other words, while interest theory allows us to prescribe rights to an animal, it does not assist us to define the extent of such legal protection or from where such protection actually arises. Thus, it appears that there is a gap between our capacity to give interest and defining the limits of such interest. Therefore, the vacuum created from this dissonance can be equated, at best, to a legal protection as a 'claim-duty' relationship. So, in the current form, when the legislature will give protection to an animal to not be hurt when the animal is a human's property, the right is claimable, as a right-duty correlative, *by* the human *for* the animal, which makes the animal immune and vests the right in *the human*. This is a situation of double-right: human's right in the animal (which is claimable) and the animal's right to not be hurt (which is an immunity, derived from *your* claim).[83] So, in this case, the

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right. But not every right thus entailed is a derivative one. The premises must also provide a justification for the existence of the derivative right (and not merely evidence or even proof of its existence). *To do so their truth must be capable of being established without…relying on the truth of the conclusion*.) (emphasis supplied).

79 Not to mention, this conclusion is in line with the within Hohfeld's framework, because for him correlativity between right and duty had a mutual entailment and they did not exist logically or existentially prior to each other. *See* Matthew H. Kramer et. al, *Supra* note 14 at 26; J.G. Wilson, *Hohfeld: A Reappraisal*, 11 U. Queensland L.J. 190 195 (1980); (...*v* is a verb signifying some legal transaction or act-in-the-law, one is properly said to have a right to *v* only if one is the person or a person authorized or empowered in law to *v*, and if one infringes no legal requirement in doing so.); MacCormick, *Supra* note 19 at 127.

80 (A right is based on the interest which figures essentially in the justification of the statement that the right exists. The interest relates directly to the core right and indirectly to its derivatives. *The relation of core and derivative rights is not that of entailment, but of the order of justification*.) (emphasis supplied) *See* Raz, *Supra* note 5 at 169.

81 ('...to say that someone holds a right even though nobody yet knows what it involves is to say merely that a certain interest has been deemed worthy of moral or legal protection…) *See* Matthew H. Kramer et. al, *Supra* note 14 at 46.

82 Kramer, *Supra* note 48 at 37. *See also*: Becker, *Supra* note 1 at 1203.

83 I suspect a response to this point to claim that a relationship of this nature would mean a right-

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protection granted *to* the animal is the *effect* of a right claimed. Thus, the right of an animal in the current form is not the correct basis for a *stricto sensu* right; and at best, the correct understanding would be of a legal protection based on duties,[84] and that, too, an atypically weak form of legal protection extended by our interest in them.[85] This is not to say, nor do I claim as a matter of fact, that a weak legal protection is not a legal protection at all, but in *toto*, the current conception of 'rights' is not ideal and is a mere abstraction of right enforced on the basis of legal duties and not on the consideration of rights. Thus, the right of an animal is a 'claim-right' and not a *stricto sensu* right.

Before we conclude this part of the discussion, I can sense a concern in the reader or even a hesitancy to accept the notion which has been contended here. And such concern is valid, for it digresses from the general and most accepted understanding of animal rights, or some might suspect 'rights' altogether. This is on account of a shift in rights theory from security to certainty to morality.[86] Thus, many readers will make a justification, to their credit mostly using ideas(or ideals?), for animal rights *qua* animals. But my concern is that these justifications will remain aloof from empirical and practical realities.[87] That is not to say that there isn't conceptual force in these ideas, in-fact, I will discuss a part of those ideas momentarily.[88] What I merely seek to contend here is that we must look at the current notion of 'rights' with a bit of scepticism because a right is normally advantageous.[89] The general protections we have assumed are evidently not advantageous. For example, the premier legislation on animal rights seeks to prevent *unnecessary* pain.[90] In other

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duty relationship, in which case, an animal has a right. But I seek to delimit the claim in its tracks since if a human has a claim (and so does the animal), it would lead to a situation where both parties enjoy a right in conflict with each other. Needless to say, the rights of an animal—where the human is still his owner—could be dispensed by him.

84 The Prevention of Cruelty to Animals Act, 1960 S. 3.

85 See *Noah* v *Attorney General*, HCJ 9232/01 [2002–2003] IsLR (The Israeli High Court of Justice in a case concerning the force-feeding of geese. Commenting on the 'problematic' regulatory language, it noted that the stated 'purpose of the Regulations is "to prevent the geese's suffering.) as cited in Stucki, *Supra* note 38 at 551; *Supra* note 7, Nagaraja, at 14. (While *it is not possible to conduct animal sport like Jallikattu without causing trauma and cruelty to animals*, it was anticipated that the *guidelines and rules would ensure that the cruelty is minimum*.) (emphasis supplied).

86 Ferson, *Supra* note 5 at 174.

87 'If your neighbour's causing you pain is wrong because of the pain that is caused, we cannot rationally ignore or dismiss the moral relevance of the pain that your dog feels.' Tom Regan, *A Case for Animal Rights* in ADVANCES IN ANIMAL WELFARE SCIENCE 181 (M.W. Fox & L.D. Mickley eds., 1986) . *See also*: Kramer, *Supra* note 48 at 30.

88 *See* Part III.

89 Matthew H. Kramer *et. al*. *Supra* note 14 at 93; MacCormick, *Supra* note 19 at 120.

90 The Prevention of Cruelty to Animals Act, 1960, Preamble.

words, *some* pain is permitted, by law, to be inflicted.[91] Thus, we must question *if* the allowance of inflicting pain or being hunted down is permissible, does such protection qualify as a 'right'. It sounds morbid to suggest that someone has a right to be killed, the decision of which lies in my hands.

Effects of the Previous Discussion on Rights of an Animal

The effect of the two caveats reinforces the 'claim-duty' relationship between a human and an animal and compels us to reconsider the current notion.

If the duty of a human being towards an animal is extinguished by his own will or by law, so will the right vested in the animal.[92] For example, the duty of the human towards an animal can come to an end if the legislature excluds an animal from protection in the name of religion, as happened in the *Jallikattu* judgement.[93] Crucially, and what is more likely to happen, is the extinguishment of a human's duty for an animal on claims of morality, religion, or some other fundamental interest.[94] In such a case, the 'claim-right' vested in the animal will become invariably dependent on the human, thus, making the 'claim-right' a reflection of the right vested by the duty-holder.[95] This would negate the 'claim-duty' jural relation of *Hohfeld* since the right-holder will find himself out of the correlatively axiom. In other words, if we assume that an animal has a right due to an interest which must be protected, the animal, then, would be deemed to have an interest-theory right. However, the moment someone shows conflicting considerations for the existence of such a right, then the animal would no longer have such a right.[96]

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[91] *Supra* note 6, Animal Board, para 30.

[92] As Hart has pointed out, there is nothing contradictory or absurd in a moral code, but no one in some such system would have 'claim rights'. *See* Hart, *Supra* note 15 at 176-177.

[93] *See* The Prevention of Cruelty to Animals Act, 1960, S.28 See also:Raz, *Supra* note 5 at 172 (the existence of a moral right to political participation, i.e. the fact that this right is given legal recognition and is already defended by some legal duties, is a ground for the authorized institutions (Parliament or the courts) to impose such a duty on government officials.)

[94] We must not hesitate to conclude that, barring times when this can happen on the basis of an individual moral code, an individual's decision will rest on collective morality.

[95] Raz, *Supra* note 5 at 184.

[96] Raz, *Supra* note 5 at 178 (My proposed principle of capacity for rights entails that those who regard the existence and well-being of (some) dogs as merely derivatively valuable (even if they believe them to be intrinsically valuable) are committed to the view that dogs can have no rights though we may have duties to protect or promote their well-being. For such people dogs have the same moral standing that many ascribe to works of art. Their existence is intrinsically valuable inasmuch as the appreciation of art is intrinsically valuable. But their value is derivative and not ultimate. It derives from their contribution to the well-being of persons.). *See also*: MacCormick, *Supra* note 19 at126 (The liability of a person of full capacity to be judged a wrongdoer in case of committing a legal wrong and to be subjected to sanctions on that account is quite properly balanced by that per- son's having a right to do whatever is not prohibited.)

One must, then, think if the 'right' so claimed by the interest theory is, in fact, a will theory right in a disguise?

Moreover, if one assumes that an animal has a right in the strict sense of the word, *quod non*, there will always remain a situation where if the duty exists in the owner to protect an animal and it is no longer in his interest to protect an animal, he can simply do away with the right of that animal. Thus, rendering the rights of an animal *essentially pointless.* As for the previous claim, admittedly, the court can enforce the right and coerce a human to act dutifully towards the animal, but, then, a question of crucial considerations arise: *to what extent?* Can a poor farmer be impelled to provide comfort to an animal just because it is the right of an animal to live comfortably? Another foreseeable situation could be the *Dudley Stephens* kind (cannibalism case).[97] If, say, a pig had a right not to be slaughtered, and man kills it to feed his family, can the man, then, be held liable? The discourse, no matter what ground we take, will rest upon this question: *is the life of an animal more important than that of a human?* Further, when a right is derived from the presupposition of duty, the duty, then, is antecedent to the right. Therefore, now when a right is generated (after the duty), does that mean such right gives rise to a new duty? And if yes, which duty should the bearer must follow?[98] Simultaneity of a claim and duty is the bedrock of Hohfeld's table and the current notion of animal rights defeats it entirely.

VI

A New Understanding of the Nature of Animal Rights

Animals' Rights: Proposing A New Understanding (Can An Animal Have a Stricto Sensu Right?)

When we conceptualise the right of an animal we tend to equate its right, or rather see it, as a right similar to that of a human being, putting both on an equal pedestal. For example, the right to life. Thus, since a human being has a right of a certain nature, so must an animal have. But this is an erroneous understanding of rights because the rights of an animal (and for that matter, rocks, plants, and rivers) will *always* be limited to our interest in them; that is to say, whenever *our* interest expands, so will *their* rights. This is implicit from the fact that we have given *some* protections to animals and plants and companies etc., since it is in our interest to do

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[97] *R* v. *Dudley and Stephens*, (1884) 14 QBD 273.

[98] Raz, Supra note 5 at 185 '...if it is true in principle that the future cannot be entirely known in advance, then there may be future circumstances which were not predicted and which, given the right to education, give rise to a new duty which was not predicted in advance.'

so. I do not deny things (living and non-living) have values, they do, no doubt. I value my laptop on which I write. But I also think that equating the values of a human comatose or otherwise, to that of an animal, domestic or otherwise, is pushing the conception of rights into the realm of liberal utopianism because equating the two will open a pandora's box of foolish claims and unnecessary litigation. For example, one might argue that their dog has a right to mate with their neighbour's dog. I obviously exaggerate the example, but the point, nevertheless, is clear.

At this point, I sense and acknowledge the arrogance of my argument which might erroneously suggest to the reader that the grand stage of justice rests on our morality. I would like to clarify here that although the rights of an animal show *our* interest in *them*, thereby giving them legal protection, it is also in *our* interest to take care of *their* interest by constant thesis and antithesis.[99] Thus, the question of morality which I raised earlier ought to be answered on this basis and I endeavour to answer it now: *Is the life of an animal more important than that of a human?* Evidently, this question stands outside the confines of this essay since it merits an extensive analysis of our morality *vis-a-vis* the current legal structure. So perhaps it could be covered in another academic endeavour. But for now, the aforesaid question could be answered, albeit with a slight modification: *Is the life of an animal important for it to have a stricto-sensu right?*

On the surface, and keeping in mind the analysis conducted insofar, I see no reason to answer this question with an absolute negative. Recall that Raz has noted two thresholds which must be fulfilled for any subject to have a right: first, the subject in question has intrinsic value as a being, and second, it must fulfil the collective societal interest. From this, an argument could be proffered where the national animal of a country, like a tiger in India, could have a *stricto sensu* right, since it has an intrinsic value as a living creature and it also fulfils the societal interest of the country being the national animal and signifying cultural heritage. In such a case, where the beneficiary's interest is of significant considerations, a 'claim-right', evidently, cannot capture all nuances of protection, and thus, an argument in favour of a *stricto sensu* right could be considered. But this evidently mustn't mean that every animal could fulfil this threshold. Therefore, there can exist two classes of animals where one class is guided by a 'claim-duty' relation, while the identified class of animals which are deemed to deserve protection must be guided with a

[99] Raz, *Supra* note 5 at 192 ('A right is a morally fundamental right if it is justified on the ground that it serves the right-holder's interest in having that right inasmuch as that interest is considered to be of ultimate value…') I do not seek to draw the conclusion that the rights of an animal to live is of a morally fundamental value. I think that to be the concern of a dedicated theory of animal rights. But I do agree with Raz that a right—of some kind—must exist if the interest of an animal is of value. And since some of our interests are dependent on an animal's interest, the onus to protect its interest becomes stronger.

different jural relation. For this, I suggest a new outlook of animal rights within *Hohfeld's* conceptualization, in addition to the current understanding

Seeing the Rights of an Animal as an Immunity-Disability Relationship Within Hohfeld's Framework

Before proceeding further, it is important to take note that *Hohfeld's* conceptualization of rights gives rise not to a single right and duty relationship but to incidences of a bundle of claims, liberties, immunities, and powers.[100] It is with this understanding and some amount of courage (and duty) that I tread forward.[101] In place of the already existing understanding of animal rights where we see the rights of animals through the lens of 'claim-duty', I suggest, instead, that an immunity-disability correlation is a better understanding for an identified class of animals. In this understanding, immunity could be understood as a '*stricto sensu* right' but not a claimable 'right'.[102] *Hohlfeld* used immunity to describe a legal relation that is not subject to change by the voluntary act of another person.[103] An immunity-right serves a *protection* function; whereas, a right serves a claim[104], a privilege serves an exemption or discretion[105], and a power serves a discretionary or non-discretionary authority.[106] Indeed, one can grade the level of protection a particular type of right can give by the difficulty attached in over-riding it.[107] So if an animal is identified to fulfil the thresholds and is considered to have a right, such animal will be held immune from any act which hinders the right so granted. In

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[100] Paton, *Supra* note 63 at 293

[101] As Kramer has said: *…the student [does not] have a right to be indulged if he wants to shun intellectual work, (Indeed, the student does not even have a liberty to pursue such a desire.)* (emphasis supplied). Matthew H. Kramer *et. al*. *Supra* note 14 at 31.

[102] As Haplin notes, Immunity can only work when it is powered by some right, otherwise the immunity is meaningless. Halpin, *Supra* note 25 at 456; Ferson, *Supra* note 5 at 177 (...Yet another use of the term 'right' is to signify a condition of legal immunity from liability for what otherwise would be a breach of duty.) I make this argument while barring, of course, the strictness of 'will consideration' in the will theories framework.

[103] Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale LJ 16, 16 (1913) (immunity is the correlative of disability ("no- power"), and the opposite, or negation, of liability.); (Cullison, *Supra* note 2 at 572; Wenar, *Supra* note 17 at 234 ("A has a right that B phi" (or, more commonly, ". . . that B not phi"). Rights that are immunities, like many rights that are claims, entitle their holders to *protection* against harm or paternalism.); Ivana Tucak, Rethinking the Hohfeld's Analysis of Legal Rights, 25 PRAVNI Vjesnik 31, 38 (2009) (Immunity is state of being safe from modifications of one's entitlements **by** another.); Halpin, *Supra* note 25 at (An immunity describes the position of a person who is free to enjoy a legal relation without it being changed by another person.); MacCormick, *Supra* 19 at 166

[104] Cook, Supra note 29 at page 724

[105] Wenar, *Supra* note 17 at 229. *See also*: Matthew H. Kramer *et. al*. *Supra* note 14 at 29

[106] *Id*., Wenar, at 233.

[107] MacCormick, *Supra* 19 at 130

other words, a right of this nature will create a disability in the human being, and thus, he will have no authority to change the jural relation on the anvil of his or collective morality. So if the legislature grants protection to *any* animal, which is not a property (say, a wild animal of the endangered kind, like, a tiger in India), the protection so granted, in the presence of disability, would protect the animal and make such protection a prerogative of the government (and the court).

Admittedly, there will always be an overlap in the relations described by *Hohlfeld*[108] owing to the fact that they come from the same *genus*, as I have noted before. In this sense, one might argue that granting *immunity* to an animal with a correlative *disability* in a human being must logically, mean, a 'claim-right' in the animal.[109] Immunity from hurt, thus, must mean a 'claim-right' not to be hurt. But this line of argument suffers from a caveat: an immunity-right is not a claim, because an immunity *presupposes* protection; that is to say, an immunity is the *effect* of a pre-existing right, whereas a claim-right pre-exists only on the supposition of a duty. Thus, the statements referred to by us in the second part of this essay will be applicable here and this would be a *stricto sensu* right.

V

Concluding Remarks

Let us recap. I argued that the correct understanding of rights between an animal and a human being is a 'claim-duty' relationship, as opposed to a 'right-duty' relationship where I differentiated between a 'claim-right' and a '*stricto sensu* right' within will theories framework. Then, we saw that the purport of this relationship has considerable impact on an animal where its 'claim-right' is invariably dependent on the morality of a human being or of the society as a collective group. Further, we also saw the mistaken inferences of *Hohfeld's* correlativity axiom where the basis of an animal's right is found upon the duties of a human which is an erroneous approach since rights ground duties (not the other way around), and any claim of rights for an animal from article 21 (or for that matter, any rights of a human being) cannot subsist because it is silent on it. Thus, as per our current understanding of animal rights, an animal cannot be said to have a *stricto sensu* right; albeit, it was revealed that there can also exist a situation where a right of this nature can be granted *if* an animal is considered to have a value as a sentient being and serves some special interest to the society. Thus, in this case, there can exist two classes of

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[108] Wenar, *Supra* note 17 at 239

[109] *See* Radin, *Supra* note 17 at 1158 (...the four Hohfeldian terms power, immunity, liability, and disability are exactly parallel to the other four: demand-right, privilege, duty, no-demand right…)

animals and jural correlatives. So when an animal is domesticated and does not fulfil the aforesaid thresholds, a 'claim-duty' relationship will continue to subsist, but if an animal is considered to have protection, an 'immunity-disability' relationship must be applied.

Thus, from this discussion, we are left with several conclusions, but also with an equally good deal of questions: firstly, if an animal could be granted a *stricto sensu* right *qua* animal, what should be the criteria? Secondly, for animals within the 'claim-duty' relationship, when the protection granted is based on morality and on law (which itself is based on changing morality), how can the courts ensure stronger normative protection to an animal? And lastly, must a threshold, other than that of Raz, be conceptualised for an animal to have a *stricto sensu* right?