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Animals as Subjects or Citizens: Can Animals have rights without duties?*

¿Pueden los animales tener derechos si no pueden contraer obligaciones? Animales sujetos y ciudadanos

Silvina Pezzetta
Senior researcher at CONICET (Argentina). Visiting Fellow Brooks McCormick Animal Law and Policy Program, Harvard Law School 2023-2024
silvinapezzetta@gmail.com
https://orcid.org/0000-0001-7668-5235

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Abstract

In this paper I will review one of the prevailing arguments used to refute that animals can be considered subjects of rights -that animals cannot be subjects of rights because they cannot assume duties. The canonical way to respond to this question is to appeal to the arguments of "species overlap" (i.e. there are humans without certain abilities that are nonetheless subject of rights); and the "moral relevance" argument (highlighting the irrelevance of that incapability to gain right's protection). At the legal level, both arguments suggest that *de facto* incapacity to assume obligations is not an obstacle to being a subject of rights (at least in matters involving humans). Although obviously flawed, the argument from obligations persists in rulings and doctrine. In this paper, I will take a critical look at the obligations argument and propose that the best way to address the argument is to examine the political theory that supports it. That political theory will be evaluated in light of Donaldson and Kymlicka's proposal of citizenship for other animals whereby the authors argue that animals can and do fulfill some obligations in today's interspecies societies.

Keywords: nonhuman animals subjects of rights; political theory; animal law

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Resumen

En este trabajo revisaré uno de los argumentos habituales para refutar que los animales pueden ser considerados sujetos de derecho. El argumento en cuestión sostiene que los animales no pueden ser sujetos de derecho porque son incapaces de contraer obligaciones. La forma canónica de responder a este cuestionamiento es apelar a los argumentos de la «superposición de especies» —hay humanos sin dicha capacidad que igual son sujetos de derecho— y al de la «relevancia moral» —una característica que no tiene relación con la necesidad de tener la protección que otorgan los derechos—. A nivel jurídico, ambos argumentos se traducen en que esta incapacidad de hecho no es obstáculo para ser sujeto de derecho —en el caso humano—. Aunque todo esto es obvio, el argumento de las obligaciones persiste en fallos y doctrina. En este trabajo tomaré en serio el argumento de las obligaciones y propondré que la forma de refutarlo es revisar la teoría política que lo apoya. Dicha teoría será evaluada a la luz de la propuesta de Donaldson y Kymlicka sobre la ciudadanía para los demás animales. En su propuesta teórica, los autores sostienen que los animales sí pueden cumplir con algunas obligaciones y de hecho ya lo hacen en las sociedades interespecies actuales.

Palabras clave: animales sujetos de derecho; teoría política; derecho animal

Introduction

In this paper, I will review one of the standard arguments used to refute the idea that animals[1] can be considered subjects of rights. The argument in question argues that animals cannot be subjects of rights because they are incapable of assuming obligations (henceforth, "the argument from obligations"). Although this is not the most common argument to reject the consideration of animals as subjects of rights, it is assumed by the most common one: the one that denies the possibility of animals being considered subjects of rights, by pointing out their inability to reason. This is because they cannot assume obligations or respect norms, if they cannot reason. The canonical way to respond to this criticism is to appeal to the argument of "species overlap," previously referred to as "marginal cases". This argument indicates that there are also humans without such abilities and that this does not entail them ceasing to be subjects of rights. Additionally, the "moral relevance" of this capacity to assume obligations as a condition to enjoy rights is also discussed; since animals can be moral patients, this feature is the only thing that morally matters to enjoy rights.

1. For the sake of brevity, I use the word "animal" without forgetting that we, humans, are also animals.

In the legal field, human beings who cannot reason, and thus, acquire obligations themselves, are not denied legal rights. However, to address the problem of being unable to act autonomously, the legal systems usually distinguish between being a subject of rights and having legal competency. Thus, this distinction separates both dimensions, and the former does not depend on the latter. A person who has a severe mental disability, for example advanced dementia, cannot assume obligations by himself because his cognitive abilities are seriously affected. Nevertheless, he does not, for this reason, lose his status of being a subject of rights. On the contrary, the legal system compensates for this lack of abilities with a legal proxy who can exercise his rights on his behalf. Any *de facto* disability, although highly severe, is not morally relevant in terms of recognizing basic legal rights. What counts is vulnerability, which must be protected through rights.[2] The aforementioned are truisms for any lawyer. For this reason, the mental gymnastics made by those who want to continue basing their refusal to recognize animals as subjects on their *de facto* incapacity to assume obligations falls flat.

However, if we pay attention to the recurrence of the argument in judicial decisions worldwide[3] and the doctrine, perhaps we will find something reasonable. In this paper, I will propose that the reasonability of this argument arises from the fact that it has more to do with political theory than legal theory. Clearly, the argument does not hold in legal terms, and thus, it is unreasonable to continue using the "argument from obligations." Still, this argument is closely linked to law insofar as it addresses the problem of its legitimacy. Therefore, it is related to the theory of who is entitled to be a member of the political community and under which status. That is to say, the argument from obligations belongs to the dimension of the relations between law and politics. Thus, it can only be addressed by considering the political theory behind it and whether that political theory is acceptable.

I will first briefly present the discussion around the legal status of animals and the different scenarios in which attempts have been made to reverse their status as "things." Next, I will explore which political ideas underlie the argument from obligations. Lastly, I will confront them in light of the animal citizenship theory proposed by Sue Donaldson & Will Kymlicka (2011) in *Zoopolis. A political theory for animal rights*. I will defend the theory of animal citizenship as more adequate than the traditional "species overlapping" and "moral relevance" defens-

2. Of course, this is the case of natural persons' rights and not of legal entities' rights, which have other functions, such as protecting the personal assets of their members.
3. The arguments of judges that I quote here are for illustrative purposes only, and are not the product of empirical research on the subject. However, to learn more about the arguments for and against the declaration of animals as subjects of rights you can read the exhaustive work of Montes Franceschini (2021).

es to dismantle the argument from obligations. I will maintain that adequacy is so because by departing the counter argumentation from the ideas proposed in *Zoopolis*, we can highlight an uncontroversial fact: animals already live among us and follow many rules, which is a way of assuming and complying with obligations. Moreover, as other authors have also emphasized (Cochrane, 2010; Smith, 2012), we already govern them (albeit tyrannically insofar as only human interests count) (Donaldson & Kymlicka, 2014). Therefore, the argument from obligations quickly appears less appealing than it seems, at least from a non-legal point of view.

1. Animals as subjects of rights

This paper does not seek to survey the theories of contemporary animal ethics that argue that species discrimination is unjustified and unjust. However, a brief reference to these central themes will serve to understand better the debate on legal personhood for animals and the positions for and against it. In addition, the animal citizenship theory is grounded in the legal animal personhood. Therefore, it first should be mentioned that these animal ethics theories emphasize that, from a moral point of view, the species to which an individual belongs is not a sufficient condition to determine who can be injured, killed, or suffer painful actions. In other words, animal ethics identifies and rejects speciesism or species discrimination and points out the sufficient morally relevant condition to be sentient.[4] Sentience, a concept further used in biology and animal welfare science (Broom, 2014), is the capacity to have subjective experiences of the world. This capacity varies in an individual throughout his or her lifetime, and there are also intraspecies and interspecies variations. Not all humans are sentient, nor will they be sentient throughout their lives, nor are humans the only sentient creatures. On this basis, the foundations were developed to build normative ethical theories that stipulate animal moral rights and human duties that mirror different currents of contemporary philosophy. In the legal field, the discussion of animal moral rights took the form, to a large extent, of attempts to recognize animals as subjects of rights. Arguably, this goal was the "legal translation" of the ethical theory contesting speciesism.

The goal of changing the status of animals from objects to subjects of rights is the compass of all legal – and social – disputes opposed to "welfarism." Welfarism is a more or less theoretically articulated moral posi-

4. Although sentience it is not a necessary condition for all ethic scholars. Thus, those who hold that nature or inanimate objects have inherent value and have rights do so on a basis distinct from sentience and even from life.

tion that holds that gratuitous or unnecessary cruelty is morally wrong and should be prohibited (Haynes, 2008). Nevertheless, however banal, any cruelty necessary for some human benefit is acceptable because welfarism does not oppose exploitation. In contrast, attempts to change the legal status of animals ultimately seek to endow them with a protective framework of rights that confers immunity from human interests and damages. Thus, when theorists argue for the recognition of animal rights, they generally maintain that all sentient animals[5] should have, at the minimum, the right to life, physical and mental integrity, and freedom.

These theories of fundamental animal rights have been put into practice by legislative and judicial means. The success of these strategies is very incomplete. The judicial path has been the most positive. In this regard, the initiative of The Nonhuman Rights Project by U.S. lawyer Steven Wise has had unexpected repercussions in Latin America. Although the lawyer did not achieve a favorable ruling in his long journey presenting *habeas corpus* to free animals in captivity, he has inspired the presentation of *habeas corpus* in Argentina, for example. The first Argentinean cases were Sandra and Cecilia,[6] and had an international impact. Soon after, more Argentinean courts recognized animals as subjects of rights, although not in *habeas corpus* proceedings but in the framework of criminal and administrative cases – great apes, horses, dogs, a puma, and two monkeys.[7] Even before these rulings, there were important decisions in Brazil regarding animal rights recognition (Montes Franceschini, 2021). These rulings, with parallels in other latitudes, such as the rulings of the courts of India and Pakistan,[8]

5. Which animals are sentient is a fact that depends on biological facts. Today there is no doubt that all vertebrates are sentient. Regarding invertebrates, some species are already known to be sentient. On the determination of sentience see Browning & Birch (2022).
6. Cámara Federal Casación Penal, Sala II, 18/12/2014, Causa CCC68831/2014/CFC1, "Orangutana Sandra s/Recurso de Casación s/Habeas Corpus". Juzgado N° 4 Contencioso Administrativo Tributario de C.A.B.A., 21/10/2015, Exp. A2174-2015/0, "A.F.A.D.A. y otros c/GCBA s/Amparo". Tercer Juzgado de Garantías de Mendoza, 03/11/2016, Exp. P-72.254/15, "Presentación efectuada por A.F.A.D.A. respecto del chimpancé Cecilia – Sujeto no humano". Cámara de Apelación Penal, Contravencional y de Faltas de C.A.B.A., Sala III, 12/12/2016, Exp. 18491-00-00/14, "Responsable del Zoológico de Buenos Aires s/Ley 14.346".
7. Juzgado Correccional N° 4 de San Isidro, 24/10/2018, Causa 4285-P. Juzgado Penal de Rawson, Provincia de Chubut, 10/06/2021, Carpeta Judicial N° 7311, Legajo Fiscal N° 21.466, "C., M. M. M. s/ Denuncia Maltrato Animal". Juzgado de 1ra Instancia en lo Penal, Contravencional y de Faltas N° 4, "Robledo, Leandro Nicolás y otros sobre 239 - resistencia o desobediencia a la autoridad", Número: IPP 246466/2021-0 CUIJ: IPP J-01-00246466-3/2021-0, Actuación Nro: 2971213/2021. Juzgado de 1ra Instancia en lo Penal, Penal Juvenil, Contravencional y de Faltas N° 3, "Ledesma, Diego Alberto sobre Ley N° 14.346 de protección al animal. Malos tratos o actos de crueldad", Número: IPP 149744/2022-0 CUIJ: IPP J-01-00149744-4/2022-0, Actuación Nro: 1802321/2022. Juzgado de 1ra Instancia en lo Penal, Contravencional y de faltas N° 1 secretaria, "nn, nn sobre 128 - mantener animales en lugares inadecuados", Número: IPP 42081/2022-0 CUIJ: IPP J-01-00042081-2/2022-0, Actuación Nro: 2179828/2022.
8. Supreme Court of Justice of India, 07/05/2014, "Animal Welfare Board of India v. Nagaraja and Ors." Supreme Court of Islamabad (Pakistan), 25/04/2020, "Islamabad Wildlife Management Board v. Metropolitan Corporation Islamabad & 4 others", W.P. No.1155/2019.

were also followed in recent caselaw in our region. The most notable is the case of Estrellita,[9] a judgment of the Constitutional Court of Ecuador that recognizes that *habeas corpus* is an acceptable procedure for animal cases[10] and that animals have rights arising from the rights of nature recognized in the Ecuadorian national constitution.

Indeed, before moving on, it is essential to note that the rationales of many of the cases mentioned above, particularly the most relevant ones – Sandra, Cecilia, Estrellita – are based partly on environmental law. While not detailed in this paper, it is significant to note that courts have accepted actions on behalf of animals without embracing *in totum* the arguments of animal advocates, which relied primarily on sentience. Although environmental law's objectives and environmentalism are generally not always compatible (Sagoff, 1984) with the defense of animal rights, judges have nonetheless relied on it. The resorting to environmental laws could arise from judges considering them the main – and only – positive law available for their rulings, unlike animal law, which needs more praetorian creation and progressive interpretation. Furthermore, because animals are often contemplated as included in the broader set of "nature," from which humans would be totally or partially excluded, the choice of environmental law seemed a logical fit.

This is to say, rulings declaring animals to be subjects of rights do not rest exclusively on animal rights theories based on sentience. Note also that the animals recognized as subjects of rights in the Latin American rulings are, on the one hand, wild animals living in captivity – zoos, private homes – or domesticated animals for "companionship" or "work," on the other. In the first group of cases, a strong appeal is made to the environmental issue to establishing legal protection by distinguishing certain animals from others, especially those used for "consumption," and notable disquisitions appear in Cecilia and Estrellita rulings. In these cases, moreover, the right to life of these animals was never at stake since they were not intended for consumption but for exhibition. The right affected in their cases, then, was the right to freedom and physical and psychological integrity, with danger to life due to the conditions of captivity. On the other hand, as far as domesticated animals were concerned, these were cases of mistreatment and cruelty, and the criminal law that punishes these crimes refers to animals as "victims," so the rationale revolved around this legal recognition, with some mention to conscience and sentience.

In short, the idea that animals should be recognized in the legal system as subjects of rights has had some success in the courts. However,

9. Ecuadorian Constitutional Court, Sentencia 253-20-JH/22.
10. Although it does not apply to the case because Estrellita was already deceased at the time of the ruling.

it is difficult to think there will be such rulings concerning the rest of sentient animals, especially those used for consumption. On the other hand, this all-encompassing protection scope, which is more proper to legislation, has been sought in different countries at different levels. The EU and some countries of that region have some norms and principles at supranational, constitutional, and national levels that recognize animals as "sentient beings" or "endowed with sentience" or mention that they have dignity.[11] However, they are still under the regime of things. Furthermore, a common element in judicial, legislative, and conventional debates should be mentioned: the focus on animal ethics and environmental arguments rather than political ones. In other words, animal rights are not embedded in a political territory: animals are never spoken of as members of our -or their- communities. Consequently, only the arguments of species overlap and moral relevance – or appeals to environmental protection – are used in those scenarios, mirroring what happens in the theoretical field. However, what if the argument from obligations that appear explicitly or implicitly in these disputes was taken seriously? Can we be certain that animals cannot have obligations?

2. The argument from obligations: is it legal or political?

In 2022, a judge in Entre Ríos, Argentina, ruled on a constitutional injunction[12] called "amparo" filed by environmental and animal protection organizations. The amparo requested the declaration of unconstitutionality of hunting animals of native species, and the declaration of the affected animals as subjects of rights. The judge declared the unconstitutionality of the resolution regulating hunting, but regarding the declaration of the animals as subjects of rights, he said:

> Our legal regime characterizes the subject of rights as one who has the capacity to have rights, and considers capacity as an attribute of the person, and understanding by these to be human persons and, by way of legal fiction, legal persons given that in the short or long run they are necessarily composed of human persons.

That is to say, the judge differentiates between the legal subject and the human person, although he maintains that capacity is an attribute

11. For a database of relevant legislation in various countries, please visit <https://www.globalanimallaw.org/database/index.html>.
12. Ruling 7/7/2022 N.º 11051 "Centro para el Estudio y Defensa de las Aves Silvestres (CEYDAS) y otros c/ Superior Gobierno de la provincia de Entre Ríos s/ acción de amparo (ambiental).

of the human person, noting that our law also recognizes the capacity of artificial legal persons. However, he justifies their existence in that they are composed of human persons. As we saw, the species is not a sufficient condition to recognize or deny rights or legal personhood. Nevertheless, what is most relevant to the idea I defend in this work is what follows in the ruling mentioned above:

> Person and capacity are concepts that go together; and capacity is characterized by being the aptitude to have rights, **but by the fact of living in a community, this has a counterpoint that are the obligations derived basically from the existence of other persons who also have rights**. And there is an inconvenience that arises to confront the situation of considering certain animals as subjects of rights; **this is the difficulty of assigning them the obligations they would have concerning other subjects of rights, whether human or not**. (the emphasis is mine)

The judge clarifies that capacity encompasses two dimensions: enjoying rights and assuming obligations. However, he does not conceive of rights outside a community; therefore, according to his reasoning, no one who cannot assume obligations can enjoy rights. Of course, in the human case, this is not so, as the judge himself recognizes by alluding to the argument of the species overlapping argument:

> And this must be sustained even when there are innumerable cases of persons who have rights without having enforceable obligations, such as minors of young age or the person with restricted capacity; but in these cases, this restriction is subject to a term – because of the increase in age – or to a resolutory condition – that the interdiction is maintained –; and they are de facto and relative incapacities. But beyond that, what has been said does not prevent the existence of opinions that allude to a diversity of assumptions, which seem to be exceptions or doubtful cases, such as the case mentioned above of infants, or it can be argued (as some participants of the theory of the legal subjectivity of animals do) that an adult mammal such as a horse, a dog or a dolphin is more intelligent or have greater capacity of comprehension and empathy than a newborn child.

How does the judge respond to the overlapping species argument he referred to? Remember that, as he states, some humans cannot assume obligations, which does not prevent them from being considered subjects of rights. Thus, some humans and animals cannot assume obligations, but this entails two different results depending on their species. There are two options to solve this inconsistency. Either denying such status to incapable humans, which is fortunately an unacceptable solu-

tion, or accepting that not being able to assume obligations cannot be an argument for denying legal personhood. However, the judge responds as follows:

> But all this is not a valid argument given that: 1°) the conceptualization is structural, and the particular does not de-characterize the system, hence taking the level of intelligence at a particular time of the species is not valid; otherwise, one could say the same of a computer or a personal companion robot, since it has more "reasoning capacity" and storage of information than a baby, or the best-trained animal (or intelligent if you will). And even taking such a position to an absurd extreme, one could establish a ranking with degrees of personality of human beings and animals, according to their intelligence or their sensitivity; and this is not possible since attributing greater or lesser personality according to these characters means nothing more or less than adopting a supremacist criterion that violates the principle of equality.

His answer misses the point by incorporating a new condition, intelligence. The judge rightly holds that intelligence cannot be the criterion for establishing personality, much less degrees of it. However, this is only the case for humans. He recognizes that intelligence is irrelevant but appeals to it indirectly when referring to the capacity to assume obligations – after all, can an obligation be respected without some degree of intelligence? In this same ruling, the private law scholar Sebastián Picasso (2015) is quoted to support the judge's denial of legal personality to animals. The quoted work has been widely disseminated in the legal field as an example of argumentation against the declaration of animals as subjects of law, because Picasso is a respected scholar. Among the classical arguments against recognizing animals as subjects of rights, already sufficiently contested, stands out the idea that I am interested in discussing:

> **Not to mention the fact that legal personality does not only imply the existence of rights but also of obligations,** with which one might ask how we will get animals, forests, or stones to abide by the legislator's mandates. This last point is particularly enlightening, because it connects us with another severe drawback. We have already said that legal personality is a technical category and that, for this very reason, it would not be inconceivable for the law to employ it with respect to animals. However, the fact that such a thing is technically possible does not prevent us from emphasizing that **animals do not care about legal norms and that no matter how many rights and duties we establish for them, we will never be able to make them act according to this scheme.** Coviello rightly said that animals are incapable of dealing with us and letting us know their determinations so that **there can be no**

> **society between man and animal, a necessary condition of law.** In the same sense, Arauz Castex pointed out that animals are alien to the possibility of having agency, which is the subject matter of law. (the emphasis is mine)

Picasso's concern is that animals cannot comply with the legislator's mandates, and that what the law says does not matter to them. Moreover, he argues that they will never be able to form a society with humans because they do not engage in autonomous behavior. This argument has at least two problems. On the one hand, animals already live among us and are subjected to our control – our societies are interspecies societies. We affect their lives and even govern them by imposing our social and legal rules. The fact that they do not know our law, something that can also be said about countless humans, does not leave them outside the impact of human societies. In addition, as will be developed in the last section, the idea that animals do not respect rules, do not comply with obligations, and are not able to collaborate, is something that is easily refuted when we think of the number of rules that domesticated animals learn and respect. Animals such as dogs and pigs are even taught to look for human beings or objects, and their unrecognized work is undoubtedly a collaboration. The denial that they can make their determinations known to us and that they do not have agency, on the other hand, is only possible to be affirmed by blatantly ignoring the science of ethology and disciplines such as the philosophy of mind (Krupenye & Call, 2019) and animal welfare (Dawkins, 2021) that refer to animal behavior and their motivations (Ferrari, Lázaro & Tarzia, 2018). Finally, animals, to their detriment, already take part and contribute to our societies with their bodies, labor force, support, and companionship.

The argument from obligations also appears in another resonant case brought forward by the Nonhuman Rights Project, that of Hercules and Leo, two chimpanzees held in captivity in a private zoo in the USA. The judge denied the *habeas corpus* filed on their behalf, in this manner:

> In reaching this conclusion, the Court, while noting that the "lack of precedent for treating animals as persons for habeas purposes does not ... end the inquiry" (id), reasoned that "legal personhood has consistently been defined in terms of both rights and duties" (id. at 152 [emphasis in original]), and determined that **the chimpanzees' "inability to assume any legal responsibilities and social duties" disqualifies them from receiving the legal rights accorded to human beings**. (the emphasis is mine)[13]

13. Supreme Court of The State of New York, New York County: IAS Part 12. In the Matter of a Proceeding under Article 70 of the CPLR for a Writ of Habeas Corpus, 2015.

Once again, we are faced with the demand on the head of the individual to assume obligations to enjoy rights. Since this is not required in the human case, the judge has to resort to an *ad hoc* argument:

> Often […] arguments in favor of animal rights proceed by analogy. First, biological human beings have rights. Second, animals share many of the characteristics of human beings, at least to a lesser degree. Therefore, animals have at least some of the same rights as humans. Obviously, this argument only works if the shared characteristics are relevant to the attribution of rights; otherwise, the analogy loses its force […]. Therefore, extending the concept of personhood to animals only indicates that they share relevant characteristics with humans and deserve rights because of it (Jens David Ohlin, Note, Is the Concept of the Person Necessary for Human Rights, 105 Colum L Rev 209, 222 [2005]). This appears to be the argument advanced by the petitioner, namely that chimpanzees should be accorded rights commensurate with their capacities, and that their autonomy and self-determination merit the right not to be unlawfully detained and, to that extent, legal personhood status. **Relying on the so-called "social contract" and common law to determine that chimpanzees are disqualified from receiving legal person status, the Third Department in People ex rel Nonhuman Rights Project, Inc. v Lavery determined, in effect, that 26 [* 26] granting chimpanzees legal person status is inappropriate, as they are incapable of assuming legal responsibilities and social duties**. (emphasis mine)[14]

If one reconstructs the arguments of these cases we see, even explicitly in the Hercules and Leo case, that there is a reference to the idea of the social contract as the foundation of law. This social contract, in turn, would ultimately underlie the requirement of being able to assume obligations in order to enjoy rights. There are two versions of contractualism: a political theory of the legitimacy of political authority, and a moral theory of the origin or legitimate content of moral norms (Quong, 2017; Ashford & Mulgan, 2018). The referents of political theory are Locke, Hobbes, Kant, and Rousseau. After the decline of this version of the theory, John Rawls (1971) turned it back into a relevant way of discussing the justice of institutions in the seventies of the last century. As for contractualism in the moral sense, that is, the idea that moral norms arise from an agreement between rational parties, this is an idea that I will leave aside in this paper. I believe that the emphasis on the problem of community, respect for norms, and the inability to comply with obligations and rules indicates that the argument from obligations is principally related to the political version of

14. Id.

the social contract theory. Moreover, the two theories do not imply each other.

The social contract theory that emerged in the 18th century had the central aim of grounding the power of the new governments, which no longer relied on the divine right of monarchs to rule. That is to say, the social contract modern philosophers refer to is a theoretical construction that explains and justifies how a political community arises. According to this theory, through social contract we leave the state of nature, which different authors describe in opposite ways and, despite the obligation that the contract entails, its advantage is that it protects rights better. Rights that, should be noted, precede the contract.[15] For this reason, contractualism is not a way of founding rights, but establishing when political power is legitimate.[16]

Although in all versions of contractualism it has been assumed that the parties are rational and self-reflective subjects capable of deliberating, deciding, and respecting the contract, this does not mean that they cannot include subjects incapable of doing so in that agreement.[17] However, this exception does not need to be a problem in the eyes of these thinkers; even moral theories based on human rational autonomous agency justify the duties we owe to other humans who do not have these capacities by resorting to the idea of indirect duties -an idea extended to animals. [18] Alternatively, they do so by appealing to their membership of the human species, although this argument is not acceptable since membership of the species alone has no moral relevance *per se*. Thus, it can be said that contractualism would not serve to deny that animals can have rights because, in the end, rights do not arise in themselves from social contract, and they are not logically connected with the capacity to assume duties. Of course, this assertion does not solve the problem for animals. After all, although the political version of contractualism differs from the moral version, there are connections, mainly because there is an assumption that rights derive from their capacity to reason and autonomy. However, since the judge's arguments deal with the political dimension, that assumption is not an obstacle to my argumentation.

All the aforementioned arguments would be enough to set aside the argument from obligations as part of the social contract theory. However,

15. With perhaps the only exception of Hobbes.
16. Of course, I am presenting a simplification of contractualist theories. But it is not possible to dwell on a more complete historical or theoretical development, and neither it is not necessary for the aim of this work.
17. Certainly, many authors maintain that this is an *ad hoc* adding to defend contractualism. But, for example, Mark Rowlands offers an interpretation of contractualism as a heuristic tool to test our moral assumptions and to defend human intrinsic value. He also proposes a modified version to include animals. Rowlands (2009).
18. Recently, Christine Korsgaard presented a work defending from a Kantian position the direct duties towards animals: *Fellow Creatures. Our Obligations to the Other Animals*.

it is still possible to give it another chance by exploring the relationship between law and politics. The question of legitimate power, which is what is really sought after to be established through the idea of social contract, is closely related to the problem of the legitimacy of law. Briefly, and following Norberto Bobbio (1996), I define political power as "[…] the ultimate (supreme or sovereign) power over a community of individuals in a territory" (157). The philosopher distinguishes this power from others, such as economic and religious power, by the means it uses: force. This description lacks an evaluative dimension, and it was said that the idea of social contract is aimed at justifying political power. In this search for legitimacy or, in other words, of the normative dimension, law appears. The relations between law and politics are manifold. Although the effort to separate the two spheres has been significant, the interdependence is undeniable. Bobbio (1996) points out two moments of contact:

> When law is understood as the set of norms, or normative order, in which the life of an organized group unfolds, politics has to do with law under two points of view: insofar as political action is carried out through law, and insofar as law delimits and disciplines political action (170-171).

Legitimate political power is carried out through law, and law needs political power to be effective. Legitimacy, as distinct from mere effectiveness, is granted by law. Compliance with law on the part of the governed and the rulers involves obedience and acceptance of the norms emanating from the political power. But whether to obey the legal norms is a normative question: political and ethical. From a contractualist point of view, it is justified to obey these norms if they are the ones that would have been chosen to leave the state of nature or, in the Rawlsian version, in the original position. In short, legal problems, such as who is entitled to what, why we should obey the law, the existence of a right to disobey the law, what is the difference between legal power and legitimate power, who is obliged to obey what, and how political communities are distinguished from other kinds of communities, do not occur in a vacuum. They always occur in a political context.

I think it is all these problems that judges keep in mind, more or less articulately, when deciding whether animals can be subjects of rights. Somehow, they have the intuition that if they recognize animals to be subjects of rights, they would be doing something else: recognize that they are members of the political community. However, this would be a problem since they would have rights but could not fulfill obligations. Animals' inability to fulfill obligations is an obstacle for judges to consider them part of the community, even if, in the human case, it is not

so at the level of legal regulation. One possible path to avoid this social contract obstacle is to reject altogether contractualism, because it cannot adequately justify the inclusion of humans – and animals – who cannot bind themselves. However, it is not the purpose of this paper to delve into this line. Obligations are a persistent and basal foundation when thinking about any community. Moreover, this work aims to take seriously the argument from obligations. For this reason, I want to explore Donaldson and Kymlicka's ideas regarding citizenship in general and animal citizenship in particular, as well as the different categories of animals to which they would apply. Because their central idea challenges the assumption we saw in the rulings and doctrinal debates that animals cannot participate in society because they are incapable of following rules. At most, some judges and scholars are willing to affirm they are objects of special protection and care or an intermediate entity category. But animals need and deserve more than that. In the next section, I will explore Donaldson's and Kymlicka's as a "way out from above" of the capacity/rationality maze challenge to consider animals as subjects, and citizens capable of fulfilling obligations and contributing to society.

3. Unruly beasts or unworthy submissives. Animals as subjects with agency in Donaldson and Kymlicka's theory

In their paper "Unruly Beasts: Animal Citizens and the Threat of Tyranny," Donaldson & Kymlicka (2014b) respond to a criticism of the proposal to extend citizenship to domesticated animals. The author to whom they respond, Emma Planinc (2014), rejects in her article "Democracy, Despots and Wolves: on the Dangers of Zoopolis' Animal Citizen" the idea that domesticated animals should be considered citizens. However, she rejects only the third function of citizenship described by Donaldson and Kymlicka: that of political agency expressed in democratic participation in making rules. Furthermore, her rejection mirrors the arguments in the legal field: animals can neither assume obligations nor respect norms. In short, if animals were considered citizens, those virtues that make for democracy, such as rational deliberation, compliance with rules by abstention from impulses, and the capacity to establish consensual limits, would fall into disgrace. However, Planinc does accept that domesticated animals enjoy the other two functions of citizenship[19] set out in Zoopolis: securing the right to be part of a political

19. Zoopolis raised many criticism, among them, some authors believe it is not in favor of animals being considered co-citizens. However, this work does not have the goal to describe all the criticism.

community and that of "popular sovereignty", i.e., that rules must also consider the interests of domesticated animals.

Now, it is worth briefly developing the ideas presented in Zoopolis and the work that responds to Planinc's criticisms, before I can argue why they are relevant to legal debates. First, Donaldson and Kymlicka take as the basis of their theory developments in animal ethics that reject speciesism and postulate that all sentient animals, because of that subjective capacity, should be recognized as subjects of rights with three fundamental rights: to life, to physical and psychological integrity, and to freedom. This position is called the "traditional theory of animal rights". Despite taking it as a basis, the authors criticize its limits for several reasons: for its lack of imagination to think of a world of fair relations with other animals, for the assumption that it is possible, and desirable, for animals and humans to live in separate spaces, and for its excessive emphasis on the obligations of abstention for humans and negative rights for animals. Finally, a significant problem they detect in the traditional theory is that there is no further specification of how to implement rights in the face of an enormous diversity of situations. Such a general theory cannot account for the differences between a pigeon living in a square, a pig on an intensive farm, a dog living with humans, or a gazelle living in the jungle.

All these limits of the traditional theory are the object of the extensions proposed by Donaldson and Kymlicka by using political theory for the case of sentient animals. Thus, the first move they make is to divide animals into categories (which are not watertight and whose species do not form an exclusive and excluding part of each other): domesticated, wild, and liminal. The domesticated, deliberately bred for centuries to live close to humans and to be exploited in different ways, are the animals that should obtain citizenship in our states. This is so because domesticated animals, by the very history and process of domestication, have characteristics that make them especially suitable for coexistence with humans. In many ways, domesticated animals comply with human norms, adapt, learn, and cooperate with us. In part, this is a product of selection for traits such as docility and tolerance of novelty. However, it is also partly a product of these species' abilities to interact based on feelings, prosocial tendencies, and the cognitive skills they already possessed when domestication began.

However, it is not only a question of the ability to comply with rules and coexist, something that domesticated animals already do. The proposal to consider them as subjects of rights and citizens of our communities is based on the fact that these species, at least in the immediate future, have no habitat to return to. Today, cows, pigs, horses, cats, and other domesticated species have no "natural" environment to return to.

Moreover, in many cases, they would not survive without human – at least temporary – assistance. Citizenship for this category implies, in addition to the fundamental rights common to the other two, a scheme that includes more rights, but also obligations. The rights that would be gained with citizenship include, for example, adequate protection of the right to life – from attacks by other animals and humans –, access to health and adequate shelter, use of public space, and the right to move around. Nevertheless, these rights also entail some obligations, among them those of socialization, to coexist in interspecies societies. This socialization, which today occurs in different versions and always with human interests in mind, often assuming cruel and degrading forms, is also a right that will allow animals to understand humans. However, we will also have to learn to do so. Moreover, at least initially, there will be control over their reproductive rights. What is most remarkable, notwithstanding, is that the proposal does not do more than recognize all that domesticated animals already do: they restrain themselves, learn to behave in different scenarios, respect rules, collaborate, communicate their preferences, and self-regulate. In addition, of course, in most cases, they are exploited.

Wild animals are those who have not been subjected to human manipulation and do not wish, in general, to live among us. Although they live free, and freedom is their fundamental right, we affect their lives in multiple ways: hunting, invasion of their territories, and capture. These animals, according to Donaldson and Kymlicka, should be considered citizens, but of their sovereign territories. They do not need us to lead their lives like domesticated animals. In the first place, our duty is to respect the sovereignty of their territories, which, given the human presence extended to almost all areas of the planet, will be shared in most cases. Human interventions in their interest, according to Zoopolis, are only required in specific cases: individual cases and cases of "failed state" in which the continuity of the sovereign community is endangered if no intervention is made. Wild animals whose rights were violated because they are in captivity, such as Sandra and Cecilia, or Hercules and Leo, are in a particular situation. They can no longer be released into their habitat but require human assistance to survive, because of the psychic damage caused by captivity. So, in such cases, we are in a scenario that resembles the domesticated. There is a human responsibility for their lives. These cases show that the categories are flexible and must always be understood with respect for the fundamental rights of animals.

Finally, liminal animals are all those that, of domesticated or wild origin, live among us in cities, but freely and without inflexible dependence on anyone in particular. Different reasons have operated for these

species to live, and even flourish as such, in urban environments: colonization of their spaces and forced displacement, use of territory that was previously theirs, contamination of their habitats, commensalism, synanthropism, abandonment or escape in urban environments (Kojusner, 2022; Pérez Pejcic, 2020). For Donaldson and Kymlicka, these animals, forgotten by traditional theory, need a sufficiently flexible protection scheme so as not to lose their capacity for self-governance and, therefore, they establish that their political status should be that of residents: with fundamental rights but without obligations like those of domesticated animals.

Now, note that the authors refer to obligations – of the domesticated who will have the right to be co-citizens – and not only to rights. Earlier, it was said that the functions of citizenship described in Zoopolis are three:

1. To grant nationality, which ensures belonging to the territory of a state.
2. To institute the idea of popular sovereignty, which implies being part of the "people" on behalf of whom one governs.
3. Guaranteeing democratic political agency: the function with which citizenship is currently almost exclusively identified, that of guaranteeing the right to participate actively in democracy.

This last function of citizenship, as participation, requires the ability to deliberate and comply with rules and obligations, which many authors, among others Planinc, argue impossible to extend to animals. However, Kymlicka and Donalson use precisely this argument about obligations for the extension of citizenship to animals. In "Unruly Beasts…" Donaldson & Kymlicka (2014) explain why the argument from obligations is not a challenge for the case of animal rights. First, they describe the two opposing commonplaces concerning domesticated animals – which should also be applied to animals imprisoned, or held captive for long periods or generations. On the one hand, animals are considered "unruly beasts," incapable of obeying, collaborating, living together, or understanding humans. On the other hand, animals are seen as "submissive and dependent beings," obedient to the point of being incapable of resisting orders and situations that oppress them and lead them to death. These two images are also present in traditional animal rights literature. For one part, there is sometimes an exaltation of "animality" seen as ungovernability, irrationality, and connection with instincts that humans should recover from. For the other part, there is a vision of animals as submissive beings, mere artificial artifacts made by humans, which is often present in the proposal that

domesticated animals, as dependent and obedient, have no dignity and will always be susceptible to oppressive relationships; *ergo*, we must tend to their extinction using contraceptive measures. However, Donaldson and Kymlicka do not believe that these platitudes represent the complex lives of domesticated animals (or many other species).

It is crucial to understand that domesticated animals and animals who have spent their lives in captivity, even born for generations in zoos, are part of our societies, comply with our rules, live under our tyranny, and contribute in many (forced in most cases) ways. They do so in ways similar to what humans usually do: non-reflective, driven by the social environment and socialization. Humans often comply with legal, social, and moral norms uncritically, without even thinking about them. Of course, we can reflect rationally on them, which is essential because many norms are unjust. There would be no moral progress without this possibility. However, we rarely act that way. In this sense, animals also comply with norms in multiple cases. For example, animals in zoos are trained to cooperate, allow studies and tests to be carried out, manipulate their environments, or perform shows. Animals exploited in circuses and other shows also learn complex routines, follow orders, and have obligations. Moreover, all domesticated animals ultimately contribute to society with their bodies, labor power, the exploitation of senses that we lack, and their companionship. These are facts that serve to substantiate the need not only to be considered subjects of rights but also to fully recognize their presence through the political rooting of that character: as citizens.

In addition, an overemphasis on intellectualism or rationality, argue Donaldson & Kymlicka (2014b) in "Unruly Beasts…" and other works (2014, 2017), makes us forget that we, too, as animals act based on basic emotions and the tendency to prosocial behavior. Therefore, the authors explain the limits of the social contract theory to include children and people with severe mental difficulties. In this regard, they point out how the theory of citizenship for children and severely mentally challenged persons illuminated the limits of considering them as mere passive subjects of care, and incapable of shaping democratic life and actively participating in it. The adaptations needed to enable people with mental illnesses and children, each with their own life experiences, require us to take their citizenship seriously at the three levels mentioned above. In this sense, Donaldson and Kymlicka argue that domesticated animals and all those in a similar situation of inflexible dependency on humans should be considered citizens. In short, domesticated animals, and the animals we exploit in zoos, for example, already live in our society, already comply with our rules voluntarily or forcibly, already collaborate with us – forcibly or not –, we already have ties with

many of them, they are already judicially[20] considered part of the family (Suárez, 2017), and fundamentally, being able to harm[21] us, most of the time they choose not to. Therefore, recognizing them as subjects of rights and co-citizens is nothing more than acting with justice and under the legal, moral, and political principles we already accept.

Let me finish with a final consideration, also in line with what Donaldson and Kymlicka argue in relation to academics clinging to the opposing images of "unruly beasts" or "submissive and dependent beings," but this time oriented to the legal field. Judges, legislators, and public officials often argue about animals and their capacities, affirming factual propositions that have long been refuted. It is incredible that in the 21st century, judges and lawyers still deny animal intelligence and their cognitive abilities and are unaware of the scientific evidence available to understand their capacities and needs. We do not only need better moral, legal, and political arguments. We also need, and very much so, adequate awareness about basic biology and ethology. At least to stop denying what scientific evidence has demonstrated about sentient animals during the last fifty years.

4. Conclusions

I have argued that the argument from obligations rests on an idea of political nature: a version of contractualism. This political theory, aimed at explaining and grounding the political power of the new non-monarchical governments, is still relevant. Despite the many criticisms it has received, especially because of its problems including those who cannot deliberate rationally or assume obligations, it still dominates political scholarship, and has weight in the legal field. As mentioned above, this idea is present in rulings and debates about the need to declare animals as subjects of rights. Contractualism also carries much weight, because it is part of the answers to critical problems of law: legitimacy, moral obligation to obey, who has rights, and which ones.

Rather than rejecting the argument from obligations, and the contractualism theory that supports it, in this paper I took seriously the idea that to be a subject of rights, one must be able to assume obligations, and not just be able to enjoy rights. Despite the argument that obligations are an untenable idea at the level of legal regulation, it is necessary to review it thoroughly. Thus, instead of denying the impor-

20. "B., N. A. c/ P., R. J. s/ Violencia Familiar", Exp. No 10022/2021-1, Argentina.
21. This does not mean attributing moral responsibility to them as we do to imputable adult humans. Nevertheless, the moral agent/moral patient dichotomy is put in crisis in the case of animals in order to recognize them as having greater agency. See Rowlands (2012).

tance of obligations, the aim was to show how domesticated animals (and wild animals that are no longer able to live in freedom) are already part of our societies rather than passive subjects of our moral, social, and legal norms. They also participate actively, communicate their interests, and respect and learn how to live among and with us. They are historical victims of human societies, which have benefited, and continue to do so, by subjecting them to the most violent of tyrannies. Recognizing animals means, then, also recognizing their capacities and granting them the appropriate legal status: legal personality rooted in political territory, i.e., recognizing them as co-citizens.

Bibliographical references

Ashford, E. & Mulgan, T. (2018). "Contractualism". In Edward N. Zalta (ed.). *The Stanford Encyclopedia of Philosophy* (Summer 2018 Edition). Stanford: Stanford University. Retrieved from <https://plato.stanford.edu/archives/sum2018/entries/contractualism/>

Bobbio, N. (1996). *El filósofo y la política*. *Antología*. México: Fondo de Cultura Económica.

Broom, D. (2014). *Sentience and Animal Welfare*. Croydon: Cabi.

Browning, H. & Birch, J. (2022). "Animal Sentience". *Philosophy Compass*, 17(5), e12822. <https://doi.org/10.1111/phc3.12822>

Cochrane, A. (2010). *An Introduction to Animals and Political Theory*. Basingstoke: Palgrave Macmillan.

Dawkins, M. (2021). *The Science of Animal Welfare. Understanding What the Animals Want.* Oxford: Oxford University Press.

Donaldson, S. & Kymlicka, W. (2011). *Zoopolis. A Political Theory of Animal Rights*. Oxford: Oxford University Press.

— (2014a). "Animals in Political Theory". In Kalof, L. (ed.). *Oxford Handbook of Animal Studies*. New York: Oxford University Press, 43-64.

— (2014b). "Unruly beasts: animal citizens and the threat of tyranny". *Canadian Journal of Political Science*, 47, 23-45.

Ferrari, H. R.; Lázaro, L. & Tarzia, C. E. (2018). *Las cuatro preguntas de Tinbergen*. Universidad Nacional de La Plata. (Libro digital) Recuperado de <https://libros.unlp.edu.ar/index.php/unlp/catalog/download/1075/1061/3488-1>

Haynes, R. (2008). *Animal Welfare. Competing Conceptions and their Ethical Implications.* New York: Springer.

Kojusner, N. (2022). "Control ético de población y convivencia responsable con especies liminales. El desafío de las palomas urbanas para el bienestar animal". *Revista Latinoamericana de Estudios Críticos Animales*, 9(1).

Korsgaard, C. (2018). *Fellow Creatures. Our Obligations to the Other Animals*. Oxford: Oxford University Press.

Krupenye, C. & Call, J. (2019). "Theory of mind in animals: Current and future directions". *WIREs Cognitive science*, 10(6), e1503. <https://doi.org/10.1002/wcs.1503>

Kymlicka, W. & Donaldson, S. (2017). "Inclusive Citizenship Beyond the Capacity Contract". In Shachar, A. et al. (eds.). *The Oxford Handbook of Citizenship*. Oxford: Oxford University Press, 863-880.

Montes Franceschini, M. (2021). "Animal Personhood: The Quest for Recognition". *Animal & Natural Resource Law Review*, 17, 93-150.

Pérez Pejcic, G. (2020). "Materiales para defender a los animales liminales". *Revista Latinoamericana de Estudios Críticos Animales*, 2, 21-84.

Picasso, S. (2015). "Reflexiones a propósito del supuesto carácter de sujeto de derecho de los animales. Cuando la mona se viste de seda". *La ley* 16/04/2015. Cita online AR/DOC/114472015, 1-13.

Planinc, E. (2014). "Democracy, desposts and wolves: on the dangers of Zoopolis' animal citizen". *Canadian Journal of Political Science*, 47(1), 1-21.

Quong, J. (2017). *Contractualism*. In: Blau, A. (ed.). *Methods in Analytical Political Theory*. Cambridge: Cambridge University Press, 65-90.

Rawls, J. (1971). *A Theory of Justice*. Cambridge: The Belknap Press.

Rowlands, M. (2009). *Animal Rights. Moral Theory and Practice.* Palgrave McMillan. <https://doi.org/10.1057/9780230245112>

— (2012). "¿Pueden los animales ser morales?". *Dilemata*, 9, 1-32.

Sagoff, M. (1984). "Animal Liberation and Environmental Ethics: Bad Marriage, Quick Divorce". *Osgoode Hall Law Journal*, 22(2), 297-307.

Smith, K. (2021). *Governing Animals. Animal Welfare and the Liberal State*. Oxford: Oxford University Press.

Suárez, P. (2017). "Animales, Incapaces y Familias Multi-especies". *Revista Latinoamericana Estudios Críticos Animales*, 4(2), 58-84.