

Orcas – A Landmark Case

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In 2002 Angela Campbell, a young legal intern, wrote a bold paper entitled ‘Could a chimpanzee or bonobo take the stand?’¹ She asserted ‘The federal competency standards for witnesses testifying on the stand are fairly liberal. Witnesses must be able to distinguish right from wrong, understand the concept of punishment, perceive events, and remember those events to communicate them in the future. Chimpanzees and bonobos are able to do all of these things to some degree, and therefore, arguably satisfy the federal competency standards. In some situations, this indicates that these nonhuman apes

should be allowed to testify in court, subject to the federal competency and interpreter rules.’ She concluded that a chimpanzee or a bonobo could meet the substantive requirements for qualifying as a competent federal witness. They are able to communicate, distinguish right from wrong, understand the concept of punishment, perceive events and then communicate about them.

Campbell felt that while the best chance of getting a chimp or bonobo on the stand would be to give testimony as witness to a crime, it would be more difficult for her to testify on her own behalf to protest some action which had been taken against her, because the apes at this point in time are considered property, and a ‘thing’ cannot testify on its own behalf.

Since that time there have been a couple of cases which have taken the latter route, testing the legal concept of ‘personhood’ in non-human primates, with somewhat differing results.

In a ground-breaking case at the Mödling district court, Austria, a judge ruled on the ‘humanness’ of a chimpanzee (Hiasl*), specifically over whether he was entitled by law to a legal guardian². As only humans can have legal guardians, the primary question to be answered by the Austrian courts was whether a chimp would qualify as such or not. This was a prerequisite to Hiasl securing donation money and thus avoiding deportation. The judge decided not to proceed as Hiasl was not mentally handicapped and faced no imminent threat, both being preconditions for getting a legal guardian. The applicants (VGT**) appealed but on 9th May, 2007, the judge turned down the appeal arguing that the applicant had no legal standing, thus avoiding the real issue.

On all levels, from the district court to the provincial appeal court in Wiener Neustadt (turned down on 5th September, 2007) up to the Austrian Supreme Court, judges refused to decide this question. Instead, the application was refused on the grounds that VGT had no legal standing. There followed an

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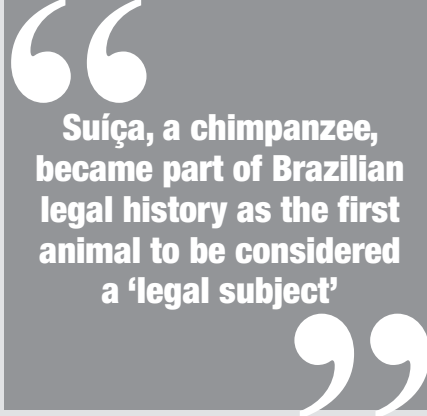
¹ Campbell, A. (2002). Could a chimpanzee or a bonobo take the stand? *Animal Law*, 8, 243, 25 April.

² <http://www.guardian.co.uk/world/2007/apr/01/austria.animalwelfare>

* The chimpanzee in question is called Hiasl. He was

born in the Sierra Leone jungle in 1981, captured by animal traders and illegally shipped to Austria in 1982, destined for a pharmaceutical laboratory. Customs officials intercepted the crate and Hiasl was handed to an animal sanctuary. Years later, the sanctuary went bankrupt and Hiasl was sent to a zoo.

** VGT is Verein Gegen Tierfabriken (the Association Against Animal Factories) in Austria



appeal to the ECHR³. The applicants asked the court to nullify the Supreme Court ruling on the grounds of an unfair trial and other basic rights being broken. Several high profile names supported the case***.

According to Dr Martin Balluch, applicant on behalf of VGT, there is no definition of what constitutes a person in Austrian civil law code³ and all the judges evaded the question of 'personhood'.

In the second case⁴, in 2005, the late Suíça, a chimpanzee, became part of Brazilian legal history as the first animal to be considered a "legal subject" under a petition for habeas corpus, the aim being to equate primates with human beings for the purposes of granting habeas corpus in order to secure release from solitary confinement and relocation to a primate sanctuary. The judge in the case, Edmundo Lúcio da Cruz, who analysed the petition submitted to the Brazilian courts, dismissed the case as Suica died and the petition for habeas corpus lost its purpose. However, he stated that "criminal procedural law is not static, but rather subject to constant change, and new decisions have to adapt to new times. I believe that even with Suíça's death, this subject will endure in continuous debates, principally in law school courses." Some have taken this to mean he might have ruled that Suica was subject to habeas corpus.

Both cases, adopting different strategies, concerned non-human hominids and attempts to achieve

transubstantiation, i.e. a change from property to person. The recent Orca case is the first of its kind to concern the 'reclassification' of a cetacean species who many consider display several of the cognitive abilities of great apes, eg. self-recognition, use of a form of communication, use of tools, deception and solving complex problems, and also share a theory of mind****.

Orca case

In Oct 2011 People for the Ethical Treatment of Animals (PETA) filed a lawsuit against SeaWorld on behalf of 5 wild-captured orcas (Tilikum, Katina, Kasatka, Ulises, and Corky), the putative plaintiffs, seeking a declaration that these five orcas (Orcinus orca, or Killer Whales, the largest member of the dolphin family and apex predators) are slaves and subjected to involuntary servitude in violation of the 13th Amendment to the U.S. Constitution. The case sought the release of the animals to a more appropriate environment such as a coastal sanctuary.

On January 13, PETA's legal team filed a brief⁵ in the US District Court for Southern California, opposing SeaWorld's motion. PETA's brief cited more than 200 years of US Supreme Court precedent, including such landmark cases as Dred Scott⁶ to establish that the orcas' species does

not deny them the right to be free under the 13th Amendment, and that long-established prejudice does not determine constitutional rights.

A federal judge, Jeffrey Miller, dismissed a claim by PETA that orcas were enslaved, ruling that they have no standing to seek the same constitutional rights as people ('...there is simply no basis to construe the Thirteenth Amendment as applying to non-humans.').⁷ He added the 'goal' of PETA attorneys who brought the lawsuit 'to protect the welfare of orcas is laudable', even if the 13th Amendment was not the correct way to approach the case. Indeed, some conservationists and legal experts assert that PETA have made a serious strategic error in attempting to apply the 13th Amendment, which abolished 'slavery or involuntary servitude' in America, to non-humans.

'It was a foolish suit and a sure loser,' says Steven Wise, president and founder of the Centre for the Expansion of Fundamental Rights' Nonhuman Rights Project (NhRP), which seeks to establish legal personhood and legal rights for animals⁸. Over the objections of both PETA and SeaWorld, NhRP secured leave of the judge to file an amicus curiae brief in which it urged the court not to reach the merits of PETA's claim⁹. SeaWorld objected to the amicus request as they were confident that the Court would rule that orcas are not slaves under the 13th Amendment.

³ <http://www.vgt.at/publikationen/texte/artikel/20080118Hiasl.htm>

*** Jane Goodall and Volker Summer, among others.

⁴ For translation of the Suica case see <http://www.animallaw.info/nonus/cases/cabrsuicaeng2005.htm> "Historic decision recognises chimpanzee as legal subject", *Correio da Bahia*, 6 October 2005.

**** The theory of mind has diffuse aspects, but essentially refers to the ability to infer another's

state of mind even if it differs from one's own.

⁵ United States District Court for the Southern District of California, Case No.11-cv-2476 JM WMC, Feb 13 2012.

⁶ The Dred Scott case, bought by the African-American slave who unsuccessfully sued for his and his family's freedom, eventually led to the abolition of slavery in the US.

⁷ United States District Court for the Southern District of California, Case 3:11 -cv- 02476 JM-WMC,

Document 32, filed 02/08/12. <http://www.nonhumanrightsproject.org/wp-content/uploads/2012/02/Court-ruling-in-PETA-v-SeaWorld.pdf>

⁸ <http://www.nonhumanrightsproject.org/2012/02/26/the-moral-rights-of-dolphins-and-whales/>

⁹ Reach the merits: (US) Generally, courts decline to reach the merits of a case when an aggrieved party does not utilize the administrative procedures available.

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**if the case fails and there
 is then case law history
 against recognising
 those rights, that would
 not be helpful for the
 cause**
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What then might be the more effective methods of achieving transubstantiation from ‘thing’ to ‘personhood’ for great apes or cetaceans?

1) Within the courts, rather than tackling the question of personhood head on, perhaps a more nuanced approach, would be to adopt Angela Campbell’s advice – the giving of testimony as a witness to a crime. This would be difficult but if such testimony is accepted then legal parity between human and non-human hominids or other species is achieved, at least in that respect, and may open a door to other species or other situations.

In the US, Steven Wise and his team are preparing a series of strategic cases that rely upon the common law of the 49 American common law states, rather than on statutes or constitutions of the United States or any state. ‘That way the problems of statutory interpretation and legislative history will not arise’ (pers. comm., Mar 2012). Their objective is not about standing but gaining personhood for the species.

NhRP believe the more promising course of action is to pursue a common law writ of habeas corpus and investigate the circumstances under which it might be used by a third party to transfer custody rather than as a release from custody¹⁰.

2) Within parliaments, the New Zealand Animal Welfare Act stands out. As long ago as October 7th, 1999, this Act was passed by the New Zealand Parliament] which

recognised the need for protection for “non-human hominids”, a world first, included the following statement: “No research, testing or teaching involving the use of a ‘non-human hominid’ is permitted unless ... [it] is in the best interests of the non-human hominid or ... in the interests of the species to which the non-human hominid belongs and ... the benefits to be derived ... are not outweighed by the likely harm to the non-human hominid.”¹¹

In 2008 the Environmental Committee of the Spanish parliament [Cortes Generales] passed a resolution endorsing the aims of the Great Ape Project, including banning the use of great apes in circuses and similar venues. It seems, though, that this resolution was never enacted by the full Spanish parliament, and little seems to have come of this resolution¹².

Now there is a Declaration of Rights for cetaceans which includes the following: ‘No cetacean should be held in captivity or servitude; be subject to cruel treatment; or be removed from their natural environment.’¹³ If that declaration were adopted into law, no one would be permitted to keep orcas in captivity. While it does not address the question of legal personhood – indeed, it is more of a moral than a legal document - it may serve to protect them from exploitation until the matter of personhood is settled.

Declaration of Rights for Cetaceans: Whales and Dolphins:

1. Every individual cetacean has the right to life.

2. No cetacean should be held in captivity or servitude; be subject to cruel treatment; or be removed from their natural environment.
3. All cetaceans have the right to freedom of movement and residence within their natural environment.
4. No cetacean is the property of any State, corporation, human group or individual.
5. Cetaceans have the right to the protection of their natural environment.
6. Cetaceans have the right not to be subject to the disruption of their cultures.
7. The rights, freedoms and norms set forth in this Declaration should be protected under international and domestic law.
8. Cetaceans are entitled to an international order in which these rights, freedoms and norms can be fully realized.
9. No State, corporation, human group or individual should engage in any activity that undermines these rights, freedoms and norms.
10. Nothing in this Declaration shall prevent a State from enacting stricter provisions for the protection of cetacean rights.

The Helsinki Group, 22nd May 2010, Helsinki, Finland.

The Declaration was discussed at the AAAS Meeting in Vancouver, Feb 2012

¹⁰Wise, Steven M [2011] Legal Personhood and the Nonhuman Rights Project. Animal Law, 17, 1.

¹¹Animal Welfare Act 1999, Section 85 and Appendix II

¹²In June of 2008, a resolution concerning great apes

was proposed in the Spanish Cortes Generales (Spanish Parliament) which, inter alia, would have required Spain to promote forums that protect great apes to prevent them from being mistreated, enslaved, tortured, killed, or driven into extinction.

¹³<http://cetaceanconservation.com.au/cetaceanrights/index.php>