Dilemma between Human and Animal Rights: Perspective from Japan

By Hiroyoshi Aoki

Introduction

In the late 17th century, the United Kingdom established the Bill of Rights, sowing the seeds of the idea of fundamental human rights globally.[1] In the early 19th century, the United Kingdom introduced the world's first statute protecting nonhuman animals through its parliamentary system.[2] These groundbreaking developments spread to other countries, such as the United States, France, Germany, and even reached Eastern nations like Japan.[3] Today, the United Kingdom could be regarded as a model country that supports both animal and human rights simultaneously.[4]

However, some have argued that animal and human rights are contradictory. Richard Epstein, a well-known American legal scholar, claimed that animal rights pose a danger to the protection of human rights,[5] in response to the growing concern over animal rights arguments among legal scholars in the United States during the early 2000s.[6] He and other scholars with similar views often highlight significant economic impacts and raise slippery slope concerns.[7]

In a recent case in the United States involving an animal rights organisation suing a zoo for the release of an elephant, the judges of the New York Court of Appeals similarly warned of the potential ramifications of granting a writ of habeas corpus on behalf of the animal.[8] The court expressed apprehension regarding the 'enormous destabilising impact on modern society' that such recognition might provoke, citing risks such as disruptions to property rights, the agricultural sector, and medical research.[9] Additionally, the court highlighted the 'grave difficulty' courts would face in addressing the 'inevitable flood of petition' that would likely follow the establishment of such a legal precedent.[10]

In a similar vein, Richard A. Posner has likened the recognition of animal rights to 'asking judges to set sail on an uncharted sea without a compass,' thereby reflecting the profound challenges and uncertainties inherent in adjudicating such claims.[11] He also draws attention to the Nazis' animal protection policies, which were weaponised as tools of severe oppression against Jews and individuals with disabil-

1 Bill of Rights 1689, 1 Will & Mar Sess 2, c 2. Even in standard texts of Japanese constitutional law, the Bill of Rights is regarded as the emergence of the concept of human rights. See Nobuyoshi Ashibe, Constitution (8th edn, supplemented by Kazuyuki Takahashi, Iwanami Shoten 2023) 78 (in Japanese).

2 Martin Act 1822, 3 Geo. 4, c. 71. 2. See Richard D Ryder, Animal Revolution: Changing Attitudes towards Speciesism (Berg 2000) 79; Thomas G. Kelch, 'A Short History of (Mostly) Western Animal Law: Part II' (2013) 19 Animal L 350.

3 As depicted from the Martin Act to the Japanese Animal Protection Law, see Hitoshi Aoki, Comparative Legal Culture of Animals (Yuhikaku Publishing 2002) (in Japanese).

4 From the perspective of modern human rights development, leading Japanese constitutional scholars such as Yoichi Higuchi have long regarded the United Kingdom, France, Germany, and the United States as model liberal democratic states, particularly in legal education and comparative constitutional studies in Japan. See Yoichi Higuchi, Comparative Constitutional Law (completely revised 3rd edn, Seirin Shoin 1992) (in Japanese). Additionally, the United Kingdom, in particular, can be recognised as a pioneering country that first adopted anti-animal cruelty legislation and animal welfare doctrines, such as the 'Five Freedoms' and the '3R principles,' on a global scale. See Mike Radford, Animal Welfare Law in Britain: Regulation and Responsibility (Oxford University Press 2001).

5 Richard A Epstein, 'The Dangerous Claims of the Animal Rights Movement' (2000) 10 Responsive Community 28.

6 See Martha C Nussbaum and Cass R Sunstein (eds), Animal Rights: Current Debates and New Directions (Oxford University Press 2004).

7 As other scholars, for example, see Richard L Cupp Jr, 'Animals as More than Mere Things, but Still Property: A Call for Continuing Evolution of the Animal Welfare Paradigm' (2016) 84 University of Cincinnati Law Review 1023, 1044; and Nicholas H Lee, 'In Defense of Humanity: Why Animals Cannot Possess Human Rights' (2014) 26 Regent University Law Review 457, 484.

8 Nonhuman Rights Project, Inc. v. Breheny, 38 N.Y.3d 555 (N.Y. 2022).

9 Ibid 573.

10 Ibid 574.

11 Richard A Posner, 'Animal Rights' (2000) 110 Yale Law Journal 527, 533.

ities.[12]

In Japan, many constitutional scholars share a similar perspective. Among them, the concept of animal rights is generally not seen as a significant issue.[13] Instead, it is often regarded as a threat to the protection of human rights, which is the prevailing view. In this paper, I argue that this tendency among Japanese constitutional scholars is related to Japan's historical and cultural background, particularly the process by which the ideas of human and animal rights were introduced from the West to the East.

While these concerns about a slippery slope have validity, there are also merits to recognising animal rights (or their individual interests).[14] I argue that, at least from the perspective of a Japanese constitutional scholar's theoretical framework, human rights and animal rights are not necessarily always in contradiction. In fact, they may share more similarities than differences. Paradoxically, a critical examination of Japanese arguments opposing animal rights reveals these underlying similarities. Japanese arguments opposing animal rights are underpinned by the pervasive theory of the 'inflation of human rights,' originally proposed by Yasuhiro Okudaira. His human rights theory aimed to strictly establish the scope of constitutional fundamental human rights by employing political philosophy. Surprisingly, or perhaps precisely for this reason, his approach to human rights shows similarities with Steven Wise's advocacy for expanding fundamental dignity rights to animals. By focusing on this similarity, we can explore the possibilities, limitations, and variations in approaches that allow for the compatibility of both animal and human rights.

Japanese constitutional scholars and human rights

In Japan, the concept of human rights was formally adopted into law in 1889 during the Meiji Restoration with the establishment of a modern monarchical constitution.[15] At that time, Japan, under pressure from imperialist powers, recognised the necessity of creating a modern constitution.[16] However, due to this foreign pressure, modern legal concepts such as human rights were not fully internalised, leading to a somewhat superficial adoption. For instance, Japan adopted a monarchical system where the emperor held sovereignty,[17] and the people had rights and duties only as loyal subjects,[18] drawing inspiration from the Prussian constitution.[19] The practice of the Meiji Constitution was not only undemocratic but also lacked a genuine commitment to human rights. In terms of the legal text, its commitment to human rights was comparatively weaker than that of the recent constitution.

12 Ibid 535-536. Also, Jessica Eisen, an expert in comparative constitutional animal law across various countries, reveals that in some nations, animal protection clauses of domestic constitutions are used to oppress minority groups. See Jessica Eisen, 'Animals in the Constitutional State' (2018) 15 International Journal of Constitutional Law 916-918. For a broader discussion on the regulation of ritual slaughter, see Jeremy A. Rovinsky, 'The Cutting Edge: The Debate over Regulation of Ritual Slaughter in the Western World' (2014) 45 California Western International Law Journal 79.

13 In the traditional old Japanese constitutional textbook by Shiro Kiyomiya, he referred to the animal protection provision in the Swiss Constitution at the time (prohibiting certain slaughter methods targeting Jewish people) in the context of explaining that the substantive definition of 'constitutional law' should not encompass any content unrelated to state institutions and fundamental rights. He thought that the Swiss Constitution of that period made a mistake by providing such a rule, as it addressed animal protection which he considered to fall outside the proper scope of constitutional law. See Shiro Kiyomiya, Constitution I (new edn, Yuhikaku Publishing 1971) 7 (in Japanese). Kiyomiya's argument has been frequently cited by other Japanese constitutional scholars. For example, Yoichi Higuchi, in his recent work, acknowledges Kiyomiya's example. See Yoichi Higuchi, Constitution (4th edn, Keiso Shobo 2021) 6. While Higuchi questions whether Kiyomiya's animal protection example should be excluded from constitutional law, his scepticism stems from the context of the Swiss provision potentially suppressing Jewish people. Higuchi argues that the provision may relate to matters of fundamental rights, specifically religious freedom. However, Higuchi also maintains that the issue of 'animals' itself does not constitute a constitutional matter. Higuchi's perspective will be discussed further in Section III.

14 Saskia Stucki, 'Towards a Theory of Legal Animal Rights: Simple and Fundamental Rights' (2020) 40 Oxford Journal of Legal Studies 533, 553–559, highlights several merits of recognising animal rights. These include the procedural advantage of addressing issues such as standing and enforceability, the substantive benefit of properly weighing the interests of non-human animals within proportionality tests in court, the fallback function of providing a safety net and establishing a baseline, and the transformative function of guiding society towards an ideal future framework for animal law.

15 Nobuyoshi Ashibe (n 1) 18.

16 Okudaira Yasuhiro, 'Forty Years of the Constitution and Its Various Influences: Japanese, American, and European' (1990) 53 Law and Contemporary Problems 48.

17 Constitution of the Empire of Japan 1889, art. 1.

18 ibid arts 18-30.

19 Yukio Matsui, 'Characteristics of the Japanese Constitution: An Overview' (2015) 26 King's Law Journal 189.

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The shift from a superficial to a more deeply committed approach to human rights in the legal text occurred after the Second World War, with the establishment of the Constitution of Japan in 1947.[20] Under indirect governance by the United States, Japan was compelled to reform its constitution in a manner more aligned with human rights principles.[21] As a result, the Japanese Constitution today includes a comprehensive list of human rights encompassing modern freedoms (such as freedom of speech, religious liberty, personal liberty, and freedom of economic activity)[22] as well as more contemporary social rights (such as the right to maintain a basic standard of living in terms of health and culture, the right to education, and labour rights).[23] While the emperor still exists, his role has fundamentally changed; sovereignty now resides with the people, and the emperor is a symbolic figure with no political power.[24] The principle of the separation of powers also gained strength, particularly to protect minority rights, with the introduction of systems of judicial review in general legal courts.[25]

However, partly because the constitution was created under indirect rule of the United States, it is debatable whether the Japanese people fully accept and commit to constitutional democratic values. The dominant political party continues to propose revisions to the constitution in a more conservative direction,[26] voter turnout remains low,[27] and there is little change in the ruling party.[28] Despite the

20 Constitution of Japan 1947 arts 10-40. See also Nobuyoshi Ashibe (n 1) 35.

21 Nobuyoshi Ashibe (n 1) 22.

22 Constitution of Japan 1947, arts 13-24, 29-40.

23 Ibid arts 25-28.

24 Ibid arts 1-8.

25 Ibid art. 81.

26 Kenneth Mori McElwain and Christian G Winkler, 'What's Unique about the Japanese Constitution? A Comparative and Historical Analysis' (2015) 41 Journal of Japanese Studies 249. In their article, McElwain and Winkler point out that there have been recent arguments from a more constructive direction.

27 Ministry of Internal Affairs and Communications, 'Turnout Rates for National Elections' https://www.soumu.go.jp/senkyo/senkyo_s/news/sonota/ritu/index.html accessed 10 January 2025 . For the last 10 years, the voter turnout in national parliamentary elections in Japan has remained below 60%.

28 In democratic theory, the realistic possibility of alternation in power is considered a fundamental principle, as it ensures accountability, prevents political stagnation, and fosters responsiveness to voter preferences. See Robert A Dahl, Polyarchy: Participation and Opposition (Yale University

existence of a system of judicial review of legislation, the number of judgments ruling that a legislation is unconstitutional remains low.[29] Public knowledge of human rights may be limited because these ideas are not deeply rooted among the populace. Post-war Japanese constitutional scholars believed that the lack of commitment to constitutionalism based on human rights as natural rights led the pre-war Japanese government to the Asia-Pacific War. Therefore, the pre-war Japanese government aimed to raise public awareness of human rights in the early post-war years.[30]

Thus, Japanese attitudes towards human rights differ between academic constitutional scholars and political society, including the general populace. While human rights are accepted in political society and among the public, they are not deeply ingrained. Among academic constitutional scholars, however, there has been a sustained effort to promote the principles of human rights towards establishing a normal constitutional state.[31]

Japanese constitutional scholars and animal rights

While Japanese constitutional scholars are committed to promoting the principles of human rights, they typically reject the notion of animal rights. For instance, Yoichi Higuchi, a prominent constitutional scholar, remarked:

> What if we abandon the premise of 'philosophical humanism'=anthropocentrism? In such a scenario, the warning that it would not be surprising for dogs or horses belonging to kings or nobles to be elevated to the status of honourable entities, whilst the humans tasked with cleaning their kennels or stables remain unrecognised, would materialise.[32]

In this statement, he highlights the risks associated with abandoning the premise of anthropocentrism, as it could lead to drawing distinctions among humans. Furthermore, prior to these sentences, he raises concerns that selecting which beings deserve to be considered human could set us on a slippery slope towards eugenics.[33]

More recent papers by other Japanese scholars, particularly those referencing the Basic Law for the Federal Republic of Germany, which includes an article on animal protection, express concerns about the animal rights movement. As this concern, Yasuhiro Fujii emphasised that the adoption of the animal protection clause in the German Basic Law occurred in the context of debates opposing Islamic religious slaughter methods[34]. He also highlighted its resemblance to the Nazi regime's antagonism towards Jewish religious slaughter practices, noting that the Nazis exploited regulations on such practices as propaganda to promote national ethnic consciousness. He warned of the potential for the animal rights movement to degrade human

Press 1971).

On Japan's political condition, see Jordan Hamzawi, 'Old Party, New Tricks: Candidates, Parties, and LDP Dominance in Japan' (2022) 23 Japanese Journal of Political Science 283. Japan experienced a historic change in power in 2009 when the Democratic Party of Japan briefly took control, but the Liberal Democratic Party (LDP) regained its dominant position just three years later. In the general election of October 2024, the ruling coalition lost its majority in the House of Representatives, marking its worst result since 2012, though it retained more seats than any other party.

29 Shigenori Matsui, 'Judicial Review of Restrictions on Constitutional Rights in Japan: Highly Ad Hoc, Contextualized, and Deferential' in Po Jen Yap (ed), Proportionality in Asia (Cambridge University Press 2020) 140-168; David S Law, 'The Anatomy of a Conservative Court: Judicial Review in Japan' (2009) 87 Texas Law Review 1545. Matsui and Law explain why the Japanese court is considered highly conservative. On the other hand, there is some suggestion that Japan is gradually moving towards issuing rulings that strike down laws as unconstitutional in favor of LGBT rights. See Masahiko Kinoshita, Guy Baldwin, and Ayako Hatano, 'Breaking with Conservatism?: A Bolder Japanese Judiciary on the Rights of Sexual and Gender Minorities' (Verfassungsblog, 7 August 2024) https://verfassungsblog.de/japan-supreme-court-same-sex/ accessed 25 November 2024. But even now, there have been only 13 cases since 1947 in which a statute was declared unconstitutional and void.

30 Atsushi Suzuki and Yuichi Deguchi (eds), Images of Post-war Constitutional Scholars (Kobundo 2021) (in Japanese), argues in detail the trajectory of post-war constitutional scholars. Scholars of the younger generation tend to focus more on the analysis of legal theories or precedents compared to older generations.

31 Yasuo Hasebe, Towards a Normal Constitutional State: The Trajectory of Japanese Constitutionalism (Waseda University Press, 2021).

32 Yoichi Higuchi, General Theory of Fundamental Rights (Yuhikaku Publishing 2004) (in Japanese) 67.

33 Ibid 66.

34 Yasuhiro Fujii, 'Constitutional Prehistory of Animal Protection (1)' (2008) 59(1) Waseda Law Journal 397 (in Japanese); Yasuhiro Fujii, 'Constitutional Prehistory of Animal Protection (2)' (2009) 59(2) Waseda Law Journal 533 (in Japanese); Yasuhiro Fujii, 'Cases Surrounding the Amendment of the German Constitution (Basic Law Article 20a) for Animal Protection' (2009) 60(1) Waseda Law Journal 437 (in Japanese).

dignity and expressed deep sympathy with Yoichi Higuchi's theoretical framework on human rights and human dignity.[35]

While Japanese constitutional scholars rarely engage in discussions on animal rights, the prevailing attitude in Japan remains one of sk epticism towards the concept of animal rights. In addition, the absence of an animal protection clause or any explicit textual basis for the protection of nonhuman animals in the Constitution of Japan is one of the reasons for this skepticism.

Interestingly, even Japanese animal law scholars tend to reject the theory of animal rights. Hitoshi Aoki, a pioneer in animal law in Japan, asserts:

Ultimately, whether we can accept animal rights depends on whether they contribute to humans and human society. (…) This conclusion is natural because law is a construct of human society, and law serves as a norm for human beings.[36]

His stance can be interpreted as a form of welfarism, grounded in indirect duty to animals.[37] He reveals that the Act on Welfare and Management of Animals of 1973 was introduced under foreign pressure, particularly during the visit of the Queen of the United Kingdom to Japan as a means to avoid criticism of animal abuse. Therefore, this law is not seen as an introduction of animal rights, nor does it recognise animals as 'sentient beings' with legal interests in the strict sense. Instead, it is viewed as a measure to safeguard the moral fabric of human society by governments and scholars.[38] While the Act on Welfare and Management of Animals has been revised numerous times, there remains a lack of effective and enforceable protection for domestic and laboratory animals under Japanese law. The Act on Welfare and Management of Animals in Japan includes licensing regulations for businesses that handle animals.[39] However, this licensing system applies only to pet-related businesses and zoos, and it does not cover farming or laboratory facilities.[40] Similarly, penalties for animal cruelty are generally interpreted as not applying to farmed or laboratory animals.[41]

Furthermore, he argues that the only practical way to accommodate respect for animal rights is for Parliament to enact legislation treating animals as legal subjects in a fictional, instrumental, and speculative manner—similar to how corporations or ships are treated.[42] Under the general framework of constitutional interpretation and legal precedents in Japan, corporations are recognised as partially enjoying fundamental human rights. Building on this, he suggests that it could be possible

35 Ibid. For an exceptional opinion in support of animal rights in Japan, see Chihiro Asakawa, The National Goal Provision and Social Rights: On Environmental and Animal Protection (Nippon Hyoron Sha 2008) (in Japanese). Asakawa also studied the revision of the Basic Law for the Federal Republic of Germany, introducing more supportive arguments regarding animal protection in Germany. And he proposes interpreting provisions of the Constitution of Japan to support nonhuman animal rights.

36 Hitoshi Aoki (n 3) 270.

37 Kant and other early modern philosophers explained that the reason animals should be protected is not because of the animals' own interests, but rather because of the moral implications for society. In animal ethics, this concept is referred to as 'indirect duty'. See Robert Garner, Animals, Politics and Morality (Manchester University Press 2004) 13. Kant argued that cruelty towards animals could desensitise individuals. See Immanuel Kant, Lectures on Ethics (Louis Infield tr, Methuen & Co 1930) 239.

38 Ministry of the Environment, Guidelines on Responses to Animal Abuse and Related Issues (2022) https://www.env.go.jp/nature/dobutsu/aigo/2_data/pamph/r0403a.html accessed 9 January 2025 (in Japanese); Hitoshi Aoki, Japanese Animal Law (2nd edn, University of Tokyo Press 2016) 72-75 (in Japanese); Mikami Masataka, 'A Legislative Study on the Legal Interests Protected in Criminal Offences Related to Animal Abuse' (2018) 58 Bulletin of Institute for Law and Religion 74 (in Japanese); and Sakura Minowa, 'The Act on Welfare and Management of Animals 25 Years After Its Enactment: Current Situation and Issues' (2024) 527 Hogaku Kyoshitsu 34 (in Japanese). Minowa emphasised that the Act is not intended to serve the interests of animals themselves. At the same time, in the article, she seeks to bridge Japan's compassion-based approach with Britain's scientific welfarist approach.

39 Act on Welfare and Management of animals, art. 10-24.

40 Ibid art. 10 (animals 'exclude those pertaining to livestock agriculture and those being cared for or kept in order to be provided for use in testing and 'research, use in manufacturing biological preparations, or for other uses specified by Cabinet Order').

41 Ministry of the Environment (n 39) 28 ('The slaughtering of industrial animals, euthanasia procedures, and acts such as culling under the Act on Domestic Animal Infectious Diseases Control (Act No. 166 of 1951) or the Rabies Prevention Act (Act No. 247 of 1950), veterinary practices, animal experimentation, and euthanasia are generally not considered unjustifiable killing or injury, as they are recognised as socially legitimate acts under laws and regulations'). For further details on recent developments in the Animal Protection Law in Japan, see Takashi Makino, 'Reviewing Animal Protection Act revised in 2019' (2021), 26 (1) Heisei Journal of Law and Political Science 249 (in Japanese).

42 Hitoshi Aoki, Japanese Animal Law (2nd edn, University of Tokyo Press 2016) 222 (in Japanese).

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to extend such treatment to animals in an instrumental manner. This indicates that even a leading figure in Japanese animal law does not accept the concept of animal rights as natural rights rooted in the subjective experiences or sentience of individual animals.[43]

Reflecting on the previous section, this phenomenon can be interpreted as an unintended consequence of the emphasis on human rights. Japanese constitutional scholars take the realisation of modern 'human' rights seriously, which is why they view 'animal' rights as a potential danger that undermines human dignity. In a society where human rights are not deeply entrenched, the primary objective of constitutional scholars is to establish and reinforce modern human rights. Their expansion and development could be interpreted as being deferred to a later stage.

'Inflation of human rights' and limiting human rights theory

In fact, not only animal rights but also other new-generation rights are often not fully accepted or effective within the theories of Japanese constitutional scholars. The new-generation rights I refer to here, as defined by public international law scholars, encompass second- and third-generation rights.[44] First-generation rights are essentially negative rights, which require the state to refrain from overreaching. In contrast, second-generation rights are positive rights that require the state to take action to ensure at least a basic standard of living for all individuals in society. While these first- and second-generation rights are intended to apply to individual human beings, regardless of their identity or group affiliation, third-generation rights are more focused on solidarity or collectivity. They are designed to protect certain communities , such as the right to development, the right to an ecologically balanced environment, and the right to

43 Conversely, Steven M. Wise cautions against the use of legal fictions while disregarding factual realities, referring to Bentham's argument. For further discussion, see Steven M Wise, 'Hardly a Revolution: The Eligibility of Non-human Animals for Dignity-Rights in a Liberal Democracy' (1998) 22 Vermont Law Review 793, 882–883.

44 Karel Vasak, 'A 30-Year Struggle; The Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights' (1977) 30 UNESCO Courier 28-29, 32.

peace.[45]

These second- and third-generation rights have limited impact in the context of judicial review in domestic courts, not only in Japan but also in other liberal democratic countries, where they are not widely accepted.[46] However, what is interesting about Japan is that while there is a push to promote idealised rights that are not deeply rooted in society, there remains a strong emphasis on establishing first-generation rights, with a reluctance to fully endorse the effectiveness of second- and third-generation rights.[47] Japanese constitutional scholars tend to be strongly committed to negative rights, but this support does not always extend to positive rights or collective rights.[48]

This position is understandable because second- and third-generation rights can have significant side effects, potentially requiring a reevaluation of how constitutional rights are structured, similar to the challenges faced during the establishment of the Second Bill of Rights in the New Deal era.[49] It is not surprising that Japanese constitutional scholars, who have deeply studied Western legal theories and histories as an ideal model since the Meiji Restoration, might aim to mirror the historical steps taken by Western countries.[50]

To justify their position, Japanese scholars often refer to the theory of 'the Inflation of Human Rights.[51]' This theory suggests that the effectiveness of human rights diminishes if too many new kinds of human rights are accepted, as this would compromise internal consistency. This concept was coined by Yasuhiro Okudaira, a prominent postwar constitutional scholar who was also involved in social movements against military expansion and introduced political philosophy into Japanese constitutional theory. His position, commonly recognised as a limiting human rights theory,[52] seeks to restrict the subjects and contents of constitutional rights within domestic positive law, and it continues to be respected among constitutional scholars today.[53]

The term of 'the Inflation of Human Rights' is still referenced in standard textbooks on the Constitution of Japan, particularly in the context of interpreting Article 13, which is often used as a basis for recognising unwritten and unstated constitutional rights, such as the right to privacy. These references serve as a caution against the arbitrary interpretation of the article.[54] Naturally, 'the Inflation of Human Rights' applies not only to the interpretation of Article 13 but also to the broader interpretation of all articles in the Japanese Constitution.

Also, 'The Inflation of Human Rights' and its foundation of the limiting human rights theory are not intended to take into account the text of the Constitution of Japan. Rather, Japanese constitutional scholars traditionally do not adhere to a strictly textualist interpretation. Instead, they often adopt a more teleological and purposive approach. For example, at a textual level, it may appear that the articles on individual rights in the Constitution of Japanese presuppose that the subjects of rights are limited to 'Japanese citizens.' However, by adopting the teleological and purposive approach, these scholars interpret 'Japanese citizens' broadly to include foreigners or organisations.[55] Nevertheless, under the influence of the limiting human rights theory, this flexible approach is not often utilised to make sec-

45 Ibid; See also Burns H Weston, 'Human Rights' (1984) 6 Human Rights Quarterly 266.
46 Akhil Reed Amar, 'The Bill of Rights as a Constitution' (1991) 100 Yale Law Journal 1131.
47 Koji Aikyo, 'Modern Human Rights and Contemporary Human Rights' in Koji Aikyo (ed), Subjects of Human Rights (Horitsu Bunka Sha 2010) 6-7, 12-16 (in Japanese).
48 Ibid. On collective rights, see also Yoichi Higuchi (n 32) 69–79, 158–169. Regarding positive rights, early Japanese constitutional scholars regarded the social and economic positive rights in the Constitution of Japan as merely programmatic provisions without judicial normativity, a view also shared by the Supreme Court. See Toshiyoshi Miyazawa, Constitution II (new edn, Yuhikaku Publishing, 1971) (in Japanese) 434–435. However, more recently, some scholars have sought to make positive rights clauses more effective in judicial review, while still broadly accepting the legislature's discretion. See Mayuko Kasai, The Normative Significance of the Right to Life (Seibundo, 2011) (in Japanese); Takeshi Ogata, The Constitutional Structure of the Welfare State (Yuhikaku, 2011) (in Japanese); and Mina Endo, 'The Future of the Social State' (2022) 38 Quarterly Jurist 86, 86–92 (in Japanese).
49 Cass R Sunstein, The Second Bill of Rights: FDR's Unfinished Revolution-- And Why We Need It More Than Ever (Basic Books 2004).
50 Yoichi Higuchi (n 4) 11-23.
51 Yasuhiro Okudaira, 'System of Human Rights and Changing its Contents' (1977) 638 Jurist 243 (in Japanese).
52 Koji Aikyo (n 48) 6-8.
53 Ibid. See below, n 59.
54 Fumio Yasunishi, Misaki Maki and George Shishido, Story of Constitutional Law (3rd edn, Yuhikaku Publishing 2018) 90 (in Japanese).
55 Nobuyoshi Ashibe (n 1) 89-100.

ond- or third-generation rights more enforceable or to recognise the rights of animals.

To better understand the Japanese negative stance on animal rights and its philosophical foundations, it is helpful to examine Okudaira's human rights theory, which is widely referenced by scholars.[56] He articulated his human rights philosophy in the following statement:

Constitutional rights as positive law are not sufficiently justified without the label of fundamental human rights. Fundamental human rights have jurisprudential meanings, which are intertwined with and based on moral-philosophical human rights.[57]

Okudaira believed that constitutional rights as positive law require justification that goes beyond mere text; for him, this justification is philosophical in nature. He understood the concept of fundamental human rights in the text as a mixed concept that encompasses both positive law and philosophical human rights theory. In this way, he emphasised the importance of philosophical human rights theory for constitutional rights as positive law and developed his theory using political philosophy. Importantly, he argued for the application of Alan Gewirth's human rights theory.[58] Gewirth's arguments are based on the premise that someone who has a purpose to do something needs the environment to accomplish their purpose, and what is needed for the environment are human rights, which must be respected at least among those who have a certain capacity for rational judgement.[59] Based on Gewirth's theory, Okudaira limits the legal subjects of fundamental human rights to fully developed persons with a minimum rational ability for judgement, while those with less rational capacity have fewer rights, proportionally depending on their ability to judge.[60] Although this argument not only limits the holders of human rights but also seeks to make certain positive rights of fully developed individuals more effective, it has been criticised for marginalising and ignoring the rights of vulnerable persons by relegating them to the periphery as less-than-average individuals.[61]

Limiting or Expanding: Comparing Yasuhiro Okudaira with Steven M. Wise

Despite their criticisms, Okudaira's human rights theory may imply an expansion of the category of human rights holders to include nonhuman animals. This is because his justification for human rights closely resembles that of Steven M. Wise, a prominent American animal lawyer who has persistently argued for extending fundamental human rights, particularly bodily integrity, to nonhuman animals.[62]

Wise's approach is based on rationality, or what he terms practical autonomy.[63] For Wise, practical autonomy differs from ideal autonomy, such as Kantian autonomy, by being more realistic and rooted in capacities such as consciousness or sentience. He argues that if animals possess practical autonomy, they are sufficiently qualified to enjoy certain fundamental rights, though he emphasises that practical autonomy is not a necessary condition for these rights.[64] He posits that fundamental rights require justification not only as positive law but also as natural rights, particu-

56 As recent papers referencing Okudaira's work, see Ryo Ogawa, 'The Foundations of Judicial Review (3)' (2022) 135(11/12) Journal of the Association of Political and Social Sciences 1048, 1011 (in Japanese); Yusuke Ohno, 'The Human Rights and the Constitutional Rights from the Perspective of the Idea of the Concrete Human and the Social Law' (2019) 43 Keio Law Journal 75 (in Japanese); and Kenta Tsuji, 'Can Welfare Rights Be Founded on Human Nature? On the Significance and Limitations of Alan Gewirth's Human Rights Theory' (2016) 112 Waseda Political and Constitutional Studies 19 (in Japanese).

57 Yasuhiro Okudaira, 'Thinking of Human Rights' in The Development of Postwar Constitutional Scholar (Nippon Hyoron Sha 1988) 123 (in Japanese).

58 Alan Gewirth, Reason and Morality (University of Chicago Press 1978).

59 Gewirth calls his argument the Principle of General Consistency (PGC). See ibid 135.

60 Yasuhiro Okudaira (n 60) 137.

61 Seigo Obata, Human Rights of Those Who Are Not 'full-fledged ' (Horitsu Bunka Sha, 2010) (in Japanese); and Hiroshi Sasanuma, 'On the Contemporary Possibilities of Critiquing Human Rights' (1993) 43 Waseda Law Journal 179-235 (in Japanese).

62 Steven M Wise, Rattling the Cage: Toward Legal Rights for Animals (Perseus Books 2000).

63 In his early writings, Wise referred to this concept as ' realistic autonomy ' but later revised the term to 'practical autonomy '. He argues that an animal is entitled to personhood and basic liberty rights if they can desire, intentionally attempt to fulfil their desires, and possess a sense of self-sufficiency that allows them to understand—however dimly—that they are the one wanting something and they are the one trying to achieve it. See Steven M Wise, Drawing the Line: Science and the Case for Animal Rights (Perseus Books 2002) 32.

64 Ibid 34. See also Steven M. Wise (n 65) 243-48.

larly those derived in a secular, philosophical, and universal manner.[65] Notably, Wise also references Alan Gewirth's arguments in his work.[66] Due to this influence, Wise limits the holders of human rights to autonomous beings and suggests that the scope of human rights should be proportionate to a being's rational abilities. In terms of argument structure and steps of justification, Okudaira's theory is akin to a typical 'expanding' claim to nonhuman animals, similar to Steven M. Wise's approach, despite its apparent 'limiting' implications.

Of course, Okudaira did not advocate for the rights of nonhuman animals. He explicitly wrote, 'Jurisprudence is not concerned with the rights of dogs or cats. All rights in law are enjoyed by humans (or legal persons).[67]' However, Okudaira's theory shares certain similarities with Wise's. Both scholars argue that human rights require philosophical justification that goes beyond the framework of positive law, both establish the holders of human rights by referencing philosophical human rights theories, and both cite the same philosopher, Gewirth, using autonomy as a central criterion. These parallels with Wise's theory that Okudaira's theory could potentially expand the legal subjects of fundamental human rights to nonhuman animals, particularly in the context of negative rights like bodily integrity. In this way, we can detect an 'expanding' dimension within the seemingly limiting human rights theory when considering the breakdown of barriers not based on autonomy, such as the factor of species.

However, this does not mean that limiting human rights theory has no restrictive effect on nonhuman animal rights. Even when discussing nonhuman animals, there are still limiting dimensions. This becomes clear when we consider some criticisms of Wise's animal rights theory. For example, Martha C. Nussbaum has criticised Wise's approach as a 'So Like Us Approach,' which focuses on similarities with humans.[68] She argues that using this approach, we cannot adequately value certain rights specific to the needs of particular animal species, such as the right to echolocation or the right to fly with their own feathers. This criticism reveals the limiting effect of Wise's theory in the context of animal rights. More broadly, it suggests that neither Okudaira nor Wise can fully support fundamental legal rights derived from traits other than autonomy.[69]

To further examine this ambivalence, we can consider another passage written by Okudaira:

> There is an inescapable difference between what we talk about when we discuss the human rights of foreigners or prisoners and what we talk about when we discuss the human rights of children or the elderly. In the former case, it means their average human rights are not adequately protected. But in the latter case, it means they need more rights than full-fledged persons, such as special care for children or particular care for the elderly.[70]

In this passage, Okudaira compares the human rights of foreigners and prisoners with those of children and the elderly. In the terminology of his limiting rights theory, 'average 'refers to the capacity for sufficient judgement to exercise one's own negative human rights. In the case of foreigners or prisoners, they possess this ability, but their rights are often restricted due to factors such as nationality or wrongdoing, rather than a lack of autonomy. The argument, therefore, is to allow them broader exercise of their negative rights, which stem from their autonomy.

On the other hand, in the case of children or the elderly, their inability to fully exercise their rights voluntarily is due to a lack of autono-

65 Steven M Wise (n 44) 843-845.
66 Ibid 898-899.
67 Yasuhiro Okudaira (n 60) 138.
68 Martha C Nussbaum, Justice for Animals: Our Collective Responsibility (Simon & Schuster 2023) 27-34.
69 In addition to animal rights theories based on autonomy, other frameworks have been proposed. For instance, Nussbaum advocates for fundamental legal rights grounded in the capability to flourish as a species. Ibid 95–96. Similarly, Kymlicka and Donaldson propose fundamental legal rights derived from a citizenship approach. See Sue Donaldson & Will Kymlicka, Zoopolis: A Political Theory of Animal Rights (Oxford University Press, 2011), 122–123. Both approaches critique Wise's notion of practical autonomy for setting a relatively high threshold, which renders his criteria overly restrictive and the scope of his theory excessively narrow. Wise himself acknowledged this limitation (below).
70 Yasuhiro Okudaira (n 60) 138.

my. Because of this deficiency, they require special care beyond the traditionally listed negative human rights. Okudaira argues that these rights to special care are 'rights beyond just average rights.[71] 'While he likely did not intend to exclude these special care rights from his constitutional theory, he emphasised that accepting such new rights, like new generation rights, would require justifications beyond those provided by his or Gewirth's limiting rights theory, which was developed for traditional negative human rights, such as first-generation rights.[72]

Conversely, Okudaira suggests that our existing fundamental rights, as listed in our constitution as positive law, largely correspond to human autonomy. This is why Wise can use existing fundamental rights to expand rights holders to autonomous animals like chimpanzees or elephants, but he cannot predict the future direction or overall scope of animal rights, as Nussbaum suggests through her capability approach.[73]

It appears that Wise is aware of the characteristics and limitations of his own theory. He stated:

> The overarching values and principles of traditional Western law – fairness, liberty, equality, and integrity in judicial decision-making – demand that dignity-rights be extended to all qualified to receive them, irrespective of their species.[74]

The correctness or desirability of the overarching values and principles of traditional Western law is beyond the scope of this article. Its purpose is to argue that as long as they remain accepted by legislators and utilized by judges, their benefits should be extended to qualified nonhuman animals.[75]

From these passages, we can see that despite his tendency towards universal philosophical arguments, Wise's theory is temporary, context-dependent, and transitional. For him, the overarching values and principles of traditional Western law are the premise or consensus for existing society. He argues that given these values and principles, we must logically extend traditional negative fundamental rights to qualified nonhuman animals. If the premise or consensus in our society changes, Wise's argument would also change. Here, this premise or consensus refers to society or judges' recognition of the connection between existing fundamental rights and autonomy.

Conclusion: Toward consistency

In this paper, I have examined whether animal rights are inherently inconsistent with human rights, particularly within the context of arguments in Japan of East Asian countries. Japanese constitutional scholars generally view animal rights as opposing human rights. This may be because their primary concern has been the promotion of modern human rights, which have not yet been deeply ingrained in Japanese society or political systems. However, we have explored the possibility that animal and human rights are not inherently contradictory and can, in fact, be understood as consistent by examining the perspectives of Okudaira, a Japanese constitutional scholar, and Wise, a leading American animal rights lawyer. Both scholars utilise Gewirth's framework for the universal justification of human rights and have encountered similar challenges when considering rights beyond existing fundamental rights. Moreover, they both recognise the necessity of developing new justifications that extend beyond autonomy for future rights discourse.

Wise cites Okudaira's work to argue that 'the overarching values and principles of traditional Western law' are not exclusive to the West but are shared, at least in part, with the East, including Japan.[76] While it is uncertain wheth-

71 Ibid 139.

72 Strictly speaking, limiting rights theory advocates for certain aspects of second-generation rights. See Alan Gewirth, 'Economic Rights' (1986) 14 Philosophical Topics 169.

73 Martha C. Nussbaum (n 71) 80-117. It is worth mentioning that Wise values 'capacities as important to their flourishing' similarly to capabilities. See Steven M. Wise (n 44) 884: 'Even the lack of autonomy should not automatically disqualify nonhuman animals from dignity-rights. If they possess capacities as important to their flourishing as our capacities for autonomy and self-determination, they should possess the corresponding dignity-rights.' Here, he implies the existence of fundamental legal rights derived from traits other than autonomy.

74 Steven M. Wise (n 44) 796.

75 Ibid 796 note 8.

76 Ibid 858 note 356; Yasuhiro Okudaira (n 16) 9.

er these values and principles are genuinely reflected in Japanese society or politics, it is clear that Japanese constitutional scholars, particularly Okudaira, were committed to the values and principles of traditional Western law. Although Okudaira did not advocate for animal rights, Wise's citation is pertinent because the primary difference between their views lies in their understanding of the practical autonomy of nonhuman animals as a factual matter. If Japanese constitutional scholars are truly committed to human rights and accept certain aspects of Okudaira's justification theory, there may be potential for greater acceptance of nonhuman animal rights within Japanese legal academia. This recognition could serve as a foundation for reinterpreting and expanding existing constitutional human rights, particularly bodily integrity, to include nonhuman animals and enhance animal protection laws.

Additionally, if Wise's analysis is correct—that societal and judicial recognition of the link between fundamental rights and autonomy can transform philosophical animal rights into legal rights—then countries that are more committed to human rights are more likely to incorporate animal rights into their legal systems. From this perspective, Japan's lack of development in animal rights law might be attributed to its insufficient commitment to and practice of human rights. Conversely, the United Kingdom's strong animal welfare laws could be seen as a result of its long history of advocating for human rights.

Ultimately, if we accept that existing fundamental human rights are at least partly grounded in autonomy, then animal and human rights are not necessarily in conflict. Instead, they share commonalities in their justificatory frameworks. Even if limiting human rights theory is limited to extending traditional negative fundamental rights to animals, there is no need to adopt a single justification exclusively.[77] We should not dismiss other rights justified by different theories based on various attributes. At the very least, recognising the consistency between human rights and animal rights at the level of argument structure can help reconcile the apparent conflict between them. Human rights can sometimes conflict with one another, but that does not invalidate the concept of human rights as a whole. Rather, a well-developed animal rights theory can strengthen human rights theory, making the foundation of fundamental rights more robust and resilient. Furthermore, it can contribute to the promotion of universal fundamental rights on a global scale.

77 For example, we can also employ the capability approach, the citizenship approach or other frameworks from the perspective of overlapping consensus. See Martha C. Nussbaum (n 71) 93-95; Donaldson & Will Kymlicka (n 72) 122–123.