

Florence Burgat
Être le bien d'un autre
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What does it mean “to be the goods of another”, “être le bien d'un autre”? The question upon which Florence Burgat constructs his book does not, as it might seem, concern the sphere of moral beneficence or attachments.

The meaning of “bien” examined here is the legal one of property, i.e. an entity that can be used and appropriated for human ends.

Historically, all non-human animals have been subjected to the category and regime of properties. They have been famous victims of the sharp division between persons and *res* operated by the Roman tradition and inherited by most modern legal systems (Korsgaard 2013: 629).

In the first part of the essay Burgat examines this dichotomy from the perspective of the fictitious nature of law and her capacity to establish a universe of discourse independent from natural reality, although designed to order it.

Burgat reflects on the fact that the classification of animals as *res* does not originate from a cartesian belief about their ontological nature. It is clear that animals, from the point of view of natural sciences and phenomenology, cannot be considered as mere objects, deprived of a psychic life, independent needs and a capacity for action. Nevertheless, they can be treated “as if” they were so in the autonomous space of the juridical formulation in order to sanction their economic use.

To underline the independence between the two levels of the speech it suffices to consider the number of different regimes under which an animal of a particular species, for example a rabbit, may fall depending on whether it is classified as wild or domesticate, as pet, farm or research animal.

Legally, biologically similar animals can be classified as quite different objects: the protection afforded to their fundamental interests varies accordingly and to a substantial degree. It could be noted that human beings can also be subjects of different rights depending of contextual and relational ties, such as in the case of citizenship rights. Will Kymlicka has suggested a similar recognition of group-differentiated rights to animal communities (Donaldson and Kymlicka 2011). However, no adult human being, except the

slave, is absolutely excluded from being a subject of justice and from enjoying some fundamental negative rights. The analysis carried out by Florence Burgat is to be understood relatively to this foundational dimension.

The dichotomic classification of persons and properties operated by the juridical system accomplishes therefore a reification of the animal, which is resolved in the utilities and goods that human beings acquire from its body and its activities. This process, however, also influences also the ontological conception: the invisibility of animal subjectivity extends from the juridical fiction both in the realm of empirical science and in that of public discourse.

The second part of the essay aims to support this approach through an in-depth historical examination which I will only briefly mention: on the one hand Burgat reconstructs the evolution of the legal status of the slave in Roman law and in the Code Noir promulgated by Louis XIV in 1685, on the other hand, the evolution of animal law in the French jurisprudence and civil code, from the beginning of the 19th century until today. Several interesting analogies emerge, for example the definition of both slaves and animals as “movable properties”, category that includes indifferently inanimate objects that can be moved, and animated ones which are able to move and act on their own initiative. With regard to these objects it exists for the owner the *ius utendi* and *abutendi*, which qualify as the right to all that is produced by his property and as the right to sell, dispose or destroy the property itself.

The animal's complete appropriation is realized by its consumption. As for the slave, even if it is not used as food, the right to dispose of it is originally equally unlimited. His life can end with the exhaustion of his productive forces and his killing is punished only to the extent that it constitutes a damage to the owner's belonging.

The evolution of the law sees a gradual limitation of the *ius abutendi* of the owner towards his “mobile property”. The old or sick slave can no longer be abandoned, can be transferred to others in case of excessive mistreatment, the punishments and mutilations that the master may inflict in response to disobedience or attempted flight are defined by the law and the unjustified murder is theoretically prosecuted. Similar limitations of property rights are found in the evolution of animal law, starting with the *loi Grammont* in 1850, which punishes the mistreatment of domestic animals, although initially limited to acts performed in public.

Two main themes emerge from the analysis of the present situation of animal law: firstly, the increasing recognition of non-human animals as sentient beings endowed with their own interests in the European and French context. Examples are easily found in Article XIII of the “Treaty on the

Functioning of the European Union”, in art.515-14 of the French *Code civil* reformed in 2015 and, more implicitly, in the evolution of criminal law. Secondly, the inconsistencies and conceptual contradictions that emerge within the corpus of laws between this principle and their persisting treatment as properties and commodities. The same article of the *Code civil* mentioned above, that states that “les animaux sont des êtres vivants doués de sensibilité”, confirms at the same time that “les animaux sont soumis au régime des biens”.

The main concern of animal law remains to establish the means, the time, and the purposes for which an animal may be killed or damaged. While the law severely punishes cruelty to animals, understood as perverse infliction of unnecessary suffering, it is reluctant to censure suffering that is functional to the exploitation of animals and integrated into established cultural and industrial practices. The animal, notes Burgat, at the same time belong and does not belong to itself, and his master is by contrast at once owner and guardian.

Starting from these legal and historical assumptions Burgat develops the most philosophically original contributes of the essay. The first one concerns the analysis of the logic that governs the situation of objects reduced to “being the good of others”. This logic, as it has been seen, originates within the legal representation but translates in the concreteness of the productive processes of exploitation.

The fundamental feature of this condition is the negation of the personal ends of a subject, understood as the set of his interests and the ability to pursue them – along the lines of what Tom Regan has called “preference autonomy” – and their replacement by the purpose imposed by the owner. Employing Hegel’s analysis from the *Elements of the Philosophy of Right*, Burgat shows how the process of appropriation takes place in relation to economic use. His thesis is that the appropriation of the totality of the working time and of production of the subject gives the master ownership over all there is of substantial in him, including his very personality.

Burgat rejects the possibility of a slave’s internal, metaphysical freedom, safeguarded independently from all external conditions. In any case, this escape route is much less available for animals as their inferior endowment of higher mental faculties makes them more vulnerable to the immediate reality of their own physical conditions.

Hence, the whole of the capacity of action of a subject is identical to his very being: “prendre toutes les forces d’un individu, c’est le prendre lui-même”. The difference between ownership of the use of a subject’s abilities and the ownership of the abilities themselves resides therefore only in the limitation of the time and the methods of utilisation.

The thesis is interestingly connected to the debate on the conditions of moral permissibility of at least some forms of animal use. For example, it seems to indicate that the mere protection from suffering and negative mental states is insufficient and should be supplemented with the time and possibility to engage in non-productive activities the animals themselves find rewarding (such as environment exploration, food acquisition, socialization and play). A parallel but descriptive shift is underway in the scientific comprehension of animal welfare, from the narrow hedonism and the traditional five liberties of the Brambell Report toward the appreciation of positive experiences acquired through autonomous activity. Unfortunately, the analysis of Burgat does not fully clarify the underlying normative reasoning, which seems reasonable however to link to a deontological approach, which could match well with Martha Nussbaum's perspective on dignity and capabilities.

Either way, the book is not limited to the *pars destruens*, but leads to a normative position. In general the solutions regarding the inconsistencies of the juridical status of non-human animals can be divided into three main groups: a pragmatic approach suggests to keep the non-human animals in the legal category of goods, although as special objects of specific protection duties defined through the resources of ordinary legislation (Favre 2010). A second approach, adopted for example by Christine Korsgaard, involves the redefinition of animals as subjects of law, through the creation of one or several intermediate categories between persons and properties. Lastly, a third and more radical proposal advocates the recognition of their subjectivity through full inclusion in the category of persons.

The author endorses the last option. Two main arguments are offered: firstly, the autonomy of the juridical formulation is recalled in relation to the vexed question of the qualities or dispositions necessary to be considered a person. Burgat notes that kantian or contractualist theories of personality, more demanding in terms of rational and linguistic requirements, involve the exclusion of many humans from the set of persons. From this observation the well-known marginal cases argument arises. However, Burgat is here rather interested in the process whereby marginal cases are protected "as if" they were persons even though they ontologically are not, specularly to how the slave could ontologically but not legally qualify as a person. The conclusion is that legal personality is not a quality that can be verified, but rather a prescriptive stipulation: "le fruit d'une décision à visée morale, protectrice, dispensatrice de droits, alors qu'aucun accord n'existe sur la compréhension et sur l'extension du concept". Hence, the law may include or exclude objects from the category "à partir du moment où la mentalité d'un société l'y invite fortement".

The second argument concerns the moral importance of sentience and of being the subject of an individual psychic life for having the right to the protection of one's fundamental interests. The will to protect these conscious lives, as already expressed by the legislator, along with the dichotomic division of the juridical system and the plasticity of the legal instrument, contribute to the extension of personality to non-human animals.

The topic is well elaborated throughout the essay and relies on examples of legal instances aimed at the recognition of the *habeas corpus* mainly in favour of great apes, some of which, such as the case of chimpanzee Cecilia in Argentina in 2016, were successful.

However, at least two questions remain to be answered.

On the one hand, how the substantive question of the moral status and standing of animals is to be resolved in the context of a society's political culture, to which the legal instruments refers. Burgat's argument about the plasticity of positive law establishes the possibility, not the necessity, of the inclusion of animals in legal personhood. A change in public culture and mentality is also required, but this change is far from realized. It is important to remark that the recognition of animal sentience in law and culture can have different meanings according to the underlying theories of duties towards them. At present, the most shared conception is probably that humans have, at best, a duty not to inflict pain and suffering to animals but not a general duty not to kill. Robert Garner, for example, believes that for now a right to life should be confined in the domain of ideal political theory, in favour of a non-ideal position focused of the rigid prohibition about the infliction of suffering (Garner 2013).

Secondly, besides public consensus, there are genuine normative questions about the precise set of fundamental rights which legal personality should protect in the case of animals. Fundamental rights are effectively the same, not only for men and other beings, but across all sentient animals? It has been argued that most sentient animals have a right not to be harmed or killed but do not have a genuine right to be free and not to be owned (Cochrane 2012). This position would not be fatal to Burgat's argument – after all, personhood is awarded also to non-autonomous humans – but surely requires to be explicitly engaged.

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