

# Constitutional protection of animal “rights” in South Africa and India: A legal comparison

Research Dissertation submitted in fulfilment of the requirements for the LLM degree  
at the University of Venda

by

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### Declaration

I, Mbavhalelo Gerson Mmbadi, hereby state that the LLM Dissertation titled “Constitutional protection of animal “rights” in South Africa and India: A legal comparison” submitted herewith in fulfilment of my LLM degree in the Module DIS 6700 at the School of Law, University of Venda is my own original work, contains no plagiarism and has, to the best of my knowledge, not previously been submitted by me or any other person to this or any other institution. Further, that it is my own work in design and in execution, and all reference materials contained herein have been duly acknowledged.

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Signed in my presence on this ..... day of ..... 2023.

.....

Commissioner of Oaths.

## Dedication

I have dedicated this research to all animals, regardless of their conservation status.

## Acknowledgment

I would like to thank my supervisor, Prof Jegede, for his guidance in this research. It was not easy, but your patience and constructive criticism was invaluable. I am forever indebted to you.

To Ms. Lansink, thank you for the guidance you gave before your retirement. Your contribution is invaluable.

Many thanks to my wife, Nokuthula Priscilla Mmbadi; and my children Muphulusi Chantelle Mmbadi and Muvhuya Cynthia Mmbadi, and the rest of my family for all the support during this study. Your support was all I needed to pull through this study. I would not have achieved this if you were not always there for me. Thank you for believing in me and always reminding me that I can achieve anything I put my mind to.

To my colleagues at the Wits Law Clinic, I am grateful to have colleagues like you. You pushed me throughout this research, and you kept me motivated even when I was losing motivation. Thank you.

## Abstract

The human-animal relationship has several inconsistencies. This is because of the contradictions on how human beings treat animals. In certain instances, human beings have shown love and affection towards animals, while in some instances, there has been a highest level of cruelty towards animals. Animal cruelty has long been a concern; however, society has occasionally accepted this behaviour as usual. This is because humans have power over animals and view them as property. A number of anti-cruelty Acts have been passed in South Africa in response to the current trend in the plight of animals. However, South Africa's anti-cruelty laws are insufficient, incoherent, and disjointed. Their anthropocentric as opposed to the ecocentric nature raises ethical and legal concern relating to the adequacy of legal protection of animals. Yet, ecocentric focus has emerged as a feature of legal protection in several legal systems; including India, which has used progressive interpretation of its Constitution for legal protection of animals. Using a doctrinal methodology, this study interrogates the various ethical and legal approaches that support the protection of animal rights. It then determines whether the legal protections for animals under South African law are adequate, and whether there are any lessons to be learned from India's constitutional protection of animals. It was found that Courts in South Africa prefer anthropocentric arguments to protect animals, while Courts in India prefer ecocentric viewpoints. Various provisions in the South African Constitution have been used to protect animals. There are, however, some constitutional provisions that can be used to protect animals, taking into account lessons in India, where Courts have readily extended constitutional provisions that protect humans to cover animals as well.

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## Chapter one

### Introduction

#### 1.1. Background

There are many contradictions in the relationship between humans and animals. This is a result of the inconsistencies in how human beings treat animals. There have been times when people have loved and cared for animals, and there have also been times when there has been extreme animal cruelty.<sup>1</sup> The view that animals are property and human beings have dominion over them has been used as justification for the inhumane treatment of animals.<sup>2</sup> If there is consideration for the plight of animals,<sup>3</sup> there are a number of ethical issues and dilemmas on the standing of animals in society.<sup>4</sup> Regarding the treatment of animals by humans and the extent to which their welfare should be protected, a variety of ethical and legal approaches have been raised.<sup>5</sup> These are influenced by the various philosophical and legal frameworks that underpin society's commitment to the protection of animals.

Effective protection of animals started to emerge as a major concern at the end of the second millennium. During this time, the legal protection of animals was important to the preservation of a healthy environment.<sup>6</sup> In this regard, criminal law was crucial in criminalising some animal cruelty acts, like slaughtering of animals without anaesthetisation, bearbaiting and cockfighting. Nevertheless, animals were still considered property, which is a principle deeply rooted in the law.<sup>7</sup> Subsequently as

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<sup>1</sup> Novak Krstic, 'Animal protection from killing and abuse in the European and Serbian criminal law' (2012) 10 (1) *Law and Politics* 43; Emanuela Prato-Previde and Others, 'The Complexity of the Human–Animal Bond: Empathy, Attachment and Anthropomorphism in Human–Animal Relationships and Animal Hoarding' (2022) 12 (20) *Animals* 2835.

<sup>2</sup> Margit Livingston, 'Desecrating the ark: Animal abuse and the law's role in prevention' (2001) 87 (1) *Iowa Law Review* 1; Dustin Crummett, 'Human dominion and wild animal suffering' (2022) 58 (4) *Religious Studies* 814.

<sup>3</sup> Tim Caro and Jason Riggio, 'Conservation and behavior of Africa's Big Five' (2014) 60 (4) *Current Zoology* 486; Gisela Kaplan, 'Casting the net widely for change in animal welfare: The plight of birds in zoos, ex situ conservation, and conservation fieldwork' (2021) 12 (1) *Animals* 31.

<sup>4</sup> Krstic, 'Animal protection from killing and abuse in the European and Serbian criminal law' 44.

<sup>5</sup> Ibid; Prato-Previde and Others, 'The Complexity of the Human–Animal Bond: Empathy, Attachment and Anthropomorphism in Human–Animal Relationships and Animal Hoarding' 2839.

<sup>6</sup> Ibid.

<sup>7</sup> David Bilchitz, 'Moving beyond arbitrariness: The legal personhood and dignity of non-human animals' (2009) 25 *South African Journal on Human Rights* 38; Crummett, 'Human dominion and wild animal suffering' 816.

law evolves, society started to move away from their perception that animals are mere property for human exploitation.<sup>8</sup>

In particular during 1822, the British Parliament laid down the foundation for most common law countries' current legal position for animal welfare by criminalising certain acts of cruelty, such as bear-baiting and cockfighting, towards animals. This started with the enactment of the Cruel Treatment of Cattle Act,<sup>9</sup> and thereafter the Cruelty to Animals Act<sup>10</sup> was promulgated. These pieces of legislation are the first to recognise that animals, just like human beings, are worthy of legal protection. In other words, criminalising cruelty towards animals was a critical point in realising that animals are worthy of legal protection. However, their protection was based on the anthropocentric views, meaning that they are protected for the benefit of human beings.<sup>11</sup>

The ecocentric view, meaning animals are protected for their own inherent worth, is without a doubt, one of the basic values for most modern states.<sup>12</sup> However, Francione observes an enormous contradiction between public sentiment and legal treatment of animals.<sup>13</sup> The author notes that the ethical worldview is that animals ought to be treated humanely and not be subjected to unnecessary suffering.<sup>14</sup> Yet, this ethical worldview cannot be guaranteed exclusively through societal self-responsibility as it lacks a strong backing from binding law.<sup>15</sup> Hence, some countries have put in place various environmental and anti-cruelty laws that criminalise the killing and abuse of animals as well as regulating the use and care of animals.<sup>16</sup> For countries such as Britain and Switzerland, these laws have been in place for more than 150 years.<sup>17</sup>

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<sup>8</sup> Joan E Schaffner, *An introduction to animal law and the law* (Palgrave Macmillan 2011) 152; Angus Nurse and Tanya Wyatt, *Wildlife criminology* (Bristol University Press 2020) 5.

<sup>9</sup> Cruel Treatment of Cattle Act of 1822.

<sup>10</sup> Cruelty to Animals Act of 1835.

<sup>11</sup> Daniele Porena, 'Constitutional protection of the environment: Evolution in Europe between anthropocentrism and ecocentrism. The Italian case' (2010) 5 (1) *Revista Electronica Direito e Politica* 296; Maneesha Deckha, *Animals as legal beings: Contesting anthropocentric legal orders* (University of Toronto Press 2021) 6.

<sup>12</sup> Vanessa Gerritsen, 'Animal welfare in Switzerland – constitutional aim, social commitment and a major challenge' (2013) 1 *Global Journal of Animal Law* 1; Deckha, *Animals as legal beings: Contesting anthropocentric legal orders* 6.

<sup>13</sup> Gary L Francione, 'Animal Welfare and the Moral Value of Non-Human Animals' (2010) 6 (1) *Law, Culture and Humanities* 14.

<sup>14</sup> Francione, 'Animal Welfare and the Moral Value of Non-Human Animals' 14.

<sup>15</sup> Gerritsen, 'Animal welfare in Switzerland – constitutional aim, social commitment and a major challenge' 1.

<sup>16</sup> Krstic, 'Animal protection from killing and abuse in the European and Serbian criminal law' 46.

<sup>17</sup> Gerritsen, 'Animal welfare in Switzerland – constitutional aim, social commitment and a major challenge' 1.

There have been various movements aimed at the welfare of animals in India. Most of these movements, even though political in nature, have a religious base as Hindus regard a cow to be a sacred animal that should be protected, even at the expense of human beings.<sup>18</sup> Harris writes about a movement in India that saw about 120,000 people, being led by religious people, demonstrating in front of Parliament to show their support for the All-Party Cow Protection Campaign Committee.<sup>19</sup> Though the cow is a sacred animal under the Hindu religion, it is not the only important animal. The religion recognises animal rights to co-exist with human rights.<sup>20</sup> Another religion that had an impact in the movements aimed at animal welfare in India is Buddhism. According to Thich, the precept of non-killing under Buddhism is extended to protect non-human animals.<sup>21</sup> In other words, all living creatures are protected by the precept that prohibits killing.

These movements started in 1962 with the creation of the Animal Welfare Board. Thereafter various animal welfare organisations such as the Visakha Society for the Protection and Care of Animals, Wildlife Trust of India, Sanjay Gandhi Animal Care Centre and the People for Animals India.<sup>22</sup> The judiciary also intervened in the protection of animals in cases such as *N.R Nair v Union of India*<sup>23</sup> and *Animal Welfare Board of India v A. Nagaraja*<sup>24</sup> wherein it adopted a liberal and welfare-oriented interpretation in the enforcement of animal rights.<sup>25</sup> As such India has innovative ways of protecting animals.<sup>26</sup> Apart from having anti-cruelty laws that proscribe cruelty to

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<sup>18</sup> Marvin Harris, 'India's sacred cow' (1978) *Human Nature* 200; Sanjay Sharma 'Cow Hug Day 2023: Why is cow so important and worshipped in India?' < <https://timesofindia.indiatimes.com> > accessed on 4 August 2023.

<sup>19</sup> Harris, 'India's sacred cow' (1978) *Human Nature* 200; Sharma 'Cow Hug Day 2023: Why is cow so important and worshipped in India?' 201.

<sup>20</sup> Govindasamy Agoramoorthy and Minna J Hsu, 'The significance of cows in Indian society between sacredness and economy' (2012) 18 (3) *Anthropological Notebooks* 5; Sharma (n 18 above).

<sup>21</sup> Nhat H Thich, *Interbeing: Fourteen Guides for Engaged Buddhism* (Parallax Press 1987) 42.

<sup>22</sup> 'NGOs working for animal welfare – NGOs India' (2021) < <http://www.ngosindia.com> > accessed on 6 September 2021.

<sup>23</sup> AIR 2000 Ker 340.

<sup>24</sup> (2014) 7 SCC 547.

<sup>25</sup> Jessamine T Mathew and Ira Chadha-Sridhar, 'Granting animal rights under the Constitution: A misplaced approach? An analysis in light of Animal Welfare Board of India v. A. Nagaraja' (2014) 7 *National University of Juridical Sciences Law Review* 349; Vikram CS Krishna, 'The Recognition of Animal Rights and Its Implication on Animal Protection Laws' (2022) 4 (2) *Indian Journal of Law and Legal Research* 1.

<sup>26</sup> Uday Shankar, 'Do animals have a right under article 21 of India? – comment on Animal Welfare Board of India case' (2014) *Bharati Law Review* 65.

animals,<sup>27</sup> such as the Prevention of Cruelty to Animals Act<sup>28</sup> and the Performing Animal Rules,<sup>29</sup> Courts in India have adopted the interpretation of fundamental rights of human beings as applying to animals as well, thus protecting animals within a constitutional framework.<sup>30</sup>

In South Africa, however, there is no express mention of animals under the South African Constitution.<sup>31</sup> The only section that may arguably protect animals is the environmental right provision in section 24 of the Constitution. This section provides that everyone has a right to have the environment protected by measures that among other things, promote conservation. The Constitution says nothing further regarding the protection of animals, and their protection is left to a range of domestically enacted legislation. Section 2 of the Animal Protection Act<sup>32</sup> provides that a person found guilty of acts of animal cruelty is liable for a fine not exceeding R5 000,00 or to a period of imprisonment not exceeding 12 months. The inadequacy of such sanctions is that it is not sufficient to deter animal cruelty.

Section 3 of the Societies for the Prevention of Cruelty to Animals Act<sup>33</sup> seeks to prevent “the ill-treatment of animals by promoting their good treatment by man”.<sup>34</sup> It further looks at advancing everything reasonably necessary to ensure the achievement of the objectives of the Act. The extent to which South African law for the protection of animals compares to other legal systems warrants an examination.

## 1.2. Problem statement

South Africa lacks comprehensive legislation that addresses all animal welfare needs. The current legal framework in the protection of animals is fragmented and to a great extent does not address the animal welfare needs. Although with a Constitution acclaimed to be one of the best in the world, there is no express mention of animal rights in the Constitution. The only section that arguably protects animals is the environmental right provision in section 24 of the Constitution. Due to the inadequacy

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<sup>27</sup> Mathew and Chadha-Sridhar, ‘Granting animal rights under the Constitution: A misplaced approach? An analysis in light of Animal Welfare Board of India v. A. Nagaraja’ 350.

<sup>28</sup> Prevention of Cruelty to Animals Act 59 of 1960.

<sup>29</sup> Performing Animal Rules, 2005.

<sup>30</sup> *N.R Nair v Union of India; Animal Welfare Board of India v A. Nagaraja.*

<sup>31</sup> Constitution of the Republic of South Africa, 1996.

<sup>32</sup> Animal Protection Act 71 of 1962.

<sup>33</sup> Prevention of Cruelty to Animals Act 107 of 1998.

<sup>34</sup> Section 3(c) of the Society for the Prevention of Cruelty to Animals Act.

of the legislation in the protection of animals,<sup>35</sup> this study examines whether there are lessons to be learnt from the constitutional protection of animals in India.

### **1.3. Aim and objectives**

#### **1.3.1. Aim**

The main aim of this study is to examine the adequacy or otherwise of the protection afforded to animals under South African law and the extent to which lessons can be learnt from the constitutional protection of animals in India. In that context, the study also interrogates the different legal, philosophical and religious approaches underlying the protection of animal rights.

#### **1.3.2 Objectives**

- a. To discuss the different legal, philosophical and religious bases for the protection of animals.
- b. To examine the strengths and shortcomings of the protection regime in South Africa.
- c. To examine the strengths and shortcomings of the protection regime in India.
- d. To explore the lessons to be learnt from each other.

### **1.4. Research question(s)**

The main question raised in this study is what lessons can South Africa and India learn from each other on the constitutional protection of animal rights? To answer this question, the following specific questions are raised:

- 1.4.1. What are the different legal, philosophical and religious bases for the protection of animals?
- 1.4.2. What are the strengths and shortcomings of the legal protection regime in South Africa?
- 1.4.3. What are the strengths and shortcomings of the legal protection regime in India?
- 1.4.4. How can South Africa develop a future legal approach that offers better protection for the rights of animals?

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<sup>35</sup> David Bilchitz, 'Does transformative constitutionalism require the recognition of animal rights?' (2010) 25 *South African Public Law* 267.

## 1.5. Research methodology

According to Hutchinson and Duncan, the core legal methodology for legal research is doctrinal, which lies at the basis of common law.<sup>36</sup> As the core for legal research, this study will employ the doctrinal methodology. Doctrinal methodology is essential in providing the conceptual analysis of the current law and predicts future developments.<sup>37</sup> It encourages transnational law by using various primary and secondary sources of law available in different countries.<sup>38</sup> In this study, the doctrinal method is conducted through the review of the primary sources of law, such as constitutions, legislation and case law. The decision to employ the doctrinal methodology, which focuses on the analysis of legal texts such as constitutions, legislation, and case law, is suitable for this study. Since the research aims to compare the legal protections afforded to animals in South Africa and India, analysing the relevant legal provisions and judicial interpretations is crucial.

The research also utilises secondary sources of law by reviewing literature sourced from books, journals, articles and other internet sources. The inclusion of both primary sources of law (constitutions, legislation, case law) and secondary sources (books, journals, articles) ensures a thorough examination of the legal frameworks and scholarly discourse surrounding animal rights in the respective countries. The focus of this study is to compare the legal protection of animals in South Africa with India, because it is a rising superpower with a legal system where the protection of animals has been elevated to the level of constitutional protection. Also, the trajectory towards constitutional supremacy after colonialism is something South Africa and India share despite their different paths and timeframes. Furthermore, it is sometimes important for comparative law to focus on non-Western and non-American legal orders.<sup>39</sup> The choice to conduct a comparative legal study between South Africa and India is justified by the similarities in their trajectories towards constitutional supremacy and the elevation of protection of animals to a constitutional level. Additionally, comparing non-

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<sup>36</sup> Terry Hutchinson and Nigel Duncan, 'Defining and describing what we do: Doctrinal legal research' (2012) 17 (1) *Deakin Law Review* 83; Mullekyaal D Pradeep, 'Legal Research- Descriptive Analysis on Doctrinal Methodology' (2019) 4 (2) *International Journal of Management, Technology, and Social Sciences* 95.

<sup>37</sup> Terry Hutchinson, *Researching and Writing in Law 3<sup>rd</sup> Ed* (Reuters Thomson 2010) 7.

<sup>38</sup> Terry Hutchinson, 'The Transnational Lawyer: GATS, Globalisation and the Effects on Legal Education' (2006) 11(2) *Australian and New Zealand Journal of Legal Education* 93.

<sup>39</sup> Edward J Eberle, 'The method and role of comparative law' (2009) 8 (3) *Washington University Global Studies Law Review* 451.

Western legal systems contributes to a more diverse and inclusive understanding of legal concepts and practices. Hence the choice of comparing South Africa with India.

This study is also comparative. Comparative legal study is about comparing the law of one country with that of another. It is usually used as a way of understanding foreign law and culture.<sup>40</sup> At the same time, it helps in understanding one nation's law and culture better by comparing it with another law and culture.<sup>41</sup> The insight gained from legal comparison may influence legal reform.<sup>42</sup> It further removes any form of bias that one might have from their own legal culture referred to as cognitive lock-in.<sup>43</sup> Removing the cognitive lock-in ensures that a researcher provides an objective assessment of available data. Generally, the use of comparative study helps in overcoming cognitive biases and ensures a more objective assessment of the available data. By comparing legal cultures and systems, researchers can gain valuable insights that may inform legal reform efforts in both countries. Hence, the choice of using comparative study in engaging with this research.

## **1.6. Literature review**

### **1.6.1. Philosophical underpinnings**

The cornerstone for the protection of animals and welfare is attributed to the work of Jeremy Bentham.<sup>44</sup> The author stated that there might be a day when animals may possess those rights which, had it not been for tyranny, they would have had. Furthermore, the author opined that granting animals the legal protection neither depends on their ability to talk nor to reason, but rather on their ability to suffer. In other words, the basis for protecting animals is because they are sentient beings.<sup>45</sup>

Regan contends that the basis for animal rights is their inherent value as subjects of life.<sup>46</sup> Cruelty towards animals is wrong, because it violates animal rights and is not based on animal suffering or pain. Granting the environment right, posits Stone, is

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<sup>40</sup> Bernhard Grossfeld and Edward J Eberle, 'Patterns of Order in Comparative Law: Discovering and Decoding Invisible Powers' (2003) 38 *Texas International Law Journal* 291.

<sup>41</sup> Eberle, 'The method and role of comparative law' 453.

<sup>42</sup> Ibid.

<sup>43</sup> Vivian G Curran, 'Cultural Immersion, Difference and Categories in U.S. Comparative Law' (1998) 46 *American Journal of Comparative Law* 43.

<sup>44</sup> Jeremy Bentham, *An introduction to the principles of morals and legislation* (Clarendon Press 1789) 307.

<sup>45</sup> Bentham, *An introduction to the principles of morals and legislation* 307.

<sup>46</sup> Tom Regan, *The case for Animal Rights* (University of California Press 1983).

important to ensure its protection from degradation.<sup>47</sup> Opponents of animal rights argue that human beings have an intrinsic worth by virtue of being homo sapiens.<sup>48</sup> Different levels of cognitive, emotional and moral capabilities are used to deny animals rights.<sup>49</sup> However, as Schaffner explains:

...what is clear is that homo sapiens are not the only species with these and other capabilities. On the other hand, nonhuman animals are quite different from human animals. They have many qualities that humans do not possess; for example, the ability to fly or to breathe under water, or heightened senses of smell, sight, and sound, and the apparent ability to predict impending disasters.<sup>50</sup>

Denying animals rights solely based on their species can be seen as a form of biasness. This type of discrimination is referred to as speciesism, a term Singer uses to label the bias of human beings in their differential treatment of animals from their treatment of human beings.<sup>51</sup> The author contends that this is similar to denying moral and legal rights to one group in favour of another based on their gender or race. In other words, speciesism is a social problem that can be compared to other social problems, such as racism, sexism, and age discrimination.<sup>52</sup>

Nussbaum contends that finding the duties owed to animals by human beings within the theory of justice is a complex issue.<sup>53</sup> The author argues that animals have an entitlement to a dignified life. Animals are given these entitlements based on ten capabilities that they possess.<sup>54</sup> Even so, the author distinguishes between entitlements and rights, and posits that animals have the former and not the latter.<sup>55</sup> Garner examines the impact of political thinking in regarding animals as morally important beings.<sup>56</sup> The author challenges the presumption that political theory is about the human question and seeks to identify the political ideology that is best able to further the interests of animals.

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<sup>47</sup> Christopher D Stone, 'Should Trees have Standing? Towards legal rights for natural objects' (1979) *Southern California Law Review* 450.

<sup>48</sup> Bilchitz, 'Does transformative constitutionalism require the recognition of animal rights?' 181.

<sup>49</sup> Peter Singer, *Animal Liberation: A New Ethics for Our Treatment of Animals* (Harper Collins 1975) 2.

<sup>50</sup> Schaffner, *An introduction to animal law and the law at 7*.

<sup>51</sup> Singer, *Animal Liberation: A New Ethics for Our Treatment of Animals* 2.

<sup>52</sup> Peter Singer, 'Speciesism and moral status' (2009) (40) (3) *Metaphilosophy* 567.

<sup>53</sup> Martha C Nussbaum, *Frontiers of Justice: Disability, nationality, species membership* (Harvard University Press 2009).

<sup>54</sup> Nussbaum, *Frontiers of Justice: Disability, nationality, species membership* 392.

<sup>55</sup> Mathew and Chadha-Sridhar, 'Granting animal rights under the Constitution: A misplaced approach? An analysis in light of Animal Welfare Board of India v. A. Nagaraja' 364.

<sup>56</sup> Robert Garner, *The Political Theory of Animal Rights* (Manchester University Press 2005) 1.

The ecocentric viewpoint, which connotes the protection of animals for their own inherent worth, and not for how they affect human beings as demanded anthropocentricism, posits Zoltan, is a major advancement in the manner in which animals are treated.<sup>57</sup> The protection of animals for their inherent worth is based on the moral views of society; the protection of animals is based on an individual's self-responsibility.<sup>58</sup> With others still having the anthropocentric view, it is not always guaranteed that individuals will enforce the moral views for protecting the rights of animals.<sup>59</sup>

To ensure the full protection of all animals, the moral basis for the protection of animals needs a strong backing from binding law.<sup>60</sup> In this regard, there have been laws put in place for the protection of animals in the form of environmental and anti-cruelty laws for a number of years.<sup>61</sup> Recently, however, most countries have included animal rights in their constitutions.<sup>62</sup> This is because the protection of animals has become a global concern.<sup>63</sup> The examination of this ethical foundation is necessary in the context of the protection of animals in South Africa. This foundation sets the backdrop for modern legal reform in the protection of animals, and led to the legal evolution in the protection of animals.

### 1.6.2. Legal evolution

According to van der Linde and Feris, the South African Constitution<sup>64</sup> has elevated environmental protection by the inclusion of environmental rights.<sup>65</sup> This is through the express mention of the environmental rights in section 24 of the Constitution. There is, however, no express mention of animal *rights* in the Constitution. The only section

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<sup>57</sup> Toth J Zoltan, 'Animal protection and animal rights in Hungary' (2012) 4 *Jogelmeleti Szemle* 166.

<sup>58</sup> Gerritsen, 'Animal welfare in Switzerland – constitutional aim, social commitment and a major challenge' 1.

<sup>59</sup> Porena, 'Constitutional protection of the environment: Evolution in Europe between anthropocentricism and ecocentrism. The Italian case' 299.

<sup>60</sup> Gerritsen, 'Animal welfare in Switzerland – constitutional aim, social commitment and a major challenge' 1.

<sup>61</sup> Ibid.

<sup>62</sup> Gieri Bolliger, 'Constitutional and legislative aspects of animal welfare in Europe: Animal welfare in constitutions' (2007) < <http://www.tierimrecht.org> > accessed on 23 September 2020.

<sup>63</sup> Katie Skyes, 'Globalization and the animal turn: How international trade law contributes to global norms of animal protection' (2016) 5 (1) *Transnational Environmental Law* 55; Sabine Brels, 'A global approach to animal protection' (2017) 20 (1) *Journal of International Wildlife Law and Policy* 105; Henry Buller and Others, 'Towards farm animal welfare and sustainability' (2018) 8 (6) *Animals* 88.

<sup>64</sup> Constitution of the Republic of South Africa, 1996.

<sup>65</sup> Morné van der Linde and Loretta Feris, *Compendium of South African Environmental Legislation 2<sup>nd</sup> Ed* (Pretoria University Law Press 2010) 20.

from which the protection of animals can be inferred is the environmental right in section 24 of the Constitution.<sup>66</sup> This section, it may be argued, only protects those animals in nature as it provides for measures that promote conservation. Consequently, the protection of animals in South Africa is left to a range of domestically enacted legislation. Animal cruelty is a statutorily defined crime proscribed by the Animal Protection Act. The Act is regarded as the primary source of legislative protection for animals. According to Lombard, the problem with this Act is that it only

addresses general welfare needs of animals, has not been amended since its inception and is rather focused on addressing human aspirations than ensuring sufficient protection, care and welfare of animals.<sup>67</sup>

India's endeavours in the promotion of animal welfare and ensuring the safety of animals date back to 1960, when the Prevention of Cruelty to Animals Act was promulgated.<sup>68</sup> Thereafter the Wildlife Protection Act<sup>69</sup> was promulgated in 1972, which provides the basic framework to ensure the safety of wild fauna and flora.<sup>70</sup> Singhar examines the effectiveness and sufficiency of existing laws in the protection of animals in India. The author questions whether these laws can, on their own, be used as a deterrent to control animal cruelty. According to the author, even though there are laws put in place to regulate illegal trade on animals, it still flourishes.<sup>71</sup>

There have been various movements aimed at the welfare of animals in India. The judiciary also intervened in the protection of animals and adopted a liberal and welfare-oriented interpretation in the enforcement of animal rights.<sup>72</sup> The Indian Constitution<sup>73</sup> is not a static document, but rather a living document that evolves and grows with

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<sup>66</sup> Bilchitz, 'Does transformative constitutionalism require the recognition of animal rights?' 289.

<sup>67</sup> Chereé Lombard 'Animal welfare and the law: towards legal regulation of the welfare of laboratory animals in South Africa' (2012) Unpublished LLM Dissertation, North-West University.

<sup>68</sup> Mathew and Chadha-Sridhar, 'Granting animal rights under the Constitution: A misplaced approach? An analysis in light of Animal Welfare Board of India v. A. Nagaraja' 349.

<sup>69</sup> Act 53 of 1972.

<sup>70</sup> Samant A Singhar, 'Laws for protection of wildlife in India: Need for awareness towards implementation of effectiveness' (2002) 17 *Indian Forester* 1113.

<sup>71</sup> Singhar, 'Laws for protection of wildlife in India: Need for awareness towards implementation of effectiveness' 1114.

<sup>72</sup> Mathew and Chadha-Sridhar, 'Granting animal rights under the Constitution: A misplaced approach? An analysis in light of Animal Welfare Board of India v. A. Nagaraja' 349.

<sup>73</sup> Constitution of India, 1950.

time.<sup>74</sup> As such, it has become one of the few constitutions in the world that contains specific provisions on environmental protection.<sup>75</sup>

Bilchitz argues that animals possess a dignity that ought to be respected. In this regard, the author argues for an amendment of the Constitution in order to have an express mention of animals. Alternatively, the author argues for an interpretation that already includes animals.<sup>76</sup> The author, however, leaves out the most important of all rights, the right to life. Though Metz finds the arguments Bilchitz presents convincing, the author contends that interpreting the South African Constitution as already involving animals may have an impact on other forms of justice. Also, the author is the view that animals are not of a similar status to human beings.<sup>77</sup> As Balamurugan *et al* argue, the judiciary's response to environmental problems in India was an insensitive one, but this has since changed, and now the judiciary views human rights and environmental protection as two faces of the same coin.<sup>78</sup> Be that as it may, animals are still regarded as incapable of having rights. It was therefore important that Courts play a role in realising the need to protect animals.

### 1.6.3. Contemporary legal interpretations

The judiciary plays a pivotal role in the realisation of the need for animals to have standing in Court. As Evans states:

In case law there has been a very gradual progression toward granting animals standing in [C]ourt for cruelty cases, which reflects a slow change from viewing animals as objects toward viewing them as beings legally capable of being wronged.<sup>79</sup>

In the South African case of *R v Moato*<sup>80</sup> it was held that the aim of prohibiting animal cruelty is to protect the sensibilities of human beings and not to afford animals rights.

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<sup>74</sup> Pooja P Vardhan, 'Constitutional protection under constitutional framework of India' (2014) < <http://pib.nic.in> > accessed 28 August 2021.

<sup>75</sup> Rohit Kumar, 'An Indian constitutional obligation for environmental protection: An appraisal' (2016) 3 (2) *International Journal of Multidisciplinary Research and Development* 347; Upasana Borah, 'An Analysis of the Constitutional Schemes for Animal Rights in India' (2021) 6 *Indian Politics and Law Review* 103.

<sup>76</sup> Bilchitz, 'Moving beyond arbitrariness: The legal personhood and dignity of non-human animals' 62.

<sup>77</sup> Thaddeus Metz 'Animal rights and the interpretation of the South African Constitution' (2010) 25 *South African Public Law Journal* 301.

<sup>78</sup> R Balamurugan and Others, 'A critical view on the impact of Constitution of India as internal regulatory mechanism for environmental issues and policies' (2011) 4 (3) *Indian Journal of Sciences and Technology* 263.

<sup>79</sup> Erin Evans, 'Constitutional inclusion of animal rights in Germany and Switzerland: How did animal protection become an issue of national importance?' (2010) 18 *Society and Animals* 231 at 233.

<sup>80</sup> 1947 (1) SA 490 (O).

The Court in *S v Edmunds*<sup>81</sup> also found that the aim of proscribing animal cruelty is not to elevate the status of animals to that of human beings, as it took the view that anti-cruelty laws are aimed at protecting the sensibilities of human beings, as opposed to protecting animals. This is because animals are regarded in law as property incapable of having rights and duties.

The protection of animals for their own sake was presented by Cameron JA in a minority judgment in the case of *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw*.<sup>82</sup> This view was favoured by the High Court in *South African Predator Breeders Association v Minister of Environmental Affairs and Tourism*.<sup>83</sup> Even so, the learned judge still maintained that legislation does not confer rights on animals. It will be argued here that not only legislation, but also the Constitution is capable of granting animals rights.

In *S v Lemthongthai*,<sup>84</sup> the Supreme Court of Appeal found that animal care and protection fall within the ambit of the South African Constitution. The Court found that “[c]onstitutional values dictate a more caring attitude towards fellow humans, animals and the environment in general”.<sup>85</sup> In elevating animal welfare to a constitutional issue, the Constitutional Court stated in *National Council for Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development and Another*<sup>86</sup> that “the rationale behind protecting animal welfare has shifted from merely safeguarding the moral status of humans to placing intrinsic value on animals as individuals”.<sup>87</sup> However, public litigation for the protection of animals was not favoured, with exclusive rights left in the National Council for Society for the Prevention of Cruelty to Animals. This study argues that this takes away the individual’s right to approach Courts when a right in the Constitution has been violated.

#### 1.6.4. Constitutional inclusion of animal rights

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<sup>81</sup> 1968 (2) PH H 398 (N).

<sup>82</sup> 2008 (5) SA 339 (SCA).

<sup>83</sup> [2009] ZAFSHC 68.

<sup>84</sup> 2015 (1) SACR 353 (SCA).

<sup>85</sup> *S v Lemthongthai* para 20.

<sup>86</sup> [2016] ZACC 46.

<sup>87</sup> *National Council for Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development and Another* para 57.

Article 51A(g) of the Indian Constitution casts a fundamental obligation on every citizen to have kindness towards living creatures. This section obliges citizens to respect animals. It further obliges the legislature to consider animals when crafting laws for welfare and regulating human conduct. Similarly, the judiciary is under a constitutional obligation to favour a liberal and welfare-oriented interpretation of laws enacted for the welfare of animals to ensure a better protection of animals through constitutional interpretation.<sup>88</sup> This obligation on the judiciary is fundamental in protecting animals, because the liberal and welfare-oriented approach takes the interests of animals into consideration. The issue of extending fundamental rights to animals was considered by the Kerala High Court in the case of *N.R Nair v Union of India*.<sup>89</sup> In this case, the Court found that legal rights should not be

the exclusive preserve of humans which has to be extended beyond people thereby dismantling the thick legal wall with humans all on one side and all non-human animals on the other side.<sup>90</sup>

The Supreme Court of India further developed this view in the case of *Animal Welfare Board of India v A. Nagaraja*.<sup>91</sup> The Court held that animal life is covered under Article 21 of the Indian Constitution dealing with the right to life, in so far as human rights are not harmed. The Court stated that human beings have an anthropocentric bias in thinking that human life is not like animal life. In extending the right to life to animals, the Court said that animals have an intrinsic worth and value.

#### 1.6.5. Conclusion

This study argues that this judicial view is the correct one in protecting animals within a constitutional framework. Though it stated that it adopted a dynamic, as opposed to a static interpretation, scholars such as Mathew and Chadha-Sridhar heavily criticised the Court as they contend that the rights-based interpretation is misplaced, and argue that a duty-based approach is the right way of protecting animals.<sup>92</sup> Also, Shankar opines that the judiciary should not be allowed to inject meaning in a text without a

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<sup>88</sup> Shankar, 'Do animals have a right under article 21 of India? – comment on Animal Welfare Board of India case' 66.

<sup>89</sup> *N.R Nair v Union of India*.

<sup>90</sup> *N.R Nair v Union of India* para 13.

<sup>91</sup> *Animal Welfare Board of India v A. Nagaraja*.

<sup>92</sup> Mathew and Chadha-Sridhar, 'Granting animal rights under the Constitution: A misplaced approach? An analysis in light of Animal Welfare Board of India v. A. Nagaraja' 350.

necessary legal justification.<sup>93</sup> It is necessary to examine whether the current legislative framework in South Africa can learn from the protection of animal rights in India. It is argued in this study that the rights-based approach is the right way to protect animals.

The study explores the features of a future legal system that offers better protection for the interests of animals. Hence, the study is of a comparative nature. The study explores eco-anthropocentric arguments as the philosophical basis for the protection of animal rights. It further argues for the extension of the application of the right to life in protecting animals.

### **1.7. Delimitations of the study**

Although there are constitutional protections of animals in different parts of the world, the study is limited to an analysis and critique of the constitutions of South Africa and India in respect of their consideration and protection of the interests of animals.

While this study looks at animals generally, specific reference for illustrative purposes will be made to endangered species such as Rhinoceros, Lion, Buffalo, Elephants and Leopards in this study.

### **1.8. Ethical considerations**

This is my own work, both in design and content, which contains no plagiarism and has, to the best of my knowledge not been submitted to this or any other institution. The study is doctrinal and did not involve human participants or researching animals. As a result, no consent was required from any human being. Furthermore, based on the methodology of the study, no animals were hurt in the conduct of this research. To ensure that there are no ethical issues, the researcher obtained ethical clearance from the University.

### **1.9. Assumptions**

The comparative analysis of constitutional provisions protecting animal rights in South Africa and India will highlight differences in the extent, efficacy, and enforcement of legal protections for animals. These distinctions are likely to be influenced by a

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<sup>93</sup> Shankar, 'Do animals have a right under article 21 of India? – comment on Animal Welfare Board of India case' 69.

difference in the two legal systems, cultural attitudes towards animals, and the socio-political contexts in both nations. The cultural, legal, and socioeconomic differences between the two countries will have a considerable impact on the success of animal rights activism and the implementation of animal welfare legislation and regulations in these two countries. These differences may result in varying levels of awareness, enforcement, and protection of animal rights. However, even with these differences, the foundation for protecting animals within a constitutional framework should not be influenced by these factors.

### 1.10. Definition of Key Concepts

**Animals** – any living being which possesses the ability to move voluntarily including all living creatures that are non-human.<sup>94</sup>

**Animal rights** – the ethical, legislative or constitutional protection of animals in a manner that furthers their welfare.<sup>95</sup> This includes the right of non-human animals to live with inherent dignity, free from abuse, suffering and exploitation by human beings.

**Animal welfare** – “an animal’s state of well-being, or maintenance of animals under conditions of space, environment, nutrition, and so forth, consistent with the physiological and social needs of the species”.<sup>96</sup>

**Constitution** – a sovereign state’s highest or supreme law.<sup>97</sup>

### 1.11. Chapter Outline

This study consists of five chapters. Chapter one is the introductory chapter which presents a brief background into the study, as well as introducing the objectives, research methodology and questions of the study.

Chapter two discusses the conceptual basis for the protection of animals. In this chapter, various philosophical and religious theories for the protection of animals are

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<sup>94</sup> ‘What is an animal?’ Black’s Law Dictionary Free Online Legal Dictionary 2nd Ed < <https://thelawdictionary.org> > accessed on 5 February 2020.

<sup>95</sup> Evans, ‘Constitutional inclusion of animal rights in Germany and Switzerland: How did animal protection become an issue of national importance?’ 235.

<sup>96</sup> Schaffner, *An introduction to animal law and the law* 71.

<sup>97</sup> *Ibid* 184.

discussed. This chapter outlines how the idea of the protection of animals in any legislation began, and how it has emerged in national constitutions.

Chapter three highlights the strengths and shortcomings of the protection regime in South Africa and India. Various constitutional provisions that are, or may be, used for protecting animals are discussed.

Chapter four is a legal comparison of the two regimes using appropriate comparative law methods. The chapter outlines the lessons South African can learn from the constitutional protection of animals in India.

Chapter five provides a summary of the study, concluding remarks and recommendations.

## Chapter two

### Philosophical and religious theories underlying the protection of animals

#### 2.1. Introduction

Various philosophical arguments have been advanced for and against the protection of animals. The previous chapter set a background for the study, as well as reviewed available literature. The current chapter looks at the philosophical and religious bases for the protection of animals. Various ethical theories for and against the protection of animals are discussed.

#### 2.2. Justification for considering philosophical basis for the protection of animals

Various philosophical arguments have brought forth different bases for and against protecting animals. Modern discussions about the ethical considerations for and against protecting animals are based on a formulation and development of one or more of the existing ethical theories.<sup>98</sup> These include the views that the protection of animals is based on utilitarianism<sup>99</sup> and their ability to experience pain and pleasure.<sup>100</sup> Some philosophers call for the respect of animals' nature<sup>101</sup> and their capabilities.<sup>102</sup> Most discussions on animal ethics are from an analytical philosophical approach. This reflects how well-known the idea has become.<sup>103</sup> Yet, the reliance on various theories discussed below has become an issue of conflict and contention. The appropriateness or otherwise of using ethical theories for the protection of animals has caused tension in cases where different principles resulted in different conclusions.<sup>104</sup> Philosophical

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<sup>98</sup> Kirsten Youens, 'animal rights: a moral and legal discussion on the standing of animals in South Africa' (2001) < <http://youensattorneys.co.za> > accessed on 9 May 2020.

<sup>99</sup> Peter Singer, *Animal Liberation* 2<sup>nd</sup> Edition (Avon Books 1990) 8.

<sup>100</sup> Regan, *The case for Animal Rights* 243.

<sup>101</sup> Bernakd E Rollin, 'Animal welfare, science, and value' (1993) 6 (2) *Journal of Agricultural and Environmental Ethics* 44; Leena Vilkkka, *The intrinsic value of nature* (Brill 2021) 50.

<sup>102</sup> Martha C Nussbaum, 'Beyond "compassion and humanity": Justice for nonhuman animals' in Sunstein, CR and Nussbaum, MC (Eds) *Animal rights: Current debates and new directions* (2004) 299; Rhyddhi Chakraborty, 'Animal Ethics and India: Understanding the Connection through the Capabilities Approach' (2017) 8 (1) 33 *Bangladesh Journal of Bioethics* 33; Nicolas Delon, 'Animal capabilities and freedom in the city' (2021) 22 (1) *Journal of Human Development and Capabilities* 131.

<sup>103</sup> Ron S Broglio, 'Animal welfare in science and society' in Smulders, FJM and Algers, B (Eds) *Food Safety Assurance and Veterinary Public Health, (volume 5) Welfare of production animals: Assessment and management of risks* (2009) 45; Mohsen Jahed, 'Ethics and animals: Approaches and theories' (2021) 1 (1) *Bioethics and Health Law Journal* 1; Paul B Thompson, 'Philosophical ethics and the improvement of farmed animal lives' (2020) 10 (1) *Animal Frontiers* 21.

<sup>104</sup> Cass R Sunstein and Martha C Nussbaum, (Eds) *Animal rights: Current debates and new directions* (Oxford University Press 2004); Angus Taylor, *Animals and ethics: An overview of the philosophical debate* 3<sup>rd</sup> Ed (Broadview Press 2009).

arguments have laid down the comprehensive prescriptions that may be used by individuals in treating animals without much guidance to law makers on how such ethics may be implemented into laws and policy.<sup>105</sup> The reliance of ethical philosophy is relevant to this study as “constitutional law (at least) cannot logically be separated from moral philosophy”.<sup>106</sup> In other words, there is a correlation between constitutional law and ethical philosophy. It is therefore necessary to discuss the various philosophical theories upon which the constitutional principles are based, in order to set a backdrop for modern protection of animals based on constitutional principles.

The contradictions characterising the relationship between human beings and animals do not provide a clear indication of what place animals have within the moral system.<sup>107</sup> These contradictions place animals in the borderline of human morality. On the one hand, human beings afford animals a strong moral status by expressions of immeasurable love. On the other hand, animals are denied any kind of moral status symbolised by incomprehensible hatred and the highest level of cruelty towards them.<sup>108</sup>

There are various philosophical arguments on the moral status of animals. These arguments are used to judge the manner in which animals are to be treated.<sup>109</sup> Some authors, herein classified as anthropocentric philosophers, contend that animals ought to be protected because of how they affect human beings, while others herein classified as ecocentric philosophers argue that animals should be protected for their own sake.

### **2.3. Anthropocentric arguments against the protection of animals**

Anthropocentric philosophers such as Aristotle, Aquinas and Kant deny animals any moral status. Their theories are classified under anthropocentrism because they believe that value is human-centred and that all other beings are means to human

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<sup>105</sup> David Fraser, ‘A “Practical” Ethic for Animals’ (2012) 25 (5) *Journal of Agricultural and Environmental Ethics* 721.

<sup>106</sup> Youens, ‘animal rights: a moral and legal discussion on the standing of animals in South Africa’ at 7.

<sup>107</sup> Scott D Wilson, ‘Animals and ethics’ < <https://www.iep.utm.edu> > accessed on 15 October 2021.

<sup>108</sup> Krstic, ‘Animal protection from killing and abuse in the European and Serbian criminal law’ 43.

<sup>109</sup> David Fraser and Others, ‘A Scientific Conception of Animal Welfare that Reflects Ethical Concerns’ (1997) 6 *Animal Welfare* 187; Clive L Spash and Tone Smith, ‘The Values of Nature’ (2021) *WU Vienna University of Economics and Business*, SRE - Discussion Papers No. 03/2021.

ends.<sup>110</sup> The theories discussed under this section deny that animals are worthy of any protection in their own right or for the benefit of the environment. Though they may at times require not harming animals, this is only on the effect that harming animals will have on human beings. Animals' lack of consciousness, reason, or autonomy is always used to deny them moral standing. Some authors, as shall be considered in the following subsections, look at the special properties that human beings have, such as rationality, autonomy, and self-consciousness to place the interests of human beings above those of animals.

### **2.3.1. Worldview (religious) theories against the protection of animals**

According to the Christian religion, human beings have been given dominion over plants and animals.<sup>111</sup> These religious views have hugely influenced philosophical arguments for the moral status of animals. Religions such as Judaism, Islam and Christianity fall within this worldview and give little regard to animals as they are human-centred.<sup>112</sup>

Since they are human centered, the duty owed to animals by human beings, according to the worldview, is based on sympathy. Religious worldviews on anthropocentrism put a hierarchy of all living beings, with the different level based on the nature of such living beings. The hierarchy, posit Aristotle, is reflected by the food chain, which places animals above plants, and human beings above animals.<sup>113</sup> Plants must therefore serve the needs of animals, while animals serve the needs of human beings. This is referred to as being "natural and expedient".<sup>114</sup> Therefore, the fact that God gave human beings dominion over animals means human beings are superior to animals. Yet, the bible also states that human beings have no superiority over animals.<sup>115</sup> Moreover, Proverbs 12:10 provides that "a righteous man regardeth the life of his beast: but the tender mercies of the wicked are cruel".<sup>116</sup> This constitutes a weakness in the anthropocentric position.

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<sup>110</sup> Helen Kopnina and Others, 'Anthropocentrism: More than Just a Misunderstood Problem' (2018) 31 *Journal of Agricultural and Environmental Ethics* 109.

<sup>111</sup> Genesis 1:28 (King James Version).

<sup>112</sup> 'Religion' < <https://worldanimal.net> > accessed on 24 February 2021.

<sup>113</sup> As cited by Clark Stephen, *The Moral Status of Animals* (Oxford 1977).

<sup>114</sup> As cited by Tom Regan and Peter Singer, *Animal Rights and Human Obligations 2<sup>nd</sup> Ed* (Prentice Hall 1989) 4 - 5.

<sup>115</sup> Ecclesiastes 3:19 (International Standard Version).

<sup>116</sup> Proverbs 12:10 (King James Version).

The belief in hierarchy of living things is based on the views and beliefs that Homo sapiens are the most powerful species in the world. Since human beings are Homo sapiens, they believe that they enjoy a superior moral status, thus making their lives greater than those of animals.<sup>117</sup> This is further supported by the traditional monotheist belief that only human beings have eternal souls which animals lack. This belief makes it okay for human beings to kill animals for food or even for fun. This monotheist belief, or at least one part of it, has been contradicted by science which found no evidence of soul in both animals and human beings.<sup>118</sup> Therefore, relying on the fact that human beings have souls, and animals do not, is not supported by any scientific evidence.

Aquinas regards rationality and ability to determine one's actions as the bases for granting moral standing.<sup>119</sup> This means that a being that is not rational should be regarded as property for the use of rational beings. The lack of rationality on the part of animals places them as instruments that exist for the sake of human beings. In justifying this argument, Aquinas contends that since only human beings are capable of understanding God, who is the last end of the universe, other beings exist to help human beings achieve the last end the universe.<sup>120</sup> This argument is counter-productive as it may lead to arguments that human beings that are not rational should be regarded as property.<sup>121</sup> Similarly, those who are atheists may also be regarded as property for their lack of understanding of God.

Some religious views therefore justify denying moral status to animals on the basis of the food chain.<sup>122</sup> A being that regularly eats another is placed higher in the food chain. It therefore becomes natural that a being which is higher than another in the food chain ought to eat that below it in order to further its own interests. There is no need to justify this behavior morally, as it is what nature dictates.<sup>123</sup> One may argue that this argument can mean that animals such as lions should have a higher status than human beings, as human beings do not eat lions and lions eat human beings.

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<sup>117</sup> Yuval N Harari, *Homo Deus: A Brief History of Tomorrow* (Harper Collins 2017).

<sup>118</sup> Harari, *Homo Deus: A Brief History of Tomorrow*.

<sup>119</sup> Tom Regan and Peter Singer, *Animal Rights and Human Obligations 2<sup>nd</sup> Ed* 6 - 12.

<sup>120</sup> Ibid.

<sup>121</sup> Wilson, 'Animals and ethics'.

<sup>122</sup> Ibid.

<sup>123</sup> Ibid.

It should be noted, however, that not all religious views are anthropocentric. Religions such as Hinduism and Buddhism are ecocentric. Since the viewpoint of these religions is ecocentric, they will be discussed under a section dealing with ecocentric viewpoint.

### 2.3.2. Autonomy as a theory for denying animals rights

One of the most prominent theories against the protection of animals; propounded by Kant, places autonomy as the basis of denying them moral status.<sup>124</sup> For a being's moral status to be considered, it ought to be autonomous.<sup>125</sup> The ability of a being to have willed and rational actions in the circumstances warrants moral status for the being. Kant places the 'will' as an integral part of this theory.<sup>126</sup> Though human beings and animals are all directed into actions by their desires, it is only human beings that have the ability to stand back from their desires and choose a rational cause of action.<sup>127</sup> The inability of animals to have wills means that they cannot have good wills. Consequently, animals do not have moral standing as they lack inherent values.

Kant's theory is an extension of the religious theory.<sup>128</sup> Instead of relying on the fact that it is 'natural' for beings on top of the food chain to use those below them, Kant presents various philosophical contentions based on autonomy and rationality.<sup>129</sup> This theory, and all those developed from it, focus on properties that human beings possess that animals lack. Though Kant's theory uses autonomy as the basis of denying animals moral standing, other related theories, such as consciousness theories and contractualist theories focus on such properties as being a moral agent, being able to exist in a reciprocal relation with other human beings, being able to speak, or being self-aware.<sup>130</sup> However, Kant's emphasis on rationality overlooks the capacity for suffering and moral consideration in sentient beings. Moreover, the theory does not take into consideration that ability to speak is not the only mode of communication one can use.

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<sup>124</sup> Immanuel Kant, *Critique of Practical Reason* (Prentice Hall 1993) 41.

<sup>125</sup> Kant, *Critique of Practical Reason* 44.

<sup>126</sup> Wilson, 'Animals and ethics'.

<sup>127</sup> Kant, *Critique of Practical Reason* 44.

<sup>128</sup> Immanuel Kant, *Groundwork of the Metaphysics of Morals* (Harper Torchbooks 1956).

<sup>129</sup> Kant, *Critique of Practical Reason* 41.

<sup>130</sup> Wilson, 'Animals and ethics'.

Autonomy as a moral theory can still find application even where it is not fully Kantian.<sup>131</sup> This is because autonomy has intrinsic value, which does not depend on practical reason. As Mill contends, autonomy is just one of the elements of well-being.<sup>132</sup> Since law ought to be universal, it must have no content based on individuals' desire, sense or any aspect such predisposed by a situation.<sup>133</sup>

### 2.3.3. Consciousness as a basis for denying moral obligation towards animals

According to the consciousness theories; as argued by philosophers such as Descartes, Harrison and Carruthers, the main reason why animals lack moral standing is because they are not conscious.<sup>134</sup> This lack of consciousness on the part of animals means they lack any interest of well-being that is worthy to be taken into consideration. Arguments under this view suggest that if animals were conscious, then they would have moral standing.<sup>135</sup> However, since these theories regard animals as lacking consciousness, they have no direct interest human beings should consider.

The denial of animal consciousness is seen from the theory of Descartes who contends that animals are automata, that is, even though they act like they are conscious, they are not.<sup>136</sup> To justify that animals are not conscious even though they appear to be, Descartes provides a mechanistic explanation to their behavior.<sup>137</sup> To prevent a situation where other human beings who are not conscious are prevented from having moral standing, this theory provides that unlike animals, human beings are capable of having complex and novel behavior which do not result from simple responses to stimuli. Furthermore, only human beings are capable of speech. Descartes' theory that animals lack consciousness is questionable given advancements in neuroscience and ethology that suggest otherwise. Since the theory is based on lack of consciousness, scientific evidence proving that animals are conscious can be used to reject this theory.

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<sup>131</sup> John Christman, 'Autonomy in Moral and Political Philosophy' (2020) *The Stanford Encyclopedia of Philosophy* 1.

<sup>132</sup> John S Mill, *On Liberty* (Parker and Son 1859) 52.

<sup>133</sup> Christman, 'Autonomy in Moral and Political Philosophy' 1.

<sup>134</sup> Wilson, 'Animals and ethics'.

<sup>135</sup> Ibid.

<sup>136</sup> Regan and Singer, *Animal Rights and Human Obligations 2<sup>nd</sup> Ed* 13 - 19.

<sup>137</sup> Stephen Voss, (ed) *Essays on the Philosophy and Science of Rene Descartes* (Oxford University Press 1993) 100.

Recent arguments against animal consciousness focus on the flaws of arguments purporting to claim that animals are conscious. According to Harrison, theories that claim that animals are conscious are ‘hopelessly’ flawed.<sup>138</sup> This is because theories claiming that animals have consciousness only look at the similarities between animals and human beings. Since the best arguments for animal consciousness fail, posits Harrison, there should be no belief that animals are conscious.<sup>139</sup>

Carruthers presents another argument to doubt that animals are conscious.<sup>140</sup> The author asserts that not all acts of human beings are conscious. There are differences between conscious and unconscious experiences, with the former available to higher-order thoughts. The only thing that makes a thought conscious is if it comes from the higher-order thoughts.<sup>141</sup> Since animals have no higher-order thought, there is no reason to believe that they are conscious.

According to Frey, animals do not possess any moral right.<sup>142</sup> The lack of moral rights for animals, posits Frey, is that their lives cannot and do not have the same emotional and cognitive experiences as humans, so they lack the moral values that guide human existence; and for this reason, animals lack any moral standing.<sup>143</sup> This is because there ought to be some kind of justification for granting moral standing, and the author finds none in case of animals.

#### **2.3.4. Contractualist arguments against animal rights**

The contractualist view is that determining which beings warrant moral consideration should be construed through various conditions that control behaviour within society.<sup>144</sup> Though this theory has a long history, it was not until the theory of justice was published by Rawls that its relationship with the status of animals in society was understood.<sup>145</sup> According to Rawls, an individual’s life ought to be governed by considered judgments that are independent of social contingencies and accidental circumstances.<sup>146</sup> As a result, autonomous agents should govern their lives according

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<sup>138</sup> Peter Harrison, ‘Do Animals Feel Pain?’ (1991) 66 *Philosophy* 25.

<sup>139</sup> Harrison, ‘Do Animals Feel Pain?’ 25.

<sup>140</sup> Peter Carruthers, *The Animals Issue: Morality in Practice* (Cambridge University Press 1992) 194.

<sup>141</sup> Carruthers, *The Animals Issue: Morality in Practice*.

<sup>142</sup> Raymond G Frey, *Interests and Rights: The Case Against Animals* (Clarendon Press 1980) 38.

<sup>143</sup> Frey, *Interests and Rights: The Case Against Animals* 38.

<sup>144</sup> Wilson, ‘Animals and ethics’.

<sup>145</sup> John Rawls, *A Theory of Justice* (Harvard University Press 1999) 15.

<sup>146</sup> Rawls, *A Theory of Justice* 11.

to justice. This is known as the theory of justice. Contractualists argue for fairness to be a concept of justice. For there to be fairness in justice, the rules that govern individual beings should be selected behind a veil of ignorance.<sup>147</sup> This entails that when choosing the rules that govern individual beings, individuals are ignorant as to their particular details, such as their gender, age, race, capabilities and species.<sup>148</sup> The basis of selecting the rules behind the veil of ignorance is because contractors normally select rules that benefit themselves. The veil removes any form of biasness, and the fact that they do not know who they are or who they will be, contractors will not choose rules that benefit any particular being in case they fall within the disfavoured group.<sup>149</sup> Rawls maintains that in such a situation, beings will choose rules that benefit rational and autonomous beings.<sup>150</sup>

Rawls theory is premised on justice and fairness. Carruthers extends this to cover every aspect of morality. The author states that an extension of Rawls' theory suggests that animals have no moral standing.<sup>151</sup> This is because, contractors know enough about themselves and that they are not animals. Consequently, they will choose rules that protect human beings, and animals will still not be protected.<sup>152</sup>

These theories may offer indirect protection to animals, as they impose indirect duties on human beings towards animals. However, there is no need under these theories to consider the interests of animals under these theories as the duty owed to animals by human beings is not a direct one.<sup>153</sup> They regard the only legitimate reason to consider human actions towards animals to be on the outcome of such actions on other human beings.<sup>154</sup> Harming animals may infringe upon the rights of the owner or of those who care for such an animal. Therefore, the anthropocentric view is that human beings should not harm animals because of the impact this might have on fellow human beings. As Kant states:

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<sup>147</sup> Lombard, 'Animal welfare and the law: towards legal regulation of the welfare of laboratory animals in South Africa' 19.

<sup>148</sup> Julie Hilden, 'A contractarian view of animals rights: insuring against the possibility of being a non-human animal' (2007 -2008) *Animal Law* 5.

<sup>149</sup> Lombard, 'Animal welfare and the law: towards legal regulation of the welfare of laboratory animals in South Africa' 19.

<sup>150</sup> Rawls, *A Theory of Justice* 15 - 19.

<sup>151</sup> Carruthers, *The Animals Issue: Morality in Practice* 105.

<sup>152</sup> Wilson, 'Animals and ethics'.

<sup>153</sup> Ibid.

<sup>154</sup> Arnold Arluke and Others, 'The Relationship of Animal Abuse to Violence and Other Forms of Antisocial Behaviour' (1994) 14 *Journal of Interpersonal Violence* 963.

Our duties towards animals are merely indirect duties towards humanity. Animal nature has analogies to human nature, and by doing our duties to animals in respect of manifestations of human nature, we indirectly do our duty to humanity.... We can judge the heart of a man by his treatment of animals.<sup>155</sup>

Though there is no direct consideration of animals in the moral society, there is still a consideration of their status based on the rights of human beings.<sup>156</sup> Indirect moral status of animals extends beyond refraining from harming the properties of other human beings. It goes deeper that just offending the rights of animal lovers. As Carruthers puts it:

Such acts [as torturing a cat for fun] are wrong because they are cruel. They betray an indifference to suffering that may manifest itself...with that person's dealings with other rational agents. So although the action may not infringe any rights...it remains wrong independently of its effect on any animal lover.<sup>157</sup>

Arguments against anthropocentric views are founded on the view that if animals lack a direct moral status based on certain qualities human beings have, then neither do such human beings as infants, the senile, the severely cognitively disabled, and other such marginal cases of humanity.<sup>158</sup> Since other human beings who lack certain qualities have direct moral status, there is no justification for denying animals standing based on their lack, if any, of those qualities.<sup>159</sup>

Though anthropocentric arguments suggest that animals have no direct moral standing, there are certain acts that may not be done on animals. For example, torturing animals for fun is considered wrong.<sup>160</sup> However, what makes it wrong is not because of the harm to animals, but rather on the effect this may have on fellow human beings or on the perpetrator. Nozick doubts this kind of arguments and asks:

Why should there be such a spillover? If it is, in itself, perfectly all right to do anything at all to animals for any reason whatsoever, then provided a person realizes the clear line between animals and persons and keeps it in mind as he acts, why should killing animals brutalize him and make him more likely to harm or kill persons?<sup>161</sup>

Cohen contends that animals cannot be the bearers of independent rights because "the concept of rights is essentially human; it is rooted in the human moral world and

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<sup>155</sup> Immanuel Kant *Lectures on Ethics* (Methuen and Co 1963) 373.

<sup>156</sup> Wilson, 'Animals and ethics'.

<sup>157</sup> Carruthers, *The Animals Issue: Morality in Practice* 153-154.

<sup>158</sup> Wilson, 'Animals and ethics'.

<sup>159</sup> Ibid.

<sup>160</sup> Carruthers, *The Animals Issue: Morality in Practice* 153.

<sup>161</sup> Robert Nozick, *Anarchy, State and Utopia* (Basic Books 1974) at 36.

has force and applicability only within that world”.<sup>162</sup> The author justifies this argument by distinguishing between rights and obligations. A right is what others can justly demand while obligations are what people ought to do.<sup>163</sup> The confusion of rights with obligations is what leads people to believe that animals have rights. The confusion is based on the assumption known as “symmetrical reciprocity”, which is founded on false logic.<sup>164</sup>

Hayward contends that the term anthropocentrism is often misused to criticise the whole of humanity.<sup>165</sup> The author contends that anthropocentrism should be distinguished from human chauvinism and speciesism as “it is not the concern with human welfare *per se* that is the problem here, but the arbitrary privileging of that welfare over the welfare of members of other species”.<sup>166</sup>

Interestingly, the basis for rejecting these theories is found in Rawls’ theory of justice, which states that

[a] theory however elegant and economical must be rejected or revised if it is untrue; likewise laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust.<sup>167</sup>

In the light of the above, it does not matter how elegant and economical anthropocentric arguments may be; as long as they are unjust, they ought to be rejected. A law can only be valid and accepted if it is just. Arbitrary laws are unjust. Hence if a law puts the welfare of human beings above the welfare of other species without a proper justification, such a law should be rejected as it is unjust.

Whether the basis for environmental protection is human centred (anthropocentric) or environment centred (ecocentric) has always been a contentious issue.<sup>168</sup> The previous section focused on the anthropocentric arguments for the protection of animals. The next section discusses the ecocentric arguments for the protection of animals.

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<sup>162</sup> Carl Cohen, ‘The Case for The Use of Animals in Biomedical Research’ (1986) 14 *The New England Journal of Medicine* 865.

<sup>163</sup> Nathan Nobis, ‘Carl Cohen’s “Kind” Arguments for Animal Rights and Against Human Rights’ (2004) 2 (1) *Journal of Applied Philosophy* 1.

<sup>164</sup> Cohen, ‘The Case for The Use of Animals in Biomedical Research’.

<sup>165</sup> Tim Hayward, ‘Anthropocentrism: A misunderstood problem’ (1997) 6 (1) *Environmental Values* 49.

<sup>166</sup> Hayward, ‘Anthropocentrism: A misunderstood problem’ at 59.

<sup>167</sup> Rawls, *A Theory of Justice* 3.

<sup>168</sup> Kopnina and Others, ‘Anthropocentrism: More than Just a Misunderstood Problem’ 110.

## 2.4. Ecocentric arguments for the protection of animals

Ecocentric philosophers such as Singer, Stone and Regan argue that animal ethics should extend equal consideration to animals based on similarities between animals and human beings. Analogy is regarded as a basis for granting animals moral standing on the grounds that animals possess certain physiological and mental capabilities possessed by infants or disabled human beings. According to these theories, there are no justifiable grounds for placing human beings and animals on different moral categories. These theorists are classified as ecocentric as they contend that the protection of the environment should focus on the environment, its intrinsic worth, and not on how it affects human beings.

### 2.4.1. Utilitarianism as a basis for protecting animals

One of the strongest and most convincing theories of normative ethics in the history of philosophy is utilitarianism.<sup>169</sup> Proto-utilitarian positions can be found throughout the development of ethical philosophy, even though they were only fully developed in the 19th century.<sup>170</sup>

While there may be variations on its application, utilitarianism is widely held to be the belief that ethically just actions are those that produce the most good.<sup>171</sup> This may be expressed in a number of ways. What is important to remember is that utilitarianism is a type of consequentialism, meaning that action is properly understood holistically based on its outcome. As a result, utilitarianism requires one to look at both the good of others and one's own good.

Classical Utilitarians such as Bentham and Mill were hedonists about value since they associated the good with pleasure.<sup>172</sup> They also believed that achieving the greatest amount of good for the greatest number requires maximising the overall good.<sup>173</sup> What distinguishes utilitarianism with other theories is that it requires impartiality and agent-neutrality.<sup>174</sup> This theory, however, may closely be associated with contractualist

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<sup>169</sup> Julia Driver, 'The history of utilitarianism' (2009) < <http://seop.illc.uva.nl> > accessed on 18 September 2023.

<sup>170</sup> Driver, 'The history of utilitarianism' 1.

<sup>171</sup> Ibid.

<sup>172</sup> Bentham, *An introduction to the principles of morals and legislation* 307; Mill, *On Liberty* 55; Tim Mulgan, *Understanding Utilitarianism* (Routledge 2014) 1.

<sup>173</sup> Ibid; Mulgan; *Understanding Utilitarianism* 9.

<sup>174</sup> Driver, 'The history of utilitarianism' 1.

viewpoint which requires a choice of what is ethical to be done behind a veil of ignorance. The only difference is that with utilitarianism, everyone's happiness counts the same, as opposed to the happiness of only rational and autonomous beings.<sup>175</sup>

#### 2.4.2. Equal consideration of interests to liberate animals

Singer presents one of the most influential arguments in the debate on animals and ethics.<sup>176</sup> Based on utilitarianism, these arguments for the liberation of animals are the bases for an ever-increasing movement on animals and ethics globally. The author attacks various theories; such as the religious worldview and autonomy, that argue that animals should be given less weight than human beings. According to Singer, giving animals less consideration based on what they cannot do will lead to less consideration for different human beings as well.<sup>177</sup> Since all human beings are regarded as being equal notwithstanding their incapacities, such consideration should be extended to animals.<sup>178</sup> The author concludes by stating that:

[t]he essence of the principle of equal consideration of Interests is that we give equal weight in our moral deliberations to the like interests of all those affected by our actions.<sup>179</sup>

This conclusion is based on two arguments. Firstly, arguing from marginal cases, the author states that reliance of capacities would mean that some human beings should be excluded as well.<sup>180</sup> Furthermore, animals possess some of the qualities possessed by human beings such as the ability to walk and communicate. This means that morally, there is no justification for treating animals different based on the qualities they possess. The author contends that sentience cannot be used to justify unequal treatment between animals and human beings, because animals are also sentient beings.<sup>181</sup> Depending on sentience will bring a conclusion that either not all human beings are equal or that all animals (human and nonhuman) are equal.<sup>182</sup> The first conclusion is "too counter-intuitive", meaning it will be against what the anthropocentric theorists believe in, and would thus be unacceptable. Therefore, the only option left is that all animals should be regarded as equal, whether they are human or nonhuman.

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<sup>175</sup> Ibid.

<sup>176</sup> Singer, *Animal Liberation: A New Ethics for Our Treatment of Animals* 2.

<sup>177</sup> Ibid 21.

<sup>178</sup> Wilson, 'Animals and ethics'.

<sup>179</sup> Singer, *Animal Liberation: A New Ethics for Our Treatment of Animals*) at 21.

<sup>180</sup> Wilson, 'Animals and ethics'.

<sup>181</sup> Singer, *Animal Liberation: A New Ethics for Our Treatment of Animals*) at 21.

<sup>182</sup> Ibid.

Secondly, relying on what is termed the ‘sophisticated inegalitarian’ argument; meaning a highly developed way of promoting inequality, the author refutes the view that all and only human beings are worthy of moral consideration.<sup>183</sup> These kinds of arguments can be used to defend racial and gender discrimination because they are predicated on a variety of ‘moral relevant’ characteristics, including autonomy, reason, and the ability to act morally.<sup>184</sup> According to Singer, the only consideration for a being to be protected morally should be its ability to feel.<sup>185</sup> This implies that all beings with the ability to experience pain ought to be accorded the same moral protection as human beings. Animals should also have moral protection since they are capable of feeling pain.

Treating animals differently from human beings is a form of discrimination based on species, termed *speciesism*, which should be condemned.<sup>186</sup> According to Singer, *speciesism* and other social issues like racism and sexism deprive one group of its moral and legal rights in favour of another, and thus they can be compared to each other.<sup>187</sup> Midgley shares this viewpoint and contends that the denial of animal rights amounts to speciesism, which is inexcusable and bears similarities to other social issues like ageism, sexism, and racism.<sup>188</sup> These arguments lead to a conclusion that denying animals rights because they are different is some form of unfair and unjustified discrimination.

#### 2.4.3. Inherent value as the basis for protecting animals

Another theory that is influential in animal ethics is presented by Regan, who argues that animals possess the same and equal rights as human beings.<sup>189</sup> The author argues against any argument of indirect or unequal moral status for animals as well as any inference that animals cannot be bearers of rights.<sup>190</sup> However Regan, unlike Singer, contends that the moral status of animals is founded on rights, not the principles of utilitarianism.<sup>191</sup>

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<sup>183</sup> Mark Rowlands, *Animal Rights: Moral Theory and Practice 2<sup>nd</sup> Ed* (Palgrave Macmillan 2016) 39.

<sup>184</sup> Wilson, ‘Animals and ethics’.

<sup>185</sup> Singer, *Animal Liberation: A New Ethics for Our Treatment of Animals* at 21.

<sup>186</sup> Wilson, ‘Animals and ethics’.

<sup>187</sup> Ingemar Nordin, *Animals don’t have rights: a philosophical study* (Libertarian Alliance 2001) 2.

<sup>188</sup> Marry Midgley, *Animals and Why They Matter* (University of Georgia Press 1983).

<sup>189</sup> Regan, *The case for Animal Rights*.

<sup>190</sup> Wilson, ‘Animals and ethics’.

<sup>191</sup> Ibid.

This is based on the idea of intrinsic value. Regan asserts that every being that is the subject of a life has intrinsic worth.<sup>192</sup> Animals are subjects of life, and this makes them beings that possess inherent value. Any being that has this inherent value should be respected.<sup>193</sup> Using animals as a means to the end of human beings does not show any respect towards them.<sup>194</sup> Therefore, animals' inherent value requires that they are treated as an end on themselves as opposed to furthering the means of human beings. Therefore, the inherent value of animals as opposed to their ability to feel pain or experience suffering is the basis for their protection; and thus distinguishes Regan's theory with utilitarianism.<sup>195</sup>

Regan also uses the argument from marginal cases to reach the conclusions that animals should enjoy rights.<sup>196</sup> The author begins by questioning the basis for human rights. In rejecting the view that for a being to have rights, it ought to be capable of representing itself, Regan argues that such arguments will prevent the marginal cases from being independent bearers of rights.<sup>197</sup> As such, since the basis for granting normal adults and the marginal cases rights is because they are subjects of life, animals, as subjects of life, should also enjoy rights.<sup>198</sup> A being is a subject of life if it possesses

beliefs and desires; perception, memory, and a sense of the future, including their own future; an emotional life together with feelings of pleasure and pain; preference and welfare interests; the ability to initiate action in pursuit of their desires and goals; a psychological identity over time; and an individual welfare in the sense that their experiential life fares well or ill for them, logically independently of their utility for others, and logically independently of their being the object of anyone else's interests.<sup>199</sup>

Mammals having a normal mental state over a year old satisfy these conditions. While there may be exceptions when it comes to those in vegetative state, birds and possible fish, these should be viewed as an exception rather than a rule.<sup>200</sup> This makes animals subject of experiences having a life that matters to them even though it may not matter

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<sup>192</sup> Rowlands, *Animal Rights: Moral Theory and Practice 2<sup>nd</sup> Ed* 61.

<sup>193</sup> Regan, *The case for Animal Rights*.

<sup>194</sup> Wilson, 'Animals and ethics'.

<sup>195</sup> Rowlands, *Animal Rights: Moral Theory and Practice 2<sup>nd</sup> Ed* 62.

<sup>196</sup> Wilson, 'Animals and ethics'.

<sup>197</sup> Regan, *The case for Animal Rights*.

<sup>198</sup> Wilson, 'Animals and ethics'.

<sup>199</sup> Regan, *The case for Animal Rights* 243.

<sup>200</sup> Rebecca Dresser, 'Respecting and Protecting Nonhuman Animals: Regan's "The Case for Animal Rights"' (1984) 9 (4) *American Bar Foundation Research Journal* 831.

to everyone else.<sup>201</sup> The fact that human beings may not know what the beliefs and desires of animals are does not mean they do not possess any belief.

The fact that human beings are granted rights for being subjects of life means animals should also enjoy rights as they are also subjects of life. There are similarities between this view and Singer's arguments. However, Regan points out the weaknesses of Singer's Utilitarian theory. While Singer argues that every interest should count equally, Regan argues that it is not an interest that counts, but rather the being capable of having an interest that counts.

Yet, Regan does not regard rights to be absolute and concedes that in cases of conflict between individual's rights, there should be a limitation of another's rights. There is, however, a need to minimise instances wherein rights are overridden.<sup>202</sup> The limitation of an individual's right should not be allowed just because it will make everyone else better off.<sup>203</sup> These limitations, as would be allowed by utilitarianism, are not permissible according to Regan.<sup>204</sup>

The above arguments as presented by Regan demand that human beings should alter the manner in which they treat animals.<sup>205</sup> This is because raising animals for food, irrespective of how they are treated and killed makes them the means to human beings' ends as opposed to them being the ends in themselves.<sup>206</sup> Similarly, using animals for experiment to advance human science is using them as a means to human beings' ends.

Stone contends that relying on the fact that animals are not able to communicate as a basis for denying the rights is not a sufficient ground.<sup>207</sup> The author asserts that if communication is used as a basis for granting standing, then animals ought to be granted standing in Courts. This is because nonhuman beings are able to communicate better than human beings. In support of these assertions, Stone relies on the ability of lawn to communicate with the owner when in need of water by

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<sup>201</sup> Thomas Nagel, 'What is it like to be a bat?' (1980) in N Block, *The Language and Thought Series, Volume 1* 159.

<sup>202</sup> Wilson, 'Animals and ethics'.

<sup>203</sup> Ibid.

<sup>204</sup> Regan *The case for Animal Rights* 243.

<sup>205</sup> Ibid.

<sup>206</sup> Tom Regan 'The case for animal rights' in P Singer (Ed) *In defense of animal rights* (1985) 13.

<sup>207</sup> Stone, 'Should Trees have Standing? Towards legal rights for natural objects'.

changing its colour. This communication, posits Stone, is better than that used by human beings in informing authorities about their own needs.<sup>208</sup>

Animals possess a number of qualities which make them eligible for moral protection. Beauchamp argues that human beings have a moral duty towards animals as they are beings capable of feeling pain.<sup>209</sup> This moral obligation is sufficient to grant animals rights as there is a correlation between rights and duties. Put differently, the basis for animal rights is in their ability to experience pain and suffering. Morality and the law should therefore afford equal consideration and protection to any being capable of feeling pain.<sup>210</sup>

Harrison believes there is no excuse for people to deprive animals of their joys in order to quickly make more money off of their dead bodies.<sup>211</sup> There is therefore no justification for causing animals to suffer.<sup>212</sup> The author posits that, there is no moral basis for arguing that animal suffering is any less significant than human suffering.<sup>213</sup>

Feinberg contends that capability to legitimately further one's interest is a basis for having legal rights.<sup>214</sup> To avoid a situation where those beings that cannot further their own interests will be denied rights, the author argues that it is sufficient if the furtherance of the interests is through representation, regardless of who represents those interests.<sup>215</sup> This was to avoid a strict requirement that each being must further its own interests, lest those who cannot manage their own affairs such as the minors, mentally handicapped and sequestered people would be denied rights.<sup>216</sup> As McMahan puts it

If certain psychological capacities are to be the bases of a person's worth, it seems that the possession of those capacities to a markedly higher degree ought to give a person a higher degree of worth. The idea that there is a threshold beyond which worth ceases to vary with the capacities that are its bases may seem an arbitrary, ad hoc stipulation motivated entirely by a desire to salvage our egalitarian intuition.<sup>217</sup>

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<sup>208</sup> Ibid.

<sup>209</sup> Tom L Beauchamp, 'Opposing Views on Animal Experimentation: Do Animals Have Rights?' (1997) 7 (2) *Ethics and Behaviour* 113.

<sup>210</sup> Harrison, 'Do Animals Feel Pain?' 25.

<sup>211</sup> Ibid.

<sup>212</sup> Ruth Harrison, *Animal Machines* (Vincent Stuart Publishers 1964).

<sup>213</sup> Harrison, 'Do Animals Feel Pain?' 25.

<sup>214</sup> Joel Feinberg, 'The Rights of Animals and Unborn Generations' in WT Blackstone (Ed) *Philosophy and Environmental Crisis* (1974).

<sup>215</sup> Feinberg, 'The Rights of Animals and Unborn Generations'.

<sup>216</sup> Joel Feinberg, *Animal Rights* Ed. by C Palmer (Palmer C Aldershot 2008).

<sup>217</sup> Jeff McMahan, *The Ethics of Killing: Problems at the Margins of Life* (OUP Usa

Therefore, having certain capacities should not be used as a basis of denying animals rights as there are other human beings as well as juristic entities that have rights even though they lack these capacities. Since they are able to be represented by human beings, this can also be the position in the case of animals, which is in line with the views of Stone who argues for trees to having standing which could be achieved by representation in Court.<sup>218</sup>

#### 2.4.4 Religious worldview on ecocentricism

For Hinduism and Buddhism, nature is highly sacred and “humans are not more significant than any other living thing”.<sup>219</sup> Human beings and nature are viewed as an organic unit, and thus animals are in an equal footing with human beings.<sup>220</sup> Hindus believe that human beings and animals possess the same soul. As such the religion recognises the rights of animals as co-existing with human rights, as without each other, the existence of both nature and man is an abstraction.<sup>221</sup> This symbolises the interconnectedness of all living beings. Killing an animal is believed to stop progression of a soul and thus causes great suffering to animals.<sup>222</sup> A soul that is self-realised is capable of understanding that all beings are equal.<sup>223</sup> Many sacred texts such as the Rig Veda and the Atharva Veda find praise toward anyone who shows sensitivity toward animals.<sup>224</sup> Moreover, any being on earth is protected by the gods, making any harm to the material world a direct ill treatment of the gods.<sup>225</sup> The belief in the cycle of birth and rebirth is that human being can come back as animals, and thus offers protection to animals.<sup>226</sup> Hindu scriptures put emphasis on the notion that, to receive God’s grace, one must not kill his creatures.<sup>227</sup> Visnupurana provides that “God, Kesava, is pleased with a person who does not harm or destroy other non-speaking creatures or animals”.<sup>228</sup> Killers of domesticated or protected animals are

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2004) at 249.

<sup>218</sup> Stone, ‘Should Trees have Standing? Towards legal rights for natural objects’.

<sup>219</sup> ‘Religion’ at 1.

<sup>220</sup> P Radharani ‘Hinduism and Natural Environment’ (2006) 31 (4) *Journal of Dharma: Dharmaram Journal of Religions and Philosophies* 497 at 499.

<sup>221</sup> Agoramorthy and Hsu, ‘The significance of cows in Indian society between sacredness and economy’ 5.

<sup>222</sup> ‘Religion’ 1; Radharani ‘Hinduism and Natural Environment’ 499.

<sup>223</sup> Bhagavad Gita (verse 5.18).

<sup>224</sup> Louis Caruana, ‘Different religions, different animal ethics?’ (2020) 10 (1) *Animal Frontier* 8.

<sup>225</sup> Radharani ‘Hinduism and Natural Environment’ 499.

<sup>226</sup> Roger S. Gottlieb *This sacred oath: Religion, nature, environment 2<sup>nd</sup> Edition* (Routledge 2004) 134.

<sup>227</sup> Gottlieb *This sacred oath: Religion, nature, environment* 134.

<sup>228</sup> Visnupurana (verse 3.8.15).

considered wicked and are bound to face hell fire for the years equal to the number on the animal's body.<sup>229</sup>

Buddhism believes in being compassionate towards all living beings.<sup>230</sup> Since a sentient being is subject to rebirth and come back in a form of another sentient being, killing a sentient being is proscribed. This is based more on the interconnectedness of all sentient beings.<sup>231</sup> “[O]ne maxim of the Noble Eightfold Path is that all Buddhists should refrain from killing”.<sup>232</sup> The weakness of Buddhism in protecting animals is that it is two-fold. While it accepts that animals ought to be protected and encouraging vegetarianism on the one hand, it views animals as inferior to human beings and being evil on the other hand.<sup>233</sup>

Concern for animal welfare is based on the belief that ancestors come back in animal form, and thus animals should be treated with the same respect due to human beings.<sup>234</sup> The Buddhist teachings regard killing any living being to be a sin, and the key to civilisation to be premised on friendliness to all living things.<sup>235</sup> Since Buddhism believes in karma, those that cause animals suffering will experience the same pain in their future.<sup>236</sup>

Both Hinduism and Buddhism question the practice involving cruelty to animals as they preach non-violence, purity, and reincarnation.<sup>237</sup> A philosophy of non-injury to living beings is deeply rooted on the belief of repeated, cyclical embodiment of all living beings.<sup>238</sup> Therefore, any act involving cruelty to animals will be against the teaching of these religions. However, Hinduism is not as strict when it comes to animal sacrifice as Buddhism.<sup>239</sup>

Another viewpoint that may have an impact on the protection of animals is the perspective of indigenous cultures worldwide. Just like Hinduism and Buddhism,

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<sup>229</sup> Yajnavalkyasmriti, Acaradhyayah (verse 180).

<sup>230</sup> 'Religion' 2.

<sup>231</sup> Ibid.

<sup>232</sup> Caruana, 'Different religions, different animal ethics?'9.

<sup>233</sup> Ibid.

<sup>234</sup> Endre Szűcs *et al* 'Animal Welfare in Different Human Cultures, Traditions and Religious Faiths' (2012) 25 (11) *Asian-Australas Journal of Anim Science* 1499 at 1500.

<sup>235</sup> Szűcs *et al* 'Animal Welfare in Different Human Cultures, Traditions and Religious Faiths' 1501.

<sup>236</sup> Ibid

<sup>237</sup> Daniela Berti 'Animals in the Public Debate: Welfare, Rights, and Conservationism in India' (2019) 10 (45) *Religions* 1 at 5.

<sup>238</sup> Szűcs *et al* 'Animal Welfare in Different Human Cultures, Traditions and Religious Faiths' 1500.

<sup>239</sup> Ibid.

indigenous cultures view animals and human beings to be interconnected.<sup>240</sup> The connection between human beings and nature is spiritual, and thus offers better protection to animals based on their traditional knowledge of ecological dynamics.<sup>241</sup> In this regard, traditional beliefs play a crucial role in protecting animals as some animals regarded as totem and taboo may not be killed or eaten.<sup>242</sup> It is widely recognised that before colonisation, indigenous people possessed a wealth of knowledge about the natural environment, which ensure not only their survival, but that of animals.<sup>243</sup> However, relying on indigenous viewpoint is problematic in that while some cultures profound reverence for nature and consider animals as sentient beings deserving of respect and protection, some view animal slaughter rituals as acceptable practice.<sup>244</sup>

## 2.5. Eco-anthropocentric arguments for the protection of animals

‘Eco-anthropocentric argument’ is a conventional phrase incorporating both the ecocentric and anthropocentric views and thus require a balancing approach between competing interests. Different philosophical theories for the protection of animals have advanced arguments that human beings can use in their decision making on the treatment of animals. Yet, there is very little guidance for law makers on how these theories can be implemented into policy. For instance, philosophers may argue that hunting animals is wrong<sup>245</sup> or that eating meat is wrong.<sup>246</sup> Such arguments are only made to persuade human beings in their personal decision making about their dietary or leisure activities. There is, however, not enough guidance for public health veterinarians, conservation agencies, international development workers, and the legislature to be used in formulating policy for addressing complex moral and legal decisions in the manner in which animals are treated.<sup>247</sup>

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<sup>240</sup> Coni Arévalo ‘Protecting the world’s wild animals through indigenous knowledge’ (18 January 2023) < <https://faunalytics.org> > accessed on 12 April 2024.

<sup>241</sup> Arévalo ‘Protecting the world’s wild animals through indigenous knowledge’.

<sup>242</sup> Ibid.

<sup>243</sup> Lynette Sibongile Masuku Van Damme and Lynn Meskell ‘Producing Conservation and Community in South Africa’ (2009) 12 (1) *Ethics Place and Environment* 69 at 73.

<sup>244</sup> Kai Horsthemke ‘Animals and African Ethics’ (2017) 7 (2) *Journal of Animal Ethics* 119 at 125.

<sup>245</sup> Marti Kheel, ‘The killing game: An ecofeminist critique of hunting’ (1996) 23 *Journal of the Philosophy of Sport* 30.

<sup>246</sup> Regan, ‘The case for animal rights’; MA Fox, *Deep Vegetarianism* (Temple University Press 1999).

<sup>247</sup> David Fraser, ‘Animal ethics and food production in the 21st century’ in D Kaplan (Ed) *Philosophy of Food* (2011) 190.

It is, for example, not sufficient to argue that animals should not be eaten while the majority of the population are dependent significantly on animals as a source of food, clothing and income.<sup>248</sup> This creates a very complex moral problem for law makers who on the one hand should protect animals, and on the other should not hinder the survival of human beings.<sup>249</sup>

Various options presented by philosophers have practical effects on animal welfare, poverty, and food availability.<sup>250</sup> These are the practical problems law makers are faced with requiring them to try and strike a balance between the competing interests.<sup>251</sup> There is thus, very little practical guidance for law makers from the various philosophical arguments on animal ethics.<sup>252</sup> The solutions require more than just focusing on whether or not it is okay to kill animals for meat. Both anthropocentric and ecocentric arguments are impractical since they do not provide guidance on how to balance competing interests as well as addressing the practical problems faced by law makers.

Certain human conducts may indirectly or unintentionally harm animals. This is one area which has created tension between the ethical concerns and animal ethics philosophy.<sup>253</sup> For instance, an animal may be harmed or killed unintentionally by a car<sup>254</sup>, by windows in buildings<sup>255</sup>, machines used for agricultural purposes<sup>256</sup> as well as many other aspects of human life.<sup>257</sup> Yet, most ethical philosophers usually focus on intentional harms caused by humans on animals and thus pay little to no regard to unintentional harms.

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<sup>248</sup> Carlos Seré, 'Not by bread alone: The next food revolution' in AG Brown (Ed) *The livestock revolution: A pathway from poverty?* (2003) 6.

<sup>249</sup> Fraser, 'A "Practical" Ethic for Animals' 722.

<sup>250</sup> Ibid 723.

<sup>251</sup> Fraser, 'Animal ethics and food production in the 21st century' 190.

<sup>252</sup> Fraser 'A "Practical" Ethic for Animals' 723.

<sup>253</sup> Ibid.

<sup>254</sup> Richard TT Forman and LE Alexander, 'Roads and their major ecological effects' (1998) 29 *Annual Review of Ecology and Systematics* 207.

<sup>255</sup> Daniel J Klem, 'Avian mortality at windows: The second largest human source of bird mortality on earth' (2009) *Proceedings Fourth International Partners in Flight Conference* 244.

<sup>256</sup> Steven L Davis, 'The least harm principle may require that humans consume a diet containing large herbivores, not a vegan diet' (2003) 16 *Journal of Agricultural and Environmental Ethics* 387.

<sup>257</sup> Anthony W Sainsbury and Others, 'The welfare of free-living wild animals in Europe: Harm caused by human activities' (1995) 4 *Animal Welfare* 183.

Lamey contends that there is a clear distinction between accidental killings and killings which are perpetrated intentionally.<sup>258</sup> The author regards this distinction as important as intentional killings are worse than accidental killings. Francione is of the similar view and contends that there is a moral difference between intentional and accidental killings of animals.<sup>259</sup> Be that as it may, there are concerns over unintentional killings and a survey by Dubois and Fraser has revealed that a number of participants regarded unintended harms as more serious than intentional harms.<sup>260</sup>

Another area of concern in the views of anthropocentric and ecocentric arguments is that they put sentience at the centre of their arguments. Their theories regard sentient beings as the main focus of concern. Not much focus is placed on the fact that animal populations are diminishing; losing habitats and that some are facing extinction. This has led environmental ethicists to propose ethical theories that focus on a greater good and put more value on biodiversity, ecological systems as well as the “biotic community”.<sup>261</sup> This is contrary to various animal ethics theories that are individual oriented.<sup>262</sup> It is contended that theories that focus on individual animals are flawed as they are more concerned about the extinction of a rare species than they are about killing an abundant species.

This reflects a need for a new approach on animal ethics that is not based only on theory, but one which takes cognisance of various issues in the complex relationship between human beings and animals. This may be achieved by what is termed “care-based ethics”. This eco-anthropocentric view suggests that the complex relationship between human beings and animals should be approached by applying virtues such as care and empathy.<sup>263</sup> Additionally, recognising the ethical obligations owed to animals by human beings as a result of various forms of community shared between

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<sup>258</sup> Andy Lamey, ‘Food fight! Davis versus Regan on the ethics of eating beef’ (2007) 38 *Journal of Social Philosophy* 331.

<sup>259</sup> Gary L Francione, ‘The abolition of animal exploitation’ in GL Francione and R Garner (contributors) *The Animal Rights Debate: Abolition or Regulation?* (2010) 1.

<sup>260</sup> Sara Dubois and David Fraser, *Public perceptions of harms to wildlife: closer than they appear* (University of British Columbia 2011).

<sup>261</sup> Baird J Callicott, *In defense of the land ethic: Essays in environmental philosophy* (State University of New York Press 1989).

<sup>262</sup> Taylor, *Animals and ethics: An overview of the philosophical debate 3<sup>rd</sup> Ed.*

<sup>263</sup> Josephine Donovan and Carol J Adams, *The feminist care tradition in animal ethics: A reader* (Columbia University Press 2007); Daniel Engster, ‘Care ethics and animal welfare’ (2006) 37 *Journal of Social Philosophy* 521.

them. This is known as communitarian or relational approach to animal ethics.<sup>264</sup> The reasonableness of human actions towards animals may also be implemented using the “pragmatic approach”.<sup>265</sup>

Practical philosophy is one of the less explored options to animal ethics.<sup>266</sup> This may provide a distinctive approach to animal ethics, even though it was not intended as a guide to animal ethics. This is because practical philosophy is based on context as opposed to theory.<sup>267</sup> Practical philosophy is therefore in a position where it would provide a robust understanding of how human actions affect animals. Furthermore, practical philosophy is timely as opposed to being timeless, and is therefore flexible to deal with current problems as they come.<sup>268</sup> The fact that it is passed on orally makes it adaptive in nature, and it may be changed to suit the current needs in society.<sup>269</sup> Practical philosophy is based more on reasonableness than it is on rationality, and thus provides a plausible fit to real-life experiences more than logic arising from different foundational philosophical theories.<sup>270</sup>

Morally, animals are regarded as having standing. Even those who argue that animals lack the capacity to be bearers of rights do not altogether say that animals are without standing. The moral obligation human beings have to animals requires them to first address the issue of the property status on animals, lest they will only be confining themselves to ways in which exploitation of animals could be done in a more “humane” manner. The moral standing of animals should be sufficient to be the ground or basis for their rights. A practical philosophical approach can provide a viable solution for policy makes as it would ensure contextual protection of animal rights. This approach can protect animal rights by providing ethical guidance, expanding moral consideration to include animals, influencing policy decisions, fostering cultural and social change, and collaborating with other disciplines to address complex ethical challenges. Such

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<sup>264</sup> Midgley, *Animals and Why They Matter*.

<sup>265</sup> Paul B Thompson, ‘Getting pragmatic about farm animal welfare’ in E McKenna and A Light, (Eds) *Animal pragmatism: rethinking human-nonhuman relationships* (2004) 140; Frank Kupper and Tjard De Cock, Buning ‘Deliberating animal values: A pragmatic-pluralistic approach to animal ethics’ (2010) 24 *Journal of Agricultural and Environmental Ethics* 431.

<sup>266</sup> Stephen Toulmin, *Cosmopolis: The hidden agenda of modernity* (Clarendon Press 1990); Marry A Warren *Moral status: Obligations to persons and other living things* (Oxford University Press 1997); Fraser (n 105 above) 724.

<sup>267</sup> Fraser, ‘A “Practical” Ethic for Animals’ 724.

<sup>268</sup> Toulmin, *Cosmopolis: The hidden agenda of modernity*.

<sup>269</sup> Fraser, ‘A “Practical” Ethic for Animals’ 724.

<sup>270</sup> Toulmin, *Cosmopolis: The hidden agenda of modernity*.

an approach would harmonise the relationship between human beings and nature, which inherently involves respecting animal rights as well as develop a more nuanced and evidence-based arguments in support of animal welfare. While it may have a theoretical underpinning, practical philosophy would be based on context taking into account all the relevant circumstances.

## **2.6. Conclusion**

The relationship between human beings and animals is complex as it is characterised by contradictions. In certain instances, human beings express immeasurable love towards animals, while in others there is a highest level of cruelty towards them. This is because human beings regard themselves as being superior to animals. The bases for the protection of animals have been subject of contention with various philosophical arguments being raised for and against their protection. Though different theories find justification for the way animals should be treated, most are based on a development of one of the existing theories canvassed by various philosophers. In other words, different legal philosophical and religious theories are used as the bases for the moral status of animals in society. The view of those who deny animals any rights are human centred. These theories classify the human race above other species, thus justifying cruel treatment of animals. Anthropocentric theories view human beings as superior to animals based on different grounds. Those who argue for equal consideration of animals base their theories around animals. Their arguments are that animals must be protected in their own right and not based on how human beings are affected. These theories are animal centred and usually look at various similarities between animals and human beings. However, these theories provide little guidance to law makers on how animal ethics may be implemented into laws and policy. One of the least explored ethical theories is the theory of practical philosophy. These theories do not base their arguments on differences or similarities but looks at competing interests. Relying on practical ethics for animals may deal with various concerns that lawmakers have in dealing with the complex nature of the human-animal relationships. This will be based on the detailed understanding of how human beings affect animals and provide insights as well as identifying various principles to be applied in solving the ethical problems faced by policy makers. These theoretical underpinnings are reflected in legislative enactments discussed in the next chapter.

## Chapter three

### The strengths and shortcomings of the protection regime in South Africa and India

#### 3.1. Introduction

The prevention of animal cruelty may, to a large extent, be solved by developing and enacting effective environmental laws.<sup>271</sup> An assessment of these laws may provide an understanding of the shortcomings in their protection of animals. The previous chapter looked at various philosophical and religions theories for and against the protection of animals. This chapter discusses the protection regime in both South Africa and India. The strengths and shortcomings of both regimes are highlighted.

#### 3.2. The protection of animals under international law

The role of international law in protecting animals can be traced back to the 1900s through the Convention for the Preservation of Wild Animals, Birds and Fish in Africa<sup>272</sup> as well as the Convention to Protect Bird Useful for Agriculture.<sup>273</sup> Though based on anthropocentrism, these multilateral treaties did offer some protection for animals.<sup>274</sup> International law is relevant to the protection of animals as it plays a pivotal role in protecting the welfare of animals globally. An international regulatory framework through multilateral treaties requires a global cooperation and can thus ensure that animals are protected from cruelty, exploitation, and habitat destruction. Treaties such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora<sup>275</sup>, the Convention on the Conservation of Migratory Species of Wild Animals<sup>276</sup> and the Convention on Biological Diversity<sup>277</sup> set guidelines for the conservation and sustainable management of endangered species. International law transcends borders, and it can therefore ensure that issues such as illegal wildlife trafficking and natural habitats destruction are combated. International law is thus important in the preservation of the planet's biodiversity. Since international law is an important source

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<sup>271</sup> Gareth Mauck, 'Wildlife Legislation in Sub-Saharan Africa: Criminal Offences' (2013) < <https://conservationaction.co.za> > accessed 13 February 2022.

<sup>272</sup> Convention for the Preservation of Wild Animals, Birds and Fish in Africa, 1900.

<sup>273</sup> Convention to Protect Bird Useful for Agriculture, 1902.

<sup>274</sup> Michael J Bowman, 'The protection of animals under international law' (1988) 4 *Connecticut Journal of International Law* 487.

<sup>275</sup> Convention on the International Trade in Endangered Species of Wild Fauna and Flora, 1975.

<sup>276</sup> Convention on the Conservation of Migratory Species of Wild Animals, 1979.

<sup>277</sup> Convention on Biological Diversity, 1992.

of both South African and Indian laws, it is therefore necessary to discuss various international instruments applicable in the two countries to evaluate their strengths and weaknesses in protecting animals.

### 3.2.1. The South African international law position

A discussion of the South African position under international law is informed by the provisions of section 39(1)(b) of the Constitution which, in peremptory terms, obliges Courts to consider international law in their interpretation of the Bill of Rights.<sup>278</sup> Moreover, section 233 of the Constitution obliges Courts to consider international law in their interpretation of legislation.<sup>279</sup> Rules of international customary law may also be relied upon, provided they are not in contravention of the Constitution.<sup>280</sup>

The Convention on the International Trade in Endangered Species of Wild Fauna and Flora<sup>281</sup> is an international treaty that aims at ensuring that the international trade in specimens of wild animals and plants does not threaten their survival.<sup>282</sup> It was drafted based on the resolution of the International Union for Conservation of Nature (IUCN) adopted in 1963.<sup>283</sup> Article II provides for fundamental principles relating to the trade of species as listed in appendix I to III.<sup>284</sup> Articles III to V regulate the trade in specimen according to the principles of article II and appendices I, II and III.<sup>285</sup> State parties to the Convention on the International Trade in Endangered Species of Wild Fauna and Flora may adopt stricter domestic measures regarding the trade, possession, or transport of species listed in appendices I, II, and III.<sup>286</sup>

South Africa is a party to the Convention on the International Trade in Endangered Species of Wild Fauna and Flora<sup>287</sup> which was ratified at its inception in 1975. Even though the Convention was ratified in 1975, it was only in 2010 that its provisions were

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<sup>278</sup> Section 39(1)(b) of the South African Constitution

<sup>279</sup> Section 233 of the South African Constitution.

<sup>280</sup> Section 232 of the South African Constitution.

<sup>281</sup> Convention on the International Trade in Endangered Species of Wild Fauna and Flora, 1975.

<sup>282</sup> CITES (the Convention on the International Trade in Endangered Species of Wild Fauna and Flora) < <https://cites.org> > accessed on 5 February 2022.

<sup>283</sup> International Union for Conservation of Nature Resolution, 1963.

<sup>284</sup> Article II of the Convention on the International Trade in Endangered Species of Wild Fauna and Flora.

<sup>285</sup> Article III, IV and V of the Convention on the International Trade in Endangered Species of Wild Fauna and Flora.

<sup>286</sup> Article XIV of the Convention on the International Trade in Endangered Species of Wild Fauna and Flora.

<sup>287</sup> John Dugard, *International Law: A South African Perspective 4<sup>th</sup> Edition* (Juta 2015) 408; Dire Tladi and Others, *Dugard's International Law: A South African Perspective 5<sup>th</sup> Edition* (Juta 2019).

included in domestic laws by the provisions of section 97(1)(b)(iv) of the National Environmental Management: Biodiversity Act.<sup>288</sup> The prohibition of trade in certain species may be in conflict with the General Agreement on Tariffs and Trade<sup>289</sup> aimed at promoting free trade.<sup>290</sup> This conflict is clearly illustrated by two cases, namely the *United States - Restrictions on Import of Tuna (No 1), Mexico v United States*<sup>291</sup> and the *United States - Import Prohibition of Certain Shrimp and Shrimp Products, India and Others v United States*.<sup>292</sup> In the former case, the United States had imposed a ban on importing tuna from Mexico. This is due to the manner in which tuna was caught, which did not allow dolphins to escape. The General Agreement on Tariffs and Trade dispute settlement panel found that the prohibition by the United States violated the General Agreement on Tariffs and Trade. It was further stated that a contracting state cannot restrict imports simply because the environmental laws and policies of the other state are different from its own. In the latter case, the Appellate Body of the World Trade Organization found that the prohibition of importations of shrimp because they are harvested without turtle-excluder devices was a violation of the World Trade Organization. The Appellate Body further stated that

[i]n reaching these conclusions, we wish to underscore what we have not decided in this appeal. We have not decided that the protection and preservation of the environment is of significance to the Members of the [World Trade Organization]. Clearly, it is. We have not decided that the sovereign nations that are Members of the [World Trade Organization] cannot adopt effective measures to protect endangered species, such as sea turtles. Clearly they can and should. And we have not decided that sovereign states should not act together bilaterally, plurilaterally or multilaterally, either within the [World Trade Organization] or in other international for a, to protect endangered species or to otherwise protect the environment. Clearly they should and do.<sup>293</sup>

These decisions have been criticised by environmentalist.<sup>294</sup> It is clear that there is a need to balance the competing interests between international trade on the one hand and environmental protection on the other.<sup>295</sup> This may be achieved by applying the

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<sup>288</sup> Convention on the International Trade in Endangered Species of Wild Fauna and Flora Regulations, 2010.

<sup>289</sup> General Agreement on Tariffs and Trade, 1948.

<sup>290</sup> Dugard, *International Law: A South African Perspective 4<sup>th</sup> Edition* 407.

<sup>291</sup> GATT Panel Report, DS21/R, BISD/39S/155, (1991) 30 ILM 1594.

<sup>292</sup> WTO case Nos. 58 (and 61), Ruling adopted on 6 November 1998, (1999) 38 ILM 118.

<sup>293</sup> *United States - Import Prohibition of Certain Shrimp and Shrimp Products, India and Others v United States* at para 185.

<sup>294</sup> Dugard, *International Law: A South African Perspective 4<sup>th</sup> Edition* 408; Dire Tladi, 'Can the Wolf Protect the Lamb?: Free Trade Regimes as Instruments Towards Sustainable Development' (2002) 27 *South African Yearbook of International Law* 149.

<sup>295</sup> Dugard, *International Law: A South African Perspective 4<sup>th</sup> Edition* 408.

principles of sustainable development which caters for the needs of developing countries, while at the same time ensuring preservation of natural resources for the benefit of future generations.<sup>296</sup> There is therefore, a need to purposively interpret the provisions of the General Agreement on Tariffs and Trade to prevent absurdity and ensure legal certainty.

Another international instrument for the protection of animals is the Convention on Biological Diversity<sup>297</sup> which is a multilateral treaty having three main aims, one of which is the conservation of biological diversity. It recognises that the conservation of biodiversity is a common concern of humankind. This Convention takes into account the concerns of developing nations when it comes to conservation of biological diversity. In particular, Article 1 of the Convention provides that the object of the Convention is, amongst other things, to ensure biological diversity, sustainable use of its components as well as the fair and equitable sharing of benefits resulting from the use of genetic resources.<sup>298</sup> South Africa ratified to the Convention on Biological Diversity.<sup>299</sup> This Convention was domestically implemented by the provisions of the National Environmental Management: Biodiversity Act. Articles 8 and 9 provides for *in-situ* conservation, meaning the conservation of species in their natural habitats, and *ex-situ* conservation, meaning the conservation of species outside their natural habitats, of biodiversity respectively. The implementation of the Convention on Biological Diversity is important as it ensure domestic enforcement.

Another international instrument relevant for protection of animals is the Convention on the Conservation of Migratory Species of Wild Animals, which aims to facilitate close cooperation on the conservation of migratory species between the countries through which these animals travel on their annual journeys. Under this Convention, state parties are obliged to conserve migratory species and their habitats.<sup>300</sup> State parties are also obliged to cooperate and promote research on migratory species,<sup>301</sup> endeavour to protect these species<sup>302</sup> as well as entering into agreements relevant for

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<sup>296</sup> Ibid.

<sup>297</sup> Convention on Biological Diversity, 1992.

<sup>298</sup> Article 1 of the Convention on Biological Diversity.

<sup>299</sup> Dugard, *International Law: A South African Perspective 4<sup>th</sup> Edition* 409.

<sup>300</sup> Article 2 of the Convention on the Conservation of Migratory Species of Wild Animals.

<sup>301</sup> Article 2(3)(a) of the Convention on the Conservation of Migratory Species of Wild Animals.

<sup>302</sup> Article 2(3)(b) of the Convention on the Conservation of Migratory Species of Wild Animals.

their conservation.<sup>303</sup> South Africa has taken steps to implement the provisions of the Convention on the Conservation of Migratory Species of Wild Animals into its domestic laws through the enactment of the National Environmental Management: Biodiversity Act. This Act, discussed below, has specific provisions relating to the conservation and management of biodiversity, including migratory species. The problem with relying on the provisions of the Convention on the Conservation of Migratory Species of Wild Animals is that it relies on cooperation from other states. South African Courts cannot compel other states to cooperate, and thus the enforcement of the Convention on the Conservation of Migratory Species of Wild Animals is limited.

Implementing environmental legislation requires domestic incorporation.<sup>304</sup> The need to have this international instrument implemented into national laws is informed by the provisions of section 231(4) of the Constitution which provides that international agreements ought to be domesticated to become law in South Africa, unless if they are self-executing.<sup>305</sup>

Regionally, the African Convention on the Conservation of Nature and Natural Resources<sup>306</sup> aims at enhancing environmental protection, to foster the sustainable use of natural resources and to harmonise the policies that regulate the protection of the environment. Articles 9 to 12 of the African Convention on the Conservation of Nature and Natural Resources provide for the protection of species, regulate trade in species and promote conservation.<sup>307</sup> The African Convention on the Conservation of Nature and Natural Resources is not self-executing and requires domestic incorporation to find application within South Africa.

The African Charter on Human and People's Rights<sup>308</sup> also sets up a standardising legal system for the advancement, assurance and satisfaction of human rights in

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<sup>303</sup> Article 2(3)(c) of the Convention on the Conservation of Migratory Species of Wild Animals.

<sup>304</sup> Dugard, *International Law: A South African Perspective 4<sup>th</sup> Edition* 413; Ed Couzens, "The incorporation of international environmental law (and multilateral environmental agreements) into South African domestic law: notes and comments" (2005) 30 *South African Yearbook of International Law* 128.

<sup>305</sup> Section 231(4) provides that "Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament".

<sup>306</sup> African Convention on the Conservation of Nature and Natural Resources, 2003.

<sup>307</sup> Articles 9 - 12 of the African Convention on the Conservation of Nature and Natural Resources.

<sup>308</sup> African Charter on Human and People's Rights, 1981.

Africa. Article 24 of the African Charter on Human and People's Rights particularly outlines environmental right, and it was the first time such right is recognised and provided for in an international legally binding instrument. The Article provides that "[a]ll peoples shall have the right to a general, satisfactory environment favourable to their development".<sup>309</sup> The strength of this Charter is that it recognises the need to protect the environment within an international legal framework. However, the instrument is aimed at protecting human rights, and therefore reflects anthropocentric viewpoint that view the protection of animals necessary in so far as it affects human beings. This is a notable weakness because, since it is human centred, the protection of animals under this Charter is consequential.

The Southern African Development Community Protocol on Wildlife Conservation and Law Enforcement in the Southern African Development Community<sup>310</sup> provides for the protection and sustainable use of wildlife resources within each member state's jurisdiction and places an obligation on various stakeholders to take necessary measure that will ensure that the conservation and sustainable use of wildlife is achieved. Article 7 provides for the wildlife management and conservation programmes in order to avoid or reduce the negative impacts on wildlife. The problem with relying on these instruments is the unwillingness on the part of local Courts to enforce them. Only those which have been incorporated into domestic law may be applied as required by section 231 of the Constitution.<sup>311</sup> Otherwise, they will have to be self-executing.<sup>312</sup> The language of these treaties does not expressly stipulate that they are self-executing, and as such, they need to be incorporated into municipal law for them have a domestic effect.

Proposals by the World Society for the Protection of Animals for the draft Universal Declaration on Animal Welfare<sup>313</sup> having seven articles were made to United Nations member states.<sup>314</sup> This draft was updated in 2011, but since then, nothing much has

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<sup>309</sup> Article 24 of the African Charter on Human and People's Rights.

<sup>310</sup> Southern African Development Community Protocol on Wildlife Conservation and Law Enforcement in the Southern African Development Community, 1999.

<sup>311</sup> Section 231 of the South African Constitution.

<sup>312</sup> Section 231(4) of the South African Constitution.

<sup>313</sup> Draft Universal Declaration on Animal Welfare, 2000 (updated in 2011).

<sup>314</sup> Centre for Environmental Rights, 'A fair game? Improving the well-being of South African wildlife Review of the legal and practical regulation of the welfare of wild animals in South Africa' (2018) *Wild Welfare Report 25 June 2018* at 9.

happened, and it has not yet been adopted into law.<sup>315</sup> In its preamble, this draft recognises that animals are sentient beings having a welfare worthy of respect and consideration.<sup>316</sup> The sentience of animals is further recognised by Article 1 which provides that “[a]nimals are sentient beings and their welfare should be respected”.<sup>317</sup> The meaning of animal welfare is provided in Article 2 which states that animals welfare includes animal health encompassing the physical and psychological state of the animal.<sup>318</sup> A good welfare is characterised by being fit, healthy and free from all sufferings.<sup>319</sup> Article 3 further confirms the sentience of animals by stating that scientific research revealed that all vertebrates and some invertebrates animals are sentient beings.<sup>320</sup>

State parties are obliged under Article 4 to take appropriate steps to ensure the prevention of cruelty to and suffering of animals.<sup>321</sup> In addition to appropriate steps, state parties must further put in place appropriate policies, legislation and standards on the welfare of animals.<sup>322</sup> These policies, legislation and standards ought to be observed, recognised and promoted by both national and international practices.<sup>323</sup> Article 7 calls upon all member states to adopt all necessary measures to give effect to these agreed principles.<sup>324</sup>

The draft Universal Declaration on Animal Welfare has a potential of protecting animals. The strength of this instrument is that it seeks to recognise that animals are sentient beings worthy of legal protection within an international legal framework. In addition, it seeks to prevent cruel treatment of animals as well as requiring legislation and policies on the welfare of animals. The problem is that this is still a draft and therefore does not have any binding force.

In addition to treaties to conventions, the environment is also protected by soft law. Though soft law can be found in many branches of international law, it plays a

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<sup>315</sup> Ibid.

<sup>316</sup> Preamble to the Draft Universal Declaration on Animal Welfare.

<sup>317</sup> Article 1 of the Draft Universal Declaration on Animal Welfare.

<sup>318</sup> Article 2 of the Draft Universal Declaration on Animal Welfare.

<sup>319</sup> Article 2 of the Draft Universal Declaration on Animal Welfare.

<sup>320</sup> Article 3 of the Draft Universal Declaration on Animal Welfare.

<sup>321</sup> Article 4 of the Draft Universal Declaration on Animal Welfare.

<sup>322</sup> Article 5 of the Draft Universal Declaration on Animal Welfare.

<sup>323</sup> Article 6 of the Draft Universal Declaration on Animal Welfare.

<sup>324</sup> Article 7 of the Draft Universal Declaration on Animal Welfare.

significant role in environmental law than any other branch of law.<sup>325</sup> Relevant to the protection of the environment is the 1972 Stockholm Declaration of the United Nations Conference on the Human Environment, the 1992 Rio Declaration on Environment and Development as well as the 2002 Declaration of the Johannesburg World Summit on Sustainable Development.<sup>326</sup> Principle 3 of the Rio Declaration on Environment and Development provides that the right to development ought to be fulfilled to ensure equitable development and protection of the needs of present future generations.<sup>327</sup> This principle seems to reinforce the anthropocentric view that the environment should be protected for the benefit of human beings. A better protection for the environment is found in Principle 4 which provides that environmental protection is a fundamental part of development which should not be isolated from the development process.<sup>328</sup> The interconnectedness and interrelation between development and environmental protection was stated by the Constitutional Court in the case of *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Mpumalanga Province*<sup>329</sup> as follows:

The principle of integration of environmental protection and socio-economic development is therefore fundamental to the concept of sustainable development. Indeed, economic development, social development and the protection of the environment are now considered pillars of sustainable development.<sup>330</sup>

The problem with relying on soft law is that it is not a binding source of law.<sup>331</sup> This may lead to enforcement problems as states are not under an obligation to comply with soft law. Some states may choose to ignore the provisions of soft law and no action may be taken against them unless if such law has become common practice between states and thus qualify as customary international law. The lack of justiciability of soft law is stated by Dugard as follows:

Much of environmental law, in both international and national systems, is non-justiciable and unenforceable. However, it is much better to have standards and policy

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<sup>325</sup> Dugard, *International Law: A South African Perspective 4<sup>th</sup> Edition* 401.

<sup>326</sup> Stockholm Declaration of the United Nations Conference on the Human Environment, 1972; Rio Declaration on Environment and Development, 1992; Declaration of the Johannesburg World Summit on Sustainable Development 2002.

<sup>327</sup> Principle 3 of the Rio Declaration on Environment and Development.

<sup>328</sup> Principle 4 of the Rio Declaration on Environment and Development.

<sup>329</sup> 2007 (6) SA 4 (CC).

<sup>330</sup> *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Mpumalanga Province* (n 311 above) at para 53.

<sup>331</sup> Dugard, *International Law: A South African Perspective 4<sup>th</sup> Edition* 401.

guidelines in place now than to wait until states have ratified multilateral treaties that translate into obligation.<sup>332</sup>

### 3.2.2. The Indian position under international law

Similarly to South Africa, India has ratified several international legal instruments relevant to the protection of animals. To ensure their domestic application, these laws have been implemented through various means. India is a signatory to the Convention on International Trade in Endangered Species of Wild Fauna and Flora.<sup>333</sup> The implementation of the provisions of this Convention has been through the enactment of the Wildlife Protection Act<sup>334</sup> discussed below. This Act regulates the trade in wildlife and their products, including endangered species, and provides penalties for illegal trade.

India is also a signatory to the Convention on the Conservation of Migratory Species of Wild Animals<sup>335</sup> which means that the country is obliged to facilitate close cooperation on the conservation of migratory species. The Wildlife (Protection) Act<sup>336</sup> and its Amendment Act<sup>337</sup> implement the provisions of the Convention on the Conservation of Migratory Species of Wild Animals. These laws, discussed under the section on the strengths and shortcomings of the Indian protection regime below aim to conserve and protect migratory species and their habitats within India.

India is a signatory to the United Nations Convention on Biological Diversity<sup>338</sup> and implemented the Convention through the enactment of the Biological Diversity Act.<sup>339</sup> Relevant provisions of the Biological Diversity Act are discussed below. Additionally, there are specific bilateral agreements and regional agreements between India and its neighbouring countries and other international organisations to address specific animal conservation and protection issues. For instance, India has agreements with

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<sup>332</sup> Dugard, *International Law: A South African Perspective 4<sup>th</sup> Edition* at 402.

<sup>333</sup> Convention on the International Trade in Endangered Species of Wild Fauna and Flora, 1975.

<sup>334</sup> Wildlife Protection Act of 1972.

<sup>335</sup> Convention on the Conservation of Migratory Species of Wild Animals, 1979.

<sup>336</sup> Wildlife (Protection) Act of 1972.

<sup>337</sup> Wildlife (Protection) Amendment Act of 2002.

<sup>338</sup> Convention on Biological Diversity, 1992.

<sup>339</sup> Biological Diversity Act, 2002; Yumnam P Singh, 'Wildlife Conservation and Protection by instrumentality of Law: India Chapter' (2019) 9 (6) *Pramana Research Journal* 409.

countries like Nepal to protect the Bengal tiger population in the Terai Arc Landscape.<sup>340</sup>

Therefore, India has implemented various principles and obligations imposed by international law into its domestic legal framework, mainly through the provisions of the Wildlife (Protection) Act, Wildlife (Protection) Amendment Act and the Biological Diversity Act.<sup>341</sup> This ensures that India has the laws in place for the protection of animals, particularly endangered species and migratory animals. Since they are enshrined in Indian domestic laws, they can be enforceable within the country as was the case in *Animal Welfare Board of India v A. Nagaraja and Others*.

### 3.3. The South African protection regime: strengths and shortcomings

Discussions around the protection of animals should start with the legal status of animals. Animals are regarded as property, which in the wider sense refers to a person's possessions, and includes anything capable of being owned.<sup>342</sup> Anything capable of being owned would satisfy a definition of property, provided that it is corporeal, external to humans, independent, subject to juridical control and useful or valuable to humans. Since animals are regarded as property, they are not given the same legal protection and entitlements as 'persons'.<sup>343</sup> The law only grants rights and duties to legal persons, whether natural or juristic.<sup>344</sup> Animals, as legal objects lack the capacity to have rights and duties.<sup>345</sup> Put differently, the object status on animals means they cannot be afforded any such entitlements that natural and juristic persons enjoy.<sup>346</sup>

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<sup>340</sup> Memorandum of Understanding between the Government of India and the Government of Nepal for the Conservation of Bengal Tigers in the Terai Arc Landscape, 2019; Y Jhala, 'Recovery of tigers in India: Critical introspection and potential lessons' (2021) 3 *People and Nature* 281.

<sup>341</sup> Biological Diversity Act, 2002; Singh, 'Wildlife Conservation and Protection by instrumentality of Law: India Chapter' 415.

<sup>342</sup> AJ van der Walt and GJ Pienaar *Introduction to the law of property 8<sup>th</sup> Edition* (Juta 2021) 1.

<sup>343</sup> Marita Carnelly, *The Law of Persons in South Africa* (Oxford University Press 2010); Kirsten Youens, 'A moral and legal discussion on the standing of animals in South African law' unpublished Environmental Law Masters Dissertation, University of Kwa-Zulu Natal 2001; Geeta Shyam, 'Is the classification of animals as property consistent with modern community attitudes?' (2018) 41 *University of New South Wales Law Journal* 1418; Pablo P Castelló, 'A Strategic Proposal for Legally Protecting Wild Animals' (2022) 25 (2) *Journal of International Wildlife Law and Policy* 103.

<sup>344</sup> June Sinclair, *Introduction* in B Van Heerden and Others, *Boberg's Law of Persons and the Family 2<sup>nd</sup> Edition* (1999) 3; Wesahl Domingo and Jacques Mahler-Coetzee, *Law of Persons and the Family* (Pearsons 2017) 7.

<sup>345</sup> Catharina J Davel, *Law of Persons Students' Textbook* (Juta and Co Ltd 1998).

<sup>346</sup> Sinclair, *Introduction* 4.

Sinclair defines a person as “a being, entity or association which is capable of having legal rights and duties”.<sup>347</sup> This definition may be viewed as providing a basis for arguments that animals deserve to be afforded rights. However, this argument is not made by the author. The author suggests that animals do not have rights because even though cruelty to animals is a statutory crime, it does not mean that animals have a right not to be treated cruelly as they are legal objects lacking capacity to have rights.<sup>348</sup> The jurisprudential view on rights by Meyerson is that legal rights are those which can be enforced through Courts granted by statute, common law or constitutional provisions.<sup>349</sup> Common law does not grant any legal rights to animals as it views animals to be property incapable of having rights and duties.<sup>350</sup>

The extent to which South African laws protect the welfare of animals can be assessed by examining a range of domestically enacted laws by both the national and provincial governments.<sup>351</sup> These laws are, to a large extent, influenced by international treaties and conventions to which South Africa is a signatory.<sup>352</sup> This section discusses the various statutes that may be used to grant animals rights.

In South Africa, legislative enactments that prohibit animal cruelty are constructed in a manner that does not interfere with the ordinary exercise of property rights over animals. These pieces of legislation are promulgated to proscribe unnecessary and unreasonable infliction of pain and suffering on animals. In *Ford v Wiley*,<sup>353</sup> it was found that the necessity or reasonableness of the pain is determined by looking at whether the purpose of inflicting pain outweighs the suffering.

These laws reflect the anthropocentric view that human beings are the primary objects of moral concern, rather than animals. These laws are thus homocentric as they impose obligations on human beings without necessarily giving rise to corresponding rights for animals.<sup>354</sup> Francione contends that anti-cruelty legislation 'reinforces and

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<sup>347</sup> Ibid at 6.

<sup>348</sup> Ibid 4.

<sup>349</sup> Denise Meyerson, *Jurisprudence* (Oxford University Press 2013).

<sup>350</sup> Susan L Goodkin, 'The evolution of animal rights' (1986) 18 *Columbian Human Rights Law Review* 259.

<sup>351</sup> Centre for Environmental Rights, 'A fair game? Improving the well-being of South African wildlife Review of the legal and practical regulation of the welfare of wild animals in South Africa' at 14.

<sup>352</sup> Ibid.

<sup>353</sup> (1889) 23QB 203.

<sup>354</sup> Youens 'animal rights: a moral and legal discussion on the standing of animals in South Africa' 24.

supports the status of animals as property'.<sup>355</sup> The author posits that anti-cruelty legislation are primarily aimed at preventing the detrimental aftermaths that animal cruelty has on the moral development of human beings. This reflects the anthropocentric attitude of treating animals in “instrumental terms” and the essential property interest human beings have in animals.<sup>356</sup>

In *R v Moato*<sup>357</sup> the Court had to deal with the contravention of section 3(1) of the Prevention of Cruelty to Animals Act.<sup>358</sup> After being charged with the contravention of section 3(1) of the Prevention of Cruelty to Animals Act, the appellant was convicted in the Court *a quo*. This was after he had hit the dog belonging to the complainant in an attempt to separate the dogs that were fighting, causing it serious injuries. The Court found that since he acted in defence of his own property, the infliction of serious injuries on the complainant’s dog did not amount to a contravention of section 3(1) of the Prevention of Cruelty to Animals Act. The Court did not look at the actual suffering of the animal. Van den Heever J found that

the object of the legislation was not to confer legal rights upon animals and this prohibition is not intended to provide them with protection. The aim is obviously to prohibit a person from being so cruel to an animal as to give offence to the finer feelings and sensibilities of other persons.<sup>359</sup>

This decision reflects the anthropocentric viewpoint that animals are protected solely for the benefit of human beings. This reflects the views of philosophers such as Aristotle, Aquinas and Kant who deny animals any moral status as they believe that value is human-centred and that all other beings are means to human ends.<sup>360</sup> A similar view was expressed by the Court in the case of *S v Edmunds*.<sup>361</sup> In this case, the Court stated that the object of the Act was not to elevate animals to the status of

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<sup>355</sup> Gary L Francione, *Rain Without Thunder: The Ideology of the Animal Rights Movement* (Temple University Press 1994) at 133.

<sup>356</sup> Francione, *Rain Without Thunder: The Ideology of the Animal Rights Movement* 133.

<sup>357</sup> *R v Moato* at 492.

<sup>358</sup> Prevention of Cruelty to Animals Act 8 of 1914.

<sup>359</sup> As translated by Youens, ‘animal rights: a moral and legal discussion on the standing of animals in South Africa’ at 24; *R v Moato* at 492 stated in Afrikaans as follows:

“Die oogmerk van die wetgewing was nie om diere tot regsgenote te verhef nie en hierdie verbod is nie bedoel om aan hulle beskerming te verleen nie. Die oogmerk was klaarblyklik om te verbied dat een regsgenoot so ongenadig teenoor diere optree dat hy daardeur die fyner gevoelens en gewaarwordings van sy medemens leed aandoen”.

<sup>360</sup> Kopnina and Others, ‘Anthropocentrism: More than Just a Misunderstood Problem’ 109.

<sup>361</sup> *S v Edmunds*.

human beings, but rather to protect human beings from treating animals in a way that would offend the finer sensibilities of society.<sup>362</sup> This is because

it is not the mistreated dog who is the ultimate object of concern...Our concern is for the feelings of other human beings, a large proportion of whom...identify themselves with a tortured dog or horse and respond with great sensitivity to its sufferings.<sup>363</sup>

Certain acts of cruelty towards animals are proscribed by law, yet some traditional or institutional acts of cruelty are allowed. Though not expressly stating that animals have rights, the laws against animal cruelty do hint that animals have rights against the cruel treatment of human beings.<sup>364</sup> It is contended that the reason to punish a person who is cruel towards his or her own animal is recognising that such animal has a moral claim against the owner. The issue would thus become the extent to which animal rights may be extended. "There is no reason why, if one can say animals should not be cruelly treated, why one cannot say they should actually be treated better".<sup>365</sup> This would be in line with eco-anthropocentric arguments based on care-based ethics. Instead of arguing against cruel treatment of animals, the approach should be for better treatment of animals.

The approach provided by legislation is however illogical and fragile.<sup>366</sup> One may contend that the better way of protecting animals should be premised on them being sentient beings worthy of protection on their own right. In other words, the ecocentric view in the protection of animals may provide a better protection regime for animals. This is based on equal consideration and inherent value theories for the protection of animals discussed under ecocentric arguments for the protection of animals.

The welfare of animals is generally regarded as almost non-existent, and simply incidental to conservation.<sup>367</sup> A report by the Centre for Environmental Rights states that

[i]t is fair to say that good animal welfare as a whole is dealt with inconsistently in our society and law. Good welfare, by its very definition, promotes healthy development, humane treatment, the ability to express innate behaviour and the fostering of biodiversity as each species performs its role in the ecosystem optimally. Welfare is

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<sup>362</sup> Bilchitz, 'Moving beyond arbitrariness: The legal personhood and dignity of non-human animals' 44.

<sup>363</sup> Youens, 'animal rights: a moral and legal discussion on the standing of animals in South Africa' at 24; Joel Feinberg, 'The Rights of Animals and Future Generations', in W Blackstone, Ed *Philosophy and Environmental Crisis* (1974) 45 - 46.

<sup>364</sup> Youens, 'animal rights: a moral and legal discussion on the standing of animals in South Africa' 24.

<sup>365</sup> Ibid.

<sup>366</sup> Ibid at 25.

<sup>367</sup> Werner Scholtz, 'Injecting compassion into international wildlife law: from Conservation to Protection?' (2017) *Transnational Environmental Law* 1 at 4.

therefore an important consideration, for more than just anthropocentric reasons, in biodiversity conservation. The [C]ourts, including the Constitutional Court, have recently and increasingly recognised the importance of animal welfare and the important link between conservation and welfare.<sup>368</sup>

Even though legislation provides an illogical approach in the protection of animals, some pieces of legislation that relevant to the protection of animals will now be discussed. Though a number of legislative enactments protect animals to some degree, a number of these are diluted as they only prohibit unnecessary suffering. What is unnecessary is assessed by applying the subjective test and places the onus to prove that the suffering was unnecessary on the prosecution instead of placing the proof on the accused to justify that the suffering was necessary.<sup>369</sup>

### 3.3.1. Animal Protection Act 71 of 1962

The main purpose of the Animal Protection Act<sup>370</sup> is to consolidate and amend the laws relating to the cruelty to animals. Moreover, the Act sought to prohibit the cruel and inhumane treatment of animals by human beings.<sup>371</sup> The Act offers protection to both domesticated and wild animals.<sup>372</sup> The officials of the Society for the Prevention of Cruelty to Animals are given powers to seize animals as well as to prohibit the killing of certain animals for commercial purposes.

The Act criminalises certain conducts of cruelty towards animals such as overloading, overdriving, overworking, ill-treating, neglecting, infuriating, torturing or maiming,<sup>373</sup> or cruelly<sup>374</sup> beating, kicking, goading or terrifying any animal or confining, chaining, tethering or securing any animal needlessly. It is also a criminal offence to fail to afford an animal adequate space, ventilation, light, protection or shelter from heat or cold weather. If any of these is done in circumstances that may cause an animal any suffering, the perpetrator may, if found guilty, be liable to imprisonment, a fine or both.

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<sup>368</sup> Centre for Environmental Rights, 'A fair game? Improving the well-being of South African wildlife Review of the legal and practical regulation of the welfare of wild animals in South Africa' 21.

<sup>369</sup> Ibid.

<sup>370</sup> Animal Protection Act 71 of 1962.

<sup>371</sup> Lombard, 'Animal welfare and the law: towards legal regulation of the welfare of laboratory animals in South Africa'.

<sup>372</sup> Section 1 of the Animal Protection Act.

<sup>373</sup> *S v Gerwe* 1977 (3) SA 1078 (T).

<sup>374</sup> Youens 'animal rights: a moral and legal discussion on the standing of animals in South Africa' 25 citing *R v Heldberg* 1993 NP 507.

What constitutes torture and maiming was considered in the case of *S v Gerwe*<sup>375</sup> where the Court found that the words should be given their ordinary meaning. The Court stated that torture means to inflict bodily pain or suffering as a form of punishment or persuasion and that maiming means to mutilate. Using the ordinary meaning of the words, the Court held that stabbing a dog did not qualify as torture or maiming. Some writings agree too, that the mere infliction of pain does not constitute a contravention of the prohibition as defined in the Act.<sup>376</sup> This view is incorrect as stabbing a dog does inflict pain which could have been done for punishment or to persuade a dog into doing something. Moreover, the view does not take into account that sometimes Courts must purposively interpret legislation to avoid an absurdity.

Furthermore, it is a criminal offence to starve, underfeed or poison any animal.<sup>377</sup> However, a closer look at the provisions of the Act suggests that killing is not necessarily proscribed but the method used in killing an animal. In other words, the Act only prohibits a killing of an animal in a manner that causes unnecessary pain and suffering. Be that as it may, the Act empowers the Minister of Justice to proscribe killing of an animal for purposes of using its skin or other parts for commercial purposes.<sup>378</sup>

The powers vested in the Society for the Prevention of Cruelty to Animals in terms of the Act are extensive. The Court in *Society for the Prevention of Cruelty to Animals, Standerton v Nel and Others*<sup>379</sup> found that the Act confers 'wide powers' on this statutory body. The powers vested in the statutory body include entering any premises where an animal is kept, to examine the conditions under which it is kept. There is no need to obtain a warrant if the owner of the property consents. However, where the owner refuses, the officers may only enter by order of a magistrate.<sup>380</sup> Furthermore, the officers are also given the powers to effect an arrest and seizure.<sup>381</sup>

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<sup>375</sup> *S v Gerwe*.

<sup>376</sup> *Youens 'animal rights: a moral and legal discussion on the standing of animals in South Africa'* 25.

<sup>377</sup> Section 2(1)(a)-(s) of the Animal Protection Act.

<sup>378</sup> Section 2(3) of the Animal Protection Act.

<sup>379</sup> 1988 (1) SA 42 (W).

<sup>380</sup> Section 8(1)(a) of the Animal Protection Act.

<sup>381</sup> Section 8(1)(b)-(d) of the Animal Protection Act.

Though the rights of animal owners are recognised in the Act,<sup>382</sup> there is a prohibition on the infliction of unnecessary and unreasonable pain on the pain by such owner.<sup>383</sup> This means that any person, including the owner, may be held liable for violating the Act if he or she inflicts unnecessary and unreasonable pain on the animal. It is only when the pain is regarded as unnecessary and unreasonable that a person may be found liable under the Act. The problem is that what is necessary is determined by human beings who might be biased towards their own species.

An imposition of additional sanctions for contravention of the Act is regulated by the provisions of section 3. In terms of section 3(1)(a), an animal may be destroyed to prevent it from further suffering as a result of inappropriate and unlawful human conduct.<sup>384</sup> Another sanction is depriving the owner of the ownership of the animal. During this time, the animal will temporarily be placed in the case of the SPCA.<sup>385</sup> If a suitable home for the animal is not found, the animal may be euthanised.<sup>386</sup> According to section 3(b), “any order may be made which the Court deems fit with regard to an animal”. This section gives Courts a wide discretion when it comes to making orders regarding an animal. In other words, Courts are not only limited to the sanctions provided for in the Act but may impose any other sanction they deem fit in the circumstances. The Constitutional Court in *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development and Another*<sup>387</sup> considered the powers vested in Courts in terms of section 3 and stated that Courts are empowered by section 3 of the Act to give specific orders relating to the treatment of animals.

Just like in any other offences, there may be a defence to inflicting pain on animals. For instance, it will not be deemed unlawful if the pain was inflicted in self-defence from an imminent or apparent attack by an animal.<sup>388</sup> It is also not an offence in terms of the Act to inflict pain on an animal for chastisement or training, or for surgery intended at making the animal more useful.<sup>389</sup> Using a living animal for research is

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<sup>382</sup> Section 1 of the Animal Protection Act.

<sup>383</sup> Section 2(a), (b), (d), (e), (f), (m) and (p) of the Animal Protection Act.

<sup>384</sup> Section 3(1)(a) of the Animal Protection Act.

<sup>385</sup> Section 3(1)(b) of the Animal Protection Act.

<sup>386</sup> Lombard, ‘Animal welfare and the law: towards legal regulation of the welfare of laboratory animals in South Africa’.

<sup>387</sup> 2017 (1) SACR 284 (CC) para 59.

<sup>388</sup> *S v Nkhumeleni* 1986 (3) SA 102 (V); *R v Sibeko* 1951 (2) SA (E).

<sup>389</sup> Youens, ‘Animal rights: a moral and legal discussion on the standing of animals in South Africa’ 26.

also not proscribed by the Act. Quite surprisingly, there is no legislation that deals specifically with the use of animals for scientific research and vivisection in South Africa.<sup>390</sup> Therefore, the use of animals in research and vivisection thus stands to be regulated by the provisions of this Act. This means that the standard used to determine the lawfulness of experiments using animals is the same as that used to determine the necessity or reasonableness of treating animals.<sup>391</sup> The Act is silent when it comes to unnecessary and unreasonable pain inflicted on animals in the course of hunting.<sup>392</sup>

Section 4 sets a civil punishment scheme that enables Courts to award damages for breaching the Act.<sup>393</sup> Under section 4, damages not exceeding R5 000 may be recovered by the person who provided the necessary treatment and care of an animal when a person has been convicted under the Act.<sup>394</sup> Lombard contends that the amount of damages is not sufficient and suggests a reform of the current legislative framework in this regard.<sup>395</sup> This is because, without harsh sentences, cruelty towards animals cannot be deterred.

Other shortcomings of this Act are that its scope does not cover all animals, and that it fails to deal with issues of animals used in testing as well as in farming. The Act also uses the concept of 'unnecessary suffering' in an extremely loose manner. This may be seen from various unnecessary infliction of pain such as those in zoos, circuses and battery chickens which are not proscribed by the Act. In other words, the Act does not proscribe certain prevalent acts of cruelty towards animals.<sup>396</sup> The unlawfulness or otherwise of acts of cruelty towards animals is determined without any consideration to the effect that such act has on an animal. What is essentially looked at is the intention and needs of the perpetrator. There are also very limited prosecutions under this Act. The implementation of this Act is thus inadequate in protecting animals from cruelty.<sup>397</sup> Moreover, the Act is criticised by Lombard who states that its main focus is

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<sup>390</sup> Ibid.

<sup>391</sup> Ibid 27.

<sup>392</sup> Ibid.

<sup>393</sup> *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development and Another* para 59.

<sup>394</sup> Section 4 of the Animal Protection Act.

<sup>395</sup> Lombard, 'Animal welfare and the law: towards legal regulation of the welfare of laboratory animals in South Africa' 40.

<sup>396</sup> Youens, 'Animal rights: a moral and legal discussion on the standing of animals in South Africa' 27.

<sup>397</sup> Lombard, 'Animal welfare and the law: towards legal regulation of the welfare of laboratory animals in South Africa'.

human aspirations as opposed to ensuring sufficient protection for animals.<sup>398</sup> This reflects the anthropocentric view that animals ought to be protected for the benefits of human beings.

### 3.3.2. Societies for the Prevention of Cruelty to Animals Act 169 of 1993

The long title to the Societies for the Prevention of Cruelty to Animals Act<sup>399</sup> provides that the Act seeks to provide for the regulation of societies for the prevention of cruelty to animals and for matters incidental thereto. The Act establishes a National Council of Societies for the Prevention of Cruelty to Animals<sup>400</sup> which aims to prevent cruelty to animals by promoting their good treatment by human beings.<sup>401</sup> Furthermore, the Act seeks to promote the interests of societies<sup>402</sup> as well as taking cognisance of the application of laws affecting animals and societies.<sup>403</sup> The Council should thus make appropriate representations in relation to animals to the relevant authorities. The Council also has “to do all things reasonably necessary for or incidental to the achievement of the objects” of the Act.<sup>404</sup>

Section 3 of the Act provides a broader perspective on the concept of humanity which underlies the South African legal foundation.<sup>405</sup> Humanity, or *Ubuntu*, is regarded as the *Grundnorm* of the South African legal system and requires all to act humanly towards others. The objects of the National Council as outlined in the Act include amongst other things:

- (c) To prevent the ill-treatment of animals by promoting their good treatment by man;
- (e) To take cognisance of the application of laws affecting animals and societies and to make representations in connection therewith to the appropriate authority; and
- (f) To do all things reasonably necessary for or incidental to the achievement of the objects mentioned in paragraphs (a) to (e).<sup>406</sup>

The Court in *National Council of the Society for Prevention of Cruelty to Animals v Minister of Environmental Affairs and Others*<sup>407</sup> stated that the Council is a statutory body created in terms of section 2 and having an obligation to prevent the ill-treatment

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<sup>398</sup> Ibid.

<sup>399</sup> Societies for the Prevention of Cruelty to Animals Act 169 of 1993.

<sup>400</sup> Section 2(1) of the Societies for the Prevention of Cruelty to Animals Act.

<sup>401</sup> Section 3(c) of the Societies for the Prevention of Cruelty to Animals Act.

<sup>402</sup> Section 3(d) of the Societies for the Prevention of Cruelty to Animals Act.

<sup>403</sup> Section 3(e) of the Societies for the Prevention of Cruelty to Animals Act.

<sup>404</sup> Section 3(f) of the Societies for the Prevention of Cruelty to Animals Act.

<sup>405</sup> Section 3 of the Societies for the Prevention of Cruelty to Animals Act.

<sup>406</sup> Section 3(c), (e) and (f) of the Societies for the Prevention of Cruelty to Animals Act.

<sup>407</sup> 2020 (1) SA 249 (GP).

of animals are required by section 3. This view does not consider the fact that the obligations of the Council are beyond those listed in section 3 of the Act. The correct view was presented in a dissenting judgment by Cameron JA in *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw*<sup>408</sup> where the learned judge found that the objects of the Council, a statutory body, go beyond preventing ill-treatment of animals. In other words, the objects of the Council go beyond those listed under section 3 of the Act.

In *R v W*<sup>409</sup> the Court had to determine what would constitute “ill-treatment” as envisaged in the Act. In this case, an accused was charged with ill-treatment of an animal after he had chained a cow to prevent it from straying onto other people’s lands, thereby causing it a sore. The Court found that there was nothing suggesting that the accused’s ill-treatment of the cow had the requisite intention to cause the cow any unnecessary suffering.

The Provisions of this Act were also considered in the case of *R v Makaza and Others*.<sup>410</sup> In this case, Beadle CJ stated that:

[i]f the Legislature had wished to prohibit snaring animals with wire snares because of the cruelty involved in this form of capture, one would expect it to have done so in specific terms. The offence of snaring is, however, coupled with many other forms of capturing animals.....methods of capture which cause less pain and suffering than most other forms. It is true that the Act prohibits the use of wire snares for destroying game which is damaging crops... But there is nothing in the Act which prevents the Minister from issuing a permit for the capture of game by means of a wire snare, should he be so advised.<sup>411</sup>

This reflects the fact that the already weak anthropocentric foundation of anti-cruelty legislation is further weakened by the judicial decisions based on such legislation, which further dilutes what constitutes ill-treatment by requiring intention for liability against cruel acts towards animals. Negligent causing of harm to an animal should also be proscribed under anticruelty laws.

The case of *Society for the Prevention of Cruelty to Animals, Standerton v Nel and Others*<sup>412</sup> presents a successful litigation for the Council in preventing cruelty to animals. In this case, the SPCA sought an interdict against the respondent who

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<sup>408</sup> 2008 (5) SA 339 (SCA).

<sup>409</sup> 1960 (4) SA 692 (SR).

<sup>410</sup> 1969 (2) SA 209 (R).

<sup>411</sup> *R v Makaza and Others* at 211 – 212.

<sup>412</sup> *Prevention of Cruelty to Animals, Standerton v Nel and Others*.

wanted to hold a rodeo with a live bull-riding competition. It was contended on behalf of the respondent that the SPCA had limited powers in terms of the Animal Protection Act. As a result of this restriction, it was argued, the SPCA had neither a clear right nor *Locus standi* to act beyond those powers. Without a clear right or *Locus standi*, there is no basis of seeking an interdict in Court. However, the Court found that such contentions are without merit. It was found that the SPCA has vast statutory powers and that such powers do include the power to prevent the injury being apprehended. The Court thus granted the interdict. It is worth mentioning, however, that this decision was made before the promulgation of the Societies for the Prevention of Cruelty to Animals Act. Under the provisions of this Act, the SPCA's *Locus standi* is automatically provided for.

In *Natal Zoological Gardens (Pty) Ltd and Others v Ezemvelo KZN Wildlife and Others*<sup>413</sup> the Court stated that it was left with a deep and abiding concern for the welfare of animals. While this is a positive step in recognising the need to protect animal welfare, it is not enough to simply have this concern without taking positive steps to ensure that animals are protected. More still needs to be done to ensure that this concern is addressed by either an enactment of legislation that expressly addresses the issue or through a purposive interpretation of existing legislation. As correctly stated in *National Council of SPCA v Openshaw*<sup>414</sup>

[t]hough animals are capable of experiencing immense suffering and though humans are capable of inflicting immense cruelty on them, the animals have no voice of their own. Like slaves under Roman law, they are the objects of the law, without being its subjects.

This viewpoint affirms some of the ecocentric theories such inherent value and religious worldview on ecocentricism which view animals as capable of suffering.<sup>415</sup> This means that animals are just like slaves under Roman law. The way in which slaves were denied rights is similar to the way animals are denied rights by human beings. Similarly, women were denied rights by laws passed by men. A number of justifications were used to deny slaves and women of rights. It is therefore expected that those who deny animals any legal status will find justifications to deny animals any legal standing.

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<sup>413</sup> (5945/09) [2009] ZAKZPHC 38 (13 August 2009).

<sup>414</sup> *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* at 351 B – C.

<sup>415</sup> These theories are discussed in chapter 2 under ecocentric arguments for the protection of animals.

The Court in *South African Predator Breeders Association and Others v Minister of Environmental Affairs and Tourism*<sup>416</sup> stated as follows:

It is clear on the evidence and also not disputed that very many people all over the world find the notion of hunting a lion bred and raised in captivity, often by hand, and totally dependent on humans for its survival, abhorrent and repulsive. I find this view to be objectively reasonable and justifiable, to say the least. This is so even, or perhaps especially so, if the hunting of such animal takes place in the circumstances put forward on behalf of the applicants as the most humane...<sup>417</sup>

This case seems to suggest that even where hunting of animals in captivity is done in the most humane way, majority of people find this practice to be abhorrent and repulsive. While this may offer some protection for animals, it is based on anthropocentric viewpoints that the protection of animals is based on how their treatment affects human beings. This would mean that in a society where people do not find this type of hunting to be 'abhorrent and repulsive', the behaviour would be justifiable.

In *National Council of Societies of the Prevention of Cruelty to Animals v Withers and Others*<sup>418</sup>, the Court missed an opportunity to deal with substantive cruelty issues. The Court found that the appeal was moot since the animals were no longer within its jurisdiction. As the Centre for Environmental Rights notes

[i]t is disheartening that a case of such blatant animal cruelty, which led to calls for the improvement of wild animal welfare and elephants in particular, did not result in a severe sentence, and significant improvement of the welfare of the animals in question. Moreover, the lack of a conviction and meaningful sentence imposed under the APA meant that an opportunity to deter other would-be offenders was lost.<sup>419</sup>

This reflects a missed opportunity by South African Courts to use current cases to develop the law in order to ensure that there is a better protection for animals. This could have been used as an opportunity to deter would-be offenders, however if the prosecution could not prove beyond reasonable doubt that the accused committed the offence, there would not be a conviction.

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<sup>416</sup> *South African Predator Breeders Association and Others v Minister of Environmental Affairs and Tourism*.

<sup>417</sup> *South African Predator Breeders Association and Others v Minister of Environmental Affairs and Tourism* at para 72.

<sup>418</sup> (686/2015) [2016] ZAECGHC 33 (19 May 2016).

<sup>419</sup> Centre for Environmental Rights, 'A fair game? Improving the well-being of South African wildlife Review of the legal and practical regulation of the welfare of wild animals in South Africa' at 33.

### 3.3.3. National Environmental Management Act 107 of 1998

The National Environmental Management Act<sup>420</sup> is an important statute in the protection of the environment. The Act was promulgated to give effect to the right to the environment as espoused in section 24 of the Constitution.<sup>421</sup> Section 32(1) of this Act confers *Locus standi* on various individuals to enforce environmental rights.<sup>422</sup> The provisions of section 32(1) are similar to those of section 38 of the Constitution which extended the common law *Locus standi* in matters relating to the rights in the Bill of Rights.<sup>423</sup>

Moreover, section 32 seeks to encourage environmental litigation by addressing the obstacles to public interest litigation to enforce environmental rights, namely the issue of costs. Under the provisions of section 32(2), Courts will not easily grant costs against a person enforcing environmental rights, unless if the litigation was vexatious or an abuse of the Court process.<sup>424</sup> This is based on the discretion given to Courts under the provisions of section 32(2) not to award costs against a litigant enforcing environmental rights if the person acted reasonably.<sup>425</sup>

Moreover, the Act encourages legal assistance in environmental matters as it empowers the Court, on application, to award costs to an attorney or advocate who provided free legal assistance or representation in the preparation for or conduct of

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<sup>420</sup> National Environmental Management Act 107 of 1998.

<sup>421</sup> Preamble to the National Environment Management Act; *Ibid* 36.

<sup>422</sup> Section 32(1) of the National Environmental Management Act provides that:

“Any person or group of persons may seek appropriate relief in respect of any breach or threatened breach of any provision of this Act, including a principle contained in Chapter 1, or any other statutory provision concerned with the protection of the environment or the use of natural resources— (a) in that person’s or group of persons own interest; (b) in the interest of, or on behalf of, a person who is, for practical reasons, unable to institute such proceedings; (c) in the interest of or on behalf of a group or class of persons whose interests are affected; (d) in the public interest; and (e) in the interest of protecting the environment”.

<sup>423</sup> Section 38 of the South African Constitution.

<sup>424</sup> Section 32(2) of the National Environmental Management Act.

<sup>425</sup> Section 32(2) of the National Environmental Management Act provides that

“A [C]ourt may decide not to award costs against a person who, or group of persons which, fails to secure the relief sought in respect of any breach or threatened breach of any provision including a principle of this Act or any other statutory provision concerned with the protection of the environment or the use of natural resources if the [C]ourt is of the opinion that the person or group of persons acted reasonably out of a concern for the public interest or in the interest of protecting the environment and had made due efforts to use other means reasonably available for obtaining the relief sought”.

the proceedings to a person or group which secured the relief sought.<sup>426</sup> The costs for investigating and preparing for the matter may also be awarded.<sup>427</sup>

It is also possible, under the provisions of the Act to institute private prosecutions to enforce environmental rights.<sup>428</sup> Public prosecutions are allowed if they are instituted in the interests of the public or to protect the environment.<sup>429</sup> There are certain statutory requirements to instituting private prosecutions which are as follows:

- (a) the person prosecuting privately does so through a person entitled to practise as an advocate or an attorney in the Republic;
- (b) the person prosecuting privately has given written notice to the appropriate public prosecutor that he or she intends to do so; and
- (c) the public prosecutor has not, within 28 days of receipt of such notice, stated in writing that he or she intends to prosecute the alleged offence,
  - (i) the person prosecuting privately shall not be required to produce a certificate issued by the Attorney-General stating that he or she has refused to prosecute the accused: and
  - (ii) the person prosecuting privately shall not be required to provide security for such action.<sup>430</sup>

If private prosecution is successful, a Court may order a person convicted to pay the costs of the private prosecution, including the costs of appeal to the conviction or sentence.<sup>431</sup> Similarly, an accused person who has charges dismissed or is acquitted if the Court finds that the institution of proceedings was not out of public interests or environmental concern or if “prosecution was unfounded, trivial or vexatious” may also recover costs from the private prosecutor.<sup>432</sup>

Once private prosecution has commenced, the Attorney-General is barred from prosecuting unless if leave of the Court has been obtained.<sup>433</sup> This seems to suggest a similar procedure to that in section 13 the Criminal Procedure Act<sup>434</sup> which provides that

[a]n attorney-general or a local public prosecutor acting on the instructions of the attorney-general, may in respect of any private prosecution apply by motion to the [C]ourt before which the private prosecution is pending to stop all further proceedings

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<sup>426</sup> Section 32(3)(a) of the National Environmental Management Act.

<sup>427</sup> Section 32(3)(b) of the National Environmental Management Act.

<sup>428</sup> Section 33 of the National Environmental Management Act.

<sup>429</sup> Section 33(1) of the National Environmental Management Act.

<sup>430</sup> Section 33(2) of the National Environmental Management Act.

<sup>431</sup> Section 33(3) of the National Environmental Management Act.

<sup>432</sup> Section 33(4) of the National Environmental Management Act.

<sup>433</sup> Section 33(5) of the National Environmental Management Act.

<sup>434</sup> Criminal Procedure Act 51 of 1977.

in the case in order that a prosecution for the offence in question may be instituted or, as the case may be, continued at the instance of the State, and the [C]ourt shall make such an order.<sup>435</sup>

The Act further sets up the essential administrative foundations that will guarantee appropriate authorisation and protection of the environment. Various environmental offences are contained in Schedule 3 read with section 34 of the Act.<sup>436</sup> A notable shortcoming of the Act is that sanctions imposed are, however, not sufficient to deter offenders or to protect endangered animal species against cruelty. Another notable weakness of the Act is that public interest private prosecution seems to suggest anthropocentric views as one could challenge the treatment of animals on how it affects the public.

The strength of the Act is that it allows interested parties to approach Courts to enforce environmental rights. Since animals are part of the environment, everyone with legal standing as extended by the Act can approach Courts for their protection. The Act further allows private prosecutions in the interest of the public as well as for the protection of the environment. Another strength of the Act is that instituting private prosecution for the protection of the environment seems to suggest ecocentric views even though not in express terms. This is because the Act does not state whether the protection of the environment is for its own worth or based on how human beings may be affected. Moreover, the Act encourages private prosecutions in the interest of the public and to protect the environment while at the same time preventing an abuse of the Court systems as costs will not lightly be granted against the private prosecutor unless where private prosecution was unfounded, trivial or vexatious.

#### **3.3.4. National Environment Management: Biodiversity Act 10 of 2004**

The National Environment Management: Biodiversity Act<sup>437</sup> establishes and provides for the various species and ecosystem that are in need of protection. Within the framework established in the National Environmental Management Act, this Act provides for the management and protection of South Africa's biodiversity.<sup>438</sup> This Act

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<sup>435</sup> Section 13 of the Criminal Procedure Act.

<sup>436</sup> Schedule 3 read with section 34 of the National Environmental Management Act.

<sup>437</sup> National Environment Management: Biodiversity Act 10 of 2004.

<sup>438</sup> Section 2 and Preamble to the National Environment Management: Biodiversity Act.

is also an implementation of the Convention on Biological Diversity into South African domestic law.<sup>439</sup>

Section 56 provides for the listing of species that are threatened or in need of national protection. Under the provisions of this section, the Minister is empowered to publish a list of critically endangered<sup>440</sup>, endangered<sup>441</sup>, vulnerable<sup>442</sup> and protected species<sup>443</sup> as well as to review these lists every five years.<sup>444</sup> There is also a prohibition on carrying out restricted activities without a permit issued in terms of section 7 of the Act if such activity may threaten the survival of a listed species.<sup>445</sup> A notable weakness of the Act is that, listing which animals are threatened only help to make people aware but does very little in protecting the endangered species. Furthermore, it appears that the legislature was mostly concerned about those animals which are endangered, with little regard on those that are not.

The Act has some benefits for animals as it requires that the biodiversity of the country be managed and protected, which reaffirms the framework of the National Environmental Management Act. Furthermore, the Act is a domestic implementation of the Convention on Biological Diversity and thus ensures the protection of animals within the standards of international law.

### **3.3.5. The Performing Animals Protection Act 24 of 1935 as amended by the Performing Animals Protection Amendment Act 4 of 2016**

The Performing Animals Protection Act<sup>446</sup> was promulgated “to regulate the exhibition and training of performing animals and use of dogs for safeguarding”.<sup>447</sup> In terms of this Act a person is only allowed to exhibit and train animals if that person is issued with a licence after establishing that such a person is ‘fit and proper’.<sup>448</sup> Though this

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<sup>439</sup> Charl De Villiers and Gillian McGregor, ‘Review of the regulatory and policy framework relating to the harvesting of wild honeybush (*Cyclopia* spp.)’ (2017) 1 (1) *Department of Environmental Affairs and Development Planning, Cape Town* 3.

<sup>440</sup> Section 56(1)(a) of the National Environment Management: Biodiversity Act.

<sup>441</sup> Section 56(1)(b) of the National Environment Management: Biodiversity Act.

<sup>442</sup> Section 56(1)(c) of the National Environment Management: Biodiversity Act.

<sup>443</sup> Section 56(1)(d) of the National Environment Management: Biodiversity Act.

<sup>444</sup> Section 56(2) of the National Environment Management: Biodiversity Act.

<sup>445</sup> Section 57 of the National Environment Management: Biodiversity Act.

<sup>446</sup> Performing Animals Protection Act 24 of 1935.

<sup>447</sup> Long Title to the Performing Animals Protection Act.

<sup>448</sup> Section 2(a) of the Performing Animals Protection Act.

Act was enacted to protect performing animals, the only mention of the manner in which such animals ought to be treated is only found in section 7 of the Act.

The Minister is authorised by this section to make regulations that prescribe the method and form of confinement as well as accommodation of animals. The regulations should make provisions for

any other reasonable requirement which may be necessary to prevent cruelty or suffering in the exhibition, training, maintenance, use or travelling of animals in respect of which a certificate has been granted.<sup>449</sup>

Though the Minister has been authorised to promulgate regulations as stated above, the only regulations promulgated under this Act only relate to conditions of obtaining a licence as well as the steps that a person licenced to exhibit or train animals should take to ensure that any wild or vicious animals are “so trained or exhibited or the dogs so used for safeguarding cannot escape control”.<sup>450</sup> It is surprising that there are no regulations promulgated to deal specifically with the training, transportation or caging of animals. This Act has been criticised as being a misnomer as even though it is termed the ‘Performing Animals Protection Act’, “it does not protect performing animals in any way whatsoever”.<sup>451</sup>

In terms of the Act, any person who contravenes its provisions is liable on conviction to a fine of R4000 or imprisonment not exceeding 12 months.<sup>452</sup> The provisions of this Act do not, however, apply to animals that are confined or trained for military, police or sporting purposes or the purpose of an agricultural show, horse show, dog show, caged bird show or any public zoological gardens.<sup>453</sup>

The Act was amended in 2016 by the Performing Animals Protection Amendment Act.<sup>454</sup> The positive step taken by the legislature in the amendment is the penalty for contravention of the Act. The fine has been increased from an amount not exceeding R4000 to an amount not exceeding R20 000, and the period of imprisonment from a period not exceeding twelve months to a period not exceeding five years.<sup>455</sup> This is a

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<sup>449</sup> Section 2(c) and (d) of the Performing Animals Protection Act.

<sup>450</sup> Regulation 3(2) to the Performing Animals Protection Act.

<sup>451</sup> Youens, ‘animal rights: a moral and legal discussion on the standing of animals in South Africa’ at 29.

<sup>452</sup> Section 8(1) of the Performing Animals Protection Act.

<sup>453</sup> Section 9 of the Performing Animals Protection Act.

<sup>454</sup> Performing Animals Protection Amendment Act 4 of 2016.

<sup>455</sup> Section 8(1) of the Performing Animals Protection Amendment Act.

step in the right direction because the legislature has recognised the need to impose harsher sanctions to deter animal cruelty.

The role played by this Act in the protection of animals was considered in *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development and Another* where the Court found it to be one of the statutes playing different roles in protection animals.<sup>456</sup> The Court stated that this Act regulates the treatment, training and exhibition of animals and guard dogs.<sup>457</sup>

### 3.3.6. Sea Birds and Seals Protection Act 46 of 1973

The main purpose of the Sea Birds and Seals Protection Act<sup>458</sup> is to provide for the control over certain islands and rocks, for the protection and the control of the capture and killing of sea birds and seals, for the disposal of the products of sea birds and seals and for matters incidental thereto.<sup>459</sup>

This Act gives the Minister discretionary powers to issue a permit to any person authorising such person to perform certain acts in terms of this Act.<sup>460</sup> Such permit should however be subject to certain conditions that the Minister may impose.<sup>461</sup> Some of the conditions that may also be added to the permit are found in section 4(3) of the Act and includes prescribing the methods of capturing and killing sea birds and seals, the age, sex and size of sea birds and seals that may be killed as well as the season on which they may be captured or killed.<sup>462</sup> Though this Act may be used to protect certain animals threatened by extinction from being killed, it does not find application if the Minister has granted a permit. However, where a permit was granted without following the provisions of the Act, a person with *Locus standi* can approach a Court to review the decision of the Minister.

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<sup>456</sup> *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development and Another* para 44.

<sup>457</sup> *Supra*.

<sup>458</sup> Sea Birds and Seals Protection Act 46 of 1973.

<sup>459</sup> Preamble to the Sea Birds and Seals Protection Act.

<sup>460</sup> Section 4(1) of the Sea Birds and Seals Protection Act.

<sup>461</sup> Section 4(2)(b) of the Sea Birds and Seals Protection Act.

<sup>462</sup> Section 4(3) of the Sea Birds and Seals Protection Act.

### 3.3.7. The Meat Safety Act 40 of 2000

The Meat Safety Act<sup>463</sup> basically deals with the safety standards of animal products, regulates the manner of importing and exporting meat as well as establishing meat safety schemes. The Act does not set any anti-cruelty standards in respect of abattoirs. The important national standards that ought to be complied with are found in section 11. In particular, section 11(h) provides that:

an animal presented for slaughter at an abattoir must be handled humanely during loading, transportation, off-loading, housing, immobilising and killing as prescribed in accordance with the requirements in the Animal Protection Act, 1962.<sup>464</sup>

Though the Meat Safety Act makes mention of the humane treatment of animals as required by the Animals Protection Act, it is not clear how this could be achieved. This is because, the Animal Protection Act clearly states that crimes against animals include ill-treatment, terrifying, confining, chaining, tethering or securing any animal unnecessarily or subjecting animals to unnecessary suffering or in any place which affords “inadequate space, ventilation, light, protection or shelter from heat, cold or weather”.<sup>465</sup> The humane treatment of animals could not be achieved under the procedures followed in abattoirs. The standard of measuring humane treatment of animals would thus be low if the treatment of animals in abattoirs may be regarded as being humane.<sup>466</sup>

Moreover, it is a criminal offence to use on or to attach to any animal any equipment, appliance or vehicle which has the potential of causing an injury to the animal.<sup>467</sup> Even without a detailed discussion of the procedure followed in abattoirs, one may safely assume that these requirements cannot possibly be complied with. The main concern of section 11 as set out in subsections (a) – (s) is the safety of the meat for the consumption of human beings.<sup>468</sup> This affirms the anthropocentric viewpoint that animals are protected in the interests of human beings. The only exception is subsection (h), which deals with the ‘humane’ treatment of animals in abattoirs.<sup>469</sup> Though only in a form of an exception, this is a positive step in realising a need to treat

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<sup>463</sup> Meat Safety Act 40 of 2000.

<sup>464</sup> Section 11(h) of the Meat Safety Act.

<sup>465</sup> Section 2(1)(b) of the Animal Protection Act.

<sup>466</sup> Youens, ‘animal rights: a moral and legal discussion on the standing of animals in South Africa’ 30.

<sup>467</sup> Section 2(1)(f) of the Animal Protection Act.

<sup>468</sup> Section 11(a) – (s) of the Meat Safety Act.

<sup>469</sup> Section 11(h) of the Meat Safety Act.

animals better, which reflects the ecocentric viewpoint which speaks not only against a cruel treatment of animals, but also advocates for their better treatment.

### 3.3.8. The Animal Health Act 7 of 2002

The Animal Health Act<sup>470</sup> was enacted to replace the Animal Diseases Act.<sup>471</sup> The main aim of this Act is to promote, amongst other things, animal health as well as regulating the importation and exportation of ‘animals and things’.<sup>472</sup> The Act basically provides for measures to control animal diseases, at the same time promoting animal health.<sup>473</sup>

The definition of animal provided in this Act relates to “any mammal, bird, fish, reptile or amphibian which is a member of the phylum vertebrates, including the carcass thereof”.<sup>474</sup> This definition is extended to include any invertebrate prescribed to be an animal for the purposes of the Act.<sup>475</sup> The Act refers to ‘owner’ with regard to animals or things,<sup>476</sup> and therefore reflects the religious worldview on anthropocentrism that human beings have dominion over animals. This thus continues the traditional view in South Africa that animals are property to be used for the benefit of human beings without them being the subject of rights.

### 3.3.9. The Hazardous Substances Act 15 of 1973

The Hazardous Substances Act<sup>477</sup> regulates the sale of cyanide which is used in poison-firing apparatus.<sup>478</sup> Provincial health authorities are given the powers to give approval to a person “who loads cyanide cartridges for use in a poison-firing apparatus”.<sup>479</sup> The relevance of this Act to animals is that these poison firing apparatus are used in controlling problem animals.<sup>480</sup> A problem animal controller is permitted by regulations that relates to the control over fluoroacetic acid (mono), its salts and derivatives to obtain a poison collar for the killing of ‘problem animals’ which has been

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<sup>470</sup> Animal Health Act 7 of 2002.

<sup>471</sup> Animal Diseases Act 35 of 1984.

<sup>472</sup> Preamble to the Animal Health Act.

<sup>473</sup> Preamble to the Animal Health Act; Lombard (n 67 above) 45.

<sup>474</sup> Section 1(1)(a) of the Animal Health Act.

<sup>475</sup> Section 1(1)(b) of the Animal Health Act.

<sup>476</sup> Section 1(1)(a) of the Animal Health Act.

<sup>477</sup> Hazardous Substances Act 15 of 1973.

<sup>478</sup> Youens, ‘animal rights: a moral and legal discussion on the standing of animals in South Africa’ 31.

<sup>479</sup> Ibid.

<sup>480</sup> Ibid.

defined in the Act as ‘a predator which causes stock losses’.<sup>481</sup> Though not originally aimed at protecting animals, a purposive interpretation of this Act may extend protection to animals as the use of poison to control predators may protect preys. There is, however, does not protect predators from human beings as it justifies the use of poison to kill them. This means that the Act protects some animals while at the same time justifying the cruel treatment of others.

### 3.3.10. Game Theft Act 105 of 1991

There are many other pieces of legislation dealing with animals either directly or indirectly, such as the Game Theft Act.<sup>482</sup> The purpose of this Act as stated in its preamble is “to regulate ownership of game in certain instances, to combat the theft and wrongful and unlawful hunting, catching and taking into possession of game; and to provide for matters connected therewith”.<sup>483</sup>

Section 2 seems to remove the common law principle of *res nullius*. In terms of this section, an owner of game does not lose ownership even if the animal has escaped from the control of the owner.<sup>484</sup> There is, however, a requirement that the animal should have been fenced. A progressive section of this Act is section 3 which provides for a presumption of intention where a person has entered another’s land wrongfully and unlawfully dispersed or lured away animals from such land.<sup>485</sup> The effect of section 3 is that the accused person will have the burden and onus to prove that he or she lacked intention to disperse or lure the animals. This lifts the burden on the prosecution to prove intention. Such presumption of intention is, however, not available in other anti-cruelty legislation.

Section 4 of the Act gives the powers on peace officers, owners of land and lawful occupiers of land to search or arrest any person suspected of game theft on reasonable suspicion, even without a warrant.<sup>486</sup> To prevent the abuse of this right to search or arrest without a warrant, section 5 criminalises wrongful and malicious arrest and search.<sup>487</sup> Any person who maliciously arrests, causes the arrest or search will be

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<sup>481</sup> Ibid.

<sup>482</sup> Game Theft Act 105 of 1991.

<sup>483</sup> Preamble to the Game Theft Act.

<sup>484</sup> Section 2 of the Game Theft Act.

<sup>485</sup> Section 3 of the Game Theft Act.

<sup>486</sup> Section 4 of the Game Theft Act.

<sup>487</sup> Section 5 of the Game Theft Act.

liable on conviction to a fine not exceeding R4 000, or to imprisonment not exceeding 12 months if the person defaulted on paying such fine, or to both a fine and imprisonment. There is a presumption of malice on any charge under section 5(1) of the Act unless the contrary is proven.<sup>488</sup>

The Act makes provision for compensation and restitution in cases of game theft.<sup>489</sup> If the conviction was made by a district Court, the amount of compensation shall not exceed R20 000 or the amount determined by the minister from time to time.<sup>490</sup> Where a conviction was made by the regional Court, the amount of compensation shall not exceed R75 000 or an amount determined by the minister from time to time.<sup>491</sup> If the prosecution or private prosecutor fails to secure a conviction for game theft, an accused may still be found guilty of the theft of stock as defined by the provisions of Stock Theft Act<sup>492</sup> which is a competent verdict of game theft.<sup>493</sup>

### **3.3.11. The Animal Improvement Act 16 of 1998**

The purpose of the Animal Improvement Act<sup>494</sup> is to provide for the breeding, identification and utilisation of genetically superior animals to enhance their economic value for the benefit of the country.<sup>495</sup> No welfare provisions can be found in the Act relating to animals involved in the breeding process. This has been seen as a concern from both the conservation and welfare perspectives.<sup>496</sup>

Section 13 deals with restrictions of certain actions in respect of animals and genetic material. Though the wording of the section seems to suggest some restrictions on human activities towards animals, it does not. All it does is to restrict the collection, evaluation, collection, processing, packing or storage of embryos or ova if the person doing such is not registered as an embryo collector or the owner of the animal.<sup>497</sup> Moreover, section 21 authorising the registrar to perform inspections on suspicion that

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<sup>488</sup> Section 5(2) of the Game Theft Act.

<sup>489</sup> Section 7(a) of the Game Theft Act.

<sup>490</sup> Section 7(b)(i) of the Game Theft Act.

<sup>491</sup> Section 7(b)(ii) of the Game Theft Act.

<sup>492</sup> Stock Theft Act 57 of 1959.

<sup>493</sup> Section 8 of the Game Theft Act.

<sup>494</sup> Animal Improvement Act 16 of 1998.

<sup>495</sup> Preamble to the Animal Improvement Act.

<sup>496</sup> Centre for Environmental Rights (n 331 above).

<sup>497</sup> Section 13 of the Animal Improvement Act.

a crime has been committed if he or she in possession of a warrant does not make provision for such inspection if there has been any act of cruelty towards animals.<sup>498</sup>

### 3.3.12. The Marine Living Resources Act 18 of 1998

The purpose of the Marine Living Resources Act<sup>499</sup> is to conserve the marine ecosystem as well as protecting and ensuring a sustainable use of marine resources.<sup>500</sup> One of the objectives of this Act reflects the anthropocentric view that the protection of animals is for the benefit of human beings.<sup>501</sup> Even though the protection is anthropocentric, the Act does offer some protection to animals. In particular the Act recognises “the need to protect the ecosystem as a whole, including species which are not targeted for exploitation”<sup>502</sup> as well as “the need to preserve marine biodiversity”.<sup>503</sup>

Under the provisions of this Act, the Minister is authorised to declare an area a marine protected area as a way of protecting plants and animals or specific species of plants and animals as well as the physical features on which they depend.<sup>504</sup> Where an area has been declared as protected marine, fishing or attempting to fish<sup>505</sup>, taking or destroying any plant or animal other than fish<sup>506</sup> or disturbing, altering or destroying the natural environment in any way<sup>507</sup> are some of the prohibited acts. Using explosives, firearm, poison or other noxious substance to kill, stun, disable or catch a fish or to make catching fish easy are also some of the prohibited acts.<sup>508</sup> Any person who has a permit, licence or right issued under this Act has an obligation to report to the Minister any contravention of the Act by any other person.<sup>509</sup> To encourage people to report any contraventions of this Act, the Minister is authorised to remunerate a person who provides information that leads to a conviction a reasonable and fair amount provided that such person is not an employee of the State or an organ of the

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<sup>498</sup> Section 21 of the Animal Improvement Act.

<sup>499</sup> Marine Living Resources Act 18 of 1998.

<sup>500</sup> Preamble to the Marine Living Resources Act.

<sup>501</sup> Section 2(a) of the Marine Living Resources Act provides for “need to conserve marine living resources for both present and future generations”.

<sup>502</sup> Section 2(e) of the Marine Living Resources Act.

<sup>503</sup> Section 2(f) of the Marine Living Resources Act.

<sup>504</sup> Section 43(1)(a) of the Marine Living Resources Act.

<sup>505</sup> Section 43(2)(a) of the Marine Living Resources Act.

<sup>506</sup> Section 43(2)(b) of the Marine Living Resources Act.

<sup>507</sup> Section 43(2)(c) of the Marine Living Resources Act.

<sup>508</sup> Section 44(1) of the Marine Living Resources Act.

<sup>509</sup> Section 57 of the Marine Living Resources Act.

state.<sup>510</sup> Though this Act provides some protection for marine animals, it lack welfare specific provisions.

### **3.3.13. Animal Matters Amendment Act 42 of 1993**

The Animal Matters Amendment Act<sup>511</sup> was enacted to provide directions relating to injuries caused by animals, to amend the Animals Protection Act as well as to regulate the prohibition of animal fights.<sup>512</sup> Under this Act, where an animal has caused injury to another person as a result of negligence, a negligent party is liable on conviction to a fine or imprisonment not exceeding two years.<sup>513</sup> Courts are empowered to make an order removing an animal from the custody of such person as well as an order than a person is unfit to own a certain kind of animal.<sup>514</sup> If an animal has caused death as a result of a person's negligence or deliberate action, the person could be found guilty for that offence.<sup>515</sup>

The Act amended the Animals Protection Act by inserting section 2A relating to animal fight. The Act is thus relevant to the protection of animals by prohibiting animal fights. A person who causes animals to fight, or who permits animals to fight in the premises he or she is in control shall be guilty of an offence and liable, on conviction to imprisonment not exceeding two years.<sup>516</sup> The weakness of this Act is that majority of its sections relate to injuries caused by animals on human beings and not injuries caused by human beings on animals. The Act, therefore, does not prevent animal cruelty. Even for sections that may potentially protect animals, they are based on injuries that may be caused on animals by other animals as a result of human conduct.

### **3.3.14. Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007**

The Criminal Law (Sexual Offences and Related Matters) Amendment Act<sup>517</sup> is also relevant in the protection of animals as it proscribes certain acts of sexual relations between animals and human beings. Section 13 of this Act criminalises any acts of bestiality which relates to any penetration of an animal or masturbating an animal

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<sup>510</sup> Section 61 of the Marine Living Resources Act.

<sup>511</sup> Animal Matters Amendment Act 42 of 1993.

<sup>512</sup> Preamble to the Animal Matters Amendment Act.

<sup>513</sup> Section 2 of the Animal Matters Amendment Act.

<sup>514</sup> Section 2(a) and (b) of the Animal Matters Amendment Act.

<sup>515</sup> Section 3 of the Animal Matters Amendment Act.

<sup>516</sup> Section 2A(1) of the Animals Protection Act as amended by the Animal Matters Amendment Act.

<sup>517</sup> Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

unless if such masturbation is done for scientific or breeding purposes.<sup>518</sup> This Act is important as it ensures that sexual abuses of animals are punished by the law. It also reflects the importance of criminal law in protecting animals.

### **3.3.15. Genetically Modified Organisms Act 15 of 1997**

The purpose of Genetically Modified Organisms Act<sup>519</sup> is, amongst other things, to ensure that there is an adequate level of protection in the modification of organisms that might adversely impact the conservation and sustainable use of biological diversity, human and animal health.<sup>520</sup>

Section 5 of the Act provides that Council shall advise the Minister on ways to avoid accidents that might adversely impact the health of animals.<sup>521</sup> The Act further requires appropriate measures should be implemented on how various stakeholders may be notified of any unintentional transboundary movement that has a potential of adversely affecting the health of animals.<sup>522</sup> Furthermore, bilateral, regional or multilateral agreements or arrangements entered into by South Africa should ensure the protection of animal health and the environment is on par with international standards set by the Cartagena Protocol on Biosafety to the Convention which South Africa acceded to on 14 August 2003.<sup>523</sup> The registrar is obliged to ensure that all users of genetically modified organisms take appropriate measures to protect the environment and animal health.<sup>524</sup> Any genetically modified organism that may have an adverse impact on the environment or animal health should be disposed of.<sup>525</sup>

This Act is a positive step in protecting the welfare of animals as it has specific provisions dealing with the environment and animal health. This protection is not based on how animals affect human beings, but is rather based on the inherent worth of animals. This reflects the ecocentric viewpoint that animals are worthy of protection not based on how this affects human beings.

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<sup>518</sup> Section 13 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act.

<sup>519</sup> Genetically Modified Organisms Act 15 of 1997.

<sup>520</sup> Preamble to the Genetically Modified Organisms Act.

<sup>521</sup> Section 5(1)(g) of the Genetically Modified Organisms Act.

<sup>522</sup> Section 5(1)(h) of the Genetically Modified Organisms Act.

<sup>523</sup> Section 5(1)(k) read with section 1 of the Genetically Modified Organisms Act.

<sup>524</sup> Section 9(d), 17(1) and 17(1A) of the Genetically Modified Organisms Act.

<sup>525</sup> Section 15(4)(e) of the Genetically Modified Organisms Act.

### **3.3.16. Environment Conservation Act 73 of 1989**

The Environment Conservation Act<sup>526</sup> was promulgated to provide effective protection and utilisation of the environment.<sup>527</sup> Part V of the Act requires that those activities that may potentially be detrimental to the environment should be identified.<sup>528</sup> While the Act does mention the environment, it does not have specific provisions for protecting animals. The only mention of animals in the Act is in the definition of ecological process in section 1 which is the interaction between human beings, plants and animals.<sup>529</sup> This means that the Act may only potentially protect animals through purposive interpretation of its provisions. For instance, the definition of the environment as referring to surroundings having an influence on the life and habits of man and other organisms.<sup>530</sup>

### **3.3.17. National Forests Act 84 of 1998**

The National Forests Act<sup>531</sup> criminalises any killing of animals, bird, insect or fish without a licence of other authority.<sup>532</sup> There are different categories of offences depending on whether the animal, bird, insect or fish killed is in a protected area or not.<sup>533</sup> The Act further prohibits the destruction of forests, which are the natural habitats of animals.<sup>534</sup> Not only does the Act prohibit the killing of animals, it further protects their habitat, which is a strength in the protection of animals. A notable weakness of the Act is that killing an animal is justified if the person has a licence or other authority.

### **3.3.18. Norms and Standards, Regulations and Prohibition Notices**

A number of norms and standards have been published in terms of section 9 of the National Environmental: National Biodiversity Act.<sup>535</sup> These norms may apply

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<sup>526</sup> Environment Conservation Act 73 of 1989.

<sup>527</sup> Preamble to the Environment Conservation Act.

<sup>528</sup> Part V of the Environment Conservation Act.

<sup>529</sup> Section 1 of the Environment Conservation Act.

<sup>530</sup> Section 1 of the Environment Conservation Act.

<sup>531</sup> National Forests Act 84 of 1998.

<sup>532</sup> Section 63(2)(b) of the National Forests Act.

<sup>533</sup> Section 63(2)(b) of the National Forests Act.

<sup>534</sup> Section 3(3)(a) and (c) of the National Forests Act.

<sup>535</sup> Section 9(1) of National Environmental Management: Biodiversity Act provides that:

“The Minister may, by notice in the Gazette- (a) issue norms and standards for the achievement of any of the objectives of this Act., including for the- (i) management and conservation of South Africa’s biological diversity and its components; (ii) restriction of activities which impact on biodiversity and its components; (b) set indicators to measure compliance with those norms and standards; and (c) amend any notice issued in terms of paragraph (a) or (b)”.

nationally, within a specific area only or to a specific category of biodiversity.<sup>536</sup> Furthermore, there may be different norms issued for different areas or to different categories of biodiversity.<sup>537</sup>

The National Principles, Norms and Standards for the Sustainable Use of Large Predators in South Africa<sup>538</sup> is currently just a policy document aimed at promoting ethical hunting of large predators, regulating the control of damage-causing animals; protecting the rights of property owners bordering those on which large predators are introduced as well as ensuring sustainable utilisation of large predators.<sup>539</sup>

The keeping and breeding of captive large predators is regulated by the provisions of section 4.<sup>540</sup> The section unequivocally prohibits the keeping of large predators as pets. Furthermore, it postulates micro-shipping and fencing arrangements. Yet, it does not prescribe any standards relating to the welfare of animals.

Section 3 deals specifically with hunting of wild and managed wild indigenous large predators.<sup>541</sup> In terms of this section, hunting of large predators is permitted if the hunter has obtained a certificate authorising such from the relevant provincial conservation authority.

Strangely, the principles allow for keeping large predators in captivity for commercial purposes. There is, however, no provision for keeping them in captivity for welfare purposes. In other words, the principles make no provisions for the welfare of large predators. The outdated outlook of the principles reflects South Africa's attitude towards animals. The country's animals are regarded to be nothing more than just property. As such, they may be used "sustainably" at will.<sup>542</sup>

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<sup>536</sup> Section 9(3) of National Environmental Management: Biodiversity Act.

<sup>537</sup> Section 9(4) of National Environmental Management: Biodiversity Act.

<sup>538</sup> GNR 25090 GG 13 June 2003.

<sup>539</sup> (i) – (viii) of the National Principles, Norms and Standards for the Sustainable Use of Large Predators in South Africa.

<sup>540</sup> Section 4 of the National Principles, Norms and Standards for the Sustainable Use of Large Predators in South Africa.

<sup>541</sup> Section 3 of the National Principles, Norms and Standards for the Sustainable Use of Large Predators in South Africa.

<sup>542</sup> (viii) of the National Principles, Norms and Standards for the Sustainable Use of Large Predators in South Africa.

Pickover criticises this policy for its failure to address the problems of animal cruelty.<sup>543</sup> The author states that “[t]his policy contains several worrying grey areas and loopholes, does not go far enough, fails to address the problems at hand and contains no plan for implementation”.<sup>544</sup>

The National Norms and Standards for the Management of Elephants in South Africa<sup>545</sup> can be contrasted to many other pieces of environmental legislation as it expressly and unambiguously protects the welfare of elephants and requires that elephants should be treated in an ethical and humane way.<sup>546</sup> Moreover, unlike other environmental laws, it regards elephants as sentient beings with highly organised social structure and ability to communicate.<sup>547</sup> This means that if sentience and ability to communicate are used as a basis to grant rights, animals, in particular elephants have rights. The Draft Minimum Standards for Captive Elephants published in 2009 also seeks to protect the welfare of captive elephants, however, it is yet to be passed into law.<sup>548</sup> According to the Centre of Environmental Rights

[a]s the elephant Norms and Standards have not yet been amended, they can provide a useful tool for enforcing welfare protection of elephants, both captive and wild. However, the actual impact of the Norms and Standards on the lives of the elephants used for tourism in the many captive elephant facilities in the country to date, has been almost non-existent.<sup>549</sup>

Threatened or Protected Species Regulations<sup>550</sup> were made in terms of section 97 of the National Environmental Management: Biodiversity Act and relates to threatened and protected species. These regulations provide for protection of wild populations of those species listed as threatened.<sup>551</sup> In terms of section 19(2), a permit holder is bound by those norms and standards that apply to the restricted activity for which a permit is issued.<sup>552</sup> Though the Draft Norms and Standards for the Management of

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<sup>543</sup> Michelè Pickover, *Animal Rights in South Africa* (Double Storey Books 2005) 46.

<sup>544</sup> Pickover, *Animal Rights in South Africa* at 46.

<sup>545</sup> National Norms and Standards for the Management of Elephants in South Africa, 2008.

<sup>546</sup> Section 2(2)(a)(vi) of the National Norms and Standards for the Management of Elephants in South Africa.

<sup>547</sup> Section 2(2)(a)(vii) of the National Norms and Standards for the Management of Elephants in South Africa.

<sup>548</sup> Draft Minimum Standards for Captive Elephants, 2009.

<sup>549</sup> Centre for Environmental Rights, ‘A fair game? Improving the well-being of South African wildlife Review of the legal and practical regulation of the welfare of wild animals in South Africa’ at 40.

<sup>550</sup> Threatened or Protected Species Regulations, 2007.

<sup>551</sup> Section 2(e) of the Threatened or Protected Species Regulations.

<sup>552</sup> Section 19(2) of the Threatened or Protected Species Regulations.

Damage-causing Animals<sup>553</sup> were republished for comment in 2016, they are yet to be passed into law.<sup>554</sup>

### 3.3.19. The protection of animals under provincial legislation

Even though the provinces have been renamed, provincial ordinances relating to nature conservation in four previous provinces have remained essentially the same and are applied throughout the nine provinces.<sup>555</sup> An evaluation of these ordinances as applied in previous provinces is thus essential in order to set a backdrop for future legal reform. It is accepted that provincial statutes are subservient to national legislation.<sup>556</sup> This means that in cases where there is conflict between provincial ordinances and national legislation, the latter will prevail.<sup>557</sup> It is, however, worth noting that nature conservation is a matter of both national and provisional competence.<sup>558</sup> This segment deals with the 'old' ordinances, being the Cape Nature and Environmental Conservation Ordinance<sup>559</sup>, the Transvaal Nature Conservation Ordinance<sup>560</sup>, Orange Free State Nature Conservation Ordinance<sup>561</sup> and the Kwa-Zulu Natal Nature Conservation Ordinance.<sup>562</sup> The latter has been supplemented by the KwaZulu-Natal Nature Conservation Management Act<sup>563</sup> as well as the KwaZulu-Natal Nature Conservation Amendment Acts.<sup>564</sup>

These provincial ordinances were aimed at protecting various species listed in their respective schedules in different ways. For instance, the KwaZulu-Natal Ordinance protects endangered mammals by prohibiting the sale, purchase or exchange in any way whatsoever of any indigenous or exotic mammal species, except where such sale, purchase or exchange is done in terms of a permit granted in terms of section 84.<sup>565</sup>

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<sup>553</sup> Draft Norms and Standards for the Management of Damage-causing Animals, 2010.

<sup>554</sup> Government Notice R512, Government Gazette 40236 (30 August 2016).

<sup>555</sup> Youens, 'animal rights: a moral and legal discussion on the standing of animals in South Africa' 32.

<sup>556</sup> Centre for Environmental Rights, 'A fair game? Improving the well-being of South African wildlife Review of the legal and practical regulation of the welfare of wild animals in South Africa' 42.

<sup>557</sup> Section 8 of the National Environmental Management: Biodiversity Act; Section 146 of the Constitution of South Africa.

<sup>558</sup> Centre for Environmental Rights, 'A fair game? Improving the well-being of South African wildlife Review of the legal and practical regulation of the welfare of wild animals in South Africa' 43.

<sup>559</sup> Cape Nature and Environmental Conservation Ordinance 19 of 1974.

<sup>560</sup> Transvaal Nature Conservation Ordinance 12 of 1983.

<sup>561</sup> Orange Free State Nature Conservation Ordinance 8 of 1969.

<sup>562</sup> Kwa-Zulu Natal Nature Conservation Ordinance 15 of 1974.

<sup>563</sup> KwaZulu-Natal Nature Conservation Management Act 9 of 1997.

<sup>564</sup> KwaZulu-Natal Nature Conservation Amendment Acts 5 of 1999 and 7 of 1999.

<sup>565</sup> Section 81 of the KwaZulu-Natal Ordinance.

In other words, the sale, purchase or exchange of indigenous or exotic mammals can only be done after one has complied with the requirements of section 84.<sup>566</sup>

The hunting, buying, selling or captivity of animals is dealt with in Chapter three of the KwaZulu-Natal Nature Conservation Act<sup>567</sup> which deals with 'wild animals or game'. In particular, section 17 lays down the basic requirements for dealing with animals in captivity.<sup>568</sup> Administrative requirements of dealing with animals in zoos are found in sections 29 to 34.<sup>569</sup> These sections deal with the manner of establishing and maintaining a zoo.

Another provincial legislation that warrants an examination is the Problem Animal Control Ordinance<sup>570</sup> of the Eastern Cape. This ordinance is so out-dated that it permits a group of six or more people to form a club for purposes of combating problematic animals, provided that such people are not black.<sup>571</sup> The aim of these clubs is to combat what is regarded as problem animals doing damage as stated in the Schedule or those animals which have been declared as problem animals.<sup>572</sup> These clubs are permitted to maintain a pack of dogs exclusively for the purpose of hunting and combating problem animals.<sup>573</sup> Astonishingly, the Ordinance provides that:

no action, either civil or criminal, shall lie against any club or any member thereof for doing any act authorised by, or ancillary to the powers conferred...by this ordinance or for any unintentional damage resulting from any such act or for the unintentional killing or injuring of stock or game...<sup>574</sup>

Moreover, obstructing or failing to render reasonable assistance to these clubs in the exercise of their powers is a criminal offence.<sup>575</sup> The ordinance further criminalises possession of a problem animal except where it is:

(a) a local authority or body controlled or subsidised by the state;

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<sup>566</sup> Section 84 of the KwaZulu-Natal Ordinance.

<sup>567</sup> KwaZulu-Natal Nature Conservation Act 29 of 1992.

<sup>568</sup> Section 17 of the KwaZulu-Natal Nature Conservation Act.

<sup>569</sup> Section 29 - 34 of the KwaZulu-Natal Nature Conservation Act.

<sup>570</sup> Problem Animal Control Ordinance 26 of 1957.

<sup>571</sup> Section 4(1) of the Problem Animal Control Ordinance.

<sup>572</sup> Youens, 'animal rights: a moral and legal discussion on the standing of animals in South Africa' 33.

<sup>573</sup> Section 9(1) of the Problem Animal Control Ordinance.

<sup>574</sup> Section 12 of the Problem Animal Control Ordinance.

<sup>575</sup> Section 13 of the Problem Animal Control Ordinance.

(b) a person who has a licence in terms of the Performing Animals Protection Act 24 of 1935;

(c) a person who, with the written permission of the Director, keeps an animal in captivity or is using an animal for scientific purposes.

The general approach of these provincial legislation is aimed at protecting animal species referred to in various schedules through absolute protection, permit requirements, hunting methods and specific hunting seasons and classify animals into 'specially protected', 'protected', 'ordinary,' 'exotic', 'indigenous' and other categories.<sup>576</sup>

[f]inally, although legal classification of wild animals may seem rational from a human point of view, it is based on the arrogant assumption that man, himself a creature harmful to the environment, is free to decide which animal is useful, useless or harmful, with the corresponding adverse or beneficial for the classified animals. Although there is no alternative to this, those responsible for compiling categories of species should reflect on the consequences of their decisions and appreciate the moral judgements they are making.<sup>577</sup>

In Free State, the protection of animals is in terms of the Nature Conservation Ordinance.<sup>578</sup> This Ordinance prohibits the hunting of protected game as listed in Schedule 1 to the Ordinance unless if there is a permit authorising such hunting.<sup>579</sup> There is also a prohibition on the hunting of game listed as ordinary in Schedule 2 unless this is authorised by a proclamation issued in terms of the provisions of section 4.<sup>580</sup>

The Nature Conservation Ordinance<sup>581</sup> applies in the Western Cape Province and prohibits the hunting of animals in provincial or local reserves unless if the hunter is in possession issued by the Board authorising the hunting.<sup>582</sup> Moreover, the hunting of endangered wild animal species and protected wild animals without a permit is prohibited.<sup>583</sup> Keeping a wild animal in captivity without a permit is also prohibited under the Ordinance.<sup>584</sup> A progressive section in protection of animals is section 31(2)

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<sup>576</sup> Youens 'animal rights: a moral and legal discussion on the standing of animals in South Africa' 33.

<sup>577</sup> Ibid.

<sup>578</sup> Nature Conservation Ordinance, 8 of 1969.

<sup>579</sup> Section 2 of the Nature Conservation Ordinance.

<sup>580</sup> Section 5 read with section 3 of the Nature Conservation Ordinance.

<sup>581</sup> Nature Conservation Ordinance, 19 of 1974.

<sup>582</sup> Section 14 of the Nature Conservation Ordinance.

<sup>583</sup> Section 26 and 27 of the Nature Conservation Ordinance.

<sup>584</sup> Section 31(1) of the Nature Conservation Ordinance.

which prohibits any person, whether with or without a permit, from restraining any wild animal by means of a “rope, cord, chain or any similar contrivance” even if the person doing so is authorised by a permit.<sup>585</sup> The maximum penalties for violating the Ordinance is a fine not exceeding R100 000 or a term of imprisonment not exceeding 10 years.<sup>586</sup>

Species in need of provincial protection are listed under the North West Biodiversity Management Act.<sup>587</sup> The Minister is required to publish a list of endangered species within the province.<sup>588</sup> In addition to listing endangered species, the Act prohibits any exportation of species listed in the appendices to the Convention on International Trade in Endangered Species of Wild Fauna and Flora.<sup>589</sup> Prohibited activities relating to listed endangered and ordinary species are found in section 23 and 24 of the Act respectively.<sup>590</sup>

Mpumalanga also has its own provincial legislation protecting animals. This protection is provided for under the provisions of the Mpumalanga Nature Conservation Act.<sup>591</sup> Under this Act, animals are listed as either specially protected game<sup>592</sup>, protected game<sup>593</sup>, ordinary game<sup>594</sup> or protected wild animals.<sup>595</sup> Hunting of these animals without a permit is prohibited.<sup>596</sup>

Hunting and catching of wild and exotic animals in Limpopo are covered under the provisions of chapter 4 of the Limpopo Environmental Management Act.<sup>597</sup> The Act prohibits the hunting of animals without a permit.<sup>598</sup> Moreover, the hunting of specially protected wild animals, protected wild animals, game and non-endemic animals at night without a permit is prohibited.<sup>599</sup>

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<sup>585</sup> Section 31(2) of the Nature Conservation Ordinance.

<sup>586</sup> Section 86 of the Nature Conservation Ordinance.

<sup>587</sup> Act 4 of 2016.

<sup>588</sup> Section 10 and 13 of the North West Biodiversity Management Act.

<sup>589</sup> Section 15 of the North West Biodiversity Management Act.

<sup>590</sup> Section 23 and 24 of the North West Biodiversity Management Act.

<sup>591</sup> Act 10 of 1998.

<sup>592</sup> Section 4(1)(a) read with Schedule 1 of the Mpumalanga Nature Conservation Act.

<sup>593</sup> Section 4(1)(b) read with Schedule 2 of the Mpumalanga Nature Conservation Act.

<sup>594</sup> Section 4(1)(c) read with Schedule 3 of the Mpumalanga Nature Conservation Act.

<sup>595</sup> Section 4(1)(d) read with Schedule 4 of the Mpumalanga Nature Conservation Act.

<sup>596</sup> Sections 5, 6, 7 and 8 of the Mpumalanga Nature Conservation Act.

<sup>597</sup> Act 7 of 2003.

<sup>598</sup> Section 31(1) of the Limpopo Environmental Management Act.

<sup>599</sup> Section 31(1)(d) of the Limpopo Environmental Management Act.

The Northern Cape Nature Conservation Act<sup>600</sup> seeks to provide for the sustainable use of wild animals.<sup>601</sup> Section 3 of this Act prohibits hunting, exporting, transporting, keeping, possessing, breeding or trading in specially protected animals without a permit.<sup>602</sup> Similar prohibitions exist for protected animals.<sup>603</sup> The importation and exportation of those species listed in appendices I, II and III of the Convention on International Trade in Endangered Species of Wild Fauna and Flora is also prohibited.<sup>604</sup>

Mercer and Pervan heavily criticise the South African nature conservation authorities.<sup>605</sup> Their criticism is based on the failure of these authorities to take into account the best interests of the wild animals in their charge. The authors consider the best interests of wild animals to be fundamental, and thus warranting a consideration in every case.<sup>606</sup> A number of examples where the nature conservation authorities failed to apply the concept of best interests, posit the authors, are all too evident.<sup>607</sup> Unfortunately, South Africa's environmental laws are basically regulated by these differing provincial Ordinances and Acts. The logical thing to do appears to be the abandonment of these provincial legislation and promulgate a new legislation that regulates wildlife at a national level.

### **3.3.20. The protection of animals under municipal bylaws**

There are other local laws that are relevant to the issue of protecting the environment. For instance, the Durban Bylaws provides that “the killing and cleaning of poultry at the depot must be done by the owner of the bird or his representative”. Furthermore, the Bylaws prescribe the manner in which the person doing the killing ought to dress and what should be done with the refuse arising from the killing.<sup>608</sup>

There are other aspects of animal welfare found in the Bylaws such as the prohibition on tying the legs of an animal together. Furthermore, it is not allowed to leave animals in crates or boxes for ‘longer than is necessary’ for the delivery to be made to the

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<sup>600</sup> Northern Cape Nature Conservation Act 9 of 2009.

<sup>601</sup> Preamble to the Northern Cape Nature Conservation Act.

<sup>602</sup> Section 3 of the Northern Cape Nature Conservation Act.

<sup>603</sup> Section 4 of the Northern Cape Nature Conservation Act.

<sup>604</sup> Section 56 of the Northern Cape Nature Conservation Act.

<sup>605</sup> Chris Mercer and Beverley Pervan, *For the Love of Wildlife* (Kalahari Raptor Centre 2000) 222 - 223.

<sup>606</sup> Mercer and Pervan (note 585 above) 223.

<sup>607</sup> Mercer and Pervan (n 585 above) 223.

<sup>608</sup> Section A.5 of the Durban Bylaws.

buyer. What is longer than necessary is however, not defined in the Bylaws. There is also a duty on the Director to take all such steps as he may deem sensible to “prevent or stop the infliction or suffering, cruelty or rough-handling on any poultry or birds”.<sup>609</sup> However, the provision used in the Bylaws are directory as opposed to being peremptory, and thus it appears as if the Director has discretion. In terms of section E.8 “no person, being in a street or public place, shall by any means wilfully frighten, tease or enrage any animal”.<sup>610</sup> This section seems to sum up the extent to which animals are protected in the Bylaws.

### **3.4. The protection regime in India: strengths and shortcomings**

The first attempts to protect the welfare of animals in India were in 1960 when the legislature enacted the Prevention of Cruelty to Animals Act.<sup>611</sup> Since then, there has been various movements to ensure the welfare of the country’s animals which was strengthened by the setting up of the Animal Welfare Board in 1962. Various laws and policies regulating the treatment of animals were developed over the years. Even though there are laws and policies put in place to regulate illegal trade on animals, it still flourishes.<sup>612</sup> The effectiveness of these laws and policies warrants an examination as it is not clear whether these laws can, on their own, deter cruelty towards animals.

#### **3.4.1. The Wildlife (Protection) Act 1972**

The promulgation of the Wildlife (Protection) Act<sup>613</sup> was in terms of section 252 of the Indian Constitution at the request of eleven States. The Act provides a strong legal foundation for protection of animals in India.<sup>614</sup> The main aim of this Act is to protect wildlife, in particular wild animals, birds and plants.<sup>615</sup> There are two split approaches to wildlife conservation under this Act. The first entails the protection of all endangered species are protected regardless of their location. The second approach is the protection of all animals in certain specified areas.<sup>616</sup> This Act was amended a number of times with an objective of offering better protection to all wild animals, birds and

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<sup>609</sup> Section A.7 of the Durban Bylaws.

<sup>610</sup> Section E.8 of the Durban Bylaws.

<sup>611</sup> Mathew and Chadha-Sridhar, ‘Granting animal rights under the Constitution: A misplaced approach? An analysis in light of Animal Welfare Board of India v. A. Nagaraja’ 349.

<sup>612</sup> Singhar, ‘Laws for protection of wildlife in India: Need for awareness towards implementation of effectiveness’ 1114.

<sup>613</sup> Wildlife (Protection) Act of 1972.

<sup>614</sup> Singh, ‘Wildlife Conservation and Protection by instrumentality of Law: India Chapter’ 409.

<sup>615</sup> Long Title to the Wildlife (Protection) Act 1972.

<sup>616</sup> Singh, ‘Wildlife Conservation and Protection by instrumentality of Law: India Chapter’ 409.

plants.<sup>617</sup> The Central Government has been vested with the powers of declaring certain areas as Sanctuaries<sup>618</sup> or National Parks.<sup>619</sup> The Supreme Court has provided an explanation of the aim of the Wildlife (Protection) Act as follows:

The policy and object of the wild life laws have a long history and are the result of an increasing awareness of the compelling need to restore the serious ecological imbalances introduced by the depredations inflicted on nature by man. The State to which the ecological imbalances and the consequent environmental damage have reached is so alarming that unless immediate, determined and effective steps were taken, the damage might become irreversible. The preservation of the fauna and flora, some species of which are getting extinct at an alarming rate, has been a great and urgent necessity for the survival of humanity and these laws reflects... a grave situation emerging from a long history of callous insensitiveness to the enormity of the risk to mankind that go with the deterioration of environment.<sup>620</sup>

The 2006 amendment of the Act established the Wildlife Crime Control Bureau which monitors and controls illegal trade in wildlife.<sup>621</sup> Headed by a Senior Police Officer, the Wildlife Crime Control Bureau complements the government's efforts to protect wildlife and enforce the provisions of the Act.<sup>622</sup>

In order to achieve its objectives, the Act authorises the Central Government to appoint a chief wildlife warden and such other officers and employees as may be necessary.<sup>623</sup> The State government is also authorised to appoint a chief wildlife warden, wildlife wardens, honorary wildlife wardens or any other officers or employees as may be necessary.<sup>624</sup>

While performing the duties and exercising powers conferred by the Act, the Director shall do so under the directions of Central Government. Furthermore, the exercise of power by the Chief Wildlife Warden shall be subject to the directions of the State Government.<sup>625</sup> These directions shall be given from time to time. There is also a general duty on the officers and other employees to be of assistance the Director.

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<sup>617</sup> Wildlife Protection Amendment Act, 1983; Wildlife Protection Amendment Act, 1986; Wildlife Protection Amendment Act, 1991; Wildlife Protection Amendment Act, 1993; Wildlife Protection Amendment Act, 2002; Wildlife Protection Amendment Act, 2006.

<sup>618</sup> Section 18 of the Wildlife (Protection Act).

<sup>619</sup> Section 35 of the Wildlife (Protection Act).

<sup>620</sup> *State of Bihar v Murad Ali Khan*, AIR 1989 SC 4.

<sup>621</sup> Singh, 'Wildlife Conservation and Protection by instrumentality of Law: India Chapter' 413.

<sup>622</sup> Singh, 'Wildlife Conservation and Protection by instrumentality of Law: India Chapter' 413.

<sup>623</sup> Section 4 of the Wildlife Protection Amendment Act, 2002.

<sup>624</sup> Section 5 of the Wildlife Protection Amendment Act, 2002.

<sup>625</sup> Section 4(2) of the Wildlife (Protection) Act.

It appears that the Director and the Chief Life Warden do not necessarily have to perform their duties as long as they have prior approval. This is because, the Act allows them to delegate their functions and powers to any other officer subordinate to them, provided that the conditions as stipulated in the order are complied with.<sup>626</sup>

In terms of the 2002 Amendment Act, the National Board for Wildlife should be constituted by the Central Government. The chairperson of this Board shall be the Prime Minister. The Board is obliged by law to take the necessary steps that ensure the promotion of conservation and development of wild life and forests.<sup>627</sup> The measures that may be taken by the Board to promote conservation may include the framing of policies as well as giving advice to the Central Government as well as the State Governments on measures that may be taken to promote wild life conservation and effective steps that may be taken to control poaching and illegal trade of wildlife and its products. Furthermore, the Board may make recommendations “on the setting up of and management of national parks, sanctuaries and other protected areas and on matters relating to restriction of activities in those areas”.<sup>628</sup>

The Board must also carry out or cause to be carried out, an assessment of what different projects may have on the wellbeing of wildlife or its habitat.<sup>629</sup> This includes the constant review of the progress made in the field of wildlife conservation. Once gaps have been established, various measures should be suggested that would ensure an improvement in the protection of wildlife.<sup>630</sup> At least once every two years, the Board must prepare and publish a status report on the country’s wildlife.<sup>631</sup>

However, the enforcement of the Wildlife Act by various States in India has been too lax. This is the case even though the provisions of the Act are clear. The laxity in the enforcement of the Act has been subject of litigation. In *Centre for Environmental Law, WWF v. Union of India*<sup>632</sup> the Supreme Court ordered the constitution of the Wild Life Advisory Board within two months for those States which either have not yet

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<sup>626</sup> Section 5 of the Wildlife Protection Amendment Act, 2002.

<sup>627</sup> Section 5C of the Wildlife Protection Amendment Act, 2002.

<sup>628</sup> Section 5C(2)(b) of the Wildlife Protection Amendment Act, 2002.

<sup>629</sup> Section 5C(2)(c) of the Wildlife Protection Amendment Act, 2002.

<sup>630</sup> Section 5C(2)(d) of the Wildlife (Protection) Amendment Act, 2002.

<sup>631</sup> Section 5C(2)(b) of the Wildlife (Protection) Amendment Act, 2002.

<sup>632</sup> 1997) (6) SCALE 8 (SP).

constituted the Board or whose term of the Board had expired. It was further ordered that State Governments which had failed to appoint Wild Life Wardens, should do so.

Schedules I, II and III of the Act specifically prohibits the hunting of specific animals. Whether or not the hunting of elephants is also proscribed was an issue for litigation in the case of *State of Bihar v. Murad Ali Baiq*.<sup>633</sup> In this case, the Supreme Court found that elephants are included in Schedule I, and thus hunting them is proscribed in terms of the Act. This protection is, however, not absolute.

This is because, if any animal listed in Schedule I has become dangerous to human beings, is disabled, or sick beyond recovery, the Chief Wildlife Warden, if satisfied of the above, may issue a permit to any person for the hunting of such animal. Similarly, if any animals as listed in Schedules II, III or IV has become dangerous to human beings, to property or is disabled or sick beyond recovery, the Chief Wildlife Warden may issue a permit for the hunting of such animal. It is, however, not illegal for the Chief Wildlife Warden to issue a permit for hunting any animals, including those listed in Schedules I, II, III and IV, provided that the hunting is for educational, scientific, collection of specimen or preparation of a serum solution from snake venom.<sup>634</sup>

The case of *B Natwall Vaid v. State of Tamil Nadu*<sup>635</sup> seems to reinforce the status of animals as property. In this case, the Court found that an animal that is found dead in private land becomes the property of the owner of such land. This is the case even where the animal was killed by a trespasser unless if the animal was chased by such person to the land. It is not clear whether the intention of the Court was only to make animals to be regarded as property only once it is dead.

Section 51 deals with the penalties that may be imposed for contravention of the Act. In terms of the section, any person who contravenes the provisions of the Act is guilty of an offence and may be liable upon conviction to either imprisonment not exceeding three years or a fine not exceeding twenty-five thousand rupees or both imprisonment and a fine. Intention is an essential element that must be proved in order to secure a conviction.<sup>636</sup>

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<sup>633</sup> 1989 AIR, 1 1988 SCR Supl. (3) 455.

<sup>634</sup> Section 12 of the Wildlife (Protection) Act.

<sup>635</sup> AIR 1979 MAD 218.

<sup>636</sup> Section 51 of the Wildlife (Protection) Act.

There are animals listed in various schedules, and a crime committed against those animals come with a minimum sentence of three years with a maximum sentence being seven years. A fine for committing a crime against the animals so listed is likewise a minimum of ten thousand rupees.<sup>637</sup> For a subsequent offence, the minimum fine should not be less than twenty-five thousand rupees.<sup>638</sup> Moreover, the provisions of section 360 of the Code of Criminal Procedure<sup>639</sup> as well as the probation period under the Probation of Offenders Act<sup>640</sup> do not apply to a person who committed a crime against the schedule animals unless if the offender is still a minor.<sup>641</sup> This is a positive move to ensure the protection of animals as it would deter those already convicted of similar offences from re-offending.

Section 51 was considered in the case of *Pyarelal v. State (Delhi Admn.)*<sup>642</sup> where the Court had to determine whether an accused should be sentenced to the minimum sentence of six months as provided for in the Act. Before determining whether minimum sentence could be imposed, the Court had to look at whether the provisions of the section applied to the facts of the case. The Court, however, found that the provisions of section 51 were not attracted as there was no evidence on how the accused came in possession of the trophies. The accused was convicted for possession of lion shaped trophies of Chinkara skins. The accused was thus sentenced to a period of two months.

In 2020, a notification was issued by the Ministry of Environment, Forests and Climate Change dealing with the import of exotic live species of animals and birds in India and declaration of stock. This was a move to ensure that animals listed in the appendices to CITES are brought within the purview of the said Act. This notification was issued prior to the amendment of the Wildlife (Protection) Amendment Act in 2022.<sup>643</sup> Section 49M of the Wildlife (Protection) Amendment Act of 2022 requires reporting of details of an animal to enable the Management Authority to investigate how the person came in possession of such animals to determine if it was obtained by a contravention of

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<sup>637</sup> Section 51(1) of the Wildlife (Protection) Act.

<sup>638</sup> Section 51(1) of the Wildlife (Protection) Act.

<sup>639</sup> Code of Criminal Procedure, 1973.

<sup>640</sup> Probation of Offenders Act, 1958.

<sup>641</sup> Section 51(4) of the Wildlife (Protection) Act.

<sup>642</sup> A.I.R 1995 S.C. 1159.

<sup>643</sup> Wildlife (Protection) Amendment Act of 2022.

any law.<sup>644</sup> Possession of an animal would become illegal if Management Authority is not satisfied,<sup>645</sup> and such an animal would be forfeited to the Central Government.<sup>646</sup> The person who would have been in possession of such animals may then be prosecuted.<sup>647</sup> In *Swetab Kumar Versus Ministry Of Environment, Forest and Climate Change and Ors*<sup>648</sup> the Court had to consider whether people that have made a declaration of ownership of 'exotic live species' were immune to prosecution. The Court found that declarants are immune from prosecution under the current and future laws as well as amendments of the Wildlife Protection Act.

### 3.4.2. The Biological Diversity Act, 2002

The purpose of the Biological Diversity Act is to conserve biological diversity in India.<sup>649</sup> Access to biodiversity is regulated by the provisions of chapter II of the Act.<sup>650</sup> The Act established the National Biodiversity Authority<sup>651</sup> with functions to regulate activities provided for in the Act.<sup>652</sup>

The Central Government is mandated by the Act to develop strategies, plans and programs at national level to ensure sustainability in the use biological diversity.<sup>653</sup> Moreover, where there is threat to biodiversity by overuse, abuse or neglect, a direction should be issued to the State Government by the Central Government to take immediate measures to ameliorate the situation.<sup>654</sup>

Contravention of sections 3, 4 or 6 of this Act come with a penalty of imprisonment not exceeding five years or with a fine ten lakh rupees.<sup>655</sup> However, where the damages caused by the contravention exceeds that amount "such fine may commensurate with the damage caused, or with both".<sup>656</sup> For contravention of section 7 or an order made

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<sup>644</sup> Section 49M(1) and (2) of the Wildlife (Protection) Amendment Act of 2022.

<sup>645</sup> Section 49M(8) of the Wildlife (Protection) Amendment Act of 2022.

<sup>646</sup> Section 48Q of the Wildlife (Protection) Amendment Act of 2022.

<sup>647</sup> Section 51 of the Wildlife (Protection) Amendment Act of 2022.

<sup>648</sup> 2023 LiveLaw (SC) 245.

<sup>649</sup> Long Title to the Biological Diversity Act.

<sup>650</sup> Section 3, 4, 5, 6 and 7 of the Biological Diversity Act.

<sup>651</sup> Chapter III of the Biological Diversity Act.

<sup>652</sup> Chapter IV of the Biological Diversity Act.

<sup>653</sup> Section 36 of the Biological Diversity Act.

<sup>654</sup> Section 36(2) of the Biological Diversity Act.

<sup>655</sup> Section 55(1) of the Biological Diversity Act.

<sup>656</sup> Section 55(1) of the Biological Diversity Act.

under section 24(2) of the Act, the penalty is imprisonment not exceeding three years or a fine not exceeding five lakh rupees or with both.<sup>657</sup>

The weakness of the Act is that it seems to restrict access to Courts and *Locus standi* to enforce it. This is because Courts are prohibited from hearing complaints relating to the Act unless of such complaint is made by

(a) the Central Government or any authority of officer authorized in this behalf by that Government, or

(b) any benefit claimer who has given notice of not less than thirty days in the prescribed manner, of such offence and of his intention to make a complaint authorized as aforesaid.<sup>658</sup>

### 3.4.3 National Zoo Policy, 1998

Zoos have become one of the most popular establishments since the growth in awareness for both natural and wildlife conservation.<sup>659</sup> The role played by zoos in the protection of animals and promoting conservation is seen when wild habitats are under severe pressure and a large number of species of wild fauna have become endangered.<sup>660</sup> This is because, in addition to sustaining their own populations, they have also augmented the depleting populations of endangered species in the wild. Section 2 of the National Zoo Policy<sup>661</sup> provides the main objectives of the policy as being, amongst others:

to complement and strengthen the national efforts in conservation and strengthen the national efforts in conservation of the rich biodiversity of the country, particularly the fauna. The objective can be achieved through the following protocol:-

Supporting the conservation of endangered species by giving species, which have no chance of survival in wild, a last chance of survival through coordinated breeding under *ex-situ* condition and raise stocks for rehabilitating them in wild as and when it is appropriate and desirable.

To inspire amongst zoo visitors empathy for wild animals, an understanding and awareness about the need for conservation of natural resources and for maintaining the ecological balance.<sup>662</sup>

This reflects the idea that conservation of animals can only be achieved if the nation works together. Such conservation would ensure that endangered species are given

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<sup>657</sup> Section 55(2) of the Biological Diversity Act.

<sup>658</sup> Section 61 of the Biological Diversity Act.

<sup>659</sup> Section 1 of the National Zoo Policy.

<sup>660</sup> Singh, 'Wildlife Conservation and Protection by instrumentality of Law: India Chapter' 415.

<sup>661</sup> National Zoo Policy, 1998.

<sup>662</sup> Section 2 of the National Zoo Policy.

a chance of survival. Aspiring empathy for animals would curb cruelty towards animals. Therefore, a concerted effort is required to ensure adequate protection of animals.

### **3.5. Conclusion**

The legal framework for animal welfare protection in South Africa is described as fragmented, inconsistent, and biased in favour of economic interests and human needs. Existing legislation focuses on prohibiting unnecessary cruelty to animals without fundamentally challenging property rights over animals. While certain acts of cruelty are prohibited by law, traditional or institutional practices that harm animals may be allowed. These laws primarily reflect an anthropocentric viewpoint, and therefore put human interests over those of animals. The protection provided by legislation is illogical and weak, with animal welfare often being discretionary rather than mandatory. South African is a signatory to various international law agreements for the protection of animals, which laws have been domestically incorporated.

In India, various laws and policies have been developed to regulate the treatment of animals, with some aimed at curbing illegal animal trade. However, these laws are often deemed ineffective in preventing cruelty towards animals. The Wildlife (Protection) Act provides a strong legal foundation for wildlife conservation but suffers from lax enforcement. Notably, section 360 of the Code of Criminal Procedure in India excludes probationary periods for individuals convicted of crimes against scheduled animals, serving as a deterrent against animal cruelty. This makes the Indian protection regime to be stronger to that of South Africa which has minimal direct connection to animal rights. In India, there is a direct mention of animals and the provisions suggest ecocentric protection as opposed to anthropocentric viewpoints in South Africa. Additionally, India is a signatory to international agreements like the United Nations Convention on Biological Diversity, which influenced the enactment of the Biological Diversity Act. However, this Act restricts access to Courts for enforcing its provisions. While environmental laws are the main source of rules protecting animals, other rules such as constitutional provisions may be equally useful, albeit to a lesser extent. These constitutional rules are discussed in the next chapter.

## Chapter four

### A comparison of constitutional protection of animals in South Africa and India

#### 4.1. Introduction

This chapter looks at various constitutional provisions that are or may be used in the protection of animals in South Africa and India. The extent to which these provisions may be used in protecting animals is discussed in light of various interpretations by Courts. The chapter compares the interpretation of constitutional provisions by South Africa and Indian Courts.

#### 4.2. The basis of constitutional protection of animals

A constitution is usually defined as a set of rules, whether written or unwritten, that determines the responsibilities, authorities and functions of different organisations of a state, at the same time regulating the relationships between those organisations and defining the relationship between the state and the individual.<sup>663</sup>

Scholars have focused on important elements that a constitution should include in order to fulfill its role as a guide to governance.<sup>664</sup> Rawls regards constitutional essentials as the underlying ideas that describe the broad form of government, political process, and the equal basic rights and liberties of citizenship that majorities must respect.<sup>665</sup> Michelman views constitutional essential as relating to the state's commitment to implement rights and laws as well as their effective administration.<sup>666</sup> According to Elster a constitution should provide a definition and protection of citizens' rights, "establish the machinery of government" as well as regulate its own changes.<sup>667</sup> However, constitutions are usually abstract and provides protection of rights without necessarily defining those rights. Constitutions should make provisions necessary for reconciling conflicting opinions relating to rights and justice.<sup>668</sup> In this regard, Courts

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<sup>663</sup> Colin Bradley, 'The success of a political system depends not only on its constitution but also on its political culture' (2012) *Government and Politics Review* 1.

<sup>664</sup> Ademola O Jegede, 'Climate Change as a 'constitutional essential': Trend and Significance for Africa' (2020) in M Addaney and AO Jegede, (Eds) *Human Rights and the Environment under African Union Law* 236.

<sup>665</sup> John Rawls, *Political Liberalism* (Columbia University Press 2005) 227; Jegede, 'Climate Change as a 'constitutional essential': Trend and Significance for Africa' 236.

<sup>666</sup> Frank I Michelman, *Constitutional Essentials: On the Constitutional Theory of Political Liberalism* (Oxford University Press 2022) 51; Ibid.

<sup>667</sup> Jon Elster 'Constitutionalism in Eastern Europe: An Introduction' (1991) 58 (2) *University of Chicago Law Review* 465; Ibid 237.

<sup>668</sup> Rawls, *Political Liberalism* 197; Ibid.

play a fundamental role in balancing competing interests of individuals and the functioning of organs of governance.<sup>669</sup> This may be achieved through purposive interpretation of various constitutional provisions.

A constitution reflects the fundamental ideals of the society at the time it was enacted.<sup>670</sup> Put differently, a country's constitution embodies the highest standards of values that existed at the time it was adopted. However, as society changes, values will "inevitably change, and standards and practices in the community become different from those prevailing when the constitution was enacted".<sup>671</sup> This leads to the majority of countries amending their constitutions to reflect the emerging social values. Some countries favour a purposive interpretation of their constitutions.

Animal laws vary from one country to the next. What one country may value as life, another country values only as property. This leads to fundamental differences in the existing laws designed to protect animals. For instance, an animal viewed as a pet by one person may be regarded as food by another, or even as a pest. The treatment of this animal will differ even though it is still the same animal. An animal's moral status, be it sentient being or machine, thus inevitably determines how an animal will be viewed in the eyes of the law. When assessing a nation's greatness and moral advancement, one ought to consider how the country treats its animal.<sup>672</sup> Put differently, a country's moral standards are reflected in how its animals are treated. These principles are typically reflected in the constitutions of different nations.<sup>673</sup>

The protection of animals is now further enhanced by constitutional law. This is a continuation of the popular belief that the constitution is the supreme law of the land. The protection of animals under a constitution, which is the highest law of the land, is a major advancement in the protection of animals, which is typically lacking in the public and judicial minds.<sup>674</sup> As Bolliger puts it:

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<sup>669</sup> Joseph Raz, *The Morality of Freedom* (Oxford University Press 1988) 258.

<sup>670</sup> Bradley, 'The success of a political system depends not only on its constitution but also on its political culture' 1.

<sup>671</sup> Basil Chubb, *The Government and Politics of Ireland* (Routledge 1970).

<sup>672</sup> Kenneth C Balcomb, 'Whales in a changing world' (2010) 36 *Aquatic Mammals* 401.

<sup>673</sup> Porena, 'Constitutional protection of the environment: Evolution in Europe between anthropocentrism and ecocentrism. The Italian case' 296.

<sup>674</sup> Jessica Eisen, 'Liberating animal law: Breaking free from human-use typologies' (2011) *Animal Law* 59.

A constitution always reflects the overall values of a nation. The inclusion of animal welfare measures . . . is rather an official and clear acknowledgement, at the highest level of law, that people cannot deal with animals at will and with no limitations set.<sup>675</sup>

Even though most constitutions refer to animals as just another part of the environment, there has been a shift with some constitutions such as the constitutions of Germany,<sup>676</sup> Austria,<sup>677</sup> Switzerland<sup>678</sup> and Brazil<sup>679</sup> having specific provisions relating to animals and treating their interests as matters of intrinsic constitutional concern. This is also the position in India where the Constitution has specific provisions for animals. Unlike South Africa, these constitutions have specific provisions for the welfare of animals.

### 4.3. Constitutional protection of animals in South Africa

There are various sections in the South African Constitution that have been applied by Courts to protect animals. Though not expressly mentioning animals, these sections have been purposively interpreted by Courts and thus played an important role in the protection of animals within a constitutional framework. There are also some provisions in the South African Constitution which may be purposively interpreted to protect animals. This section interrogates those constitutional provisions that have been used or have a potential of being used to protect animals within the South African context.

#### 4.3.1. Protection of environmental rights

The inclusion of environmental rights in the South African Constitution<sup>680</sup> have improved environmental protection.<sup>681</sup> That said, animal rights are not specifically protected by the South African Constitution. The environmental right found in Section

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<sup>675</sup> Bolliger, 'Constitutional and legislative aspects of animal welfare in Europe: Animal welfare in constitutions'.

<sup>676</sup> The Constitution of the Federal Republic of Germany, 1949 was amended in 2002 by section 20(a) to include "...und die tiere..." which means "and the animals" and now provides that "Mindful also of its responsibility toward future generations, the state shall protect the natural bases of life *and animals* by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order."

<sup>677</sup> Article 11(1) inserted into the Federal Constitution of Austria, 1920 to empower the federation to make laws affecting animal welfare.

<sup>678</sup> Article 25bis of the Federal Constitution of the Swiss Confederation, 1999 makes animal welfare a state matter and obliges the state to codify animal welfare legislation.

<sup>679</sup> Article 225 of the Constitution of the Federative Republic of Brazil, 1988 provides that the law should prohibit all practices which represent a risk to the ecological function, cause the extinction of species or subject animals to cruelty.

<sup>680</sup> Constitution of the Republic of South Africa, 1996.

<sup>681</sup> Van der Linde and Feris, *Compendium of South African Environmental Legislation 2<sup>nd</sup> Ed.*

24 of the Constitution is the only provision that might arguably be considered as relevant to the protection of animals.<sup>682</sup> This is because animals are part of the environment and are thus included under the provisions of this section, though not in express terms. Furthermore, since the section 24(b)(ii) protects the right of everyone to have the environment protected for the benefit of present and future generations through the enactment of legislation that, amongst other things, promotes conservation.<sup>683</sup>

The jurisprudence on environmental law has been advanced by the express inclusion of environmental rights in the Constitution of the Republic of South Africa.<sup>684</sup> Even though there are a number of legislative enactments on the protection of the environment, this right has been elevated by the express protection of environmental rights in the Bill of Rights. The protection of the environment in section 24 is two-fold. First, it requires the State to abstain from actions that could endanger the environment and negatively impact the health and welfare of its population. The language of subsection (a), which states that everyone has the right to enjoy an environment that is not detrimental to their health and well-being, makes this evident.<sup>685</sup> Put differently, the state is required to refrain from taking any action that could endanger the environment. Second, the State is required by subsection (b) to safeguard the environment for the benefit of both the current and future generations. This needs to be accomplished by reasonable legislation as well as other strategies, such as promotion of conservation and prevention of ecological degradation.<sup>686</sup>

What reasonable legislative and other actions meant in the context of section 24 was examined by the Court in the case of *BP Southern Africa v MEC for Agriculture, Conservation and Land Affairs*.<sup>687</sup> It was held that it is up to Courts to determine what measures are reasonable. The Court was of the view that section 24 imposes a positive obligation to 'take reasonable legislative and other measures' towards the fulfilment of the environmental right. This case lays down a foundation to protect animals in that Courts can review the reasonableness of the steps taken by the state.

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<sup>682</sup> Bilchitz, 'Does transformative constitutionalism require the recognition of animal rights?' 267; Bilchitz, 'Moving beyond arbitrariness: The legal personhood and dignity of non-human animals' 66.

<sup>683</sup> Section 24(b)(ii) of the South African Constitution.

<sup>684</sup> Section 24 of the South African Constitution.

<sup>685</sup> Section 24(a) of the South African Constitution.

<sup>686</sup> Section 24(b) of the South African Constitution.

<sup>687</sup> 2004 (5) SA 124 (W).

Transitioning from a period when discrimination based on various grounds was legitimised, a new constitutional order was formed based on the rejection of arbitrariness.<sup>688</sup> Furthermore, the new constitutional order ought to protect significant interests of all, especially those who are vulnerable. This is more so because South African belongs to all those who live in it<sup>689</sup>, not just human beings or a particular species. Even though the Constitution expressly states that South Africa belongs to all those who live in it,<sup>690</sup> there is no express provision in the Constitution protecting the interests of animals.

While section 24 of the Constitution makes express mention to the right to the environment, the problem with this constitutional protection is that it reflects anthropocentrism. This is clearly revealed by section 24(b) which protects the right of everyone “to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that ...promote conversation...”.<sup>691</sup> ‘Everyone’ in the context of this section seems to suggest that the rights so protected are for human beings. Moreover, the protection of the environment for the benefit of present and future generations suggests that the protection is for the benefit of human beings and not all species. If this is the interpretation intended by the Constitution, then the protection of the environment is arbitrary. A reasonable interpretation should, however, reject arbitrariness. Thus, even if animals are regarded as property, they should nonetheless be entitled to rights. There are various inanimate rights holders such as trusts, joint ventures, municipalities, churches and companies.<sup>692</sup> These ‘things’ have always enjoyed rights and they still do. South Africa recognises the rights of inanimate things such as a company, which is bound by the provisions of the Constitution.<sup>693</sup> If the Constitution extends rights to juristic person, which are a fiction of law, it should also extend rights to animals by requiring the protection of the environment for the benefit of present and future animal species.

There is no further mention of animals in particular or the environment in general except that in section 24. Instead, the protection of the environment is left to several

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<sup>688</sup> Ibid.

<sup>689</sup> Preamble to the South African Constitution.

<sup>690</sup> Preamble to the South African Constitution.

<sup>691</sup> Section 24(b) of the South African Constitution.

<sup>692</sup> Stone, ‘Should Trees have Standing? Towards legal rights for natural objects’ 452 – 453.

<sup>693</sup> Section 8(2) and (4) of the South African Constitution.

statutory enactments that expressly protect the interests of animals either directly or indirectly. This may be attributed to the fact that constitutions are framed in an abstract manner and though they seek to protect various interests of life, they cannot expressly do so comprehensively. In this regard, domestic legislative enactments are necessary to give meaning to the rights contained in the Constitution. The lack of further express mention of animals in the Constitution does not mean that a reasonable interpretation that rejects arbitrariness may not find a protection of animals from other constitutional provisions.

According to Van der Bank and Karsten

[s]ubsection (b) contains the directive that requires the three spheres of government to take positive steps to attain the right in paragraph (a). The interest in the environment of everyone must be conserved, protected and judiciously utilised.<sup>694</sup>

Section 24(b) requires that the environment be protected by legislative and 'other measures'.<sup>695</sup> The state promulgated a number of statutes to give meaning to the environmental rights as protected in section 24 which are discussed above. However, on their own, these pieces of legislation are not sufficient to protect the environment in general and animals in particular. Other measures may include the enforcement of the rights through constitutional litigation. The importance of constitutional litigation to enforce environmental rights is stated by Sive who posits that "litigation is the most important thing that environmental movement has done".<sup>696</sup> This will be in line with the right to access Courts as protected under section 34 of the Constitution.<sup>697</sup>

Cameron JA stated in a minority judgment in the case of *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw*<sup>698</sup> that animals should be protected for their own sake. In this case, the learned judge advanced the ecocentric view that animals ought to be protected for their own sake and not based on how they affect human beings. Similarly, the High Court in *South African Predator Breeders Association v Minister of Environmental Affairs and Tourism*<sup>699</sup> favoured this view that

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<sup>694</sup> Marjoné van der Bank and Jaco Karsten, 'Climate Change and South Africa: A Critical Analysis of the Earthlife Africa Johannesburg and Another v Minister of Energy and Others 65662/16 (2017) Case and the Drive for Concrete Climate Practices' (2020) 13 *Air, Soil and Water Research* 1 at 3.

<sup>695</sup> Section 24(b) of the Constitution of South Africa provides for the right of everyone to have the environment protected through reasonable legislative and other measures.

<sup>696</sup> David Sive, 'The Litigation Process in the Development of Environmental Law' (1995) 13 *Pace Environmental Law Review* 1 at 3.

<sup>697</sup> Section 34 of the Constitution of South Africa.

<sup>698</sup> *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw*.

<sup>699</sup> *South African Predator Breeders Association v Minister of Environmental Affairs and Tourism*.

the animals deserve protection for their own benefit. Even after expressing this opinion, the Court upheld the viewpoint that laws do not grant animals any legal rights. This is rather unfortunate as the Court missed an opportunity to give animals the protection, which it has acknowledged they deserve.

The protection of animals within the ambit of the South African Constitution was stated by the Supreme Court of Appeal in the case of *S v Lemthongthai*.<sup>700</sup> In this case, the Court stated that “[c]onstitutional values dictate a more caring attitude towards fellow humans, animals and the environment in general”.<sup>701</sup> Animal welfare was further elevated to a constitutional issue by the Constitutional Court in *National Council for Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development and Another*<sup>702</sup> where the Court correctly found that “the rationale behind protecting animal welfare has shifted from merely safeguarding the moral status of humans to placing intrinsic value on animals as individuals”.<sup>703</sup> This is a step in the right direction as it recognises the need to protect animals for their own worth.

The progression in recognising the need to protect animals for their own inherent worth is further seen in cases such as *Smuts and Another v Botha*<sup>704</sup> where the Court stated that it is axiomatic that animals are worthy of legal protection not based on how they affect human beings but because they are sentient beings capable of suffering. This case used the right to freedom of expression as a defence against a defamation lawsuit and found that the public has a right to be informed about the humane and inhumane treatment of animals, and that such comments would not constitute defamation.<sup>705</sup> This would mean that people are free to publicise any cruel treatment of animals without fear of being sued by the perpetrators. Courts have limited some human rights, including the right to privacy, in the interest of protecting animals.<sup>706</sup>

The relevance of section 24 of the Constitution in protecting the welfare of animals was considered in *National Council of the Society for Prevention of Cruelty to Animals*

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<sup>700</sup> *S v Lemthongthai*.

<sup>701</sup> *Supra* para 20.

<sup>702</sup> *National Council for Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development and Another*.

<sup>703</sup> *Supra* para 57.

<sup>704</sup> 2022 (2) SA 425 (SCA) para 24.

<sup>705</sup> *Smuts and Another v Botha* para 25.

<sup>706</sup> *Supra*; *Smuts N.O. and Others v Member of the Executive Council: Eastern Cape Department of Economic Development Environmental Affairs and Tourism and Others* (1199/2021) [2022] ZAECMKHC 42 (26 July 2022).

*v Minister of Environmental Affairs and Others*.<sup>707</sup> The Court found that the welfare of animals is a relevant consideration in the interpretation of section 24.<sup>708</sup> Courts in South Africa have thus applied the provisions of section 24 of the Constitution in protecting animals, even though the section does not expressly mention animals. This is a positive step in realising the importance to purposively interpret constitutional provisions to protect the welfare of animals.

Given the interdependence and mutual support of constitutional rights,<sup>709</sup> consideration must also be given to other rights that may be relevant to the protection of animals. As such, other rights that may potentially protect animals will be discussed, even those not expressly applied yet by South African Courts in the protection of animals.

#### **4.3.2. Right to access information**

Another provision that may be relevant in protecting animals is the right to access information as espoused in section 32 of the Constitution.<sup>710</sup> The section protects the right of every individual to access information necessary for protecting or exercising of any right. At first glance, it appears as if the right to access information does not have any effect in protecting animals. However, a closer look reveals that the right may be used to access information necessary for the exercise or protection of any rights, including environmental rights. Furthermore, when this right is read with legislation such as the National Environment Management: Biodiversity Act<sup>711</sup>, and taking into account that knowledge on protected species is essential to the protection of environmental rights, the Minister has a duty to guarantee that the public has access to this information.<sup>712</sup> This protection is not enough as the protection of animal rights will require that the law recognises the need to protect animals by giving them constitutional rights.

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<sup>707</sup> *National Council of the Society for Prevention of Cruelty to Animals v Minister of Environmental Affairs and Others*.

<sup>708</sup> *National Council of the Society for Prevention of Cruelty to Animals v Minister of Environmental Affairs and Others* paras 41, 63, 72 and 74.

<sup>709</sup> *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development and Others* 2004 (6) BCLR 569 (CC).

<sup>710</sup> Section 32 of the Constitution of South Africa.

<sup>711</sup> National Environment Management: Biodiversity Act 10 of 2004.

<sup>712</sup> Section 49 of the National Environment Management: Biodiversity Act.

The scope of rights intended to be protected under section 32 has been a subject of contention. This was, however, answered by Cameron J in the case of *Van Niekerk v Pretoria City Council*<sup>713</sup> when it was stated that an interpretation of section 32 should be wide enough to include not only rights in the Bill of Rights but other rights, such as contractual and delictual rights. This means that the right to access information should be applied to the extent that it protects even those rights not expressly protected in the Bill of Rights, such as animal rights. Within the context of protecting animals, the right to access information was applied in the case of *Smuts N.O. and Others v Member of the Executive Council: Eastern Cape Department of Economic Development Environmental Affairs and Tourism and Others* where the Court ordered the government to hand over all records of applications and permits issued to individuals allowing them to trap, kill, hunt, or translocate leopards.<sup>714</sup>

#### 4.3.3. Right to just administrative action

A person whose environmental rights have been adversely affected by administrative action undertaken by a public official or private person may approach a Court to review such administrative action on the basis of it being unreasonable, unfair or unlawful. This is based on the protected right to just administrative action as protected in the South African Constitution.<sup>715</sup> This will apply if a public official or a private person undertaking a public function fails in their obligation to ensure the protection of the environment. This right is, however, only limited to instances where a public official or a private person undertaking a public function undermines the right to the environment. It may not be applied in cases such as where a private person is cruel to animals. This means that the protection of animals in terms of this section is limited.

In *Bato Star Fishing v Minister of Environmental Affairs*<sup>716</sup> the Court found that a number of factors that should be used in establishing whether or not the decision taken or a failure to take a decision is reasonable, and these are mainly related to the nature of the competing interests involved as well as the impact that the decision would have on the lives and well-being of those affected. The Court continued to state that when

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<sup>713</sup> 1997 (3) SA 839 (T).

<sup>714</sup> *Smuts N.O. and Others v Member of the Executive Council: Eastern Cape Department of Economic Development Environmental Affairs and Tourism and Others* para 49.

<sup>715</sup> Section 33 of the Constitution of South Africa.

<sup>716</sup> 2004 (4) SA 490 (CC).

dealing with administrative issues, other fundamental rights such as the environmental right must also be taken into consideration.

In *National Council of the Society for Prevention of Cruelty to Animals v Minister of Environmental Affairs and Others*,<sup>717</sup> the Court had to decide whether the decisions of the Minister in setting the annual quotas constitute administrative action reviewable under the Promotion of Administrative Justice Act. The Court found that the determinations of the Minister constituted administrative action as opposed to executive action.<sup>718</sup> This case shows willingness on the parts of Courts to allow decisions of the executive branch of government to be reviewed under the right to just administrative action. This section may potentially be used to challenge administrative actions that affect animals such as those setting the annual quotas for animals that may be hunted or granting of permits to hunt animals.

#### 4.5.1. The right to property

Domesticated animals and those in game reserves may be protected under section 25, which is the property clause.<sup>719</sup> This section prohibits arbitrary deprivation of property. The problem with relying on section 25 as a basis for protecting animals is that the section does nothing more than acknowledge the status of animals as property. If it is accepted that animals are property, this would mean that they are nothing more than legal objects for the benefit of human beings, which reflects anthropocentric views that animals are only protected in the interests of human beings. This would also reflect the anthropocentric view that animals are only protected for the interests of human beings, and in this case, it would be for the interests of the 'property' owner. The extent to which private property may be limited in the interests of the environment is not too clear. As stated above, the law protects some things such as companies, churches and trusts and recognise them as holders of certain rights. Though not expressly stated in the Constitution, the law does recognise some of the rights of animals. For instance, if the protection of domestic animals is based on the property clause, what is the justification of punishing a dog owner who kicks his own

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<sup>717</sup> *National Council of the Society for Prevention of Cruelty to Animals v Minister of Environmental Affairs and Others*.

<sup>718</sup> *Supra* para 50.

<sup>719</sup> Section 25 of the Constitution of South Africa.

dog? Why does the law not punish a cellphone owner who destroys his phone or a house owner who demolishes his house?

Explicit guidance on whether or not private property interests may be limited in the interests of the environment was provided by the Court in *BP Southern Africa v MEC of Agriculture, Conservation and Land Affairs*.<sup>720</sup> In this case, the Court held that the right to the environment contained in section 24 is on par with the right to property espoused in section 25. A conflict between these rights should be resolved by balancing the competing interests with environmental rights forming part and parcel of the factors to be considered. This should be done in a manner that does regards all rights as important and worthy of legal protection, subject to reasonable limitations.

The Court in *R v Smit*<sup>721</sup> has acknowledged that even though animals may be regarded as property, they should be destroyed as humanely with as little suffering as possible.<sup>722</sup> This means that even though animals may be regarded as property, their welfare still matters. However, the right to property in section 25 of the Constitution has not yet been used in the protection of animals in South Africa. However, if animals are regarded as property, an owner of an animals subjected to cruelty can thus be allowed to approach a Court to protect his or her property rights. The problem with this provision is that only the owner of animals will have legal standing and therefore offers no protection of the cruel treatment of an animal is perpetrated by the owner.

#### 4.5.2. Enforcement of rights

In terms of section 38 of Constitution, various persons will have *Locus standi* to enforce a right in the Bill of Rights that has been infringed.<sup>723</sup> The environmental right is a constitutionally protected right, and thus the following persons have *Locus standi* to enforce it:

- (a) Anyone acting in their own interest;
- (b) Anyone acting on behalf of another person who cannot act in their own name;
- (c) Anyone acting as a member of, or in the interest of, a group or class of persons;
- (d) Anyone acting in the public interest; and
- (e) An association acting in the interest of its members.<sup>724</sup>

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<sup>720</sup> *BP Southern Africa v MEC of Agriculture, Conservation and Land Affairs*.

<sup>721</sup> 1929 TPD 397.

<sup>722</sup> *R v Smit* at 401.

<sup>723</sup> Section 38 of the Constitution of South Africa.

<sup>724</sup> Section 38 of the Constitution of South Africa.

The provisions of section 38 dealing *Locus standi* extended the common position of *Locus standi*.<sup>725</sup> Under common law, a person would have *Locus standi* if he or she is able to show that he or she has a direct and substantial interest in the matter in order to institute or defend legal proceedings. This position has been improved under section 38 as *Locus standi* is extended to even those who are not directly as they may still institute proceedings on behalf of or for the benefit of others.<sup>726</sup>

The protection of animals in terms of this right is limited as it would only protect animals if the law recognises that animals have rights. This is because, if animals have no rights, approaching Courts in terms of section 38 would not be possible as section 38 only grants *Locus standi* in order to enforce rights. It is, however, possible to approach Courts to enforce environmental rights as protected by section 24 of the South African Constitution.

The Court in *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others*<sup>727</sup> addressed the issue of *Locus standi* in constitutional matters. The Court found that legal standing should be determined broadly, which is consistent with the courts' duty to protect the Constitution and guarantee that constitutional rights are fully safeguarded.<sup>728</sup> The broad application of legal standing means that various people, such as those in section 38 can have legal standing to enforce environmental rights.

The Court in *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development and Another*<sup>729</sup> found that the National Society for Prevention of Cruelty to Animals has legal standing to institute private prosecution on the protection of animals. While the legal standing was conferred by various statutory provisions such as section 6(2)(e) of the Societies for the Prevention of Cruelty to Animals Act and section 8 of the Criminal Procedure Act, this is in line with the provisions of section 38 of the Constitution which confers legal standing to enforce

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<sup>725</sup> Steve Pete and Others, *Civil Procedure: A Practical Guide* (Oxford University Press 2017) 14; Constantine Theophilopoulos and Others, *Fundamental Principles of Civil Procedure Fourth Edition* (Lexis Nexis 2020) 122.

<sup>726</sup> Pete and Others, *Civil Procedure: A Practical Guide* 14; Theophilopoulos and Others, *Fundamental Principles of Civil Procedure Fourth Edition* 122.

<sup>727</sup> 1996 (1) SA 948 (CC).

<sup>728</sup> *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* para 1082.

<sup>729</sup> *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development and Another* para 65.

rights in the Bill of Rights.<sup>730</sup> This legal standing can therefore be extended to various persons having standing to approach Courts to protect animals as is the case in India.

#### 4.5.3. Right to access Courts

*Locus standi*<sup>731</sup> is closely related to the right to access Courts<sup>732</sup> which is one of the fundamental rights espoused in the Constitution. The significance of section 34 in a democratic society has been stated in a number of judgments including the case of *First National Bank v Lukhele and Seven Others*<sup>733</sup> where the Court found that:

access to [C]ourts is fundamentally important to our democratic order. It is not only a cornerstone of the democratic architecture but, also a vehicle through which the protection of the Constitution itself may be achieved. It also facilitates an orderly resolution of disputes so as to do justice between individuals and between private parties and the state.<sup>734</sup>

The importance of the right to access Courts is that it ensures that other rights protected by the Constitution can be enforced. It would not make sense if animals were given rights under the Constitution if such rights cannot be enforced through constitutional litigation. In this regard, Courts play a fundamental role in deciding disputes relating to violations of constitutional rights.

South African Courts have not expressly relied on the provisions of section 34 to enforce animals rights, however, there are other provisions such as section 6(2)(e) of the Societies for the Prevention of Cruelty to Animals Act and section 8 of the Criminal Procedure Act that allows for private prosecution of those involved in animals cruelty.<sup>735</sup>

#### 4.5.4. Right to equality

Section 9 of the Constitution, being the equality clause, finds application in protecting animals within a constitutional framework. The section provides that everyone is equal before the law and the right to equal protection of the law.<sup>736</sup> The section further states various grounds on which discrimination is prohibited.<sup>737</sup> It is worth stating here that

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<sup>730</sup> *Supra* para 27.

<sup>731</sup> Section 38 of the Constitution of South Africa.

<sup>732</sup> Section 34 of the Constitution of South Africa.

<sup>733</sup> [2016] ZAGPPHC 616 (16 May 2016).

<sup>734</sup> *First National Bank v Lukhele and Seven Others* at para 1.

<sup>735</sup> *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development and Another* para 65.

<sup>736</sup> Section 9 of the Constitution of South Africa.

<sup>737</sup> Section 9(3) and (4) of the Constitution of South Africa.

the grounds on which discrimination is prohibited are not exhaustive.<sup>738</sup> When applied to protect animals, this right would mean that human beings may not discriminate on animals on the basis of species. The importance of equality within animal rights context is presented by de Villiers who posits that:

[w]ithin a society characterised by an uneven balance of power and ensuing oppression and domination, we find various approaches that seek to remedy this structure and strive towards the ideal of 'equality'.<sup>739</sup>

The reason to seek equal treatment is premised on the fact that the impact of discrimination may have on individuals. The impact of discrimination against disfavoured groups and minorities was considered in the case of *MEC for Education: Kwazulu Natal v Pillay*.<sup>740</sup> It was found by the Court that discriminating against members of disfavoured groups was prima facie unfair and may have an adverse impact on the rights of those members and may lead to patterns of harm against the disfavoured groups.

Similarly, the Court in *Pretoria City Council v Walker*<sup>741</sup> found that prohibiting discrimination is more focused on the consequences that it may have as opposed to the conduct itself. Since the focus is more on the consequences that the conduct, discrimination may result from conduct that seems neutral and non-discriminatory. In addition to being a guaranteed constitutional right, equality is also one of the founding values of the Constitution.<sup>742</sup> In South Africa, where discrimination based on a variety of grounds was legitimised, the idea of equality is essential to guaranteeing that everyone is afforded equal protection under the law and to redress the grave injustices of the past. This would be in line with the Constitution's Preamble, which acknowledges the historical injustices and aims to heal historical divisions.<sup>743</sup>

However, just like any other right in the Constitution, equality is not defined and its scope of application is not described. To find the meaning of equality, guidance should be sought from how Courts defined the concept. The meaning of equality as defined by Sachs J in *National Coalition for Gay and Lesbian Equality v Minister of Justice*<sup>744</sup>

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<sup>738</sup> Section 9 of the Constitution of South Africa.

<sup>739</sup> Jan-Harm De Villiers, 'Examining the similarity principle and language of (animal) rights as a foundation for animal liberation' (2012) 27 *South African Public Law Journal* 40.

<sup>740</sup> 2008 (1) SA 474 (CC).

<sup>741</sup> 1998 (2) SA 363 (CC).

<sup>742</sup> Section (1)(a) of the South African Constitution.

<sup>743</sup> Preamble to the South African Constitution.

<sup>744</sup> 1999 (1) SA 6 (CC).

encompasses all the elements of equality. It was stated that equality in this instance refers to treating everyone equally regardless of their differences. It was also emphasised that equality should not be confused with uniformity, as the latter could be detrimental to the former. Differences cannot be the justification for exclusion in the pursuit of equality.

This means that even though animals may be different to human beings, this should not be the basis for discriminating against them. What should happen is that human beings must have equal concern and respect towards animals. The basis for equal concern should not be on uniformity as there is a clear difference between uniformity and equality.

Deputy President, Thabo Mbeki, as he then was, stated in a famous “I am an African” speech, while introducing the final South African Constitution, as follows:

At time, and in fear, I have wondered whether I should concede equal citizenship of our country to the leopard and the lion, the elephant and the springbok, the hyena, the black mamba and the pestilential mosquito. A human presence amongst all these, a feature on the face of our native land thus defined, I know that none dare challenge me when I say – I am an African.<sup>745</sup>

The above seems to suggest that animals have certain features that human beings have, and as such ought to be given equal citizenship of the country. This would be consistent with the right to equality. However, it is worth stating that animals should not be granted rights simply because they have similar features to human beings as equality should not be based on uniformity.

The differences between animals and human being can therefore not legitimately be used to deny animals rights under the Constitution. Doing so would be unfair discrimination which has been termed speciesism as it discriminates against animals based on their species. Section 9 of the Constitution has not yet been used by South African Courts to protect animals, but this section may potentially protect animals should Courts apply it.

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<sup>745</sup> Thabo Mbeki , ‘I am an African’ (1996) Speech at the Adoption of the Republic of South Africa Constitution Bill < <http://www.anc.org.za> > accessed on 30 December 2021.

#### 4.5.5. The right to dignity

Another right that may be used to protect animals is the right to dignity.<sup>746</sup> According to Bilchitz, the right to dignity as espoused in the South African Constitution may be used to protect animals as they have a dignity that ought to be respected.<sup>747</sup> As a result, the author contends that the South African Constitution should be amended to specifically include reference to animals. As an alternative, the author argues for interpreting the South African Constitution as already including the right to dignity of animals.<sup>748</sup> According to Metz, while the arguments presented by Bilchitz have merit, other forms of justice may be impacted by interpreting the Constitution as already including animals. Additionally, the author holds the belief that animals and human beings do not share the same status.<sup>749</sup>

Dignity is more than just a right protected in section 10 of the Constitution.<sup>750</sup> It is also one of the founding values of the Constitution.<sup>751</sup> It is also one of the few rights that may not be limited even in the case of state of emergency. A key component of South Africa's new constitutional order is the respect for human dignity. In addition to being a founding value of the Constitution, it is also in line with the three instruments under international law that are usually referred to as the International Bill of rights, namely the Universal Declaration of Human Rights<sup>752</sup>, the International Covenant on Civil and Political Rights<sup>753</sup> and the International Covenant on Economic, Social and Cultural Rights.<sup>754</sup>

The interpretation of the right to inherent dignity was presented by Ackerman J in *National Coalition for Gay and Lesbian Equality v Minister of Justice*<sup>755</sup> who found that it requires “us to acknowledge the value and worth of all individuals as members of our society”.<sup>756</sup> If animals are to be considered as ‘members’ of society, the protection under section 10 of the South African Constitution can be extended to animals.

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<sup>746</sup> Section 10 of the South African Constitution provides that “Everyone has inherent dignity and the right to have their dignity respected and protected”.

<sup>747</sup> Bilchitz, ‘Moving beyond arbitrariness: The legal personhood and dignity of non-human animals’ 67.  
<sup>748</sup> Ibid.

<sup>749</sup> Metz, ‘Animal rights and the interpretation of the South African Constitution’ 301.

<sup>750</sup> Section 10 of the Constitution of South Africa.

<sup>751</sup> Section 7(1) of the Constitution of South Africa.

<sup>752</sup> Universal Declaration of Human Rights, 1948.

<sup>753</sup> International Covenant on Civil and Political Rights, 1966.

<sup>754</sup> International Covenant on Economic, Social and Cultural Right, 1976.

<sup>755</sup> *National Coalition for Gay and Lesbian Equality v Minister of Justice*.

<sup>756</sup> *Supra* at para 28.

However, the right to dignity is yet to be applied in the protection of animals under South African case law. South African Courts can follow the position in India, where even though the right to dignity was initially limited to human beings, it has been extended to include animals as was the case in *Animal Welfare Board of India v A. Nagaraja*. South African Courts can rely on the provisions of section 39(1)(c) of the Constitution which, though in directory terms, allow Courts to consider foreign law.

#### 4.5.6. Interpretation of the Bill of Rights

The importance of international law is based on the peremptory provisions of section 39(1)(b) of the South African Constitution which obliges Courts and tribunals to consider international law when interpreting the Bill of Rights.<sup>757</sup> Moreover, section 39(2) mandates Courts to develop common law so as to bring it in harmony with the Bill of Rights. This suggests that if any of the constitutional provisions can be used to afford animals any rights, the status of animals as property under common law ought to be developed so as to bring it in harmony with the Bill of Rights.

The constitutions of various nations, like Brazil, Germany, and India, have innovative clauses pertaining to the rights of animals. The directory provisions of section 39(1)(c) of the South African Constitution, which states that a court, tribunal, or forum may take foreign law into account while interpreting the Bill of Rights, necessitates an analysis of foreign law.<sup>758</sup> Foreign law has advanced regarding animal rights, however, it is not a binding source of South African law. Though not a binding source of law, it is still persuasive and Courts have discretion to apply it. Despite having one of the strongest constitutions in the world, there are still some areas where South Africa can take lessons from other legal systems. As stated by Mahatma Gandhi, “[t]he greatness of a nation and its moral progress can be judged by the way its animals are treated”.<sup>759</sup> A number of countries such as Germany, Switzerland, Austria and Slovenia have progressive constitutions that expressly protect animals, however they are beyond the scope of this study and will not be discussed in detail here. As stated in chapter 1, the focus of foreign law is on India. Surprisingly, South African Courts seems to avoid reliance on foreign law in the protection of animals.

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<sup>757</sup> Section 39(1)(b) of the Constitution of South Africa

<sup>758</sup> Section 39(1)(c) of the Constitution of South Africa.

<sup>759</sup> As cited by KC Balcomb ‘Whales in a changing word’ at 407.

#### 4.5.7. The right to life

A question which arises is whether the right to life protected under section 11 of the Constitution has any implications for animals. In terms of section 11, everyone has a right to life.<sup>760</sup> Just like the right to dignity, the right to life is one of the inalienable rights. Rachels posits that “an individual has a right to life if that individual has a life”.<sup>761</sup> This implies that everyone individual having life should be able to enjoy the right to life. Since the right to life is the most essential right, all other rights are only corollaries, it is crucial to use it to protect animals. Stated differently, one cannot enjoy any other right in the absence of life. Therefore, granting any other right before the right to life is granted would be unnecessary if the Constitution were to offer animals any rights at all. The most fundamental human right is the right to life, and animals should also have this right.

The Constitution is an important document, but it is essential to remember that it is written at a very abstract manner. As a result, it cannot specifically address every area of life and society, even though it is legislated to cover various aspects of life. As a result, a purposive interpretation of constitutional provisions as well as enactment of national legislation may be necessary to understand a scope of rights. This is more so because the Constitution does not define the rights contained in the Bill of Rights.

Preserving the interests of those most in need in our society is a fundamental and related principle of the new constitutional order.<sup>762</sup> This is particularly so when considering the right to life of the most vulnerable such as animals’ right to life. Guidance on how the right to life should be interpreted was provided by the Constitutional Court in the case of *S v Makwanyane*.<sup>763</sup> In this case, it was found that “[i]t is only if there is a willingness to protect the worst and the weakest amongst us, that all of us can be secure that our own rights will be protected”.<sup>764</sup> Animals need the protection of the law to survive because they are susceptible to cruel treatment by humans. Furthermore, since they are not in a position to exercise their own rights and

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<sup>760</sup> Section 11 of the Constitution of South Africa.

<sup>761</sup> James Rachels, ‘Do Animals Have a Right to Life?’ < <http://www.animalrights.com> > accessed on 26 July 2021).

<sup>762</sup> *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development and Others*.

<sup>763</sup> 1995 (3) SA 391 (CC).

<sup>764</sup> *S v Makwanyane* at para 88.

to challenge violations of their rights in Court, they need more protection to ensure that their rights are not easily violated.

Another case dealing with transforming the needs of the most vulnerable in society is the case of *Government of Republic of South Africa v Grootboom*.<sup>765</sup> This decision is significant because it introduced the reasonableness approach to the state's commitment to defend rights, which was previously unheard of in South African socioeconomic rights doctrine. Subsection 2 of section 26, which deals with socioeconomic rights, is drafted similarly to section 24, which requires the state to adopt reasonable legislative and other steps to facilitate the progressive realisation of rights. This case, however, focused on section 26 and not section 24, but can be used in the interpretation of section 24 based on how the two sections are similarly drafted.

Applying the reasonableness test, the Court in *Khosa and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development and Others*<sup>766</sup> granted non-citizens the right to social assistance. This was due to the Court's conclusion that depriving vulnerable groups of their rights may result in harmful and discriminatory trends. It is submitted that the same approach may be used to extend the rights aimed at protecting the interests of human beings to include animals as they are also vulnerable in society.

The extension of human rights to animals is based on the view of what Legodi, J termed as "animal rightsists" in the case of *Kruger and Another v Minister of Water and Environmental Affairs and Others*.<sup>767</sup> It was found in this case that those who support animal rights believe that animals have the same rights to life and liberty as human beings. The learned judge continued by saying that this belief extends to include that no one may use animals in any capacity. This delineates the difference between animal welfare and animal rights. Animal welfare advocates believe that animals should be used in a compassionate manner. In this case, the Minister used his legislative authority to change the Regulations pertaining to threatened or protected species in addition to challenging the ban on the domestic trade in rhino horns. In determining the reasonableness of the moratorium, the Court applied a

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<sup>765</sup> 2001 (1) SA 46 (CC).

<sup>766</sup> *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development and Others*.

<sup>767</sup> [2016] 1 All SA 565 GP.

rationality test. It is submitted that rationality can also be used in determining whether denying animals rights solely based on species is reasonable or not.

Though the Court took pains in differentiating between animal rights and animal welfare, it should be noted that this distinction is unimportant when there is a threat to the life of animals. The protection of animal welfare does not have any importance if their right to life cannot be guaranteed. Giving animals legal personality does not mean that human beings cannot “own” them. This is because, a juristic person has certain rights, but that does not preclude it from being “owned”. It is interesting to note that non-living things such as a company are given rights but the same is not extended to living things such as animals.

Animals are sentient entities with the ability to suffer, unlike juristic persons, and as such, humans owe animals a moral duty. Any form of torture is forbidden by the Constitution and a number of international agreements.<sup>768</sup> Moreover, any form of degrading and inhuman treatment is proscribed by the Constitution.<sup>769</sup> The right against inhuman treatment should be extended to also protect animals.

The right to life is the most important right as all other rights cannot be enjoyed without it. None of the cases decided by South African Courts have mentioned this right in the protection of animals, even though it is an important right. Granting animals any other right, without giving them the right to life, is pointless. South African Courts should therefore begin to acknowledge the importance of the right to life in protecting the welfare of animals. This has been done in India even though the provisions of Article 21 dealing with the right to life did not necessarily protect animals in express terms. It is therefore possible to interpret the right to life purposively taking lessons from foreign law to ensure that animals are protected by affording them the right to life. This is important taking into consideration that all other rights are corollary to the right to life.

#### **4.5.8. Limitation of rights**

It is worth noting that most of the rights protected in the Bill of Rights are not absolute, and may be limited to the extent that such limitation is reasonable or justifiable in an

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<sup>768</sup> Section 12(1)(d) of the Constitution of South Africa; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984; International Covenant on Civil and Political rights of 1966; Universal Declaration of Human Rights, 1948.

<sup>769</sup> Section 12(1)(c) of the Constitution of South Africa.

open and democratic society.<sup>770</sup> It is wise to first determine if the right in question can be restricted by the law of general application before claiming that it has been violated. Courts have limited the environmental right in the interest of the right to housing, as stipulated by Section 36, which lists circumstances under which the rights may be limited.<sup>771</sup> However, the limitation clause may not be used to limit the right to life and the right to dignity as these are inalienable rights.<sup>772</sup>

South Africa follows a two-stage inquiry when determining whether the limitation of rights is justifiable in an open and democratic society.<sup>773</sup> Firstly, Courts will look at the nature and scope of the right being limited.<sup>774</sup> Secondly, they will look at the factors listed in section 36(1) to determine whether the limitation is justifiable in an open and democratic society based on human dignity, equality and freedom.<sup>775</sup> A limitation will be justifiable under section 36 of the Constitution if there is “a due relation between the limitation and its purpose”.<sup>776</sup>

Section 36 has not yet been used to evaluate how animal rights can be limited because South African Courts do not recognise that animals have rights. This section can only be useful once the rights of animals have been recognised to evaluate the extent to which such rights can be limited. Until such time as the rights of animals are recognised by the Courts, section 36 will not be applicable to the welfare of animals. This is because this section applies to the limitation of rights, and it cannot limit that that do not exist.

#### 4.5.9. Role of the South African judiciary in protecting animals

A legal system that simply changes its constitutional and political structure without creating an egalitarian society where the rights of all can be protected would suffer a serious legitimacy problem.<sup>777</sup> It is for this reason that such a change in constitutional and political structure should be supported by a transformative constitution as well as

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<sup>770</sup> Section 36 of the Constitution of South Africa.

<sup>771</sup> Section 36(1) of the Constitution of South Africa.

<sup>772</sup> Table of Non-Derogable Rights of the Constitution of South Africa.

<sup>773</sup> Kevin Iles, 'A Fresh Look a Limitations: Unpacking Section 36' (2007) 23 (1) *African Journal on Human Rights* 68.

<sup>774</sup> Iles, 'A Fresh Look a Limitations: Unpacking Section 36' 68

<sup>775</sup> Ibid.

<sup>776</sup> Ignatius M Rautenbach, 'Proportionality and the limitation clauses of the South African Bill of Rights' (2014) 17 (6) *Potchefstroom Electronic Law Journal* 2229.

<sup>777</sup> Eric Kibet and Charles Fombad, 'Transformative constitutionalism and the adjudication of constitutional rights in Africa' (2017) 17 *African Human Rights Law Journal* 340.

the idea of transformative constitutionalism.<sup>778</sup> In describing the transformative vision of the Constitution, Justice Mohamed states that it represents

a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive, and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos expressly articulated in the Constitution.<sup>779</sup>

One of the potential ways of protecting animals is through transformative constitutionalism. Transformative constitutionalism does not have a universally accepted definition.<sup>780</sup> To grasp the meaning of the term, some academics decide to define transformation and constitutionalism independently.<sup>781</sup> However, as it covers the essential ideas of transformative constitutionalism, Klare's definition of transformative constitutionalism appears to be enough. According to the author, transformative constitutionalism is

a long-term project of constitutional enactment, interpretation and enforcement committed to transforming a country's political, legal and social institutions, and power relations in a democratic, participatory and egalitarian direction.<sup>782</sup>

Transformative constitutionalism has received much academic interest from scholars within the South Africa context.<sup>783</sup> Langa noted the difficulty of defining transformative constitutionalism but stated that social and political change are its main objectives.<sup>784</sup> Within the legal framework, transformative constitutionalism requires methods of legal reasoning that goes beyond formalism or positivism for the protection of substantive rights.<sup>785</sup> The application of transformative constitutionalism "places a lot of faith in the law as an instrument for social and political change".<sup>786</sup> As such, the legal profession must be prepared to view the law in this lens and be prepared to conceptualise and organise for the achievement of transformation.<sup>787</sup>

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<sup>778</sup> Kibet and Fombad, 'Transformative constitutionalism and the adjudication of constitutional rights in Africa' 350 – 351.

<sup>779</sup> *S v Makwanyane* at para 262.

<sup>780</sup> Pius Langa, 'Transformative Constitutionalism' (2006) 17 *Stellenbosch Law Review* 351.

<sup>781</sup> Mashele Rapatsa, 'The Right to Equality under South Africa's Transformative Constitutionalism: A Myth or Reality?' (2015) 11 (2) *Acta Universitatis Danubius Juridica* 14.

<sup>782</sup> Karl E Klare, 'Legal culture and transformative constitutionalism' (1998) 4 *South African Journal on Human Rights* 146.

<sup>783</sup> Kibet and Fombad, 'Transformative constitutionalism and the adjudication of constitutional rights in Africa' 352.

<sup>784</sup> Langa, 'Transformative constitutionalism' 351.

<sup>785</sup> Theunis Roux, 'Transformative constitutionalism and the best interpretation of the South African Constitution: Distinction without a difference?' (2009) 2 *Stellenbosch Law Review* 260.

<sup>786</sup> Kibet and Fombad, 'Transformative constitutionalism and the adjudication of constitutional rights in Africa' at 353.

<sup>787</sup> *Ibid* 352.

Transformative constitutionalism when it comes to the environmental right, would guarantee the interpretation and implementation of rights beyond the clear language of the provisions that safeguard them. When Courts apply transformative constitutionalism, they will consider how rational the state's actions were in ensuring the progressive realisation of rights. This is because the idea of transformative constitutionalism is multi-faceted.<sup>788</sup> In addition to the enactment of a constitution, there ought to be purposeful interpretation and enforcement. The highest realisation of rights can only be achieved where there is willingness on the parts of Courts to interpret and enforce rights.<sup>789</sup>

The jurisprudence on substantive equality should be transformative as opposed to being merely inclusionary.<sup>790</sup> This jurisprudence can be achieved by applying the concept consistently. An understanding of systematic inequalities within a social context may result in overcoming legal formalism, in particular the traditional legal concepts and doctrines on transformative outcomes.<sup>791</sup> Albertyn argues that

[t]he interrogation of the actual social, political and legal context in which an alleged rights violation occurs requires an examination of the substantive arrangements that determine a group's social or economic position, including the relationship between disadvantaged or vulnerable groups and more powerful and privileged groups. Care should be taken to avoid the use of a comparator that intentionally or inadvertently reproduces inequalities because it reinforces dominant norms and standards.<sup>792</sup>

Bilchitz states that if South Africa is consistent, the rejection of the moral failings of apartheid may also lead to the rejection of bare denials of animal rights.<sup>793</sup> This is because there is no justification why animals should be excluded from key legal protections. Excluding animals from legal protection based on the characteristics would amount to a form of discrimination based on species.<sup>794</sup> Allowing such unjustified discrimination would be similar to the apartheid system which Constitution is designed to move away from.<sup>795</sup> This would lead to a failure in the realisation of "the Constitution's promise as a transformative document, designed to place future South

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<sup>788</sup> Ibid 365.

<sup>789</sup> Ibid.

<sup>790</sup> Catherine Albertyn, 'Substantive Equality and Transformation in South Africa' (2007) 23 (2) *South African Journal on Human Rights* 253.

<sup>791</sup> Albertyn, 'Substantive Equality and Transformation in South Africa' 254.

<sup>792</sup> Ibid at 259.

<sup>793</sup> Bilchitz, 'Does transformative constitutionalism require the recognition of animal rights?' 274.

<sup>794</sup> Ibid.

<sup>795</sup> Ibid.

African society on a different and better moral foundation”.<sup>796</sup> Transformative constitutionalism can thus be used to interpret the South African Constitution in such a manner that the rights of animals are recognised.

#### 4.4. Constitutional protection of Animals in India

The Indian Constitution<sup>797</sup> is not a static, but is rather a living document that changes with time.<sup>798</sup> As a result, it is now among the few constitutions in the world with explicit environmental protection clauses.<sup>799</sup> Discussions in this section are based on judicial approach to constitutional provisions as well as statutory provisions.

##### 4.4.1. Fundamental obligations of citizens

Every Indian citizen is obligated by Article 51A(g) of the Indian Constitution to treat creatures with care.<sup>800</sup> Citizens are required to respect animals by this provision. It also requires lawmakers to take animal welfare into account when drafting legislation governing human behaviour. In a same vein, Courts must interpret legislation passed for the welfare of animals in a liberal and welfare-focused manner.<sup>801</sup> Because the liberal and welfare-oriented approaches take animal concerns into account, the judiciary has a fundamental commitment to safeguard animals.

In *State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamat and Ors*<sup>802</sup> the Court found that the intention of the legislature when enacting Article 51A was that it should be read with the provisions of Articles 48 and 48A to ensure that the spirit of all provisions is honoured. The Court used extrinsic method for interpretation and relied on the dictionary meaning of compassion as meaning ‘a strong feeling of sympathy for those who are suffering and a desire to help them’. It was further stated that no religion or holy book in any part of the world encourages cruelty. This view contradicts the

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<sup>796</sup> David Bilchitz, ‘Does transformative constitutionalism require the recognition of animals rights?’ in S Woolman and D Bilchitz, (eds) *Is This Seat Taken? Conversations at the Bar, the Bench and the Academy about the South African Constitution* (2012) at 180.

<sup>797</sup> Constitution of India, 1950.

<sup>798</sup> Vardhan, ‘Constitutional protection under constitutional framework of India’.

<sup>799</sup> Kumar, ‘An Indian constitutional obligation for environmental protection: An appraisal’ 347.

<sup>800</sup> Article 51A(g) of the Indian Constitution.

<sup>801</sup> Shankar, ‘Do animals have a right under article 21 of India? – comment on Animal Welfare Board of India case’ 66.

<sup>802</sup> (2005) 8 SCC 534.

worldview on anthropocentrism that has little regard towards animals and affirms the view that righteous people will have regard to animals while cruelty is for the wicked.<sup>803</sup>

In *AIIMS Students' Union v. AIIMS and Ors*,<sup>804</sup> it was stated that fundamental duties provide a valuable guidance in the interpretation and resolution of constitutional and legal issues. It was further stated that even though Article 51A(g) does not expressly place a duty on the state, it can be extended to bind the state because the duty of every citizen of India is also the duty of the State.

#### 4.4.2. Government's obligation to protect animals

The Constitution of India places a huge responsibility of the government to protect animals. In particular, Article 48A of the Indian Constitution mandates the state to take measures aimed at protecting and improving the environment as well as measures that are aimed at safeguarding the forests and wildlife of the country.<sup>805</sup> The Indian Constitution further places an obligation on every citizen to protect and improve the natural environment "including forests, lakes, rivers and wildlife and to have compassion for living creatures".<sup>806</sup>

Both section 48A and 51A(g) were included in the Indian Constitution by the 42nd amendment to the Constitution in 1976. Article 48A mandates the state to take responsibility to ensure the protection of the forests and wildlife of the country. The provision of this section falls under fundamental rights and may be challenged in Court. This is similar to the provision of section 24 of the South African Constitution which requires a positive action on the part of the state. Every person is required under Article 51A(g) to preserve and enhance the natural environment, which includes woods, lakes, rivers, and wildlife, as well as to have compassion for all living things. This section falls under fundamental obligations which cannot be challenged in Court.

In *T.N. Godavarman Thirumalpad v Union of India & Ors*<sup>807</sup> the Court read Article 48A and Article 51A together and stated that they lay down a foundation for the jurisprudence of environmental protection. The Court found that there is a fundamental obligation on both the state and citizens to protect and improve the environment, which

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<sup>803</sup> Proverbs 12:10.

<sup>804</sup> (2002) 1 SCC 428.

<sup>805</sup> Article 48A of the Indian Constitution.

<sup>806</sup> Article 51A(g) of the Indian Constitution.

<sup>807</sup> (2002) 10 SCC 606.

includes, amongst other things, wildlife and having compassion for living creatures. This case correctly reflects the idea that constitutional rights are connected and should not be viewed in isolation.

The interconnectedness of constitutional rights was further stated in *State of W.B. & Ors. v Sujit Kumar Rana*<sup>808</sup> where the Court read Articles 48 and 51A(g) of the Constitution together and found that these provisions should be kept in mind when interpreting legislative provisions. It is therefore important not to look at rights in isolation when interpreting constitutional provisions to ensure a better protection of animals.

#### 4.4.3. The right to life

An important question is whether Article 21 of the Indian Constitution has any relevance to animals. The role that Article 21 plays in the protection of the environment is a subject of contention. The provision expressly refers to the rights of human beings and provides that: “[n]o person shall be deprived of his life or personal liberty except according to procedure established by law.”<sup>809</sup>

The fact that Article 21 does not expressly mention environmental rights has not stopped the Supreme Court and various High Courts in India from giving a wider interpretation to the word “life” in order to include the environment. Courts in India have noted that the right to life includes the right to a living environment which is friendly to human existence.

The Kerala High Court examined the possibility of granting animals fundamental rights in the case of *N.R Nair v Union of India*.<sup>810</sup> In correctly finding that animals deserve to be afforded rights, the Court in this case stated that legal rights are not

the exclusive preserve of humans which has to be extended beyond people thereby dismantling the thick legal wall with humans all on one side and all non-human animals on the other side.<sup>811</sup>

The Supreme Court of India expanded on this viewpoint in *Animal Welfare Board of India v A. Nagaraja*.<sup>812</sup> The Court found that, to the extent that human rights are not violated, animal life is protected by Article 21 of the Indian Constitution, which deals

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<sup>808</sup> (2004) 4 SCC 129.

<sup>809</sup> Article 21 of the Indian Constitution.

<sup>810</sup> *N.R Nair v Union of India*.

<sup>811</sup> *Supra* para 13.

<sup>812</sup> *Animal Welfare Board of India v A. Nagaraja*.

with the right to life. According to the Court, people display an anthropocentric prejudice when they believe that animal existence is not similar to human life. The Court stated that animals have intrinsic worth and value while granting them the right to life. When it comes to safeguarding animals within a constitutional framework, this judicial perspective is correct. The Court faced harsh criticism even though it claimed to have taken a dynamic interpretation rather than a static one. Mathew and Chadha-Sridhar suggest that a duty-based approach is the best method to preserve animals, arguing that the rights-based view is misguided.<sup>813</sup> Furthermore, Shankar believes that a text should not have meaning added to it by the judiciary without a required legal basis.<sup>814</sup> What the author seems to suggest is that even though a purposive interpretation of the Constitution is necessary, this ought to be done against a backdrop of a valid legal justification.

In *Subhas Kumar v. State of Bihar*<sup>815</sup>, the Indian Supreme Court found that the right to the environment is a fundamental right of every citizen and is included in the “right to life” guaranteed under Article 21 of the Indian Constitution. *Locus standi* is given to various affected persons, groups of social workers and journalists to institute public interest litigation in both the High Court and the Supreme Court.<sup>816</sup>

The right to life under the Indian Constitution is afforded to every species with such necessary limitations in terms of the law of the country and out of human necessity. Though Article 21 of the Indian Constitution was originally enacted to protect human beings, a wider definition has been preferred and it includes all forms of life, including animal life. The right to life is regarded as the most important of all rights and all other rights add quality to the right to life.<sup>817</sup> As the Court in *Bandhua Mukti Morcha v. Union of India*<sup>818</sup> found, the right to life is at the heart of fundamental rights. This right means much more than just animal existence.<sup>819</sup> Jain contends that this right has received the widest possible interpretation because

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<sup>813</sup> Mathew and Chadha-Sridhar, ‘Granting animal rights under the Constitution: A misplaced approach? An analysis in light of Animal Welfare Board of India v. A. Nagaraja’ 350.

<sup>814</sup> Shankar, ‘Do animals have a right under article 21 of India? – comment on Animal Welfare Board of India case’ 69.

<sup>815</sup> (AIR 1991 SC 420).

<sup>816</sup> Article 226 and 32 of the Indian Constitution.

<sup>817</sup> Riya Jain, ‘Article 21 of the Constitution of India – Right to life and personal liberty’ (2015) < <https://www.lawctopus.com> > accessed on 7 August 2021).

<sup>818</sup> (1997) 10 SCC 549.

<sup>819</sup> *Kharak Singh v. State of Uttar Pradesh* 1963 AIR SC 1295.

'[l]ife' in Article 21 of the Constitution is not merely the physical act of breathing. It does not connote mere animal existence or continued drudgery through life. It has a much wider meaning which includes right to live with human dignity, right to livelihood, right to health, right to pollution free air.<sup>820</sup>

The above statement makes it clear that the right to life is important and all other rights that may be enjoyed by either human beings or animals are just corollaries to the right to life. It is therefore important that this right be protected by the best way possible. One of the ways that can be used to protect the right to life is through the provisions of the Constitution.

In *Maneka Gandhi v. Union of India*<sup>821</sup>, the Court interpreted the right to life as being more than just a physical right but to also include the right to live with dignity. A similar view was expressed by the Court in *Francis Coralie v. Union Territory of Delhi*<sup>822</sup> where the Court found that the right to live includes the right to dignity. The expansion of the scope of the right to life to include the right to dignity was further stated in *Chandra Raja Kumar v. Police Commissioner Hyderabad*<sup>823</sup> where the Court found that the right to life includes the right to live with dignity and decency.

From the above, it is clear that life means so much more than just survival and includes the right to live life with some intrinsic worth, honour and dignity.<sup>824</sup> As stated in *Animal Welfare Board of India v A. Nagaraja*, this means that the

[r]ight to dignity and fair treatment is, therefore, not confined to human beings alone, but to animals as well. Right, not to be beaten, kicked, over-ridder, over-loading is also a right recognized by Section 11 read with Section 3 of the PCA Act. Animals have also a right against the human beings not to be tortured and against infliction of unnecessary pain or suffering. Penalty for violation of those rights are insignificant, since laws are made by humans. Punishment prescribed in Section 11(1) is not commensurate with the gravity of the offence, hence being violated with impunity defeating the very object and purpose of the Act, hence the necessity of taking disciplinary action against those officers who fail to discharge their duties to safeguard the statutory rights of animals under the PCA Act.<sup>825</sup>

It is worth mentioning that, unlike in South Africa where the right to life is non-derogable, the right to life and personal liberty as guaranteed in Article 21 of the Indian Constitution is not absolute and may be limited. This is clear from the wording of Article 21 which allows limitation of this right if it is in accordance with a procedure established

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<sup>820</sup> Jain, 'Article 21 of the Constitution of India – Right to life and personal liberty'.

<sup>821</sup> 1978 AIR 597.

<sup>822</sup> 1981 AIR 746.

<sup>823</sup> 1998 (1) ALT 329.

<sup>824</sup> *Animal Welfare Board of India v A. Nagaraja* para 62.

<sup>825</sup> *Supra*.

by law.<sup>826</sup> Since the limitation is within the section itself, the right to life and personal liberty is subject to internal limitations. However, this has not stopped Courts in India from extending the application of this Article to include animals as well. However, depriving an animal of its life out of human necessity is justified under Article 21.<sup>827</sup>

#### 4.4.4. The right to equality and prohibition of discrimination

Another constitutional provision that may be relevant to the protection of animals under the Indian Constitution is the equality clause. In terms of section 14, “[t]he State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India”.<sup>828</sup> The Article provides for two distinct protections namely; equality before the law and equal protection of the law. In terms of the former, the state is under a negative obligation to abstain from engaging in any discriminatory act. The latter is a positive obligation on the state to ensure that everyone within India has equal protection of the law.<sup>829</sup> In *Ramesh Prasad v. State of Bihar*<sup>830</sup> the Court found that equal protection of laws as enshrined in Article 14 of the Indian Constitution is aimed at advancing justice and avoiding discrimination. The Court, however, went on to state that the fact that equality is protected does not mean that similar rules will apply in spite of differences.<sup>831</sup> This pronouncement is problematic as it may be used to deny animals rights based on the differences between human beings and animals.

In *Sri Srinivas Theatre v Government of Tamil Nadu and Ors*<sup>832</sup>, the Court found that even though the two expressions in Article 14 may appear to be similar, there are notable differences. The differences, as stated by the Supreme Court are in the meanings of the two expressions. Similarly, the Court in *State of West Bengal v Anwar Ali Sarkar*<sup>833</sup> stated that equal protection of law as provided for in Article 14 of the Indian Constitution is a natural consequence of equality before the law. This means that equal protection of law flows from equality before the law. The right to equality is closely connected to the prohibition against discrimination. Article 15 of the Indian Constitution prohibits discrimination of various grounds such as religion, race, sex,

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<sup>826</sup> Article 21 of the Indian Constitution.

<sup>827</sup> *Animal Welfare Board of India v A. Nagaraja* at para 62.

<sup>828</sup> Section 14 of the Constitution of India.

<sup>829</sup> Adarsh S Thakur, ‘Right to equality under Article 14’ < <https://www.hindustantimes.com> > accessed on 28 December 2021).

<sup>830</sup> AIR 1978 SC 327.

<sup>831</sup> *Ramesh Prasad v. State of Bihar*.

<sup>832</sup> 1992 AIR 999.

<sup>833</sup> 1952 AIR 75.

place of birth or caste.<sup>834</sup> The state is thus prohibited from discriminating on anyone based on the grounds as listed in Article 15. Though these provisions are clear, the state is not prohibited from making special provisions for women and children.<sup>835</sup> To discriminate against animals based on their species is a form of discrimination which has been classified as speciesism.<sup>836</sup>

#### 4.4.5. The right to dignity

The right to dignity is protected under Article 21 of the Indian Constitution which deals with the right to life.<sup>837</sup> This right was initially limited to human beings as was stated in *Maneka Gandhi v. Union of India*,<sup>838</sup> where the Supreme Court stated that the right to live is not merely a physical right but includes the right to live with sheer 'human dignity'. The Court took an extensive rights-based approach and expressed a view that any law that is 'fanciful, oppressive or arbitrary' is no law.<sup>839</sup> Without a proper justification to deny animals rights, anthropocentric laws may be deemed arbitrary and should thus not be regarded as law.

In *Prem Shankar Shukla v Delhi Administration*<sup>840</sup> it was found that the guarantee of human dignity is part of a constitutional culture connected to various rights as the right to equality in Article 14, the right to freedom of speech and expression in Article 19 and the right to life in Article 21 of the Indian Constitution. Similarly, the Court in *Shabnam v Union of India and Ors*<sup>841</sup> found that the right to dignity is connected to the right to life. These cases reflect the ideology that constitutional rights are connected and mutually supporting. However, they deemed the right to be limited only to human beings without any consideration of how the right to dignity can be extended to animals.

The Supreme Court, in *Naz Foundation v Government of NCT of Delhi*<sup>842</sup> found that recognising each person's worth as a member of our community is essential to the

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<sup>834</sup> Article 15 of the Indian Constitution.

<sup>835</sup> JK Mittal, 'Right to equality and the Indian Supreme Court' (1965) 14 (3) *The American Journal of Comparative Law* 422.

<sup>836</sup> Wilson, 'Animals and ethics'.

<sup>837</sup> Article 21 of the Indian Constitution.

<sup>838</sup> *Maneka Gandhi v. Union of India*.

<sup>839</sup> Srikrishna D Rao, 'Human Dignity and Human Rights: In search of Theory' (2017) 16 *Journal of the National Human Rights Commission* 192.

<sup>840</sup> AIR 1980 SC 535.

<sup>841</sup> (2015) 6 SCC 702.

<sup>842</sup> (2009) 160 Delhi Law Times 277.

constitutional protection of dignity. Since animals are members of society, they should thus be afforded protection through the right to dignity. This affirms the view by Bilchitz who states that the dignity of animals should be protected within constitutional provisions.<sup>843</sup>

The right to dignity was extended to include animals in the case of *Animal Welfare Board of India v A. Nagaraja* where the Court stated that animal also possess honour and dignity which should not be arbitrarily deprived.<sup>844</sup> Furthermore, the rights and privacy of animals must be respected and protected from unlawful attacks.<sup>845</sup>

#### 4.4.6. Legal standing to enforce rights

Article 32 guarantees the right to approach the Supreme Court in order to enforce any rights in Part III of the Indian Constitution.<sup>846</sup> The Supreme Court is empowered to enforce rights protected under Part III if the Constitution when so approached by appropriate proceedings. In *Bandhua Mukti Morcha vs Union of India and Others*<sup>847</sup> the Court found that the provisions of Article 32 do not specify who should approach Courts. As such, anyone whom the law recognises as having standing may approach the Court to enforce fundamental rights. This may even be by way of public interest litigation which the Court noted was a new system within the judicial system in India.

Article 32 does not give powers to litigants to challenge the constitutional validity of certain legislative enactments. It is limited to the enforcement of fundamental rights guaranteed by the Indian Constitution. A successful litigant will have to prove not only that the law complained of is beyond the competence of the legislative authority, but also that it affects or invades his or her fundamental rights guaranteed by the Constitution.<sup>848</sup>

#### 4.4.7. The judicial approach to statutory provisions that protect animals

The Judiciary in India has played a fundamental role in protecting and interpreting environmental related legislation. This has made a significant contribution to the development of environmental law jurisprudence as Courts sought guidance from

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<sup>843</sup> Bilchitz, 'Moving beyond arbitrariness: The legal personhood and dignity of non-human animals'.

<sup>844</sup> *Animal Welfare Board of India v A. Nagaraja* para 51.

<sup>845</sup> *Supra*.

<sup>846</sup> Article 32 of the Indian Constitution.

<sup>847</sup> 1984 AIR 802, 1984 SCR (2) 67.

<sup>848</sup> *Chiranjit Lal Chowdhuri vs The Union of India and Others* 1951 AIR 41, 1950 SCR 869.

international law to enforce environmental rights.<sup>849</sup> This has been seen over the years when the judiciary acknowledged the need to protect and conserve forests and animals.

In India, Courts in cases such as *N.R Nair v Union of India*<sup>850</sup> and *Animal Welfare Board of India v A. Nagaraja*<sup>851</sup> have played a fundamental role in recognising the rights of animals and elevating them to the ambit of constitutional protection. In doing so, Courts followed a liberal and welfare-oriented interpretation of human rights to extend their protection to animals.<sup>852</sup> This reflects the willingness on the part of Indian Courts to find innovative ways to protect the rights of animals.<sup>853</sup> Such liberal interpretation is not only based on various pieces of legislation protecting the environment, but through an interpretation of various constitutional rights ordinarily aimed at protecting human beings but extending them to cover the interests of animals, which ensures that animals are protected within a constitutional framework.<sup>854</sup>

After the adoption of the Indian Constitution, the powers to interpret and characterise it were left to the Supreme Court of India, which is the apex Court of the country.<sup>855</sup> The decisions of the Supreme Court of India have, over the years, reflected different views on the concepts of liberalism and a liberal constitution when interpreting and applying the Constitution to difficult cases.<sup>856</sup>

In *Indian Young Lawyers Association v State of Kerala*,<sup>857</sup> the Court stated that

Constitutional democracies do not necessarily result in constitutional liberalism. While our Constitution has adopted a democratic form of governance, it has at the same time adopted values based on constitutional liberalism. Central to those values is the position of the individual. The fundamental freedoms which Part III confers are central to the constitutional purpose of overseeing a transformation of a society based on dignity, liberty and equality.<sup>858</sup>

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<sup>849</sup> *M/S Ivory Traders and Manufacturers Association and Others vs. Union of India, WWF-I and Others* AIR 1997 Del 267; *Ashok Kumar vs. State of Jammu and Kashmir and Others* 2003 (4) SLJ 475.

<sup>850</sup> *N.R Nair v Union of India*.

<sup>851</sup> *Animal Welfare Board of India v A. Nagaraja*.

<sup>852</sup> Mathew and Chadha-Sridhar, 'Granting animal rights under the Constitution: A misplaced approach? An analysis in light of *Animal Welfare Board of India v. A. Nagaraja*' 349.

<sup>853</sup> Shankar, 'Do animals have a right under article 21 of India? – comment on *Animal Welfare Board of India case*' 65.

<sup>854</sup> *N.R Nair v Union of India; Animal Welfare Board of India v A. Nagaraja*.

<sup>855</sup> Sudhir Krishnaswamy, 'Is the Indian Constitution liberal?' < <https://clpr.org.in> > accessed on 27 July 2022).

<sup>856</sup> Krishnaswamy, 'Is the Indian Constitution liberal?' 54.

<sup>857</sup> (2019) 11 SCC 1.

<sup>858</sup> *Indian Young Lawyers Association v State of Kerala* at 188.

The above shows that the Indian Constitution is a liberal Constitution, which aims to transform society in line with fundamental values such as dignity liberty, and equality. These are the same values that the South African Constitution strives to achieve. In a number of judgments, the Supreme Court of India has sought to use liberalism as a way on interpreting and applying constitutional principles to hard cases.<sup>859</sup> This has been the case when the Court has interpreted rights such as the right to life to protect the interests of animals.

Moreover, the judiciary has shown willingness to entertain environmental related litigation by public interest groups under Articles 32 which provides for remedies to enforce constitutional rights<sup>860</sup> and 226 which empowers the High Courts to issue certain writs<sup>861</sup> of the Indian Constitution. Based on these cases, the judiciary has ruled on many environmental related cases which saw the Supreme Court and High Courts delivering many important judgments. These judgments have supported the need to protect animals and their habitats. Some of these judgments will now be discussed.

The first case to deal with environmental related dispute is the case of *R.L. & E. Kendra, Dehradun v. State of U.P.*<sup>862</sup> This case dealt with a conflict between development and conservation. Though it applied a cautious approach of not interfering with government decisions, it observed the need to balancing competing interests. The Court stated that:

[w]e are not oblivious of the fact that natural resources have got to be tapped for the purposes of the social development but one cannot forget at the same time that tapping of resources have to be done with requisite attention and care so that ecology and environment may not be affected in any serious way, there may not be depletion of water resources and long term planning must be undertaken to keep up the national wealth. It has always to be remembered that these are permanent assets of mankind and are not intended to be exhausted in one generation.<sup>863</sup>

There have been some cases where the application of environmental legislation has led to the acquittal of accused persons. For instance, in the case of *Nabin Chandra vs. State*<sup>864</sup>, the conviction by the Magistrate which was confirmed by the High Court had to be overturned by the Supreme Court. This was because the Magistrate convicted the accused for shooting and killing a rhinoceros based on the provisions of

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<sup>859</sup> Krishnaswamy, 'Is the Indian Constitution liberal?' 54.

<sup>860</sup> Article 32 of the Constitution of India.

<sup>861</sup> Article 226 of the Constitution of India.

<sup>862</sup> A.I.R. 1985 S.C. 652.

<sup>863</sup> *R.L. & E. Kendra, Dehradun v. State of U.P* at 364.

<sup>864</sup> AIR 1961 ASS 18.

section 429 of the Indian Penal Code 1860. However, since the express provision of section 429 applied to killing of domestic animals, the conviction had to be overturned since a rhinoceros a wild animal, and not a domestic, animal.

In *Trilok Bahadur vs. State of Arunachal Pradesh*<sup>865</sup> case, the Court had to determine whether the private defence available to killing of human beings can be used in the killing of an animal. The Court found that the killing of a tiger which was attacking the accused could be covered under a private defence, in particular defense of self.

The Court in *Babu Lal and Another vs. State (Delhi Administration)*<sup>866</sup>, had imposed a sentence of imprisonment and a fine under the Wildlife Protection Act. On appeal, the conviction of some of the accused were set aside and the sentence of another accused reduced. This was, however, changed on further appeal when the Court set aside the order acquitting some of the accused and remitted the Court back to the trial Court for retrial.

In *Rafique Ramzan Ali vs. A A Jalgaonkar*,<sup>867</sup> the accused challenged his conviction for selling snake and lizard skins in contravention of sections 39(3), 40(2), 42(1), 44(2), 49 read with section 51 of the Wildlife Protection Act. On appeal, the High Court found that the complaint against the accused did not state whether the skins were made of snake and lizard species under a schedule. As a result, the conviction was set aside on the basis that the offence was not a contravention of the Act. This case reflects a strict application of the provisions of the Act which has left accused persons to walk free.

The issue of standing in environmental issues was decided by the Court in *Consumer Education Research Center and Center for Environmental Law, WWF India vs. Union of India*.<sup>868</sup> In this case, the Court found that the petitioners had *Locus standi* as, even though they had no direct interest, they were acting in the interest of the public. In *State of Bihar vs. Murad Ali Khan*<sup>869</sup> it was found that proceedings could be instituted even where there is potentially another case if the offences as not substantially the same. The Court found that the Magistrate had jurisdiction to hear the matter since the

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<sup>865</sup> 1979 CR. L. J. 1409.

<sup>866</sup> 1982 CR. L. J. 41.

<sup>867</sup> 1984 Cr. C. J. 1460.

<sup>868</sup> AIR 1995 Guj. 133.

<sup>869</sup> AIR 1989 SC 1.

offense under section 9(1) read with sections 2(16) and 51 of the Wildlife Protection Act was not the same or substantially the same as section 429 of the Indian Penal Code. Since the police report was based on section 429 the Magistrate was not barred from taking cognisance of the case.

In *Forest Range Officer vs Aboobacker and Another*,<sup>870</sup> the Magistrate convicted three accused persons for killing a bison. The conviction was based on the confessions by the accused. On appeal, the conviction was initially set aside, but was confirmed on further appeal.

Whether the Indian Constitution recognises trade as a fundamental right when it comes to animals was considered by the Court in *M/S Ivory Traders and Manufacturers Association and Others vs. Union of India, WWF-I and Others*.<sup>871</sup> This case dealt with a constitutional challenge to sections 39(1) (c) and 49(c) (7) read with section 5(12) of the Wildlife (Protection) Act. These sections do not provide for compensation for ivory owners when their title on the imported ivory was extinguished. It was held that the right to trade is not recognised as a fundamental right under the Indian Constitution. Furthermore, the Court found that legislation protecting elephants in India was in par with international law. However, in *Animal Welfare Board of India v A. Nagaraja* the Supreme Court of India stated that

[w]e may, at the outset, indicate unfortunately, there is no international agreement that ensures the welfare and protection of animals. United Nations, all these years, safeguarded only the rights of human beings, not the rights of other species like animals, ignoring the fact that many of them, including Bulls, are sacrificing their lives to alleviate human suffering, combating diseases and as food for human consumption. International community should hang their head in shame, for not recognizing their rights all these ages, a species which served the humanity from the time of Adam and Eve. Of course, there has been a slow but observable shift from the anthropocentric approach to a more nature's right centric approach in International Environmental Law and Animal Welfare Laws.<sup>872</sup>

This pronouncement by the Court suggests that any country which does not recognise the rights of animals should hang its head in shame. The Court further indicated that there are three stages in the development of international law when it relates to the environment in general and animals in particular. In the first stage, international law was focused on human self-interest reason to protect the environment. During this stage, international instruments were anthropocentric in that they protected nature for

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<sup>870</sup> 1990 FLT 22.

<sup>871</sup> *M/S Ivory Traders and Manufacturers Association and Others vs. Union of India, WWF-I and Others*.

<sup>872</sup> *Animal Welfare Board of India v A. Nagaraja* at para 47.

the benefit of human beings.<sup>873</sup> These international instruments included the Declaration of the Protection of Birds Useful to Agriculture,<sup>874</sup> the Convention Designed to Ensure the Protection of Various Species of Wild Animals which are Useful to Man or Inoffensive,<sup>875</sup> and Convention for the Regulation of Whaling.<sup>876</sup>

A shift from pure anthropocentrism was seen during the second stage which was based on international equity. During this stage, the protection of the environment was not purely based on the needs of future generations of human beings.<sup>877</sup> The Whaling Convention,<sup>878</sup> provided that “it is in the interest of the nations of the world to safeguard for future generations the great natural resource represented by the whale stocks”.<sup>879</sup> This is further supported by soft law in the form of the Stockholm Declaration which places an obligation on human beings to protect and improve the environment for present and future generations.

During the third stage, the international community began to recognise the intrinsic value of biological biodiversity. In its Preamble, the Biodiversity Convention,<sup>880</sup> recognised “the intrinsic value of biological diversity and of the ecological, genetic, social, economic, educational, cultural, recreational and aesthetic values of biological diversity and its components”.<sup>881</sup> The Preamble to the World Charter for Nature,<sup>882</sup> further recognised that every form of life is unique, therefore warranting respect regardless of its worth to human beings.<sup>883</sup> This reflects the ecocentric viewpoint that animals ought to be protected in their own right and not based on the interests of human beings. The ecocentric viewpoint has been accepted and applied in a number of cases such as *T. N. Godavarman Thirumulpad v. Union of India and Others*,<sup>884</sup> *T. N. Godavarman Thirumulpad v. Union of India and Others*,<sup>885</sup> as well as *Centre for*

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<sup>873</sup> *Supra*.

<sup>874</sup> Declaration of the Protection of Birds Useful to Agriculture, 1875.

<sup>875</sup> Convention Designed to Ensure the Protection of Various Species of Wild Animals which are Useful to Man or Inoffensive, 1900.

<sup>876</sup> Convention for the Regulation of Whaling, 1931.

<sup>877</sup> *Animal Welfare Board of India v A. Nagaraja* para 47.

<sup>878</sup> Whaling Convention, 1946.

<sup>879</sup> Preamble to the Whaling Convention, 1946.

<sup>880</sup> Biodiversity Convention, 1992.

<sup>881</sup> Preamble to the Biodiversity Convention, 1992.

<sup>882</sup> World Charter for Nature, 1982.

<sup>883</sup> Preamble to the World Charter for Nature, 1982.

<sup>884</sup> (2012) 3 SCC 277.

<sup>885</sup> (2012) 4 SCC 362.

*Environmental Law World Wide Fund - India v. Union of India and Others*.<sup>886</sup> Using the ecocentric principles provides adequate protection to animals as based on these principles “rights of animals have been recognized in various countries”.<sup>887</sup>

#### **4.5. The potential in South African Constitution and Indian Constitution to protect animal rights**

While South Africa has been elevated environmental protection of by including environmental rights,<sup>888</sup> within its supreme Constitution, there is no expressly protection of animal rights. While not expressly mentioning animals, the relevance of the right to environment to the welfare of animals was considered by the South African court in *National Council of the Society for Prevention of Cruelty to Animals v Minister of Environmental Affairs and Others*,<sup>889</sup> through purposive interpretation. This is a step in the right direction in realising the need to purposively interpret constitutional provisions to protect the welfare of animals.

Articles 48, 48A and 51A(g) of the Indian Constitution protect the environment and obliges both the state and citizens to be kind and ensure the protection of living creatures.<sup>890</sup> The section expressly mentions animals, and thus animals are expressly protected in terms of constitutional provisions in India, something still missing in South Africa. In addition to placing the obligation to protect animals on the government and citizens, the legislature and the judiciary are obliged to ensure the welfare of animals.<sup>891</sup> This is something that South Africa can learn from India and ensures that various stakeholders play a fundamental role in protecting animals.

Section 10 and 11 of the South African Constitution protect the right to dignity and life respectively. The case of *S v Makwanyane*<sup>892</sup> is authoritative in interpreting both the right to dignity and life in South Africa and presents the view that the willingness to protect the weak and vulnerable can translate to the willingness to protect everyone else’s rights. However, the right to life and dignity have not been used in protecting

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<sup>886</sup> (2013) 8 SCC 234.

<sup>887</sup> *Animal Welfare Board of India v A. Nagaraja* at para 49.

<sup>888</sup> Van der Linde and Feris *Compendium of South African Environmental Legislation 2<sup>nd</sup> Ed.*

<sup>889</sup> *National Council of the Society for Prevention of Cruelty to Animals v Minister of Environmental Affairs and Others*.

<sup>890</sup> Article 51A(g) of the Indian Constitution.

<sup>891</sup> Shankar, ‘Do animals have a right under article 21 of India? – comment on Animal Welfare Board of India case’ 66.

<sup>892</sup> *S v Makwanyane*.

animals in South Africa. This has been done in India even though the provisions of Article 21 dealing with the right to life and dignity did not provide and express protection of animals. South Africa can take lessons from India, in that the lack of express mention of animals should not be a bar to protecting animals using the right to life. The interpretation of the right to life in *N.R Nair v Union of India*<sup>893</sup> and *Animal Welfare Board of India v A. Nagaraja*<sup>894</sup> can provide guidance for South Africa Courts, something allowed by the provisions of section 39(1)(c) of the South African Constitution. The advantage of relying on the rights to dignity and life in South Africa is that these rights are absolute and listed as non-derogable rights. In India, the rights are not absolute and may be limited in accordance with a procedure established by law.<sup>895</sup> India can then take lessons from South Africa where the rights to dignity and life are fully protected.

The right to equality and prohibition of unfair discrimination in section 9 of the South African Constitution may potentially offer protection to animals. Since discrimination on various grounds is prohibited, this can be extended to discrimination based on species. South African courts have not yet applied section 9 to protect animals, but this section may potentially protect animals if the courts are willing to purposively interpret it. Equality before the law in India is protected under Article 14 while prohibition of discrimination is protected under Article 15. The problem of relying on the right to equality is that the view of the court in *Ramesh Prasad v. State of Bihar*<sup>896</sup> gave a problematic pronouncement as it found that differences can be used to justify discrimination. While both South African and Indian Courts have not applied the right to equality and prohibition of discrimination in protecting animals, Indian courts must follow the approach in South African where differences are not the basis for discrimination.

The right to approach courts and enforcement of rights in sections 34 and 38 of the South African Constitution respectively give rights to various persons to approach courts for the enforcement of constitutional rights.<sup>897</sup> While these rights may potentially protect animals, it will not be so until such a time that South African law recognises

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<sup>893</sup> *N.R Nair v Union of India*.

<sup>894</sup> *Animal Welfare Board of India v A. Nagaraja*.

<sup>895</sup> Article 21 of the Indian Constitution.

<sup>896</sup> *Ramesh Prasad v. State of Bihar*.

<sup>897</sup> Section 34 and 38 of the Constitution of South Africa.

that animals have rights. The view in *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development and Another*<sup>898</sup> that the National Society for Prevention of Cruelty to Animals has legal standing to institute private prosecution on the protection of animals is a positive step in recognising the need to approach Courts to protect animals, even though the view was based on section 6(2)(e) as opposed to constitutional provisions. This legal standing can therefore be extended to various persons having standing to approach Courts to protect animals as is the case in India under Article 32 of the Indian Constitution.<sup>899</sup> Even though Article 32 does not specify who has standing to enforce rights, it is submitted that anyone recognised by law as having standing is competent to approach Courts to enforce fundamental rights.

#### 4.6 Conclusion

The protection of animals has evolved from a time when it was solely reliant on statutory provisions to an era where it finds application within constitutional frameworks. This shift has elevated animals to a higher status within society as they are now protected by the highest laws of the land. Constitutions, often regarded as the supreme laws, signify a significant advancement in the protection of animals. Regrettably, this elevation often goes unnoticed by the public and the judiciary. Recognising animal rights within a constitution represents an official acknowledgment by the highest law that the treatment of animals should have certain limitations, aligning with a nation's core values.

South Africa, for instance, has prioritised environmental protection within its Bill of Rights under section 24 of the Constitution, though without explicit mention of animals. This constitutional framework for the protection of animals can be contrasted with India, which explicitly mentions animals in its Constitution. Article 51A(g) of the Indian Constitution places a fundamental obligation on citizens to be kind to animals, and the judiciary is constitutionally mandated to interpret laws liberally and in favour of animal welfare. The question of whether the right to life can extend protection to animals remains unexplored in South African Courts, in contrast to India, where Courts have interpreted Article 21 to include the rights of animal. South Africa's transition from a

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<sup>898</sup> *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development and Another* para 65.

<sup>899</sup> Article 32 of the Indian Constitution.

history of discrimination to a constitutional order founded on the rejection of arbitrariness underscores the need to protect the rights of all, regardless of species, with the principle of equality demanding equal protection and concern for animals.

## Chapter five

### Conclusion and recommendations

#### 5.1. Introduction

This concluding chapter summarises the findings of this study and makes recommendations. The first section summarises the findings of the study in light of research questions, aims and objectives and the last section makes recommendations on how South Africa can develop a future legal approach that offers better protection for the rights of animals.

#### 5.2. Conclusion

This research set out to determine whether or not South African law provides adequate protection for animals, and to explore whether there are lessons to be learned from the constitutional protection of animals in India. Chapter one sketched a brief introduction, outlined the problem statement, aims and objectives as well as the research questions.

Chapter two answers the question on the philosophical and religious bases for protecting animals. In doing so, it discussed various theories for and against protecting animals. The study found two main philosophical arguments used to determine the status of animals in society. Anthropocentric arguments which are human centred focus on the differences between animals and human beings to determine whether animals deserve any moral rights. The differences are then used as justification for the cruel treatment of animals. In cases where animals should be protected, such protection should be based on the interests of human beings. Ecocentric arguments focus on the similarities between animals and human beings and argue for the protection of animals since they have similar traits to human beings. One lesser explored philosophical argument is based on practical philosophy, which does not consider the differences or similarities between animals and humans to determine their protection status. Its adaptive nature makes it relevant to protect animals in a society that changes over time.

Chapter three sought to examine the strengths and shortcomings of the protection regime in both South Africa and India. This was to determine whether or not there is a need for legal reform on animal law. A range of legislative enactments in both countries

were examined. A number of judicial decisions on these statutes were discussed. It was found that Courts in South Africa prefer anthropocentric arguments in protecting animals. However, there has been a recent shift to acknowledge that animals may be protected based on their inherent worth. In India, ecocentric arguments are preferred in the protection of animals. Furthermore, it was found that the legal framework for the protection of animals is fragmented and requires significant reform.

Chapter four looked at how South Africa can develop a future legal approach that offers better protection for the rights of animals taking lessons from the protection of animals in India. Various constitutional provisions that have been, or may potentially be, used to protect animals were discussed. It was found that South Africa Courts have applied environmental rights to protect the rights of animals. They have not, however, explored rights such as the right to life and dignity in their protection of animals. In India, Courts are readily prepared to interpret the right to life in their protection of animals, even without an express mention of the right applying to animals in the Constitution. Courts in South Africa have not explored transformative constitutionalism in animal rights cases as is the case with socio-economic rights, while Courts in India have preferred liberal interpretations of the constitutional rights and extended various rights to animals.

### **5.3. Recommendations**

The protection of animals from a philosophical point of view should be based on eco-anthropocentric arguments, which requires a balancing approach of ecocentric and anthropocentric arguments. Since eco-anthropocentric arguments do not look at the similarities or differences between human beings and animals, they can offer a better protection for animals. The adaptive nature of this theory means that it can change to meet the needs of society as and when required. For this this philosophical approach to be effective, there has to be a shift in society's viewpoint to regard animals as worthy of protection. Moreover, there is a need to balance the protection of animals in a way that does not hinder the survival of human beings.

Amending the current legislative enactments on animal welfare to include the need to protect animals in their own rights is needed. Incorporating the animal welfare amendments seen in India is a practical solution to South Africa's animal welfare problems. Although there are shortcomings in the protection of animals in India, South

Africa can enhance its current animal welfare laws and adopt improved principles from India. South Africa can also pass the National Principles, Norms and Standards for the Sustainable Use of Large Predators in South Africa, the National Norms and Standards for the Management of Elephants in South Africa as well as the Draft Norms and Standards for the Management of Damage-causing Animals into law to ensure a better protection for animals. Alternatively, enacting specific animal welfare legislation that take into account the need to protect animals in the interest of the environment and not human beings. It may not be enough to simply enact legislation on animal welfare, and as such, there is a need to ensure property implementation and enforcement of such legislation. Furthermore, the legislative protection of animals will not be strong without a strong backing from constitutional provisions.

There is a need to have a section dealing with animals in the Constitution in addition to the protection of the environment in section 24. As such, section 24 of the Constitution should be amended to include specific provisions on animals. Such amendment must also place an obligation on human beings to show compassion to animals. South Africa can learn from the jurisprudence in India where Article 48A places an obligation on citizens to have compassion towards animals. This should also include an obligation on the legislature to take the interests of animals into account when enacting legislation. A further obligation should be on the judiciary to prefer an interpretation that favours the rights of animals as is the case in India. Any limitation imposed on the rights of animals should be justified in an open and democratic society. The problem with enacting a constitutional provision dealing specifically with animals is that it requires an amendment of the Constitution. This may not be achieved unless if there is a two-thirds majority. As a result, a constitutional amendment without a shift in the minds of politicians is not feasible.

Courts in South Africa must show willingness to interpret rights such as the right to life, dignity and equality in the protection of animals. Transformative constitutionalism can play a fundamental role as constitutional provisions can be interpreted purposively, taking into account international and foreign laws. South Africa Courts can take lessons from India where Courts are ready to interpret constitutional provisions to include animals even without an express mention of animals in those provisions. This requires a move away from the anthropocentric views usually followed by South African Courts that the protection of animals is based on the interests of human beings,

to a more ecocentric viewpoint that animals deserve protection for their own inherent worth. Litigants could use cases from foreign jurisdictions such as India to persuade courts to prefer an animal protection regime premised on ecocentricism. The non-binding nature of foreign law might be problematic as Courts are not mandated to consider them.

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**WORD COUNT: 53 146**