

Protection of Animal Interests

Within the Framework of Human Rights

by

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Protection of Animal Interests Within the Framework of Human Rights

Koç University

Graduate School of Social Sciences and Humanities

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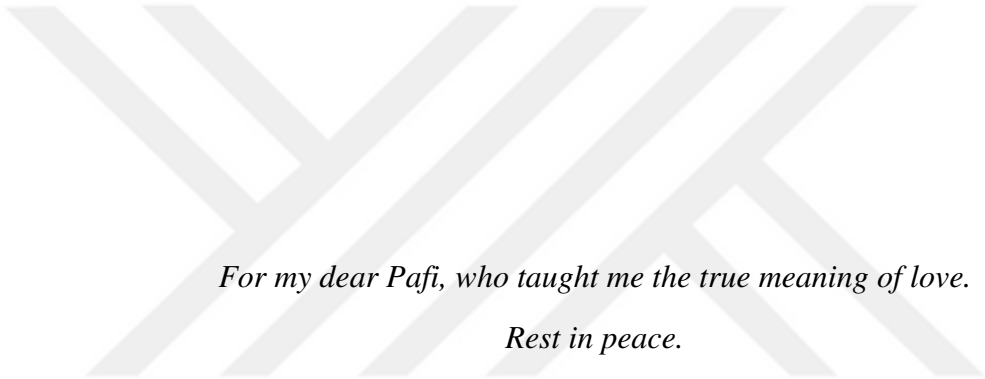
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For my dear Pafi, who taught me the true meaning of love.

Rest in peace.

ABSTRACT

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Humans have a complex relationship with other animals and animal species daily. Numerous legal systems contain norms that regulate humans' interaction with or treatment of other animals. In cases where there is an interference with a human right in consideration of an animal interest, or where the interference with a human right indirectly affects an animal interest, the position of animal interests vis-à-vis human rights should be determined. To answer how and to what extent animal interests can be regarded in legal disputes relating to human rights, it is important to revisit the notion of rights. Since human rights stem from common human interests, and those interests mostly intersect common animal interests as a result of sentience in animals, theoretical bases of justification for human rights and potential animal rights are comparable to one another. Despite this intersectionality, there is currently no legal system in which animals other than humans can hold rights. On the other hand, it is possible to encounter legal norms at both domestic and international levels that protect specific animal interests. The degree of protection varies considerably. A few constitutions are addressing certain animal interests, which do not only bind the legislature but also provide the judiciary with an interpretative ground. Several legal systems pay regard to animal interests through animal welfare regulations and anti-cruelty laws. Some legal systems also distinguish the legal status of animals other than humans from things. Conservation of animal species is often dealt with by international treaties due to the transnational character of the issue. These various national and international legal norms may contradict human rights in the course of their implementation. Protection of animal interests appears as a matter of public interest, and it may correspond to a legitimate aim for interfering with a human right. The proportionality of such an interference is contingent upon the protection standard provided in the relevant legal system. If the animal interest is sufficiently compelling, it may be more worthy of protection than a conflicting human right. In addition, human rights enjoyed by animal rights defenders may indirectly serve animal interests. As more people become aware of sentience in animals and acknowledge that animals hold interests that matter to them, animal rights become more achievable. Considering that human rights arose out of similar concerns, the framework of human rights may play an effective role in the protection of animal interests, and it may shape the progress towards animal rights.

Keywords: Animal interests, human rights, animal rights, intersectionality, proportionality

ÖZETÇE

Hayvan Çıkarlarının İnsan Hakları Çerçevesinde Korunması

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İnsanların günlük yaşamlarında diğer hayvanlar ve hayvan türleriyle karmaşık bir ilişkisi vardır. Birçok hukuk düzeninde insanların diğer hayvanlarla etkileşimini ve onlara yönelik muamelesini düzenleyen normlar bulunur. Bir hayvan çıkarı gözetilerek bir insan hakkına müdahale edildiği veya bir insan hakkına yönelen müdahalenin dolaylı olarak bir hayvan çıkarını etkilediği durumlarda, hayvan çıkarlarının insan hakları karşısındaki konumunu tespit etmek gerekir. İnsan haklarına ilişkin hukuki uyumsuzluklarda hayvan çıkarlarının nasıl ve ne derecede dikkate alınabileceği sorusunu yanıtlamak için, hak kavramını yeniden gözden geçirmek elzemdir. İnsan hakları ile potansiyel hayvan haklarının kuramsal temelleri birbiriyle benzerdir, zira insan hakları insanların ortak çıkarlarından kaynaklanır ve hayvanların hissetme yetisinin sonucu olarak bu çıkarlar, hayvanların ortak çıkarlarıyla büyük ölçüde kesişmektedir. Bu kesişimselliğe karşın, insanlar dışındaki hayvanların hak sahibi olabildiği hiçbir hukuk düzeni mevcut değildir. Öte yandan, gerek ulusal gerek uluslararası düzeyde belirli hayvan çıkarlarını koruyan hukuk normlarıyla karşılaşmak mümkündür. Korumanın derecesi hayli değişiklik göstermektedir. Belirli hayvan çıkarlarına değinen az sayıda anayasa vardır ki bu yalnızca yasama organını bağlamakla kalmayıp aynı zamanda yargı organı için de bir yorumlama zemini sağlar. Pek çok hukuk düzeni, hayvan çıkarlarını hayvan refahı düzenlemeleri veya zulüm karşıtı yasalar yoluyla gözetir. Bazı hukuk düzenleri, insanlar dışındaki hayvanların hukuki statüsünü de eşyadan ayırır. Hayvan türlerinin muhafazası, konunun ulusaşırı niteliğinden ötürü, genellikle uluslararası antlaşmalarda ele alınmıştır. Bu çeşitli ulusal ve uluslararası hukuk normları, uygulanmaları esnasında insan haklarıyla çatışabilir. Hayvan çıkarlarının korunması, kamuyu ilgilendiren bir mesele olarak ortaya çıkar ve insan haklarına müdahale etmede meşru bir amaca tekabül edebilir. Böylesi bir müdahalenin ölçülülüğü, ilgili hukuk düzeninde öngörülen koruma standardına bağlıdır. Bahse konu hayvan çıkarı yeterince baskın ise çatıştığı insan hakkına kıyasla korunmaya daha değer olabilir. Ayrıca, hayvan hakları savunucularının yararlandıkları insan hakları da dolaylı yoldan hayvan çıkarlarına hizmet edebilir. Daha çok kişi hayvanların hissetme yetisinin farkına varıp onların kendileri için önem ifade eden çıkarlara sahip olduğunu kabullendikçe hayvan hakları daha ulaşılabilir hale gelmektedir. İnsan haklarının benzer kaygılardan doğduğu göz önüne alındığında insan hakları çerçevesi, hayvan çıkarlarının korumasında etkili bir rol oynayabilir ve hayvan haklarına yönelik ilerlemeyi şekillendirebilir.

Anahtar Sözcükler: Hayvan çıkarları, insan hakları, hayvan hakları, kesişimsellik, ölçülülük

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TABLE OF CONTENTS

Table of Authorities	x
Abbreviations.....	xiv
Chapter 1: Introduction.....	1
Chapter 2: THE RELATION BETWEEN HUMAN RIGHTS AND ANIMAL RIGHTS	6
2.1 Humans, Other Animals, and Their Rights.....	6
2.1.1 Origin of Human Rights	9
2.1.2 Origin of Animal Rights	14
2.2 Theoretical Bases of Animal Rights	18
2.2.1 Welfarism.....	19
2.2.2 Abolitionism	21
2.2.3 New Welfarism	22
2.2.4 Mixed Theory	23
2.2.5 Virtue Ethics	25
2.3 Compatibility of Animal Rights with Human Rights	26
2.3.1 Equality	28
2.3.2 Dignity	29
2.3.3 Autonomy	30
2.3.4 Fairness	31
Chapter 3: LEGAL STATUS OF ANIMALS: DOMESTIC AND GLOBAL APPROACHES	32
3.1 Discussions in Constitutional Law	32
3.1.1 United States	33
3.1.2 Brazil.....	35
3.1.3 Germany.....	36
3.1.4 India	38

3.2	Discussions in Criminal Law	39
3.2.1	United Kingdom	39
3.2.2	Israel.....	41
3.2.3	Canada	43
3.2.4	Norway.....	45
3.3	Discussions in Private Law	46
3.3.1	United States	47
3.3.2	New Zealand	49
3.3.3	Austria.....	50
3.3.4	The Netherlands	52
3.4	Discussions in International Law	54
3.4.1	Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).....	55
3.4.2	Convention on the Conservation of European Wildlife and Natural Habitats (Bern Convention)	57
3.4.3	International Convention for the Regulation of Whaling (ICRW)	59
3.4.4	Convention on the Conservation of Migratory Species of Wild Animals (CMS).....	62
3.5	Animal Rights Activism and Its Impact on Legislation	64
3.6	Future of Animal Rights	67
Chapter 4: HUMAN RIGHTS VERSUS ANIMALS AND ANIMAL RIGHTS DEFENDERS		69
4.1	Animals in Entertainment	70
4.2	Hunting	72
4.2.1	Canned Hunting	72
4.2.2	Hunter Harassment Laws.....	74
4.2.3	Expropriation of Land for Hunting	75
4.3	International Trade in Animals	76

4.4	Cruel Industry Practices and Slaughter.....	80
4.4.1	Force-feeding	81
4.4.2	Animal Labor	83
4.4.3	Slaughter of Animals for Food	84
4.5	Taking Care of Companion Animals	85
4.6	Taking Care of Homeless Companion Animals	88
4.7	Media Coverage of Animals	98
4.7.1	Defamation Cases Against the Press	99
4.7.2	Animal Crushing	100
4.8	Cultural, Religious, and Ethical Stances on Animals	101
4.8.1	Animal Sacrifice as a Cultural Practice	102
4.8.2	Religious Rituals Involving Animals.....	103
4.8.3	Vegetarianism and Veganism as Conscientious Choices	107
4.9	Animal Rights Movement and Activism	110
4.9.1	Access to Information Regarding Animals.....	110
4.9.2	Exposing Animal Abuses in the Industry	112
Chapter 5: Conclusion		114
Bibliography		124

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ABBREVIATIONS

ABGB	Allgemeines bürgerliches Gesetzbuch
BW	Burgerlijk Wetboek
CBD	Convention on Biological Diversity
CCC	Criminal Code of Canada
CITES	Convention on International Trade of Endangered Species
CJEU	Court of Justice of the European Union
CMS	Convention on the Conservation of Migratory Species of Wild Animals
CoE	Council of Europe
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
GAP	Great Ape Project
GATT	General Agreement on Tariffs and Trade
HSUS	Humane Society of the United States
ICRW	International Convention for the Regulation of Whaling
IWC	International Whaling Commission
NGO	Non-governmental organization
PETA	People for the Ethical Treatment of Animals
RSPCA	Royal Society for the Prevention of Cruelty to Animals
TBT	Agreement on Technical Barriers to Trade
UDAW	Universal Declaration on Animal Welfare
UN	United Nations
WTO	World Trade Organization

Chapter 1:

INTRODUCTION

The law touches upon numerous aspects of human life, including our relations with other animals. With each passing day, a new dimension is brought to the complexity of this interaction. In the past, most humans assumed that other animals could not have their own interests. Legally, they were considered as any other *thing* under the dominion of humans. They could be treated and exploited in any manner at the hands of humans. However, how animals other than humans were treated mattered for them and humans since they were part of a common environment and shared the capacity to suffer. The acknowledgment of sentience in animals challenged the dominion of humans from an ethical standpoint. Humanity became aware that other animals could have their own interests as well. Since then, various political and philosophical theories and approaches have been developed regarding the position of animal interests vis-à-vis human interests, which enriched the debates about potential animal rights. Law, on the other hand, fell behind the contemporary understanding of animals. Most legal systems include legal norms that regard animal interests to an extent, but none currently consider animals other than humans as right-holders in the legal sense.

Although humankind continues to consume other animals and exploit them in other ways on a vast scale, we are becoming more aware of the impact of such actions on individual humans, other animals, and animal species as a whole. To give a couple of examples, the loss of biological diversity driven by the consumption of animals has given rise to several deadly zoonotic diseases.¹ The excessive exploitation of animals has also created a threat of widespread antimicrobial resistance that may claim even more lives.² Moreover, our treatment of animals has a detrimental impact on the environment. Greenhouse gas emissions occurring as a result of raising animals for human consumption is one of the leading causes of global climate change, and perhaps, the one that is most easily avoidable as well.³ It is clear that the current status of animals other than humans

¹ See Tom Sparks et al., *Editorial: Animal Rights: Interconnections with Human Rights and the Environment*, 11 J. HUM. RTS. & ENV'T 149, 152 (2020).

² See *id.*

³ See Andrew Knight, *Animal Agriculture and Climate Change*, in THE GLOBAL GUIDE TO ANIMAL PROTECTION 254, 255 (Andrew Linzey ed., Univ. of Ill. Press 2013).

is not sustainable and that we need to rethink the possibility of animal rights. Therefore, this issue can be discussed as a significant part of the broader context of environmental rights.

This study aims to stay within the boundaries of positive law but may refer to animal rights as moral rights in some places and make analogies for the development of a potential animal rights law. It is possible to consider the existing legal norms that protect specific animal interests as early steps on the road to animal rights. This proposition is not without opposition. Among the opponents of animal rights, some argue that animals cannot hold rights because they cannot be held liable for legal duties, whereas others argue that rights arise from dignity and that the only beings with dignity are human beings.⁴ This study adopts a critical approach to the prerequisites of being a right-holder and is open to the possibility of animal rights. However, aside from animal rights, it also delves into the broader concept of animal interests and the varying legal approaches toward such interests.

Animal interests, for the purpose of this study, are an umbrella term that covers a variety of grounds that matter to animals other than humans. Even in the absence of legal rights bestowed upon animals other than humans, the law may serve animal interests through animal welfare or the conservation of animal species. For example, a legal obligation to provide sufficient space for farmed animals would serve animal welfare, and a legal prohibition of hunting certain species during their spawning period would serve the conservation of animal species. There may be other types of norms that would protect animals or serve their interests in other ways, such as a simple legal provision acknowledging the status of animals as sentient beings or a general criminalization of cruel treatment. None of these supposed norms would grant legal rights to animals other than humans, yet they would serve their particular interests. A potential redefinition of the legal status of other animals as right-holders would require radical changes in the established forms of our treatment of animals, both on paper and in practice.

Legal disputes involving human rights may necessitate discussing animal interests in these cases. This study examines how and to what extent animal interests can be regarded in legal disputes relating to human rights. It simultaneously attempts to answer whether the human rights framework can provide a legal basis for considering animal interests.

⁴ See John Adenitire, *The Rule of Law for All Sentient Animals*, 35 CAN. J.L. & JURIS. 1, 15-16 (2022).

The idea that human rights may contribute to the legal protection of animal interests is not new. However, it is a rapidly developing area that is not sufficiently researched. The quest for legal bases for protecting basic animal interests remains a relevant matter that is open to further progress. This study hopefully contributes to the emerging animal law by offering new and broader comparative dimensions. In addition to the main questions, it also seeks striking examples of how animal interests are or are not protected in specific legal systems or industries and asks whether one could deduct viable and generalizable solutions to the problem of animals in law from those examples. It searches how some legal systems view animals other than humans. In this connection, it explores whether constitutions, criminal and civil codes, and international treaties may refer to animal interests and what would be the legal and practical implications of such a reference, or can they be interpreted in a way that serves animal interests even in the absence of a reference to any animal interest. It evaluates cases of conflicting human rights and animal interests critically and questions whether human rights always prevail over animal interests or the rights of those who defend animal interests.

This study resorts to theoretical analysis, especially with respect to relevant basic concepts. It divides the relevant terms into their components and aims to reach a definition or description piece by piece. It aims to reconstruct the law's approach to animals from a non-anthropocentric perspective. It visits and reviews several existing theories, e.g., the welfare theory, the theory of rights, or the theory of personhood. In so doing, the study inevitably resorts to the interdisciplinary research method and appeals to relevant disciplines besides law, especially moral philosophy and political science. Moral philosophy provides a better comprehension of justifications for human rights and potential animal rights, and political science helps us understand certain choices of the lawmaker. The study also resorts to the historical research method to provide background information about the research topics. Knowledge of the emergence and historical development of related basic concepts facilitates a critical approach to the status quo. As part of this study, selected jurisdictions and jurisprudences are evaluated to demonstrate diverse approaches comparatively. The case study method is also utilized for practical examples that lead to jurisprudential discussions with normative reflections.

This study is divided into five chapters. The three chapters following this introductory chapter constitute the body of this study in a specific sequence, i.e., theory, written law, and applied law. Accordingly, Chapter *two* starts by describing the notion of

rights, then specifies what human rights and animal rights mean in moral and legal contexts. It discusses the emergence and historical development of both concepts, presents justifications, and compares their compatibility on a theoretical basis. It lays the foundations for further discussions by pointing out the intersectionality of human rights and potential animal rights. It critically analyzes whether there may be correlations between their philosophical and legal sources.

Chapter *three* compiles salient examples from diverse legal systems concerning the legal status of animals other than humans. The compiled examples represent a variety of branches and fields of law. It is anticipated that they represent a diverse range of legal systems and demonstrate different ways that the law may address the problem of animals other than humans. As for constitutional law, the chapter analyzes the constitutions of certain federated states within the United States, and the federal constitutions of Brazil, Germany, and India, all of which refer to animals other than humans to an extent. As for criminal law, it illustrates the historical development of anti-cruelty legislation in the United Kingdom and Canada, and it dissects the relevant criminal laws in Israel and Norway. As for private law, it assesses the legal status of animals other than humans in the United States through court decisions regarding the loss of one's companion animal, in New Zealand through a legislative attempt to grant personhood to a particular group of animal species, in Austria through a case in which the personhood of a chimpanzee was discussed, and in the Netherlands through the legal and practical implications of redefining the status of animals in the civil code. As for international law, four international treaties differing in scope and content are evaluated from the perspective of animal interests. Under that chapter, it is possible to find examples of the influence of political structures over the decision-making process within a state or an international organization. The chapter also demonstrates how evolving social perceptions of animals other than humans may alter the interpretation of the same legal provision, or how they may result in amending existing legal provisions regarding specific animal interests. It emphasizes the importance of the animal rights movement as an impetus in the development of animal law. It also addresses deficiencies in some of the existing legislation as well as the potential trajectory of the development of animal rights.

In Chapter *four*, legal proceedings arising from the conflict between human rights and animal interests are categorized based on the form of animal interest or exploitation in question and are reviewed elaborately. The conflict arising from the exploitation of

animals in the entertainment sector is discussed through a case from Brazil in which the legal personhood of a chimpanzee from a zoological park was discussed, and the decision of a state high court in India regarding the constitutionality of certain spectacles involving animals other than humans. Hunting is scrutinized on the basis of administrative regulations in South Africa that restrict canned hunting, criminalization of obstructing hunting in various jurisdictions, and the forceful designation of private lands as hunting areas in France. The chapter discusses the relationship between international trade regulations and domestic animal protection laws. Then it reviews the issue of cruel industry practices and slaughter based on the prohibition of commercial force-feeding in Israel through a supreme court decision, a case from the United States in which the validity of New York's anti-cruelty law was discussed in relation to property rights, and the decision of a state high court in India regarding the prohibition of commercial buffalo slaughter. After discussing the protection of companion animals even against the people who exert property rights over them through a case from the United States, the chapter delves into the question of homeless companion animals with reference to the amendment of Turkey's animal protection law. Then it touches upon the media coverage of animals through a defamation case in which the relation between the freedom of expression and the interest in one's reputation was discussed in relation to anti-cruelty laws, and through cases from the United States on the compatibility of federal laws prohibiting animal crushing videos with the freedom of expression. It then reviews the relation between cultural rights and animal protection laws through an example from South Africa regarding a cultural festival in which a bull is sacrificed, and the relation between freedom of religion and animal protection laws through two cases: one from the United States regarding religious animal sacrifice and one from Belgium regarding the compulsory stunning of animals before slaughter. The chapter examines whether vegetarianism and veganism could be protected under the freedom of thought and conscience. It continues by addressing the human rights enjoyed by animal rights activists, which simultaneously serve specific animal interests. Lastly, Chapter *five* includes concluding remarks regarding the research questions.

Chapter 2:

**THE RELATION BETWEEN
HUMAN RIGHTS AND ANIMAL RIGHTS**

2.1 *Humans, Other Animals, and Their Rights*

In colloquial speech, rights are mentioned as a sense of entitlement to own or do something. This general understanding fails in a hypothetical scenario where two persons claim to have a right, but their rights contradict each other, as it is practically not possible for both persons to enforce their so-called rights at the same time. If this scenario were extended to multiple persons, or to a society, what we end up with would be chaos. Claiming to have a right is not sufficient to have that right. This brings us to the questions: what are rights, who has them, and who gets to decide who has them? Therefore, before delving into human rights and animal rights, an overview of the legal theory of rights is needed to better understand what rights are, who the subjects of rights are, and how rights are allocated.

Rights are not an invention, but a conceptualization that has evolved throughout intellectual human history. Although the word itself is of ancient origin, it did not always correspond with the current concept of *right*. However, the lack of a linguistic equivalent for a concept does not mean that the concept in question did not exist. It just means that we are unable to pinpoint a date when it was first introduced.⁵ The term right in the modern legal sense became prominent during the Enlightenment, circa 17th–18th centuries.⁶ Since then, various academic discussions have centered around this term, which eventually turned it into one of the basic terms of law.

Except when expressly stated otherwise, not all rights in the lexical meaning, but only legal rights are taken into the scope of this study to distinguish the technical term from the everyday usage. Legal rights are recognized and enforceable by the law, irrespectively of their compliance with morality.⁷ Duties arising out of legal rights and moral duties may intersect, but the first does not cover the entirety of the latter, and vice versa. This, however, does not make presenting a definition for a right an easier task.

⁵ See WILLIAM A. EDMUNDSON, *AN INTRODUCTION TO RIGHTS* 5 (Cambridge Univ. Press, 2nd ed. 2012).

⁶ See *id.* at 13.

⁷ See PHIL HARRIS, *AN INTRODUCTION TO LAW* 94-95 (Cambridge Univ. Press, 7th ed. 2007).

Hohfeld argues that any initiative to suggest a single definition for a right is doomed to fail due to the complex structure of legal relations; therefore, rights may be described by a correlative duty instead.⁸ According to him, duties are not an opposite of rights, but a correlative of rights, and rights in the strict sense should be discerned from other basic legal concepts, i.e., privileges, powers, and immunities.⁹ Duties are indeed helpful for comprehending the concept of rights. That said, rights and duties do not always have to be correlative. A right creates a duty, but not all duties give rise to a right.¹⁰ Imagine a scenario where every pedestrian must wait at the red light. If a pedestrian crosses the street before the traffic light turns green in the given scenario, this does not automatically entitle others waiting in the same crosswalk to any right, since a person's duty to stay at the red light is not of concern to anybody's rights. That is why some scholars would rather describe each right as a compound of certain basic legal concepts such as permissions, competencies, immunities, and duties with a varying composition.¹¹

Not all legal scholars believe that it is impossible to define rights. The most common definition of a right is an interest protected by the law. This definition is consonant with the quality of a right being legally recognized and enforceable. Although it may satisfy the need for a generic definition, more is needed within the context of specific fields of law. Human rights, for instance, do not encompass every legally protected interest of a human being. Therefore, further elaboration on the protected interests is required in each field of law, as will also be the case in this study later.

A right provides the right-holder with justification for the power to assert an interest or protect themselves from others who assert claim their own interest.¹² Power, in this sense, does not indicate physical dominance but a normative and abstract competence. To be able to speak of a right, there needs to be a right-holder and a person against whom the right in question can be asserted. Having a right would only be meaningful with the possibility of it being challenged. This means that rights are not preexisting entities independent of a subject but rather a relation between the right-holder and others.¹³

⁸ Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 30 (1913).

⁹ *Id.* at 30-32.

¹⁰ See DAVID BOERSEMA, *PHILOSOPHY OF HUMAN RIGHTS: THEORY AND PRACTICE* 16-17 (Routledge 2018).

¹¹ See Jaap Hage, *Basic Concepts of Law*, in *INTRODUCTION TO LAW* 33, 46-47 (Jaap Hage, Antonia Waltermann & Bram Akkermans eds., Springer, 2nd ed. 2017).

¹² See BOERSEMA, *supra* note 10, at 18.

¹³ See *id.* at 13-14.

Though the interest pertinent to that right may exist before the legal recognition giving rise to a right. For example, women always had an interest in electing those who lay down rules which bind them, but this interest was not legally recognized as a right until the success of the suffragette movement, and still is not so in some non-democracies.

Right-holders are subjects of a right owing to their inclusion to or exclusion from a specific status.¹⁴ This status is determined by laws enacted by the lawmaker. The lawmaker legislates rules that regulate the legal relations under its jurisdiction and allocates rights for this cause. The legal recognition of an interest is a prerequisite for a right, and the recognition or non-recognition of an interest as a right is inevitably a political choice.

The lawmaker is bound and guided by the constitution in its decision to recognize an interest as a right. There lies a political demand arising out of an ideal or an ideology beneath each constitutional principle.¹⁵ This ideal or ideology belongs initially to the founding cadres of a state. It may later be altered or entirely replaced by another constituent power. Since a constitution is a fundamental law that binds all other laws, the rights contained in laws often reflect the underlying political vision of the constitution to which they are bound.

The will of a constituent power, as manifested in a constitution, sets the ideological elbow room of the lawmaker. For example, if a constitution were written with an economically liberal mindset, it would recognize the interest of people in owning private property as a fundamental right. In this case, the lawmaker could not abolish private property through legislation as long as the constitution stands, even if the lawmaker did not share the liberal mindset. It could, however, recognize the interest of workers in owning their business collectively and thus legislate laws allowing the formation of cooperatives if it is of the opinion that such a model would create a more equitable system of distributing wealth. As can be understood, the reasoning behind granting rights to certain subjects or depriving them of certain rights often finds its basis in political and philosophical thinking.

¹⁴ See *id.* at 49-50.

¹⁵ See Günter Frankenberg, *Comparing Constitutions: Ideas, Ideals, and Ideology—Toward a Layered Narrative*, 4 INT. J. CONST. LAW [I.CON] 439, 455 (2006).

2.1.1 *Origin of Human Rights*

The word *human* basically refers to a member of the species of *Homo sapiens*. Human species, as the name suggests, constitutes the core of human rights, and is the primary subject thereof. Besides human beings, some non-human entities may enjoy human rights. Every modern legal system recognizes the personhood of certain legal entities representing human interests, e.g., associations, labor unions, or corporations. Such legal persons are also regarded as subjects of human rights, albeit limited to those suitable to their non-physical nature.¹⁶ It is possible to encounter domestic or international human rights instruments that acknowledge the status of groups of people, despite lacking legal personality, as subjects of human rights.¹⁷ As can be seen, humans are able to bestow *human* rights upon *non-humans* by virtue of law. What is certain is that states cannot be included among the subjects of human rights since they only hold negative or positive duties with respect to human rights.¹⁸

A categoric definition of a human right is a right designated as a human right by domestic or international law.¹⁹ Although it might help us comprehend certain rights granted to non-humans, e.g., the right to a fair trial of a corporation, this categoric definition does not embrace the whole scope of the term since not all human rights instruments have the label of human rights. It is apparent that a further review of the substance of the term is necessary to identify which rights are not any rights but human rights. The historical development of modern human rights may guide us in drawing the line between them.

During the Enlightenment, numerous thinkers associated human rights with certain entitlements that humans are born into, such as natural rights. The general intellectual standpoint of the era can be summarized in Locke's words stating that "[men are] by nature all free, equal, and independent".²⁰ Enlightenment thinkers' natural rights catalog was far more limited than today's human rights. Their envisioned rights mostly revolved

¹⁶ See CHRISTIAN TOMUSCHAT, *HUMAN RIGHTS: BETWEEN IDEALISM AND REALISM* 117 (Oxford Univ. Press, 3rd ed. 2014).

¹⁷ See LOUIS HENKIN ET AL., *HUMAN RIGHTS* 46 (Foundation Press, 2nd ed. 2009).

¹⁸ See TOMUSCHAT, *supra* note 16, at 119-20.

¹⁹ See Christopher McCrudden, *The Pluralism of Human Rights Adjudication*, in *REASONING RIGHTS: COMPARATIVE JUDICIAL ENGAGEMENT* 3, 17 (Liora Lazarus, Christopher McCrudden & Nigel Bowles eds., Hart Publ'g 2014).

²⁰ JOHN LOCKE, *TWO TREATISES OF CIVIL GOVERNMENT* 240 (George Routledge and Sons 1884) (1690).

around preserving life, bodily integrity, liberty, wealth, and property.²¹ It is also arguable whom they precisely meant by *men*, even though the wording suggests that the entire humankind is meant. Not all humans could enjoy the concepts held dear by the Enlightenment thinkers. Several circumstances not currently regarded in conformity with human rights were the norm back then. For instance, slavery was still prevalent, homosexuality was still widely criminalized, and women's suffrage was still illegal. It is doubtful that thinkers of the time thoroughly considered every type of identity in their deliberations, which casts doubt on the natural character of such rights in the first place. Otherwise, one might argue that the scope of human rights would not have changed and broadened over time.

Enlightenment thinkers laid the foundations of the distinction between human rights and other rights by attributing supremacy to specific human interests. Their ideas were initially reflected in the United States Declaration of Independence, written in 1776, then the French Declaration of the Rights of Man and of the Citizen, written in 1789, which inspired later constitutions.²² It was through constitutionalism that human rights have finally been transferred into positive law, and thus became recognized and enforceable.²³ Today, almost every constitution in the modern sense provides a list of human rights.

The extent of human rights has gradually expanded throughout its evolutionary process. The first set of human rights mostly included negative rights since less interference and control by the state were desired because of classical liberal thinking.²⁴ These mainly included the negative aspects of the right to life, right to liberty, right to a free trial, right to property, freedom of religion, and freedom of expression. The second set of human rights, which emerged during the period from the Industrial Revolution in the 19th century to the aftermath of the Second World War in the 20th century, complemented prior human rights with a positive aspect and brought new human rights by taking social justice and welfare into consideration, such as the right to work, right to social security, right to form and join labor unions, right to housing, right to medical care, and right to education.²⁵ Another set of more recent and less recognized human rights,

²¹ See Ed Bates, *History*, in INTERNATIONAL HUMAN RIGHTS LAW 15, 17-18 (Daniel Moeckli, Sangeeta Shah & Sandesh Sivakumaran eds., Oxford Univ. Press, 2nd ed. 2014).

²² See TOMUSCHAT, *supra* note 16, at 19-20.

²³ See Bates, *supra* note 21, at 18.

²⁴ See TOMUSCHAT, *supra* note 16, at 137-38.

²⁵ See *id.* at 139-40.

sometimes referred to as the third-generation human rights, include rights such as the right to peace, the right to a clean and healthy environment, and the right to development.²⁶ Further waves of human rights movements will likely occur in the future, as constant intellectual and technological progress creates new common interests whose legal recognition and protection may be demanded. As can be inferred from the historical development of human rights, specific interests are attributed to everyone, which they share equally with the rest of humanity. Such interests take the form of human rights when the law protects them.

Justification for human rights has yet to be sufficiently discussed, as the existence of such rights has usually been taken for granted since their emergence.²⁷ In today's world, we view human rights as good and necessary through our subjective experiences. The status quo might change, and a more significant part of society might start to despise and disregard human rights. This, however, would not trivialize the need for human rights as long as the same common human interests remain. There should be objective grounds for attaching certain special rights to human beings and other entities representing their interests.

One of the objective justifications for human rights is the consequentialist or utilitarian approach, which suggests that human rights benefit the general welfare. Accordingly, a society in which human rights are implemented is better off. This approach requires a comparison between the interests of an individual and the society in each case. Such a balancing might undermine the current human rights standard when society's general interest dictates the violation of a human right.²⁸ For example, from a purely utilitarian standpoint, someone could be tortured if this action were to serve a greater good. However, prohibition of torture is a peremptory norm, which means it ought not be limited nor derogated under any circumstance, no matter how pragmatic the consequences would be.

Alternatively, there are deontological approaches to justify human rights, which focus either on the instrumental value of human rights or the inherent value of human beings.²⁹ Approaches based on the instrumental value highlight the necessity of human

²⁶ See *id.* at 149.

²⁷ See Samantha Besson, *Justifications*, in INTERNATIONAL HUMAN RIGHTS LAW 34, 34-35 (Daniel Moeckli, Sangeeta Shah & Sandesh Sivakumaran eds., Oxford Univ. Press, 2nd ed. 2014).

²⁸ See *id.* at 42.

²⁹ See *id.* at 42-43.

rights for the enjoyment of other rights and concepts, often through empirical data. If one were to suggest that human rights are indispensable for implementing democracy and rule of law or to demonstrate that the quality of life increases in societies that respect human rights more, these would serve as examples of justification based on the instrumental value of human rights. On the other side, approaches based on the inherent value of human beings justify human rights by associating them with several concepts, the most common of which are equality, dignity, autonomy, and fairness.³⁰ Since these concepts are assumed to be shared by every person, human rights can be asserted not only against parties of a specific action or a transaction but against all other persons.

Equality

Dworkin argues that equality can be encountered in two different forms: treating someone equally and as an equal.³¹ The first one relates to the distribution of a certain opportunity, e.g., wealth, resources, liberty, etc., whereas the second one indicates an intrinsic interest.³² This interest in being treated as an equal is often associated with a person's inherent value as a moral subject. From an equality-based perspective, human rights are related to interests stemming from the equal moral value of humans. Equality, in this sense, is understood in a way that every human being has an equal moral status, and none is superior or inferior on a moral basis.³³ Equality constitutes a legal principle in the form of non-discrimination to be considered in applying other rights. Still, it also corresponds to a person's interest in being treated as an equal when other rights fail to provide so.³⁴

Dignity

Dignity is another inherent value prevalently taken as a basis for justifying human rights. Equality-based and dignity-based justifications often resort to the same rhetoric, and thus are highly intertwined.³⁵ The equal moral value of humans is a presumption upon which human rights are constructed in both approaches. Dignity complements the notion

³⁰ See *id.* at 44.

³¹ RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY 11 (Harv. Univ. Press, 2nd ed. 2000).

³² See *id.*

³³ See Besson, *supra* note 27, at 44-45.

³⁴ See CHARILAOS NIKOLAIDIS, THE RIGHT TO EQUALITY IN EUROPEAN HUMAN RIGHTS LAW: THE QUEST FOR SUBSTANCE IN THE JURISPRUDENCE OF THE EUROPEAN COURT 33 (Routledge 2014).

³⁵ See Besson, *supra* note 27, at 46.

of equality since being maltreated equally is not a favorable outcome, and human rights ensure that all humans are treated not just equally but equally dignified.³⁶ What distinguishes human dignity as a justification for human rights is that it also puts forward the unique value of humans among other beings.³⁷

Autonomy

Human rights enable individuals to be an end in themselves, that is to say, they are subjects of their own lives and are not merely objects in the lives of others. To be more precise, each human's life holds a value on its own, not in relation to the lives of others. The underlying value here is explained by autonomy. Autonomy is the opportunity of a person to decide freely what is good or bad for themselves and to direct their actions accordingly.³⁸ Autonomy as a justification for human rights is inevitably linked to equality and dignity. If all autonomous individuals are an end in themselves, it can be inferred that they all matter equally, in other words, they all have an equal moral value. Autonomy is also regarded as a component of dignity, as it attaches a special status to the autonomous individual.³⁹

Fairness

Lastly, fairness is the most abstract among the justifications for human rights, since it appeals to sentiments. Rawls presupposes that every person is endowed with two inherent moral capacities which enable members of a society to look after their collective interests fairly: "a sense of justice" and "a conception of the good".⁴⁰ The promise of fairness is to equalize the opportunities for all. A social or economic system is fair when everyone starts on an even ground with equal access to adequate basic rights and liberties. Ultimately, the overall advantage is allocated in favor of the least advantaged ones in the society to enable continuous equality of opportunity.⁴¹ Every person deserves to gain wealth under equitable conditions, and certain rights such as liberty, security, taking part in the political decision-making process and expressing opinions about it are necessary to

³⁶ See NIKOLAIDIS, *supra* note 34, at 35.

³⁷ See GEORGE KATEB, HUMAN DIGNITY 6 (Belknap Press of Harv. Univ. Press 2011).

³⁸ See JAMES GRIFFIN, ON HUMAN RIGHTS 150 (Oxford Univ. Press 2008).

³⁹ See *id.* at 151-52.

⁴⁰ JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 18-19 (Erin Kelly ed., Belknap Press of Harv. Univ. Press, 3rd ed. 2003).

⁴¹ See JOHN RAWLS, A THEORY OF JUSTICE 60 (Belknap Press of Harv. Univ. Press 1971).

ensure that this opportunity is equally accessible for all.⁴² From this point, the fairness-based approach might seem to refer to the instrumental value of such rights. Still, it also emphasizes moral capacities and does not deny all persons' equal moral value.⁴³ Human rights find their basis in the inherent moral capacities, and members of a fair society attain these rights irrespective of their changeable affiliations.⁴⁴

Many other objective grounds besides those discussed above may be asserted to justify human rights, and each ground can be the subject of a doctrine of its own and be examined in detail to an extent that exceeds the scope of this study. Yet none of the justifications for human rights are in sharp contrast. Instead, they nourish each other in their development. For instance, Rawls explains that his theory of justice as fairness is a result of critical additions to his reading of Kant's conception of autonomy and how Kant has been a source of inspiration for him regardless.⁴⁵ Kant justifies human rights by grounding them on the inherent value of personal independence, which he argues is universal.⁴⁶ To clarify the Kantian standpoint, one should still resort to the notion of inner autonomy concerning the enforcement of human rights and refer to the notion of equality for the allocation of human rights.⁴⁷ Accordingly, further justifications for human rights may be derived and adopted by synthesizing the approaches mentioned so far.

2.1.2 *Origin of Animal Rights*

The word *animal* originates from the Latin word *animalis*, which means "having breath or soul".⁴⁸ The etymological origin of the word indicates that humans have been aware of the features that they share with other animals since the earliest times. Although certain animals are revered or even adored in some cultures and religions,⁴⁹ most humans

⁴² See RAWLS, *supra* note 40, at 149-50.

⁴³ See *id.* at 20.

⁴⁴ See JOHN RAWLS, *POLITICAL LIBERALISM* 30 (Colum. Univ. Press 1993).

⁴⁵ RAWLS, *supra* note 41, at 251.

⁴⁶ See Ariel Zylberman, *Kant's Juridical Idea of Human Rights*, in *KANTIAN THEORY AND HUMAN RIGHTS* 27, 33 (Andreas Follesdal & Reidar Maliks eds., Routledge 2013).

⁴⁷ See Luke MacInnis, *Agency and Attitude: Kant's Purposive Conception of Human Rights*, 42 *PHIL. & SOC. CRITICISM* 289, 300-01, 313-14 (2016).

⁴⁸ *Animal*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/animal> (last visited Jan. 30, 2024).

⁴⁹ See, e.g., E. Szűcs et al., *Animal Welfare in Different Human Cultures, Traditions and Religious Faiths*, 25 *ASIAN-AUSTRALASIAN J. ANIMAL SCI.* 1499, 1501-03 (2012) (conveying information about the sacred position of animals other than humans in Jainism, Hinduism, and Buddhism).

have long considered animals as beings of lower status. Animal can even be used as a derogatory word in many languages including English.

In the most generic colloquial sense, animals are living beings other than humans, plants, and microorganisms invisible to the human eye. The exclusion of the last two from the animal kingdom seems unchallenged today, but humans have not always completely distinguished themselves from other animals. Aristotle defines humans as political animals, and formulates the following opinion:

[M]an is the only animal . . . endowed with the gift of speech. And whereas mere voice is but an indication of pleasure and pain, and is therefore found in other animals, the power of speech is intended to set forth the expedient and inexpedient, and therefore likewise the just and the unjust.⁵⁰

He further speculates that there is a continuum between plants and animals, and that their capabilities are comparable despite differing in degree.⁵¹ He, however, does not claim that humans owe any duty to other animals, whereas we know that several ancient Greek philosophers argued against killing animals for consumption, most notably Pythagoras who preceded Aristotle by approximately a century. Since Pythagoras' works on the matter are lost in history, we learn about his ideas through other historical accounts. Plutarch, for instance, later develops an empathetical approach by referring to Pythagoras, and he regards animals other than humans as subjects of their own life and reason, which is apparent in the following words ascribed to him:

[N]othing shames us, not the fresh bloom of their skin, not the persuasiveness of their harmonious voices, not their cleverness of spirit, nor the cleanliness of their manner of living and the extraordinary degree of intelligence in the poor creatures, but for the sake of a bit of flesh we deprive their lives of the light of the sun, of the span of life to which they were born and begotten.⁵²

Porphyry continued the Pythagorean tradition in the Roman era. As Porphyry recites, Pythagoras abstained from killing animals for consumption because he thought animals that naturally feed on flesh were more brutal and savage, and acting in the same manner

⁵⁰ ARISTOTLE, *POLITICS* bk. I, at 5 (Benjamin Jowett trans., Batoche Books 1999) (c. 350 B.C.E.).

⁵¹ ARISTOTLE, *HISTORY OF ANIMALS* bk. VIII, at 194-95 (Richard Cresswell trans., George Bell & Sons 1883) (c. 350 B.C.E.).

⁵² PLUTARCH, *ON EATING MEAT* bk. I (c. 100 C.E.), *reprinted in* STEPHEN T. NEWMYER, *PLUTARCH'S THREE TREATISES ON ANIMALS: A TRANSLATION WITH INTRODUCTIONS AND COMMENTARY* 138, 140 (Routledge 2021).

as they would deteriorate the human body and soul.⁵³ Porphyry, on the other hand, was not fully satisfied with this reasoning. He believed that animals were rational beings and humans ought to act justly towards rational beings.⁵⁴

The empathetical approach of some thinkers towards animals in antiquity could not exceed a limited circle of intellectuals and become widespread. Furthermore, the reasoning behind such approaches was primarily metaphysical rather than ethical. Owing to the rediscovery of ancient Greek literature during and after the Renaissance in the 16th century, the complete apathy towards animals was once again challenged, even though the assumption of human supremacy remained prevalent.⁵⁵ In the 19th century, the idea that humans have a religious or spiritual duty not to mistreat animals finally blossomed in the Western world.⁵⁶ Groups of people who advocate against killing animals for consumption started to occur, possibly with the influence of the Industrial Revolution, which has reduced the urban population's dependence on animal power in their daily lives.⁵⁷ However, it was not until the 20th century that a significant ethical animal rights movement emerged. The end of both world wars prepared the intellectual infrastructure to seriously discuss the suffering of animals at the hands of humans.

Animal Machines, written by Ruth Harrison in 1964, was a milestone in the road to an animal rights movement as it created broad public awareness of the maltreatment of animals in intensive agricultural processes.⁵⁸ Harrison explained that her purpose in writing the book was to reveal some standard but excruciating factory farming practices after having witnessed them personally.⁵⁹ Such practices were continued for the sole reason that they were deemed economically more feasible. However, slight changes to be made by producers in favor of animals might provide even more significant benefits for both humans in terms of health and morality, and other animals in terms of well-being.⁶⁰ Despite the increasing public awareness on the conditions of animals raised for human consumption, an established animal rights theory still needed to be present. It was Peter

⁵³ See PORPHYRY, ON ABSTINENCE FROM KILLING ANIMALS bk. I, at 37 (Gillian Clark trans., Bloomsbury 2000) (c. 268-70 B.C.E.).

⁵⁴ See *id.* at 90.

⁵⁵ See COLIN SPENCER, VEGETARIANISM: A HISTORY 173 (Grub St. 2016).

⁵⁶ See GARY L. FRANCIONE, INTRODUCTION TO ANIMAL RIGHTS: YOUR CHILD OR THE DOG 1-2 (Temp. Univ. Press 2007).

⁵⁷ See SPENCER, *supra* note 55, at 273-74.

⁵⁸ See *id.* at 296.

⁵⁹ RUTH HARRISON, ANIMAL MACHINES 35-40 (CABI Publ'g 2013) (1964).

⁶⁰ Cf. *id.* at 194 (pointing out the regulations in favor of human welfare despite their evident conflict with economic interests).

Singer's *Animal Liberation* written in 1975 followed by Tom Regan's *The Case for Animal Rights* written in 1983 that laid the solid foundations of contemporary animal rights theory and gave rise to a whole new literature of academic discussions on the matter. Before having a closer look at how animal rights are justified on a theoretical basis and where animal rights stand about human rights, we first need to elaborate on the term *animal rights*.

There lies an interest at the core of a right, and the existence of a right in the legal sense is contingent upon the legal recognition and enforceability of that interest. Only entities that can have a genuine interest of their own can be subjects of a right. Imagine a scenario in which a person wishes to tear the pages of another person's book. The person who owns the book may legally prevent the other person from harming the book by relying on the right to property. Although the right directly protects the book from physical damage in this specific scenario, it is the book owner's interest that is ultimately protected by that right. Otherwise, the same right would also prohibit harming a book that was thrown away and found in the trash bin, but no right arises in that occurrence insomuch as a book cannot hold an interest of its own. Law may interfere only when someone holds an interest in the physical integrity of that book by owning or possessing it. In this scenario, it is clear that the book is the object of an interest, not the subject thereof. That said, there are more complicated situations in the world we live in. A simple book may not hold an interest of its own, but a corporation, for instance, may hold an interest in employing workers. In this case, humans would be the object of an interest held by a non-human entity, and that interest is even recognized as a right in every modern legal system. The mere status of being animate or inanimate, or human or non-human is not sufficient on its own to determine whether someone or something can be a right-holder.

An accurate way of defining a right would be to start from its content rather than its subject. As we discussed above, human rights protect the common interests of humans, but the set of subjects of human rights is broader than just humans. If rights were to be defined by what they protect rather than whom they protect, anyone who holds the interest pertinent to a right could have a legitimate demand to be entitled to that right based on non-discrimination as well as morality. Most interests protected by human rights, e.g., well-being or relief from pain, are also shared by other animals. Animal rights in this context are a reflection of specific human rights upon the rest of Animalia. This name

might be deceiving, as no current legal system acknowledges that animals can hold an interest of their own and be subjects of a right, at least not to the extent that humans and legal entities can. The animal rights movement, therefore, advocates for the legal recognition and enforceability of basic animal interests.

The idea that other animals share common interests with humans and so can be subjects of rights is not without criticism or opposition. After all, legal systems have been created by humans and exclusively centered around the interests of humans. This anthropocentric attitude that is built upon human supremacy is often not a result of hatred towards animals other than humans but of age-long traditional perceptions. Even in some earlier legal systems that pay little to no regard to animal interests, we encounter laws that prohibit bestiality, animal fighting, or certain forms of mistreatment of animals. Nonetheless, the reasoning behind such laws was related to human interests, e.g., protecting the human soul from corruption, the right to *property*, or even the emotional attachment or affection felt towards companion animals.⁶¹ Since the existence of animal rights is not taken for granted, unlike human rights, and humans lack direct subjective experience of violation of animal interests, justifying animal rights on a theoretical basis has been a relatively more arduous task.

2.2 *Theoretical Bases of Animal Rights*

Humans have long exploited animals, including their own kind, throughout their recorded history. At some point, humans could mostly spare themselves from this cycle by human rights. As of the Enlightenment era, circa 17th–18th centuries, the worth of all human lives has been widely acknowledged, yet this was initially done at the expense of the worth of other lives. René Descartes, the renowned Enlightenment philosopher, referred to animals as automata, which indicates that he considered animals other than humans as soulless objects that move and make sound mechanically.⁶² Paradoxical as it may seem, the challenge to human supremacy was going to be caused by the glorification of human intellect as it accelerated advancements in art, philosophy, and science, owing to which humans began to further realize their commonalities with other animals.

⁶¹ See Joel Feinberg, *Human Duties and Animal Rights*, in *ON THE FIFTH DAY: ANIMAL RIGHTS AND HUMAN ETHICS* 45, 48–49 (Richard Knowles Morris & Michael W. Fox eds., Acropolis Books 1978), reprinted in *ANIMAL RIGHTS* 399, 402–03 (Clare Palmer ed., Routledge 2016).

⁶² See FRANCIONE, *supra* note 56, at 2.

Modern science has come to terms with animal emotions. There are enough scientific accounts of animals other than humans displaying joy, sorrow, or empathy to conclude that animals have a wide range of emotions, which are reflected in their behaviors, although their way of expressing emotions may differ from that of humans.⁶³ The human understanding of right and wrong is closely linked with knowledge. The knowledge of sentience in other animal species inevitably results in ethical repercussions that necessitate acknowledging animal interests.⁶⁴ The discussions over the scope and manner of this acknowledgment have given rise to several approaches.

One approach argues that the action that serves animal interests the most is the one that can practically be taken. It deems increasing the welfare of exploited animals more realistic and achievable than seeking to abolish all forms of exploitation. Another approach attributes an inherent value to all animals and argues that animal exploitation infringes upon this value and should thus be abolished. These two mainstream approaches constitute the two ends of a spectrum. Other unorthodox approaches may also be derived by assembling features from both ends of the spectrum or by resorting to different branches of moral philosophy.

2.2.1 *Welfarism*

In *Animal Liberation*, Singer argues that the principle of equality constitutes a basis for considering animal interests.⁶⁵ By doing so, he introduces animals other than humans to the arena of modern ethics.⁶⁶ According to his theory, human or not, animals are sentient beings, in other words, they can suffer and enjoy, and fundamental animal interests arise from this common ground. This argument is expressed in his following statement:

If a being suffers there can be no moral justification for refusing to take that suffering into consideration. No matter what the nature of the being, the principle of equality requires that its suffering be counted equally with

⁶³ See MARC BEKOFF, *THE EMOTIONAL LIVES OF ANIMALS: A LEADING SCIENTIST EXPLORES ANIMAL JOY, SORROW, AND EMPATHY — AND WHY THEY MATTER* 10-12 (New World Libr. 2007).

⁶⁴ See *id.* at 133-34.

⁶⁵ PETER SINGER, *ANIMAL LIBERATION* 2 (Avon Books, new rev. ed. 1991) (1975).

⁶⁶ See JOSEPH R. DESJARDINS, *ENVIRONMENTAL ETHICS: AN INTRODUCTION TO ENVIRONMENTAL PHILOSOPHY* 110 (Wadsworth, 5th ed. 2013).

the like suffering—insofar as rough comparisons can be made—of any other being.⁶⁷

Singer comes up with the term *speciesism* analogously with racism and sexism.⁶⁸ If members of a group share a common interest, but some members devoid others of that interest by rejecting they had it in the first place, that would violate the principle of equality. If that specificity were to be defined by race, the discrimination in question would take the form of racism or sexism if it were to be determined by sex instead. Similarly, discrimination based on one's species or exploitation of a species by another species by ignoring their suffering is called speciesism. If the interests of all beings that can suffer matter, one should avoid the discriminatory practices of speciesism.

The ethical implication of acknowledging the sentient status of all animals, according to Singer, is to reduce their suffering to the most possible extent.⁶⁹ He expressly mentions utilitarianism as his philosophical source of influence on the issue of consideration of animal interests.⁷⁰ Indeed, utilitarianism pledges to maximize pleasure and minimize pain to reach the greatest good for most of the population.⁷¹ Singer's theory applies this equation to how humans treat other animals. Accordingly, any action that consequently increases the well-being of animals or decreases the amount of suffering they experience serves their welfare, and thus should be endorsed. That is why the utility-based approach is often called welfarism.

Despite laying the theoretical bases of animal rights, Singer's welfarism is not concerned with rights.⁷² Welfarism measures the general consequences of an action by taking provable parameters such as pleasure or pain into account. This equation determines the moral considerations of welfarism, which may or may not correspond to existing rights. Nevertheless, many animal rights defenders rely on Singer's ideas to justify their cause. In fact, Singer himself compares human rights with animal interests and concludes that other animals share some interests protected by human rights, therefore their common interests are as worthy of protection as those of humans.⁷³ Most interests giving rise to human rights, such as avoiding pain or preserving bodily integrity,

⁶⁷ SINGER, *supra* note 65, at 8.

⁶⁸ *Id.* at 6.

⁶⁹ *Id.* at 17.

⁷⁰ *Id.* at 5.

⁷¹ See JOHN STUART MILL, UTILITARIANISM 9-10 (Longmans, Green, Reader, & Dyer, 4th ed. 1871).

⁷² See DESJARDINS, *supra* note 66, at 111.

⁷³ SINGER, *supra* note 65, at 238.

are not unique to human beings. If humans acquire human rights because such interests matter to them, morality requires that they not be exclusive to humans.⁷⁴

2.2.2 Abolitionism

Tom Regan's *The Case for Animal Rights* is a significant milestone in the animal rights discourse in modern ethics. In the book, Regan reaffirms the existence of sentience in animals and establishes that human welfare functions like animal welfare.⁷⁵ He argues against utility-based welfare as a moral compass since its interpretation of the principle of equality attaches the same amount of importance to each interest. In contrast, not all interests are on an even ground, and some interests may outweigh others in pursuance of equity.⁷⁶ The so-called best consequence in utilitarianism, and the principles and behaviors to be inferred from that consequence vary depending on the selected population and approach, which, according to Regan, creates ambiguity.⁷⁷ In Regan's deontological understanding, an action itself may be morally right or wrong regardless of its consequences.⁷⁸

Regan establishes a rights-based approach built upon the inherent value of animals. Rights in this context are not necessarily legal and can be understood as direct moral duties imposed on humans. It is possible to infer from Regan's theory that *killing with kindness* is an oxymoron if the victim is the subject of a life that is worth maintaining.⁷⁹ Neither the infliction of pain nor the deprivation of pleasure is, even though they are undeniable indicators, but the violation of their inherent value is the fundamental wrong in the exploitation of animals.⁸⁰ Unlike pain or pleasure, inherent value is not gradual.⁸¹ One may either respect it or violate it, and there is no middle ground.⁸² The inherent value of animals is seemingly an abstract concept, yet it may be justified by relying upon an observable criterion, i.e., being subject of a life. Being subject of a life differs from being merely alive or conscious. Regan describes this criterion as follows:

⁷⁴ See *id.*

⁷⁵ TOM REGAN, *THE CASE FOR ANIMAL RIGHTS* 116 (Univ. of Cal. Press 1983).

⁷⁶ *Id.* at 226-27.

⁷⁷ *Id.* at 143.

⁷⁸ *Id.* at 144-45.

⁷⁹ Cf. *id.* at 208-10 (arguing against the utilitarian understanding that humans' hedonistic interests may outweigh the interest of other animals in living).

⁸⁰ See DESJARDINS, *supra* note 66, at 112-13.

⁸¹ See REGAN, *supra* note 75, at 237.

⁸² See *id.* at 240-41.

[I]ndividuals are subjects-of-a-life if they have 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 psychophysical identity over time; and an individual welfare in the sense that their experiential [sic] 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. Those who satisfy the subject-of-a-life criterion themselves have a distinctive kind of value—inherent value—and are not to be viewed or treated as mere receptacles.⁸³

Since the interests resulting from being subject of a life matter equally to each individual who holds them, whether human or another species, they deserve equal respect.⁸⁴ The ethical implications of acknowledging this approach according to Regan is to give up on the practices that constantly contradict the inherent value of animals in various fields of our daily lives, and to demand and defend the recognition of their moral rights as legal rights.⁸⁵ Therefore, the rights-based approach is often referred to as abolitionism. Animal rights envisioned by the rights-based approach are related to common interests stemming from the inherent value of animals. Since not all human interests are shared by other animal species, animal rights do not cover the entirety of human rights.⁸⁶ The inherent value of animals primarily necessitates the protection of their life, bodily integrity, and liberty. The rights and freedoms of no concern to common animal interests, e.g., right to vote or right to marry, naturally lie outside the scope of animal rights.⁸⁷

2.2.3 *New Welfarism*

The main welfarist criticism against abolitionism is its immediate all-or-none attitude. Welfarists approve the actions that make animals' conditions better off despite not abolishing the existing practices, since such actions are deemed more plausible for a

⁸³ *Id.* at 243.

⁸⁴ See DESJARDINS, *supra* note 66, at 114.

⁸⁵ REGAN, *supra* note 75, at 394-98.

⁸⁶ See BOB FISCHER, *ANIMAL ETHICS: A CONTEMPORARY INTRODUCTION* 70 (Routledge 2021).

⁸⁷ The argument that the right to vote is irrelevant to common animal interests is not without dissent. Despite the absence of a feasible method for the direct participation of animals other than humans in the political domain, their indirect participation may be seen as a common animal interest. See, e.g., JOAN E. SCHAFFNER, *AN INTRODUCTION TO ANIMALS AND THE LAW* 185 (Palgrave Macmillan 2011).

greater portion of the society, and thus are consequently more achievable.⁸⁸ Some of the more recent proponents of welfarism adopt a mental element from abolitionism by acknowledging animal rights, but set them as an ultimate goal.⁸⁹ These new welfarists agree with abolitionists on the moral status of animals in theory but apply welfarism in practice as an interim measure until animal rights are legally protected.⁹⁰

New welfarists receive criticism mostly from abolitionists who argue that gradually restricting animal exploitation until such practices vanish is an unpredictable outcome. It allows some level of exploitation for an unforeseeable duration.⁹¹ They underline the contradiction of acknowledging animal rights at present but granting them only to future animal generations.⁹² Nevertheless, new welfarists constitute a considerable part of the animal rights movement, as they combine the practicable appeal of welfarism with the ideological appeal of abolitionism.

2.2.4 *Mixed Theory*

Since their emergence, the debates over animal rights have been dominated by the dichotomy of welfarism versus abolitionism. In 2012, Alasdair Cochrane's *Animal Rights Without Liberation* enriched these debates by suggesting a third alternative that combines pieces from both mainstream approaches. There, he establishes a mixed theory that he names the interest-based rights theory.

Cochrane distinguishes animal rights from animal liberation by reformulating the moral rights of animals without abolishing the entirety of occasions in which sentient animals can be exploited for human needs.⁹³ He applies a sufficiency test on interests and measures whether their severity justifies imposing moral duties on humans.⁹⁴ Assuming there is one interest on one side of the scale and another conflicting interest on the other side, the interest-based rights theory evaluates which side weighs more by considering two parameters. The first one is how much an action contributes to the interest-holder's

⁸⁸ See, e.g., SINGER, *supra* note 65, at 86-87.

⁸⁹ See Nicola Taylor, *Whither Rights? Animal Rights and the Rise of New Welfarism*, 3 ANIMAL ISSUES 27, 27-28 (1999).

⁹⁰ See *id.*

⁹¹ See, e.g., GARY L. FRANCIONE, ANIMALS, PROPERTY, AND THE LAW 257 (Temp. Univ. Press 2012) (1995).

⁹² See *id.* at 258.

⁹³ ALASDAIR COCHRANE, ANIMAL RIGHTS WITHOUT LIBERATION: APPLIED ETHICS AND HUMAN OBLIGATIONS 19 (Colum. Univ. Press 2012).

⁹⁴ *Id.* at 43.

well-being, and the second one is to what extent an action continues its effect on the interest-holder on a psychological level.⁹⁵ In either case, the impact of an action is calculated objectively and does not differ by how positive or negative the interest-holder personally deems it is.⁹⁶

Cochrane discusses that no aggregate benefit of humans can justify their deliberate infliction of pain on animals, since avoiding suffering is crucial for an individual's well-being.⁹⁷ From this perspective, humans have a moral duty not to conduct painful experiments on animals. However, conducting painless and non-lethal experiments on animals for medical purposes is proportionate, considering the benefits humans and other animals may receive from it.

When humans' interest in maintaining life is compared with that of other animals, the complexity of day-to-day human life and its prospective potential makes the former more significant than the latter, according to Cochrane.⁹⁸ This, however, does not justify killing an animal in return for any benefit, even when conducted painlessly, since the grounds for refusing to do so would also apply to some human beings due to certain factors such as age or mental capacity.⁹⁹ In such a scenario, an animal's interest in maintaining life, as the phrase goes, benefits from the doubt resulting from the evident moral dilemma.

Lastly, Cochrane examines whether animals other than humans are interested in liberty, or more precisely, freedom from constraint or imposition of physical activity that does not involve pain.¹⁰⁰ He concludes that, unlike humans, other animals are not autonomous, therefore they lack an interest in directing their lives under their own decisions.¹⁰¹ In Cochrane's view, legal or physical dominion over animals other than humans does not automatically result in harm.¹⁰² They may be owned and exploited in ways that do not involve inflicting pain or killing.¹⁰³ In conclusion, the interest-based rights theory allows experimentation or any treatment that does not inflict pain on animals

⁹⁵ See *id.* at 53.

⁹⁶ See *id.*

⁹⁷ *Id.* at 64.

⁹⁸ *Id.* at 67.

⁹⁹ See *id.* at 71.

¹⁰⁰ *Id.* at 72.

¹⁰¹ *Id.* at 73.

¹⁰² *Id.* at 76.

¹⁰³ *Id.* at 73.

and not kill them, as basic animal interests include maintaining life and avoiding suffering, but humans do not owe liberty to other species.

2.2.5 *Virtue Ethics*

The third pillar of moral philosophy, after utilitarianism and deontology, is virtue ethics. Singer's welfarism can be categorized under utilitarianism, and Regan's abolitionism can be categorized under deontology. Virtue ethics, on the other hand, may seem uninterested in animal interests at first glance since it has not yet presented a mainstream approach on the matter. The truth is that virtue ethics does not entirely ignore animals and contains serious discussions concerning humans' relation with other animals.

According to virtue ethics, moral acts do not follow a single principle and thus cannot be listed nor codified. Virtue ethics focuses on the overall moral character and deducts traits from it in each case instead of generalizing a course of action by discussing what to do in abstract scenarios.¹⁰⁴ Rosalind Hursthouse brings together virtue ethics and animal rights discourse in her book *Ethics, Humans and Other Animals*, written in 2000.

The character traits of a virtuous agent would include kindness and compassion and exclude cruelty and callosity.¹⁰⁵ Hursthouse expands the scope of these virtues and vices in consideration of animals.¹⁰⁶ Hurting an animal unnecessarily, even if the perpetrator is not cruel enough to take pleasure in the animal's pain, is at least a callous practice.¹⁰⁷ In most scenarios where circumstances do not compel otherwise, a virtuous agent who is kind and compassionate to animals would ideally not hurt animals nor participate in practices that contribute thereto.

The ways that virtues are applied and vices are avoided are matters of practical wisdom.¹⁰⁸ If the virtue in one of our practices is challenged, we may either adopt this new, wiser practice or reject it on the ground that our current practice is, in fact, more virtuous than the suggested one.¹⁰⁹ In Hursthouse's theory, compassion and kindness to other animal species are considered as virtues, therefore it would be wiser to adjust our treatment of animals accordingly. She does not deny the involvement of established

¹⁰⁴ See FISCHER, *supra* note 86, at 71.

¹⁰⁵ See ROSALIND HURSTHOUSE, *ETHICS, HUMANS AND OTHER ANIMALS* 155-56 (Routledge 2000).

¹⁰⁶ *Id.* at 157.

¹⁰⁷ See *id.* at 159-60.

¹⁰⁸ See ENGIN ARIKAN, *HAYVAN HAKLARI İNSAN HUKUKU [HUMAN LAW OF ANIMAL RIGHTS]* 115-16 (Ekin Yayınevi 2016).

¹⁰⁹ See HURSTHOUSE, *supra* note 105, at 156.

perceptions in determining whether an action is deemed virtuous or not, but the fact that such perceptions resist change should not indicate they ought not change at all.¹¹⁰

Hursthouse's virtue-based approach does not seem to have breached the dichotomy of welfarism versus abolitionism, but her perspective is worth mentioning, since she contributes to the animal rights discourse from a completely different ethical perspective that is not concerned with the moral status of animals.¹¹¹

2.3 *Compatibility of Animal Rights with Human Rights*

The human mind tends to place itself on top of nature instead of a part thereof. When we look at history, whether ancient or modern, we encounter gods, demigods, and other supreme beings depicted entirely or partly in the image of humans. Although the contrary is a matter of religious or other spiritual belief, the current established scientific theory is that humans have evolved from common ancestors with other species, some of which are currently categorized as animals. As humans, no matter how much we wish to distinguish ourselves, the physiological and psychological commonalities we share with other animals are unignorable. The following conclusive statement by Darwin explains this:

[W]e must acknowledge, as it seems to me, that man with all his noble qualities, with sympathy which feels for the most debased, with benevolence which extends not only to other men but to the humblest living creature, with his god-like intellect which has penetrated into the movements and constitution of the solar system—with all these exalted powers—Man still bears in his bodily frame the indelible stamp of his lowly origin.¹¹²

The human species belongs to the animal kingdom, or Animalia, in the commonly recognized taxonomy of living beings. The fact that humans are also animals raises the question of what makes humans similar to or different from other animals. The answers to these questions are crucial in associating humans' rights with or dissociating them from the potential rights of other animals.

Some may claim that humans think and speak, unlike other animals. It is partially correct since no other animal that we know of uses language naturally in the same way as

¹¹⁰ *Id.* at 157.

¹¹¹ See ARIKAN, *supra* note 108, at 133.

¹¹² CHARLES DARWIN, THE DESCENT OF MAN, AND SELECTION IN RELATION TO SEX 405 (John Murray, 2nd vol. 1871).

humans speak. Language is the means that humans typically use to convey their thoughts and knowledge. However, their lack of a language does not necessarily mean that animals other than humans do not think or know anything at all.¹¹³ As ancient Greek philosopher Chrysippus observes, when a dog chasing after a prey arrives at a crossroads, the dog sniffs all the routes the prey could use to run, eliminates the options one by one, and picks a particular route among them by resorting to reason.¹¹⁴ Most animals seem to have similar logical considerations. However, the only individuals known for having moral considerations in their thinking process so far are members of the human species. The two specific implications of this fact are that humans can have moral duties and that other animals cannot have moral responsibilities. Such a fact alone, on the other hand, does not indicate that animals other than humans cannot hold interests of their own.

Even if we assume that all animals can reason, its manner and extent would clearly differ between humans and other animals, even more so among non-human animal species.¹¹⁵ Whether animals other than humans can reason is a different question than whether the ability to reason is the ground for holding interests. According to Bentham, intellectual abilities do not matter in determining whether a being can hold interests of its own, as can be inferred from his following words:

The day *may* come, when the rest of the animal creation may acquire those rights which never could have been withholden from them but by the hand of tyranny. The French have already discovered that the blackness of the skin is no reason why a human being should be abandoned without redress to the caprice of a tormentor. It may come one day to be recognized, that the number of the legs, the villosity of the skin, or the termination of the *os sacrum*, are reasons equally insufficient for abandoning a sensitive being to the same fate. . . . [T]he question is not, Can they *reason*? nor, Can they *talk*? but, Can they *suffer*?¹¹⁶

Bentham's words point to the intersectionality of animal rights and human rights. The expansion of right-holders from some humans to all humans has been perceived as intellectual progress. Not only humans but even groups of humans or entities established

¹¹³ See KRISTIN ANDREWS, *THE ANIMAL MIND: AN INTRODUCTION TO THE PHILOSOPHY OF ANIMAL COGNITION* 134 (Routledge, 2nd ed. 2020).

¹¹⁴ See *id.* at 107-08.

¹¹⁵ See Victoria Ridler, *Dressing the Sow and the Legal Subjectivation of the Non-Human Animal*, in *LAW AND THE QUESTION OF THE ANIMAL: A CRITICAL JURISPRUDENCE* 102, 110 (Yoriko Otomo & Ed Mussawir eds., Routledge 2013).

¹¹⁶ JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 310-11 n.1 (J. H. Burns & H. L. A. Hart eds., Oxford at the Clarendon Press 1907) (1789).

by humans may acquire rights in contemporary legal systems. Although the current limit of holding rights is drawn more or less based on one's proximity to humanity, the reasons previously uttered for granting rights to all humans may be presented in favor of expanding right-holders beyond humanity as well.¹¹⁷ A parallel can be drawn between the justifications for potential animal rights resulting from sentience in animals and basic animal interests and the theoretical bases of human rights.¹¹⁸ Under the last few subtitles of this chapter, it will be discussed how compatible the objective justifications for human rights are with the two mainstream theories on the recognition of animal interests.

2.3.1 *Equality*

The opponents of women's rights initially mocked the feminist movement by pointing out that the reasons for recognizing equal rights for women would be valid for granting rights to animals as well, which used to be seen as an even more ridiculous idea back then.¹¹⁹ Little were they aware that the discrepancy they mentioned was going to be used as an example in establishing an animal liberation theory by Singer.¹²⁰ At first glance, the principle of equality might seem irrelevant to Singer's welfarism. After all, equality in the context of human rights is a deontological reference point, whereas welfarism is a utility-based approach. That is why when Singer says that all animals are *equal*, he does not refer to the equal moral value of animals, but to the equal consideration of animal interests.¹²¹ As previously explained, welfarism is not concerned with the notion of rights, and it argues that the consideration of interests in measuring the utility of an action should be extended to all species that may enjoy or suffer from the consequences of that action.

Regan's abolitionism, however, sees no reason to differentiate human equality from animal equality. His theory attaches equality not to the interests of individuals but to the individuals themselves.¹²² Accordingly, all those who are subjects of a life equally share an inherent moral value. One of the backbones of abolitionism is to refuse the property status of animals. Regan is aware that all existing legal systems grant humans the right to

¹¹⁷ See EDMUNDSON, *supra* note 5, at 153-54.

¹¹⁸ See Valerio Pocar, *Animal Rights: A Socio-legal Perspective*, 19 J.L. & SOC'Y 214, 228 (1992).

¹¹⁹ See SINGER, *supra* note 65, at 1.

¹²⁰ *Id.* at 2-3.

¹²¹ *Id.* at 1.

¹²² REGAN, *supra* note 75, at 235.

property over animals to an extent, but he distinguishes legality from morality.¹²³ He compares the moral duties resulting from the inherent value of animals with the legally allowed forms of animal exploitation, and argues as follows:

[G]ranted that the present legal status of farm animals is that they are property, and even assuming that their legal status as property is not changed, it does not follow that legal constraints placed on how animals may be treated necessarily violate farmers' property rights. Property rights are not absolute. While what color I choose to paint my walls is my affair, what I choose to do with my property is not my affair alone if what I do with it will have an adverse affect [sic] on others.¹²⁴

Each animal species differs from one another in terms of what they need or how they perceive life. The same could be said for members of the same species as well. Equality, as in treating all individuals equally despite their differences, would not be ideal. On the other hand, equality as in treating all individuals as equals would be the expected outcome of recognizing their inherent value.¹²⁵ As remarked by Regan, the inherent moral value of humans is not more or less than that of other animals.¹²⁶ Consequently, human interests cannot, in principle, justify overriding the inherent moral value of other animals.

2.3.2 Dignity

Dignity in the context of human rights is hierarchical, since it is traditionally viewed as an inalienable inherent worth that only humans have and everything else lacks. According to Singer, it is unsurprising for humans to attach their kind an exclusive value when other animals obviously cannot protest it.¹²⁷ Like all other inherent values, he finds the entire concept of dignity unsubstantiated.¹²⁸

At the opposite pole, Regan's theory relies on the inherent value of animals. Although he does not expressly mention dignity in terms of animal rights, one may extract traces of it from his understanding of equality. The term inherent value may be interpreted as an expansion of human dignity over the rest of Animalia. Even if that were not the case, a potential recognition of fundamental animal interests would not diminish the

¹²³ *Id.* at 394.

¹²⁴ *Id.* at 347-48.

¹²⁵ See Adenitire, *supra* note 4, at 18.

¹²⁶ REGAN, *supra* note 75, at 240.

¹²⁷ SINGER, *supra* note 65, at 239.

¹²⁸ *Id.* at 238-39.

inalienable inherent worth of any human. Animal rights would require humans to respect the common interests of animals as much as their own, but not more than their own.¹²⁹

2.3.3 *Autonomy*

It would not be an exaggeration to assert that autonomy in the general sense is what makes a being an individual. Autonomous individuals are ends in themselves, which means their existence matters independently of their utility to others. In the strict sense of the word, autonomy requires individuals be able to direct their actions by their own choices. This concept, by definition, is not welcomed in welfarism which is a utility-based approach. Singer expressly finds it unnecessary to discuss autonomy in animals.¹³⁰ Autonomous or not, animals may enjoy or suffer, and these two constitute the primary concerns of welfarism.

Unlike Singer, Regan discusses autonomy in animals other than humans and concludes that they are autonomous in the sense that they prioritize specific actions over others depending on their needs, likes, and dislikes.¹³¹ His theory regards animals as ends in themselves. However, he does not base the theory of animal rights solely upon autonomy.¹³² Instead, he describes autonomy as the ability to act as one prefers and presents it as a supporting argument for the prevalent idea of inherent value.¹³³ Although animals other than humans are autonomous, their choices are not guided by morality, and therefore cannot be judged as morally right or wrong.¹³⁴ Nevertheless, their lack of moral agency does not preclude them from the moral consideration of humans as long as their inherent value stands.¹³⁵

Proponents of animal rights refuse to equate autonomy with moral agency. Neither autonomy, i.e., the ability to act as one prefers, nor moral agency, i.e., the ability to distinguish between right and wrong, seem related to the human rights to life, bodily integrity, or liberty. A categorical exclusion of animals other than humans from the set of

¹²⁹ See REGAN, *supra* note 75, at 278.

¹³⁰ SINGER, *supra* note 65, at 8.

¹³¹ REGAN, *supra* note 75, at 84-85.

¹³² See DESJARDINS, *supra* note 66, at 113.

¹³³ See FISCHER, *supra* note 86, at 39.

¹³⁴ See REGAN, *supra* note 69, at 151-54.

¹³⁵ See *id.* at 155.

potential right holders based on the claim that they lack these qualities is contradictory.¹³⁶ The disparity of expected mental capacities in humans and other animals may indicate that most humans enjoy certain common interests more intensely than other animals do, but it does not indicate that animals lack those very interests.¹³⁷

2.3.4 *Fairness*

Fairness has gained prominence as a justification for human rights owing to Rawls' theory of justice. Rawls argues that if everyone were allowed to construct a society from scratch without knowing who they will be and in which segment of the society they would end up—or in his terminology, if they were in the original position behind a veil of ignorance—they would opt for a fair system which favors the least advantaged the most.¹³⁸ After all, those who construct their ideal society could find themselves among its least advantaged members when the veil of ignorance is lifted. To give an example, from a Rawlsian standpoint, those who are behind the veil of ignorance would agree that members of a political minority should be able to criticize and express their opinions against the policies of the majority because they could end up as a part of that minority, and in that case, they would not wish to face oppression at the hands of the majority. Rawls does not include animals other than humans in this equation by arguing that they lack moral agency.¹³⁹ According to the classical understanding of justice as fairness, those behind the veil of ignorance would not agree, for instance, that farmed animals should not be killed for human consumption, because they do not have to consider the possibility of ending up as a farmed animal once the veil is lifted. This view suggests that only humans can be just to one another; therefore, justice is only owed to humans.¹⁴⁰

Singer criticizes Rawls for not presenting any sufficient reason to disregard animals in the distribution of justice.¹⁴¹ Despite not digging deeper into the notion of fairness, he explains that any theory that asserts moral equality among humans regardless of age or

¹³⁶ See Mary Anne Warren, *The Rights of the Nonhuman World*, in ENVIRONMENTAL PHILOSOPHY 109, 118 (Robert Elliot & Arran Gare eds., Univ. of Queensl. Press 1983), reprinted in ANIMAL RIGHTS 31, 40 (Clare Palmer ed., Routledge 2016).

¹³⁷ See *id.* at 41.

¹³⁸ RAWLS, *supra* note 40, at 15.

¹³⁹ RAWLS, *supra* note 41, at 512.

¹⁴⁰ See *id.* at 510-11.

¹⁴¹ SINGER, *supra* note 65, at 240.

mental capacity should logically consider animals other than humans as well.¹⁴² Rawls' justice as fairness, unlike Singer's welfarism, is highly concerned with the notion of rights, yet deems it exclusive to humans. According to an alternative reading of Rawls' theory, humans still do not owe justice to other animals, which would otherwise result in granting them the status of right-holder, but this does not necessarily mean that humans cannot owe them other duties such as compassionate or humane treatment.¹⁴³ In fact, Rawls himself acknowledges sentience in animals, and calls cruelty to animals and extinction of their species at the hands of humans as "wrong" and a "great evil" respectively.¹⁴⁴

Regan openly criticizes Rawls for being unclear on whether individuals who lack moral agency are owed justice.¹⁴⁵ According to him, if humans have a direct duty to refrain from cruel treatment of other animals solely because of the consequences of such an action on animals, there remains no reasonable ground not to consider animals other than humans as worthy of fair treatment either.¹⁴⁶ Rawls' veil of ignorance does not totally shroud the sight of those behind it since they are aware that they will end up as humans.¹⁴⁷ A consistent veil of ignorance would not let those behind it know beforehand which species they will be born into, just as they would not know their other prospective qualities and capacities. This would compel them to recognize animal interests as rights in pursuance of fairness.

Chapter 3:

LEGAL STATUS OF ANIMALS: DOMESTIC AND GLOBAL APPROACHES

3.1 *Discussions in Constitutional Law*

A constitution is the primary source of a domestic law that is binding upon all other sources. It typically establishes the constituent organs of a state and outlines their functioning. Most modern constitutions also include a catalog of fundamental rights the

¹⁴² *Id.*

¹⁴³ See Ruth Abbey, *Rawlsian Resources for Animal Ethics*, 12 ETHICS & ENV'T 1, 6-8 (2007).

¹⁴⁴ RAWLS, *supra* note 41.

¹⁴⁵ REGAN, *supra* note 75, at 165-66.

¹⁴⁶ *Id.* at 167-69.

¹⁴⁷ See *id.* at 171-72.

state must respect and abide by. In this case, laws enacted by the legislative organ of the relevant state cannot interfere with a fundamental right unless authorized by the constitution. These fundamental rights that enjoy constitutional protection are human rights as usual. Constitutional protection in favor of animal rights is hardly imaginable in almost any current legal system.¹⁴⁸ However, animals are not alien to constitutional law and the discussions related thereto.

A potential constitutional provision referring to animal welfare or animal rights would provide an overarching legal principle for the protection of certain animal interests that could even be applicable in the absence of a specific statute. It would also provide a ground for legal interpretation in cases that require discussing animal interests. For these reasons, the importance of constitutional law in discussions concerning the recognition of animal interests is evident. In this regard, the constitutional laws of the United States, Brazil, Germany, and India are examined, as they are examples among the few legal systems that address animals other than humans at the constitutional level to varying extents.

3.1.1 *United States*

The federal structure of the United States allows federated states to include provisions in their own constitutions that regulate the treatment of other animals by humans. For instance, the constitution of Florida includes a specific provision that prohibits and criminalizes the cruel and inhumane confinement of pregnant sows.¹⁴⁹ In this case, a state constitution compares the commercial interests of pig farmers and the welfare interests of pregnant sows, then prioritizes the latter as a rule. There are contrary examples where human interests are constitutionally protected to the detriment of animal interests, e.g., the right to fish stipulated in the constitutions of California¹⁵⁰ and Rhode

¹⁴⁸ See Paul Waldau, *Second Wave Animal Law and the Arrival of Animal Studies*, in *ANIMAL LAW AND WELFARE - INTERNATIONAL PERSPECTIVES* 11, 38 (Deborah Cao & Steven White eds., Springer 2016).

¹⁴⁹ See BRUCE A. WAGMAN & MATTHEW LIEBMAN, *A WORLDVIEW OF ANIMAL LAW* 272 (Carolina Acad. Press 2011); FLA. CONST. art. X, § 21.

¹⁵⁰ CAL. CONST. art. I, § 25.

Island,¹⁵¹ and the additional right to hunt stipulated in the constitutions of Alabama¹⁵² and Oklahoma.¹⁵³

Both the proponents and the opponents of the legal recognition of animal interests may naturally seek constitutional protection in their favor. Consequently, state constitutions may turn into a battleground between different interest groups. One notable example of this is the amendment to the Ohio Constitution in 2009 that established the Ohio Livestock Care Standards Board, which is entrusted with the authority to, *inter alia*, set the standard practices of the animal agriculture sector.¹⁵⁴ Animal rights activists considered the amendment as a lobbyist attempt to hinder public discussions about the cruelty of some common industry practices and to legitimize them by labeling them as standard practices.¹⁵⁵ In the year that followed, a group of activist organizations proposed a counter amendment that provided for strict welfarist measures and penalties for certain cruel acts, but this proposal was not put to the vote after the governor of Ohio brought both sides together, and leaders of the animal agriculture sector agreed on a compromise to effectively raise the standards of related industry practices.¹⁵⁶ The influence of lobbying on state legislatures is a noteworthy factor to consider in terms of animal law development in the United States.

The federal law of the United States prevails over the laws of each federated state.¹⁵⁷ That said, no constitutional provision on the federal level expressly refers to animal interests in the United States.¹⁵⁸ Although the exceptions to non-absolute fundamental rights may provide interpretative grounds for addressing the interests of animals other than humans indirectly,¹⁵⁹ relevant provisions of state constitutions and all anti-cruelty statutes remain vulnerable against federal constitutional claims that prioritize commercial or religious interests of humans in exploiting other animals.

¹⁵¹ R.I. CONST. art. I, § 17.

¹⁵² ALA. CONST. art. I, § 36.02.

¹⁵³ OKLA. CONST. art. 2, § 36; *see* WAGMAN & LIEBMAN, *supra* note 149, at 273.

¹⁵⁴ *See* WAGMAN & LIEBMAN, *supra* note 149, at 274.

¹⁵⁵ *See id.*

¹⁵⁶ *See id.* at 275; OHIO CONST. art. XIV.

¹⁵⁷ U.S. CONST. art. VI, cl. 2.

¹⁵⁸ *See* WAGMAN & LIEBMAN, *supra* note 149, at 270.

¹⁵⁹ *See id.*

3.1.2 Brazil

The Constitution of the Federative Republic of Brazil imposes, *inter alia*, a direct duty on the government to prohibit “all practices which . . . subject animals to cruelty”.¹⁶⁰ Since the provision mentions the prohibition of cruel conduct against animals, it indirectly imposes duties on individuals. The interest in not being subjected to cruel treatment is a common animal interest. In this example, the constitution protects an interest beyond humans by imposing a constitutional duty.

Before the current constitutional provision, only animals in the wildlife were granted a higher standard of protection, as they and their living space were considered state property under the law of Brazil. In contrast, other animals were deemed no different than any object over which the right to private property could be exerted.¹⁶¹ A special provision against the cruel treatment of animals brings the constitution’s approach closer to a rights-based one. By redefining the status of animals other than humans—albeit limited to the issues of ecological balance, biological diversity, and cruel treatment—the constitution allows part of their interests to be considered in legal deliberations.¹⁶² Most legal systems tolerate recognition of certain animal interests to the extent that they do not hamper traditionally accepted practices of the animal industry, even if they are cruel. Whereas in the case of Brazil, although the exploitation of animals for human needs and consumption is not entirely outlawed, the constitution draws the line at cruel practices at the expense of human interests.¹⁶³

In practice, the anti-cruelty provision in the constitution led to the prohibition of some blood sports in which animals were harmed or even killed.¹⁶⁴ Disaccustoming society from such traditional blood sports was one of the main rationales behind the provision in the first place.¹⁶⁵ However, this protective approach was not without backlash. Reactions against the constitution’s firm stance against cruel animal sports became visible after a state law regulating *vaquejada*—a traditional activity in which a bull is chased by riders

¹⁶⁰ CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 225, para. 1, subpara. VII (Braz.), translation at https://www.stf.jus.br/arquivo/cms/legislacaoConstituicao/anexo/brazil_federal_constitution.pdf.

¹⁶¹ See Tagore Trajano de Almeida Silva, *The Constitutional Defense of Animals in Brazil*, in ANIMAL LAW AND WELFARE - INTERNATIONAL PERSPECTIVES 181, 183 (Deborah Cao & Steven White eds., Springer 2016).

¹⁶² See *id.* 189-90.

¹⁶³ See WAGMAN & LIEBMAN, *supra* note 149, at 40.

¹⁶⁴ See *id.* at 39-40.

¹⁶⁵ See Silva, *supra* note 161, at 188.

and eventually knocked over by pulling the tail—was struck down by the Federal Supreme Court of Brazil.¹⁶⁶ Several protests were organized in the Northeastern Region of Brazil, where *vaquejada* was common, and some protesters even reached the capital city.¹⁶⁷

The protesters claimed that *vaquejada* used to include cruel practices in the past, but its regulation was more considerate of the welfare of bulls.¹⁶⁸ According to them, the tradition was also an important source of income for many people in the region.¹⁶⁹ The legislature stepped in upon the protests, but a federal law was not sufficient to override the verdict of the Federal Supreme Court of Brazil. In 2017, a constitutional amendment exempted animal sports from the scope of prohibition as long as they were considered cultural manifestations.¹⁷⁰ In the aftermath of the constitutional amendment, *vaquejada* and some other animal sports were defined and regulated as cultural manifestations through legislative acts.¹⁷¹ The Federal Supreme Court of Brazil may still interpret whether such animal sports are cultural manifestations within the meaning sought in the constitution, yet its discretion is limited by the amended constitutional provision. The example of Brazil shows that even a constitutional recognition of specific animal interests may be vulnerable to political retaliations.

3.1.3 Germany

The federal constitution of Germany, usually called the Basic Law, had a specific provision that imposed a positive duty on the state to protect “natural foundations of life”.¹⁷² The term was too broad to conclude without suspicion that the protection of animals other than humans was within its scope. A constitutional amendment in 2002 clarified the vague terminology by expressly mentioning animals as beings that deserve

¹⁶⁶ See Carolina Maciel, *The Legal Protection of Animals in Brazil: The Awakening of a Giant Potential*, 22 REVISTA: HARV. REV. LATIN AM. (2023), <https://revista.drclas.harvard.edu/the-legal-protection-of-animals-in-brazil/>.

¹⁶⁷ Yara Aquino, *Several Protests Sparked Across the Northeastern Region of Brazil, Where Vaquejada Was Commonly Practiced, and Even in the Capital City*, AGÊNCIA BRASIL (Amarilis Anchieta trans., Oct. 25, 2016, 7:23 PM), <https://agenciabrasil.ebc.com.br/en/geral/noticia/2016-10/protest-against-ban-vaquejada-arrives-brazils-capital>.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ C.F. art. 225, para. 7 (Braz.).

¹⁷¹ See Maciel, *supra* note 166.

¹⁷² Grundgesetz [GG] [Basic Law] art. 20a, translation at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html.

protection by the state at the federal level.¹⁷³ The constitutional provision has been interpreted broadly since then, allowing the protection of other animals not for the sake of humans but for their own sake.¹⁷⁴

The inclusion of animals in the Basic Law marks a notable change in the status of animals other than humans in the law of Germany. Before the constitutional amendment, it could be argued that animal interests should not be considered when a human interest was at stake.¹⁷⁵ As a result of the constitutional principle to protect animals, it is now possible and in fact imperative for the state organs to compare the conflicting interests of humans and other animals.¹⁷⁶ It is also owing to this amendment that the animal protection clauses in federated state constitutions within Germany cannot be automatically dismissed vis-à-vis the rights of humans that are protected at the federal level.¹⁷⁷ It was initially debated whether the amended provision in the Basic Law was a mere clarification that did not necessarily have to result in any change of judicial interpretation regarding the legality of existing practices that affect animal interests.¹⁷⁸ However, it has since been used as a reference point by the judiciary in cases that require discussion of animal interests.¹⁷⁹

The rationale behind the constitutional amendment was to provide legal certainty on whether the sentience and suffering of animals other than humans could be considered in legal deliberations.¹⁸⁰ The Basic Law does not hold the interests of one species supreme over those of another species; instead, it provides an individual balancing ground at the constitutional level.¹⁸¹ Although it may justify prioritizing a crucial animal interest over a less significant human interest in specific cases, the inclusion of animals in the constitution is still not sufficient to outlaw all instances of animal exploitation or

¹⁷³ See WAGMAN & LIEBMAN, *supra* note 149, at 266.

¹⁷⁴ See Jessica Eisen, *Animals in the Constitutional State*, 15 INT. J. CONST. L. [I.CON] 909, 919 (2017).

¹⁷⁵ See JANNEKE VINK, *THE OPEN SOCIETY AND ITS ANIMALS* 212 (Palgrave Macmillan 2020).

¹⁷⁶ See Eva Bernet Kempers, *Neither Persons nor Things: The Changing Status of Animals in Private Law*, 29 EUR. REV. PRIV. L. 39, 44 (2021).

¹⁷⁷ See Claudia E. Haupt, *The Nature and Effects of Constitutional State Objectives: Assessing the German Basic Law's Animal Protection Clause*, 16 ANIMAL L. REV. 213, 221 (2010).

¹⁷⁸ See WAGMAN & LIEBMAN, *supra* note 149, at 267-68.

¹⁷⁹ See Bernet Kempers, *supra* note 176.

¹⁸⁰ See Haupt, *supra* note 177, at 220.

¹⁸¹ See Elien Verniers, *The Impact of Including Animals in the Constitution—Lessons Learned from the German Animal Welfare State Objective*, 8 GLOB. J. ANIMAL L. Oct. 2020, at 16, <https://ojs.abo.fi/ojs/index.php/gjal/article/view/1691>.

suffering.¹⁸² The constitutional provision does not create animal rights but only obligates consideration of animal welfare. Nevertheless, it presents a potentially powerful interpretative ground for further development of animal law.

3.1.4 India

The Constitution of India is a highly casuistic example of its kind with almost 400 articles. It includes two provisions in the context of animal interests: one that includes a general provision regarding all living beings as part of the environment and another one that specifically relates explicitly to certain animal species. The first of these provisions states that every citizen of India must “protect and improve the natural environment” and “have compassion for living creatures”.¹⁸³ In contrast, the latter obliges the state to “take steps” for “prohibiting the slaughter of cows and calves and other milch and draught cattle”.¹⁸⁴

The positive duty to be compassionate is interpreted broadly by the judiciary of India in a way that leaves no room for discretion over investigating or prosecuting cases of actionable cruel conduct against animals.¹⁸⁵ This approach in the law of India regarding animals resembles, in the context of human rights, the positive obligation of a state to prevent violations of a right and to investigate the violations if it fails to do so.

A unique feature of the Constitution of India is that it expressly endorses federated states to prohibit the slaughter of certain bovines. Thus, state legislatures can enact laws that penalize the act of slaughter under constitutional guarantee. The fact that constitutional protection applies only to a limited number of species indicates that the underlying principle is not respect for the inherent value of animals. Political and religious motives play a more significant role in the adoption of such a prohibition, considering that the protected species are deemed sacred in a variety of prevalent religions in India.¹⁸⁶

¹⁸² See VINK, *supra* note 175, at 214.

¹⁸³ India Const. art. 51A, cl. 1(g).

¹⁸⁴ *Id.* art. 48.

¹⁸⁵ See WAGMAN & LIEBMAN, *supra* note 149, at 262-63.

¹⁸⁶ See Sambaiah Gundimeda, *Debating Cow-Slaughter: The Making of Article 48 in the Constituent Assembly of India*, 22 INDIA REV. 1, 22 (2023).

3.2 *Discussions in Criminal Law*

In the simplest sense, criminal law may be defined as the set of rules that govern a legal system's response to violations of specific values of societal importance.¹⁸⁷ It deals with the type of actions that a law defines and categorizes as a crime, often due to its detrimental impact on the victim and society. The type of sanction that a law imposes on a criminal action is called a punishment, which usually takes the form of restriction of the perpetrator's freedom or a punitive fine.

In modern legal systems, criminal liability is exclusively caused by human action or inaction. However, there are historical occurrences of animals other than humans being tried and punished for their alleged crimes.¹⁸⁸ Although those trials were claimed to be in pursuance of justice for the damage inflicted upon humans by other animals, our contemporary understanding of justice does not tolerate holding them criminally liable as their actions are naturally not guided by the moral considerations of right or wrong.¹⁸⁹

It is clear that an animal other than a human cannot be the perpetrator of a crime, yet there seems to be no consensus on whether such an animal can be the victim of a crime committed by a human. Among the criminal laws that penalize violations of specific animal interests, the United Kingdom is examined hereunder as an example of how legislation may raise the standards of animal welfare, Israel as an example of how jurisprudence may raise the standards of animal welfare, Canada as an example of how federal and federated criminal laws may interact in this context, and lastly Norway as an example of how anti-cruelty laws may be made more legally foreseeable and yield more floor to the inherent value of animals.

3.2.1 *United Kingdom*

In the 19th century, the legislature in the United Kingdom was influenced by a wave of increasing public compassion towards groups that the law had traditionally neglected, and these did not only include groups of humans such as children or inmates, but also

¹⁸⁷ See Johannes Keiler, Michele Panzavolta & David Roef, *Criminal Law*, in INTRODUCTION TO LAW 129, 131 (Jaap Hage, Antonia Waltermann & Bram Akkermans eds., Springer, 2nd ed. 2017).

¹⁸⁸ See Ridler, *supra* note 115, at 102.

¹⁸⁹ See *id.* at 110.

some animals other than humans.¹⁹⁰ Early legislative attempts to ban blood sports involving animals failed as their substance was found overparticular and subjective by the House of Lords.¹⁹¹ A later legislative attempt that aimed to protect the so-called *beasts of burden* from cruel treatment was approved by the House of Lords, but the House of Commons rejected it for being too vague.¹⁹²

The first legislative act in this context to pass from both houses was the Cruel Treatment of Cattle Act of 1822. This Act imposed a fine on any person who “wantonly and cruelly beat, abuse, or ill-treat” horses, mules, donkeys, oxen, cows, and other cattle, upon complaint by third parties.¹⁹³ The Cruelty to Animals Act of 1835 expanded the content and scope of the previous Act by banning a more comprehensive range of blood sports involving animals, adding dogs and other companion animals among the protected species, and torture among the prohibited actions.¹⁹⁴ It also specified the time and manner of professional slaughter of horses and cattle.¹⁹⁵ These earlier acts were the parliament’s acknowledgment of the growing societal concern for animal welfare in the United Kingdom.

The Protection of Animals Act of 1911 was a more comprehensive revision of the former anti-cruelty legislation in the United Kingdom.¹⁹⁶ It penalized the commission or omission of a wide range of behaviors that cause unnecessary suffering to not particular animal species but “any domestic or captive animal” in the generic sense with a few specified exceptions.¹⁹⁷ Even in cases where the perpetrator is also the legal owner, failure to exercise reasonable care and supervision that results in the defined forms of cruelty was made punishable thereunder.¹⁹⁸ This meant that the law of the United Kingdom would now prioritize an animal’s interest in not being subjected to cruelty over a human’s right to property that is exerted in an abusive manner.

The most recent anti-cruelty codification in the United Kingdom is the Animal Welfare Act of 2006, which consolidated the previous acts preventing unnecessary

¹⁹⁰ See Steven White, *Animal Protection Law in Australia: Bound by History*, in ANIMAL LAW AND WELFARE - INTERNATIONAL PERSPECTIVES 109, 113 (Deborah Cao & Steven White eds., Springer 2016).

¹⁹¹ See *id.* at 114.

¹⁹² See *id.* at 114-15.

¹⁹³ See *id.* at 115-16; Cruel Treatment of Cattle Act 1822, 3 Geo. 4 c. 71 (UK).

¹⁹⁴ Cruelty to Animals Act 1835, 5 & 6 Will. 4 c. 59 (UK).

¹⁹⁵ See White, *supra* note 190, at 117.

¹⁹⁶ See WAGMAN & LIEBMAN, *supra* note 149, at 150.

¹⁹⁷ Protection of Animals Act 1911, 1 & 2 Geo. 5 c. 27, § 15 (UK).

¹⁹⁸ *Id.* § 1.

suffering, promoting welfare, and regulating related procedural rules and obligations in conformity with up-to-date standards.¹⁹⁹ The new Act only covers vertebrates with a few specified exceptions.²⁰⁰ It prohibits causing unnecessary suffering to animals protected by law. Within the context of legally allowed practices that inevitably involve suffering to a certain degree, it penalizes breaches of animal care regulations.²⁰¹

The Animal Welfare Act of 2006 enhances animal protection standards from three noteworthy aspects. Firstly, aside from more defined protective measures, it also introduces a preventive approach in the prosecution of offenses of cruelty so that the competent investigating authority can intervene without having to wait for the perpetrator to harm an animal.²⁰² Secondly, it broadens the concept of unnecessary suffering by including psychological distress along with physical harm and thus expands the legal acknowledgment of sentience in animals.²⁰³ Thirdly, the sanctions, in addition to imprisonment and punitive fine under the Animal Welfare Act of 2006, are not limited to separating the victim animal from the perpetrator and depriving the perpetrator of asserting certain legal powers over the victim animal. The court may also disqualify the perpetrator from owning animals, keeping animals, participating in keeping animals or even being party to an arrangement that enables the perpetrator to have control or influence over the keeping of animals in general.²⁰⁴ These consequences that exceed the victim animal add to the Act's deterrent aspect.

3.2.2 Israel

The penal code in Israel has prohibited animal abuse since the time it was a British colony.²⁰⁵ However, unlike in the United Kingdom, the law of Israel used to lack a legal basis for enforcing the prohibitive provisions that protected animals other than humans.²⁰⁶ This became possible in 1994 by the Animal Protection Law, which not only penalized

¹⁹⁹ See Angus Nurse, *Beyond the Property Debate: Animal Welfare as a Public Good*, 19 CONTEMP. JUST. REV. 174, 181 (2016); Animal Welfare Act 2006, c. 45 (UK).

²⁰⁰ Animal Welfare Act 2006, c. 45, § 1 (UK).

²⁰¹ *Id.* §§ 4, 9.

²⁰² See Nurse, *supra* note 199, at 181.

²⁰³ See *id.*; Animal Welfare Act 2006, c. 45, § 9 (UK).

²⁰⁴ Animal Welfare Act 2006, c. 45, § 34 (UK).

²⁰⁵ See Yossi Wolfson, *Animal Protection Under Israeli Law*, in ANIMAL LAW AND WELFARE - INTERNATIONAL PERSPECTIVES 157, 159 (Deborah Cao & Steven White eds., Springer 2016).

²⁰⁶ See WAGMAN & LIEBMAN, *supra* note 149, at 35.

torture, cruel treatment, and any other sort of abuse of animals,²⁰⁷ but also named the authorities in charge of implementing the law and stipulated other preventive and protective measures.²⁰⁸

The Animal Protection Law did not include an in-depth definition of the umbrella term of *animal abuse*, and its content materialized through the case-law of the Supreme Court of Israel.²⁰⁹ In its pivotal ruling in the case of *Let the Animals Live v. Hamat Gader*,²¹⁰ the Supreme Court of Israel discussed the legality of a spectacle in which an alligator was disturbed and provoked to fight a man seemingly.²¹¹ According to the Court's interpretation, an animal's suffering did not have to be solely physical, but it could also be caused by psychological distress.²¹² It was also held that the elements of the crime shall be determined objectively. Thus, the perpetrator's motive to commit the prohibited actions was irrelevant in terms of criminal liability.²¹³

Another significant aspect of the ruling in *Let the Animals Live v. Hamat Gader* was that the Supreme Court of Israel resorted to a balancing test for measuring the proportionality of protecting animal interests.²¹⁴ Similar to the proportionality test applied to the laws that restrict fundamental human rights, the Supreme Court of Israel examined, *inter alia*, whether the interference with the animal's interest in not suffering was necessary and whether there could be other means that cause less suffering.²¹⁵ This method may also be compared with the sufficiency test proposed by the interest-based rights theory that seeks to find a middle ground between welfarism and abolitionism by comparing an animal's interest with how much and how long one receives benefit from exploiting the animal. In both approaches, a human interest may outweigh specific common animal interests, but watching a wild animal being irritated to perform specific tasks at an unnatural habitat is not one of those human interests that are worthy of

²⁰⁷ See Wolfson, *supra* note 205.

²⁰⁸ See MINISTRY OF ENV'T PROT. (Isr.), *The Animal Welfare (Animal Protection) Law, 1994*, https://www.gov.il/en/pages/animal_protection_law_1994 (last visited May 2, 2024).

²⁰⁹ See Wolfson, *supra* note 205.

²¹⁰ CivA 1684/96 *Let the Animals Live v. Hamat Gader*, 51(3) PD 832 (1997) (Isr.), translation at <https://www.animallaw.info/case/let-animals-live-v-hamat-gader>.

²¹¹ See Wolfson, *supra* note 205.

²¹² See *id.*

²¹³ See *id.*

²¹⁴ See *id.* at 159-60.

²¹⁵ See *id.*

protection.²¹⁶ Nevertheless, it should be noted that the law of Israel penalizes *misuse* rather than *use* of animals and is still centered around the utility of other animals to human needs.²¹⁷ Therefore, the Israeli approach is not a carbon copy of the interest-based rights theory but rather a more animal-oriented adaptation of the already existing proportionality test within a different context.

3.2.3 Canada

Federal states like Australia or the United States are localized in their manner of legislating anti-cruelty laws, meaning federated states enact their own rules and procedures.²¹⁸ In contrast, some other federal states like Switzerland or Canada have centralized anti-cruelty laws that are enacted at the federal level.²¹⁹ An apparent advantage of the centralized approach is that it provides certain animal interests with a uniform and more widely applicable protection that federated state legislatures cannot curb. However, federal laws usually require more complex bureaucratic processes and a higher threshold of consensus to be amended compared to federated state laws. Over the course of time, a federal anti-cruelty law might become outdated and even impede the progress at the federated level where most of the cases that involve discussion of animal interests occur and are heard. This was observed in the example of Canada whose criminal law is almost exclusively federal.²²⁰

The anti-cruelty legislation in Canada dates back to the late 19th century, during which the overarching concern of the legislature was the protection of property. Since then, it has not undergone an extensive revision except for the renumbering of former provisions and the switch to a broader terminology instead of naming specific animal species.²²¹ The relevant provisions in the Criminal Code of Canada (CCC) are still placed under a title that refers to animals other than humans as property.²²² Sections 445 and 445.01 of the CCC penalize killing or injuring certain animals “wilfully and without

²¹⁶ Cf. COCHRANE, *supra* note 93, at 138 (discussing that the exploitation and captivity of animals in circuses and zoos for the purpose of entertaining humans do not comply with the interest-based rights theory).

²¹⁷ See Wolfson, *supra* note 205, at 160.

²¹⁸ See WAGMAN & LIEBMAN, *supra* note 149, at 45, 149.

²¹⁹ See *id.* at 167.

²²⁰ See *id.* at 156.

²²¹ See *id.* at 157.

²²² Criminal Code, R.S.C. 1985, c. C-46, part XI (Can.).

lawful excuse” in defined ways. Under these provisions, only intentional conduct against animals is punishable.²²³ Moreover, legal protection is granted only to animals that are kept by humans, with the exception of dogs and birds.²²⁴ These aspects of the CCC solidify the *property* status of animals other than humans in the law of Canada, although most other contemporary anti-cruelty legislations tend to differentiate animals from any other good or entity.²²⁵

Section 445.1 was added to the CCC in 2008, and it prohibits intentionally causing unnecessary pain, suffering, or injury to an animal by any person or the permission of these actions by the so-called owner. It also prohibits specific actions related to fighting, baiting, and poisoning of animals. Inclusion of the owner’s criminal liability is an apparent deviation from the original property-based approach in the law of Canada.²²⁶ However, the provision is still insufficient as it does not entail liability from negligence despite considering the failure to exercise reasonable care as evidence of intent.²²⁷ The vague wording might lead to ambiguity in interpreting which sufferings are necessary or unnecessary.²²⁸

Section 446 of the CCC penalizes willful negligence that consequently harms an animal while driving or conveying. It also prohibits abandoning a companion animal or a captive animal of the wildlife in distress, or willfully neglecting or failing to provide them with certain suitable and adequate means of maintenance by the so-called owner or keeper. An amendment in 2008 added failure to exercise reasonable care as evidence of willful negligence. Other provisions that aim to protect certain animal interests in the CCC are Section 160, which was largely amended in 2019 to define and penalize all forms of bestiality; Section 445.2, which was added in 2019 to prohibit keeping or breeding certain aquatic mammals; Section 447, which prohibits a wide range of actions related to animal fighting arenas, and Section 447.1 which specifies sanctions in addition to imprisonment or punitive fine, i.e., restraining the perpetrator’s access to other animals and ordering the perpetrator to pay compensation.

²²³ See James Gacek, *Confronting Animal Cruelty: Understanding Evidence of Harm Towards Animals*, 42 MAN. L.J. 315, 321 (2019).

²²⁴ See *id.*

²²⁵ See WAGMAN & LIEBMAN, *supra* note 149, at 143.

²²⁶ See *id.* at 157-58.

²²⁷ See Gacek, *supra* note 223, at 322.

²²⁸ See *id.*

The amendments to the CCC regarding animals other than humans were attempts to adapt obsolete provisions in accordance with the necessities of the time due to the absence of criminal anti-cruelty laws at the federated level. As a legacy of the dominant idea in the law of Canada that an animal interest cannot justify an interference with the human right to property, both federal and federated legislatures have long refrained from raising the minimum standards of animal welfare.²²⁹ The slow-paced development of the entirely federal anti-cruelty legislation initially prolonged the progress at the federated level to the degree that even major Canadian states waited until the dawn of the 21st century to enact their very first anti-cruelty laws.²³⁰ Since these relatively newly enacted laws in federated states were inspired by contemporary sources, they ended up noticeably more considerate of animal interests.²³¹ The criminal law of Canada is a striking example of how federal and federated laws interact in a way that may either foster or hinder progress, and it demonstrates the importance of coordination between varying jurisdictional layers within a state.

3.2.4 Norway

Legal provisions regarding animal welfare in Norway are codified under the Animal Welfare Act. It presents a thorough list of protected animal species, including all mammals, birds, reptiles, amphibians, fish, and certain invertebrates.²³² Even unborn members of these species are taken into the scope of the Act as long as they are at a stage that suffices to consider them sentient.²³³ Instead of repeating the term *unnecessary suffering*, which may cause more ambiguity in interpretation, the current Act attempts to clarify the content of suffering by laying down a general rule to protect animals from the “danger of unnecessary stress and strains.”²³⁴

A notable aspect of the Animal Welfare Act is that it does not include a general provision that prohibits cruelty but individually defines a wide range of punishable

²²⁹ See *id.* at 319-20.

²³⁰ See WAGMAN & LIEBMAN, *supra* note 149, at 158.

²³¹ See *id.* at 158-59.

²³² LOV OM DYREVELFERD [ANIMAL WELFARE ACT] July 10, 2009, No. 97, § 2 (Nor.), translation at <https://www.regjeringen.no/en/dokumenter/animal-welfare-act/id571188/>.

²³³ See Charlotte E. Blattner, *The Recognition of Animal Sentience by the Law*, 9 J. ANIMAL ETHICS 121, 123 (2019).

²³⁴ See Ellen-Marie Forsberg, *Inspiring Respect for Animals Through the Law? Current Development in the Norwegian Animal Welfare Legislation*, 24 J. AGRIC. & ENV'T ETHICS 351, 354-55 (2011).

actions that are deemed cruel.²³⁵ The Act outlaws killing animals for the sole purpose of entertainment or competition and, in cases where killing is allowed, requires that legally owned or kept animals be stunned in advance so that they remain unconscious until death occurs.²³⁶ Committing an offense or aiding and abetting is punishable by imprisonment and punitive fine under the Animal Welfare Act.²³⁷ Additionally, it allows courts to order preventive or protective measures to protect victim animals.²³⁸ Aside from offenses, the Act also specifies detailed duties to help if an animal is found “sick, injured, or helpless” and to notify the authorities if there is suspicion of “mistreatment or serious neglect” of an animal.²³⁹

Norway’s Animal Welfare Act not only contains relatively high standards for animal welfare but is also one of the few legislative acts that expressly refers to the inherent value of animals.²⁴⁰ The Act itself has welfarist characteristics and is far from an entirely rights-based text, as it tolerates the established forms of exploiting animals for human interests. On this account, some legislators initially discussed that the reference to the inherent value of animals was merely symbolic and would not constitute an interpretative ground.²⁴¹ However, scholars highlight the fact that the very first article of the Animal Welfare Act includes respect for animals as one of its principal concerns and thereby argue that the reference declares that animals deserve protection solely because they are beings worthy of protection, not because of the utility of their protection.²⁴² Symbolic or not, including the inherent value of animals and the principle of respect to animals in a legislative act is a progressive step in terms of the legal recognition of animal interests.

3.3 *Discussions in Private Law*

Private law is a major branch of law that regulates the legal relations that are not of a public character.²⁴³ It is concerned with individuals’ legal status and their legal relations. The capacity to hold rights is primarily determined by private law, as the law of persons

²³⁵ See WAGMAN & LIEBMAN, *supra* note 149, at 165-66.

²³⁶ LOV OM DYREVELFERD [ANIMAL WELFARE ACT] July 10, 2009, No. 97, § 12 (Nor.), translation at <https://www.regjeringen.no/en/dokumenter/animal-welfare-act/id571188/>.

²³⁷ *Id.* §§ 29, 37.

²³⁸ *Id.* § 32.

²³⁹ *Id.* §§ 4-5.

²⁴⁰ See Forsberg, *supra* note 234, at 355-56.

²⁴¹ See *id.* at 356.

²⁴² See *id.* at 357.

²⁴³ See Hage, *supra* note 11, at 34.

and the law of property are fields thereunder. This makes private law an integral part of the animal rights discourse because to have legal rights, one must first have a legally recognized personhood upon which legal rights may be bestowed.

Animals other than humans have traditionally been treated as property.²⁴⁴ Wildlife animals have been considered as public or unclaimed goods unless they are put under the dominion of private persons. In contrast, captivated or companion animals have been regarded as private goods.²⁴⁵ In any case, they have been devoid of personhood in the legal sense, and their interests have not been legally recognized as rights despite ongoing theoretical arguments on the contrary. The legal status quo that disregards sentience in animals is inconsistent with the contemporary sense of justice.²⁴⁶ This discrepancy urges private laws to acknowledge that animals other than humans ought not be treated as any belonging at the disposal of humans.

Though none completely grant personhood to animals other than humans, some legal systems resort to criminal law to distinguish animals from non-sentient beings through welfare and anti-cruelty legislation. On the other hand, some legal systems also opt for designating a third legal status category in their private laws that is between a *person* and a *thing* to that end.²⁴⁷ Within this context, the private law of the United States is examined hereunder to discuss the tortious liability arising from harming an animal in the absence of a separate legal status category, New Zealand to demonstrate a legislative attempt and Austria to demonstrate a judicial attempt to grant certain animal species legal personhood, and lastly, the Netherlands to examine the effects of creating a separate legal status for animals on various fields of private law.

3.3.1 *United States*

The interest of animals other than humans in their bodily integrity is not recognized as a right, whereas the right to property of humans over other animals is a well-established fundamental right in the United States. Therefore, if an unjustified injury is inflicted upon an animal other than a human, tortious liability arises only when there is a human interest over the bodily integrity of the animal. The tortfeasor in the given scenario would be

²⁴⁴ See WAGMAN & LIEBMAN, *supra* note 149, at 26.

²⁴⁵ See SCHAFFNER, *supra* note 87, at 19-20.

²⁴⁶ See Ridler, *supra* note 115.

²⁴⁷ See Bernet Kempers, *supra* note 176.

obliged to compensate the pecuniary damage of the person who exerts a legal right over the animal, but whether the non-pecuniary damage would be considered or not was discussed by the Ohio Court of Appeals in 2003.²⁴⁸

The facts of the case relate to a spaying surgery conducted on a puppy who had already been spayed.²⁴⁹ The puppy and her caregivers filed a lawsuit in which they claimed compensation for, *inter alia*, the pain the puppy had to endure and the psychological distress they all had suffered due to the veterinary malpractice. The plaintiffs appealed the decision of the district court to dismiss the case. The Ohio Court of Appeals held in its final decision that companion animals were considered as personal property, and damages incurred to personal property were not subject to non-pecuniary compensation under the state law.²⁵⁰ Despite agreeing that animals are capable of suffering pain and distress, the court of appeals also ruled that the pain and psychological distress experienced by an animal other than a human is not reimbursable, since the subjective aspect thereof cannot be evaluated nor proven.²⁵¹ The appeal was therefore not upheld. The law of Ohio is not alone in reaching these conclusions. There is currently no state law in the United States that grants personhood to any animal species besides humans, even though there are numerous welfare and anti-cruelty laws and regulations at both federal and federated levels.²⁵²

If the tort results in the death of an animal legally owned by a person, civil courts in the United States tend to compensate the *market price* of the animal, and if possible, the anticipated economic benefits one would gain from exploiting the animal.²⁵³ This formula might lead to unjust conclusions, especially regarding companion animals. Companion animals such as cats, dogs, fish, or rabbits taken care of inside a residence are usually not expected to generate profit. From a purely arithmetical standpoint that ignores the emotional bond between the companion animal and the caregiver, one could even argue that the loss of a companion animal would make the caregiver financially better off as this occurrence would reduce caregiving expenses.²⁵⁴ For this reason, some civil courts

²⁴⁸ See SCHAFFNER, *supra* note 87, at 162; *Oberschlake v. Veterinary Associates Animal Hospital*, 785 N.E.2d 811 (Ohio Ct. App. 2003).

²⁴⁹ See SCHAFFNER, *supra* note 87, at 162.

²⁵⁰ *Oberschlake v. Veterinary Assocs. Animal Hosp.*, 785 N.E.2d 811, ¶ 15 (Ohio Ct. App. 2003).

²⁵¹ See SCHAFFNER, *supra* note 87, at 163.

²⁵² See WAGMAN & LIEBMAN, *supra* note 149, at 38-39.

²⁵³ See SCHAFFNER, *supra* note 87, at 163-64.

²⁵⁴ See *id.*

in the United States abandoned viewing companion animals as mere commodities considering their changing role in the society.²⁵⁵

Distinguishing the loss of a companion animal from the destruction of personal property would not be an entirely extralegal conclusion. The common law, as applied in the United States, allows for compensation for the relative value of the destroyed property to the owner if the owner proves that the loss is irreversible and their grief is exceptionally beyond endurance.²⁵⁶ From the caregiver's perspective, the loss of a companion animal is not merely a loss of *property* but is, perhaps more significantly, a loss of companionship.²⁵⁷ Therefore, as long as the legal status of animals remains unchanged, interpreting the loss of companionship as a compensation component would be a more equitable outcome.

3.3.2 New Zealand

The term *great ape* is used to designate members of four simian species—i.e., bonobos, chimpanzees, gorillas, orangutans—collectively referred to as hominids.²⁵⁸ As their collective name suggests, they are viewed as the closest living species to humans based on their capacities and appearance. This makes them the most likely contenders to share the legal personhood status with humans. One of the major proponents of this idea, the Great Ape Project (GAP), is an influential international movement founded by philosophers Paola Cavalieri and Peter Singer that advocates for the worldwide legal recognition and protection of basic hominid interests as rights.²⁵⁹ Owing to a campaign by the GAP in New Zealand in the late 1990s, the discussions revolving around the legal status of hominids were finally brought up in a legislative body.²⁶⁰

New Zealand revised and renewed its animal welfare legislation in 1999 by enacting the Animal Welfare Act.²⁶¹ Although the legal personhood of hominids as proposed by the GAP was eventually rejected, the related parliamentary discussions led to the formulation of a provision in which “research, testing, or teaching involving the use of a

²⁵⁵ See *id.* at 166.

²⁵⁶ See *id.* at 166-67.

²⁵⁷ See *id.*

²⁵⁸ See Sheryl N. Hamilton, ‘Human No Like Smart Ape’: Figuring the Ape as Legal Person in *Rise of the Planet of the Apes*, 10 LAW & HUMAN. 300, 309 (2016).

²⁵⁹ See *id.* at 311.

²⁶⁰ See WAGMAN & LIEBMAN, *supra* note 149, at 21.

²⁶¹ See *id.* at 20-21.

non-human hominid” was prohibited unless otherwise approved by the competent authority.²⁶² Thus, New Zealand’s Animal Welfare Act became the first of its kind to prohibit experimentation on hominids expressly.²⁶³

Even though the earliest legislative attempt to grant legal personhood to certain animal species failed in the case of New Zealand, it inspired further legislative developments in animal experimentation. Many other legal systems worldwide followed the same path by protecting certain animal species from being experimented on.²⁶⁴ San Marino outlawed all sorts of animal experimentation irrespective of the species in 2007 with reference to sentience in animals and the ineffectiveness of such experiments.²⁶⁵ In the same year, the autonomous community of the Balearic Islands in Spain enacted a law that granted legal personhood to hominids.²⁶⁶ It is possible to infer from these previous examples a slow yet ongoing legislative trend towards expanding personhood beyond humanity.

3.3.3 Austria

Matthew Hiasl Pan, shortly known as just Hiasl, was a chimpanzee brought from Sierra Leone to Austria in 1982 to be subjected to scientific experimentation.²⁶⁷ Although his transfer breached the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) to which Austria had already been a party, the company that captivated Hiasl was permitted to keep him owing to a court decision.²⁶⁸ The animal shelter where Hiasl received temporary care during the legal proceedings refused to abide by the decision until the new management of the company finally decided to donate him to the shelter as they were already planning to abandon the practice of animal experimentation.²⁶⁹ According to the Civil Code of Austria (ABGB), anything that was

²⁶² See *id.* at 189-90; Animal Welfare Act 1999, s 85 (N.Z.).

²⁶³ See WAGMAN & LIEBMAN, *supra* note 149, at 189.

²⁶⁴ See *id.* at 190.

²⁶⁵ See *id.* at 187-88.

²⁶⁶ See Hamilton, *supra* note 258, at 311.

²⁶⁷ See Ciméa Barbato Bevilaqua, *Chimpanzees in Court: What Difference Does It Make?*, in LAW AND THE QUESTION OF THE ANIMAL: A CRITICAL JURISPRUDENCE 71, 73 (Yoriko Otomo & Ed Mussawir eds., Routledge 2013).

²⁶⁸ See *id.* at 74.

²⁶⁹ See *id.*

not a *person* was a *thing*.²⁷⁰ Accordingly, animals other than humans were treated as mere property assets under the law back then. While Hiasl was staying in the animal shelter, an amendment to the ABGB passed in 1988 that added Section 285a in which it was clearly stated that animals were not considered things. However, there was no express recognition of personhood in the provision.²⁷¹ Moreover, the legal regime applicable to animals other than humans remained the same as that applied to things as a rule.²⁷²

The sanctuary where Hiasl was residing eventually went bankrupt. While the relevant proceeding continued, one of the shelter's donors asked the district court to appoint a legal guardian for Hiasl in 2007.²⁷³ This was an attempt to protect Hiasl from being auctioned and used in experimentations.²⁷⁴ The plaintiffs asserted that Hiasl qualified as a person under the law since he had the capacity to reason and shared an almost identical genetic structure as that of humans.²⁷⁵ The district court refrained from discussing the scientific evidence presented by the plaintiffs regarding the personhood of Hiasl, but instead dismissed the case on the ground that the conditions of appointing a legal guardian—i.e., having an intellectual disability or being under an imminent threat—were not present in the case at hand.²⁷⁶ All the following legal remedies, including an individual application to the European Court of Human Rights (ECtHR), ended up in vain as the case was found inadmissible on procedural grounds.²⁷⁷

Courts tend to evade the question of animal personhood, possibly due to the potential social and legal repercussions of breaching the existing distinction between humans and non-humans, which would require a radical change of mentality.²⁷⁸ Another reason for the hesitation might be the apparent moral dilemma arising from equality. If an animal other than a human retains the qualities that grant legal personhood to a human, it would simply be unjust to deprive the animal of the benefits of legal personhood from a moral perspective. However, vaguely written and practically unenforceable legal provisions

²⁷⁰ See *id.*; ALLGEMEINES BÜRGERLICHES GESETZBUCH [ABGB] [CIVIL CODE] § 285, <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001622> (Austria).

²⁷¹ See Bevilaqua, *supra* note 267, at 74.

²⁷² See *id.*

²⁷³ See *id.*

²⁷⁴ See Alexia Staker, *Should Chimpanzees Have Standing? The Case for Pursuing Legal Personhood for Non-Human Animals*, 6 TRANSNAT'L ENV'T L. 485, 497 (2017).

²⁷⁵ See *id.* at 498.

²⁷⁶ See *id.*

²⁷⁷ See Bevilaqua, *supra* note 267, at 78-79.

²⁷⁸ See Staker, *supra* note 274, at 501.

may hinder competent courts from drawing that conclusion. As in the case of Austria, the laws in which animals other than humans are not classified as things do not always further clarify the third legal status to which such animals belong, and this leads to ambiguity in determining the applicable legal regime.²⁷⁹

3.3.4 *The Netherlands*

The Civil Code of the Netherlands (BW) makes a distinction between persons and things, and it clearly states that animals are not things, whereas it does not classify animals as persons and subjects them to the legal regime of things as a rule.²⁸⁰ In addition to the BW, art. 1.3 of the Animals Act provides a reliable interpretative ground by recognizing the inherent value of animals.²⁸¹ Furthermore, the law attributes self-esteem to animals and acknowledges them as sentient beings.²⁸² An evident commitment to the legal recognition of specific animal interests lies under these general principles, yet none of them are directly applicable. Therefore, these provisions require additional legislation or judicial interpretation to become practically meaningful.

A private law field in which the inherent value of animals other than humans may play a role is tort law. In the case of the Netherlands, the recognition of the inherent value does not seem to have caused significant changes in the judiciary's approach on compensating damages resulting from torts.²⁸³ Regarding tortious liability, only pecuniary damages that correspond to the loss of the animal's *market price* and the expenses such as recovery or burial are compensated when a companion animal is injured or killed.²⁸⁴ Non-pecuniary damages that correspond to the caregiver's anguish, on the other hand, are not compensated due to lack of legal basis.²⁸⁵ Likewise, the law of the Netherlands does not prevent the seizure of animals other than humans, which means they may be sold to third parties as part of an enforcement process.²⁸⁶

²⁷⁹ See Bevilaqua, *supra* note 267, at 85.

²⁸⁰ See Bernet Kempers *supra* note 176, at 46; art. 3:2a BW.

²⁸¹ See Bernet Kempers *supra* note 176, at 45-46; Wet dieren [Animals Act], Stb. 2011, 345 (Neth.).

²⁸² See Jane Kotzmann, *Sentience and Intrinsic Worth as a Pluralist Foundation for Fundamental Animal Rights*, 43 OXFORD J. LEGAL STUD. 405, 415 (2023).

²⁸³ See Bernet Kempers, *supra* note 176, at 58.

²⁸⁴ See *id.* at 58, 61.

²⁸⁵ See *id.* at 58-59.

²⁸⁶ See *id.* at 63-64.

The references to sentience in animals and their inherent value in the law of the Netherlands are features of a rights-based approach. However, neither the recognition of sentience in animals nor of their inherent value seem to have equated the status of animals other than humans as that of persons in the legal sense. For this reason, the law of the Netherlands cannot be said to have fully embraced a rights-based approach and is still predominantly of a welfarist nature. That being said, acknowledging inherent value is not merely symbolic, as it provides a legal basis for judicial interpretation in favor of animals other than humans.²⁸⁷

Family law is another field of private law in which the consequences of a general recognition of the inherent value of animals may be observed. In divorce cases, the status of companion animals who once accompanied the parties is likely to be disputed. There is an overall consensus among courts in the Netherlands that the legal provisions regarding a parent's right to contact the child-in-common during and after the divorce cannot be applied through analogy to companion animals.²⁸⁸ This, however, does not mean that companion animals are divided as any household item under the law of the Netherlands. If the placement of a companion animal after the divorce is disputed, the court decides separately which party is to continue taking care of the animal, although it is still not within the court's jurisdiction to rule when and how the other party may visit the animal.²⁸⁹ This decision should be based not only on the interests of the parties but also on the interests of the animal.²⁹⁰

The legal recognition of the inherent value of animals had a surge in Europe following the enactment of art. 3:2a of the BW and art. 1.3 of the Animals Act.²⁹¹ Although such recognitions do not ipso facto grant legal personhood to animals other than humans, as seen in the example of the Netherlands, they prepare the intellectual infrastructure for further developments. The popularization of references to the inherent value in various legislations marks an emerging consensus that might result in the recognition of animals other than humans as legal right-holders.

²⁸⁷ See *id.* at 50.

²⁸⁸ See *id.* at 52.

²⁸⁹ See *id.* at 52-53.

²⁹⁰ See *id.* at 54-55.

²⁹¹ See Kotzmann, *supra* note 282, at 412.

3.4 *Discussions in International Law*

International law, as a branch of public law, relates to legal relations between states. It also governs international organizations established by international legal instruments. Since there is no international custom regarding animal interests, international law involves in this matter exclusively through international treaties.²⁹² As a consequence of the principle of state sovereignty, being bound by the terms of an international treaty depends on the consent of a state. Due to this unique aspect of international law, international treaties are usually drafted in a way that appeals to the largest possible number of states with varying approaches. Concerning animal interests, this often results in adopting a lower threshold of protection that more states are willing to agree on. Compared to domestic laws, on the other hand, international treaties are applicable on a broader scale, and their implementation may be supervised more easily by the international community.

International treaties may adopt a global or a regional approach depending on their geographical scope. There are advantages and disadvantages to both approaches. International treaties with a global approach are more widely applicable but pass over particular controversial problems and are usually devoid of effective enforcement mechanisms. Those with a regional approach, on the other hand, often provide more protective and observable measures but are applicable in a narrower area. Besides their geographical scope, the existing international treaty rules concerning animal interests may focus on regulating certain human activities or conserving certain species.²⁹³ The first type of treaties aim to sustain an economic activity by limiting its harmful consequences on the affected animals, whereas the latter type of treaties aim to enhance international cooperation for the protection of a particular fauna. Such international treaties are common in their goal of preventing the extinction of animal species.

Although no international treaty in force directly elaborates on the status of animals other than humans, numerous international treaties bear upon animal interests. The international treaties to be examined hereunder are a brief demonstration of a wide array of approaches, and it should be noted in advance that the relevant international instruments on the matter are not limited to them. The CITES sets forth rules to, *inter*

²⁹² See WAGMAN & LIEBMAN, *supra* note 149, at 282.

²⁹³ See *id.* at 279.

alia, regulate the international trade in endangered animals and is selected as an example of a treaty with a global approach. The Bern Convention also aims to conserve specified species and constitutes an example of a treaty with a regional approach. The International Convention for the Regulation of Whaling (ICRW) and the Convention on the Conservation of Migratory Species of Wild Animals (CMS) represent a global approach. The first is selected to exemplify a treaty specific to a particular economic activity, i.e., whaling, and the latter is selected to exemplify a treaty specific to certain species and their habitats, i.e., migratory species. An examination of the given treaties is expected to provide an understanding of how international law may regard animal interests.

3.4.1 *Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)*

The CITES was drafted out of concern for the animal and plant species that face threat of extinction due to commercial activities.²⁹⁴ It entered into force in 1975 and currently has more than 180 parties that constitute most of the international community.²⁹⁵ Three appendices accompany the convention, and the main text stipulates the legal regime to be applied under each appendix. Appendix I lists the species that are endangered due to international trade, Appendix II lists the species that may become endangered unless their trade is restricted. Lastly, Appendix III lists the species whose protection under the convention is requested by a state party and requires international cooperation.

The purpose of the CITES overrides the economic interests of states and individuals in gaining profit from exploiting endangered animal species through international trade.²⁹⁶ However, the convention does not cover domestic trade in endangered species, which may lead to contradictory practices by the state parties. A striking example thereof would be the trade in certain body parts of tigers that are often used in traditional Chinese medicine.²⁹⁷ The exports and imports of tigers are prohibited in the People's Republic of China as it is a state party to the CITES. Yet, there is still a relatively large domestic market for tigers and their certain body parts.²⁹⁸ There are thousands of tiger-breeding

²⁹⁴ See *id.* at 284; Convention on International Trade in Endangered Species of Wild Fauna and Flora, opened for signature Mar. 3, 1973, 993 U.N.T.S. 243.

²⁹⁵ See CITES, *What Is CITES*, <https://cites.org/eng/disc/what.php> (last visited May 22, 2024).

²⁹⁶ See WAGMAN & LIEBMAN, *supra* note 149, at 290.

²⁹⁷ See Amanda Whitford, *China and CITES: Strange Bedfellows or Willing Partners?* 22 J. INT'L WILDLIFE L. & POL'Y 342, 343 (2019).

²⁹⁸ See WAGMAN & LIEBMAN, *supra* note 149, at 291.

farms inside the country, and the heavy demand also boosts the market for tiger products in several neighboring countries that attract tourists from the People's Republic of China.²⁹⁹ Despite making the CITES more appealing to more states, the exclusion of domestic trade in endangered species may jeopardize the convention's purpose in the first place.³⁰⁰

Another serious setback in implementing the CITES is that when a species is protected under the convention, the unmet demand for the protected species may cause illicit markets to emerge.³⁰¹ This is aggravated by restricted animal products becoming rarer, and thus more expensive and profitable.³⁰² The convention does not provide effective precautions besides imposing permits and certificates. Under these circumstances, the lack of an enforcement mechanism may hinder the effectiveness of the CITES, as it relies solely on compliance by state parties.³⁰³

The CITES serves animal interests to a limited extent since its primary concern is neither their welfare nor their rights but the preservation of their species against the threat of extinction. For instance, the complete prohibition of trade in African elephants under the CITES at the beginning of the 1990s successfully led to a growth in their population.³⁰⁴ In less than a decade, the number of African elephants exceeded the threshold that had once put them under the protection of Appendix I of the CITES.³⁰⁵ In 1997, after pressure by some state parties claiming that the complete prohibition was unnecessary, African elephants were relisted in Appendix II of the CITES, which paved the way for hunting permits or trade in elephant products, albeit restrictedly.³⁰⁶ This step was followed by a quick reescalation of illegal poaching and trading activities that threatened the survival of African elephants again.³⁰⁷ The case of African elephants demonstrates that once an endangered animal species recovers and manages to sustain its

²⁹⁹ See Whitford, *supra* note 297, at 347-48.

³⁰⁰ See WAGMAN & LIEBMAN, *supra* note 149, at 293.

³⁰¹ See *id.* at 292.

³⁰² See Armin Rosencranz & Dhiren Sehgal, *Elephants, Ivory and CITES*, 47 ENV'T POL'Y & L. 2, 4 (2017).

³⁰³ See WAGMAN & LIEBMAN, *supra* note 149, at 292.

³⁰⁴ See Sabrina Persaud, *Losing Our "CITES" on the "Traffic": How Taxing Ivory Trafficking Can Save the African Elephant from Its Bloody Extinction*, 20 J. INT'L WILDLIFE L. & POL'Y 295, 302 (2017).

³⁰⁵ See WAGMAN & LIEBMAN, *supra* note 149, at 294.

³⁰⁶ See Persaud, *supra* note 304.

³⁰⁷ See *id.* at 303.

population, the CITES does not entirely protect its members from being killed, sold, or exploited in other ways.

Notwithstanding the obstacles related to its content and implementation, the CITES is still a pioneering international treaty. Art. XIV authorizes domestic laws to elevate the minimum standard of protection set by the convention. This provision has indeed given rise to stricter restrictions that protect certain animal species at both international and national levels.³⁰⁸ Although the CITES is not a welfarist instrument overall, it requires minimization of the risk of “injury, damage to health, or cruel treatment” of living animals in cases of shipment and transportation.³⁰⁹ The current approach of the CITES lags behind the contemporary scientific, social, and legal views and discussions on how animals other than humans are or should be perceived.³¹⁰ A potential revision of the CITES with a different approach that gives more weight to animal welfare and animal rights would better preserve the endangered wild fauna.

3.4.2 *Convention on the Conservation of European Wildlife and Natural Habitats (Bern Convention)*

The Bern Convention was prepared under the framework of the Council of Europe (CoE), and it currently has 51 parties, including the European Union (EU) as a separate party and several other states outside of Europe.³¹¹ As can be inferred from its preamble, it is an extensive international treaty that aims for nature conservation by protecting certain habitats and species of the wildlife.³¹² The main text of the convention establishes the Standing Committee as a treaty body and sets forth normative rules, whereas the appendices cover respectively the strictly protected plant species, strictly protected animal species, less strictly protected animal species, and prohibited means and methods of animal exploitation.³¹³

³⁰⁸ See WAGMAN & LIEBMAN, *supra* note 149, at 296.

³⁰⁹ See Whitford, *supra* note 297, at 361; Convention on International Trade in Endangered Species of Wild Fauna and Flora art. VIII, para. 3, *opened for signature* Mar. 3, 1973, 993 U.N.T.S. 243, 250.

³¹⁰ See Rosencranz & Sehgal, *supra* note 302, at 5.

³¹¹ COUNCIL OF EUROPE [CoE], *Biennial Reports*, <https://www.coe.int/en/web/bern-convention/biennial-reports> (last visited Sept. 10, 2024).

³¹² Convention on the Conservation of European Wildlife and Natural Habitats preamble, *opened for signature* Sept. 19, 1979, E.T.S. No. 104, 1284 U.N.T.S. 209, 210-11 [hereinafter *Bern Convention*].

³¹³ *Id.* at 211-14 (art. 5-8, 13).

The Bern Convention prohibits the deliberate killing and exploitation of the strictly protected animal species specified in Appendix II. Despite not prohibiting the deliberate killing and exploitation of the animal species specified in Appendix III, it encompasses provisions that prevent their overexploitation.³¹⁴ With regards to the animal species whose exploitation is permitted under the convention, art. 8 prohibits the “use of all indiscriminate means of capture and killing and the use of all means capable of causing local disappearance of, or serious disturbance to, populations of a species” under any circumstances whatsoever.

In order to keep the convention up to date, the Standing Committee is entrusted with reviewing the provisions of the Bern Convention and recommending amendments to its appendices. These duties of the Standing Committee make the implementation of the convention more adaptable to changing conditions.³¹⁵ To give an example, climate change was not considered in the making of the Bern Convention in 1979, but the flexible treaty system makes it possible to address the issue through the decisions and recommendations of the Standing Committee within the limits of interpretation.³¹⁶ In this context, the Standing Committee has even established a Group of Experts on Biodiversity and Climate Change.³¹⁷

Civil society has a meaningful impact in the implementation of the Bern Convention.³¹⁸ The convention has a monitoring mechanism that receives complaints of non-compliance from relevant NGOs and citizens of state parties.³¹⁹ This case-file system is not stipulated in the text of the convention but was established by the Standing Committee itself.³²⁰ Since not all activities detrimental to the wildlife and natural habitats might draw international attention, enabling local citizens and relevant organizations to report potential breaches fosters the effectiveness of the Bern Convention. Nevertheless,

³¹⁴ See Carolina Lasén Díaz, *The Bern Convention: 30 Years of Nature Conservation in Europe*, 19 REV. EUR. COMPAR. & INT’L ENV’T L. [RECIEL] 185, 185-86 (2010).

³¹⁵ See *id.* at 187-88.

³¹⁶ See Arie Trouwborst, *Conserving European Biodiversity in a Changing Climate: The Bern Convention, the European Union Birds and Habitats Directives and the Adaptation of Nature to Climate Change*, 20 REV. EUR. COMPAR. & INT’L ENV’T L. [RECIEL] 62, 65, 70 (2011).

³¹⁷ CoE, *Group of Experts on Biodiversity and Climate Change*, <https://www.coe.int/en/web/bern-convention/on-biodiversity-and-climate-change> (last visited May 27, 2024).

³¹⁸ See Lasén Díaz, *supra* note 314, at 189.

³¹⁹ See *id.* at 194.

³²⁰ See *id.*

it should be noted that the Standing Committee is a political body, and the judicial means of dispute resolution as stipulated in art. 18 may only be initiated by the state parties.³²¹

A notable aspect of the Bern Convention is that it expressly refers to, *inter alia*, the “economic and intrinsic value” of the wild flora and fauna.³²² Although this reference gives the impression of a rights-based approach, the Bern Convention does not recognize animals other than humans as ends in themselves. The text of the convention is not written so as to grant rights to individual beings, but instead, it acknowledges the value of ecosystems as a whole.³²³ The economic value is mentioned right next to the intrinsic value in the preamble, and the convention tackles overexploitation rather than the concept of exploitation. Art. 9 reaffirms the *property* status of animals exploited for human needs. These facts demonstrate that the Bern Convention prioritizes human subsistence over other concerns.³²⁴ However, compared to other broader international treaties on the same matter, such as the CITES, the regional character of the Bern Convention allows it to be more participatory and comprehensive, which reduces the level of anthropocentrism within the convention mechanism.

3.4.3 *International Convention for the Regulation of Whaling (ICRW)*

Whale is the umbrella term for a group aquatic mammal species that are usually larger than and apart from other cetaceans such as dolphins and porpoises.³²⁵ Humans have long hunted whales to use their body parts as food or fuel. This rooted practice is referred to as whaling. In the early 20th century, whalers noticed that whales could not reproduce as rapidly as they were hunted, and their numbers were shrinking steadily.³²⁶ For this reason, the earliest endeavors to increase the whale population aimed entirely at sustaining the whaling industry.³²⁷

³²¹ See David Rodríguez Goyes, *Contending Philosophical Foundations in International Wildlife Law: A Discourse Analysis of CITES and the Bern Convention*, 12 REVISTA CATALANA DE DRET AMBIENTAL [RCDA] 1, 10-11 (2021).

³²² Bern Convention, *supra* note 312, at 210 (preamble).

³²³ See Goyes, *supra* note 321, at 22.

³²⁴ See *id.* at 25.

³²⁵ See INTERNATIONAL WHALING COMMISSION [IWC], *Small Cetaceans - Dolphins and Porpoises*, <https://iwc.int/management-and-conservation/smallcetacean> (last visited May 23, 2024).

³²⁶ See WAGMAN & LIEBMAN, *supra* note 149, at 312.

³²⁷ See MALGOSIA FITZMAURICE, *WHALING AND INTERNATIONAL LAW* 9 (Cambridge Univ. Press 2015).

The first international treaty to address excessive whaling was the 1931 Geneva Convention for Regulation of Whaling, which sought to prohibit the killing of certain whales in an attempt to ensure that they reproduce at a natural pace.³²⁸ It was followed by the 1937 Agreement for the Regulation of Whaling that prohibited the killing of certain whale species and introduced off-seasons, but none of these former treaties managed to recover the whale population.³²⁹ The ICRW was prepared in 1946 as the latest global attempt to achieve sustainable whaling with a broader regulatory framework.³³⁰

The main text of the ICRW establishes the International Whaling Commission (IWC), the principal body of the convention.³³¹ There is also an attached Schedule that is considered as an integral part of the ICRW and contains detailed regulations set out and amended by the IWC. The IWC can determine which whales and whale species may or may not be hunted to what extent and with which methods. Despite the extensive capacities of the IWC, the implementation of the ICRW is primarily under the responsibility of state parties.³³²

As stated in its preamble, the *raison d'être* of the ICRW was to sustain the whaling industry by ensuring continuous supply. However, although the main text of the ICRW remained the same, the public perception has drastically changed in favor of whales since the convention's conclusion.³³³ Accordingly, the IWC's approach has leaned from solely looking after the benefits of the industry towards the preservation of whale species.³³⁴ This shift in the application of the ICRW became obvious when a moratorium to cease commercial whaling was adopted by the IWC in 1982.³³⁵

The decision to set the commercial whaling quota to zero had initially been thought as a temporary measure, but the concerns for whale welfare have outweighed the demand for whale products in a majority of the state parties over time.³³⁶ As a result, the moratorium by the IWC has remained in force to this day.³³⁷ Even though the rationale

³²⁸ See WAGMAN & LIEBMAN, *supra* note 149, at 312.

³²⁹ See *id.*

³³⁰ See *id.* at 312-13.

³³¹ International Convention on the Regulation of Whaling art. III, *opened for signature* Dec. 2, 1946, 161 U.N.T.S. 72, 76-79.

³³² See FITZMAURICE, *supra* note 327, at 38.

³³³ See WAGMAN & LIEBMAN, *supra* note 149, at 315.

³³⁴ See Anastasia Telesetsky & Seokwoo Lee, *After Whaling in the Antarctic: Amending Article VIII to Fix a Broken Treaty Regime*, 30 INT'L J. MARINE & COASTAL L. 700, 703 (2015).

³³⁵ See WAGMAN & LIEBMAN, *supra* note 149, at 315.

³³⁶ See FITZMAURICE, *supra* note 327, at 34.

³³⁷ IWC, *Commercial Whaling*, <https://iwc.int/management-and-conservation/whaling/commercial> (last visited May 23, 2024).

behind the moratorium was to prevent the extinction of whales, preserving their species simultaneously served their welfare.³³⁸ Therefore, addressing the flaws in the implementation of international whaling regulations would also be relevant to the protection of certain interests of whales.

Art. V.3 of the ICRW allows objections by the state parties to the subsequent regulations adopted by the IWC. This provision is highly criticized for creating a loophole to bypass the treaty obligations.³³⁹ Among the state parties to the ICRW, Norway and Iceland continue to allow commercial whaling by claiming to have lodged an objection to the moratorium.³⁴⁰ Moreover, the IWC distinguishes commercial whaling from whaling as an indigenous cultural practice and hunting whales for scientific research.³⁴¹ Permitting scientific research on whales, even when lethal, is up to the authorities of each state party according to art. VIII of the ICRW. The involvement of an international body could have been challenging with the technology available at the time of the conclusion of the ICRW, but the absence of the IWC in the special permit process at present is obsolete.³⁴²

Other reasons external to the ICRW also impede the implementation of the regulations thereunder. For instance, modern whaling is predominantly practiced in the high seas, and it is often challenging for the state parties to supervise and curb illegal whaling activities in the course of their occurrence.³⁴³ Furthermore, states may face not only practical but also legal barriers in their efforts to eliminate the practice of whaling. In a scenario where a member state of the World Trade Organization (WTO) wishes to deter another member state from whaling through economic sanctions, the General Agreement on Tariffs and Trade (GATT) would prevent the sanctioning state from prohibiting the exports and imports of any other product than whale products.³⁴⁴

Despite not being a whale welfare or a whale rights document, the ICRW is still the main international treaty regarding whaling. The fundamental discrepancy between what the IWC was established for and what purpose it serves now limits the extent of its

³³⁸ See FITZMAURICE, *supra* note 327, at 165.

³³⁹ See *id.* at 63-64.

³⁴⁰ See WAGMAN & LIEBMAN, *supra* note 149, at 316-17.

³⁴¹ See FITZMAURICE, *supra* note 327, at 30.

³⁴² See Telesetsky & Lee, *supra* note 334, at 724.

³⁴³ See WAGMAN & LIEBMAN, *supra* note 149, at 314.

³⁴⁴ See *id.* at 311.

capability to address preservation and welfare concerns.³⁴⁵ The scientific knowledge of sentience in cetaceans and the public awareness about their welfare nowadays are far beyond that of the time of the conclusion of the ICRW. A complete prohibition of whaling should be on the agenda instead of a prolonged moratorium that even some states parties to the ICRW do not abide by.³⁴⁶ Nevertheless, the story of the ICRW demonstrates how significant changes in mindset supported by scientific development may alter the interpretation and application of an international treaty.

3.4.4 *Convention on the Conservation of Migratory Species of Wild Animals (CMS)*

Routes used by migratory animal species are usually transnational. Even if a migratory animal species is well-protected within a state's borders, it may still face extinction due to risks awaiting in the territory of another state.³⁴⁷ Therefore, the issue of protecting migratory animals needs to be addressed with an international approach. A significant step in this regard was the CMS, also known as the Bonn Convention, prepared under the United Nations (UN) framework in 1989.³⁴⁸ It consists of a main text that stipulates the basic principles, establishes the treaty bodies and determines the legal regime to be applied to the species listed in the two appendices. Appendix I lists the animal species that are both migratory and endangered, whereas Appendix II lists the migratory animal species that would benefit from international cooperation despite not being endangered.

An outstanding aspect of the CMS is that it calls for the states parties to make subsequent international treaties collectively referred to as the "Agreements" to further protect the animal species listed in the appendices.³⁴⁹ In so doing, it aims to ensure a broad yet minimal standard of protection that would bring together as many states as possible and that particular issues are debated only among the relevant parties in separate international treaties.³⁵⁰ Even if a state is not party to the CMS, it may accede to the

³⁴⁵ See FITZMAURICE, *supra* note 327, at 168-69.

³⁴⁶ See *id.* at 168.

³⁴⁷ See Simon Lyster, *The Convention on the Conservation of Migratory Species of Wild Animals (The "Bonn Convention")*, 29 NAT. RESOURCES J. 979, 979-80 (1989).

³⁴⁸ Convention on the Conservation of Migratory Species of Wild Animals, *opened for signature* June 23, 1979, 1651 U.N.T.S. 356 [hereinafter CMS].

³⁴⁹ See Lyster, *supra* note 347, at 999.

³⁵⁰ See Elizabeth A. Baldwin, *Twenty-Five Years under the Convention on Migratory Species: Migration Conservation Lessons from Europe*, 41 ENV'T L. 535, 542-43 (2011).

Agreements made in accordance with the CMS. Although the system was designed primarily to protect the unendangered species of Appendix II, most of the existing Agreements are related to endangered migratory animal species.³⁵¹

The state parties to the CMS comprise a considerable majority of the international community.³⁵² Considering other states that are only parties to subsequent Agreements, the framework of the CMS is applicable on a nearly global scale.³⁵³ Despite this vast scope and area of application, a few key states are situated on the migration routes of various animal species but are party to neither the CMS nor any of the Agreements, which poses a risk to the overall effectiveness of the convention's implementation.³⁵⁴

The appendices of the CMS are amendable during meetings of the Conference of the Parties. Similar to the ICRW, even though the convention seeks a qualified majority for such amendments, it simultaneously allows the state parties to lodge reservations not to be bound by the amended versions of the appendices.³⁵⁵ Moreover, it does not provide for any ground that may justify a reservation and prevent arbitrariness, which is another factor that potentially jeopardizes the effective implementation of the convention.³⁵⁶

The CMS recognizes the importance of animals of the wildlife for the nature, but it does not recognize their inherent value. It may be inferred from its preamble that animals of wildlife should be protected not because they hold a value of their own, have an interest in the survival of their species, or the continuation of their individual lives, but simply because such a protection serves human interests. The inclination to protect animals for their own sake in domestic laws has not yet extended to international law. As with many other relevant international legal instruments, the CMS and subsequent Agreements should be revised with a perspective that also takes account of the welfare and other special interests of animals other than humans.

³⁵¹ See *id.* at 546.

³⁵² CMS, *Parties and Range States*, <https://www.cms.int/en/parties-range-states> (last visited May 28, 2024).

³⁵³ See Baldwin, *supra* note 350, at 538-39.

³⁵⁴ See Nikolas Sellheim & Jochen Schumacher, *Increasing the Effectiveness of the Bonn Convention on the Conservation of Migratory Species*, 25 J. INT'L WILDLIFE L. & POL'Y 367, 369, 382 (2022).

³⁵⁵ CMS, *supra* note 348, at 372 (art. XI, para. 6).

³⁵⁶ See Sellheim & Schumacher, *supra* note 354, at 383.

3.5 *Animal Rights Activism and Its Impact on Legislation*

Activism is the stance of taking action for a sociopolitical cause.³⁵⁷ A person may be the proponent or opponent of a certain idea on an intellectual level. If that person engages in positive actions to spread or refute that idea, as long as their purpose is to change a social norm, they become an activist in the simplest sense.³⁵⁸ An activist's challenge to an established social norm may be directed at the entire society or parts of it.³⁵⁹ In this regard, taking organized or individual action for the benefit of animals other than humans and endorsing the moral or legal consideration of their common interests may cumulatively be referred to as animal rights activism, though it may be defined and understood in different ways. Because animals other than humans are not able to assert political demands for their common interests to be respected by humans, animal rights activism is essential in the quests for animal welfare and animal rights. Animal rights activism is, in a way, the voice that animals other than humans cannot raise by themselves.

Animal rights activists resort to various methods to raise public awareness on issues that affect animal interests and challenge the current legal status of animals.³⁶⁰ These actions to change the status quo are not likely to be welcomed without any reaction.³⁶¹ There may even be cases where opposition to the idea beneath animal rights activism, as well as the methods used by animal rights activists, result in setbacks to the detriment of animal interests. However, the achievements of animal rights activism that were influential enough to trigger changes in the law are too many to ignore, examples of which will be briefly examined hereunder.

Whether actions that serve the interests of a particular group of animals instead of the entire Animalia qualify as animal rights activism is debated among activists.³⁶² That being said, the legal impact of animal activism may be assessed better with a broader

³⁵⁷ See Sarifa Moola, *Contemporary Activism: Shifting Movements, Changing Actors*, 18 *AGENDA* 39, 39 (2004).

³⁵⁸ See *id.* at 39-40.

³⁵⁹ Cf. Deborah G. Martin et al., *What Counts as Activism?: The Role of Individuals in Creating Change*, 35 *WOMEN'S STUD. Q.* 78, 79 (2007) (expanding the scope of activism beyond the scale of actions from a feminist perspective).

³⁶⁰ See Lyle Munro, *Strategies, Action Repertoires and DIY Activism in the Animal Rights Movement*, 4 *SOC. MOVEMENT STUD.* 75, 78 (2005).

³⁶¹ See KERSTIN JACOBSSON & JONAS LINDBLOM, *ANIMAL RIGHTS ACTIVISM: A MORAL-SOCIOLOGICAL PERSPECTIVE ON SOCIAL MOVEMENTS* 12 (Amsterdam Univ. Press 2016).

³⁶² See Genevieve Johnston & Matthew S. Johnston, *'Until Every Cage Is Empty': Frames of Justice in the Radical Animal Liberation Movement*, 23 *CONTEMP. JUST. REV.* 563, 566 (2020).

understanding for this study. In that sense, animal rights activism includes petitions, demonstrations, media campaigns, publications, litigation, and lobbying with corporations or public institutions for the benefit of animals other than humans in whole or in part. Directly engaging with animals other than humans to look after their specific needs is also animal rights activism even when it is not intended to raise public awareness.

Exposure to the uncompassionate treatment of other animals may stimulate general concern and empathy, and animal rights activism often plays an important role in such cases. For instance, residents were forced to leave their companion animals behind during the evacuation of New Orleans before Hurricane Katrina hit the city in the summer of 2005.³⁶³ As a result, tens of thousands of abandoned animals were trapped in the city when the hurricane arrived.³⁶⁴ In the aftermath of the disaster, entry into the city remained restricted for weeks, and the abandoned animals who had survived the hurricane now faced other dangers, such as starvation and dehydration.³⁶⁵ The rescue operations by several activist groups were closely observed and largely appreciated by the public.³⁶⁶ The ensuing concern for the safety of companion animals in times of emergency was so widespread that many federated states had to include companion animals in their relevant action plans, and the United States Congress legislated the Pets Evacuation and Transportation Standards Act in 2006.³⁶⁷

Exposing the dire conditions that other animals have to endure during exploitative processes is often an effective form of activism that appeals to public compassion and may facilitate legislative changes. To give an example, an animal rights activist associated with the Humane Society of the United States (HSUS) investigated a slaughtering plant belonging to a well-known meat-packing company under the pretense of applying for a job in 2007 and recorded a footage in which several cows who were clearly sick and already in agony were tortured before sharing the same fate as other cows in the facility.³⁶⁸ The footage leaked by the HSUS created a nationwide outrage, and the company had to recall millions of kilograms of its products from the market.³⁶⁹ The concerns about public

³⁶³ See Wayne Pacelle, *The Long Road to Animal Welfare: How Activism Works in Practice*, 94 FOREIGN AFF. 65, 68 (2015).

³⁶⁴ See Animal Welfare Institute [AWI], *Katrina's Lesson Learned: Animals No Longer Excluded from Storm Evacuations*, 66 AWI Q. 7, 7 (2017).

³⁶⁵ See *id.*

³⁶⁶ See Pacelle, *supra* note 363.

³⁶⁷ See *id.* at 68-69.

³⁶⁸ See *id.* at 75-76.

³⁶⁹ See *id.* at 76.

health and animal welfare resulting from the incident led to several hearings before the United States Congress, and eventually an amendment was passed by the federated state legislature of California that improved the confinement standards of animals kept in farms.³⁷⁰

NGOs have been a significant part of animal rights activism since the earliest stages of its development. Two years after the adoption of the Cruel Treatment of Cattle Act of 1822, the Royal Society for the Prevention of Cruelty to Animals (RSPCA) was founded in the United Kingdom.³⁷¹ Since then, the RSPCA in the United Kingdom and many other NGOs elsewhere have remained as key actors for the effective prosecution of breaches of anti-cruelty legislations.³⁷² The issues discussed and brought into question by the RSPCA advanced the legal protection of animals in the United Kingdom.³⁷³ A similar course of events was seen in other parts of the world following the emergence of numerous NGOs advocating against cruelty to animals.³⁷⁴ Today, the contributions of NGOs have become a crucial part of the preparation and supervision of domestic laws and international treaties. It is usual for legislatures to receive consultation and assistance from relevant NGOs in the making of laws that affect animals other than humans. The NGOs that are influential enough may also lobby with legislators to pass or withdraw proposed laws in consideration of animal interests.

Animal rights activism has not grown in a vacuum; it has almost always been hand to hand with other rights movements. The perceived status of other animals in the eyes of humans is a social construct after all.³⁷⁵ Therefore, it may be affected by challenges to other societal norms. A development in human rights may stimulate empathy and awareness that expands to animals other than humans, and vice versa.³⁷⁶ The language used in the Universal Declaration on Animal Welfare (UDAW) proposed by the World Animal Protection resembles that of the Universal Declaration of Human Rights.³⁷⁷ Despite being supported by millions of individuals as well as some UN member states, the UDAW has yet to become an international soft law instrument as it initially

³⁷⁰ See *id.*

³⁷¹ See Jerry L. Anderson, *The Origins and Efficacy of Private Enforcement of Animal Cruelty Law in Britain*, 17 DRAKE J. AGRIC. L. 263, 265 (2012).

³⁷² See *id.* at 265-67.

³⁷³ See *id.* at 310.

³⁷⁴ See Silva, *supra* note 161, at 185.

³⁷⁵ See Gacek, *supra* note 223, at 329.

³⁷⁶ See Silva, *supra* note 161, at 186.

³⁷⁷ See WAGMAN & LIEBMAN, *supra* note 149, at 25.

intended.³⁷⁸ Nonetheless, it is a preview of potential legal documents. It also illustrates the intersectionality between human rights and animal rights, and a parallel may be drawn between their activisms.

Animal rights activists are key catalysts to the development of animal rights as a legitimate and serious matter of discussion, which was hardly imaginable.³⁷⁹ It is mainly owing to their efforts that the legal recognition of animal interests is not seen as an idea on the fringe anymore. Animal rights activism serves as a driving force for legislative changes in favor of animals other than humans. Likewise, legislative developments may stimulate further demands and debates within the animal rights discourse. Existing laws may be perceived as static and ever-present, but there lies an activist struggle behind many laws that create rights.³⁸⁰ Accordingly, the road to animal rights is likely to go side by side with animal rights activism.

3.6 Future of Animal Rights

It might sound odd to discuss the future of animal rights, considering that the common interests of animals other than humans still need to be recognized and protected as legal rights at present. This conclusion, however, would overlook the burgeoning representation of such animals in legal discussions and texts. The future is uncertain yet predictable. The fact that legal systems refer to animals not in the same ways as they used to do indicates that the future of animal rights will be different than the status quo. Predicting whether that difference will favor animals or not is outside the scope of this study, as law is only concerned with improving the current affairs. In brief, what is meant by the future in this study is the potential progress of animal rights.

Legal systems' current approach to animal interests is almost entirely built upon welfarism, yet it is slowly but visibly drifting towards abolitionism. The vast majority of people today agree and are aware that animals are sentient and can suffer.³⁸¹ The moral implications of this impending consensus might be reflected in law in the form of animal rights, just as a similar consensus has once evolved into human rights. The fundamental

³⁷⁸ See *id.*

³⁷⁹ See Mylan Engel, Jr., *Introduction: The Moral Rights of Animals and Why They Matter*, in MYLAN ENGEL, JR. & GARY LYNN COMSTOCK, *THE MORAL RIGHTS OF ANIMALS* xiii, xv (Lexington Books 2016).

³⁸⁰ See Pacelle, *supra* note 363, at 69.

³⁸¹ See SCHAFFNER, *supra* note 87, at 184.

rights stipulated in modern constitutions are exclusively human rights, although constitutional provisions on animal protection have started to emerge. In the future, animal rights might also become a usual part of constitutions, which would set a standard that laws could not impede.³⁸² In this case, legislatures would have to refrain from using speciesist language as well as ambiguous terms that could limit the scope and implementation of animal-related laws.³⁸³

Existing legal systems tolerate the suffering of other animals at the hands of humans to varying extents when the interest of a human is involved. Some legal systems reduce the amount of suffering or draw the line at inflicting unnecessary pain on animals other than humans. Animal rights are to stem possibly from the very concerns that led to such anti-cruelty and animal welfare laws. Knowing that animals can suffer and that whether they suffer or not matters to them requires moral consideration of their basic interest in not suffering.³⁸⁴ The legal consideration thereof, on the other hand, entails granting them the status of right-holder, which is only possible through abolishing their status as property. Enacting anti-cruelty laws or creating a third legal status category may be viewed as the earlier steps of this leap.³⁸⁵

Humans' dependence on animals is diminishing in all areas of life with each passing day. It is not utopian to envision legal provisions prohibiting the exploitation of other animals for economic interests or human consumption. Suppose a sufficient number of domestic laws and international instruments recognize and respect these common animal interests as legal rights. In that case, this widespread and constant practice might give rise to an international custom. One day, animals other than humans might even enjoy peremptory norms that secure them from exploitation and torture at the hands of humans.³⁸⁶ The legal recognition of common animal interests as legal rights would be followed by the legal recognition of interests specific to certain animals dependent on human interference to fulfill their needs so that equity among species may be guaranteed.³⁸⁷

³⁸² See PAUL WALDAU, *ANIMAL RIGHTS: WHAT EVERYONE NEEDS TO KNOW* 90 (Oxford Univ. Press 2011).

³⁸³ See SCHAFFNER, *supra* note 87, at 186.

³⁸⁴ See *id.* at 183.

³⁸⁵ See WALDAU, *supra* note 382, at 100-01.

³⁸⁶ See SCHAFFNER, *supra* note 87, at 184.

³⁸⁷ See *id.*

The legal recognition of an animal's interest is necessary, but more is needed to create a right in the legal sense. An animal interest becomes an animal right when it is also legally enforceable. The unique nature of animal rights would bring along special enforcement requirements. For instance, animals other than humans should be adequately and duly represented before courts and enforcement offices since they cannot be expected to claim their rights by themselves.³⁸⁸ We might see courts that are specialized in animal law where animals other than humans are also represented. Achieving individual rights for animals might open the door to the collective rights and legal representation of animal species and even other components of nature such as plants, forests, coral reefs, bodies of water, and geological formations.³⁸⁹ The discussions on animal rights are closely connected with the broader discussion revolving around the rights of nature.

Even if all the current deficiencies regarding the legal status of animals other than humans were overcome, it would be futile to depict a complete scenario in advance, as we lack knowledge of what the future holds for us. With each step of constant progress in all areas of life, we find ourselves bothered about problems we never thought of before, some of which might affect and even complicate the relationship between humans and other animals. We do know, on the other hand, that humans can care about and respect others.³⁹⁰ The foremost obstacle to animal rights is the hesitancy to make that choice. Removing that obstacle depends on treating other animals as subjects of law in accordance with their inherent value, not just on paper but also in practice. Only then progress towards a better world for all animals can be made.

Chapter 4:

HUMAN RIGHTS VERSUS ANIMALS AND ANIMAL RIGHTS DEFENDERS

Human rights are often formulated as general principles that are as broadly interpretable as possible with limited grounds for interference. Courts that adjudicate in human rights questions seek to find a balance between competing individual and public interests. This usually involves a proportionality test to resolve whether there was a less

³⁸⁸ See SCHAFFNER, *supra* note 87.

³⁸⁹ See DESJARDINS, *supra* note 66, at 118.

³⁹⁰ See WALDAU, *supra* note 382, at 195-96.

interfering means or method, whether the interference was suitable for achieving the legitimate aim pursued, and whether the interference was excessive or reasonably tolerable. In cases where the interference with a human right is pertinent to an animal interest, it becomes inevitable to determine where animal interests stand in relation to human rights.

Human rights are based on interests that do not serve justice unless they are protected for everyone, not for one or more of the parties of a particular transaction. This feature of commonality positions human rights at a separate—and perhaps, a higher—category than that of other rights held by humans. In cases where an animal other than a human has the same interest protected by a particular human right, a moral and legal dilemma arises.³⁹¹ Human rights law is designed primarily to take human interests into consideration, even though there exists an evident intersectionality between human rights and animal rights movements. When human interests and animal interests collide in a legal dispute, whether and to what extent courts may consider animal interests vary depending on the jurisdiction and relevant matter of discussion, some examples of which will be discussed under this chapter.

4.1 *Animals in Entertainment*

Animals in circuses and zoological or aquatic parks are confined and demonstrated in places that are much different than their natural habitats. After being separated from the environment to which they are accustomed, they lack the opportunity to live and behave in the same way as they normally would. There is an emerging public concern and awareness that call in question the exploitation of animals for the purpose of entertaining humans in such places.³⁹² Especially in legal systems that grant constitutional protection in favor of animals other than humans, it is possible to encounter serious legal discussions regarding the confinement of animals that are exploited in the entertainment sector.

The existence of a specific federal constitutional provision that protects animals from cruelty enables the judiciary in Brazil to use a rights-based language as to the confinement of animals for entertaining humans.³⁹³ Accordingly, the interest in one's liberty may

³⁹¹ See EDMUNDSON, *supra* note 5, at 128.

³⁹² See COCHRANE, *supra* note 93, at 137.

³⁹³ See Silva, *supra* note 161, at 190.

extend to certain animal species under judicial interpretation.³⁹⁴ A trendsetting example was the writ of habeas corpus requested in 2005 by two lawyers from Brazil on behalf of Suíça, a chimpanzee kept inside a cage at the Salvador Zoo.³⁹⁵ In the ensuing judgment, the court did not dismiss the request on the ground that the confinement of animals other than humans could constitute an unlawful detention but rather assessed the possibility of recognizing Suíça's legal personhood.³⁹⁶ Although the case remained inconclusive due to the untimely death of Suíça, it paved the way for prioritizing animals' interest in liberty over the commercial activities of corporations that profit from animal displays and spectacles.³⁹⁷

Aside from corporate commercial activities, the issue of entertainment also covers competitions that involve animals other than humans. These include so-called animal sports in which animals other than humans are forced to perform certain physical activities and are ranked based on the outcome of their efforts, and blood sports in which animals other than humans are provoked to attack others until they are exhausted or even killed. Since enjoying cruelty and violence is part of these practices, interferences with them are often deemed socially more tolerable. The most common outcome of anti-cruelty laws is the restriction or prohibition of bloodshed for the sole purpose of entertainment.

Anti-cruelty laws may be complemented and strengthened through judicial interpretation. In *People for Animals v. State of Goa*, Bombay High Court interpreted the anti-cruelty law of India in accordance with the constitutional duty to be compassionate towards living creatures.³⁹⁸ It confirmed the illegality of traditional bull wrestling.³⁹⁹ This conclusion was further supported by values enshrined in the culture of India through diverse religious teachings, some of which were expressly mentioned in the court's reasoning.⁴⁰⁰ Traditional cattle racing shared the same fate as bull wrestling on similar grounds.⁴⁰¹ In both cases, the constitutional protection allowed the judiciary to interpret

³⁹⁴ See *id.*

³⁹⁵ See *id.*

³⁹⁶ T.J.BA 9ª Vara Criminal, Habeas Corpus No. 833085-3/2005, 28.09.2005 (Braz.), translation at <https://www.animallaw.info/case/suica-habeas-corpus>.

³⁹⁷ See WAGMAN & LIEBMAN, *supra* note 149, at 40.

³⁹⁸ *People for Animals v. State of Goa*, (1997) 4 Bom. C.R. 271 (India).

³⁹⁹ See WAGMAN & LIEBMAN, *supra* note 149, at 262.

⁴⁰⁰ See Thomas G. Kelch, *Cultural Solipsism, Cultural Lenses, Universal Principles, and Animal Advocacy*, 31 PACE ENV'T L. REV. 403, 419 (2014).

⁴⁰¹ See WAGMAN & LIEBMAN, *supra* note 149, at 263-64.

existing anti-cruelty laws more broadly and in a manner that expands towards animals that are exploited for human entertainment.

4.2 *Hunting*

Hunting is the practice of trapping and killing animals other than humans for purposes such as entertainment and consumption. It is often a highly regulated practice, since its various forms include usage of weapons and firearms, and the practice itself may pose a risk to biodiversity. Aside from practical reasons, states may also interfere with hunting based on concerns for the lives and well-being of animals that may be startled, distressed, injured, and killed. Although hunters may regard this practice as a leisure activity, a sport, or even a profession, the morality of hunting remains highly contested.

4.2.1 *Canned Hunting*

Canned hunting is a special form of hunting in which the mobility of the so-called prey is limited so that the kill is guaranteed.⁴⁰² The controversial usage of hunting for conserving wild animal species fails to justify this particular form of hunting, as the animals involved are not raised as *wild* animals.⁴⁰³ Instead, they are kept and bred to be killed by hunters. Canned hunting is widely disapproved for lacking an ethical foundation, but those who practice it often emphasize its legality.⁴⁰⁴ Some also argue that canned hunting helps sustain the wild animal population since the animals killed during a canned hunt are technically not part of the wildlife.⁴⁰⁵ However, the growing extinction rate of animal species indicates that neither regular nor canned hunting is an effective conservation method.⁴⁰⁶

In South Africa, there is a lively canned lion hunting sector that attracts both local and foreign hunters because it is usually cheaper than hunting in the wild, and it is undoubtedly more probable to kill a lion that way.⁴⁰⁷ In this method, lion cubs are raised accustomed to humans so that they do not feel the urge to run away from humans once

⁴⁰² See NIKOLAJ BICHEL & ADAM HART, *Trophy Hunting* 311 (Springer 2023).

⁴⁰³ See Yann Prisner-Levyne, *Trophy Hunting, Canned Hunting, Tiger Farming, and the Questionable Relevance of the Conservation Narrative Grounding International Wildlife Law*, 23 J. INT'L WILDLIFE & POL'Y 239, 252 (2020).

⁴⁰⁴ See *id.* at 240.

⁴⁰⁵ See *id.* at 255.

⁴⁰⁶ See *id.* at 240.

⁴⁰⁷ See BICHEL & HART, *supra* note 402, at 232, 313.

they grow up, and the hunt occurs within a confined area.⁴⁰⁸ Upon heavy criticism and public reaction out of ethical concerns, the government issued a regulation in 2007 that banned hunting certain large predators, including lions, who had not lived freely in nature for at least two years prior to the killing.⁴⁰⁹ Since this requirement would effectively end the practice of canned lion hunting in South Africa, a group of hunters and lion breeders brought an action for the annulment of the administrative regulation.⁴¹⁰

The government's main argument in the relevant case was that the two-year period was installed as a conservationist measure for lions bred for canned hunting to be reintegrated into their natural habitat.⁴¹¹ The Supreme Court of Appeals concluded that if the regulation in question sought to conserve the lion species, the sufficiency of the proposed two-year period for the reintegration of captive-bred lions should have been scientifically substantiated.⁴¹² Moreover, it was also emphasized that the prohibition of canned hunting could not be justified by the conservation of lion species, since such lions were neither part of the wildlife nor were they raised to be released into the wildlife in the first place.⁴¹³

In the example of canned hunting in South Africa, the Supreme Court of Appeals narrowed its review down to the conservation of lion species instead of the lives and well-being of individual lions and thus found the regulation invalid.⁴¹⁴ Although the case was brought on account of the canned hunting sector's economic interests, the decision lacked a comparison between the economic interests and common animal interests. The judicial review was limited to whether the contested regulation served the protection of biodiversity. If the conservationist legislation in South Africa had been reinforced by effective anti-cruelty legislation, the outcome of the canned lion hunting case could have been different. Despite being vital for biodiversity, the conservation of vulnerable and endangered species is not a sufficient legal ground on its own, especially against ethically

⁴⁰⁸ David Bilchitz, *Animal Interests and South African Law: The Elephant in the Room?* in *ANIMAL LAW AND WELFARE - INTERNATIONAL PERSPECTIVES* 131, 143 (Deborah Cao & Steven White eds., Springer 2016).

⁴⁰⁹ *See id.* at 143-44.

⁴¹⁰ *See id.* at 144.

⁴¹¹ *SA Predator Breeders Ass'n and Others v. Minister of Env't Affairs and Tourism* 2011 (2) All SA 529 (SCA) at 18 para. 40 (S. Afr.).

⁴¹² *See* Bilchitz, *supra* note 408, at 144-45.

⁴¹³ *See id.*; *SA Predator Breeders Ass'n* 2011 (2) All SA 529 (SCA) at 17 para. 37 (S. Afr.).

⁴¹⁴ *See* Bilchitz, *supra* note 408, at 144-45.

controversial practices that do not target an entire species but still involve unnecessary suffering and cruelty.

4.2.2 Hunter Harassment Laws

The United States is home to unique constitutional provisions that specifically guarantee the practice of hunting at the federated level.⁴¹⁵ Some state legislatures take it one step further by penalizing actions that obstruct or disturb hunters during the hunt.⁴¹⁶ When such legislative acts are challenged on the basis of the federally protected right to free speech, state courts primarily check whether the piece of legislation at hand targets a specific message that it purposely wishes to exclude from public discussions. Yet, there seems to be no unanimity over this issue.⁴¹⁷ The right to hunt does not correspond to a common human interest. Therefore, even when it is legally recognized, the fundamental freedom of expression requires speeches and actions that call attention to the immorality of hunting not be quelled by public force.⁴¹⁸

The conflict between the interests of hunters and those who protest the practice of hunting was discussed before the ECtHR on several occasions. The initial approach of the ECtHR was to prioritize the prevention of disorder over the freedom of expression and peaceful assembly of anti-hunting protesters.⁴¹⁹ As of the decision rendered in the key case of *Bladet Tromsø and Stensaas v. Norway*, the cruelty of hunting began to be seen as a serious matter of public interest that could outweigh individual interests.⁴²⁰ Nonetheless, the ECtHR has remained reluctant to consider protests that obstruct hunters as more worthy of protection than the legally permitted practice of hunting, even in cases where there is no allegation that such protests caused any danger or damage.⁴²¹ For instance, in *Drieman and Others v. Norway*,⁴²² the arrest of protesters that stood between whalers and whales were not protected under the freedoms of expression and peaceful

⁴¹⁵ See WAGMAN & LIEBMAN, *supra* note 149, at 273; see SCHAFFNER, *supra* note 87, at 137.

⁴¹⁶ See SCHAFFNER, *supra* note 87, at 137.

⁴¹⁷ See *id.* at 138-40.

⁴¹⁸ See *id.* at 140.

⁴¹⁹ See Tom Sparks, *Protection of Animals Through Human Rights: The Case-Law of the European Court of Human Rights*, in *STUDIES IN GLOBAL ANIMAL LAW* 153, 157 (Anne Peters ed., Springer 2020).

⁴²⁰ *Bladet Tromsø and Stensaas v. Norway*, 1999-III Eur. Ct. H.R. 289, 327.

⁴²¹ See Sparks, *supra* note 419, at 159.

⁴²² *Drieman and Others v. Norway*, App. No. 33678/96 (May 4, 2000), <https://hudoc.echr.coe.int/eng?i=001-5290>.

assembly, and the economic interests of whalers were given priority.⁴²³ If more legislations across Europe adopt a stance against hunting, the ECtHR may presumably change its approach accordingly.

4.2.3 *Expropriation of Land for Hunting*

Expropriation is the process of forceful purchase of a private property or real rights over it by the state due to an overarching public interest. There are instances in which lands subject to private property are expropriated for the purpose of regulating wildlife or the practice of hunting. In *Chassagnou and Others v. France*, the ECtHR discussed whether the expropriation of land for members of the municipal hunting association to use, and the unwanted affiliation of proprietors with that association were compatible with the right to property and freedom of association.⁴²⁴ It was held that the interference was prescribed by law, and the law served a general interest, which legitimized the interference.⁴²⁵ However, the ECtHR elaborated further on the proportionality of the interference because the applicants were opposed to hunting based on ethical concerns.⁴²⁶ It was argued that, even if a state wished to regulate hunting and control illegal hunting activities, compulsory membership in the municipal hunting association and the transfer of certain real rights in favor of hunters were disproportionate outcomes that proprietors could not reasonably be expected to withstand.⁴²⁷

The ECtHR ascribes importance to the aspect of ethical concerns in cases of expropriation of land for hunting.⁴²⁸ In *Chabauty v. France*, the applicant's private property was included in the area collectively open to all members of the municipal hunting association. He was also automatically affiliated with the same association. Still, unlike the situation in *Chassagnou and Others v. France*, the applicant in this case alleged that the relevant law favored proprietors of extensive lands over those of smaller lands and that he was at an economic disadvantage if he were to leave the municipal hunting association.⁴²⁹ The ECtHR distinguished the circumstances of this case and pointed out

⁴²³ See Sparks, *supra* note 419, at 158-59.

⁴²⁴ See *id.* at 155-56.

⁴²⁵ *Chassagnou and Others v. France*, 1999-III Eur. Ct. H.R. 21, 55.

⁴²⁶ See Sparks, *supra* note 419, at 156.

⁴²⁷ *Chassagnou and Others v. France*, 1999-III Eur. Ct. H.R. 21, 57-58, 67.

⁴²⁸ See Sparks, *supra* note 419, at 156.

⁴²⁹ *Chabauty v. France*, App. No. 57412/08 (Oct. 4, 2012), §§ 28-31, <https://hudoc.echr.coe.int/eng?i=001-113715>.

that the legitimate aims pursued by the relevant law would prevail in the absence of ethical concerns over hunting.⁴³⁰ Considering that the applicant could still hunt in his piece of land and exert his right to property except other hunters using his land, the Court found no violation in this individual application.⁴³¹

For the applicants in *Chassagnou and Others v. France*, being able to hunt in a larger area designated for members of the municipal hunting association was not an advantage, therefore the burden they had to endure was not counterbalanced. In *Chabauty v. France*, on the other hand, the ECtHR did not need to consider the applicant's interest in abiding by his conscientious choices or the consequences of its decision over the lives and well-being of animals that could be hunted on the applicant's land. It is possible to infer from its case-law that the ECtHR is prone to yield a broad margin of appreciation to states in their hunting regulation, but that margin narrows down when the affected individuals oppose the practice of hunting out of ethical concerns.⁴³² Since ethical concerns play a significant role in determining the legality of expropriations to create hunting areas, it is possible to conclude that increases in public pressure and awareness may encourage courts to address the cruelty of hunting.

4.3 International Trade in Animals

Trade was seen as a peaceful means to bring nations together based on their mutual economic interests following World War II, which gave rise to the GATT. This international treaty sets the basic principles of international trade.⁴³³ The GATT was succeeded and supplemented by establishing the WTO in 1995.⁴³⁴ Nearly all of the global trade is conducted among member states of the WTO.⁴³⁵ Therefore, the WTO and provisions of the GATT should be considered in any animal welfare or animal rights discourse that might impact international trade. Discriminatory trade practices that hamper free and fair international trade are not permitted under the GATT as a rule. The exceptions include measures "necessary to protect human, animal or plant life or

⁴³⁰ *Id.* §§ 52-57.

⁴³¹ *Id.*

⁴³² See Sparks, *supra* note 419.

⁴³³ See WAGMAN & LIEBMAN, *supra* note 149, at 297.

⁴³⁴ See *id.*

⁴³⁵ See *id.*

health”.⁴³⁶ In case of an international trade dispute related to this exception, the WTO seeks to find a balance between the economic interests of its member states and relevant animal interests.

In two of its landmark rulings, the Appellate Body of the WTO discussed within the context of trade in shrimps whether resorting to trade measures out of environmental concerns that also affect particular animal interests was compatible with the obligations of member states under the GATT.⁴³⁷ The subject matter of the first case was the import prohibition by the United States regarding shrimps caught with trawl nets that strangle sea turtles.⁴³⁸ The apparent purpose of the prohibition was to preserve the already endangered sea turtle species against an indiscriminate commercial practice.⁴³⁹ The second ruling resulted from the claim that the United States had failed to comply with the ruling of the first case.⁴⁴⁰

The United States did not contest that the import prohibition was discriminatory but argued that it could be justified by relying on the general exceptions provided in the GATT.⁴⁴¹ In its initial form, the ban was applicable only in the Wider Caribbean Region.⁴⁴² The United States had already signed international treaties with several other sovereign states in this region to protect sea turtles.⁴⁴³ The Appellate Body of the WTO, despite acknowledging the importance of the conservation of animal species, only reviewed whether the United States could rightfully impose prerequisites for other member states of the WTO to enter into its domestic shrimp market.⁴⁴⁴ It was eventually found that the United States’ import prohibition constituted unjustified and arbitrary discrimination.⁴⁴⁵

⁴³⁶ General Agreement on Trade and Tariffs art. XX, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194, 262.

⁴³⁷ See Duncan Brack, *The Shrimp-Turtle Case: Implications for the Multilateral Environmental Agreement—World Trade Organization Debate*, 9 Y.B. INT’L ENV’T L. 13, 14-15 (1998).

⁴³⁸ Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/AB/R (adopted Nov. 6, 1998); see WAGMAN & LIEBMAN, *supra* note 149, at 303.

⁴³⁹ See WAGMAN & LIEBMAN, *supra* note 149, at 303.

⁴⁴⁰ Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia*, WTO Doc. WT/DS58/AB/RW (adopted Nov. 21, 2001).

⁴⁴¹ See David Kaczka, *WTO’s Shrimp-Sea Turtle Decision*, 7 REV. EUR. COMPAR. & INT’L ENV’T L. [RECIEL] 308, 309 (1998).

⁴⁴² See *id.* at 308.

⁴⁴³ See Brack, *supra* note 437, at 16.

⁴⁴⁴ Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 185-88, WTO Doc. WT/DS58/AB/R (adopted Nov. 6, 1998).

⁴⁴⁵ *Id.*

Conservation of animal species often leans not only on international cooperation, but also on international pressure, as non-compliance by even a single state may irreversibly impair all prior efforts. Furthermore, states that spend resources for the conservation of an animal species may be discouraged if most other states refrain from undertaking their share of the burden. That is why domestic trade measures may intentionally be used as a policy tool to compel other states to respect the environmental concerns of conservationist states.⁴⁴⁶ As a state that pledges not to endanger sea turtles, the import prohibition by the United States may also be viewed as a means to sustain the domestic shrimp market threatened by foreign competitors who do not have to use relatively more expensive methods to detach sea turtles from their catches.⁴⁴⁷

The WTO viewed the import prohibition on shrimps that are not caught with a method to exclude sea turtles as the unilateral imposition of a certain environmental policy, whereas there could have been more efforts on the United States' behalf to further negotiate international treaties to achieve the same goal in a multilateral fashion.⁴⁴⁸ Therefore, it may be argued that if the prohibition had applied only among the states that agreed to protect sea turtles from indiscriminate hunting practices, the WTO would have found it compatible with the GATT.⁴⁴⁹ Following the first ruling, the United States issued a new administrative guideline that did not require the usage of turtle-excluding devices for imported shrimps and shrimp products. However, the enforcement of an effective policy to protect sea turtles was still expected from the importing state provided that the hunt may potentially harm sea turtles.⁴⁵⁰ The Appellate Body of the WTO concluded in the second ruling that the renewed guidelines were no longer unjustified or arbitrary.⁴⁵¹

Another case that demonstrates to what extent member states of the WTO may regard certain animal interests in international trade was caused by the usage of dolphin-safe labels on products made of tuna caught in the Eastern Tropical Pacific Ocean and sold in

⁴⁴⁶ See Brack, *supra* note 437, at 13.

⁴⁴⁷ Cf. WAGMAN & LIEBMAN, *supra* note 149, at 306 (explaining that the implementation of an animal welfare measure under the WTO regime would normally result in an increase in the relevant product's market price)

⁴⁴⁸ Appellate Body Report, *United States–Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 169-72, WTO Doc. WT/DS58/AB/R (adopted Nov. 6, 1998).

⁴⁴⁹ See Brack, *supra* note 437, at 16.

⁴⁵⁰ Appellate Body Report, *United States–Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia*, ¶ 6-7, WTO Doc. WT/DS58/AB/RW (adopted Nov. 21, 2001).

⁴⁵¹ *Id.* ¶ 144, 153-54.

the United States.⁴⁵² Since dolphins feed on tuna and swim closer to the surface, some tuna fishers resort to the purse seine fishing method which catches and kills a large number of tuna along with the dolphins used to detect the tuna below them.⁴⁵³ The purpose of implementing dolphin-safe labels was to inform consumers about the origin of tuna and the fishing method used to catch the tuna so that they could purchase it in light of their ethical choices regarding the unnecessary and excessive killing of dolphins.⁴⁵⁴

The Appellate Body of the WTO reviewed the conformity of dolphin-safe labels with another international treaty under the WTO framework in addition to the GATT, namely the Agreement on Technical Barriers to Trade (TBT) that also recognizes the protection of “human, animal or plant life or health” as a legitimate aim to restrict international trade.⁴⁵⁵ It was initially concluded that the implementation of dolphin-safe labels disfavored the imported like products within the domestic market for tuna products, and thus the restriction was not proportionate with the legitimate aim pursued by the United States.⁴⁵⁶ This conclusion resulted from a restrictive interpretation of the TBT that puts dolphin-safe and other tuna products in the same equation. However, the two might not be identical in the eyes of ethical consumers.⁴⁵⁷

In the aftermath of the first ruling, the United States amended the labeling regulations in a manner that does not make it compulsory to use dolphin-safe labels if the criteria are met, but only prohibits its misleading usage if the criteria are not met.⁴⁵⁸ In a later ruling by the Appellate Body of the WTO, the latest version of the relevant regulations was found to be in conformity with the TBT as well as the GATT since the restrictions were now properly assessed based on the location and method of tuna fishing, and related risks

⁴⁵² Appellate Body Report, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc. WT/DS381/AB/R (adopted June 13, 2012).

⁴⁵³ See WAGMAN & LIEBMAN, *supra* note 149, at 300.

⁴⁵⁴ See Angelica Bonfanti, *The WTO Members’ Right to Protect Animals in International Trade: A TBT Perspective*, in NATURAL RESOURCES GRABBING: AN INTERNATIONAL LAW PERSPECTIVE 317, 318-19 (Francesca Romanin Jacur, Angelica Bonfanti & Francesco Seatzu eds., Brill | Nijhoff 2016).

⁴⁵⁵ Agreement on Technical Barriers to Trade art. 2, para. 2, Apr. 15, 1994, 1868 U.N.T.S. 120, 121.

⁴⁵⁶ Appellate Body Report, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, ¶¶ 407-08, WTO Doc. WT/DS381/AB/R (adopted June 13, 2012).

⁴⁵⁷ See Bonfanti, *supra* note 454, at 325, 337.

⁴⁵⁸ 50 C.F.R. § 216.91 (2024).

to dolphins.⁴⁵⁹ It was reiterated that the compatibility of a technical regulation with the requirement to treat like products alike irrespectively of their origin under art. 2.1 of the TBT was correlated with the compatibility of a trade measure with the prohibition of arbitrary and unjustified discrimination under the *chapeau* of art. XX of the GATT, and the United States' dolphin-safe labeling regulations were now under both principles.⁴⁶⁰

The main dilemma regarding the consideration of animal interests in international trade is that the WTO can and does decide on matters that involve animals other than humans, although it was not designed to function as an animal welfare or animal rights mechanism in the first place.⁴⁶¹ The current structure of the WTO may need to be revised in the development of animal law, as it is prone to prioritize global economic interests over specific animal interests. A short-term solution would be a new international treaty under the WTO framework that addresses issues of animal interests within the context of international trade.⁴⁶² A lasting solution, on the other hand, would get to the bottom of the problem by challenging the legal status of animals other than humans. It is hardly possible to find a middle ground when both domestic laws and international treaties recognize animal interests to an extent, yet animals other than humans are still viewed and treated as mere commodities in international trade.

4.4 Cruel Industry Practices and Slaughter

The human demand for animal products or products whose manufacturing process involves animals other than humans inevitably creates industries that profit from exploiting such animals. Most legal systems today delimit the extent of industrial exploitation of animals, and many draw the line at cruelty. From a rights-based approach, any industry that exploits animals other than humans for profit may be considered cruel. That said, although the legal definition of cruelty varies from jurisdiction to jurisdiction, none understands cruelty as broadly as the rights-based approach. Either way, the term cruelty encompasses a vast number of practices all of which cannot be examined within

⁴⁵⁹ Appellate Body Report, *United States–Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products: Recourse to Article 21.5 of the DSU by the United States, United States–Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products: Second Recourse to Article 21.5 of the DSU by Mexico*, ¶ 7.5, 7.12-7.14, WTO Doc. WT/DS381/AB/RW/USA, WT/DS381/AB/RW2 (adopted Jan. 11, 2019).

⁴⁶⁰ *Id.* ¶ 7.12-7.14.

⁴⁶¹ See WAGMAN & LIEBMAN, *supra* note 149, at 307.

⁴⁶² See Brack, *supra* note 437, at 19.

the scope of this study. Under this title, only a few striking examples demonstrating different perspectives on the interaction between the legally protected interests of humans and other animals will be examined.

4.4.1 *Force-feeding*

Fatty liver, or *foie gras* as it is more commonly known, is a luxury dish made of the liver of a duck or a goose intentionally fattened for a better taste.⁴⁶³ To make fatty liver, ducks or geese are immobilized and are fed more than necessary through tubes inserted into the esophagus, which eventually causes their liver to grow unnaturally and puts them under a fatal condition.⁴⁶⁴ Since the traditional form of the dish cannot be made in any way other than force-feeding, cruelty is unavoidable and inherent in the production process.⁴⁶⁵ The highly controversial practice of force-feeding to make fatty liver was discussed in a landmark case before the Supreme Court of Israel in 2003.⁴⁶⁶ The main allegation in the case was that fatty liver production in Israel was not compatible with the existing anti-cruelty legislation, and the administrative regulations regarding fatty liver production were therefore unlawful.⁴⁶⁷

By the time the case was brought before the Supreme Court of Israel, the fatty liver industry had grown significantly owing to decades of governmental support.⁴⁶⁸ It was the main source of income for approximately a hundred families in Israel.⁴⁶⁹ The government argued that the agriculture industry's needs should be considered while ensuring animal welfare.⁴⁷⁰ That said, any torture, cruelty, or abuse against animals was outlawed in Israel by the Animal Protection Law.⁴⁷¹ The legal question in the case was whether force-feeding as an integral part of fatty liver production constituted cruelty or not.

The Supreme Court of Israel assessed the legality of force-feeding not in consideration of the gastronomic pleasure one gets from the taste of fatty liver but of the

⁴⁶³ See Wolfson, *supra* note 205, at 161.

⁴⁶⁴ See Mariann Sullivan & David J. Wolfson, *What's Good for the Goose... The Israeli Supreme Court, Foie Gras, and the Future of Farmed Animals in the United States*, 70 LAW & CONTEMP. PROBS. 139, 144 (2007).

⁴⁶⁵ See Wolfson, *supra* note 205, at 161.

⁴⁶⁶ HCJ 9232/01 "Noah" - Israeli Fed'n of Animal Prot. Orgs. v. Attorney Gen., 57(6) PD 212 (2003) (Isr.).

⁴⁶⁷ See Sullivan & Wolfson, *supra* note 464, at 143.

⁴⁶⁸ See *id.*

⁴⁶⁹ See *id.* at 144; see Wolfson, *supra* note 205, at 161.

⁴⁷⁰ See Sullivan & Wolfson, *supra* note 464, at 143.

⁴⁷¹ See Wolfson, *supra* note 205.

economic interests of those who make a living from producing and selling fatty livers.⁴⁷² The Court relied on scientific knowledge of the suffering caused by force-feeding, arguing that an industry practice could not be justified based on its prevalence.⁴⁷³ Then it applied a proportionality test between the economic interests of farmers and the suffering that force-fed ducks and geese had to endure.⁴⁷⁴ It eventually concluded that fatty liver production was a disproportionate practice that could not be permitted in spite of the evident concerns for animal welfare.⁴⁷⁵ As a consequence, the fatty liver regulations in question were annulled.⁴⁷⁶

What makes the decision of the Supreme Court of Israel outstanding is that Israel was one of the top producers of fatty livers in the global market at the time the decision was rendered.⁴⁷⁷ The annulment of fatty liver regulations on the grounds of cruelty meant that the animal interests in life and health were prioritized over a prevalent industry practice.⁴⁷⁸ This, however, does not mean that the Court's approach was rights-based. If the economic interests of farmers were to outweigh the suffering caused by force-feeding according to the justices, ducks and geese could continue to be exploited. The proportionality test applied by the Supreme Court of Israel allows animal exploitation on condition that the suffering is reduced to a certain extent, and the key problem with fatty liver was the absence of a method other than force-feeding to produce it.⁴⁷⁹ Since neither a less-painful method to produce fatty liver has been developed nor the legislature in Israel has enacted a law to permit and regulate force-feeding, the decision of the Supreme Court of Israel resulted in an effective prohibition of force-feeding to produce fatty liver.⁴⁸⁰

In the aftermath of the decision, the government's initiatives to regulate and allow fatty liver production were blocked by the legislature due to concerns for animal welfare.⁴⁸¹ There have been statements by government officials that blamed the animal rights movement and radicalized the legislature's welfarist stance, one even claiming that

⁴⁷² See *id.* at 162.

⁴⁷³ See *id.*

⁴⁷⁴ See SCHAFFNER, *supra* note 87, at 57.

⁴⁷⁵ See *id.*

⁴⁷⁶ See *id.* at 58.

⁴⁷⁷ See WAGMAN & LIEBMAN, *supra* note 149, at 35.

⁴⁷⁸ See *id.*

⁴⁷⁹ See *id.* at 36.

⁴⁸⁰ See SCHAFFNER, *supra* note 87, at 58.

⁴⁸¹ See Sullivan & Wolfson, *supra* note 464, at 152.

the prohibition of fatty liver production could later risk the existence of dairy and poultry industries.⁴⁸² The toleration of unregulated force-feeding by the government of Israel continued until the Supreme Court of Israel explicitly called for the government to enforce the prohibition.⁴⁸³ In this later decision,⁴⁸⁴ the government's hesitance to enforce the previous decision was criticized not only from the perspective of animal welfare but also the rule of law.⁴⁸⁵ The example of Israel shows how effective anti-cruelty legislation can be in ensuring animal welfare when common industry practices are not exempted.

4.4.2 *Animal Labor*

Humans still capitalize on animal power and body, albeit less often compared to the past. The growing awareness about sentience in animals and concerns about their welfare have given rise to laws and regulations limiting animal exploitation. Some legal systems describe specific actions that remain outside of these limits as forms of cruelty and penalize them. Modern anti-cruelty norms provide the animals within their scope with legal protection, even against persons who exert dominion and control over them.

In the United States, each federated state has its own set of anti-cruelty norms in addition to federal legal provisions.⁴⁸⁶ In New York, for instance, cruelty is defined in the state legislation as “every act, omission, or neglect, whereby unjustifiable physical pain, suffering or death is caused or permitted”.⁴⁸⁷ Failure to provide “necessary sustenance” to an animal is stipulated, *inter alia*, as a form of cruelty and is penalized accordingly.⁴⁸⁸ Practical implications of these provision as well as their interaction with the right to property was indirectly discussed in *People v. O’Rourke* in 1975.⁴⁸⁹

The case relates to a horse named Mabel who was forced to pull a hansom cab despite limping and thus being clearly unfit for the work.⁴⁹⁰ The driver was warned about Mabel’s condition, but in the following day, Mabel was once again forced to pull the hansom cab.⁴⁹¹ Consequently, the driver and the legal owner were brought before the criminal

⁴⁸² *See id.*

⁴⁸³ *See id.*

⁴⁸⁴ HCJ 7713/05 “Noah” - Israeli Fed’n of Animal Prot. Orgs. v. Attorney Gen., (2006) (Isr.).

⁴⁸⁵ *See Sullivan & Wolfson, supra* note 464, at 152.

⁴⁸⁶ *See WAGMAN & LIEBMAN, supra* note 149, at 38-39.

⁴⁸⁷ AGRIC. & MKTS. § 350 (2014).

⁴⁸⁸ *Id.* § 353.

⁴⁸⁹ *People v. O’Rourke*, 83 Misc. 2d 175, 369 N.Y.S.2d 335 (N.Y. City Crim. Ct. 1975).

⁴⁹⁰ *See SCHAFFNER, supra* note 87, at 33.

⁴⁹¹ *See id.*

court for allegedly violating the anti-cruelty provisions of the state law.⁴⁹² It was revealed during the trial that pulling the hansom cab while limping had inflicted considerable physical pain on Mabel.⁴⁹³ Since the defendants were aware of Mabel's condition yet continued to force her to pull the hansom cab, their failure to provide medical care was found to have constituted torture and cruelty.⁴⁹⁴ Although failure to provide necessary medical care was considered a form of cruelty in *People v. O'Rourke*, later judgments narrowed the scope of necessary sustenance down to only food and water.⁴⁹⁵

Treating animals as any other property at humans' disposal leads to conclusions that do not conform to the sense of justice.⁴⁹⁶ In *People v. O'Rourke*, Mabel was not regarded by the court as merely a sort of fuel or a power source to move the hansom cab. The fact that her interest in not being subjected to cruel treatment was legally recognized and protected could not possibly be explained without acknowledging her sentience. Although the legal status of animals other than humans as objects of the right to property has not fundamentally changed since then, the moral concerns stemming from sentience in animals constitute an intellectual basis for distinguishing them from other so-called properties. This is evidently manifested by anti-cruelty laws in which animal interests may prevail over human interests originating from the human right to property.

4.4.3 Slaughter of Animals for Food

It is impossible to determine when animal flesh has entered into humans' diet for the first time due to the length of evolutionary processes and the absence of record.⁴⁹⁷ What we do know, on the other hand, is that the primate ancestors of modern humans relied heavily on plants to live on.⁴⁹⁸ Even today, the only primate species known to eat large animals is humankind.⁴⁹⁹ *Meat* has appeared in early humans' diet not as a gastronomic

⁴⁹² See *id.*

⁴⁹³ See *id.* at 34.

⁴⁹⁴ See *id.*

⁴⁹⁵ See *id.* See also *People v. Walsh*, 19 Misc. 3d 1105(A), 859 N.Y.S.2d 906 (N.Y. City Crim. Ct. 2008); *People v. Curcio*, 22 Misc. 3d 907, 874 N.Y.S.2d 723 (N.Y. City Crim. Ct. 2008).

⁴⁹⁶ See Özgün Çelebi, *Kişi ve Eşya Ayrımı Bağlamında Hayvanların Hukuki Statüsü* [Legal Status of Animals with Regards to the Distinction Between Persons and Things], 76 İSTANBUL HUKUK MECMUASI [ISTANBUL L. REV.] 559, 574 (2018).

⁴⁹⁷ See SPENCER, *supra* note 55, at 4.

⁴⁹⁸ See *id.*

⁴⁹⁹ See *id.* at 8.

delicacy like it currently is, but as a means to increase their chance of survival, similar to other exploited features of animals such as their power or products.⁵⁰⁰

In this age, humans no longer hunt other animals for survival, yet the demand for animal flesh persists.⁵⁰¹ Its various forms are an ingredient of numerous dishes from numerous cuisines. This demand helps sustain the vast meat industry in which billions of farmed animals—multiple times the number of humans—are continuously raised and killed for human consumption.⁵⁰² Though methods of industrial animal slaughter are often highly regulated for sanitary or religious reasons and out of concern for animal welfare as well, the practice of slaughter itself is rarely discussed in the legal field. It is such an established and prevalent practice that the link between an animal as a sentient being and their *meat* as a commercial product is usually ignored.

In 1994, a state high court in India received a writ petition by a group of butchers alleging that the legal regulations on buffalo slaughter had restricted their professional activities and livelihood.⁵⁰³ In the following judgment, the court underlined the constitutional duty to “have compassion for living creatures”.⁵⁰⁴ It held that killing animals could not be asserted as a fundamental right.⁵⁰⁵ The dismissal of the writ petition on the given ground effectively excludes animal slaughter from the scope of rights to property and respect to private life within professional activities, albeit limited to the particular state jurisdiction. It also demonstrates the potential impact of a constitutional principle as an interpretative basis against industrial animal slaughter.

4.5 Taking Care of Companion Animals

Although humans exert property rights over companion animals, the relation between companion animals and their caregivers differs from the one between an object and its owner from various aspects.⁵⁰⁶ Humans typically take care of their companion animals without anticipating any revenue, and the bond in between is mostly immaterial.⁵⁰⁷ In

⁵⁰⁰ See *id.* at 21.

⁵⁰¹ See *id.* at 304.

⁵⁰² See *id.* at 303.

⁵⁰³ See WAGMAN & LIEBMAN, *supra* note 149, at 265.

⁵⁰⁴ Mohd. Habib v. State of Uttar Pradesh, Civil Misc. Writ Petition No. 38469 of 1994 (Allahabad HC 1997) (India); India Const. art. 51A, cl. 1(g).

⁵⁰⁵ See WAGMAN & LIEBMAN, *supra* note 149, at 265-66.

⁵⁰⁶ See Steve Cooke, *Duties to Companion Animals*, 17 RES PUBLICA 261, 264 (2011).

⁵⁰⁷ See *id.*

many legal systems, disposing of or intentionally hurting a companion animal is not tolerated, resulting from acknowledging their status as sentient beings even when they are not granted legal personhood.⁵⁰⁸ It seems that the classical understanding of *property* does not sufficiently explain humans' interaction with companion animals.

Since companion animal species are made dependent on receiving care from humans for sustaining their life and well-being, the predominant moral tendency is that they should be protected.⁵⁰⁹ Humans defend their possessions from interferences to preserve an economic value as part of their assets, but that is not the rationale behind protecting a companion animal.⁵¹⁰ The economic interest is usually irrelevant to the solid emotional bond established between a companion animal and a caregiver. However, from a moral standpoint, the amount of protection a companion animal deserves should not be contingent upon the emotional bond a caregiver feels towards the animal. Animals suffer, and their suffering matters to them. Therefore, besides protection, there is also a moral duty not to harm animals.⁵¹¹

Moral duties towards companion animals may simultaneously be recognized as legal duties, and in such legal systems, the special relation between humans and companion animals may be considered in judicial deliberations. Even though most courts only reimburse the market value of the injured or deceased animal, there are rare instances where some federated state courts in the United States have ordered compensation for non-pecuniary and punitive damages resulting from the murder of a companion animal, especially with malicious intent.⁵¹² Another example of judicial consideration in this regard is the decision of a criminal court in Russia to suspend a sentence relying, *inter alia*, on the fact that the defendant was the caregiver of a cat.⁵¹³ It should be noted that these are exceptional judgments that mark a slow yet ongoing change in the general approach.⁵¹⁴

Companion animals are socially perceived as household members, and for the sake of their dependence to humans, harming or neglecting them is widely condemned. Despite

⁵⁰⁸ See *id.*

⁵⁰⁹ See *id.* at 268.

⁵¹⁰ See *id.*

⁵¹¹ See *id.* at 271.

⁵¹² See Sande L. Buhai, *Pets as Property: Signs of Change in the Law of Judgment Collections*, 26 ANIMAL L. 171, 181-82 (2020).

⁵¹³ *Cat Saves Man from Jail – Media*, RT (Nov. 19, 2023), <https://www.rt.com/russia/587612-cat-save-man-jail/>.

⁵¹⁴ See Buhai, *supra* note 512, at 182.

the existence of anti-cruelty laws resulting from such concerns, cases of cruelty to companion animals are rarely prosecuted due to impracticability.⁵¹⁵ The situation was no different in Connecticut in the United States until a horrendous incident and the ensuing public outrage led the state legislature to take a radical step.⁵¹⁶ In 2012, the body of a dog named Desmond was found thrown away inside a trash bag.⁵¹⁷ Desmond's legal owner confessed to having tortured and killed Desmond, yet his sentence was a mere enrollment in a diversion program after which the conviction would be struck down from his criminal record.⁵¹⁸

The predicament in Desmond's case was that he was legally owned by the very person who tormented him, and disposing of one's own property was part of the property rights. The trial was conducted in the absence of an advocate who could speak out for Desmond and safeguard his interests that were clearly conflicting with the defendant's property rights. This case revealed the ineffectiveness of Connecticut's anti-cruelty legislation at that time. It led to enacting a new provision, more commonly referred to as Desmond's Law.⁵¹⁹ A significant novelty introduced by Desmond's Law was the appointment of advocates who have the expertise and interest in animal issues to assist the court in animal cruelty cases regarding dogs and cats.⁵²⁰ These advocates are entrusted with looking after animal victims' interests and make suggestions to the court for justice.⁵²¹

Not all those who have a legally recognized interest are able to assert it against others without assistance. Children, for instance, have their own rights, but they cannot be expected to defend their rights by themselves. For this reason, judicial systems are adjusted to their special needs in cases where they are involved.⁵²² In terms of animal cruelty cases, there is an obvious intersectionality with other groups that need special assistance in judicial procedures.⁵²³ The direct victims of offenses of cruelty are animals other than humans. Without representatives to voice animals' interests before courts, most

⁵¹⁵ See, e.g., Jessica Rubin, *Desmond's Law: Early Impressions of Connecticut's Court Advocate Program for Animal Cruelty Cases*, 134 HARV. L. REV. 263, 263-64 (2021).

⁵¹⁶ See *id.*

⁵¹⁷ See *id.* at 263.

⁵¹⁸ See *id.*

⁵¹⁹ See *id.* at 264.

⁵²⁰ CONN. GEN. STAT. § 54-86n (2019).

⁵²¹ See Rubin, *supra* note 515, at 267.

⁵²² See *id.* at 274.

⁵²³ See *id.*

breaches of anti-cruelty laws are likely to remain uncovered and unprosecuted.⁵²⁴ Desmond's Law may be viewed as an early step that might pave the way for the effective representation of animals other than humans in legal disputes. Only then can a fair judicial system for all animals who can be victimized, whether human or not, be ensured.

4.6 Taking Care of Homeless Companion Animals

Humans share their contemporary settlements with a variety of companion animals, especially dogs and cats, who are not taken care of inside homes. These animals, usually cumulatively referred to as stray animals,⁵²⁵ still depend on receiving care from humans despite living outdoors since they cannot become part of the wildlife once they are separated from the sphere of humans. As a more vulnerable group within the set of companion animals, their status requires a separate discussion. An insight into how homeless companion animals have appeared and which problems they face may provide a meaningful background before discussing the relevant legal issues.

Modern dogs are ancestors of wolves who developed a mutually beneficial relationship with hunter-gatherer humans in the Mesolithic era.⁵²⁶ Since their emergence as a different species, dogs have lived alongside humans and accompanied them through each step of their progress for thousands of years. Cats, on the other hand, contacted humans at a later era, when humans had already become settled and started farming.⁵²⁷ It is presumed that humans allowed the presence of wild cats in their settlements, and some cats have slowly become accustomed to living alongside humans through a natural process.⁵²⁸ The bodies and metabolisms of these *domestic* dogs and cats have altered from those of their *wild* ancestors, and as a result of humans' intervention, they have irreversibly lost most of the skills and behaviors that are vital for sustaining oneself out in nature.⁵²⁹

⁵²⁴ See Adenitire, *supra* note 4, at 25.

⁵²⁵ The term *stray animal* may not cover companion animals who once received care indoors but have to live outdoors with no definite caregiver for reasons such as being abandoned. The preferred term for the purpose of this study is a *homeless companion animal* or, shortly, a *homeless animal*, as it is more comprehensive and less prone to be perceived as speciesist.

⁵²⁶ See Carlos A. Driscoll et al., *From Wild Animals to Domestic Pets, An Evolutionary View of Domestication*, 106 PROC. NAT'L ACAD. SCI. U.S. [PNAS] 9971, 9973 (Supp. 1, 2009).

⁵²⁷ See *id.* at 9974.

⁵²⁸ See *id.*

⁵²⁹ See Melinda A. Zeder, *The Domestication of Animals*, 68 J. ANTHROPOLOGICAL RSCH. 161, 171 (2012).

As companion animals, dogs and cats are expected to live inside homes as household members. However, some of them are abandoned by their caregivers, some escape their home and are not found or returned, and some are simply born as a homeless animal and are not adopted later on.⁵³⁰ Homeless companion animals have a considerably shorter lifespan compared to their counterparts that are taken care of inside homes.⁵³¹ The difference is not only quantitative but also qualitative. Homeless companion animals are at numerous risks such as diseases, violence, and traffic accidents.⁵³² Without any help from humans, they can hardly access proper healthcare and medication, sufficient food and water, and a hygienic environment. These deficiencies are worsened by overpopulation, which causes health and safety problems for humans and other animals.

Historically, administrations first resorted to lethal methods to manage homeless animal populations.⁵³³ Lethal methods vary in the degree of consideration to the suffering of animals. Most administrations today have stopped shooting homeless animals at sight with the rising public concern for animal welfare and started to kill the ones who are not adopted through lethal injection instead. As the animal rights discourse shifted towards sentience in animals and their inherent value, the necessity of lethal injection was questioned, and non-lethal methods were sought.⁵³⁴ The popularity of trap-neuter-return as an alternative to lethal injection has escalated in recent years.⁵³⁵ In this method, homeless animals are collected, neutered and often additionally vaccinated, then released back to the place where they were found. Despite its prevalence, the main criticism against trap-neuter-return is that neutered and vaccinated animals are put back to a hostile environment where they cannot live their life to the fullest extent.⁵³⁶ An alternative to trap-neuter-return is long-term shelters for homeless animals where they receive care until they are adopted.⁵³⁷

⁵³⁰ See ALAN M. BECK, *THE ECOLOGY OF STRAY DOGS: A STUDY OF FREE-RANGING URBAN ANIMALS* 4-5 (Purdue Univ. Press 1973).

⁵³¹ Cf. *id.* at 37 (displaying local scientific findings that compare the lifespans of dogs found dead on the streets and dogs that are taken care of inside homes).

⁵³² See *id.* at 35.

⁵³³ See Peter Joseph Wolf & Joan E. Schaffner, *The Road to TNR: Examining Trap-Neuter-Return Through the Lens of Our Evolving Ethics*, 5 *FRONTIERS IN VETERINARY SCI.* article no. 341, Jan. 2019, at 1, 3.

⁵³⁴ See *id.*

⁵³⁵ See *id.* at 4.

⁵³⁶ See Alisa Mullins, *To TNR or Not to TNR—That Is the Question*, PETA (Feb. 10, 2021), <https://www.peta.org/features/does-tnr-really-save-cats/>.

⁵³⁷ See *id.*

The history of homeless animal management in Turkey is worth examining hereunder, as it has been abundant in legal discussions. Even before the emergence of the animal rights movement, there were foundations in the Ottoman era that were solely established to care for homeless animals.⁵³⁸ Aside from voluntary citizens, there were people employed to feed or cure homeless animals in need.⁵³⁹ Most homeless animals in the rapidly urbanizing cities in other parts of Europe were not as lucky, since a wave of mass killing wiped them off almost entirely in the 18th–19th centuries.⁵⁴⁰ In the 19th century, the Ottoman Empire entered into a period of *westernization* to modernize itself in the style of other European powers, and this may be considered a turning point in public authorities’ as well as some of the Ottoman elite’s view on homeless animals.⁵⁴¹ Homeless animals, especially dogs in the streets of Istanbul—the empire’s capital—were now seen as an impediment to modernization.

The negative sentiment towards Istanbul’s homeless dogs peaked in the early 20th century and led to one of the most notorious animal massacres in history. On May 29, 1910, approximately 80 thousand homeless dogs were collected from the streets of Istanbul and abandoned on a barren island.⁵⁴² Their cries were heard from the mainland for days, and eventually, they all starved to death on that island, which was referred to as the Inauspicious Island after this incident.⁵⁴³ After the collapse of the Ottoman Empire and the proclamation of the Republic of Turkey, society’s compassion for homeless animals continued but so did the administration’s intolerance.

For decades, municipalities across Turkey resorted to various lethal methods including shooting, poisoning, and burning in furnaces, and when their efforts were insufficient, some even called for mass killing campaigns with monetary prizes.⁵⁴⁴ Simultaneously, there were campaigns and scholarly calls for adopting a modern animal protection law that considers homeless animals’ interest in maintaining life.⁵⁴⁵ This

⁵³⁸ See İSMET SUNGURBEY, *HAYVAN HAKLARI: BİR İNSANLIK KİTABI* [ANIMAL RIGHTS: A BOOK OF HUMANITY] 365 (Istanbul Univ. Press, 1992).

⁵³⁹ See *id.*

⁵⁴⁰ See Murat Toklucu, *Kedi ve Köpek Düşmanları Yine Sahnedeyken: Başiboş Hayvan Sorunu Yok, Başiboş İnsan Sorunu Var!* [Enemies of Cats and Dogs Are on Stage Again: There Is No Stray Animal Problem, But a Stray Human Problem!], #TARİH, Sept. 2024, no. 117, at 32, 32.

⁵⁴¹ See *id.*

⁵⁴² See *id.* at 32-33.

⁵⁴³ See *id.* at 33.

⁵⁴⁴ See *id.* at 34-35.

⁵⁴⁵ See, e.g., SUNGURBEY, *supra* note 538, at 377 (emphasizing the trend in modern legal systems to provide a legal ground for animal protection).

became possible with the Law on the Protection of Animals in 2004. Since then, Turkey's global image has been intertwined with its people's hospitality towards homeless animals. Society's reverence of animals has been widely praised and become the subject of documentaries.⁵⁴⁶ Some famous homeless animals in Turkey have even become the center of international attraction.⁵⁴⁷

Turkey had adopted a strict trap-neuter-return policy in its relevant law until recently.⁵⁴⁸ Although it is theoretically in the best interest of homeless animals to receive care indoors as any other companion animal, long-term shelters are practically not the ideal solution in the context of Turkey. A study conducted in 28 municipal shelters across Turkey from July 2015 to June 2016 reveals that veterinarians report, *inter alia*, that shelters are overcrowded and understaffed.⁵⁴⁹ Other complaints include lack of medicine and treatment opportunities, and maltreatment of animals at the hands of employees.⁵⁵⁰ These problems are furthered by the restriction of supervision by the public, as most municipal shelters that temporarily host homeless animals are hesitant to cooperate with relevant NGOs and voluntary citizens despite the clear wording of the law.⁵⁵¹ Homeless animals in Turkey are traditionally treated as the companion animals of their neighborhood and often receive communal care. Considering the evident deficiencies in

⁵⁴⁶ Jennifer Hattam, *The Extraordinary Lives of Istanbul's Street Cats*, BLOOMBERG (Apr. 26, 2016), <https://www.bloomberg.com/news/articles/2016-04-26/the-extraordinary-lives-of-istanbul-s-street-cats>; Danny Leigh, *Stray — A Dog's-Eye View of Istanbul*, Financial Times (Mar. 24, 2021), <https://www.ft.com/content/4c74f6fa-e95e-47c6-b52c-626d5815f2b4>.

⁵⁴⁷ E.g., Harry Warner, *Dog Known as 'The Boulder' Is the Highest Rated Tourist Attraction in Istanbul*, THE LONDON ECONOMIC [TLE] (Aug. 30, 2024), <https://www.thelondoneconomic.com/travel/dog-known-as-the-boulder-is-the-highest-rated-tourist-attraction-in-istanbul-382022/>; Hannah Sparks, *Why Boji the Commuting Street Dog Is Becoming a Global Superstar*, NEW YORK POST (Oct. 7, 2021), <https://nypost.com/2021/10/07/why-this-commuting-dog-is-becoming-a-global-superstar/>; Yasmına Allouche, *Hagia Sophia's Beloved Feline of 16 Years Dies After Short Illness*, MIDDLE EAST EYE (Nov. 8, 2020), <https://www.middleeasteye.net/news/hagia-sophia-gli-cat-dies>; *Tombili: Istanbul Cat and Worldwide Meme Honoured with Statue*, THE INDEPENDENT (Oct. 4, 2016), <https://www.independent.co.uk/news/world/middle-east/tombili-istanbul-cat-and-worldwide-meme-honoured-with-statue-a7344671.html>.

⁵⁴⁸ Hayvanları Koruma Kanunu [Law on the Protection of Animals], Law No. 5199, art. 6 (as amended by Law No. 7527 on Aug. 2, 2024) (Turk.).

⁵⁴⁹ See Ali Yiğit et al., *Evaluation on Shelter Medicine and Stray Animal Shelters in Turkey*, 26 KAFKAS ÜNİVERSİTESİ VETERİNER FAKÜLTESİ DERGİSİ [J. FAC. VETERINARY MED. KAFKAS UNIV.] 17, 20 (2020).

⁵⁵⁰ See *id.*

⁵⁵¹ See H. Tayfur Özgür, *Türkiye'de Barınak Sorunu ve Çözüm Yolları [The Shelter Problem in Turkey and Solutions]*, 8 İSTANBUL BAROSU DERGİSİ [J. ISTANBUL BAR ASS'N] (SPECIAL ISSUE: HAYVAN HAKLARINA HUKUKİ YAKLAŞIM [LEGAL APPROACH TO ANIMAL RIGHTS]) 79, 79 (2008).

municipal shelters in Turkey, most homeless animals are better off where they are accustomed to rather than in shelters.

The inefficiency of trap-neuter-return in Turkey was mainly caused by the failure of competent authorities to effectively fulfill their duties and enforce the measures prescribed in the law.⁵⁵² Although the law sets minimum thresholds in the budgets of both municipalities and the relevant ministry to be spent for the protection of homeless animals, funding has remained scarce in defiance of the law.⁵⁵³ Nominal fines for abandoning companion animals, insufficient microchipping by caregivers, and legalization of commercial breeding and sale of companion animals were other factors that were hampering the implementation of the law. Nevertheless, voluntary NGOs and citizens in Turkey have been trying to neuter and vaccinate homeless animals within their reach in private clinics.⁵⁵⁴ The state's lack of willingness to effectively enforce the law could be addressed as a rule of law problem,⁵⁵⁵ and yet the legislature in Turkey addressed the issue much differently. Although it was the state authorities that were responsible for the deficient implementation of the law, a highly controversial amendment to the detriment of homeless animals was passed in 2024 that changed the management method from trap-neuter-return to rehome-or-kill.

According to the amendment's reasoning, the adoption of *euthanasia* as a method of homeless animal management was explained by the right to life and the right to property.⁵⁵⁶ The reasoning specifically mentioned traffic accidents allegedly caused by homeless animals, psychological distress that some people experience due to the presence of homeless animals, risk of rabies and other zoonotic diseases, lawsuits against municipalities resulting from damages allegedly caused by homeless animals, and the alleged harm caused to the wildlife by homeless animals as justifications for the amendment.⁵⁵⁷ The genuineness of these concerns was questioned, and the amendment

⁵⁵² See Okşan Tandoğan, *Qualitative Study: Issue(s) of Stray Animal(s) in Turkey from the Point of View of Volunteers*, 6 J. ENV'T & NAT. STUD. [JENAS] 72, 81-82 (2024).

⁵⁵³ See Özgür, *supra* note 551, at 80.

⁵⁵⁴ See Tandoğan, *supra* note 552.

⁵⁵⁵ See M. B. Rodriguez Ferrere, *Animal Welfare Underenforcement as a Rule of Law Problem*, 12 ANIMALS article no. 1411, June 2022, at 1, 13.

⁵⁵⁶ Hayvanları Koruma Kanununda Değişiklik Yapılması Hakkında Kanun [Law on Amending the Law on the Protection of Animals], Law No. 7237, reasoning, <https://mevzuat.tbmm.gov.tr/Kanun/KanunDetay?YasamaKanunId=39ba3d53-08dd-45c0-94a0-0190a6fb1d67&kanunNumarasi=7527#step-2> (Turk.).

⁵⁵⁷ *Id.*

was criticized for fabricating another ground for political division in the already polarized society.⁵⁵⁸ The amendment was passed despite numerous protests all across Turkey.⁵⁵⁹

One of the institutions that deplored the amendment was the Union of Turkish Bar Associations, which published a review stating, *inter alia*, that the term *euthanasia* was a euphemism that could not be applied in the context of animals who lack moral agency and cannot be associated with such a right.⁵⁶⁰ The review also pointed out that the data in the amendment's reasoning were distorted and misrepresented, as traffic accidents related to homeless animals were less than 1% of the total number of accidents, and the prevalence of rabies in humans had considerably decreased in Turkey with 1 or 2 human cases per year on average since 2018.⁵⁶¹ The amendment's justifications for departing from trap-neuter-return were portraying homeless animals as the causes of existing problems, whereas such animals were the victims. An analysis published by the Vegan Association of Turkey clarified that the reasoning lacked up-to-date scientific evidence to support the effectiveness of the proposed method or the claims regarding traffic accidents, rabies, and wildlife.⁵⁶²

The enactment of the rehome-or-kill method drew reaction from outside of Turkey as well. For instance, Humane Society International published a statement calling for reconsidering the proposed method that was described as "not only cruel, but also ineffective".⁵⁶³ There were even social media campaigns calling foreign tourists to protest the amendment by canceling their trips to Turkey.⁵⁶⁴ The amended law has been

⁵⁵⁸ Dorian Jones, *Turkey's Plan to Cull Street Dogs Provokes Fury Across Political Lines*, RADIO FRANCE INTERNATIONALE [RFI] (July 28, 2024), <https://www.rfi.fr/en/podcasts/international-report/20240728-turkey-s-plan-to-cull-street-dogs-provokes-fury-across-political-lines>.

⁵⁵⁹ *Id.*

⁵⁶⁰ TÜRKİYE BAROLAR BİRLİĞİ [UNION OF TURKISH BAR ASS'NS], *Hayvanları Koruma Kanununda Değişiklik Yapılmasına Dair Kanun Teklifine İlişkin Hukuki Değerlendirme* [Legal Review Concerning the Proposed Law on Amending the Law on the Protection of Animals], <https://www.barobirlik.org.tr/Haberler/hayvanlari-koruma-kanununda-degisiklik-yapilmasina-dair-kanun-teklifine-iliskin-hukuki-degerlendirme-84921> (last visited Nov. 4, 2024).

⁵⁶¹ *Id.*

⁵⁶² VEGAN DERNEĞİ TÜRKİYE [TVD] [VEGAN ASS'N TURK.], *Hayvanları Koruma Kanunu'nda Değişiklik Yapılmasını Öngören Yasa Taslak Teklifi Genel Gereğçeler Üzerine Detaylı Bir İnceleme* [A Detailed Analysis of the General Reasoning of the Proposed Draft Law to Amend the Law on the Protection of Animals], <https://haberler.tvd.org.tr/2024/07/13/genel-gerekceler-uzerine-detayli-bir-inceleme/> (last visited Nov. 4, 2024).

⁵⁶³ Humane Society International, *Statement on Bill to Kill Street Dogs and Cats in Türkiye*, <https://www.hsi.org/news-resources/statement-on-bill-to-kill-street-dogs-and-cats-in-turkiye/> (last visited Nov. 4, 2024).

⁵⁶⁴ Sabrina Penty, *UK Tourists Vow to Boycott Turkey and Cancel Their Holidays over New Law to Round Up and Exterminate Stray Dogs*, DAILY MAIL (Aug. 12, 2024), <https://www.dailymail.co.uk/news/article-13735665/UK-tourists-vow-boycott-Turkey-cancel-holidays-new-law-round-exterminate-stray-dogs.html>.

interpreted by many as an incitement to a homeless animal massacre. For instance, reports of a man saying “The state has made a law to kill the dogs” while stabbing a puppy with a pitchfork appeared in the news.⁵⁶⁵ In the aftermath of the amendment’s entry into force, several mass graves of brutally murdered homeless animals were discovered.⁵⁶⁶ Bodies of more than 50 homeless dogs and cats were found thrown away inside the dumpsters of a municipal animal shelter.⁵⁶⁷ Reports of mass killing or maltreatment of homeless animals are expected to continue as long as the wording of the law stays the same.

According to the constitution of Turkey, the Constitutional Court can strike down legal provisions that are unconstitutional “in form or in substance”.⁵⁶⁸ Upon an appeal by the main opposition party group in the parliament, a case is pending before the Constitutional Court for the annulment of amended provisions of the law. The main challenge in this case is that there is no explicit constitutional basis for protecting animal interests in the law of Turkey. In contrast, the constitution contains a programmatic norm endorsing animal agriculture.⁵⁶⁹ If the Constitutional Court simply dismisses the case due to the absence of a constitutional ground directly in favor of animals other than humans, that would be a one-dimensional approach, whereas the issue of homeless animal management deserves a more in-depth discussion concerning various legal dimensions arising from the constitution.

A crucial fundamental right to consider in this context is the right to live in a healthy and balanced environment. One of the components of this fundamental right is the protection of environmental health as also stipulated in the constitution of Turkey.⁵⁷⁰ The environment, by definition, is not composed solely of human beings. Even though the law protects the environment for the sake of humans, it indirectly has to consider humans’ interaction with other beings that share the same environment to that end. This means that

⁵⁶⁵ *Yavru Köpeği Tarım Aleti Saplayarak Öldüren Kişi: Devlet Kanun Çıkardı Köpekleri Öldürmek İçin* [The Person Who Killed a Puppy by Stabbing with an Agricultural Tool: The State Has Made a Law to Kill the Dogs], T24 (Aug. 31, 2024), <https://t24.com.tr/haber/ankara-da-kan-donduran-olay-yavru-kopeci-tarim-aletiyle-oldurdu-tutuklandi,1181901>.

⁵⁶⁶ Hilken Doğaç Boran, *Sokak Köpeklerinin ‘Topluca Öldürüldüğü’ İddiaları: Ankara ve Niğde’de Neler Oluyor?* [Alleged ‘Mass Killing’ of Stray Dogs: What Is Happening in Ankara and Niğde?], BBC NEWS TÜRKÇE (Aug. 9, 2024), <https://www.bbc.com/turkce/articles/c4gd5vx3gxno>.

⁵⁶⁷ Hilken Doğaç Boran, *Gebze’de Barınağın Çöp Konteynerlerinde Onlarca Hayvan Ölüsü Bulundu* [Tens of Animal Corpses Were Found Inside the Garbage Dumpsters of the Shelter in Gebze], BBC NEWS TÜRKÇE (Oct. 11, 2024), <https://www.bbc.com/turkce/articles/c89l3ygdqnwo>.

⁵⁶⁸ Türkiye Cumhuriyeti Anayasası [Constitution of the Republic of Turkey] art. 150, translation at https://www.anayasa.gov.tr/media/7258/anayasa_eng.pdf.

⁵⁶⁹ *Id.* art. 45.

⁵⁷⁰ *Id.* art. 56.

the ethical concerns underlying the right to live in a healthy and balanced environment may contest and even prevail over other human rights, and those very concerns may also relate to elements of the environment besides humans.⁵⁷¹ That said, the Constitutional Court of Turkey overlooks the ecological aspect of this fundamental right.⁵⁷² It rather tends to protect components of the environment as natural resources, despite dissenting opinions in its case-law asserting that they should be protected as parts of a sustainable and balanced ecological system regardless of their utility.⁵⁷³

Environment is a generic term that is not confined to nature or wildlife. Human settlements—however urban they may be—are also part of the environment. Since homeless animals live side by side with humans and are part of their day-to-day lives, a healthy environment cannot be thought of without addressing the effects of their presence on humans' health.⁵⁷⁴ Studies suggest that interaction with companion animals has numerous positive consequences on the physical and psychological well-being of humans from various aspects such as confidence, empathy, and sociability.⁵⁷⁵ Considering homeless animals are also companion animals and most homeless animals in Turkey are looked after by members of the local community, these health benefits are expected to apply within the context of homeless animals in Turkey as well. This relation is not unilateral, as there is evidence that interaction with people who look after them contributes to the health of companion animals.⁵⁷⁶

The environments of humans and homeless animals are intertwined. Since human settlements are not human habitats alone, a new approach that is not based on the utility of everyone else and everything else to humans is needed.⁵⁷⁷ In addition to the apparent unethical outcomes, designing human settlements by ignoring humans' interrelation with other elements of the same environment may also lead to impractical outcomes. To give

⁵⁷¹ See César Rodríguez-Garavito, *A Human Right to a Healthy Environment? Moral, Legal, and Empirical Considerations*, in *THE HUMAN RIGHT TO A HEALTHY ENVIRONMENT* 155, 157 (John H. Knox & Ramin Pejan eds., Cambridge Univ. Press 2018).

⁵⁷² See Yasemin Semiz, *Anayasa Mahkemesi'nin Çevre Hakkı Perspektifi [Constitutional Court's Perspective About Right to Environment]*, 4 HACETTEPE ÜNİVERSİTESİ HUKUK FAKÜLTESİ DERGİSİ [HACETTEPE UNIV. FAC. L. REV.] 9, 17 (2014).

⁵⁷³ See, e.g., *id.* at 19-20 (exemplifying the Constitutional Court's approach not to associate the protection of animals in the wildlife with the right to live in a healthy and balanced environment).

⁵⁷⁴ See CECILY MALLER, *HEALTHY URBAN ENVIRONMENTS: MORE-THAN-HUMAN THEORIES* 102 (Routledge 2018).

⁵⁷⁵ See Catherine Amiot et al., *People and Companion Animals: It Takes Two to Tango*, 66 *BIOSCIENCE* 552, 554-55 (2016).

⁵⁷⁶ See *id.* at 556.

⁵⁷⁷ See MALLER, *supra* note 574, at 143.

an example from history, the municipality of Istanbul—Turkey’s most populous city—started a mass killing campaign against homeless cats in 1937 and even offered a monetary prize for each cat caught and brought by citizens.⁵⁷⁸ In less than a year, the city’s streets were overrun by rats, and the same municipality had to cease the campaign and recommend store owners keep cats to ensure food hygiene and to prevent related diseases.⁵⁷⁹ In this example, the interest of homeless cats in a healthy life and balanced environment was coinciding with that of humans. If the same incident were to happen today, it could be evaluated from a human rights perspective. Therefore, the recent amendment imposing rehome-or-kill as a method of homeless animal management can be evaluated from the same perspective.

The amendment’s reasoning only mentions the so-called risks of homeless animals to the rights to life and property. By doing so, it overlooks the potential mutual benefits of non-lethal management of homeless animals in the environment where they belong. Urbanization considerate of all components of the collective environment contributes to achieving healthier settlements for all species within it, including humans and homeless animals.⁵⁸⁰ If implemented duly, trap-neuter-return provides an extended process of homeless animal management, and thus its effects on the environment and health may be observed and controlled better. Ruling out the destructive consequences of an immediate eradication of the homeless animal population through rehome-or-kill allows the Constitutional Court to discuss the issue on a constitutional basis in relation to the right to live in a healthy and balanced environment. This would also be compatible with the law’s purpose to “provide human, animal and environmental health” and to “ensure well and proper treatment of animals”.⁵⁸¹

Another aspect of the issue is the amendment’s potential effect on biological diversity. One of the justifications presented for the amendment is the claim that homeless dogs “cause harm to wild animals such as gazelles and roe deer”.⁵⁸² This particular reasoning is criticized for not being scientifically substantiated with sufficient data in the

⁵⁷⁸ See Toklucu, *supra* note 540, at 34.

⁵⁷⁹ See *id.*

⁵⁸⁰ See MALLER, *supra* note 574, at 152-53.

⁵⁸¹ Hayvanları Koruma Kanunu [Law on the Protection of Animals], Law No. 5199, art. 1 (Turk.).

⁵⁸² Hayvanları Koruma Kanununda Değişiklik Yapılması Hakkında Kanun [Law on Amending the Law on the Protection of Animals], Law No. 7237, reasoning, <https://mevzuat.tbmm.gov.tr/Kanun/KanunDetay?YasamaKanunId=39ba3d53-08dd-45c0-94a0-0190a6fb1d67&kanunNumarasi=7527#step-2> (Turk.).

context of Turkey.⁵⁸³ As one of the parties to the Convention on Biological Diversity (CBD), Turkey is “conscious of the intrinsic value of biological diversity and of the ecological . . . values of biological diversity and its components”.⁵⁸⁴ According to the constitution of Turkey, international treaties that are duly put into effect are at the same level as domestic laws in the hierarchy of norms, or above domestic laws if they are pertinent to fundamental rights and freedoms.⁵⁸⁵ This means that provisions of the CBD have at least as much normative power as the laws enacted by the parliament.

Human settlements contain diverse habitats that are home to numerous plant and animal species.⁵⁸⁶ Even urbanized cities and towns where the majority of humans live today are not devoid of biological diversity.⁵⁸⁷ On the contrary, they are of key importance in achieving and conserving biological diversity, as they may potentially both contribute to and harm biodiversity in and around them depending on their administration.⁵⁸⁸ Therefore, the CBD does not distinguish between urban habitats and habitats that are uninhabited by humans. Although the amendment aims to protect wildlife by removing homeless dogs from human settlements, it does not refer to any research on how many gazelles (*Gazella marica*) or roe deer (*Capreolus capreolus*) are killed by homeless dogs. However, members of the two mentioned species are regularly killed by local and foreign hunters through legal permits.⁵⁸⁹ Moreover, biological diversity is not limited to wildlife. Homeless companion animals are part of the vibrant habitats in urban environments. An immediate and uncontrolled removal of one or more species from that environment may cause a greater loss of biological diversity.

Biological diversity is one of the vital elements of the right to live in a healthy and balanced environment.⁵⁹⁰ This provides another legal ground to discuss the amendment’s

⁵⁸³ VEGAN DERNEĞİ TÜRKİYE [TVD] [VEGAN ASS’N TURK.], *supra* note 562.

⁵⁸⁴ Convention on Biological Diversity preamble, *opened for signature* June 5, 1992, 1760 U.N.T.S. 79, 143.

⁵⁸⁵ Türkiye Cumhuriyeti Anayasası [Constitution of the Republic of Turkey] art. 90, para. 5, translation at https://www.anayasa.gov.tr/media/7258/anayasa_eng.pdf.

⁵⁸⁶ *See* MALLER, *supra* note 574, at 111.

⁵⁸⁷ *See* J. A. Puppim de Oliveira et al., *Cities and Biodiversity: Perspective and Governance Challenges for Implementing the Convention on Biological Diversity (CBD) at the City Level*, 144 BIOLOGICAL CONSERVATION 1302, 1303 (2011).

⁵⁸⁸ *See id.* at 1304.

⁵⁸⁹ DOĞA KORUMA VE MİLLİ PARKLAR GENEL MÜDÜRLÜĞÜ [GEN. DIRECTORATE OF NATURE CONSERVATION & NAT’L PARKS] (Turk.), TÜRKİYE’DE AV VE YABAN HAYATI [HUNTING AND WILDLIFE IN TURKEY] 27 (CTA Ltd. 2013), <https://www.tarimorman.gov.tr/DKMP/Belgeler/dkmp%20resmi%20istatistik/kutuphane/77.pdf>.

⁵⁹⁰ *See* Semiz, *supra* note 572, at 10.

constitutionality in the context of fundamental rights. Even if the amendment is not struck down by the Constitutional Court, domestic courts may still interpret the CBD as an international treaty pertinent to fundamental rights and freedoms—particularly the right to live in a healthy and balanced environment—and conclude that its provisions prevail over domestic laws. Although not all parties to the CBD enforce non-lethal methods of homeless animal management, courts in Turkey may rely on its basic principles to find a balance in the implementation of the amended law in each specific case before them.

The link between homeless animal management and the right to live in a healthy and balanced environment is not far-fetched, as examples from the past have shown. The fact that mass killings of homeless companion animals in Turkey’s history only caused suffering with no permanent solution to the issue indicates that the newly enacted method is likely to end up ineffective as well. In any case, a judicial review of the amendment’s conformity with the constitution requires a comparison between the rationale behind implementing a lethal management method and the potential effects of such a method on the ecological balance and biological diversity. Although whether the Constitutional Court will annul the amendment is uncertain, a decision that lacks a discussion of the amendment’s constitutionality vis-à-vis the right to live in a healthy and balanced environment will certainly have insufficient reasoning.

4.7 Media Coverage of Animals

Public awareness about issues faced by animals other than humans is a powerful tool to challenge the legal status quo, and the media constitutes a platform of discussion and pressure required for the progress of animal law.⁵⁹¹ Nevertheless, the media coverage of animals being exploited and mistreated is not without political and legal backlash.⁵⁹² An informed society might give up on certain animal products or demand less of them unless the conditions of exploited animals are enhanced.⁵⁹³ Disclosure of exploitative and cruel practices potentially damages animal industries as it either decreases sales due to changing consumer choices or increases the cost of production if public awareness leads

⁵⁹¹ See Donald M. Broom, *International Animal Welfare Perspectives, Including Whaling and Inhumane Seal Killing as a W.T.O. Public Morality Issue*, in ANIMAL LAW AND WELFARE - INTERNATIONAL PERSPECTIVES 45, 48 (Deborah Cao & Steven White eds., Springer 2016).

⁵⁹² Cf. Waldau, *supra* note 148, at 33 (specifying the lack of interest in problems faced by other animals as a realistic challenge against the progress of animal law despite the media coverage).

⁵⁹³ See Broom, *supra* note 591, at 50.

to the implementation of legal regulations in favor of animals. Certain human rights inevitably collide with duties of the press when it reports about the condition of farmed or hunted animals. Such cases are valuable to observe how animal interests come into question in legal disputes revolving around human rights.

4.7.1 *Defamation Cases Against the Press*

Legal regulations that aim to increase animal welfare standards are often punitive, since they do not only prohibit, but also penalize specific actions committed against animals other than humans. Therefore, in their efforts to inform the public about alleged cruelty to or mistreatment of animals, press members may face accusations of defamation. In such cases, the comparison between the freedom of expression enjoyed by the press and the reputation of those under allegation requires a discussion of whether the animal interest in question serves a public interest or not.

In *Bladet Tromsø and Stensaas v. Norway*, the ECtHR had to make a similar comparison for the first time.⁵⁹⁴ The applicants were a local newspaper and its editor who had published articles regarding the alleged breaches of welfare regulations on a seal hunting vessel with reference to an onboard inspector's report.⁵⁹⁵ Upon complaint by the vessel's crew, the articles in the newspaper were found defamatory and were declared null and void by the domestic court.⁵⁹⁶ The applicants claimed that the sanction constituted a violation of their freedom of expression. In its judgment, the ECtHR discussed the boundaries of the applicants' freedom of expression in consideration of the reputation of the seal hunters involved.⁵⁹⁷

Seal hunting is a controversial practice since the risk of suffering and cruelty cannot be entirely avoided, whereas the possible harm and pain inflicted on the seals are intense.⁵⁹⁸ By relying on debates over the cruelty of seal hunting, the ECtHR acknowledged in *Bladet Tromsø and Stensaas v. Norway* that the news articles published by the applicants were related to a serious matter of public interest, both domestic and international.⁵⁹⁹ Therefore, it held that the general interest in informing the public freely

⁵⁹⁴ See Sparks, *supra* note 419, at 160.

⁵⁹⁵ See *id.*

⁵⁹⁶ *Bladet Tromsø and Stensaas v. Norway*, 1999-III Eur. Ct. H.R. 289, 307-13.

⁵⁹⁷ *Id.* at 324-25.

⁵⁹⁸ See Broom, *supra* note 591, at 57.

⁵⁹⁹ *Bladet Tromsø and Stensaas v. Norway*, 1999-III Eur. Ct. H.R. 289, 323-24.

about allegedly illegal seal hunting practices prevailed over the individual interest in protecting one's reputation.⁶⁰⁰ The ECtHR reiterated in its following judgments that animal welfare and rights were public interest matters.⁶⁰¹ This case-law stands as a safeguard against the suppression of public discussions over the existing forms of animal exploitation.

4.7.2 *Animal Crushing*

Movie screens used to abound in scenes in which real animals were injured or killed until concerns over their life and welfare were raised.⁶⁰² Filming animals for commercial purposes nowadays is usually subject to permits and supervision due to risks of mistreatment. However, there is still an audience that takes pleasure in watching animals being injured or killed on the fringes of media. This type of visual content is known as animal crush videos. In a legal system that treats animals other than humans as any object, those who exert the right to property may theoretically torment such animals in any way they desire and profit from their suffering. However, some legal systems do not tolerate the production and distribution of these violent contents due to the moral wrongness of inflicting pain on sentient beings and killing them in excruciating ways for the sole purpose of pleasure.

Both houses of the United States Congress passed a law—commonly referred to as Section 48⁶⁰³—with bipartisan support in 1999 to halt the commercial production and distribution of animal crush videos.⁶⁰⁴ Accordingly, depictions of animal cruelty for commercial use were penalized.⁶⁰⁵ The constitutionality of Section 48 was brought into question following the conviction of a filmmaker for profiting from dogfighting videos.⁶⁰⁶ The defendant claimed that the incriminating legal provision was written in a vague language, and the visual content he had produced was a constitutionally protected form of expression.⁶⁰⁷ His conviction was reversed by the United States Court of Appeals for

⁶⁰⁰ See Sparks, *supra* note 419, at 160-61.

⁶⁰¹ See *id.* at 161.

⁶⁰² See ABIGAIL PERDUE & RANDALL LOCKWOOD, ANIMAL CRUELTY AND FREEDOM OF SPEECH: WHEN WORLDS COLLIDE 18 (Purdue Univ. Press 2014).

⁶⁰³ 18 U.S.C. § 48 (1999).

⁶⁰⁴ See PERDUE & LOCKWOOD, *supra* note 602, at 51-52.

⁶⁰⁵ See *id.*

⁶⁰⁶ See *id.* at 52-53.

⁶⁰⁷ See *id.* at 54.

the Third Circuit upon appeal on the ground that Section 48 only covered videos of animal crushing, whereas it cannot be interpreted as broadly as to include videos of animal fighting.⁶⁰⁸ The Third Circuit did not elaborate further on whether the defendant's videos were categorically outside the scope of free speech or not.⁶⁰⁹

Upon a writ of certiorari, the Supreme Court affirmed the judgment of the Third Circuit and found Section 48 invalid due to its text's vagueness.⁶¹⁰ The Court also stated that there was no basis to deem all depictions of animal cruelty categorically unprotected by the constitutional right to free speech.⁶¹¹ Consequently, Section 48 was revised in a manner that prohibited animal crush videos as initially intended, this time with a more precise definition and a reference to obscenity.⁶¹² Soon afterwards, the United States Court of Appeals for the Fifth Circuit examined the constitutionality of the amended law in another criminal case of animal crushing. Eventually, it held that animal crush videos of an obscene character did not fall within the scope of free speech.⁶¹³ Therefore, in the example of the United States, the judiciary drew the line at obscenity in determining to what extent animal crush videos could be tolerated as an expression. If the law further recognizes the connection between the suffering of humans and other animals, a new precedent might be set that categorically excludes animal crushing from the scope of free speech irrespective of its obscenity.

4.8 Cultural, Religious, and Ethical Stances on Animals

Humans have exploited other animals not solely for practical reasons, but also for spiritual reasons since the time of earliest civilizations.⁶¹⁴ Some values originating from past teachings have survived and remained embedded in various cultural and religious practices. Such practices are mostly under the protection of cultural rights and freedom of religion. In cases where an enhancement in animal welfare gives rise to a legal dispute due to its negative impact on certain cultural or religious practices, whether the relevant animal interest justifies the interference with a human right becomes a question of law.

⁶⁰⁸ United States v. Stevens, 533 F.3d 218 (3d Cir. 2008), *aff'd* 559 U.S. 460 (2010).

⁶⁰⁹ See PERDUE & LOCKWOOD, *supra* note 602, at 55-56.

⁶¹⁰ See *id.* at 61-62.

⁶¹¹ Stevens, 559 U.S. at 472.

⁶¹² See SCHAFFNER, *supra* note 87, at 42-43; see also PERDUE & LOCKWOOD, *supra* note 602, at 51 (explaining the initial rationale behind the enactment of 18 U.S.C. § 48).

⁶¹³ United States v. Richards, 755 F.3d 269, 279 (5th Cir. 2014).

⁶¹⁴ See SPENCER, *supra* note 55, at 36.

In the absence of animal rights, human rights are given a head start in balancing the two conflicting interests.

4.8.1 *Animal Sacrifice as a Cultural Practice*

Established cultural traditions are a common exception in legal norms that are designed to increase animal welfare and to protect certain animal interests. Therefore, notwithstanding the significance of cultural values and diversity, the legal consideration of certain animal interests might be undermined by hiding behind traditions.⁶¹⁵ Likewise, animal welfare legislation may be misapplied to oppress a specific culture without addressing the necessity that gave rise to such legislation in the first place.⁶¹⁶ The disputes in which legally recognized animal interests and cultural practices collide should be resolved without ruling out either of these considerations.

The tension between traditions and animal welfare concerns is evident in cultural practices that involve animal sacrifice. One example is *uMkhosi WokweShwama*, or the First Fruits Festival, which the Zulu people in South Africa celebrate.⁶¹⁷ As part of the celebrations, a bull is killed by a group of young men without using any tool or weapon.⁶¹⁸ In 2009, an interim measure to prevent the killing of a bull during the festival was requested from the court based on previous reports that raised suspicions about bulls being beaten, suffocated, and mutilated in the process.⁶¹⁹ The request was dismissed due to insufficient proof that bulls were traditionally sacrificed with the alleged agonizing methods.⁶²⁰ It was highlighted in the judgment that the festival was of cultural significance for the Zulu people, and effectively prohibiting an integral part thereof could harm social peace and unity.⁶²¹ As revealed by its reasoning, the court based its assessments solely on the traditional method of bull sacrifice, and thus evaded the legal question of whether the actual practice was conducted cruelly or not.⁶²² The possibility

⁶¹⁵ See Anne Peters, *Liberté, Égalité, Animalité: Human-Animal Comparisons in Law*, 5 TRANSNAT'L ENV'T L. 25, 38 (2016).

⁶¹⁶ See *id.* at 37.

⁶¹⁷ ULWAZI PROGRAMME, *Umkhosi WokweShwama*, <https://www.ulwaziprogramme.org/umkhosi-wokweshwama/> (last visited July 12, 2024).

⁶¹⁸ See Bilchitz, *supra* note 408, at 137-38.

⁶¹⁹ See *id.* at 138.

⁶²⁰ See *id.*

⁶²¹ See *id.* at 139.

⁶²² See *id.*

of a bull's excessive suffering was ignored vis-à-vis the cultural right of the Zulu people to practice one of their rooted traditions.⁶²³

In South Africa, the right to enjoy one's own culture is indeed guaranteed by the constitution unless a cultural practice violates another fundamental human right.⁶²⁴ Without a counterbalancing constitutional provision regarding animal interests, it is expectable that a human right prescribed in the constitution prevails over certain animal interests even if they are recognized in anti-cruelty laws. In the example of bull sacrifice during the First Fruits Festival, this conclusion is supported by the fact that the court addressed and compared the conscientious and cultural values held by the parties rather than their actual consequences on the animal in question.⁶²⁵ That being said, cultural practices might be altered and even abandoned in the course of time, and a better understanding of the suffering of animals other than humans might play a role in it.⁶²⁶ If the suffering that occurs during the cultural ritual of animal sacrifice continues to be tolerated, and the interest of other animals in not being subjected to cruelty remains unrecognized by an equally powerful legal norm, cultural rights may cause an undesired loophole in the purpose and implementation of anti-cruelty laws.

4.8.2 *Religious Rituals Involving Animals*

A religion touches upon a considerable portion of the daily lives of its followers. It may determine which animals are sacred or should be refrained from, or which animal products should or should not be consumed. Many religions have specific rituals that involve animals other than humans, and some among these include certain performances that injure or kill the animals involved. If a legal dispute arises out of concerns about the lives and well-being of animals with respect to such religious rites, where do animal interests stand in relation to the freedom of religion becomes an inevitable matter of discussion.

The question of which and how animals may or may not be slaughtered are often answered by religious norms that vary greatly from one faith to another. This divergence may lead to legal disputes in which concerns about animal interests and religious rituals

⁶²³ See *id.* at 140.

⁶²⁴ S. AFR. CONST., art. 31, 1996.

⁶²⁵ See Bilchitz, *supra* note 408, at 141.

⁶²⁶ See Peters, *supra* note 615, at 39.

collide, as seen in the case of *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* before the Supreme Court of the United States.⁶²⁷ The case relates to the Santeria faith that originated in Cuba and is also practiced by some members of the Cuban community in the United States.⁶²⁸ Relying on the existing anti-cruelty legislation, the municipality of Hialeah in the state of Florida outlawed killing animals for primarily religious purposes, which affected believers of the Santeria faith who performed animal sacrifice as an integral part of their religion.⁶²⁹

The Supreme Court held that the prohibition of religious sacrifice by the municipality of Hialeah was unlawful for the reason that it specifically targeted the Santeria faith without addressing whether the practice in question could be performed in an uncruel and healthy way and why other potentially cruel but legal activities remain outside the scope of the prohibition.⁶³⁰ Since the Court found that the municipal ordinance aimed directly at a certain religious practice, it did not elaborate further on the conflict between animal sacrifice and the anti-cruelty legislation.⁶³¹ If the ordinance were written in neutral language with no particular intention to target the Santeria faith, it would be possible to infer decisive conclusions from the Court's decision.⁶³² In a scenario where an animal sacrifice ritual is prohibited for the reason that it can only be performed in a cruel manner and poses a hazard to public health, the outcome of the proceeding would likely differ from the decision in *Church of the Lukumi Babalu Aye*.⁶³³

The proportionality of interferences in consideration of animal interests is evaluated differently with respect to religious rituals that believers may opt not to perform while still adhering to that religion and those that are deemed compulsory for all believers.⁶³⁴ For instance, a religion may require its believers to eat the flesh of an animal that is slaughtered with a specific method if they are to eat animal flesh, albeit not making it compulsory to eat it in the first place. In this case, animal slaughter as a religious ritual would not be an integral part of the religion, and a potential interference would only limit believers' access to a particular animal product without restricting the performance of

⁶²⁷ *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

⁶²⁸ See SCHAFFNER, *supra* note 87, at 44.

⁶²⁹ See *id.* at 44-45.

⁶³⁰ See *id.* at 45.

⁶³¹ See WAGMAN & LIEBMAN, *supra* note 149, at 270-71.

⁶³² See *id.* at 271.

⁶³³ See *id.*

⁶³⁴ See SCHAFFNER, *supra* note 87, at 47.

their religion. A typical example thereof is the compulsory stunning of animals before slaughter, which is a welfarist measure to ensure that animals are unconscious during the slaughter so that they cannot feel any pain, whereas most followers of Judaism and Islam believe that slaughtered animals must be conscious while they bleed.⁶³⁵

A legal dispute arising from these religious considerations was observed in Belgium, when two of the three federated legislatures within the country—namely, the legislatures of Flanders and Wallonia—obligated a stunning procedure before slaughter.⁶³⁶ The region of Brussels, on the other hand, hesitated to enact such a requirement due to legal opinions stating that animal welfare, even when recognized as a legitimate concern, could not override the human right to freedom of religion.⁶³⁷ As a matter of fact, all member states of the EU, including Belgium, are under an obligation to enforce compulsory stunning before slaughter, but religious methods of slaughter that require otherwise are exempt from this regulation, provided that they are conducted in a slaughterhouse.⁶³⁸ However, this obligation does not prevent member states to set a higher animal welfare standard in their domestic laws.⁶³⁹ Despite this exemption, since a religious exemption was predominantly viewed as a legal safeguard in the imposition of so-called humane slaughter methods, the stunning obligations laid down by the legislatures of Flanders and Wallonia were challenged before the Constitutional Court of Belgium from the point of freedom of religion.⁶⁴⁰

The Constitutional Court of Belgium dismissed the case on the compulsory stunning in Wallonia since the challenged version of the law was not in force at the time of judgment,⁶⁴¹ but referred the case on the compulsory stunning in Flanders to the Court of Justice of the European Union (CJEU).⁶⁴² The CJEU, sitting in a Grand Chamber, remarked that member states of the EU could enact stricter welfare rules regarding religious slaughter than those stipulated in the relevant regulation and held that the

⁶³⁵ See Stéphanie Wattier, *Ritual Slaughter Case: The Court of Justice and the Belgian Constitutional Court Put Animal Welfare First*, 18 EUR. CONST. L. REV. 264, 265-66 (2022).

⁶³⁶ See *id.* at 265.

⁶³⁷ See Gerhard van der Schyff & Stefan Sottiaux, *Debating Ritual Slaughter in Belgium: A Multilevel Fundamental Rights Perspective*, in HUMAN RIGHTS WITH A HUMAN TOUCH: LIBER AMICORUM PAUL LEMMENS 715, 720-21 (Koen Lemmens, Stephan Parmentier & Louise Reyntjens eds., Intersentia 2019).

⁶³⁸ Council Regulation 1099/2009 of Sept. 24, 2009, On the Protection of Animals at the Time of Killing, art. 4, 2009 O.J. (L 303) 1, 9.

⁶³⁹ *Id.* art. 26, 2009 O.J. (L 303) 1, 17.

⁶⁴⁰ See Wattier, *supra* note 635, at 269.

⁶⁴¹ CC [Constitutional Court], Apr. 4, 2019, n° 52/2019, <https://www.const-court.be/fr/>.

⁶⁴² CC [Constitutional Court], Apr. 4, 2019, n° 53/2019, <https://www.const-court.be/fr/>.

compulsory stunning procedure enacted in Flanders was valid.⁶⁴³ The CJEU reiterated that public authorities in Belgium could not interfere with religious practices in an unlawful, arbitrary, and disproportionate manner, yet found that the legal imposition of prior stunning due to animal welfare concerns was proportionate vis-à-vis freedom of religion, since it was the most effective method known to minimize the suffering of slaughtered animals, and as long as the animal is not killed before slaughter, the cause of death would still be bleeding as required by the applicants' religious beliefs.⁶⁴⁴

Two decades prior to Belgium's case before the CJEU, a similar dispute was brought before the ECtHR in *Cha'are Shalom Ve Tsedek v. France*.⁶⁴⁵ The case was caused by the refusal to authorize an association to perform a specific method of religious slaughter without stunning before commercial sale, although another association had been granted that authorization.⁶⁴⁶ The ECtHR found that the applicant association could and did have access to animal products that met the conditions of approved religious slaughter through importation from other countries, especially Belgium.⁶⁴⁷ As a result, it held that there was no interference with the freedom of religion.⁶⁴⁸ The circumstances remained the same since then, as the region of Brussels in Belgium still allows ritual slaughter, unlike the regions of Flanders and Wallonia.⁶⁴⁹

Despite the given case-law of the ECtHR and the judgment of the CJEU on the matter, compulsory stunning procedures in Flanders and Wallonia were once again challenged, this time before the ECtHR, in the more recent case of *Executief van de Moslims van België and Others v. Belgium*.⁶⁵⁰ The ECtHR discussed whether animal welfare could constitute a legitimate aim in an interference with the freedom of religion, and it consequently held that the ground of protection of public morals could be interpreted in a manner that includes public concerns about animal welfare.⁶⁵¹ Then, by referring to the decision of the CJEU, it found compulsory stunning to be a necessary measure since there was no other method that could both eliminate the slaughtered

⁶⁴³ C-336/19, *Centraal Israëlitisch Consistorie van België and Others*, ECLI:EU:C:2020:1031, ¶ 96 (Dec. 17, 2020).

⁶⁴⁴ See Wattier, *supra* note 635, at 272-73.

⁶⁴⁵ *Cha'are Shalom Ve Tsedek v. France*, 2000-VII Eur. Ct. H.R. 231.

⁶⁴⁶ See Van der Schyff & Sottiaux, *supra* note 637, at 726-27.

⁶⁴⁷ *Cha'are Shalom Ve Tsedek v. France*, 2000-VII Eur. Ct. H.R. 231, 259.

⁶⁴⁸ *Id.* at 260.

⁶⁴⁹ See Van der Schyff & Sottiaux, *supra* note 637, at 727.

⁶⁵⁰ *Executief van de Moslims van België and Others v. Belgium*, App. No. 16760/22 and 10 others, § 1 (Feb. 13, 2024), <https://hudoc.echr.coe.int/eng?i=001-230858>.

⁶⁵¹ *Id.* §§ 90-102.

animal's suffering and satisfy the conditions of the applicants' religious rituals at the same time.⁶⁵² Lastly, the ECtHR reminded that the applicants were able to access religiously slaughtered animal products through another country or the region of Brussels, and thus concluded that their freedom of religion had not been violated.⁶⁵³

It appears that the approaches of the CJEU and the ECtHR on religious slaughter rituals are in line with each other.⁶⁵⁴ Both courts deem such rituals as part of freedom of religion, yet they do not ipso facto disregard animal welfare concerns when these two interests collide.⁶⁵⁵ It would be too speculative to assume their approach in prospective cases where believers of a certain religion are entirely unable to consume religiously slaughtered animal products. However, it is possible to conclude, according to their case-law, that, as long as the access of believers to religiously slaughtered animal products is maintained, animal welfare may justify interferences with religious slaughter rituals. Animals other than humans are still being killed for human consumption, though it is currently possible to encounter legal systems that recognize their interests in not suffering during slaughter. The decisions of the CJEU and the ECtHR make it possible to prioritize animal welfare over the interest of humans in slaughtering animals in any manner demanded by their religious belief, which negates the obsolete understanding that a human right overrides an animal's interest in any circumstances.

4.8.3 *Vegetarianism and Veganism as Conscientious Choices*

In *Conisbee v. Crossley Farms Ltd. and Others*,⁶⁵⁶ an employment tribunal in the United Kingdom had to resolve whether a person could legally be discriminated due to their status as a vegetarian.⁶⁵⁷ Despite acknowledging that vegetarianism had philosophical roots, the court found that the message it conveyed and its practical implications in the daily lives of its adherents did not amount to a *belief* that required equal treatment.⁶⁵⁸ Vegetarianism is indeed not a monolithic stance. It excludes *meat* from

⁶⁵² *Id.* §§ 116-18.

⁶⁵³ *Id.* §§ 120-24.

⁶⁵⁴ See Yumiko Nakanishi, *Case C-336/19 Centraal Israëlitisch Consistorie van België: Animal Welfare and Freedom of Religion*, 28 MAASTRICHT J. EUR. & COMPAR. L. 597, 696-97 (2021).

⁶⁵⁵ See *id.* at 695-96.

⁶⁵⁶ *Conisbee v. Crossley Farms Ltd. and Others* [2019] ET 3335357/2018 (Eng.).

⁶⁵⁷ See Paul McKeown & Rachel Ann Dunn, *A 'Life-Style Choice' or a Philosophical Belief?: The Argument for Veganism and Vegetarianism to Be a Protected Philosophical Belief and the Position in England and Wales*, 42 LIVERPOOL L. REV. 207, 230 (2021).

⁶⁵⁸ See *id.* at 230-31.

humans' diet, but the scope and manner thereof vary immensely among those who identify as vegetarian.⁶⁵⁹ Vegetarianism, in the simplest sense, rejects the idea and practice of eating animals, whereas some variations exclude certain animal species from their ethical considerations.⁶⁶⁰ For instance, pescatarians are vegetarians who tolerate consuming fish,⁶⁶¹ or pollotarians are vegetarians who tolerate consuming poultry.⁶⁶² There is also a variation called flexitarianism, which refers to following a vegetarian diet from time to time.⁶⁶³ Some vegetarians, on the other hand, expand their ethical concerns in consideration of the suffering and exploitation of animals to a degree. For instance, lacto-vegetarians additionally refrain from consuming eggs, and ovo-vegetarians additionally refrain from consuming dairy products.⁶⁶⁴

Veganism exceeds a person's ethical dietary preferences. It refers to a comprehensive ethical stance that opposes the direct or indirect exploitation of other animals for human needs and pleasures to the most practical extent. As most forms of animal exploitation are legal, whether the conscientious choice of a person not to take part in or contribute to any of such practices may be protected as a human right or not has rarely been discussed. One of the few examples in this regard is the case of *Casamitjana Costa v. League Against Cruel Sports* in the United Kingdom.⁶⁶⁵ The case concerned the dismissal of the plaintiff for raising ethical concerns over the management of pension funds by his employers—who were investing them in companies known to conduct animal experiments—and informing other employees about the financial disadvantage he faced after demanding an ethical fund alternative as a vegan.⁶⁶⁶ Since a “philosophical belief” was legally protected against discrimination,⁶⁶⁷ the preliminary question before the court was to determine whether veganism constituted a philosophical belief or not.⁶⁶⁸

The court emphasized the conscientious aspect of veganism and held that it had strict obligations as well as a considerable impact on one's relation with other animals and the

⁶⁵⁹ See Matthew B. Ruby, *Vegetarianism: A Blossoming Field of Study*, 58 APPETITE 141, 142 (2012).

⁶⁶⁰ See *id.*

⁶⁶¹ See David Tilman & Michael Clark, *Global Diets Link Environmental Sustainability and Human Health*, 515 NATURE 518, 520 (2014).

⁶⁶² See FLAVIA CAVALIERE, *THOUGHT FOR FOOD* 45-46 (Aracne 2019).

⁶⁶³ See VEGETARIAN NATION, *7 Types of Vegetarianism*, <https://vegetarian-nation.com/resources/common-questions/types-levels-vegetarian/> (last visited Oct. 4, 2024).

⁶⁶⁴ See CAVALIERE, *supra* note 662, at 46.

⁶⁶⁵ *Casamitjana Costa v. League Against Cruel Sports* [2020] ET 3331129/2018 (Eng.).

⁶⁶⁶ See Lauren Strumos, *Ethical Veganism as Nonreligion in Mr J Casamitjana Costa v the League Against Cruel Sports*, 51 STUD. IN RELIGION/SCIENCES RELIGIEUSES 295, 296 (2022).

⁶⁶⁷ Equality Act 2010, c. 15, §§ 4, 10 (UK).

⁶⁶⁸ See Strumos, *supra* note 666.

environment.⁶⁶⁹ After drawing similarities with comparable religious teachings that condemn harming sentient life, the court examined the implications of veganism separately as a philosophical belief.⁶⁷⁰ It eventually concluded that veganism constituted a philosophical belief that required equal treatment.⁶⁷¹ The judgments in both *Conisbee* and *Casamitjana Costa* were rendered by an employment tribunal, i.e., a court of first instance, which means that they may be reversed through legal remedies or in another judgment in the future.⁶⁷² Nevertheless, being the first judgment in which veganism was protected as a philosophical belief,⁶⁷³ *Casamitjana Costa* sets a strong precedent for further progress.

It is possible to encounter other judgments in which veganism is considered a philosophical belief and is protected accordingly within different contexts. The refusal to provide a vegan meal at a kindergarten was found to have constituted an unjust interference with the freedom of thought and belief by a domestic court in the city of Hjørring in Denmark.⁶⁷⁴ Considering that a person should not be put in a disadvantaged situation due to their belief, the kindergarten's unwillingness to provide a vegan lunch option was also found discriminatory by the same court.⁶⁷⁵ The issue of access to vegan alternatives and options is not directly pertinent to animal interests, and the relevant legal disputes rather concern human rights. However, due to its direct reference to the oppression and exploitation of animals other than humans, the legal protection of veganism as a belief indirectly affects animal interests.

A religious or ethical worldview needs to meet certain conditions to be legally protected against discrimination, e.g., passing a certain threshold of “cogency, seriousness, cohesion and importance”.⁶⁷⁶ Non-religious beliefs such as veganism are theoretically as worthy of protection as religious beliefs, since both are assessed on the same legal grounds. Although ethical veganism is not a religion by any means, religion may serve as a tool for comparing and defining its status as a belief.⁶⁷⁷ Freedom of religion

⁶⁶⁹ See McKeown & Dunn, *supra* note 657, at 234.

⁶⁷⁰ See Strumos, *supra* note 666, at 300.

⁶⁷¹ See *id.* at 301-02.

⁶⁷² See McKeown & Dunn, *supra* note 657, at 231.

⁶⁷³ See *id.* at 238.

⁶⁷⁴ Jordi Casamitjana, *Danish Court Acknowledges Veganism as a Protected Belief*, VEGAN FTA (Feb. 11, 2024), <https://veganfta.com/2024/02/11/danish-court-acknowledges-veganism-as-a-protected-belief/>.

⁶⁷⁵ *Id.*

⁶⁷⁶ Equality Act 2010, c. 15, Explanatory Notes ¶ 52 (UK).

⁶⁷⁷ See Strumos, *supra* note 666, at 304.

and freedom of conscience are components of the same wider human right after all, which marks an apparent resemblance, and more importantly, an interrelatedness. If the legal discussions regarding the exploitation of animals other than humans for religious reasons is one side of the coin, the other side would be the discussions regarding their non-exploitation for conscientious reasons. A conscientious stance centered around animal interests may not turn other animals into subjects of a right, but the legal protection of that stance as a sort of philosophical belief may result in protecting certain animal interests through the agency of human rights.

4.9 *Animal Rights Movement and Activism*

Since animals other than humans cannot campaign for the legal recognition and enforcement of their interests, advocacy is needed.⁶⁷⁸ Animal rights movement comprises of humans and legal entities that advocate for the legal recognition and enforceability of basic animal interests. The fact that animal rights defenders may enjoy certain human rights, such as the freedom of assembly or freedom of expression, does not mean that those rights and freedoms are ipso facto part of animal rights. However, they are vital for the indirect protection of animal interests. Like all other activists, animal rights activists are common in their desire to make change, but not in their methods of achieving change.⁶⁷⁹ The legality of some of these methods was discussed before courts in relation to other human rights.

4.9.1 *Access to Information Regarding Animals*

Freedom of expression, as stipulated in art. 10 of the European Convention on Human Rights (ECHR),⁶⁸⁰ encompasses a variety of rights and freedoms within its scope, including the right to impart and receive information.⁶⁸¹ Similar to other components of the freedom of expression, the right to receive information is not absolute. Public

⁶⁷⁸ See Peters, *supra* note 615, at 52.

⁶⁷⁹ See FISCHER, *supra* note 86, at 224.

⁶⁸⁰ Convention for the Protection of Human Rights and Fundamental Freedoms art. 10, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221, 230. Although the official title of the convention is the Convention for the Protection of Human Rights and Fundamental Freedoms, it is more widely known and referred to as the European Convention on Human Rights.

⁶⁸¹ See Rafael Bustos Gisbert, *The Right to Freedom of Expression in a Democratic Society (Art. 10 ECHR)*, in EUROPE OF RIGHTS: A COMPENDIUM ON THE EUROPEAN CONVENTION OF HUMAN RIGHTS 371, 372 (Javier García Roca & Pablo Santolaya eds., Martinus Nijhoff Publishers 2012).

authorities may withhold information from the public only if it is prescribed by law, pursues a legitimate aim, and is necessary in a democratic society.⁶⁸² The ECtHR resorts to this right especially in cases where the information is pertinent to public interest.⁶⁸³ In *Guseva v. Bulgaria*,⁶⁸⁴ it was discussed within the context of homeless companion animals whether access to information regarding animals other than humans could be guaranteed under art. 10 of the ECHR.

The applicant was an animal rights activist, and the purpose of her inquiries was to be informed and to inform the public about the municipality's handling of homeless companion animals.⁶⁸⁵ According to the ECtHR, the applicant's access to the particular information, in this case, was integral to the practice of the right to receive information about a matter of public interest due to her status as a rights defender.⁶⁸⁶ Eventually, it was held that the normative basis for withholding the demanded information had not met the criteria of *law* in terms of foreseeability as required by the ECHR. Accordingly, the interference with the applicant's right to receive information as part of her freedom of expression was found unsubstantiated.⁶⁸⁷

The direct effect of the judgment was that the applicant's human rights, i.e., freedom of expression and right to an effective remedy, were protected. However, in its reasoning, the ECtHR recognized the treatment of homeless companion animals as a matter of public interest and found that the applicant's inquiries could contribute to relevant public discussions.⁶⁸⁸ As a result of allowing public scrutiny, the judgment also had an indirect positive impact on the well-being of homeless companion animals that are or may be collected and placed in shelters. If the rights of an animal rights defender in advocating for their cause is guaranteed, this legal protection inevitably has consequences in favor animals embraced by that person's activism. Animal interests could thus be protected within the framework of human rights, albeit indirectly.

⁶⁸² *See id.*

⁶⁸³ *See id.* at 386-87.

⁶⁸⁴ *Guseva v. Bulgaria*, App. No. 6987/07 (Feb. 17, 2015), <https://hudoc.echr.coe.int/eng?i=001-152416>.

⁶⁸⁵ *Id.* § 7-18, 52.

⁶⁸⁶ *Id.* § 36-37, 41.

⁶⁸⁷ *Id.* § 59-61.

⁶⁸⁸ *Id.* § 55.

4.9.2 Exposing Animal Abuses in the Industry

The modern animal agriculture industry is a highly secretive sector that often operates out of sight on the periphery of cities or in rural areas.⁶⁸⁹ This puts farmed animals in a vulnerable position since cruelty and maltreatment occurring inside industrial facilities and slaughterhouses are more likely to go unnoticed. Differing views on the type of action that needs to be taken about the appalling conditions of farmed animals create fractions in the animal rights movement.⁶⁹⁰ Direct actions aim to physically liberate farmed animals and are often actionable under existing criminal laws. Indirect actions, on the other hand, aim to decrease the demand for products of the animal agriculture industry by appealing to the conscience and mercy of consumers.

Some rooted forms of animal rights activism include filming, gathering near or infiltrating into industrial facilities and slaughterhouses to reveal information about the treatment of farmed animals that may never be revealed to the public in any other way.⁶⁹¹ The more aware consumers become about how *meat* and other animal products are produced, the more prone they are to prefer alternatives that cause less or no harm to animal life.⁶⁹² People for the Ethical Treatment of Animals (PETA) pioneered this type of activism with its whistleblowing campaign initiated in the 1980s.⁶⁹³ Covert inspections by PETA and other NGOs in industrial facilities and slaughterhouses continued in the following decades and proved effective in creating widespread awareness.⁶⁹⁴

Visual materials that display violence against or maltreatment of farmed animals—even when they do not intend so—might lead to condemnation of the animal agriculture industry by the public and foster sensibility towards the exploitation of animals under similar conditions.⁶⁹⁵ Those who profit from exploiting animals usually feel threatened by the potential influence of such images or footage on consumers and attempt to curb

⁶⁸⁹ See Pamela Fiber-Ostrow & Jarret S. Lovell, *Behind a Veil of Secrecy: Animal Abuse, Factory Farms, and Ag-Gag Legislation*, 19 CONTEMP. JUST. REV. 230, 233 (2016).

⁶⁹⁰ See Johnston & Johnston, *supra* note 362.

⁶⁹¹ See Jodi Lazare, Ag-Gag Laws, *Animal Rights Activism, and the Constitution: What Is Protected Speech?* 58 ALTA. L. REV. 83, 86 (2020).

⁶⁹² Cf. Fiber-Ostrow & Lovell, *supra* note 689, at 234 (explaining that it serves the benefit of the animal agriculture industry to disengage consumers' perception from the fact that the product was once a sentient animal).

⁶⁹³ See *id.* at 238.

⁶⁹⁴ See *id.*

⁶⁹⁵ See PERDUE & LOCKWOOD, *supra* note 602, at 21.

their dissemination.⁶⁹⁶ Some legislatures enact laws that shield the animal agriculture industry from the types of activism that seek to expose potential abuses of farmed animals. These laws are generally referred to as agricultural gag, or, shortly, *ag-gag* laws by their target group, indicating that they result from the industry's efforts to silence those who wish to inform the public about the mishandling of animals.⁶⁹⁷

A common feature of ag-gag laws is that they do not merely repeat existing crimes such as trespass, damage to property, or burglary, but also penalize certain actions that would otherwise be considered legal such as taking pictures of an animal agriculture facility.⁶⁹⁸ Especially in the United States, some forms of activism against the industry are labeled as terrorism and are penalized accordingly, even though they may not include violence.⁶⁹⁹ To give an example, an amendment in 2006 made it actionable at the federal level, *inter alia*, to leak visual content about animal abuses within an animal farming enterprise if the abuser or the person in charge of the enterprise feels intimidated upon reactions.⁷⁰⁰

The *raison d'être* of strict ag-gag laws is to sustain the animal agriculture industry and suppress any suspicion about its certain methods or its existence. Granting exemption to a particular industry from public discussions and criticism constitutes an apparent interference with the freedom of expression. For this reason, the constitutionality of several ag-gag laws in the United States have been challenged.⁷⁰¹ A notable example in this regard was the case of *Animal Legal Defense Fund v. Otter*.⁷⁰² The case concerned an Idaho statute's incrimination of damaging the animal agriculture industry by whistleblowing and recording footage.⁷⁰³

In its judgment, the district court found that the statute specifically targeted animal rights activists for their political opinions.⁷⁰⁴ According to the court, the language of the statute was too broad, and it could hinder discussions about matters of public interest.⁷⁰⁵

⁶⁹⁶ See *id.*

⁶⁹⁷ See Fiber-Ostrow & Lovell, *supra* note 689, at 231.

⁶⁹⁸ See *id.* at 239.

⁶⁹⁹ See Johnston & Johnston, *supra* note 362, at 575.

⁷⁰⁰ Animal Enterprise Terrorism Act, Pub. L. No. 109-374, 120 Stat. 2652 (2006) (codified as amended at 18 U.S.C. § 43).

⁷⁰¹ See Lazare, *supra* note 691, at 96.

⁷⁰² *Animal Legal Defense Fund v. Otter*, 18 F. Supp. 3d 1195 (D. Idaho 2015), *aff'd in part, rev'd in part sub nom.* *Animal Legal Defense Fund v. Wasden*, 878 F.3d 1184 (9th Cir. 2018).

⁷⁰³ IDAHO CODE § 18-7042 (2014).

⁷⁰⁴ See Fiber-Ostrow & Lovell, *supra* note 689, at 245-46.

⁷⁰⁵ See *id.* at 245.

The district court's ruling was eventually affirmed in part by the United States Court of Appeals for the Ninth Circuit.⁷⁰⁶ The Ninth Circuit acknowledged that “food safety” and “animal cruelty” were matters of public interest.⁷⁰⁷ Although it disagreed with the district court’s finding that the prohibition of misrepresenting oneself to access a facility had targeted a specific political opinion as the corresponding fine was solely based on economic loss,⁷⁰⁸ it struck down the provision that had penalized recording footages of potential animal abuses by relying on the constitutional freedom of expression.⁷⁰⁹

Ag-gag laws are designed to protect the rights to property and privacy of those who conduct business or work in the animal agriculture sector to the detriment of the freedoms of expression and assembly of those who wish to disclose and protest the gory content of the industry. It should be noted that the public has an interest in knowing whether certain animal products in the market were produced under sanitary and uncruel conditions, and about the environmental effects of such production.⁷¹⁰ If it were not for the efforts of animal rights activists to access industrial facilities and slaughterhouses under legal pretexts, potential misconduct within the industry, including maltreatment of farmed animals, might never have been exposed to a large segment of the society. This type of activism enables the enjoyment of freedom of expression in the first place.⁷¹¹ Therefore, it deserves protection against the more trivial private interests of the animal agriculture industry.

Chapter 5:

CONCLUSION

Animal interests are becoming a more relevant problem in legal theory, legislation, and jurisprudence. The premise of this study was that conflicts between animal interests and human rights are an inevitable consequence of the progress of animal law. Therefore, the main research questions were how and to what extent animal interests could be regarded in legal disputes relating to human rights and whether the human rights framework could provide a legal basis for considering animal interests. Since these are

⁷⁰⁶ *Animal Legal Defense Fund v. Wasden*, 878 F.3d 1184 (9th Cir. 2018).

⁷⁰⁷ *Id.* at 1190.

⁷⁰⁸ *Id.* at 1202.

⁷⁰⁹ *Id.* at 1205.

⁷¹⁰ *See Lazare, supra* note 691, at 103.

⁷¹¹ *See id.*

not simple yes-or-no questions, the study first visited the theoretical roots of human rights and potential animal rights to prepare a conceptual background for further inquiry. Then, it examined selected examples of related legal norms and cases to explain the interaction between human rights and animal interests and to deduct policy suggestions to enhance the status quo.

The existence of an interest worthy of protection does not ipso facto create a right in the legal sense. To conclude that a right exists, the subject must be granted the legal capacity to hold rights, and the law must recognize and enforce the interest in question. Human rights stem from the common interests of humans. A feature of human rights is that they serve justice only when they are enjoyed by everybody under the relevant jurisdiction, at least theoretically. For example, a creditor has the right to collect the debt arising from a sales contract from the debtor, but the debtor in this situation does not hold the same right as that of the creditor. In this scenario, it is just when only one of the parties of a particular transaction has the right to claim. Since the debt in question is contractual and only the creditor has an interest in claiming it, the right to claim one's debt is not technically a human right. Once a common human interest gives rise to a human right, that right should not be allocated in a discriminatory manner. For example, it would be unjust if only certain people under a particular jurisdiction were or were not allowed to express their political views or perform their religion, because freedoms of expression and religion are part of the set of human rights.

Although human rights result from common human interests, those who enjoy human rights are not limited to human beings. All modern legal systems bestow human rights upon certain non-humans, such as legal entities, since they represent specific human interests. There is no innate capacity to hold rights, as both legal rights and right-holders are designated freely by the lawmaker. It seems the mere quality of being animate or inanimate, or human or non-human is irrelevant in terms of holding rights in the legal sense. That said, none of the existing legal systems have recognized animals other than humans as right-holders yet. This fact points out a continuing rift between what is moral and what is legal. As a natural result of sentience, we know that animals other than humans have certain common interests that matter to them. Most of these interests are the same as those of humans, such as the interests in maintaining life and bodily integrity. Despite constituting the legal status quo, it is morally unjust that humans still deprive

other animals of potential legal rights that could be asserted against interferences by humans.

That is not to say that legal systems completely turn a blind eye to animal interests. The most common ways that legal systems address animal interests are through anti-cruelty and animal welfare legislation or conservation of animal species. Anti-cruelty laws penalize some forms of human behavior that inflict harm and suffering on members of specific animal species. Animal welfare laws aim to reduce the suffering or increase the well-being of animals during some established forms and procedures of animal exploitation at the hands of humans. Laws on the conservation of certain animal species provide safer and more diverse habitats for members of the protected species and protect them from extinction. However, none of such laws technically create *animal rights*. They confer legally recognized and enforceable duties upon humans, but do not necessarily bestow rights upon the animals concerned. The existence of a legal duty does not always indicate that a correlative right also exists.

Human rights are justifiable on subjective and objective grounds. Subjective justifications and objective justifications based on the instrumental value of human rights are not reliable as they depend on the current experiential data as well as the dominant liberal worldview. The common human interests at the core of human rights would remain unchanged even if the political atmosphere changes. Therefore, objective justifications for human rights based on the inherent value of human beings are more reliable compared to other justifications. Among the most common concepts associated with the inherent value of human beings, the concepts of equality, dignity, autonomy, and fairness were examined under this study. They were then evaluated from a non-anthropocentric viewpoint to test whether they could constitute theoretical bases for potential animal rights.

This study finds that equality and fairness can substantiate potential animal rights just as they are applied in justifying human rights. According to an understanding of equality presented by Dworkin, every individual has equal moral status and should thus be treated as an equal.⁷¹² This understanding of equality in its classical form does not consider animals other than humans. However, animals other than humans are also *individuals* in the sense that their life “fares well or ill for them”.⁷¹³ If an interest that

⁷¹² DWORKIN, *supra* note 31.

⁷¹³ REGAN, *supra* note 75, at 243.

gives rise to a human right is shared by animals other than humans, all those who share that interest—whether they are human or not—should be entitled to equal consideration of their interest on a moral basis. Another concept that can substantiate potential animal rights but excludes animals other than humans in its classical form is fairness as theorized by Rawls.⁷¹⁴ According to this understanding of fairness, if members of a society were to design a society from scratch without knowing who they are going to become, they would favor the least advantaged ones, thinking that they could end up in that segment of society.⁷¹⁵ This theory may be enhanced by including the possibility that those behind the supposed veil of ignorance might end up as an animal other than a human after the veil is lifted.

Autonomy as in being an end in oneself could also explain potential animal rights since it refers to a being's moral value that is not quantified in relation to anyone or anything else. However, it is disputed whether autonomy as directing one's actions by one's own choices is found in animals other than humans, as moral patients cannot be held liable for their actions. Autonomy may justify potential animal rights only when moral agency is discerned from the prerequisites of autonomy. On the other hand, dignity is an inherently hierarchical and traditionally anthropocentric concept. It refers to a superior value that a dignified being has and every other being lacks. One could define *animal dignity*, but its content and practical implications would not be much different than the equal moral value, or the inherent value of animals. Unlike equality and fairness, autonomy and dignity cannot be applied directly to justify potential animal rights. Instead of merely expanding their scope to include animals other than humans, they need to be understood or reformulated with a non-anthropocentric approach if they are to constitute a basis for potential animal rights.

As can be seen, the justifications for human rights are comparable to those for potential animal rights. That said, there is currently no legal system that addresses animal interests through animal rights. The existing laws and regulations that are considerate of specific animal interests may be viewed as steps towards animal rights. There are examples of legal norms that redefine the status of animals other than humans, increase their welfare, protect them from unnecessary suffering, or ensure the continuity and diversity of their species despite not embracing animal rights. These underlying concerns

⁷¹⁴ RAWLS, *supra* note 41, at 512.

⁷¹⁵ See RAWLS, *supra* note 40, at 15.

may constitute reasons for state organs to interfere with human rights. In such cases, whether human rights always prevail over animal interests becomes a serious matter of debate. As the examples reviewed in this study demonstrate, the concerns about specific animal interests are not always automatically dismissed vis-à-vis human rights even in the absence of animal rights.

Nowadays, it is possible to encounter legal systems that address specific animal interests in their constitutions, which establish a standard of protection that cannot be surmounted even through lawmaking and provide the judiciary with a ground to interpret laws in a manner that serves animal interests. A few examples may help constitutions of the near future with their way of referring to animal interests. For example, in federal states, the lack of a basis for considering animal interests in the federal constitution may hinder constitutional efforts to address animal interests at the federated level, because the fundamental *human* rights enshrined in a federal constitution would prevail over the provisions of federated state constitutions. That said, all constitutional references to animal interests—even if they are placed in a federal constitution—may be vulnerable to political backlash since they are a compelling challenge to the status quo. A state duty regarding the well-being of animals other than humans imposed by the constitution equips the judiciary with a balancing ground for considering animal interests in legal conflicts involving human rights. A constitutional provision in favor of animals other than humans would also facilitate the legislature to prohibit or regulate forms of animal exploitation, especially when the mere interest in pleasure or economic efficiency is negligible against the excessive suffering inflicted upon the animals concerned.

In several criminal laws, cruelty towards certain animals or violations of certain animal welfare regulations are penalized. Such criminal laws should regard sentence in animals in all respects by considering not only physical pain but also psychological distress. To achieve effective implementation, incriminating laws should not reinforce the property status of animals and may yield more floor to their inherent value instead. They should protect animals even against their caregivers or those who exert legal dominion over them in any way. A genuine will to protect animals through legislation would require measures that extend beyond the victim animal. For example, if the law penalizes torturing companion animals but the perpetrator violates that provision, instead of prosecuting and punishing this action each time it occurs, the law should enable courts not only to separate the victim animal from the perpetrator but also to disqualify the

perpetrator from keeping any other companion animal. Most anti-cruelty laws penalize vaguely defined terms such as animal abuse or unnecessary suffering. The specific actions such terms implicate may not always be foreseeable for everybody. To prevent ambiguity, such criminal laws should define the forms of animal abuse or unnecessary suffering, so that the elements of crime may be known beforehand. In addition, in federal states, the lack of a federal anti-cruelty or animal welfare law may cause legislative attempts at the federated level to be invalid against the federally protected fundamental rights. Therefore, federal and federated laws should be synchronized in criminal matters regarding animals other than humans.

The law of persons and the law of property are fields under private law, and to which field a legal system subjects animals other than humans is essential to determine their legal status. Currently, there is no legal system that grants legal personhood to animals other than humans, but not all of them equate the status of other animals to that of *things* either. This creates a theoretically intermediate legal status. However, forming a third status alone does not practically distinguish the treatment of animals from that of objects. In several legal systems, although animals other than humans are not considered *things*, tortious liability resulting from lethal or injurious interferences with their lives and bodies is still evaluated the same as damage to property. They rarely entail compensation of non-pecuniary damages, and in cases of loss of a companion animal, the caregiver's loss of companionship is usually not considered in the measure of damages. Similarly, companion animals are still mostly divided as matrimonial property in divorce cases or liquidated as seized property in enforcement procedures. This study finds that private laws that create a third legal status for animals other than humans without granting them legal personhood rarely lead to meaningful changes in practice. The failed attempts to grant personhood to hominids so far mark a legal trend in that direction. Therefore, forming a third legal status for animals may be viewed as a step in the transition from *thing* to person.

In addition to domestic laws, international treaties may also raise the standard of protection of certain animal interests by forging regional and global approaches that may later turn into international customs. The existing international treaties that address specific animal interests are overwhelmingly conservationist and usually include welfarist provisions as well. They mostly focus on preserving the population of certain species without removing the underlying causes of their decline in the first place. An

important loophole in their implementation is that they usually do not stipulate limited grounds for reservations, allowing state parties not to abide by a provision without adequate justification. Moreover, most international treaties lack an enforcement mechanism despite playing a monitoring role. Aside from a few examples such as the IWC's lasting moratorium to cease commercial whaling depending upon the ICRW,⁷¹⁶ international treaties generally lag in addressing animal interests compared to developments at the domestic level.

In every domestic and global legal step toward addressing animal interests, animal rights activists have played a crucial role by contributing to scholarly discussions and raising public awareness. Owing to their efforts, the status quo tends to enhance in favor of animals other than humans. The evolving social perceptions about such animals may alter the interpretation of existing legal provisions or result in amending them considerably of common animal interests. In the absence of further legal recognition of animal interests, the current measures may not be sufficient in the long term. They do not address the core of the animal problem by abolishing the status of other animals as property. In the future, along with other components of nature that deserve or need protection, we may witness the granting of legal personhood as well as legal rights to animals other than humans. The present solutions to the problems of other animals are not sustainable unless the law repositions humans not as masters of the animal kingdom but as a mere part thereof.

Courts usually resort to a proportionality test to balance competing individual and public interests in legal disputes resulting from interfering with a human right. If the interference is prescribed by law and pursues a legitimate aim, the proportionality test reveals whether that legitimate aim justifies the interference. Laws that address specific animal interests may contradict human rights. Especially in cases where a law prioritizes animal welfare or the protection of animals, interference with human rights becomes inevitable. The reason for not disregarding animal interests without question is that they may be pertinent to a matter of public interest. The public interest in protecting an animal interest may be sufficient to outweigh the conflicting human interest. Its possibility is highly dependent on the protection standard provided in the relevant legal system.

⁷¹⁶ IWC, *supra* note 337.

Furthermore, animal rights activists' enjoyment of human rights as part of their advocacy contributes to the protection of animal interests indirectly.

The various examples of conflicts between human rights and animal interests presented hereunder are selected from particular jurisdictions, but they draw a direction for animal law to follow or avoid, and their implications are generalizable. Due to their impact on businesses, economic efficiency, and profitability, the laws and regulations protecting specific animal interests are contested mostly from the point of property rights. For instance, when the government of South Africa took action to deter canned hunting in 2007, it relied on the conservation of lion species instead of the lives and well-being of captive-bred lions. After being challenged by the representatives of the canned hunting sector, the relevant regulations were annulled for not being reasonably substantiated.⁷¹⁷ If the cruelty aspect of canned hunting had been taken as a basis rather than its insignificant effect on the lion population, the issue could have been discussed on accurate grounds. This shows that a law or a regulation in consideration of animal interests should be reasoned duly and properly so as to minimize collisions with human rights.

The tension between animal interests and the right to property is often observed with respect to restrictions imposed on an industry by an animal welfare law or penalization of certain forms of treatment of animals by an anti-cruelty law. The prohibition of force-feeding ducks and geese to produce *foie gras* in Israel even though the country was among the largest producers is an outstanding example in this context.⁷¹⁸ It proves the possibility of prioritizing the common animal interests of utmost importance, e.g., the interest in not being subjected to torture, over the economic interests no matter how lucrative the practice in question may be. Such an overarching interest, if recognized by law, may even justify penalizing certain forms of enjoyment of property rights. In cases where the victim of an offense is an animal other than a human, there should be procedural safeguards for animal interests to be voiced before the courts. A pioneering example thereof is Desmond's Law, enacted in the state of Connecticut in the United States, which appoints advocates to assist the courts in matters involving animal interests.⁷¹⁹ It paves the way for discussing animal representation in judicial procedures and the potential animal right to a fair trial.

⁷¹⁷ See Bilchitz, *supra* note 408, at 144-45.

⁷¹⁸ See WAGMAN & LIEBMAN, *supra* note 149, at 35.

⁷¹⁹ CONN. GEN. STAT. § 54-86n (2019).

Human rights do not necessarily negate the protection of animal interests. They may also contribute to establishing grounds for supporting specific animal interests in the absence of a reference to the sentience or inherent value of animals other than humans in existing legal norms. This issue was discussed in the present study within the context of the recent amendment in Turkey that enabled municipalities to collect homeless companion animals and kill the unadopted ones instead of neutering, vaccinating, and putting them back in their original living space.⁷²⁰ A case for the annulment of the amendment is pending before the Constitutional Court of Turkey. The constitution of Turkey lacks a provision that directly addresses animal interests, but it stipulates the right to a healthy and balanced environment.⁷²¹ Urban habitats where humans and homeless companion animals coexist are part of the environment. The amendment needs to be reviewed considering the mutual health benefits of interaction between humans and companion animals as well as the potential ecological risks to be caused by eradicating some species from a particular environment through mass killing, all of which are related to the elements of a healthy and balanced environment. Due to its connection with human health, ecological balance, and biological diversity, the human right to a healthy and balanced environment may entail consideration of animal interests.

The cases that require discussion of animal interests vis-à-vis human rights are not limited to those concerning the environment or relating to the right to property. In legal systems that define cruelty towards animals as a crime, allegations of cruel conduct may be actionable based on defamation. In such scenarios, the courts should discuss whether the interference with the freedom of expression is justified by the interest in one's reputation. The case-law of the ECtHR clarifies that matters of animal welfare and cruelty towards animals are of public interest and may prevail over concerns for reputation.⁷²² The freedom of expression enjoyed by the press in this regard may be extended to the freedom of expression enjoyed by animal rights activists who similarly endeavor to reveal animal abuses in the industry. It is such an effective activism method that there are incriminating laws targeting its peaceful forms, especially in the United States.⁷²³ The

⁷²⁰ Hayvanları Koruma Kanunu [Law on the Protection of Animals], Law No. 5199, art. 6 (as amended by Law No. 7527 on Aug. 2, 2024) (Turk.).

⁷²¹ Türkiye Cumhuriyeti Anayasası [Constitution of the Republic of Turkey] art. 56, translation at https://www.anayasa.gov.tr/media/7258/anayasa_eng.pdf.

⁷²² *Bladet Tromsø and Stensaas v. Norway*, 1999-III Eur. Ct. H.R. 289, 323-24; see Sparks, *supra* note 419, at 160-61.

⁷²³ See Johnston & Johnston, *supra* note 362, at 575.

suppression of non-violent efforts to record instances of cruel treatment that cannot be known by the public in any other way causes grave violations of the freedom of expression.

The freedoms of religion and conscience are other areas where human rights and animal interests may intersect since there are numerous religious and non-religious beliefs regarding animals other than humans. If a religion obligates a particular slaughtering method but that method cannot be performed due to animal welfare laws, the current approach is to prioritize concerns for animal welfare as long as believers can access products of religiously slaughtered animals. Religious rites that do not conform with other human rights, e.g., human sacrifice, are undoubtedly not worthy of protection under the freedom of religion. Although animals other than humans are also able to suffer and thus share the interest in maintaining life and bodily integrity, the law still allows religious slaughter to an extent under the pretext of freedom of religion even if they inflict pain and harm upon the animals concerned. On the other hand, there is an ethical stance that rejects joining or contributing to animal exploitation as much as practically possible, called veganism. The protection of people from discrimination based on their philosophical belief of veganism under the freedom of conscience may indirectly serve animal interests similar to the freedoms of expression and assembly enjoyed by animal rights activists.

As American writer Henry Beston puts it: “[Animals] are not underlings; they are other nations, caught with ourselves in the net of life and time, fellow-prisoners of the splendour and travail of the earth.”⁷²⁴ Humans are but a part of the environment and the animal kingdom within. There is a continuum between the interests of humans and other animals.⁷²⁵ It is likely for this interrelation in their interests to be reflected in their rights as well. Even now, there are legal disputes relating to human rights that inevitably require discussion of animal interests. Human rights might be the key to achieving animal rights one day, as they both emerge from the same source.

⁷²⁴ HENRY BESTON, *THE OUTERMOST HOUSE: A YEAR OF LIFE ON THE GREAT BEACH OF CAPE COD* 25 (Henry Holt & Co. 2003) (1928).

⁷²⁵ See SASKIA STUCKI, *ONE RIGHTS: HUMAN AND ANIMAL RIGHTS IN THE ANTHROPOCENE* 96-97 (Springer 2023).

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