From Animal Welfare to Animal Rights: Rethinking our Legal Paradigm

by

Stephanie O' Flynn

A thesis submitted for the degree of Doctor of Philosophy (Ph.D.)

Supervisor: Dr. Maureen O' Sullivan

School of Law,

National University of Ireland, Galway

March 2021

Declaration of Originality

I, Stephanie O' Flynn, do hereby declare that this work that is submitted for examination is my own and that due credit has been given to all sources of information contained herein. With this declaration, I certify that I have not obtained a degree at National University of Ireland Galway or elsewhere on the basis of this work. I acknowledge that I have read and understood the Code of Practice dealing with Plagiarism and the University Code of Conduct of the National University of Ireland Galway and that I am bound by them.

Signature:

Date:

Table of Contents

ACKNOWLEDGEMENTS

The completion of my PhD has been a long and inspiring journey during which many wonderful people have accompanied me along the way. This work could not have been realised without their inspiration and help.

I would like to thank my family for their constant love, encouragement and belief in me and my ability to see this through. To my parents and sister, Laura: I cannot express how lucky I am to have had each of you there with me every step of the way. A special thank you to my fiancé Ali, who has provided invaluable support throughout this journey. Without their love, encouragement, patience, and generosity, this would not have been possible, and I thank them dearly for supporting me through this journey.

I would like to acknowledge and thank my supervisor, Dr. Maureen O' Sullivan, for her guidance and support. I would also like to thank the members of my Graduate Research Committee, Dr. Charles O' Mahony, Dr. Ioanna Tourkochoriti and Ms. Ursula Connolly, for their kind support.

Finally, I would like to acknowledge the funding support that I received from the School of Law in NUIG.

ABSTRACT

This thesis is a critique of the current welfare system of protection for nonhuman animals (hereafter, animals) and calls for a paradigm shift in the legal protection. It is argued that there needs to be a shift from a welfare approach towards legal rights as the current system is inadequate. The purpose of this thesis is to highlight the need for an evidence-based approach to animal protection laws given the body of evidence now available demonstrating animal cognition and moral capabilities. It examines the adequacy of the current animal welfare system and identifies the shortcomings of a welfarist approach, such as the failure to pay regard to animal abilities, the lack of standing and the lack of consistent treatment of animals. This thesis advocates for the extension of species-specific legal rights, to animals based on their interests and capabilities. This research compiles and analyses the relevant empirical evidence and philosophical findings to highlight the need for legal reform in how animals are protected. Arguments have been made for the need to improve the current system on varying grounds; however, this thesis argues that the best approach is to bring together a number of disciplines to broaden the factors considered when drafting and designing animal protection laws. This study takes a mixed methodological approach combining legal analysis, empirical findings, socio-legal arguments, and theoretical perspectives as this serves to provide an evidence-based approach while also providing originality to addressing this problem.

BACKGROUND TO THIS RESEARCH

For as long as I can remember, I have always had a love for animals and an immense respect for their welfare. I have been exposed to varying uses and approaches to animals over the years. My grandparents had a traditional farm, abattoir, and shop. This business has passed down through generations of my extended family. On the other side, I have family members who are vegetarians, and my immediate family have adopted numerous rescue dogs over the years. Thus, I have witnessed many different relationships with animals. I never questioned human use of animals but was always mindful of the fact that animals must be cared for – my mindset was purely welfarist. In 2009 this began to change. After completing my law degree, I, along with my sister, established a pet accessories store and doggie daycare centre. Given my legal background, I was keen to ensure that any regulations were complied with. I was shocked to realise that the main Irish animal protection laws that were in place dated back to 1911 and this knowledge inspired me to explore the legal protection of animals in Ireland.

Once the business was established, I pursued a Master's in Law. This was the perfect opportunity to combine my interest in animal protection with my legal background. The topic I choose for my master's dissertation was entitled "Animal Protection Laws in Ireland." The timing of this thesis was fitting as reforms were underway at that time in Ireland, including dog breeding legislation, greyhound welfare and amendments to our wildlife regulations.

This dissertation spiked my interest to explore further literature. I began by reading the seminal works of Peter Singer and Tom Regan, which challenged my views and morals and importantly, made me question the adequacy of the current animal welfare system of protection. Upon reading the Great Ape Project and the scientific evidence regarding animal capabilities and interests, I moved from a welfarist to a rights approach. I explored the developments which have occurred, including the EU recognition of animal sentience. While this development was welcomed, it does not focus on the evidence regarding animal cognition and animals' vast abilities. Furthermore, despite the recognition of their sentience, they are still legally classified as property. This inspired me to pursue a PhD on this issue. I secured a scholarship for this research, and during my time as a PhD candidate, I have taught seminars and given lectures on this area to both law and social policy students. I have also

presented at law conferences within Ireland and the UK on issues including dog breeding and humane education, the case for rights for animals, the evolution of EU animal law and challenges and opportunities in Irish animal protection law. My conference papers have been delivered at mainstream law conferences including the Society for Legal Scholars, the Socio-Legal Studies Association, and the Irish Association for Law Teachers, for which I received a scholarship given the originality of my topic. As my studies advanced, I participated in stand-alone animal specific conferences including the Oxford Centre for Animal Ethics (OCFAE) Summer School on Animal Ethics and Law and the Cambridge Centre for Animal Rights on European Animal Rights Law. Both Steven Wise and David Favre were in attendance at the OCFAE Summer School on Animal Ethics and the Law, allowing me the opportunity to learn from the prominent scholars in this field. It also ensured I remain up to date with contemporary issues and new innovations in animal law. Following this summer school, I was invited to become an Associate Fellow of the Centre and have continued to present at their summer schools, maintaining links with other scholars in the field. I was also invited to present at the first European Animal Rights Law Conference held in Cambridge University in 2019 alongside established academics in the area of animal rights law, and thus gaining a real insight into the current European landscape of animal law. This conference focused on animal rights law and covered topics including the Nonhuman Rights Project, the use of habeas corpus writs and animals and the concept of personhood and the extension of rights to animals. This conference confirmed the need for animal rights to protect animal interests adequately. I have published aspects of my research, and I am a reviewer for the *Global Animal Law Journal*, which has developed my critical skills and broadened my awareness of global animal law issues. All this experience has greatly added to my knowledge base and skills set in order to complete this study.

GLOSSARY OF KEY TERMS

Animal

The term "animal" refers to all animals, excluding human beings. While human beings are themselves animals, this popular use of the term animal is helpful for the purpose of clear communication. By using the term animals, this thesis refers to sentient living creatures other than human beings.

Consciousness and cognition

Consciousness and cognition are often used interchangeably. For instance, Peter Singer defines conscious beings as those that can conceptualise the past, present, and future of their lives as one coherent whole. Cognition is defined as the mental action or process of acquiring knowledge and understanding through thought, experience, and the senses.[1] However, other academics explain that there are several concepts used in the area of consciousness and cognition.[2] There are five distinguished types of creature consciousness starting at where an organism may be said to be conscious, that is, they can sense and perceive their environment and has the capacity to respond appropriately, to higher-order theories to consciousness as a form of self-awareness.

Empathy

The ability to share and understand the emotions of others.[3]

Legal person

Legal person refers to a human or non-human entity that is treated as a person for limited legal purposes.[4]

[1] See definition at https://www.lexico.com/en/definition/cognition accessed 20/12/19
[2] See Robert Van Gulick "Consciousness and Cognition" in The Oxford Handbook of Philosophy of Cognitive Science (OUP 2012).
[3] See Cambridge dictionary definition at https://dictionary.cambridge.org/dictionary/english/empathy accessed 10/5/21.
[4] See section 5.2 THE RECOGNITION OF LEGAL PERSONHOOD for further discussion

Morality

Morality refers to the set of standards, values and behaviour that enable beings to live cooperatively in groups.[5]

Rights

A right is something to which someone is entitled and that they may claim from others.

Sentience

Sentience is the ability to experience negative and positive experiences, including physical, mental, and emotional states.[6]

Welfare

Animal welfare is generally understood to comprise three interlinked components: physical health, psychological/emotional wellbeing, and naturalness. Animal welfare refers to the mental and physical state of an individual as it experiences and engages with its environment.[7]

[5] See discussion on varying definitions of morality in chapter 2 see 2.3 ANIMALS AND MORAL CAPACITIES

[6] See discussion on definitions of animal sentience or lack thereof, in chapter 3 see 3.1.2.4.1 Article 13 of the Treaty on the Functioning of the European Union does not define sentience. In contrast, the Scottish Animal Welfare Commission defines sentience as "The ability to have physical and emotional experiences, which matter to the animal, and which can be positive and negative" available at https://www.gov.scot/publications/scottish-animal-welfare-commission-statement-on-animal-sentience/#:~:text=Scottish%20Animal%20Welfare%20Commission%3A%20statement%20on%20animal%20sentience,-Published%3A%2010%20Feb&text=SAWC%20defines%20animal%20sentience%20as,animals%20that%20have%20this%20ability accessed 15/6/21

[7] Definition provided the Scottish Animal Welfare Commission see https://www.gov.scot/publications/scottish-animal-welfare-commission-statement-on-animal-sentience/#:~:text=SAWC%20defines%20animal%20welfare%20as,and%20also%20comfort%20and%20enjoyment accessed 20/6/21.

CHAPTER 1: INTRODUCTION

1.RESEARCH QUESTION

This thesis is a critique of the legal system of protection for animals and advocates for the inclusion of legal rights. The research question is whether the current legal framework for the protection of animals is adequate, given our increasing scientific knowledge of their states of being. It is hypothesised that the system employed to protect animals should be evidence-based, it should incorporate the scientific evidence that is now available, in order to protect animals adequately. This thesis, therefore, explores advances in empirical evidence regarding animal cognition[8] and an expanding body of theoretical approaches[9] and concludes that this evidence should be incorporated into animal protection laws.

This thesis has two goals: To question the adequacy of the current system by highlighting its inherent flaws and developing a case for legal rights for animals, using evidence regarding their moral abilities and interests. This thesis makes a normative claim that the law needs to incorporate rights to adequately protect the moral capabilities and interests of animals.

1.1 SCOPE OF THE STUDY

In accordance with the main research question, the key objective is to identify the gaps in protection and consider the need for the inclusion of legal rights for animals. This thesis argues for the extension of species-specific legal rights, to animals based on their interests

[8] There is a growing body of evidence to demonstrate the cognitive abilities of many animals from experts in the field including Jane Goodall, Frans de Wall and James Anderson to name a few. Chapter five examines animal cognition and the findings of these experts in detail see 2.3 ANIMALS . Consciousness and cognition are often used interchangeably. For instance, Singer defines conscious beings those that can conceptualise the past, present, and future of their lives as one coherent whole. Cognition is defined as the mental action or process of acquiring knowledge and understanding through thought, experience, and the senses see https://www.lexico.com/en/definition/cognition However, other academics explain that there are several concepts used in the area of consciousness and cognition see Robert Van Gulick "Consciousness and Cognition" in *The Oxford Handbook of Philosophy of Cognitive Science* (OUP 2012) in which he explains that there are five distinguished types of creature consciousness starting at where an organism may be said to be conscious is it can sense and perceive its environment and has the capacity to respond appropriately to higher-order theories to consciousness as a form of self-awareness.

[9] Theorists and lawyers such as Tom Regan, Gary Francione, David Favre and Steven Wise have set forth theories for the extension of rights to animals. These theories are explored in chapter two see 2.2 ANIMAL RIGHTS THEORY: ANIMAL AS AUTOMATA TO UTILITARIANISM AND DEONTOLOGY.

and moral capabilities. In examining these various areas, some decisions had to be made in this thesis. For example, when investigating animal capabilities – the evidence predominately focused on cetacean and ape abilities as we currently have the most information about these species and the thesis therefore is using the strongest example. However, it does not restrict the rights argument to these species. When examining the current system of protection, the European Union was chosen as a case study to demonstrate that the law is not protecting the sentience of animals and does not consider the interests of animals. In selecting to examine what are considered among the highest standards of welfare laws in the world[10] this thesis demonstrates that even our best laws are not sufficient and are largely not evidence-based.

By using the term animals, this thesis refers to sentient living creatures other than human beings. This thesis does not advocate rights for amoebas or other single-cell organisms. The extension of rights based on a species' abilities is crucial, given the evidence-based approach which this thesis takes. The cut-off point for inclusion is somewhat obscure due to continually changing scientific knowledge about the cognitive and sentient abilities of different animals, and this is likely to remain in a state of flux for some time to come.

1.2 THESIS STRUCTURE

Chapter one provides an introduction to the thesis. This chapter outlines the reasons for this study, the research question and the scope of the research, the structure of the study, the methodology, and the literature review.

Chapter two examines the importance of knowledge of animal abilities to highlight the need for effective, evidence-based, legal protection. This chapter examines both utilitarian and deontological theories and analyses the concept of cognition and moral capacities as a basis for rights. It further analyses the scientific evidence on animal cognition predominately using great apes and cetaceans as a case study. The empirical data was collected largely through internet sources, predominately science-based journals and supplemented by published

[10] EU animal welfare legislation is stated to be one of the most advanced in the world see Denis Simonin and Andrea Gavinelli **"**The European Union legislation on animal welfare: state of play, enforcement and future activities" (2019) in Sophie Hild and Louis Schweitzer, *Animal Welfare: From Science to Law* (La Fondation Droit Animal, Éthique et Sciences (LFDA) 2019) 59-70 see also Steven P McCulloch "Brexit and Animal Welfare Impact Assessment: Analysis of the Threats Brexit Poses to Animal Protection in the UK, EU and Internationally" (2019) Animals (Basel) 9 (3) and International Fund for Animal Welfare "Pledge to protect the environment and wildlife" available at https://www.ifaw.org/eu/action/pledge-to-protect-the-environment-and-wildlife accessed 20/12/19.

reports. First, the importance of animal rights theory is examined, and evidence of animal cognition is set out to illustrate the gap between this recognition in science and theory, to the protection or lack thereof, in law. The scope of this section has been limited to great apes and cetaceans, as a case study, due to the extent of knowledge that exists in relation to these species. Finally, anti-rights arguments are addressed.

Chapter three is divided into two parts. Part one provides an overview of the current legal terrain for animals in the European Union (EU). It sets out a historical and a chronological account of the legislation in place which seeks to provide for the regulation and protection of animals. EU law has been credited for its pioneering status in advancing animal welfare law,[11] therefore, this chapter traces the evolution of the EU legal system and details how the law has adapted its view of animals. A chronological account of EU law is provided, and an examination of case law on animal welfare from the Court of Justice of the European Union (CJEU) is presented. The chapter identifies the specific concerns in relation to the current legal regulations in place, and this forms the basis for the subsequent analysis of other jurisdictions. Part two examines the impact of trade law on animal protection and examines animal welfare in trade disputes. This section of the thesis relies on a mix of primary sources, such as treaties, directives and regulations as well as secondary sources from journals and books.

Chapter four analyses the current animal welfare system and focuses on describing and questioning the adequacy of the current system of protection by highlighting the inherent flaws within the animal welfare system. The focus is on the most critical factors affecting the effectiveness of animal welfare legislation such as the lack of standing of animals, animal welfare as a secondary concern, the failure to adequately pay regard to animal sentience and evidence of animal cognition. Throughout the conduct of this research, extensive use was made of the online legal research databases of the James Hardiman Library at the National

[11] Diane Ryland "Advancing Animal Welfare: State, Society and Economy" available at http://eprints.lincoln.ac.uk/12375/7/12375%20Open%20access%20submitted%20draft%20Andrzej%20Frycz%20Modrzewski%20Krak%C3%B3w%20University%20in%20cooperation%20with%20the%20Jagiellonian%20University%20(3).pdf accessed 14/11/15 5 also see Tara Camm and David Bowles, "Animal Welfare and the Treaty of Rome – A Legal Analysis of the Protocol on Animal Welfare and Welfare Standards in the European Union" (2000) Journal of Environmental Law 197 see also Nicholas K Pedersen "Detailed Discussion of European Animal Welfare Laws 2003 to Present: Explaining the Downturn" (2009) The Animal Legal and Historical Center available at https://www.animallaw.info/article/detailed-discussion-european-animal-welfare-laws-2003-present-explaining-downturn accessed 15/8/17.

University of Ireland, Galway (NUIG). The purpose of this chapter is to demonstrate that the current animal welfare system does not protect animal interests adequately. It sets out how animals' fundamental interests are not protected by highlighting the shortcomings in the current animal welfare system in order to demonstrate why welfare measures do not work.

After providing a contextual background of EU animal welfare law, trade law and a critique of the current animal welfare system, chapter five analyses the recent developments in animal law in the international legal system that demonstrate a change in views regarding animals that have been reflected in changing laws. It analyses the concept of legal personhood and the extension of personhood to animals. It examines the status of animals in jurisdictions that are closing the gap between law and empirical data, thereby acknowledging the scientific evidence regarding animal sentience and cognition. It explores the developments that have been made regarding the treatment and protection of animals, highlighting shifting contemporary norms. This chapter illustrates that animals can have improved protection, including certain legal rights and demonstrates some of the ways in which this is possible. The chapter relies on a number of sources, from legislation, court decisions to books and journals.

Chapter six establishes why a rights-based approach is essential. It summarises and restates this thesis' findings that the present system is inadequate, and reform in this area is needed. The main conclusion drawn from this research is that the current system is not appropriate and needs to be evidence-based. It leads to the conclusion that we should create an evolving legal framework which incorporates rights for animals. There is sufficient evidence to challenge the current system. This chapter concludes by setting out recommendations for reform based on the findings of this study. It explores the creation of a rights-based approach to animal protection and provides recommendations on how this can be achieved in addition to enforcement options.

1.3 RESEARCH METHODOLOGY

To answer the research question proposed, the principal methodology adopted is a traditional doctrinal research. A doctrinal approach[12] is used to provide a systematic exposition of the

[12] Doctrinal (or "black letter") methodology refers to a way of conducting research which is usually thought of as "typical legal research." A doctrinal approach to research will focus on case-law, statutes and other legal sources see https://uweascllmsupport.wordpress.com/2017/01/18/research-methods-doctrinal-

rules governing animals. Legislation has been rigorously traced to ascertain the changing shift in the legal protection afforded to animals, for example, within the EU. This approach is coupled with an examination of other approaches to animal protection from jurisdictions that are closing the gap between the laws in place and the evidence we have now acquired regarding animal cognition. The doctrinal critique of legislation and case law is married with empirical knowledge acquired which provides the basis for the evidence-based arguments and is supplemented by socio-legal arguments from jurisdictions with improved rights for animals based on shifts in societal opinion and views.[13]

Animal welfare science plays a significant role in determining how we should treat animals.[14] Empirical research which is based on observations and derives knowledge from actual experience or experimentation which focused on animal sentience and cognition were examined. Examining scientific findings was important in order to comprehensively present a balanced contextual assessment of the current position. In science, empirical research is the accumulation of data using only the evidence that can be observed using our senses or scientific instruments that are properly calibrated.[15] Therefore, an empirical study is one based on experimentation, observation, or measurement. The research conducted, included a detailed, comprehensive review of the scientific evidence regarding animal cognition. It involved an analysis of scientific literature and other materials, using a traditional analysis. For example, it argues that the possession of interests and moral capacities ought to play a part in determining how the legal system should protect animals. It provides a scientific perspective to this discussion and appreciates the need to ensure that scientific evidence is reflected in our laws.

methodology/ see also Dawn Watkins and Mandy Burton Research Methods in Law (Routledge 2013) 9 and Suzanne Egan UCD Working Papers in Law, Criminology & Socio-Legal Studies Research Paper No.19/2017 The Doctrinal Approach in International Human Rights Scholarship 2.

[13] For example, Canada and their recent ban on cetacean captivity is based on shifting societal opinion on the ethics of keeping highly cognitive species in captivity. The socio legal arguments will be discussed in further detail later in this chapter.

[14] Donald Broom "Sentience and animal welfare: New thoughts and controversies: Response to Commentary on Broom on Animal Welfare" (2016) Animal Sentience 1.

[15] See "What is Empirical Research? "available at http://www.writeawriting.com/academic-writing/empirical-research/ accessed on 10/10/18.

The legal and empirical analysis is supported by a theoretical framework. Theoretical perspectives[16] provide one of the components of the interdisciplinary research[17] employed in this thesis to advance a rights-based approach to the legal protection of animals. This research involved an analysis of cognition-based theories, including arguments established by Tom Regan and more recently by Steven Wise and set forth a theoretical framework based on the moral capacities of animals.

In addition to legal, theoretical and empirical research, socio-legal arguments were presented as there is evidence which demonstrates a change in the societal view of both apes and cetaceans which is impacting upon the legal protection in place. A socio-legal approach is an analysis of law that is directly linked to an analysis of the social situation to which the law applies and should be put into the perspective of that situation by seeing the part the law plays in the creation, maintenance and/or change of the situation. We have evidence to confirm that both apes and cetaceans have moral capacities, but there is also societal support for improving the legal protection in place for these species. For example, a change in opinion is beginning to occur among the judiciary[18] and also amongst the public, for instance, the Swiss primate initiative,[19] the support in place for the Canadian ban on cetacean captivity and the EU seal products ban.[20] As society and various societal factors contribute to framing the

[16] Theoretical research is a logical exploration of a system of beliefs and assumptions see "Theoretical Research" at https://www.sciencedirect.com/topics/computer-science/theoretical-research accessed on 10/10/18.

[17] Interdisciplinary research uses multiple research methods see Allen F Repko and Rick Szostak *Interdisciplinary Research: Process and Theory* (3rd edn, Sage 2017) ch 1 3.

[18] In the Nonhuman Right Project cases, for example. Judge Fahey's statement for instance, where he stated that chimpanzees are not mere property. Also, in the Argentinian case of Cecilia and the successful habeas corpus writ. These cases are discussed in detail in chapter four see 5.3.2 America and the Nonhuman Rights Project (NhRP) – The evolution of legal personhood for nonhuman animals in the United States and 5.3.3 Argentina and the protection of Great Apes.

19 The Swiss canton of Basel-Stadt is determining whether to grant fundamental rights to life to non-human primates. The aim of the initiative is to guarantee the fundamental rights to life and to mental and physical integrity for non-human primates – a group that include animals such as chimpanzees, orangutans, and bonobos. The initiative is based on the collection of signatures from members of the public. This initiative will be discussed in further detail in chapter four see 5.3.8 Switzerland.

20 Canadian ban on cetacean captivity see "Canada passes law banning holding dolphins and whales in captivity" available at https://www.independent.co.uk/news/world/americas/canada-free-willy-dolphins-whales-porpoises-captivity-a8954551.html accessed 20/6/19 and Paola Conconi and Tania Voon "EC–Seal Products: The Tension between Public Morals and International Trade Agreements" (2016) World Trade Review 15 (2).

law, particularly in relation to animal protection, socio-legal research[21] was engaged with to demonstrate how society affects the implementation of policy and law in practice. It explores the implications of societal preferences and norms, specifically in relation to the legal protection of animals. For this reason, the relationship between the law and society had to be studied. Thus socio-legal research and doctrinal research are equally important to press forward the development of law.[22] The addition of socio-legal research aided the argument to go beyond the legal status quo and to re-shape it according to societal or ethical requirements.

Reconciling legal protection of animals and the evidence collected in science and theory requires a nuanced approach to facilitate scientifically informed laws. This research is rooted in law but also relies on other disciplines. This method of interdisciplinarity is best seen as bringing together distinctive components of two or more disciplines and can help bring a new awareness of the meaningful connections that exist among the disciplines.[23] It creates a new way of thinking about the law and how it ought to protect animals and develop linkages between different disciplines to create new approaches and ask questions about how best to protect animals. Several disciplines are applied to animal law to establish a better model for the future, and it is concluded that the justificatory narratives overlap and support each other. As Paul Waldau notes, in Animal Studies,

---

21 It became clear that it seems widely accepted that there is no agreed definition of the socio-legal research approach (Harris D R, "The development of socio-legal studies in the United Kingdom" (1983) 3 Legal Studies 315; Cownie F, Legal Academics: Culture and Identities (Hart Oxford 2004); Cownie C and Bradney A, "Socio-legal studies: A challenge to the doctrinal approach" in Watkins D and Burton M, Research Methods in Law (Routledge Abingdon 2011). Examples of definitions include: "Law and society research supports evidence-based policy. Socio-legal research fosters a connection in solving research problems." (Darran O' Donovan, "Socio-Legal Methodology: Conceptual Underpinnings, Justifications and Practical Pitfalls" in Laura Cahillane and Jennifer Schweppe, *Legal Research Methods: Principles and Practicalities*); "According to a socio-legal approach, analysis of law is directly linked to an analysis of the social situation to which the law applies, and should be put into the perspective of that situation by seeing the part the law plays in the creation, maintenance and/or change of the situation." (David N Schiff, Socio-Legal Theory: Social Structure and Law."); ."Socio-legal research may be interdisciplinary, and it may combine doctrinal with nondoctrinal analysis, for example to justify recommendations for reform or development of existing doctrine or practice." (Blandy S (2014) Socio-legal approaches to property law research. Property Law Review, 3 (3) 4);."Socio-legal research... represents an attempt at evaluation and analysis of the social factors bearing on very specific legal situations." (Dorothy Swaine Thomas, "Some Aspects of Socio-Legal Research at Yale").

22 Amrit Kharel "Doctrinal Legal Research" (2018) available at SSRN: https://ssrn.com/abstract=3130525 or http://dx.doi.org/10.2139/ssrn.3130525 14.

23 See Moti Nissani "Ten cheers for interdisciplinarity: The case for interdisciplinary knowledge and research" (1997) The Social Science Journal 34 (2) available at https://www.researchgate.net/publication/222446160_Ten_cheers_for_interdisciplinarity_The_case_for_interdisciplinary_knowledge_and_research accessed 21/10/18.

> Both a great number and a wide variety of disciplines are needed if Animal Studies is to engage the past, present, and future possibilities of human interactions with living beings outside our own species. There is simply no other way to explore the diversity of other animals, respect the variety in human responses, and describe the peculiar dynamics of human animals.[24]

Library-based research was also used to explore an extensive array of secondary sources of law throughout the research. This background provides crucial details as to why the current system is ineffective and is essential as it ties into the second goal of the thesis to provide a case for the inclusion of legal rights. It further facilitated the identification of the gaps in the literature and aided in refining and focusing the thesis on the key issues. Therefore, this research was used to provide a foundation for the normative aspect of this research which leads to the conclusion that the law needs to be evidence-based.

1.4 LITERATURE REVIEW

This study commenced by examining the seminal works of Peter Singer and Tom Regan. Peter Singer in *Animal Liberation*[25] contends that self-conscious beings have a stronger claim to life than non-self-conscious beings, where self-conscious beings are defined as those that can conceptualise the past, present, and future of their lives as one coherent whole. This theory relies on sentience and combines this with utilitarianism which of course improves the position of animals by demanding equal consideration, but it also allows their exploitation and their needs to be overridden through the utilitarian calculus.[26]

Literature has been published on animal sentience and the impact this should have on the treatment of animals. Ruth Harrison in *Animal machines*[27] outlined the welfare issues inherent in factory farming which had a profound impact on public opinion and the quality of life of farmed animals when it was published in 1964. This book greatly increased public awareness of animal welfare and led to legal reforms such as The Brambell Report and the Five Freedoms. Other authors, such as Sabine Brels in her article "The evolution of the legal

[24] Paul Waldau, *Animal Studies: An Introduction* (Oxford University Press 2013) 21–22.
[25] Peter Singer, Animal Liberation (HarperCollins 1975).
26 See Peter Singer (n25) 9.
[27] Ruth Harrison Animal *Machines* (CABI Publishing 1964).

status of animals: From things to sentient beings",[28] examines the changing classification of animals. Brels highlights the jurisdictions that have recognised animals as sentient beings in order to illustrate that the legal status of animals is evolving.

In contrast to Singer's *Animal Liberation,* Tom Regan's *The Case for Animal Rights*[29] sets out a deontological approach based on the argument for strict rights for animals on the grounds that they are "subjects-of-a-life," that each animal is a unique life story, with interests of their own, irrespective of how humans view or use them and thus possess inherent worth.[30] Regan holds a rights position which incorporates autonomy as his theory applies to mammalian animals one year or more as they demonstrate advanced cognition which renders them worthy of rights. However, Regan cannot say with confidence how far we should go in identifying creatures that are "subjects-of-a-life." It is clear that many academics refer to capabilities as being central to the extension of rights and therefore, an examination of empirical evidence relating to animal sentience and cognition is required.

Empirical studies of the lives of some animals have prompted scientists and philosophers to debate the question of whether moral capacity exists in nonhuman animals. Researchers have demonstrated evidence of moral capacities in animals, such as empathy and altruism which underpin moral behavior. Primatologist Frans De Waal in his work *The Bonobo and the atheist: In search of humanism among the primates*[31] contends that morality is an evolutionary product. More recently philosopher and political theorist Philip Pettit developed his naturalistic theory about the origin of morality in his work *The Birth of Ethics: The Evolution of Morality*. For Pettit, morality comes in the wake of social life and not personal individual rationality.[32] There is disagreement between researchers as to what morality is and whether or not animals have morality. In *Wild Justice: The Moral Lives of Animals,* evolutionary biologist Marc Bekoff and bioethicist Jessica Pierce define morality as "a suite of interrelated other-regarding behaviors that cultivate and regulate complex interactions within social

[28] Sabine Brels "The evolution of the legal status of animals: From things to sentient beings" (2017) available at https://www.globalanimalnetwork.org/evolution-legal-status-animals-things-sentient-beings accessed 15/02/18.
[29] Tom Regan, *The Case for Animal Rights* (2nd edn, University of California Press 2004).
30 *Ibid.*
[31] Frans De Waal *The bonobo and the atheist: In search of humanism among the primates* (W. W. Norton & Company 2014).
[32] Philip Pettit *The birth of ethics: Reconstructing the role and nature of ethics* (OUP 2018).

groups."[33] In *"Primates and Philosophers: How Morality Evolved,"* primatologist Frans De Waal defines morality as "a compass for life's choices that takes the interests of the entire community into account."[34] Philosopher Mark Rowland in his work *Can Animals be Moral?* holds that one can act morally if one is moved by certain emotional states, such as compassion or indignation at another's actions, which may incline one to behave punitively towards them.[35]

There is now a body of evidence which highlights animal abilities and their corresponding interests. This fact has important moral and legal implications. The literature on ape and cetacean abilities is vast. Experts such as Jane Goodall, in her many works, including her contribution to the *Great Ape Project: Equality beyond Humanity*[36], has documented the advanced abilities of great apes. This collection of thirty-one essays from a range of world experts including primatologists, philosophers and scientists advocates for the immediate extension of our human rights to the great apes. Literature from other experts such as Frans de Wall who has been a prominent researcher on great ape cognition and has published a vast amount of literature including "Are We Smart Enough To Know How Smart Animals Are?"[37] has added extensively to the evidence on ape cognition. Marino Lori and Louis Herman have conducted and published their findings regarding cetacean cognition and have published works including "Cetacean have complex brains for complex cognition"[38] and *Cetacean Behavior: Mechanisms and Functions*[39] which demonstrate the advanced cognition and autonomy of cetaceans, and Denise Herzing's *Dolphin Communication and Cognition: Past, Present, and Future*[40] surveys the latest research on dolphin communication and cognition, offering a comprehensive reference to findings in the laboratory and from the field.

Theories that centre on capacities or cognition have led to legal arguments for the extension of personhood to animals. Academics such as Tamie Byrant[41] in "Sacrificing the Sacrifice of Animals: Legal Personhood for Animals, the Status of Animals as Property, and the Presumed

[33] Marc Bekoff and Jessica Pierce *Wild Justice: The Moral Lives of Animals* (University of Chicago Press 2010) 7.
[34] Frans De Wall *Primates and Philosophers: How morality evolved* (Princeton University Press, 2016)
[35] Mark Rowlands *Can Animals be moral?* (OUP 2014).
[36] Paola Cavalieri and Peter Singer *The great ape project: Equality beyond humanity* (St. Martin's Griffin 1993).
[37] Frans de Wall *Are We Smart Enough To Know How Smart Animals Are?* (W W Norton 2016).
[38] Lori Marino et al "Cetaceans Have Complex Brains for Complex Cognition" (2007) PLoS Biol 5 (5).
[39] Louis Hermann *Cetacean Behavior: Mechanisms and Functions* (Krieger Pub Co 1988).
[40] Denise Herzing's *Dolphin Communication and Cognition: Past, Present, and Future* (MIT Press 2015).
[41] Professor of Law at UCLA see https://law.ucla.edu/faculty/faculty-profiles/taimie-l-bryant/.

Primacy of Humans"[42] has advanced arguments for legal personhood for animals. The extension of legal personhood to animals has also been explored by Visa Kurki and Tomasz Pietrzykowski in *Legal Personhood: Animals, Artificial Intelligence and the Unborn*[43] and in Visa Kurki in *A Theory of Legal Personhood*[44] where it is argued that personhood can apply to animals. Organisations such as the Great Ape Project (GAP) and the Nonhuman Rights Project (NhRP) have pursued this argument. While the two projects differ in various ways – GAP aims primarily at legislative change; the NhRP at courts – but they share the same decision to single out primates for personhood.

However, the academic boundaries between law, theory and the empirical evidence on animal cognition have not been traversed in this area. Furthermore, it was discovered that while there are many books on animals and other disciplines such as animals and philosophy, and animals and religion, there are a limited number of books on animals and the law. This is an aspect of this thesis' original contribution.

Some of the prominent literature that has been published on animals and the law includes Steven Wise's book, *Rattling the Cage: Toward Legal Rights For Animals*[45] which offers a legal analysis of the issues and specifically proposes that legal recognition of the rights of chimpanzees and bonobos. Wise's theory concerns the legal status of animals by relying on scientific knowledge about the physiological and cognitive capacities of animals. Wise essentially argues that animals with high levels of autonomy such as chimpanzees meet the requirements of personhood and thereby are worthy of legal rights.[46] In *Drawing the Line: Science and the Case for Animal Rights,*[47] Wise went beyond exploring arguments for the legal personhood of chimpanzees and bonobos to whether other nonhuman animals –elephants, gorillas, orangutans, cetaceans, parrots, corvids, and dogs – should be entitled to legal personhood and, if so, where would one draw the line?

[42] Tamie Bryant "Sacrificing the Sacrifice of Animals: Legal Personhood for Animals, the Status of Animals as Property, and the Presumed Primacy of Humans" (2007-2008) 39 Rutgers L.J. 247–248.
[43] Visa Kurki and Tomasz Pietrzykowski in *Legal Personhood: Animals, Artificial Intelligence and the Unborn* (Springer International Publishing 2017).
[44] Visa Kurki *A Theory of Legal Personhood* (OUP 2019).
[45] Steven Wise *Rattling the Cage* (Hachette Books 2000).
[46] *Ibid.*
[47] Steven Wise *Drawing the Line: Science and the Case for Animal Rights* (Basic Books 2002).

Simon Brooman and Debbie Legge's *Laws relating to Animals*[48] which was published in 1999 was a forward-thinking piece of literature. There have not been many books of this nature published since, yet there have been many developments in the law. This book takes an interdisciplinary approach looking at philosophy, tracing the history of how animals have been treated by the law and examining topical issues including experimentation, animals in agriculture, sport and entertainment. It looks at animal law in a wide context and considers moral and ethical debates, political ideas and economic influences.

Scientific knowledge accumulated over many decades has amplified and demonstrated that animals are more than things which has led to legislation referring to animals as sentient beings, for example, Article 13 of the Treaty on the Functioning of the European Union. This illustrates that the legal status of animals is evolving and has been analysed by academics such as Camm and Bowles "Animal Welfare and the Treaty of Rome –A Legal Analysis of the Protocol on Animal Welfare and Welfare Standards in the European Union."[49] There is some further literature on EU law and animal welfare. Authors such as Rasso Ludwig and Roderic O' Gorman in their 2008 article "A Cock and Bull Story? —Problems with the Protection of Animal Welfare in EU Law and Some Proposed Solutions,"[50] discuss the EU's approach to animal protection. Prof. Donald Broom has also outlined the EU's approach to animal protection in his article "Animal Welfare in the European Union."[51]

Academics have examined the impact of trade laws on animals, highlighting the issues affecting animal protection. For example, Katie Sykes in her article "Sealing animal welfare into the GATT exceptions: the international dimension of animal welfare in WTO disputes"[52] examines the argument that there is a general principle of international law concerning animal welfare and Jacky Turner's book *Animals, Ethics and Trade: The Challenge of Animal Sentience*[53] which addresses how human activities, such as science, law, farming, food

[48] Simon Brooman and Debbie Legge *Laws relating to Animal* (Routledge-Cavendish 1999)
[49] Tara Camm and David Bowles "Animal Welfare and the Treaty of Rome – A Legal Analysis of the Protocol on Animal Welfare and Welfare Standards in the European Union" (2000) Journal of Environmental Law 12 (2).
[50] Rasso Ludwig and Roderic O' Gorman "A Cock and Bull Story? — Problems with the Protection of Animal Welfare in EU Law and Some Proposed Solutions" (2008) The Journal of Environmental Law 20 (3).
[51] Donal Broom "Animal Welfare in the European Union" (2017) European Parliament Policy Department, Citizen's Rights and Constitutional Affairs, Study for the PETI Committee.
[52] Katie Sykes "Sealing animal welfare into the GATT exceptions: the international dimension of animal welfare in WTO disputes" (2013) World Trade Review 13.
[53] Jacky Turner *Animals, Ethics and Trade: The Challenge of Animal Sentience* (Routledge 2006).

production, trade, development and education respect or ignore animals' sentience and welfare. This thesis fills the gap in the literature for an up to date critique of the current animal welfare system and the modern developments.

Some reforms are suggested in the literature. For instance, David Favre contends in "Living Property: A New Status for Animals Within the Legal System"[54] that animals should become a special kind of property – living property.[55] However, others such as Gary Francione in *Rain Without Thunder: The Ideology of the Animal Rights Movement*[56] calls for an abolitionist[57] approach which would cease the categorisation of animals as property. Francione is extremely critical of a welfare approach. He believes that animals cannot be sufficiently protected if they remain in this category.[58] He argues that animal rights advocates should propose and support legal reforms that seek prohibition, as opposed to regulation. He holds that animals must no longer be classified as property if we are to adequately protect their interests. Francione's *Animals as Persons* accepts the idea that personhood grounds rights but redefines personhood so that all sentient beings qualify as "persons."

Robert Garner provides two theories – an ideal and a non-ideal in his *Towards a Theory of Justice for Animals: Animal Rights in a Nonideal World*.[59] His ideal position also known as the enhanced sentience position takes into account the interest animals have in continued life, and the non-ideal position, or also known as the sentience position is an interest-based, capacity orientated rights theory. Furthermore, Alasdair Cochrane in *Animals Rights without Liberation*[60] argues for animal rights on the basis of interests; however, he contends that these rights apply without liberation but provides a possible caveat of high cognitively advanced animals such as cetaceans.[61]

[54] *Infra.*
[55] See generally, David Favre, "Living Property: A New Status for Animals Within the Legal System" (2010) 93. (3) Marq L Rev 1021.
[56] Gary Francione in *Rain Without Thunder: The Ideology of the Animal Rights Movement* (Temple University Press 2010).
[57] An abolitionist approach would free all animals from all exploitation.
[58] See Gary Francione "Animals as Property" (1996) 2 Animal Law.
[59] Robert Garner *Towards a Theory of Justice for Animals*: *Animal Rights in a Nonideal World* (OUP 2013)
[60] *Infra.*
[61] See Alasdair Cochrane, *Animal Rights without Liberation* (Columba University Press 2012).

There are, of course, academics who do not support animal rights such as Carl Cohen who sets out his opposition in *The Animal Right Debate*[62] in which Cohen and Regan make their respective cases. A similar exchange was made between Judge Richard Posner and Peter Singer in their debate in Slate magazine in 2001 both arguing their opposing viewpoints. Furthermore, Richard Cupp has published literature[63] on his argument against nonhuman personhood as has Richard Epstein in "Animals as Objects, or Subjects, of Rights."[64] While they support animal welfare, they are opposed to animal rights on the grounds that animals cannot be rights holders and the impact this would have on human rights and resistance. These arguments have been rebutted by many scholars including Singer, Regan and Wise in their respective literature[65]

1.4.1 Contribution and originality

This thesis highlights that there is a gap in research for an in-depth evaluation of animals and the law. There is a need for a thorough examination of the adequacy of the current system of protection. Furthermore, a key claim of this thesis is that the law needs to be evidence-based – it thus provides this evidence. It argues that the best approach is to bring together a number of disciplines to broaden the factors considered when drafting and designing animal protection laws. It seeks to combine the subjects relevant to animal protection, thereby taking a pluralistic approach, contributing to knowledge in this area. This thesis holds that a complexity of reality is required: an approach that looks at a number of factors – one that focuses on the capacities of animals and what they need rather than a piecemeal approach which is full of inconsistencies. The argument made is that animals can hold rights commensurate with their individual capacities even if they are not entitled to the full suite of rights to which the majority of humans are entitled. To support this claim, evidence from science and philosophical insights are utilised. This thesis provides a critique of the current animal welfare system and prescribes a solution based on the evidence available. It further

[62] Tom Regan and Carl Cohen *The Animal Rights Debate* (Rowman & Littlefield Publishers 2001).
[63] Richard Cupp "Litigating Nonhuman Animal Legal Personhood" (2018) 50 Texas Tech Law Review Legal Studies Research Paper Series Paper Number 2017/10 also see Richard Cupp "Edgy Animal Welfare" (2018) Denv. L. Rev. 95 Pepperdine University Legal Studies Research Paper No. 2018/11.
[64] Richard Epstein "Animals as Objects, or Subjects, of Rights" (2002). U Chicago Law & Economics, Olin Working Paper No. 171.
[65] A full section dealing with critical objections and counter arguments is provided in chapter two see 2.4 CAN WE MOVE TOWARD THE RECOGNITION OF ANIMAL RIGHTS: CRITICAL OBJECTIONS.

sets forth some recommendations for reform. The endeavour of this thesis is not to search for an ideal law, but, rather, to create a starting point.

1.5 CONCLUSION

There is increasing evidence[66] to show that animals are sentient beings with interests of their own; therefore, it is argued that the law needs to be evidence-based in order to appropriately protect animal interests. The goal of welfare-based laws is to incrementally improve the lives of animals without directly challenging either the use or treatment of animals or the property status of animals. One of the most prominent problems in animal welfare laws is the gap between empirical evidence and the actual laws and practices of countries.[67] Science can testify to the significant capabilities of animals, yet our current laws are based on the classification of animals as property – the law generally disregards this evidence. The laws we do have in place are welfare-based and are focused on reducing and minimising pain and suffering, which does consider animal sentience and moral capabilities. Because animal welfare laws are grounded in the property status of animals, the interests of animals will always count for less than human interests. Therefore, the argument is that the scientific evidence that we now have in addition to theoretical insights, should be integrated into our laws.

For animals to qualify as potential rights holders, they must have an interest in their well-being. This requirement is fulfilled and exhibited in existing animal welfare laws which are based on the recognition of animals having interests which are worthy of legal protection. This thesis argues for a number of species-specific rights to be granted to animals to ensure adequate protection. Under the interest-based conception of rights, to have a right is to have an interest that is sufficiently strong to ground duties in others.[68] Currently, the system of

[66] There is a body of evidence to demonstrate animal sentience and the vast cognitive abilities of animals particularly great apes and cetaceans. For example, Jane Goodall, Frans de Wall, Lori Marino, James Anderson have published findings on ape and cetacean cognition which is explored in chapter five see 2.3 ANIMALS .

[67] For instance, scientific evidence tells us captive marine mammals suffer from a huge range of health problems, including extreme stress, neurotic behaviours and abnormal levels of aggression yet this practice is legal in most countries. See Case Against Marine Mammals in Captivity report available at https://www.worldanimalprotection.org/sites/default/files/media/int_files/the_case_against_marine_mammals_in_captivity_5th.pdf accessed 03/1/20.

[68] Joseph Raz *The Morality of Freedom* (OUP 1988) 166 and Christine Korsgaard "Personhood, Animals and the Law" (2013) Think available at https://www.cambridge.org/core/services/aop-cambridge-core/content/view/E9F2FBA3B2F8ECF65A7C6BAD1DCD6D2A/S1477175613000018a.pdf/personhood_animals

protection allows animal interests to be outweighed in almost all circumstances; therefore, animals need legal rights.[69] Animals are considered property – things – and are not treated as beings with interests and moral abilities. There are no scientific findings supporting the notion that humans' unique abilities are absent in our fellow animals. This thesis argues that animals are worthy of improved protection. The evidence we now have regarding the moral capacities of animals should be reflected in our laws.

The next chapter will examine the importance of animal cognition. It will provide an account of the scientific evidence regarding animal abilities and analyses the concept of cognition and moral capacities as a basis for rights. The purpose of the next chapter is to illustrate that the law is not adequately taking account of the evidence that exists on animal capabilities and will further examine the objections to the granting of legal rights to animals.

_and_the_law.pdf accessed 5/04/16 6 also see Alasdair Cochrane & Steve Cooke "Humane Intervention: The International Protection of Animal Rights" (2016) available at https://lra.le.ac.uk/bitstream/2381/37111/2/Humane_InterventionFFD_REDRAFT2.pdf accessed on 7/2/17 7.

[69] Alasdair Cochrane *Animal Rights Without Liberation* (Columbia University Press 2012) 109–110.

CHAPTER 2: ANIMAL CAPABILITIES, THEORY AND LEGAL RIGHTS

"Do the animals have legal rights? The answer to this question, without any hesitation, is in the affirmative."

Chief Justice Minallah, 2020

2. INTRODUCTION

This chapter will examine the importance of knowledge of animal capacities to highlight the need for effective, evidence-based, legal protection. Empirical studies of the lives of animals have prompted scientists and philosophers to debate the question of whether morality and moral cognition exists in non-human animals. Welfare laws thus far have responded to utilitarianism and the recognition of animal sentience. We now have evidence on the moral capacities of animals. However, this scientific evidence regarding animal abilities has not been fully translated into legal protection.[70]

First, the development of animal rights theory will be examined. The next section analyses the concept of cognition and moral capacities as a basis for rights, highlighting its importance and relevance to animal protection. A case study using the evidence on great ape and cetacean cognition will then be discussed in order to inform appropriate legal protection and provide an evidence-based approach. Finally, objections to the granting of legal rights for animals will be addressed.

2.1 THE IMPORTANCE OF ANIMAL ABILITIES AND COGNITION

Knowledge of animal interests is fundamental for adequate animal protection.[71] Our existing laws still lag far behind our current understanding of animal interests by classifying animals as property. Therefore, the relationship between theory, science and law remain to be united. Animal rights advocates argue that because animals have many capacities and characteristics

[70] These species are still regarded as property and denied fundamental rights including the right to life, liberty and bodily integrity.

[71] Helen S Proctor, Gemma Carder and Amelia R Cornish "Searching for Animal Sentience: A Systematic Review of the Scientific Literature" (2013) Animals 882 and Editorial "Animal sentience and animal welfare: what is it to them and what is it to us?' (2013) Applied Animal Behaviour Science 100.

which are deemed important in humans, animals should be entitled to certain rights as well.[72] Animals possess certain capabilities that suggest they should enjoy the legal protection of their interests.

Evidence of animal capabilities is essential in determining how we should protect animals, as legal decisions regarding our treatment of animals should respond to the research findings. Evidence of animal sentience is the reason why animal protection laws exist.[73] Indeed, recognition of animal sentience is the basis for modern EU animal welfare law. Understanding the subjective minds of animals is of utmost importance to ensure they are given adequate protection. However, evidence on animal capabilities is yet to be incorporated into our laws and therefore is not evidence-based and fails to utilise our knowledge on animal cognition. A utilitarian approach is not sufficient to determine all obligations to animals because their interests can be outweighed. While animal welfare laws provide many protections for animals, this system of protection is not sufficient. A deontological approach is also needed, I argue, because there are some degrees of animal suffering that are never justified by the benefit to others.[74] The law needs to move beyond utilitarianism and evolve in line with the evidence now available. Recent and future scientific developments should influence developments in the law. Findings on the abilities of animals lead to discussions on the treatment of animals, which in turn should trigger new legislation in this area. This was and is the case with sentience, in the European Union(EU) at least. Scientific research supports claims that many animals possess moral capacities.[75] Evidence of animal capacities is vital as it tells us the social and biological needs of animals and in turn, should indicate the legal protection needed to protect their interests adequately. Thus, it is useful to investigate what science has to say regarding these capacities.[76] The framework of law needs to respond to this knowledge as current legal protection for animals is primarily based on the idea that they are the property of humans, and they are protected in much the same way and for many of

[72]Tom Regan and Steven Wise, for example. Also see Susan L Goodkin "The Evolution of Animal Rights" (1986-1987) 18 Colum. Hum. Rts. L. Rev. 25926.

[73] Helen S Proctor et al (n71) 883 See also Servière Jacques "Science and animal welfare in France and European Union: Rules, constraints, achievements" (2014) Meat Science 98 484.

[74] Donald Broom "Considering animals' feelings" (2016) Animal Sentience 5.

[75] There is a body of evidence to demonstrate animal sentience and the vast cognitive abilities of animals particularly great apes and cetaceans including studies from zoologists, primatologists and biologists. For example, Jane Goodall, Frans de Wall, Lori Marino, James Anderson have published findings on ape and cetacean cognition this evidence will be set out in the following sections of this chapter.

[76] Robert C Jones (n161) 11.

the same reasons that inanimate property is protected,[77] which disregards their moral capacities. The law should now include moral capacities as a criterion when determining the protections that a species requires.

The next section will trace the evolution in philosophical thought on how animals ought to be treated. There has been a shift in defining animals from things to sentient beings and more recently, arguments supporting animal rights. This section will highlight this evolution in thought by tracing the prominent theorists and schools of thought from defining animals as automata to the rise in utilitarianism to theories based on animal morality. Thus far, the law has only responded to utilitarian arguments.

2.2 ANIMAL RIGHTS THEORY: ANIMAL AS AUTOMATA TO UTILITARIANISM AND DEONTOLOGY

We are beginning to witness a change in attitudes to animals – from the idea that they are tools, machines, commodities, here for human use, to the idea that they are sentient beings who have intrinsic value, dignity, and rights. This section will focus predominantly on modern animal rights theory that has been developed at a time where animal sentience, cognition and morality are acknowledged but will also discuss traditional thinkers to illustrate the evolution in philosophical thought. This section will examine both utilitarianism and deontological theories from prominent writers in the field. The works of philosophers such as Descartes, who is usually held responsible for introducing the idea of animals as "automata"[78] and whose theory has dominated for centuries will be discussed.[79] Relevant tracts from Immanuel Kant's writings will also be analysed. While Kant's theory only applies to humans, his philosophy has been advanced in recent years as an argument for the extension of animal rights. Furthermore, Jeremy Bentham's theory will be examined as his theory illustrated a shift in how animals should be viewed based on their sentience. The modern-day theories of Peter Singer, Tom Regan and Steven Wise will be critiqued. Both Singer and Regan are credited with kick-starting the modern animal rights movement;

[77] Adam Kolber "Standing Upright: The Moral and Legal Standing of Humans and Other Apes"(2001-2002) 54 Stan. L. Rev. 163 174.
[78] Ian Duncan "The changing concept of sentience" (2006) Applied Animal Behaviour Science.
[79] Indeed, Descartes' classification of animal as things still continues today. Animals are legally classified as things and practices such factory farming and animal experimentation continue to treat animals as if they were machines.

therefore, their seminal works must be examined. Singer's theory builds on Bentham's utilitarian approach, and Regan advances Kant's theory providing a deontological approach to animal rights. The work of Wise provides a current autonomy-based legal approach that draws some similarities to Regan's theory and is of importance as this thesis advocates rights on the basis of cognition. Gary Francione's abolitionist theory also will be examined.

It is important to note the development of theory to see the progression in thought. There has been an evolution in philosophical thought from the recognition of animals as things lacking any feeling, to the acknowledgement of animals as sentient beings, to the argument that animals are worthy of rights. The next section will trace this evolvement.

2.2.1 Animal as Automata

The French philosopher Rene Descartes[80] is credited with the opinion that animals are non-sentient automata, thereby equating animals to machines.[81] Descartes' views which were held by many to the detriment of animals have since been proven to be false.[82] However, in many respects, animals are still treated today as though they are machines. Many laws follow this outdated position, which disregards scientific knowledge.[83] His view was that animals were not rational, did not have a sense of self, did not have any true cognitive abilities, emotions, and language and did not experience pain in the same sense that humans do.[84] For Descartes, animals are sophisticated machines that can make the physical motions that would in humans accompany the sensation of pain; but, possessing no minds themselves, animals are incapable of possessing the accompanying sensation.[85] He claimed that animals were nothing more than "machines" created by God. They were mere automata, or things incapable of real pain and suffering. For Descartes, animals were completely material, mechanic entities.[86] A crying dog was no different from a whining gear that needs oil.

[80] *(1596-1650).*
[81] See Rene Descartes *Mediations on the First Philosophy* 1641.
[82] We have evidence that animals are sentient beings.
[83] For example, whaling laws also see Roger S Fouts "Apes, Darwinian Continuity, and the Law" (2004) Animal Law 10 99.
[84] Rene Descartes (n81) also see Thomas G. Kelch, *Globalization and Animal Law: Comparative Law, International Law and Internal Trade* (Kluwer Law International 2011) 40.
[85] Alissa Branham "Overview of Philosophy and Animals" (2005) Animal Legal & Historical Center, Michigan State University College of Law.
[86] *Ibid.*

However, scientific evidence reveals vertebrate animals possess sentience.[87] When Descartes suggested that animals are machines, he created a rationale widely taken for granted by most thinkers in the Western tradition.[88] The Cartesian view, which sees humans as superior to all other beings remains popular despite the scientific evidence which demonstrates that many species are capable of numerous cognitive abilities.

A century later philosopher Immanuel Kant[89] echoed Descartes view that animals are not autonomous or self - conscious, and therefore cannot be considered moral agents. Kant's view that cruelty to animals is justified in cases where the benefits to humans outweigh the harm to humans has dominated our legal system. Kant's theory essentially devises a principle to distinguish between right and wrong and is, therefore, deontological.

Kant notes that human beings are rational beings, and this constitutes their intrinsic dignity.[90] Therefore, we must treat humans as an end in themselves. Human beings are moral agents and therefore are owed direct duties as rational beings or autonomous beings that can choose their own way of life. Animals, for Kant, however, are not autonomous and the right to liberty in Kant's ethical system depends on rationality. What makes animals mere things is due to them not being rational agents.[91]

Therefore, according to Kant, animals were nothing but a means to human ends.[92] He did not think that we had any direct moral duties to animals and believed that the only reason we should avoid being cruel to animals is that in doing so we might develop cruel habits that we would inflict on other people.[93] We only owe moral duties to rational beings, and animals are not included in that group. According to Kant, as animals cannot choose their way of life, they do not have rights grounded in this kind of autonomy.[94]

---

[87] See Helen Proctor et al "Searching for Animal Sentience: A Systematic Review of the Scientific Literature" (2013) Animals (Basel) 3 (3) 882–906..

[88] James L Gould "Animal Cognition" (2004) Current Biology 14 (10) 372.

[89] *(1724-1804).*

[90] Bernadette Rainey *Human Rights Law (*4th edn, OUP 2018).

[91] Allen Wood "Kant on Duties regarding Nonrational Nature" (1998) *Proceedings of the Aristotelian Society* Supplement, LXXII 95 also see Ellen P. Goodman" Animal Ethics and the Law" (2006) Temple Law Review 79 (1291) 1300.

[92] Immanuel Kant, Lecture on Ethics, (translated by L Infield, 1963) 239–40.

[93] See Kant XXVII: 710:1997:434 see also Martha Nussbaum "The Moral status of Animals" available at https://pdfs.semanticscholar.org/39a9/e6a9b2732e13bf19b98a6b0a25952f180530.pdf accessed on 16/2/17 2.

[94] Christine M Korsgaard Personhood, Animals and the Law." (2013) Think 12 (34) 7.

Kantian philosophy is hence a seemingly unlikely philosophical theory upon which to erect an animal rights platform. However, some animal rights advocates attempt to work within his philosophy as there are other aspects of Kantian ethics which they respect, such as the notion that ethical subjects possess inviolable rights; therefore, Kantianism has emerged as an ethical backdrop for the animal rights movement. Animal rights advocates such as Christine Korsgaard and Tom Regan have been attracted to Kant's philosophy for many reasons. For instance, Regan agrees that a certain level of mental life is required for admission to our ethical community, but he argues that Kant's standard is somewhat amiss and too rigorous. Redefining the mental criterion, of what it is to be a rational being, Regan argues that science can play a tremendous role in integrating animals into our ethical community, as science can testify to the significant cognitive abilities of animals and their similarity to our own abilities.[95] Animal rights advocates argue that animals too have these sorts of rights and that they should never be sacrificed under the auspices of the greater good, either as food or as the subjects of medical experimentation. They do not agree with Kant's conclusion but have realised that Kant's theory can be used to argue for rights given that we now know that some animals are rational and therefore have an inherent value which in turn, according to Kant's theory means we have direct duties to them.[96]

2.2.2 The influence of utilitarianism

This section outlines the views of utilitarian's Bentham and Singer. It traces the influence of utilitarianism on the treatment of animals while also critiquing the work of both philosophers.

The influential views of both Descartes and Kant were challenged by the rise of utilitarianism. The philosopher Jeremey Bentham is primarily known today for his moral philosophy, especially his principle of utilitarianism. Utilitarianism is an ethical theory that determines right from wrong by focusing on outcomes. It is a form of consequentialism that promotes

[95] Tom Regan *The Case for Animal Rights* (2nd edn, University of California Press 2004).

[96] Theorists such as Christine Korsgaard have used Kant's approach, but reject his finding that it should be applied exclusively to humans. She holds that if we were in the place of an animal who is sentient, we would not find it acceptable to have our interests disregarded as theirs are. Therefore, all humans and sentient animals should be considered as ends in themselves. Moreover, Kant may have undervalued the role of emotions in morality, but his insight that it is this very capability for morality that might make a being worthy of respect cannot be overlooked. Scientific research provides fascinating conclusions in the animal capability for morality. This argument is explored in 2.3 ANIMALS AND MORAL CAPACITIES

actions that maximise greater good or happiness for the majority.[97] It deems that the morally right action is the action that produces the most good. While traditional thinkers such as Descartes and Kant held that animals should be excluded from moral consideration, Bentham[98] separated rationality and autonomy from the question of who merits justice. He argued that it was the ability to suffer that should be the benchmark of how we treat other beings. If rationality were the criterion, he argued, many humans, including infants and the disabled, would also have to be treated as though they were things. He did not conclude that humans and animals had equal moral significance but argued that the latter's interests should be considered.

In a forward-looking passage, written at a time when black slaves in the British dominions were still being treated as property, Bentham wrote:

> 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 one day come to be recognised that the number of the legs, the villosity of the skin, or the termination of the os sacrum[99], are reasons equally insufficient for abandoning a sensitive being to the same fate. What else is it that should trace the insuperable line? It is the faculty of reason, or perhaps the faculty of discourse? But a full-grown horse or dog is beyond comparison a more rational, as well as a more conversable animal, than an infant of a day, or a week, or even a month, old. But

[97] Julian Franklin *Animal Rights and Moral Philosophy* (Columbia University Press 2005) 2; Mark Rowland "Utilitarianism and Animals: Peter Singer's Case for Animal Liberation" in *Animal Rights* (Palgrave Macmillan,2009) "Peter Singer can, with justification, be regarded as the founding father of the contemporary animal liberation movement" 31; Gonzalo Villanueva "The 'Bible' of the animal movement: Peter Singer and animal liberation 1970-1976" (2016) History Australia 13; John Tuohey and Terence Ma "Fifteen years after "Animal Liberation": has the animal rights movement achieved philosophical legitimacy?" (1992) The Journal of Medical Humanities; Nathan Nobis "Animals and Ethics 101: Thinking Critically About Animal Rights" (2016). Open Philosophy Press.

[98] Jeremy Bentham, Principles of Morals and Legislation (Hafner 1789) See Gary Francione "Animals – Property or Persons?" published in *Animal Rights: Current Debates and New Directions*, edited by Cass R Sunstein and Martha C Nussbaum (OUP 2005).

[99] This is a bone between the lumbar vertebrae and tail vertebrae, composed of five fused vertebrae that form the posterior pelvic wall.

> suppose they were otherwise, what would it avail? the question is not, Can they reason? nor Can they talk but, Can they suffer?[100]

In this passage, Bentham points to the capacity for suffering as the vital characteristic that gives a being the right to equal consideration. For Bentham, humans and animals may be different in many respects, but they are relevantly similar in that they are sentient; they are perceptually aware and able to experience pain and pleasure. He argues that the morally relevant characteristic cannot be reason, free will or language use. He bases this view on the fact that young infants lack such capacities, and yet we do include them in our considerations when formulating moral and political obligations. We rightly include them, Bentham claimed, because they can suffer; it is this capacity that is of moral relevance, and it is this capacity which makes one deserving of justice according to Bentham.

Bentham's utilitarian theory was advanced by philosopher Peter Singer with his work *Animal Liberation* in 1975. Singer, like Bentham, contends that the necessary criterion for inclusion in considerations of morality and justice is sentience.[101] Singer's theory reformulated Bentham's principle of "equal consideration of interests."[102] Singer's utilitarian theory builds on Bentham's and advances his theory, not only arguing that animals should not be treated cruelly but the animals' interest in enjoying happiness, must be considered equally with the interests of humans. His theory on animal liberation has been extremely influential and is credited with initiating the modern animal rights movement.[103] Singer, as a utilitarian, does not believe in inviolable rights for either humans or animals. However, instead of simply acknowledging that animals can suffer, Singer argues that pain should be given equal consideration with like interests in the balancing test. Under his proposal, if an animal can suffer, that suffering must be taken into account along with the like suffering of humans.

Singer does not argue for equal treatment but equal consideration of all beings. In other words, we must consider both the interests of the animal and the human, but this does not mean they receive equal weight. This is a claim that one should give equal weight in one's

[100] Jeremy Bentham (n98).
[101] Peter Singer *Animal Liberation* (HarperCollins 1975) also see Alasdair Cochrane, *An introduction to animal and political theory* (Palgrave Macmiilan 2010) 32.
[102] Margit Livingston "Desecrating the ark: animal abuse and the law's role in prevention" (2001) 87 Iowa L. Rev. 1.
[103] Julian Franklin *Animal rights and moral philosophy* (Columbia University Press 2005) 2.

moral decision-making to the like interests of all those affected by one's actions, for example, Singer maintains in the case of non-therapeutic experimentation the animal's right to not suffer is greater than the human benefit. He advocates for better treatment for animals by balancing their interests against those of humanity.[104] Singer's notion of equal consideration does not preclude the morality of a decision to exploit a human or animal.[105] His theory requires humans to balance their needs against animals' needs in order to prevent unnecessary animal suffering in the pursuit of human goals.[106] He states that similar interests are given similar weight in ethical deliberation, regardless of the species of the interest bearer, and identifies the maximisation of interest satisfaction as the proper goal of morality. Singer argues that the principle of equality on which humans base their relationships should logically extend to animals.[107] He justifies the need to extend the principle of equality to animals by pointing out that humans do not base their principle of equality as it applies to human beings on factual differences like levels of intelligence or ability. For Singer, every interest of every sentient being must be considered on its own merits.

Singer's equal consideration has received criticism. For example, Carl Cohen notes that an area of Singer's argument which is seriously flawed is his contention that the interests of animals and humans must be considered equally. Cohen argues that distinctions based on species are "in most situations, a demarcation of capacities which are ethically meaningful."[108] He contends that Singer's utilitarian starting point leads to judgements about animals that contradict the common-sense moral judgements of most people. This criticism is avoided in the case of cetaceans and great apes given their advanced cognition. Deontological theories provide a basis for the extension of rights on animals' capabilities – a position this thesis proposes. To establish what obligations and policies follow from this principle of equal consideration, Singer applies this to utilitarianism, which is the goal of

[104] Peter Singer (n101) also see Joseph Lubinski, "The cow says moo, the duck says quack, and the dog says vote! the use of the initiative the initiative to promote animal protection" (2003) 74 U. Colo. L. Rev. 1109.
[105] Peter Singer (n101) also see Gary Francione," Animal law animal rights theory and utilitarianism: relative normative guidance" (1997) 3 Animal L. 75 3.
[106] Peter Singer (n101) also see Petra Renée Wicklund, "Abrogating property status in the fight for animal rights" (1997) 107 Yale L.J. 569.
[107] Peter Singer (n101) also see Lars Johnson, "Pushing nepa's boundaries: using nepa to improve the relationship between animal law and environmental law" (2009) 17 N.Y.U. Envtl. L.J. 1367.
[108] Carl Cohen "The case for the use of animals in biomedical research" (The New England Journal of Medicine 1896,) 315 also see Ian Hill "Against the Utilitarian Argument for Animal Liberation: A Criticism of Peter Singer "(2010) 6 15.

promoting utility, or in his terms, "the satisfaction of interests." Singer proposes a welfarist-utilitarian theory that asks people to balance their own needs against the needs of animals, in a manner that avoids unnecessary animal suffering without compromising human interests.[109] Singer allows animals to be exploited, so long as the suffering caused is outweighed by the benefit gained. His theory is representative of some current laws such as the EU and Article 13 of the TFEU, in that it calls for full regard to be given to animal welfare considerations, but animals interests can be, and are, overridden by human desires in many instances such as the exceptions laid out in Article 13 regarding culture, for example. Singer's utilitarian principle of equal consideration of like interests can be translated in law as a "proportionality test."[110] This test considers both the amount of animal suffering and the human need for that suffering and may find the pain inflicted too great to justify the benefit. While this recognition is positive and has led to the advancement of legislation, in reality, animal sentience is not being regarded. Furthermore, our system currently operates on a balancing of interests which has been shown to be detrimental to many animals. Significantly, cognition is not present as a factor to be considered, despite the growing body of evidence now available. Therefore, it is argued that a rights-based approach is needed.

Richard Posner is one of the most prominent scholars to oppose Singer's theory.[111] Posner, while supportive of animal welfare, opposes the granting of legal rights to animals on the basis of human preference.[112] Posner states that Singer's arguments reject the emotional or intuitive assertion that humans are owed greater ethical consideration than that of animals, therefore, he rejects these arguments that we should disallow appeals to emotion and intuition.[113]

Although Singer's work has greatly advanced the general thinking on the extent of human responsibilities regarding animals, other philosophers, such as Regan, found his utilitarian

[109] Steven J. Bartlett "Roots of human resistance to animal rights: psychological and conceptual blocks" (2002) 8 Animal L. 143 also see David Sztybel "The Rights of Animal Persons" Animal Liberation Philosophy and Policy Journal, (2006) 4(1) 6.
[110] The proportionality test is a legal method used by courts to decide difficult cases where legitimate rights collide. In order to decide such cases correctly, the court must balance the rights and the damage to them resulting from a judgment.
[111] See Animal Rights debate between Peter Singer and Richard Posner in Slate magazine (2001) available at https://www.utilitarian.net/singer/interviews-debates/200106--.htm accessed 15/9/14 also see Sheri Flannery "The thirteenth amendment won't help free willy" (2012) 15 Scholar: St. Mary's L. Rev. & Soc. Just. 29.
[112] Richard Posner (n149) also refer to Animal Rights debate between Peter Singer and Richard Posner (n111).
[113] Ian Hill (n108), 7.

orientation limiting and ultimately unsatisfactory. Singer is a utilitarian, so he believes that the morally correct action is that which brings about the best overall consequences for all those affected by the action. Regardless of the criticism of his theory, his work has brought significant attention to the issue of animal rights and is considered an important contribution to the scholarship in this area.[114] Furthermore, using his principle of equal consideration of interests, Singer comes to the idea of an extension of fundamental rights to those animals that, due to their abilities and their way of life, closely resemble humans. Together with Paola Cavalieri, Singer published the Great Ape Project[115] which has been influential in arguing for fundamental legal rights for great apes.[116]

Singer's theory is a step on the road to rights. The approach posited by Bentham and Singer is quite consistent with the philosophical doctrine of animal welfare and has improved the lives of animals; however, humans may justifiably exploit animals as long as human or animal suffering is considered as part of the utilitarian calculus.[117] This utilitarian approach to animals is, therefore, inadequate as it violates animals' inherent rights for the greater good of others.

2.2.3 Deontology and a rights-based approach

This section traces Tom Regan's deontological theory, Gary Francione's abolitionist theory and Steven Wise's cognition-based rights approach. Tom Regan's theory is credited with advancing the animal rights movement with the publication of *A Case for Animal Rights* in 1983, where he developed one of the first animal rights theories in this book. Gary Francione's theory is based on the recognition that the moral value of animals requires that we accord them the right not to be used as property. His theory of animal rights requires the abolition, and not merely the regulation, of animal exploitation. Steven Wise's theory is of importance as it is being applied through the work of the Nonhuman Rights Project which is creating a change in thought among some members of the judiciary regarding the legal classification of animals.

[114] Rebecca J Huss, "Valuing man's and woman's best friend: the moral and legal status of companion animals" (2002) 86 Marq. L. Rev. 47.
[115] Great Ape Project see n5.3.1 The Great Ape Project (GAP).
[116] For a discussion of this project see 5.3.2 America and the Nonhuman Rights Project (NhRP) – The evolution of legal personhood for nonhuman animals in the United States.
[117] Gary Francione "Abortion and Animal Rights: Are they Comparable Issues? (1999) available at https://www.abolitionistapproach.com/wp-content/uploads/2016/12/Abortion-and-Animal-Rights-1995.pdf accessed 15/4/20.

For deontologists such as Regan, some acts are morally obligatory regardless of their consequences for human welfare. In taking this stance, Regan differs from the utilitarian position of Singer. He argues that all instrumental use of animals for such things as food, hunting and vivisection is wrong. Regan's argument is that no human has the right to exploit a creature for any purpose, no matter how apparently virtuous the human's purpose might be. Regan's theory contends that animals have certain inviolable rights. According to Regan, it is morally wrong to regard individuals as nothing more than receptacles for intrinsic value that lack any value of their own.[118] For Regan, animals have certain interests of their own, irrespective of how humans view or use them.[119] He argues that individuals have inherent value and that it is inappropriate to treat individuals solely as a means to an end.[120] He places emphasis on the difficulty of the comparison between pleasure and pain. He notes how there are no standard measures for comparison and no valid basis for suggesting that all humans, not to mention animals, should be counted as one when the aggregate of utility is added up.[121]

Regan's theory of animal rights contends that there is another universal trait in animals, other than sentience. Regan finds this trait in his concept of a "subject-of-a-life". Being a "subject-of-a-life" involves more than being alive and being conscious it is,

> being able to perceive and remember; if they have beliefs, desires, and preferences; if they are able to act intentionally in pursuit of their desires or goals; if they are sentient and have an emotional life; if they have a sense of the future, including a sense of their own future; if they have a psychological identity over time; and if they have an individual experimental welfare that is logically independent of their utility for, and the interests of, others.[122]

Regan refers to cognition as his criterion that will admit animals to the moral community. Essentially a "subject-of-a-life" is a conscious, sentient being with an experiential welfare

[118] Gary Francione, "Animal rights and animal welfare" (1996) 48 Rutgers L. Rev. 397.
[119] Jerrold Tannenbaum, "What is animal law?"(2013) 61 Clev. St. L. Rev. 891.
[120] Tom Regan, *The Case for Animal Rights* (2nd edn, University of California Press, 2004), 264 also see Richard L Cupp, Jr. "Children, chimps, and rights: arguments from 'marginal' cases" (2013) 45 Ariz. St. L.J. 1 referring to Larry Alexander and Michael Moore, *Deontological Ethics* (Stanford Encyclopaedia of Philosophy 2016).
[121] Julian Franklin *Animal Rights and Moral Philosophy* (Columbia University Press 2007) 10.
[122] Tom Regan (n120) 264.

which entitles them to a moral right to life and bodily integrity. Regan's theory applies to all normal mammals aged one year and over that satisfy his "subject-of-a-life" criterion. He also notes that he drew this line in pencil, and much higher than he believes it should be drawn, simply to put the burden of proof on those who would deny that mammals have beliefs and desires. All "subjects-of-a-life" have equal inherent value and an equal right not to be harmed.

He notes that we owe moral agents[123] and moral patients[124] respectful treatment as a matter of justice, not based on achieving the "optimal aggregate balance of intrinsic good over intrinsic evils for all concerned," or out of kindness, but solely based on justice.[125] Regan argues that the respect principle requires that we treat those individuals who have inherent value in ways that respect that value. The respect principle applies to all those who satisfy the "subject-of-a-life" criterion. Regan contends that animal exploitation, such as the use of animals for food, experiments, clothing and entertainment, violates the respect principle by treating all animal interests as tradable if the aggregation of consequences is justified.[126] Importantly, according to Regan, animals that fall short of being "a-subject-of-a-life" are still regarded as having inherent value and must still be treated with respect and given consideration.[127] Regan differs from utilitarianism, arguing that it allows the continuation of morally indefensible exploitation of animals for human gain. He challenges Singer's theory by stating it is not enough to simply ensure animals interests are given equal consideration but that animals possess moral rights. This means some uses of animals must cease completely, irrespective of how this affects overall utility.

Regan's theory is not without criticism. Cohen, for example, is also critical of Regan's theory by noting that he cannot delineate precisely which animals have rights and which do not - where do we draw the line? Regan cannot say with confidence how far we should go in identifying creatures that are "subjects-of-a-life."[128] However, where the line is drawn is dependent on scientific evidence regarding cognition. Cohen further argues that only moral

[123] Moral agents can function as the bearers of moral obligations towards others.
[124] Moral patients can be the objects of the moral obligations of others but need not themselves be capable of moral agency.
[125]Tom Regan (n120) 261.
[126] Tom Regan (n120) also see Gary Francione, "Animal law animal rights theory and utilitarianism: relative normative guidance" (1997) 3 Animal L. 75.
[127] Tom Regan (n120).
[128] Carl Cohen and Tom Regan, *The Animal Rights Debate* (Rowman & Littlefield Publishers 2011) 228.

agents have rights and therefore, animals lack rights given that they are not moral agents.[129] For Regan the notion that only humans are worthy of moral status is mistaken, he defends an inherent value for all individuals that are "subjects-of-a-life." He claims that all those who have inherent value possess it equally. As Regan holds that both moral agents and moral patients have inherent value, he feels it necessary to provide a relevant similarity between the two to avoid a claim of being arbitrary.[130] Regan offers being a "subject-of-a-life" as a relevant similarity. Recognising the intrinsic value of humans and some animals requires recognising that they cannot be used as a means to an end, regardless of whether the best overall consequences will be secured by such treatment.

Furthermore, Cochrane notes that Regan's rights-based position is restrictive when compared to Singer. Singer's theory does allow human uses of animals once both parts of his theory are applied;[131] however, Regan's theory condemns every form of exploitation where animals are used as a means to an end.[132] Regan maintains that we have no moral justification for treating adult nonhuman mammals exclusively as means to the ends of humans, so he does not rely on the lesser moral value of animals to justify animal use as did Bentham and Singer. Regan wants to give certain animals a degree of protection very much akin to our own. He seeks to abolish all human use of animals as resources, regardless of how comfortable we might be able to make them. His theory is uncompromising; he unambiguously and without equivocation, condemns the use of animals for food, hunting, trapping, toxicity testing, education, and research. According to Regan, the rights view requires the abolition of all these activities.[133]

Regan argues that what is important for moral consideration are not the differences between humans and nonhumans but the similarities. He holds that because persons share with certain non-persons the ability to be classified as a "subject-of-a-life" and to have an individual welfare that matters to them regardless of the impact on humans. Therefore, while

[129] Carl Cohen and Tom Regan (n128) also see Nathan Nobis "Tom Regan on 'kind' Arguments Against Animal Rights and For Human Rights" 2014 Animal Studies Repository available at https://animalstudiesrepository.org/acwp_sata/17/ accessed 12/8/15.
[130] Tom Regan (n120) 241.
[131] Singer (n101).
[132] Alasdair Cochrane "Animal Rights without Liberation" (Columbia University Press 2012) 6.
[133] Tom Regan (n120).

Regan and Singer arrive at different outcomes, both hold a similar view regarding animal and human similarity.

Gary Francione agrees with Regan that welfarist reforms fail to challenge the underlying cause of animal suffering and may legitimise animal exploitation. However, for abolitionists,[134] such as Francione, to truly recognise animal rights, we must abolish their status as property and not merely regulate their use.[135] He argues that classifying animals as property or things under the law, allows us to treat them as if they are not living or sentient. Francione contends that the classification scheme of persons and things means that animals are property, and there is a limit on the extent to which the law can protect animals. Animals' property status is the foundation of animal law; animals are property, defined by their specific usefulness to humans. They are labelled and governed by how they benefit their human owners. Francione argues that real progress for animals requires them to become moral persons. He holds that they become moral persons if we extend the right not to be property to animals.[136] He explains that his conceptualisation of animal personhood is limited and practical:

> To say a being is a person is merely to say that the being has morally significant interests, that the principle of equal consideration applies to that being, that the being is not a thing.[137]

While animal welfarism amounts to the creation of "quasi-persons" or "things plus," he maintains that there really is not this third choice. A being is either a person or a thing, and since animals have morally significant interests, they should be regarded as persons in terms of the persons-things divide. The property status of animals is a structural impediment to taking their interests seriously and, therefore, animal advocacy must be directed full-time on challenging this barrier.[138] He argues that:

> The property status of animals renders completely meaningless any balancing that is supposedly required under the humane treatment principle or animal welfare laws because what we really balance are the interests of property owners against the

[134] An abolitionist approach would free all animals from all exploitation.
[135] Gary Francione (n136).
[136] Gary Francione "Animals as Property" (1996) 2 Animal Law.
[137] Gary Francione (n136).
[138] Gary Francione (n136).

> interests of their animal property… Such a balance will rarely, if ever, tip in the animal's favour.[139]

He contends that there is no morally sound reason to continue to treat animals as property and that we should abolish, not merely regulate animal exploitation.

The founder of the Nonhuman Rights Project, Steven Wise, offers a solution to animal suffering by working with existing common law structures. Wise's theory involves granting animals legal personhood based on animal autonomy.[140] His theory requires autonomy possessed by "any being who can want, act intentionally and has a sense of self. [141] In his book *Drawing the Line,* he sets out the concept of "practical autonomy." That is that an animal that is practically autonomous must first be cognitively complicated enough that it desires; must be able to act intentionally in achieving those desires and must have a sense of self that is complicated enough to recognise when those goals and desires are achieved.[142] Wise essentially argues that animals with high levels of autonomy such as chimpanzees meet the requirements of personhood and thereby are worthy of legal rights. His theory concerns the moral and legal status of animals by relying on scientific knowledge about the physiological and cognitive capacities of animals. These philosophical underpinnings are significant since the law, albeit at a later stage, tends to take account of the foremost lines of reasoning. His theory is important as it tackles one of the main obstacles to progress in animal rights which is the legal relegation of animals to property status. Wise's view is similar to that of Regan's "subject-of-a-life," that autonomous individuals have preferences which should be acknowledged and protected. However, Wise is a lawyer, and his theory has translated into a litigation strategy with the legal system. Wise takes Regan's approach to moral rights, arguing that scientific evidence supports the conclusion that they are "subjects-of-a-life" and he applies Francione's approach to legal reform, arguing that nonhuman animals should no longer be considered property.

---

[139] Gary Francione (n136).
[140] Autonomy is defined as the right or condition of self-government see Oxford Dictionary available at https://www.lexico.com/en/definition/autonomy.
[141] Steven Wise *Unlocking the Cage: Science and the Case for Animal Rights* (Perseus Press 2002) 231 also see Robert C. Jones "Science, sentience, and animal welfare" (2012) Springer Science+Business Media Dordrecht 1-2.
[142] Steven Wise *Drawing the Line : Science and the Case for Animal Rights* (Merloyd Lawrence 2003).

Importantly Wise's theory is a practical solution to the problems inherent in our current system of protection. He seeks to incorporate animal rights into the existing common law framework by focusing on attributes that have traditionally been important in the common law as a basis for legal rights. His theory gives rise to a rhetoric and compelling social message, based on a plethora of evidence [143] His aim is to convince people capable of legal and political action that certain animals should be counted as persons under the law. To that end, he offers the reader an account of how the common law adapts to accommodate the rights of previously excluded parties. He details the treatment of chimpanzees and bonobos for the sake of science, entertainment and profit, which is legal under a system that treats all nonhuman as mere things. He uses the *Somerset* case[144] as a basis for his action. In *Somerset*, Lord Mansfield for the first time recognised that a human slave was considered to be a person. The slave was allowed to petition for and be granted the writ for habeas corpus even though there was no precedent that could be relied upon. History has shown that extensions of rights can bring about significant legal change: the abolition of slavery, for example, was a legal as well as a cultural process. While this extension related to the human species, this does not affect the capacity of rights as a concept to be a driver of change.[145]

Wise's thesis moves on to draw heavily on research into animal cognition which is used as the justification for extending legal rights to chimpanzees and bonobos. Key to Wise's argument is the extent to which these animals are understood to be autonomous beings. He argues that nonhuman animals are entitled to legal personhood status based on autonomy. Therefore, based on a measurement of autonomy, animals achieve legal personhood status and can more adequately protect their fundamental legal interests. The theory he advances is consequently narrower than Regan's. Wise wants to defend the rights of some animals on the same basis on which various rights of humans have been defended in our legal tradition.[146]

Not everyone agrees with Wise's thesis and among his critics are Richard Epstein and Richard Posner. Epstein raises many issues with Wise's position, namely the use of the term

[143] Steven Wise (n141) also see Martha Nussbaum **"**Book Review: Animal Rights: The Need for A Theoretical Basis Rattling the Cage: Toward Legal Rights for Animals" (2001) Harvard Law Review 1513.
[144] Somerset v Stewart (1772) 98 ER 499.
[145] Visa Kurki *A Theory of Legal Personhood* (OUP 2019) Introduction 3.
[146] Martha Nussbaum "Animal rights: The need for a theoretical basis" (2001) Harvard Law Review 114 (5) 1533.

"nonhuman," and his analogy between the rights of animals and slaves.[147] The moot point in Wise's analogy is to illustrate that history has shown a widening or an extension of legal rights which can create significant change. He uses slavery to highlight that sentient beings have been treated as property.[148] He further raises an issue with how legal rights for animals would work. According to Epstein, since animals are incapable of owning property, making and enforcing contracts, they cannot share rights with humans.[149] Furthermore, Posner is not in favour of Wise's analogy with slavery. He is of the belief that such analogy depreciates human rights and insists that analogies to racism are inapt because membership in the human species is not morally irrelevant. Posner notes that judges are reluctant to change the law unless they have a good reason, and, in his view, Wise does not produce any reason that would encourage judges to do so in the case of animals.[150] Wise has noted that part of his legal strategy is to study the character and values of the judges through the documents of their rulings. The court system is not isolated from the world outside the courtroom. A change in public attitude, science and culture can be influential. While present judges have been raised in a culture that pervasively views all nonhuman animals as things,[151] and may be unable to isolate their biases, new generations who are maturing in the new culture that is questioning the legal thinghood of all nonhuman animals, may take a different view.[152]

Wise argues that we must make a transition in law from thinking of animals as mere things and property to seeing them as persons.[153] For Wise, the status of legal personhood for an ape or whale is more akin to the status of children, or persons with mental disabilities, as legal persons. Under this concept, a plaintiff can protect the interests of the animal and even sue in the animal's name, much like legal guardians protect the interests of children or the mentally ill by bringing suits on their behalf. He offers a theory that provides a framework in

[147] Richard Epstein " Animals as Objects, or Subjects, of Rights" (2002) (John M. Olin Program in Law and Economics Working Paper No. 171.
[148] Glen Wright "Animal Law and Earth Jurisprudence: A Comparative Analysis of the Status of Animals in two Emerging Critical Legal Theories" ' (2013) 9 Australian Animal Protection Law Journal 14.
[149] Richard Epstein (n147) also see Davison- Vecchione and Pambos "Steven Wise and the Common Law Case for Animal Rights" 296.
[150] Richard Posner "Animal Rights" (2000) 110 Yale L.J. 527.
[151] *Ibid.*
[152] Shawn Thompson "Supporting Ape Rights : Finding the Right Fit between Science and the Law" (2019) ASEBL Journal 21–22.
[153] Steven Wise, "Rattling the Cage Defended" (2002) Boston Environmental Law Review 43 (3) 640 Indeed, the NhRP have included elephants in their list of clients see https://www.nonhumanrights.org/clients-beulah-karen-minnie/ and https://www.nonhumanrights.org/client-happy/.

which to challenge the property status of animals. A difficulty with Wise's theory is the fact that he is asking judges to pursue a new legal path when they are unsure where this path may lead.[154] However, as Wise has noted, previous cases have been founded without any precedent in place.[155] Wise's theory is offering a solution to animal suffering based on the rational extension of existing common law rights, which is legally feasible.[156] While Wise's theory has been the subject of some criticism, he has turned theory into practice. It has materialised into several lawsuits under the Nonhuman Rights Project[157] and is creating discussion and reflection amongst judges which have been set out in chapter three thereby, demonstrating that it is gaining traction.

The next section sets forth the concept of moral capacities as a basis for rights. A case study using the evidence on great ape and cetacean capacities will then be discussed in order to inform appropriate legal protection and provide an evidence-based approach.

2.3 ANIMALS AND MORAL CAPACITIES

A common theme in philosophical and scientific writing about animals is whether or not they have moral capacity. This is of great importance as the possession of morality is fundamental for recognising rights. While Kant holds that rationality is required, Bentham, Singer and Regan separate morality from reason and highlight the important capacities of animals which warrant them legal rights, including sentience. Recent studies have made significant advances in our understanding of the cognitive skills, social lives, emotional capacities, and sentience of nonhuman animals. Different species may have more sophisticated moral capacities than others, however, at a general level, the capacity to possess morality is something that humans share with many other animals, and this capacity to possess morality is fundamental for recognising rights to animals. In order to draft appropriate legal protection, knowledge of

[154] Davison- Vecchine and Pambos (n147).
[155] Wise uses the *Somerset* case to illustrate this point.
[156] Davison-Vecchine and Pambos (n147).
[157]The Nonhuman Rights Project (NhRP) was founded in 2007 by attorney Steven M Wise. The group's goal is to change the current law that separates humans from nonhumans. More precisely, they try to achieve legal personhood for (initially) some of the most cognitively advanced animals, e.g. chimpanzees, elephants, dolphins, and whales. While it must be acknowledged that Wise has not won a habeas claim on behalf of a chimp, he has gained significant ground with the courts. When he began his work, no court had ever allowed a non-injured human to sue on behalf of an injured animal.

animal interests and capabilities is vital. Recent discoveries of the abilities in some species are bringing about changes in our attitudes toward animals.[158] Morality has relevance because attitudes to animals are affected by people's evaluations of the animals' abilities. If they are considered to be unaware, they are more likely to be treated as objects than as individuals[159] bearing a resemblance to the false Cartesian view that animals are merely unfeeling machines.

Morality has long been understood as a feature that distinguishes humanity from the rest of the animal kingdom[160] however, there is now evidence of moral capacities in animals. It is often argued that only humans are the proper subjects of moral concern, occupying a separate and superior moral sphere from that of animals. Implicit in this view, are two distinct claims. First is the claim that humans are unique in their possession of some capacity or capacities; second is the claim that the possession of such capacities is what makes humans morally superior to those who lack such capacities. The first claim is largely empirical, the second, normative. Further, these two claims represent two fronts on which philosophers and animal rights advocates have begun to dismantle the foundations of human exceptionalism.[161] The strategy for those philosophers and lawyers seeking to expand the moral status of animals has been to question the existence of a clear distinction between humans and animals regarding the possession of certain morally relevant capacities. Since the first claim that humans are unique in their possession of some set of morally relevant capacities, is primarily an empirical one, it is quite useful, and in some cases, indispensable, to see what science has to say about just which animals possess which capacities. An ever-expanding body of scientific knowledge about animal abilities and behaviour is helping us to reconsider the age-old boundary between humans and other creatures. The law often ignores the evolving scientific understanding of animals; however, these findings have important

[158] Lesley J Rogers and Gisela Kaplan "Think or Be Damned: The Problematic Case of Higher Cognition in Animals and Legislation for Animal Welfare (2005–2006) 12 Animal L. 151 For example, scientific discovery has led to the EU Seal Products Ban which is based on scientific knowledge regarding animal suffering see Regulation (EC) No 1007/2009 and Regulation (EU) No 737/2010 also projects such as GAP and the NhRP.
[159] Donald Broom "Cognitive ability and awareness in domestic animals and decisions about obligations to animals" Applied Animal Behaviour Science 126 (2010) 7.
[160] Susana Monso "Animal morality: what it means and why it matters" (2018) The Journal of Ethics 22 285.
[161] Robert C Jones "Science, sentience, and animal welfare" (2013) Science and Engineering Ethics 20 (2) 2.

implications for the ethics of how we treat animals and should assist us in questioning our ethical consistency.[162]

The next section will examine the nature and importance of animal morality.

2.3.1 The nature, evolution, and existence of animal morality

Empirical studies of the lives of some animals have prompted scientists and philosophers to debate the question of whether moral capacity exists in nonhuman animals. Primatologist Frans De Waal contends that morality is an evolutionary product.[163] He argues that human morality centres on social emotions, with empathy at its core. He holds that humans simply exhibit a scaled-up form of morality that is in essence no different from that of other animals. De Wall argues that adherence to a set of norms and values is crucial to social cohesion and which he believes exists in other social primates.[164] Evolutionary biologist Marc Beckoff also holds that morality is a broadly adaptive strategy for social living that has evolved in many animal societies other than our own.[165] More recently philosopher and political theorist Philip Pettit developed his naturalistic theory about the origin of morality. For Pettit, morality comes in the wake of social life and not personal individual rationality. Pettit's theory is in contrast to evolutionary theories which he claims are speculative, therefore, he uses a counterfactual story rather than historical account.[166] He holds that a counterfactual story, in contrast to evolutionary theories, provides an account about nature and the role of ethics. His counterfactual story details how people might have evolved - both value concepts and responsibility concepts and the corresponding practices. In the society he imagines, people have a language, but this is only used to provide information. As the story develops, he argues that people will have an interest in developing their credibility and hence develop an ability to communicate desires. He contends that when we get to the point of avowing desires, the notion of the valuable appears. His theory moves on to discuss responsibility concepts which he associates with pledges or promises on which your reputation matters and in order to develop a mutually reliant society. Therefore, he contends that ethics emerges on a social

[162] Comment made by Lori Marino, neuroscientist and biologist.
[163] Frans De Waal *The bonobo and the atheist: In search of humanism among the primates* (W. W. Norton & Company 2014).
[164] *Ibid.*
[165] Marc Beckoff (n172).
[166] Philip Pettit *The birth of ethics: Reconstructing the role and nature of ethics* (OUP 2018).

basis among creatures who in order to achieve credibility with one another have the idea of avowing their desires, giving them entry to the space of the idea of the valuable versus the attractive. These creatures who come to recognise they can influence one another and this opens up the space of responsibility.[167]

2.3.2. What constitutes morality?

There is disagreement between researchers as to what morality is and whether or not animals have morality. These different positions on animal morality generally appear to be motivated due to different conceptions of how the term ‘‘morality’’ is to be defined.[168] While some researchers argue that animals have complex emotions, others contend that they do not necessarily have true morality.[169] Furthermore, some researchers have argued that nothing remotely resembling morality can be found in any non-human species. Philosopher Christine Korsgaard, for example, holds that morality is a manifestation of what she calls “normative self-government.”[170] Korsgaard regards a capacity for “normative self-government” to be the essence of morality - that is the capacity to be motivated to do something by the thought that you ought to do it.[171] However, Marc Bekoff defines morality as “a suite of interrelated other-regarding behaviors that cultivate and regulate complex interactions within social groups.”[172] Primatologist Frans De Waal defines morality as “a compass for life’s choices that takes the interests of the entire community into account.”[173] De Waal’s claims that ‘‘building blocks’’ of morality are present in other species including sympathy and empathy towards others, altruism, and what he calls a “sense of fairness” tied to social norms.[174] Philosopher Mark Rowland holds that one can act morally if one is moved by certain emotional states, such as compassion or indignation at another’s actions, which may incline one to behave punitively

[167] *Ibid.*
[168] Simon Fitzpatrick “Animal morality: what is the debate about?” (2017) Biol Philos 32 1151.
[169] For example, some researchers argue that animals do not have full moral capacity and have developed terms such as “proto morality” indicating that they have ethically relevant capacities, but this does not amount to full morality. The term “proto-*morality*” is read: “they may have some of the seeds of moral behavior, but obviously not morality per se”). Frans de Waal argues that nonhuman primates are the most likely animals to show precursors of human morality. However, biologist Marc Bekoff argues that research needs to focus on animal morality.
[170] Christine Korsgaard “Reflections on the evolution of morality. Amherst Lecture in Philosophy” (2010) The Department of Philosophy at Amherst College available at http://www.amherstlecture.org/ korsgaard2010 6.
[171] *Ibid* 1
[172] Marc Bekoff and Jessica Pierce *Wild Justice: The Moral Lives of Animals* (University of Chicago Press 2010) 7.
[173] Frans De Wall (n163)
[174] Simon Fitzpatrick (n168) 1158.

towards them.[175] In turning to dictionary definitions, Cambridge dictionary defines morality as "a set of personal or social standards for good or bad behaviour and character or the quality of being right, honest, or acceptable."[176] Collins dictionary states that "morality is the belief that some behaviour is right and acceptable and that other behaviour is wrong"[177] and Merriam-Webster defines morality as "a doctrine or system of moral conduct"[178]

The disagreement about what should be considered as morality is predominately focused on which grouping of capacities warrants a particular label.[179] However, while there is some disagreement and difference in terminology, what is important is the capacities, what animals have them and how we should protect them. Bekoff highlights animal capacities including empathy, forgiveness, trust, and reciprocity.[180] He argues that these behaviors form the core of what we call morality. De Wall contends that the pillars of morality involve a sense of fairness, empathy and a sense of compassion.[181] Rowlands argues that while animals may lack the sorts of concepts and metacognitive capacities necessary to be held morally responsible for their behaviour, this only excludes them from the possibility of counting as moral agents.[182] However, Rowland argues that some animals do possess certain moral motivations, namely, moral emotions such as sympathy and compassion, kindness and fairness, and also their negative counterparts such as anger.[183] He contends that if animals do behave on the basis of moral emotions, even if their lack of sophisticated cognitive capacities that prevents humans from holding them morally responsible, they should be considered moral subjects.[184]

Importantly, moral capacity can be disassociated from reason alone and associated with other elements, for example empathy or social interaction. De Waal and Bekoff contend that reason

[175] Simon Fitzpatrick (n168) 1161.
[176] Cambridge dictionary available at https://dictionary.cambridge.org/dictionary/english/morality accessed 8/7/21.
[177] Collins dictionary available at https://www.collinsdictionary.com/dictionary/english/morality accessed 8/7/21.
[178] Merriam-Webster dictionary available at https://www.merriam-webster.com/dictionary/morality accessed 8/7/21 .
[179] Simon Fitzpatrick (n168) 1177.
[180] Marc Bekoff (n172).
[181] Frans De Wall *Primates and Philosophers: How morality evolved* (Princeton University Press 2016)
[182] Mark Rowlands (n184).
[183] Susana Monso "Animal morality: what it means and why it matters" (2018) The Journal of Ethics 22 283-284.
[184] Mark Rowlands *Can Animals be moral?* (OUP 2014).

is not a foundational part of morality per se, however, they acknowledge that complex reasoning is a characteristic feature of human moral behavior. While rational consideration of rules and duties can enhance and extend moral behavior, rationality is not necessary for morality. Higher intelligence offers special capacities for the enhancement of morality.[185] According to Rowland, emotions are at the heart of morality. Evidence suggests that animals can act on those sorts of emotions. Morality, therefore, involves or depends upon social norms and the relevant social norms are derived solely from capacities not unique to humans. This leaves open the space for moral agency in other beings.[186] It is argued that questioning which grouping of emotions constitute morality or the use of other terms such as "proto-morality", is not a substantive one; it is merely terminological.[187] Rowlands argues that these distinctions are pointless and unnecessary. He contends that we should adopt the precautionary principle in this case.

2.3.3.The importance of morality

Recent studies have made significant advances in our understanding of the cognitive skills, social lives, emotional capacity, and sentience of nonhuman animals. There is evidence of moral capacities in animals, such as empathy and altruism which underpin moral behavior. Research suggests that some animals are indeed capable of behaving morally, that is, they are capable of behaving on the basis of moral motivations. Science has consistently informed animal law reform. Therefore, it is argued that at least a core subset of the psychological capacities that underlie human morality are far from uniquely human but are rather capacities which we share with many social animals. The ethical and legal consequences that follow from this are key. It thus follows that if animals have moral capacity, then their interests should be legally protected. These capacities are significant in determining how the law should address human conduct towards animals and when making decisions that affect them. This evidence calls us to re-examine and re-imagine our relationship with other animals. Therefore, the

[185] *Ibid* 348 see also Adam M Willows and Marcus Baines – Rock "Two perspectives on animal morality" (2018) Zygon 53(4) 955.
[186] Adam (n185).
[187] Simon Fitzpatrick (n168) 1179.

interests and capacities of animals should be considered when creating and enforcing laws, so as to ensure that animal morality is protected.

Given the evidence-based approach this thesis takes, the next section will focus on animal cognition and abilities. This section will focus on the cognitive abilities in association with capacities that animals have which are morally relevant, to demonstrate that these species have interests that warrant legal rights in order to protect these interests. These traits are currently not reflected in our laws. It is argued that the capability for morality should act as the foundation to include a species in a normative system. Many social animals possess a variety of psychological capacities including sympathy and empathy, altruistic motivation, and a sense of fairness tied to various social norms that exist within their communities, which ought to make them worthy of being regarded as having moral capacity.

In order to highlight the moral capacities of animals, a case study which focuses on great apes and cetaceans will be provided. While there are many species with varying levels of cognition and moral capacities, the scope of this section has been limited to great apes and cetaceans due to the plethora of evidence that has been gathered from leading primatologists and biologists. This section will demonstrate the moral capacities of animals, focusing predominately on cetaceans mainly dolphins, and great apes, mainly chimpanzees, to highlight the need for the granting of legal rights. However, it is acknowledged that there are other animals who share these interests and capacities.[188] The level of evidence was the determining factor that led to the decision to focus on these species. The rationale for

[188] For example, studies have been conducted on birds, elephants and dogs. Studies have shown that some species of birds can: manufacture and use tools, follow the direction of eye gaze which shows they may be aware of the thoughts of another, express numerosity; form abstract concepts and communicate using referential signals. Elephants have been found to be self-aware see Joshua Plotnik, Franc de Waal and Diana Reiss, "Self-recognition in an Asian elephant" (2006) Proc Natl Acad Sci U S A 103 (5) and Diana Reiss and Lori Marino "Mirror self-recognition in the bottlenose dolphin: A case of cognitive convergence"(2001) Proc Natl Acad Sci U S A 98 (10) for evidence of mirror self-recognition in elephants and cetaceans. Furthermore, corvids demonstrate similar reasoning abilities as great apes, with regard to how tools work, how social agents can be manipulated, and how events are remembered see Seed et al "Intelligence in Corvids and Apes: A Case of Convergent Evolution?" Ethology (2009) 115. They have consistently demonstrated cognitive skills that surpass those described in other birds, and in many cases, they rival similar cognitive domains previously thought confined to monkeys and apes see Nathan Emery "The Mentality of Crows: Convergent Evolution of Intelligence in Corvids and Apes" (2004) Science 306. Corvids and parrots share with the great apes, many of the biological, ecological, behavioural, and psychological attributes thought fundamental to complex cognition. See Marc Beckoff, Colin Allen and Gordon Burghardt *The Cognitive Animal: Empirical and Theoretical Perspectives on Animal Cognition* (MIT Press 2002) for a detailed analysis of cognitive studies on a wide variety of species.

selecting these species is not anthropocentric but due to the overwhelming evidence showing that both species possess the necessary capacities and fundamental interests for morality. From a legal perspective, the law can only respond to the current knowledge of animal cognition. The evidence to demonstrate that both great apes and cetaceans are moral beings is compelling. The purpose of this section is to provide evidence to demonstrate animal morality. Once this evidence is presented, the legal rights that can be derived from this evidence will be discussed.

2.3.4 Case study: The moral capacities of great apes and cetaceans

In recent years there has been an increasing knowledge about the abilities of great apes and cetaceans.[189] Studies over the last two decades[190] by researchers, zoologists, primatologists and biologists such as Jane Goodall, Frans de Wall, Sue Savage-Rumbaugh and James Anderson among others, have demonstrated moral abilities in both wild and captive great apes.[191] Primatologists have shown that great apes exhibit signs of altruism and grieving and understand that other creatures have desires and intentions. Chimpanzees understand cause and effect; can imitate, teach, and deceive and have even demonstrated empathy. This evidence illustrates the vast abilities of these species and demonstrates their morality. It is argued that because great apes have moral capacities, they need fundamental legal rights to

[189] This new knowledge has been the subject of many media articles for examples see "How smart are plant apes? 7 intelligence milestones" available at https://www.nationalgeographic.com/news/2011/8/110805-rise-planet-apes-movie-science-chimps-gorillas-tools/ accessed 1/5/15; "Who ape whom?" available at https://www.nytimes.com/2015/09/15/opinion/who-apes-whom.html accessed 15/8/16; "Chimp who threw stones at zoo visitors showed human trait, says scientist" available at https://www.theguardian.com/science/2009/mar/09/chimp-zoo-stones-science accessed 14/5/16; "Should chimpanzees be considered 'persons'?" available at https://www.nytimes.com/2018/04/07/opinion/sunday/chimps-legal-personhood.html accessed 7/4/18; "Humans are more than clever apes? Don't make me laugh" available at https://www.theguardian.com/science/2014/feb/01/humans-clever-apes-laugh-alice-roberts-evolution accessed 1/8/16 and "The world's smartest chimp has died" available at https://www.nytimes.com/2019/08/09/opinion/chimpanzee-sarah.html accessed 9/8/19.

[190] University of Portsmouth "Apes' abilities misunderstood by decades of poor science – Hundreds of scientific studies over 2 decades have told us that apes are clever – just not as clever as us" (2017) ScienceDaily available at https://www.sciencedaily.com/releases/2017/08/170831091457.htm accessed 12/10/17 and see David A. Leavens, Kim A. Bard, William D. Hopkins**.** The mismeasure of ape social cognition (2017) *Animal Cognition.*

[191] It has been noted that research on primates currently provides the most robust account of moral behavior in animals see Marc Bekoff and Jessica Pierce *Wild Justice: The Moral Lives of Animals* (University of Chicago Press 2010).

adequately protect their interests. Experts such as Louis Herman[192] and Lori Marino,[193] among others, have provided evidence demonstrating that cetaceans have moral capacities and capabilities including altruism, cooperation, and culture.[194]

The following are important moral abilities that researchers have shown great apes and cetaceans are capable of:

-Emotions, altruism, cooperation, and fairness

Chimpanzees are emotional beings and express emotions including empathy, happiness, anger, and fear.[195] Scientists have shown that chimpanzees demonstrate empathetic tendencies – the ability to share and understand the emotions of others.[196] Researchers have confirmed that apes yawn in response to stranger apes' yawns which is a sign of empathy.[197] Evidence also demonstrates that chimpanzees behave selflessly to one another. Studies have shown that chimpanzees show clear signs of true selflessness, helping both human handlers and other unrelated chimps with no desire for reward.[198] It has been demonstrated that chimpanzees, if given the choice, would rather share food rewards with another chimpanzee than keep it all for themselves - as long as they knows that the other chimp actually receives the reward.[199] Researchers have shown that bonobos share food with

[192] Louis Herman was an American marine biologist. He was a researcher of dolphin sensory abilities, dolphin cognition, and humpback whales. He was professor in the Department of Psychology and a cooperating faculty member of the Department of Oceanography at the University of Hawaii at Manoa Hawaii.
[193] Lori Marino is the founder and executive director of the Kimmela Center for Animal Advocacy and founder and President of the Whale Sanctuary Project. She was a senior lecturer at Emory University. She is internationally known for her work on the evolution of the brain and intelligence in dolphins and whales and comparisons to primates.
[194] These capabilities will be discussed in the following section.
[195]Kristin Andrews et al *Chimpanzee Rights: The Philosophers' Brief*(Routledge, 2019) 85.
[196] Christine Webb et al "Long-term consistency in chimpanzee consolation behaviour reflects empathic personalities" Nature Communications (2017) 292.
[197] Elaina Zachos (n200).
[198] Ed Yong "Altruistic chimpanzees clearly help each other out" National Geographic (2019) available at https://www.nationalgeographic.com/science/article/altruistic-chimpanzees-clearly-help-each-other-out accessed 23/7/21
[199] Jill Suttie "Finding morality in animals" (2013) available at https://greatergood.berkeley.edu/article/item/morality_animals accessed 23/7/2. For example, in one experiment, hungry rhesus monkeys refused to electrically shock their fellow monkeys, even when it meant getting food for themselves see https://www.newscientist.com/article/2078560-bonobos-know-when-others-are-being-treated-unfairly-and-react/#ixzz72sOvGbpJ

strangers.[200] Furthermore, primatologists have highlighted that chimpanzees will give up a treat in order to help out unrelated chimpanzees.[201] Further studies highlight that chimpanzees will put themselves at risk to protect their group by policing their territory even when there are no close relatives in the group.[202] This evidence demonstrates that chimpanzees help and assist unrelated strangers without expectation of reward.[203] De Waal also has provided accounts of individual primates who have demonstrated a capacity for kindness, generosity, and gratitude.[204] Furthermore, comparative and developmental psychologist, Zanna Clay has shown that fairness is likely to be present in bonobos.[205] Her research highlights that when one bonobo attacks another, there is sometimes an obvious reason, such as fighting over food. On other occasions it appears unprovoked, and in those cases the scream is longer, more high-pitched, and harsher sounding. Clay notes that this suggests they are aware of what should and should not happen to them.[206]

Evidence has shown that whales deliberately interfere with attacking killer whales to help others in distress. Furthermore, this behaviour is not limited to just their own babies or close relatives. They intervene on behalf of other species. Research has demonstrated that whales act to improve the welfare of other species which is the classic definition of altruism.[207]

---

[200] Elaina Zachos "Bonobo apes express empathy and willingly to help others" National Geographic (2017) available at https://www.nationalgeographic.com/animals/article/bonobo-help-stranger-behavior-animals-speed accessed 23/7/21.

[201] Michael Price "True altruism seen in chimpanzees, giving clues to the evolution of human cooperation" (2017) available at https://www.sciencemag.org/news/2017/06/true-altruism-seen-chimpanzees-giving-clues-evolution-human-cooperation accessed 15/8/21.

[202] *Ibid*

[203] See Felix Warneken, Brian Hare, Alicia Melis, Daniel Hanus & Michael Tomasello "Spontaneous altruism by chimpanzees and young children" (2007) PLOS Biology 5.

[204] In a headline news across the world ,it was reported that a female gorilla named Binti Jua, rescued an unconscious 3-year-old (human) boy who had fallen into her enclosure at the Brookline Zoo in Illinois, protecting the child from other gorillas and even calling for human help. Also see Dale Peterson *The Moral Lives of Animals* (Bloomsberry Press,2013) where it is noted that a chimpanzee in a zoo loses his own life trying to save an unrelated infant who has fallen into a watery moat.

[205] Clay's team analysed over 800 hours of videos of two groups of bonobos at the Lola Ya Bonobo sanctuary in the Democratic Republic of the Congo see Zanna Clay et al "Bonobos (*Pan paniscus*) vocally protest against violations of social expectations" (2016) *Journal of Comparative Psychology, 130*(1). Also see Sarah Brosnan "Justice and fairness-related behaviors in nonhuman primates" (2013) Proc Natl Acad Sci U S A.

[206] *Ibid* also see Tia Ghose "Chimps have a sense of fairness" (2013) available at https://www.livescience.com/26245-chimps-value-fairness.html accessed 23/7/21.

[207] Elin Kelsey "What humpback whales can teach us about compassion" (2017) Hakai Magazine available at https://www.smithsonianmag.com/science-nature/what-humpback-whales-teach-us-compassion-180964545/ accessed 15/7/21 Also see Robert L. Pitman et al "Humpback whales interfering when mammal-eating killer whales attack other species: Mobbing behavior and interspecific altruism" (2016) Marine Mammal Science available at https://onlinelibrary.wiley.com/doi/full/10.1111/mms.12343 accessed 10/7/21.

There are also many reports of whales and dolphins exhibiting a variety of behaviours that can be associated with certain emotions including grief and love.[208] Mammals have what De Wall refers to as an "altruistic impulse" in that they respond to signs of distress in others and feel an urge to improve their situation. Whale and dolphin species tend to exhibit a high degree of social behaviour, including cooperation, which helps to ensure that groups thrive.[209]

The examples above and many others, show that great apes and cetaceans have powerful impulses toward cooperation, generosity, and fairness. Yet it is commonly held that humans are the only beings with a moral sense.[210]

- Intentions, beliefs, and desires

There is a considerable body of work that has demonstrated that many primates behave in ways that are consistent with an understanding of others' perceptions, knowledge, and intentions.[211] This requires attributing mental states and motives to others.[212] Chimpanzees can understand other individuals' visual perspectives and knowledge state. For example, there is evidence to demonstrate that subordinate chimpanzees will only approach food that they believe the dominant chimpanzees cannot see.[213] Furthermore, chimpanzees only recruit partners that they know are the most skilled.[214] Additionally, in the wild and in captivity, chimpanzees are capable of deception.[215] This evidence highlights that great apes

[208] See Marc Beckoff *The smile of a dolphin: Remarkable accounts of animal emotion* (Discovery Bokks,2000)
[209] Whale and Dolphin Conservation "Scientific evidence for whale and dolphin rights" available at https://uk.whales.org/whale-culture/scientific-evidence-for-whale-and-dolphin-rights/ accessed 15/7/21
[210] Dale Peterson (n204).
[211] Mark Sheskin and Laurie Santos "The Evolution of Morality: Which Aspects of Human Moral Concerns Are Shared with Nonhuman Primates?" in Todd Shackelford and Jennifer Vonk *The Oxford handbook of Comparative Psychology* (OUP 2016) ch 23 2 and Sue Savage-Rumbaugh, Stuart Shanker, Talbot Taylor *Apes, Language and the Human Mind* (OUP 1998). also see Michael Huffman and Richard Wrangham "Diversity of medicinal plant use by chimpanzees in the wild" in Richard Wrangham et al *Chimpanzee cultures* (Cambridge: Harvard University Press 1994) 129–148; and Frans de Waal *Good natured. The origins of right and wrong in humans and other animals* (Harvard University Press 1996).
[212] Affidavit of psychologist James Anderson which was attached to Nonhuman Rights Project case law available at https://www.nonhumanrightsproject.org/content/uploads/Suffolk-Ex.-4-Anderson-Affidavit-to-VP.pdf accessed 05/12/16 point 14 4.
[213] Brian Hare, Joesp Call and Michael Tomasello "Do chimps know what conspecifics know?"(2001) Animal Behaviour 61.
[214]Alicia Melis, Brian Hare and Michael Tomasello "Chimpanzees only recruit the best collaborators" (2006) Science 311.
[215] Richard Byrne and William Whiten "Cognitive Evolution in Primates: Evidence from Tactical Deception" (1992) Man, New Series, 27 (3).

have intentions, beliefs and desires that are not currently protected in law. Apes can make a conscious choice of their own identity.

-Culture, social relationships, punishment, and grief

Nonhuman culture[216] is considered a very rare occurrence.[217] However, many primates, notably chimpanzees as well as some monkeys, live a social life of such complexity that they can be described as "political." The term "chimpanzee politics" has come to refer to the complex degree of interaction and social manipulation chimpanzees express in their social lives.[218] Chimpanzees engage in various forms of social interaction that involve cooperation, alliance formation, social manoeuvring, manipulation and even deception. Furthermore, in many primate species females stay near and baby-sit juveniles in the group to protect them from predation and other threats.[219] Great ape culture cannot be fulfilled in captivity in which many apes are kept alone and therefore are unable to partake in social interaction.

Primates form complex social relationships[220] with others and have knowledge and memory, not only of their own relationships, but also of relationships between other individuals. For example, chimpanzees, for instance, are willing to help a person reach an out-of-reach object and also help fellow chimpanzees enter a room to obtain food. There is also evidence to strongly suggest that chimpanzees grieve when a death of an individual occurs as well as showing compassion in cases of morality. [221] Chimpanzees also appear to engage in third-

[216] Culture is the ideas, customs, and social behaviour of a particular people or society see https://www.lexico.com/en/definition/culture .
[217] Lori Marino "Cetacean Brain Evolution: Multiplication Generates Complexity" (2004) International Journal of Comparative Psychology 17 29.
[218] See Francs De Waal *Chimpanzee Politics: Power and Sex among Apes* (2nd edn, Johns Hopkins University Press 1989); Richard Byrne and William Whiten *Brain and cognition in monkeys, apes and man* (Oxford University Press 1998) 228–244.
[219] See Nancy Nicolson "Infants, mothers, and other females" in Barbara Smuts et al *Primate Societies* (University of Chicago Press 1986) 330–342.
[220] See Felix Warneken et al "Spontaneous Altruism by Chimpanzees and Young Children " (2007) PLoS Biol 5(7) also studies investigating this aspect of social cognition have assessed primates' ability to recognise kinship, dominance-rank relationships, or friendships among individuals that reside in their social group. Knowledge of social relationships is used in complex cooperative and competitive strategies involving exchange of favours, alliance formation, opportunistic exploitation of social situations, and manipulation of other individuals with deceitful tactics.
[221] See Christophe Boesch affidavit attached to case law issued by the Nonhuman Rights Project point 12 6 available at https://www.nonhumanrightsproject.org/content/uploads/Suffolk-Ex.-5-Boesch-Affidavit-to-VP.pdf accessed on 5/12/16.

party policing of behaviour, which seems to indicate the existence and enforcement of norms of conduct within their communities.[222] Furthermore, some research suggests animals have a sense of outrage when social codes are violated. Chimpanzees may punish other chimps for violating certain rules of the social order.[223] Chimpanzees are social beings and have social cognitive capacities. They can distinguish between helpers and those who will hinder.[224] Many species of primates engage in elaborate play rituals and appear to punish individuals that break the rules governing such interactions, such as ostracising animals that play too aggressively.[225] This example suggests that animals have some sense of right and wrong. Furthermore, scientific evidence has demonstrated that they can predict others' behaviour. Many primates develop long lasting kinship ties. For example, orangutan mothers stay with their young for eight to ten years and while they eventually part company, they continue to maintain their relationships. Less solitary animals, such as chimpanzees and baboons maintain extended family units built upon complex individual relationships, for long periods of time.[226]

Cultural traditions are also evident in cetaceans.[227] Culture,[228] is one of the attributes of cetaceans that most sets them apart from the majority of other nonhuman species.[229] There are cultural traditions regarding tool use, methods of prey capture in killer whales and other social behaviours.[230] Furthermore, data has been gathered on wild cetaceans to show that many species possess cultural traditions regarding dialects.[231] This evidence highlights that

[222] Frans De Waal (n163).
223 Marc Bekoff *Wild Justice: The Moral Lives of Animals* (University Of Chicago Press, 2012).
[224] Kristin Andres et al (n195) 88
[225] Marc Bekoff and Jessica Pierce (n172).
[226] Lori Gruen "The moral status of animals" (2017) available at https://plato.stanford.edu/entries/moral-animal/ accessed 26/6/21.
[227] Luke Rendell and Hal Whitehead (n229) For example, killer whales in some areas noisily pursue fish as prey while those in other waters they hunt their prey silently. Furthermore, bottlenose dolphins in Florida tend to form coalitions of two males, while in Australia, they more often form a coalition of three and in Scotland the males are not seen to form a coalition.
[228] Culture is the ideas, customs, and social behaviour of a particular people or society see https://www.lexico.com/en/definition/culture.
[229] Luke Rendell and Hal Whitehead "Culture in whales and dolphins" (2001) Behavioural and Brain Sciences 24 (02) 309–324.
[230] See Richard Connor et al "Complex social structures, alliances stability and mating access in a bottlenose dolphin 'super-alliance'" (2001) Proceedings of the Royal Society B: Biological Sciences 268(1464).
[230] Lori Marino (n217) 28.
[231] Richard Connor et al "Social Evolution in toothed Whales" (1998) Trends in Ecology and Evolution 13 (6) For example, the song of the humpback is a case which demonstrates a capacity for learned behaviour,

culture is not exclusive to humans and that dolphins have the ability to understand, which brings into questions the ethics of keeping cetaceans in captivity which denies them the ability to explore their culture.

Studies suggest that some cetaceans grieve for their deceased. Several species of cetaceans have been observed behaving in ways that suggest they mourn their deceased group members.[232] Evidence has shown that some dolphin mothers carry around their dead calves on their backs for hours or even days.[233] Furthermore, research confirms that whales and dolphins have advanced social behaviours. They have close social groups with complex relationships, use regional dialects, work together for mutual benefit, teach each other how to hunt and how to use tools, and engage in cooperative hunting.[234]

These capabilities are significant. In order to adequately protect animals, their moral capacities should be taken into account. This evidence establishes that great apes and cetaceans have an interest in living, they have emotions and social complexity. Their culture cannot be fulfilled in captivity in which many apes and cetaceans are kept alone and therefore are unable to partake in social interaction. These interests are currently not protected under the animal welfare system. This evidence highlights the vast moral abilities of both species which brings into question the ethics of keeping them in captivity which denies them the ability to explore their culture. These species are not adequately protected under the animal welfare system.

In conclusion, the studies cited, portray the broad scope of cognitive and moral characteristics and attest to these species' wide-ranging competencies. We have evidence that great apes

memorisation, imitation and innovation. Sperm whales possess a sophisticated system of "codas" or rhythmic clicks, while bottlenose dolphins and orcas use a range of altruistic "alarm calls" and "greeting calls" see David Mence "The cetacean right to life revisited" (2015) International journal of Law in Context 11 (1) 17.

[232] Giovanni Bearzi et al "Cetacean behavior toward the dead and the dying" (2017) Encyclopaedia of Animal Cognition and Behavior.

[233] Tahlequah, an orca mother who carried her dead newborn around for seventeen days until she finally let go see Lori Cuthbert and Douglas Main "Orca mother drops calf after unprecedented 17 days of mourning" (2018) National Geographic available at https://www.nationalgeographic.com/animals/article/orca-mourning-calf-killer-whale-northwest-news accessed 4/5/2.

[234] Kiernan Fox et al "The social and cultural roots of whale and dolphin brains" (2017) Nature, Ecology and Evolution.

and cetaceans possess moral qualities such as culture and empathy.[235] Of course, it is not human-level morality,[236] however, these species have significant moral abilities, and as such should have their own specific rights. The next section will explore the rights that can be derived from the evidence presented.

2.3.4.1. Rights that derive from the evidence available

It is argued that because many animals have the capacity for morality, they need fundamental legal rights to adequately protect their interests. It is on the basis of these many of these capabilities that jurisdictions such as Canada have banned cetacean captivity[237] and why projects such as the Great Ape Project and the Nonhuman Rights Project were established.[238]

Current legal provisions worldwide hardly accommodate these interests. Therefore, animals need to be protected by fundamental rights which guarantee that their essential interests are respected. Animals can hold rights commensurate with their individual capacities. Based on the evidence we now have, it is suggested that the following five rights can be used to inform discussion as to the basic underlying reasoning for change:

1. The right to continued life

Animals have an interest in living. Not only are they sentient, but they also have intentions, desires, and form relationships. They have an interest in continuing their life. Under the current animal welfare regime, they are classified as property; therefore, they can be killed or euthanised at their owner's discretion and consent.

2. The right to be free from pain and suffering

Many species have complex moral abilities, which elevate their capability for suffering. There is evidence that many animals experience emotions including joy, fear, frustration, anxiety, and grief.[239] However, under the animal welfare system, animals

[235] Lori Marino and Toni Frohoff "Towards a new paradigm of non-captive research on cetacean cognition" (2011) PLoS ONE 6 (9).
[236] Louis M Herman " What Laboratory Research Has Told Us about Dolphin Cognition" (2010) International Journal of Comparative Psychology 23 324.
[237] See discussion of this ban at 5.3.5 Canada.
[238] See discussion on these projects at 5.3.1 The Great Ape Project (GAP) and 5.3.2 America and the Nonhuman Rights Project (NhRP) – The evolution of legal personhood for nonhuman animals in the United States.
[239] Kevin Boileau *Prolegomenon Towards A Primate Rights Bill* (EPIS Press 2015) Introduction.

are exposed to pain and suffering through factory farming, captivity, hunting and experimentation.

3. The right to bodily integrity

Animals live their lives not according to reflexes or innate behaviours but make choices and pursue actions based on internal cognitive processes. Their interests should be protected. Currently, their bodily integrity is compromised under the animal welfare system.[240]

4. The right to live in a habitat appropriate to their needs and express species-typical behaviour

Animals kept in captivity cannot express normal behaviour. Moral animals have a culture and create social relationships with their young, families and community. They should have the ability to move around freely, ideally in their native home or if not possible, as close as can be to their natural environment, which allows for normal functions.

5. The right to liberty and to be free from captivity

Captivity denies social animals the ability to be part of a group and partake in their culture. Detaining these animals grossly interferes with the exercise of their autonomy.

The ways in which rights can be applied and enforced will be explored in chapter six.[241] There are of course cost implications to the granting of these rights which will be discussed in further detail in the recommendation section of this thesis.[242] While change does come at a cost, it is necessary, important, and worthwhile when sentient beings no longer have to suffer, and their interests are protected.

[240] The right to bodily integrity grants autonomy and self-determination over one's own body.
[241] See 6.3 RECOMMENDATIONS FOR REFORM
[242] See 6.3 RECOMMENDATIONS FOR REFORM.

The next section will examine the critical objections to the recognition of animal rights and provide a counter-argument to each objection.

2.4 CAN WE MOVE TOWARD THE RECOGNITION OF ANIMAL RIGHTS: CRITICAL OBJECTIONS

To claim that animals have moral and legal entitlements is to say that they possess certain capacities that should entitle them to significant interests or rights. This chapter has shown that both great apes and cetaceans (and possibly other species) have moral capacities. This evidence establishes a moral and legal entitlement that should be considered in order to respect these interests. Animals are sentient; therefore, their interests are of moral importance, and thus they have a moral worth that cannot be reduced simply to their usefulness to others. The possession of interests is a necessary and sufficient condition for holding rights. Given that all sentient animals have interests, they are potential rights bearers.[243] However, for many, the idea of animal personhood is still implausible. The rights afforded to humans, it is argued, come with societal responsibilities, such as obeying laws and paying taxes—behaviours which animals would not be able to demonstrate.

The focus of this section is to outline the critical objections and arguments against rights for animals and will provide a counter-argument.

2.4.1 Human superiority

In the book of Genesis, man is given "dominion over the fish in the sea, and over the birds in the air, and over the cattle, and over all the earth, and over every creeping thing that creeps upon the earth."[244] As a result, it is contended that humans are entitled to sacrifice the interests of animals if by so doing some significant benefit to humans occurs. Any suffering inflicted, therefore, must be "necessary" if it is to be morally legitimate. "Necessity" is a subjective term and much of the debate in contemporary animal welfare centres on to what degree particular kinds of animal exploitation are necessary, a judgement that can change over time.[245] Philosophers have called upon multiple capacities, including language, reason,

[243] Alasdair Cochrane *An introduction to animal and political theory* (Palgrave Macmiilan 2010) 109–110.
[244]Book of Genesis 1: 26.
[245] Robert Garner "Animal rights, political theory and the liberal tradition" (2002) Contemporary Politics 8 (1) and Stephen A. Plass "Exploring animal rights as an imperative for human welfare" (2010) 112 W. Va. L. Rev. 406.

self-awareness and morality, to distinguish humans from and elevate humans above animals. It is held that only humans are moral agents, and that human language has a symbolic function which can be used for transferring knowledge and for dealing with abstract concepts. Furthermore, only humans are able to carry out long-term planning, to invent various alternatives of action, to foresee their possible results and to make an evaluation.[246] Moreover, humans exclusively, are capable of setting up their own life-goals, in that way making a conscious choice of their own identity.[247] We have the unique capacity for empathy and for making moral judgements.[248] However, morality extends beyond the human species thus dismantling claims of human superiority solely on the basis of morality. Studies have demonstrated that many great apes and cetaceans (in addition to other species) exhibit many of these abilities.[249] For example, this chapter provided evidence that chimpanzees and dolphins possess empathy, a sense of fairness and other moral capacities.[250] Animals such as great apes have many of the capabilities of humans, yet our differences are used as grounds to deny rights. However, using animal experimentation as an example, it is argued "one cannot argue that animal experiments are justified because animals are so different from humans and then say that similarities between animals and humans allow us to extrapolate research results to humans. One cannot have it both ways."[251] This was the case with great apes and is continuing to occur with other primates.[252]

[246] Ingemar Nordin "Animals don't have rights: A philosophical study" (2001) available at http://www.libertarian.co.uk/lapubs/philn/philn062.pdf accessed 14/7/16.
[247] *Ibid.*
[248] *Ibid.*
[249] See Nonhuman Rights Project available at http://www.nonhumanrightsproject.org/2013/11/07/empathy-in-chimpanzees/ accessed 11/07/16 and Steven Wise "Rattling the Cage: Toward Legal Rights for Animals" (2000) at 211 where there is a section with examples of chimpanzees displaying empathy. Also see Emory Health Sciences. "Empathy chimpanzees offer is key to understanding human engagement" (2014).
[250] Rodger Fouts and Deborah Fouts "Chimpanzees' use of sign language" in Steven Wise *Rattling the Cage: Toward Legal Rights for Animals* (Perseus Publishing 2000) 28.
[251]Rebekah Humphreys "Contractarianism: On the Incoherence of the Exclusion of Nonhuman Beings" (2008) available at http://www.personal.ceu.hu/percipi/archive/200802/03_rh.pdf accessed on 01/07/16.
[252] While the EU and other countries such as New Zealand and the UK, among others, have now banned experimentation on great apes, other primates such as monkeys continue to be subjects of experimentation. Globally, tens of thousands of monkeys – mainly macaques and marmosets – are used in research and testing see https://www.rspca.org.uk/adviceandwelfare/laboratory/primates and https://www.theguardian.com/environment/2019/oct/15/barbaric-tests-on-monkeys-lead-to-calls-for-closure-of-german-lab and https://www.crueltyfreeinternational.org/what-we-do/primate-campaign/stop-international-trade-monkeys-research and https://www.peta.org/issues/animals-used-for-experimentation/primates-laboratories/.

Most of society still accept the use of animals for food, clothing, research, entertainment, education, and religious purposes.[253] Many people around the world view animal exploitation as necessary and in furtherance of human interests and fail to consider the animals involved.[254] It is argued that we cannot grant animals legal rights as this would have a detrimental impact on human rights and freedoms.[255] However, while the granting of legal rights would impact on human life, as all laws do, this will not equate animals with humans or entitle them to all the rights humans hold. Scientific knowledge particularly pertaining to the evolution of species, challenges many of the assumptions of traditional morality, namely the notion that the human animal simply by virtue of being human is entitled to some special moral treatment. Now thanks to the advancement of the science of biology, we now know that human beings do not solely possess important moral capabilities such and empathy[256], consequently our treatment of nonhuman animals needs to be revised in light of present-day knowledge.[257]

2.4.2 Animal rights will devalue human life

There are concerns about what would happen to humans if we were to take the lives of animals more seriously. However, recognising the needs of animals does not minimise who we are as people. On the contrary, future advancements for animals could help enlighten and benefit us.[258] Regan has noted "those involved in the animal rights movement are partners in the struggle to secure respect for human rights – the rights of women, for example, or minorities, or workers. The animal rights movement is cut from the same moral cloth as these,[259] therefore, animal rights should be part of the human rights movement. More recently, a study conducted at Harvard University revealed that people who favoured expanding human rights were also more likely to favour animal rights.[260]

[253] Stephen A Plass (n245) 408.
[254] Stephen A Plass (n245) 426.
[255] David R Schmahmann and Lori J Polacheck " The Case Against Animal Rights" (1995) Boston College Environmental Law Review 22 (4) 749
[256] Science continues to add to our knowledge on the capabilities and requirements of animals see Simon Broom and Debbie Legge *Law Relating to Animals* (Cavendish Publishing Limited 1997).
[257] James Rachels *The Moral Implications of Darwinism* (OUP 1990).
[258] Marc Bekoff "Why Justice for Animals Is the Social Movement of Our Time" available at https://www.psychologytoday.com/us/blog/animal-emotions/201603/why-justice-animals-is-the-social-movement-our-time assessed 12/02/17.
[259] Tom Regan (n122).
[260] The results of the study are available at https://www.washingtonpost.com/politics/2019/07/26/who-supports-animal-rights-heres-what-we-found/?noredirect=on accessed on 3/11/19.

Furthermore, legal personhood does not confer absolute rights. Even if our rights to equality or non-discrimination have been violated, courts may decide that this violation is justified under a legislative scheme that allows balancing individual and collective interests, such as a charter of rights or a human rights convention. Nevertheless, humans will have benefited from a fair hearing. Our legal status at least entitles us to appear in a court and claim equal protection under the law.[261] We can give animals legal rights without diminishing humanity – we can make distinctions. Morality extends beyond the human species albeit different to human morality. We can acknowledge and understand these gradations between human abilities and obligations and grant legal rights accordingly. Professor Nussbaum asserts:

> Giving apes legal rights does not mean giving them the same rights as adult humans. As with mentally disabled humans, a right may be qualified in certain ways in keeping with the creature's level of understanding. Apes may have fewer rights in certain areas, and the rights they have may be more narrowly conceived. Finally, they may be given only certain elements of a complex right.[262]

Therefore, animals do not have rights comparable to human rights. What is demanded is simply rights based on an animal's interests, capabilities, and characteristics. However, they cannot be equated with human rights, since the category of human rights contains more than the limited fundamental rights proposed here. For instance, human rights also encompass the rights to freedom of expression and to religious freedom. As animals do not possess the characteristics that ground these fundamental rights, they also have no interest in these rights, and therefore there is no need for protection in relation to these rights.

Professor Cupp contends that the route of using legal rights to protect animals as ultimately counter-productive to the movement; not only will it fail to help animals; it will also negate some of the rights of humans.[263] Rights, as Cupp points out, are not free; they come with societal costs bearing upon their usage. As an example, he notes that legal personhood for an ape would thereby enable its freedom from slavery, thus destroying property rights as we

[261] Jonas-Sébastien Beaudry "From Autonomy to Habeas Corpus: Animal Rights Activists Take the Parameters of Legal Personhood to Court" (2016) Global Journal of Animal Law 10.
[262] Steven Wise "Rattling Cage Defended" (2002) 43 B.C. L. Rev. 623 quoting Nussbaum M "Animal Rights: The Need for a Theoretical Basis"(2001) Harvard Law Review 114 1548.
[263] Richard L Cupp, Jr, "Children, chimps, and rights: arguments from "marginal" cases" (2013) 45 Ariz. St. L.J. 1 referring to Larry Alexander & Michael Moore, Deontological Ethics, Stanford Encyclopaedia of Philosophy.

know them, and the ability for scientists to use animals freely for their research.[264] However, there are examples of jurisdictions that have done so, such as Argentina granting a writ of habeas corpus to Cecilia.[265] For Cupp, the entitlement of legal rights for animals comes at simply too high of a cost to humans. Furthermore, he holds that rights are linked with responsibility. Since those of the animal rights movement would be unlikely to say that we should afford moral responsibilities to animals, it is accordingly fit that we do not afford them legal rights either.[266] Consequently, animals cannot have their own rights. Yet human rights, in his view, entail the obligatory protection of animals. Humans are therefore given rights with the assumption that they are to treat animals in accordance with their needs; however, they are currently not meeting these needs under the current system of protection.

Cohen believes acknowledging rights for other animals would seriously damage human well-being and highlights some implications of animal rights, for example, that we must forgo medicines whose development violated animal rights and we must abstain from meat whose production violated animal rights. [267] While it is true, there will be implications for humans if animals were granted specific legal rights, this is an aspect of law - to control human behaviour. For example, criminal law dictates that we cannot take another person's possessions; tort law prevents us from trespassing on another's land and so on. Animal rights do not equate animals with humans or give animals all human rights. This simply gives certain animals access to species-specific legal rights.

2.4.3 The legal system does not allow for rights of animals

The argument is put forth that our legal systems cannot accommodate a theory that purports to detach decisions as to how we should treat animals from an anthropocentric reference point.[268] It is contended that it would be implausible and dangerous to give legal rights to animals[269] and revolutionary changes in our legal institutions would be necessary if animals were to be holders of legal rights.[270] This thesis proposes a cautious approach. One which is

[264] *Ibid.*
[265] See 5.3.3 Argentina and the protection of Great Apes.
[266] Richard Cupp "Litigating Nonhuman Animal Legal Personhood" (2018) 50 Texas Tech Law Review Legal Studies Research Paper Series Paper Number 2017/10 also see Richard Cupp "Edgy Animal Welfare" (2018) Denv. L. Rev. 95 Pepperdine University Legal Studies Research Paper No. 2018/11.
[267] Carl Cohen and Tom Regan, *The Animal Rights Debate* (Rowman and Littlefield Publisher Inc 2001).
[268] David R Schmahmann and Lori J Polacheck (n255) 761.
[269] Views held by both Epstein and Posner also see David Schmahmann and Lori J Polacheck (n255) 748.
[270] David Schmahmann and Lori J Polacheck (n255) 748.

evidence-based, commencing with apes and cetaceans. It is further argued that law, government, and rights are exclusively a human concept that can only apply to human actions.[271] However, animals have been granted legal rights using our current system. For example, in Argentina, where a writ of habeas corpus was granted to Cecilia the chimpanzee.[272] Cecilia is now in the Great Apes Sanctuary of Sorocaba, in Brazil. She was the first chimpanzee in the world to be released due to her habeas corpus right, allowing her to be transferred from a zoo to the Brazilian sanctuary.

It is argued that it is logical, or at least natural from a historical point of view, to widen the circle of compassion. Scientific evidence shows that many animals possess moral capacities, and this justifies them being granted basic legal rights in line with their interests. The rights granted to one species does not require all animals to be provided with the same rights – rights must be species-specific and based on the evidence available regarding their interests. Therefore, if we grant animals legal personhood, their abilities need to be taken into consideration with their legal standing. If animals are granted legal rights, it need not entail the destruction of our legal system.

2.4.4 Animals lack responsibilities and duties and therefore cannot assert rights

It is contended that a person is a being with responsibilities, and animals do not have any responsibilities. However, Salmond defines personhood as "any being whom the law regards as capable of rights or[273] duties."[274] Furthermore, many humans do not meet the criteria for personhood; they benefit from rights without being capable of reciprocal responsibilities. Rights on the basis of reciprocal responsibilities would deny rights to persons who are unable to contribute to society, such as those who are incapacitated. Is it not a requirement of bearers of fundamental rights to be in a position to exercise responsibilities themselves. Children and persons with developmental disabilities or dementia are not in this position, yet they are still protected by fundamental rights due to their moral capacity. However, it can be argued that some animals also possess moral capacity. Morality can be disassociated from

[271] Nicholas H Lee "In Defense of Humanity: Why Animals Cannot Possess Human Rights" (2013-2014) Regent University Law Review 26 (2) 470.
[272] See section on Argentina 5.3.3 Additionally India used their legal system to declare dolphins as non-human person see 5.3.6 India.
[273] Emphasis added.
[274] Salmond (n933).

reason and associated with other elements such as emotion including altruism, empathy and a sense of fairness. On this basis, it can be argued that morality extends beyond the human species, albeit a different to human morality. Many animals may be considered as moral patients rather than as moral agents. Therefore, whether animals can bear legal duties and responsibilities, or be held legally accountable, is irrelevant to their legal status as persons. Importantly, there can be a graduation in the recognition of rights for animals.

Additionally, Regan believes that by focusing on differences – what separates humans from animals – society has created a way in which to justify the use of animals. Yet modern science tells us that animals are genetically similar enough to humans to experiment on them, yet simultaneously they are so different that they do not merit ethical consideration or legal protection.[275]

2.4.5 Lack of reason

Most adult humans have a developed ability to think in a rational way and to plan far into the future. They can speak a language and thereby acquire better knowledge about life and death. There is a difference between adults and children. The child's abilities of rationality - that is the quality of being reasonable, based on facts or reason, language, creativity, moral judgement is still not fully developed. But since the infant is human, it has, in contrast to an animal, the potential to develop full rationality. In relation to humans with grave brain damage; their brains have the same biological function as all human brains do, that is, the function to think, plan, speak and so on. They simply lack that function; therefore, there is a distinction between lacking traits and organs with a certain function on the one hand and having organs that are malfunctioning on the other.[276] This is the argument advanced by many anti-rights campaigners.[277] However, this does not mean animals cannot have rights. Morality can be separated from rationality. For example, this chapter has set out an account of the moral abilities of great apes and cetaceans, which highlights the importance of emotions such

[275] Derek W St. Pierre "The Transition from property to people: The road to the recognition of rights for nonhuman animals" (1998) Hastings Women's Law Journal 9 (2) 261.
[276] Ingemar Nordin "Animals don't have rights: A philosophical study" (2001) available at http://www.libertarian.co.uk/lapubs/philn/philn062.pdf accessed 14/7/16.
[277] For example, Richard Cupp see (n263).

as empathy. Therefore, rights and rationality are not interdependent. According to De Wall, emotional responses are the building blocks of human morality.[278]

2.4.6 Psychological and conceptual blocks

Studies have been conducted on human psychology and the conceptual blocks that stand in the way of efforts to improve animal law and legislation.[279] For many people in our society, the concept of legal rights for other animals is quite unthinkable. That is because our relationship with the majority of animals is one in which we exploit them: the majority of people eat them, hunt them, and use them in a variety of ways that are harmful to the animals. The idea that these animals feel pain and that they have interests which call out for recognition is too close for comfort.[280] The most fundamental forces that tend to compromise the realisation of animal rights is deeply rooted both in the psychological mindset of the human majority and in the conceptual system that the majority accepts.[281] The psychological and conceptual structures that influence and underlie the present state of animal law need to be examined. Bartlett[282] addresses what he considers the real obstacles to animal rights. He believes attempts to advance animal laws, lies in human species - level narcissism and human resistance, to question one's way of thinking resulting in mankind's resistance to animal rights. He holds that to achieve rights for animals, we need to address these issues that he regards as almost universally ignored. Changes in human attitudes and laws relating to the classification of nonhuman animals as things appear to be taking place.[283] There is

[278] Frans De Wall *Primates and Philosophers: How morality evolved* (Princeton University Press, 2006)
[279] Steven Bartlett "Roots of Human Significance to Animal Rights: Psychological and Conceptual Blocks" (2002) Animal Law 8.
[280] Steven Bartlett (n279) 8.
[281] For instances, Posner notes that we do have a species biased towards our own kind see (n150).
[282] Steven Bartlett is a **s**cholar at the Departments of Psychology and Philosophy at Salem University United States.
[283] In March 2007, the European Commission released a survey called "Attitudes of EU Citizens Towards Animal Welfare," which found that more than 34% of those polled felt that animal welfare was of the highest possible importance and gave it a score of ten out of ten points, whereas only 2% deemed animal welfare unimportant. (Overall, those surveyed gave animal welfare an average rating of 7.8 points.) In 2008, the FAO convened a forum on animal welfare practices, which led to a report stating that as human and farm animal populations continue to rise, "the resulting escalation of animal production raises a number of ethical issues, including environmental sustainability and secure access to food, which must be considered alongside the growing concern about animal welfare." It went on to state, "animal welfare is coming to be recognized as highly relevant to success in international development." Also, a change in societal attitude has resulted in a move towards eliminating animals from circuses, the work of the NhRP**,** Article 13 TFEU recognising animals as sentient beings, the development of EU law on animal welfare for example, the regulation on trade in seal products (Regulation EC No. 1007/2009).

evidence of a change in societal attitude, which the previous chapter has set out including the Canadian ban on cetacean captivity.[284]

2.4.7 The Dominance of a welfarist approach

While many theorists do not agree with granting rights to animals, many do believe they are deserving of good treatment. Furthermore, it is questioned, "why do animals need rights when we can improve the welfare system that already exists?" There are many arguments that welfare standards should be sufficient.[285]

It is also argued that the rights view is too strict, for example, Regan's defence of animal rights differs from Singer's in that it makes no compromises or a balance of interests. The abolition of animal exploitation is a must for Regan, irrespective of the consequences for human interests. Francione argues that there are several problems with attempting to employ animal welfare to abolish animal use and, therefore, animal advocates are wasting time, energy, and money. He suggests that it is problematic for a social movement to promote humane forms of exploitation.[286] He believes welfarist laws create complacency that animals are well-treated and thus leads to more animal consumption. As long as animals are property, only the owners' interests will be considered. He holds that welfarist suffering-reduction laws are inconsistent with animal rights and are therefore unethical to support.

Richard Posner's main concern is the cost of animal rights. He is critical of the impact of liberating animals as we do not know what this will mean. He is of the belief that animal welfare should be improved – that this would be more productive than rights. However, we now have more welfare laws than ever, yet animals are being exploited more than ever. The number of animals used in experiments has risen as has the number of animals used in factory farming.[287] Furthermore, it may be argued that it is ethically unsatisfactory to allow the well-

[284] See 5.3.5 Canada.

[285] Some of the failings have been demonstrated in chapter two, however, chapter three provided a full critique of the welfare system highlighting its shortcomings in CHAPTER 4: A CRITIQUE OF THE ANIMAL WELFARE SYSTEM

[286] Gary Francione "Animal Welfare and the Moral Value of Nonhuman Animals" (2010) Law, Culture and the Humanities 6 (24) 31.

[287] See "PETA Study Shows a Staggering Increase in Animal Use in Experiments" available at http://www.peta.org/blog/peta-study-shows-a-staggering-increase-in-animal-use-in-experiments/ accessed 05/03/15 and "Rise in number of animals used in UK research, Home Office reports shows" available at https://www.theguardian.com/science/2016/jul/20/rise-in-number-of-animals-used-in-uk-research-home-office-report-shows accessed 20/08/16 and "Animal experimentation statics for Ireland" available at http://www.irishantivivisection.org/statistics.html

being of animals to be dependent on the abstract weighing of different interests. The problem with utilitarian calculation is that individuals are not given any intrinsic value. The law can grant animals species-specific rights. In *Rattling the Cage*, Wise wrote that legal rights are "the least porous barrier against oppression and abuse that humans have ever devised."[288] This is because "innate rights provide stronger protections against abuse than the traditional noblesse oblige of welfare theory."[289] A rights-based view carries weight as it focuses on the creature itself and in their own entitlement to a decent life.

However, Epstein favours a general statute that forbids cruelty to animals. His position is like that of Posner. He holds that we should consider improvements in technology that lessen our dependence on animals. That is, we should find ways in which to improve the lives of animals without damaging our own. However, this is the current situation within the law - to balance human interests with animal welfare, and this does not provide adequate protection for animals. Epstein's theory has been criticised for relying too heavily on the ability of animal anticruelty statutes to protect animals from suffering.[290] Furthermore, he contends that spending time on "this heroic campaign" is taking our attention away from the improvements that can be made for animals.[291] In essence, Professor Epstein argues that we should not undermine the liberty and dignity of human beings by treating animals as their moral equals and legal peers. Along with Posner, Epstein states that the goal of the animal rights movement is for animals to be treated as human beings.[292] However, according rights to animals does not have to mean that they are treated in the same way as humans. We can grant some animals a limited number of rights which are applicable to them, not all the rights which are granted to humans.

There is a fear of animal rights. Opponents have filled people with fear that life as they know it will cease. However, they are focusing on the most extreme outcome- an outcome that is very unlikely, while ignoring the fact that some legal rights can be granted without radical change to human life. Welfare laws do not adequately consider animal sentience or their

[288] Steven Wise *Rattling the Cage* (Profile books ltd, 1999) 236.
[289] Steven Wise (n288).
[290]Laura Ireland Moore "A Review of Animal Rights: Current Debates and New Directions" (2005) Animal Law 11 318.
[291] Richard A Epstein "Animals as objects or subjects of rights" in Sunstein C and Nussbaum M Animal Rights: *Current Debates and New Directions* (OUP 2004).
[292]Richard A Epstein (n291) also see Laura Ireland Moore (n290) 318.

capacity for self-consciousness. They are limited and restricted and can be taken away. Rights, however, are harder to erode. Furthermore, welfare laws continue to classify animals as property and thereby ignore the animal's intrinsic interest in governing their own lives. As personal property, they have no status in the legal system for the protection of their interests.[293]

2.5 CONCLUSION

This chapter provided a theoretical basis for the granting of rights on the basis of moral capacity. It outlined the importance of animal cognition, demonstrating that some animals (using great apes and cetaceans as a case study), have interests and moral capabilities that warrant legal rights in order to protect these interests. It was established that the granting of species-specific rights does not equate to all human rights. Recognition of this point is crucial in that it importantly allows for the nature of the fundamental rights of natural persons to vary depending upon the capabilities of such a person. In the same way that infants do not have the right to vote, it would be meaningless for a chimpanzee or a dolphin to be granted such a right. However, the right to be free from torture is critically important to an animal. Animals may also require certain rights to live in a habitat appropriate to their needs, and the autonomy to live lives that are on their own terms without undue human interference. This thesis does not argue for animals to be given the same rights as humans but species-specific rights. Furthermore, it addressed anti-rights theory providing a counter-argument to the objections advanced.

The next chapter is divided into two parts. Part one will examine the current protection in place by providing a historical and a chronological account of EU laws. The EU was chosen as a case study to demonstrate that the law is not protecting animals adequately. In selecting to examine what are considered among the highest standards of welfare laws in the world[294] to follow through on the claim that even our best laws are not sufficient and are largely not evidence-based. Furthermore, while the EU has recognised animal sentience, animals are still classified as property. Moreover, this recognition of animal sentience has not been fully implemented and even if it were to be actualised; it would not offer sufficient protection for

[293] See discussion on animals as property at 4.1.2 The property status of animals.
[294] European Food Safety Authority discussion on animal welfare available at https://www.efsa.europa.eu/en/topics/topic/animal-welfare accessed 17/2/17.

animals as it does not consider all the other evidence now available on animal capabilities and interests. Part two examines the impact of trade laws on animal protection. The World Trade Organisation (WTO) still considers animals as products despite all the evidence and developments. It will further examine animal welfare in trade disputes.

CHAPTER 3: EUROPEAN UNION ANIMAL PROTECTION AND THE WORLD TRADE ORGANISATION AND ANIMALS

"…the Union and the Member States shall, since animals are sentient beings, pay full regard to the welfare requirements of animals…"

Article 13 of the Treaty on the Functioning of the European Union

3. INTRODUCTION

This chapter provides an examination of European Union (EU) legislation and trade law as part of the critique of the animal welfare system. Both EU and trade law use animals as commodities. While the EU has formally recognised animals as sentient beings, in practice, this has made very little difference to the treatment of animals, while the World Trade Organisation (WTO) continues to define and treat animals as products. The purpose of this chapter is to demonstrate that despite more laws, animals are not adequately protected under these systems and a new rights-based approach is required.

This chapter is divided into two parts. Part one provides an overview of the current legal terrain for animals in the EU. It sets out a historical and a chronological account of the legislation in place which seeks to provide for the regulation and protection of animals. EU law has evolved with respect to animal welfare in that animals are no longer perceived in law solely as goods[295] and has been credited for its pioneering status in advancing animal welfare law.[296] Therefore, this chapter traces the evolution of the EU legal system and details how the law has adapted its view of animals, including defining animals as sentient beings since the Treaty of Amsterdam was signed in 1997. This recognition was strengthened by the Lisbon

[295] Diane Ryland "Advancing Animal Welfare: State, Society and Economy" available at http://eprints.lincoln.ac.uk/12375/7/12375%20Open%20access%20submitted%20draft%20Andrzej%20Frycz%20Modrzewski%20Krak%C3%B3w%20University%20in%20cooperation%20with%20the%20Jagiellonian%20University%20(3).pdf accessed 14/11/15 5 also see Special Eurobarometer 442 2 Attitudes of Europeans towards Animal Welfare" (2016).

[296] Diane Ryland (n295) also see Tara Camm and David Bowles, "Animal Welfare and the Treaty of Rome – A Legal Analysis of the Protocol on Animal Welfare and Welfare Standards in the European Union" (2000) Journal of Environmental Law 197 see also Nicholas K Pedersen "Detailed Discussion of European Animal Welfare Laws 2003 to Present: Explaining the Downturn" (2009) The Animal Legal and Historical Center available at https://www.animallaw.info/article/detailed-discussion-european-animal-welfare-laws-2003-present-explaining-downturn accessed 15/8/17.

Treaty of 2009 which included animal sentience as an article in the main body of the treaty. These changes were the result of culture extending empathy to animals and the law being updated to reflect the view that animals are not merely property but are also sentient and are deserving of legal protection.[297] However, the EU does not include our most up to date evidence on animal cognition.

The development of the Union's law has led to the introduction of legislative acts relating to animal health and welfare. Rules were adopted by the Member States of the European Community, subsequently the European Union. These rules were developed by the European Commission (EC), and many were based on the Conventions of the Council of Europe: directives on slaughter, transport, the welfare of calves and pigs, the welfare of breeding animals, as well as laying hens. This led to the adoption of the Five Freedoms[298] which have been most influential in shaping animal welfare legislation and forms the basis of much EU legislation on farm animals.[299] Since the year 2000, there have been various revisions of the existing text, as well as further implementation of EU rules.[300] Animal welfare is now stated to be a value of the Union that is enshrined in Article 13 of the Treaty on the Functioning of the European Union (TFEU) and the capacity of animals to sense and express pain, suffering and distress are acknowledged.[301]

The first part of this section introduces EU animal protection legislation and is followed by an account of early legislation on animal welfare. A chronological account of EU law will be provided, and there will be an examination of case law on animal welfare from the Court of Justice of the European Union (CJEU) to demonstrate the evolving judiciary response. This

[297] Andrea Gavinelli and Nelly Lakestani "Animal Welfare in Europe" Derecho Animal (2010) 1(1) 1 also see Sabine Brels "The evolution of the legal status of animals: From things to sentient beings" (2017) available at https://www.globalanimalnetwork.org/evolution-legal-status-animals-things-sentient-beings accessed 15/02/18.

[298] As summarised by the EU, the five freedoms include: Freedom from hunger and thirst – access to fresh water and a diet for full health and vigour, Freedom from discomfort – an appropriate environment with shelter and comfortable rest area, Freedom from pain, injury and disease – prevention or rapid treatment, Freedom to express normal behaviour – adequate space and facilities, company of the animal's own kind and Freedom from fear and distress – conditions and treatment which avoid mental sufferings.

[299] The Five Freedoms were brought into European law with the European Convention for the Protection of Animals kept for farming purposes in 1976. This convention was followed by the EU in 1998. There will be a detailed discussion of the Five Freedoms later in this chapter.

[300] Etienne Bonbon "Regional Steps Towards A Common Animal Welfare Approach in Europe" (2012) available at https://www.oie.int/doc/ged/D13888.PDF accessed 15/3/19 2.

[301] Diane Rylands and Angus Nurse "Mainstreaming after Lisbon: Advancing Animal Welfare in the EU Internal Market" (2013) European Energy and Environmental Law Review 102 114.

chapter will demonstrate that while the EU law has evolved and has formally recognised animals as sentient beings, in practice, animals are not treated as such. It will also discuss the potential impact of Brexit on animal protection. Importantly, it raises the question of whether a welfare-based system offers adequate protection.

Part two of this chapter focuses on trade law and animals. Under the WTO animals are goods and objects of trade.[302] However, broader public and legal efforts to re-categorise animals from goods to sentient beings, are emerging across the world. As mentioned, the EU, along with other countries, including France and New Zealand, have amended their laws to define animals as sentient beings.[303] The 2014 Seal Products case, which will be discussed in this chapter, has brought to the forefront the conflict between ethics and economics that underlie the world's largest trade regime. Finally, there will be a discussion on how Brexit and trade law may impact upon animals.

The following section will commence with an examination of EU animal welfare laws. A chronology of EU legislation is set out in order to demonstrate that while the EU has more laws, this has not resulted in improved protection for animals. In reality, we have more laws because we have an increased use of animals. Furthermore, this section will trace the evolution of the classification of animals from goods to sentients beings and will further outline the development of animal welfare laws. The purpose of this section is to demonstrate that animals have not greatly benefited from the increase in welfare laws or their reclassification as sentient beings.

3.1 EU ANIMAL PROTECTION LEGISLATION

Historically, animal welfare was not included in treaty law. The formal legal status of animals under EU law[304] was equivalent to that of goods or agricultural products. There were no powers in the treaty to introduce EU legislation for the specific purpose of protecting animals. Thus, any measures to protect animals were secondary to the primary purpose of the legislation. Since the mid-1970s, the EU has passed specific legislation on animal welfare. It

[302] Charlotte Blattner "Beyond the Goods/Resources Dichotomy: Animal Labor and Trade Law" (2019) Journal of International Wildlife Law & Policy, 22 (2).
[303] France, New Zealand and the Canadian province of Quebec all explicitly recognised animal sentience in their laws in 2015.
[304] The European Union (EU) was created in 1993, therefore, legislation prior to this date is European Community (EC). As this is a chronological account, the EU may also be referred to in place of the EC.

was not until the birth of the modern European Union in 1993 that a decade of significant animal welfare reform commenced. Much of this reform focused on the setting of minimum welfare standards for the major classes of farm animals. Importantly, it regulated the keeping of animals, the transporting of animals to slaughter and the killing of animals.[305] The EU has recognised animal sentience firstly in the Treaty of Amsterdam and again in the Treaty of Lisbon. This recognition was instrumental in paving the way for the development of EU legislation to protect animal welfare.[306] This legislation is founded on scientific evidence.[307] Scientific research and advice about animal welfare and data from investigations of public opinion are of importance for the creation of legislation on animal welfare and policies in the EU.[308]

Furthermore, the role of the European Food Safety Authority (EFSA) is vital to provide scientific information.[309] The EFSA was established and funded by the European Community in 2002, as an independent source of scientific opinion on food and feed safety, including the welfare of food-producing animals to evaluate what is essential for creating efficient laws for improving animal welfare standards.[310] A large part of the EFSA's work is undertaken in response to specific requests from the European Commission, the European Parliament and the European Member States for scientific advice.[311]

Broom has noted that "about 65% of animals kept by man are protected by EU law, during normal living conditions, and 35%, perhaps 300 million, are not."[312] Furthermore, while the

[305] Nicholas K Pedersen "Detailed Discussion of European Animal Welfare Laws 2003 to Present: Explaining the Downturn" (2009) The Animal Legal and Historical Center available at https://www.animallaw.info/article/detailed-discussion-european-animal-welfare-laws-2003-present-explaining-downturn accessed 5/3/16.

[306] Paola Sabbrio "The relationship between humans and other animals in European animal welfare legislation" Relations (2013) 1 (1) 33.

[307] See The European Food Safety Authority (EFSA) website (n294) also Etienne Bonbon (n300) 2.

[308] Donald Broom "Animal Welfare in the European Union" (2017) European Parliament Policy Department, Citizen's Rights and Constitutional Affairs, Study for the PETI Committee, Policy Department: Citizens' Rights and Constitutional Affairs available at https://publications.europa.eu/en/publication-detail/-/publication/ad71de8e-aef9-11e7-837e-01aa75ed71a1/language-en accessed 31/10/17 9.

[309] Rex Horgan and Andrea Gavinelli "The expanding role of animal welfare within EU legislation and beyond" (2006) Livestock Science 103 30.

[310] See EFSA website (n294) and see Andrea Gavinelli and Nelly Lakestani (n297) 3.

[311] *Ibid.*

[312] Donald Broom (n308) 56 Many animals not protected under EU laws. For example, farmed trout, salmon, rabbits, ducks, turkeys, cattle and sheep and pet fish, dogs and cats are not protected under the Directive 98/58 see European Parliament 2017 report available at https://www.europarl.europa.eu/RegData/etudes/STUD/2017/583114/IPOL_STU(2017)583114_EN.pdf.

EU focuses on welfarism, the same issue is present – the evidence available is not given due regard.

3.1.1 Early events and legislation

The first known animal protection legislation was passed in Ireland in 1635 – "An Act against plowing by the tayle and pulling the wooll off living sheep." This was an Act of the Parliament of Ireland which aimed to prevent Irish farming practices deemed to be unnecessarily cruel to horses and sheep. The "Cruel Treatment of Cattle Act 1822"[313] was the first piece of legislation specifically intended to prevent cruelty to animals.[314] The British Parliament passed this Act and following from the introduction of this Act, MP Richard Martin was among the founders of the world's first animal welfare organisation two years later in 1824. The Society for the Prevention of Cruelty to Animals, which offered protection from cruelty to cattle, horses, and sheep, was established. This Act applied to food-producing and labour animals and stated that if any person or persons "shall wantonly and cruelly beat, abuse, or ill-treat any horse, mare, gelding, mule, ass, ox, cow, heifer, steer, sheep, or other cattle" they would be fined between five pounds, and ten shillings. Failure to pay the fine would result in a prison sentence of up to three months.[315]

Towards the end of the 19th century, scientists and philosophers had developed a sophisticated concept of sentience.[316] However, little consideration was given to sentience by scientists through much of the 20th century due to the negative influence of behaviourism. John Watson established the School of Behaviourism, and this halted any development in this area.[317] Its theoretical goal is the prediction and control of behaviour. Behaviourism refers to a psychological approach which emphasises scientific and objective methods of investigation. The approach is only concerned with observable stimulus-response behaviours, and states all behaviours are learned through interaction with the environment. This had a huge effect on the way that behavioural scientists thought about the mind, consciousness, and feelings. Under the cover of this theoretical frame, some researchers denied the existence of animal

[313] Also known as An Act to Prevent the Cruel and Improper Treatment of Cattle or Martin's Act.
[314] Mike Radford *Animal Welfare Law in Britain* (OUP 2001) 38.
[315] An Act to Prevent the Cruel and Improper Treatment of Cattle 1822.
[316] Ian Duncan "The changing concept of sentience" (2006) Applied Animal Behaviour Science 13-14.
[317] *Ibid.*

"consciousness" or "sensitivity" and developed experiments in which animals were used as living models to understand the basic components of the human psyche.

It was not until the second part of the 20th century that there was a growth in interest in animal sentience. Animal welfare scientists quickly realised that welfare problems could be better tackled with an understanding of how animals feel.[318] Behavioural scientists gradually accepted the importance of feelings in their investigations into animal welfare problems. Public awareness campaigns informing against the poor conditions of animals appeared in the mid-sixties. The most noticeable one happened in England with the publication of the book *Animal Machines* by Ruth Harrison in 1964.[319] The book was said to have exposed the whole reality of intensive farming. She also called for respect for animals and that they should be considered as sentient beings and, as such, should deserve much better treatment. The large uproar triggered by this testimony led the British government to set up a committee to study the area.

In 1965, the committee, chaired by Professor Roger Brambell was formed to conduct hearings and acknowledged that sentience was important. They presented the 85-page "Report of the Technical Committee to Enquire into the Welfare of Animals Kept under Intensive Livestock Husbandry Systems" which became known as "The Brambell Report." This report described the general principles for the care and use of farm animals. They stated:

> Welfare is a wide term that embraces both the physical and mental well-being of the animal. Any attempt to evaluate welfare, therefore, must take into account the scientific evidence available concerning the feelings of animals that can be derived from their structure and functions and also from their behaviour.[320]

The committee realised that an understanding of sentience is an essential part of assessing welfare. When discussing the confinement of animals, the emphasis was put on the

[318] Ian Duncan (n316)11.
[319] Ruth Harrison *Animal Machines* (Ballantine Books 1964) Furthermore, the publication of Marian Dawkins' book *Animal Suffering* in the 1980s on how to recognise animal suffering triggered behavioural scientists to gradually accepted the importance of feelings in their investigations into animal welfare problems. There was a progression from a position in which feelings were a necessary component of welfare to one in which feelings are the only thing that matters.
[320] Command Paper (1965).

behavioural needs of animals: “in principle, we disapprove of a degree of confinement of an animal.” The core principle for animal care was expressed as the “Five Freedoms”.

1. Freedom from hunger and thirst,
2. Freedom from pain, injury, and disease,
3. Freedom from discomfort,
4. Freedom from fear and distress,
5. Freedom to express normal behaviour.

The Five Freedoms have been very influential in shaping EU animal laws and while they have resulted in an improvement in the lives of animals within the EU, it is argued that the freedoms need to be updated as they focus on negative states rather than positive.[321] This point will be discussed further in this chapter.

The next section will set out the historical development of EU legislation by providing a chronological account of EU directives and regulations relating to animal welfare from 1974 to the present day. This section will trace the development of the protection in place for animals.

3.1.2 EU directives and regulations

Most of the EU laws concerning animals are directives.[322] According to the Treaty on the Functioning of the European Union, “A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.” It is, therefore, left to each Member State to decide on the kind of legislative instrument it employs and what language it uses, provided that it is both binding and the directive is achieved. Some EU laws on animals are in the form of regulations. An EU regulation is “binding in its entirety”[323] and therefore does not allow for any choice in form or language.

[321] David J Mellor “Moving beyond the “Five Freedoms” by Updating the “Five Provisions” and Introducing Aligned “Animal Welfare Aims” (2016) Animas (Basel) 6 (10).
[322] Compassion in World Farming https://www.ciwf.org.uk/media/3818623/eu-law-on-the-welfare-of-farm-animals.pdf 4 accessed 1/10/19.
[323] *Ibid.*

3.1.2.1 The 1970s

The first EU legislation addressing animal welfare was introduced in 1974 and focused on the stunning of animals before slaughter. This directive addressed concerns about the lack of standards of welfare for animals. It stated that the European Economic Community (EEC) should take action to avoid in general, all forms of cruelty to animals and conditions should be developed to avoid all unnecessary suffering on the part of animals when being slaughtered.[324] The recitals of this directive indicate the importance that was attached to animal welfare and the prevention of unnecessary suffering.[325] This preoccupation of reducing unnecessary suffering in animals has now become prominent in the legislative instruments, with several other legislative documents produced since.

A directive[326] concerning cosmetic products came into force in 1976. This directive related to cosmetic products and did not initially address animal welfare, but it was later amended to include a ban putting an end to testing cosmetic products on animals.[327] In 1977 legislation[328] on the protection of animals during international transport was introduced. The preamble of this directive referred to the European Convention for the Protection of Animals During International Transport with the proviso that animal protection should not affect the functioning of the common market demonstrating that while there is a consideration for animal welfare, this is secondary to the effective functioning of the common market. This is a contentious issue that is still in existence today.

Approval[329] of the European Convention for the Protection of Animals kept for Farming Purposes was adopted in 1978. However, while the convention aims to preserve the well-being of animals, the council decision clearly highlights that the protection of animals is not in itself one of the objectives of the EEC. The main focus is the regulation of trade, with some

[324] Council Directive 74/577/EEC of 18 November 1974 on stunning of animals before slaughter Official Journal L 316, 26/11/1974.
[325] Rex Hogan (n309) 304.
[326] Council Directive 76/768/EEC of 27 July 1976 on the approximation of the laws of the Member States relating to cosmetic products. *OJEC* L262 of 1976-09-27, 169–200.
[327] Regulation (EC) No 1223/2009 of the European Parliament and of the Council of 30 November 2009 on cosmetic products, 59-209.
[328] Council Directive 77/489/EEC of 18 July 1977 on the protection of animals during international transport *OJ L 200, 8.8.1977,* 10–16.
[329] Council Decision 78/923/EEC of 19 June 1978 concerning the conclusion of the European Convention for the protection of animals kept for farming purposes *OJ L 323, 17.11.1978,* 12–13.

consideration of animal welfare. A year later, legislation[330] was introduced, which deals with the conservation of wild birds. This directive and its amending acts aimed at providing long-term protection and conservation of all bird species naturally living in the wild within the European territory of the Member States (except Greenland). This directive was adopted unanimously by the Member States in 1979 as a response to increasing concerns about the decline in Europe's wild bird population resulting from pollution, loss of habitats as well as unsustainable use of the habitats. It recognised that wild birds, many of which are migratory, are a shared heritage of the Member States and that their effective conservation required international cooperation.[331] It established a general scheme for the protection of all bird species. The directive prohibits deliberately killing or capturing any bird species covered by the directive.

3.1.2.2 The 1980s

The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) was implemented into the Community[332] in 1982. The convention aims to ensure that international trade in specimens of wild animals and plants does not threaten their survival. The EU Wildlife Trade Regulations not only implement the provisions of CITES and the majority of CITES Resolutions, but they also go beyond the requirements of the convention in some respects by imposing additional conditions. For example, the EU regulations establish stricter import conditions than those imposed by CITES. Import permits are not only required for species listed in Annex A but also for species listed in Annex B.[333] While the EU did include further conditions, these regulations can be noted as a missed opportunity as there was a failure to include animal protection measures.

[330] Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds. *OJ L 103, 25.4.1979, 1–18.*

[331] See Judgment of the Court of Justice of the European Union in Case C 418/04 Commission v Ireland available at https://www.npws.ie/sites/default/files/files/Birds%20Case%20PoM%20(June%202016).pdf accessed 2/6/19.

[332] Council Regulation (EEC) No 3626/82 of 3 December 1982 on the implementation in the Community of the Convention on International Trade in Endangered Species of Wild Fauna and Flora *OJ L 384, 31.12.1982, 1–61.*

[333] See http://ec.europa.eu/environment/cites/legislation_en.htm accessed 01/5/19 also see https://ec.europa.eu/environment/cites/pdf/trade_regulations/short_ref_guide.pdf 13 accessed 15/11/19.

In 1983 rules[334] were introduced on the importation into Member States of skins of certain seal pups and products derived therefrom. The rationale for this directive was due to unease on the population status of harp and hooded seals and especially as to the effect of non-traditional hunting on the conservation and population status of hooded seals. This ban was initially in operation until October 1985. However, an extension[335] was implemented in September 1985 – thereby extending the validity of the directive until October 1989.

To stem the spread of foot-and-mouth disease, the EU passed a directive[336] in 1985, banning the use of preventative vaccinations and mandated compulsory slaughter of any susceptible animals. Given the stipulation of mandatory slaughter, this directive was later subject to a European Court of Justice ruling in 2001.[337] When instituting the policy of non-vaccination, the Council carried out a global assessment of the advantages and drawbacks of the system to be established and that policy, corresponding to the recommendations of the International Office of Epizootics and the practice followed by numerous countries worldwide.[338]

The first rules on animals kept on farms were introduced in 1986[339] and concerned the protection of laying hens. This made positive improvements, such as regulating the size of cages.[340] This directive was, however, declared void by the European Court of Justice because the preamble and the text of the directive partly differed and was later replaced in 1988.[341] A commitment was also made to pursue efforts to replace animals used in experiments as well as to improve the welfare of those still being used. This led to the adoption of protection of

[334] Council Directive 83/129/EEC of 28 March 1983 concerning the importation into Member States of skins of certain seal pups and products derived therefrom
OJ L 91, 9.4.1983, 30–31.
[335] Council Directive 85/444/EEC of 27 September 1985 amending Council Directive 83/129/EEC concerning the importation into Member States of skins of certain seal pups and products derived therefrom *OJ L 259, 1.10.1985, 70–70.*
[336] Council Directive 85/511/EEC of 18 November 1985 introducing Community measures for the control of foot- and-mouth disease *OJ L 315, 26.11.1985, 11–18.*
[337] This case will be discussed later in this chapter.
[338] See paras 82, 84, 95-96, 100.
[339] Council Directive 86/113/EEC of 25 March 1986 laying down minimum standards for the protection of laying hens kept in battery cages *OJ L 95, 10.4.1986, 45–48.*
[340] Article 3 of Directives 86/113/EEC.
341 Council Directive 88/166/EEC of 7 March 1988 complying with the judgment of the Court of Justice in Case 131/86 (annulment of Council Directive 86/1 see also Yumiko Nakanishi *Contemporary Issues in Environmental Law: The EU and Japan* (Springer 2016) 90.

animals used for experimental and other scientific purposes.[342] This was one of the first examples of common legislation to set standards for animal protection across the Member States to secure a level European playing field regulating the use of animals in research. It included measures related to the use of experimental animals such as housing and care, requirements for the authorisation of persons and establishments and the minimisation of pain, suffering and distress.[343] This represented a major improvement in the protection offered to animals and significantly an aim to replace the use of animals used in experimentation.

A number of further measures were introduced to improve the conditions of farm animals in 1988. At this time, concern was growing about the increasing spread of factory farming.[344] Legislation on the minimum standards for the protection of laying hens kept in battery cages[345] and a Council Decision[346] came into effect which approved the convention for the Protection of Animals for Slaughter. The primary purpose of the convention is to help harmonise methods of slaughter in Europe and make them more humane. It imposes a number of obligations concerning the treatment of animals in slaughterhouses and stipulates that all animals must be stunned before being bled, with some exceptions including ritual slaughter, a tension which still exists today.[347] For meat to be considered kosher under Jewish law or halal under Islamic law, the animal must be conscious when killed. Most countries and the European Union allow religious exceptions to the stunning requirement, however, some countries do not provide for any exceptions. In 2014, Denmark's government brought in a ban

[342] Council Directive 86/609/EEC of 24 November 1986 on the approximation of laws, regulations and administrative provisions of the Member States regarding the protection of animals used for experimental and other scientific purposes *OJ L 358, 18.12.1986. 1–28.*

[343] Anna S Olsson, Sandra Pinto da Silva, David Townend, and Peter Sandøe "Protecting Animals and Enabling Research in the European Union: An Overview of Development and Implementation of Directive 2010/63/EU" (2016) ILAR Journal 57 (3) 347.

[344] Ruth Harrison *Animals as Machines* and Peter Singer's *Animal Liberation* both exposed the welfare issues with factory farming and had become influential at this time. Concerns were also present given the BSE outbreak see https://www.theguardian.com/uk/2000/oct/26/bse3 accessed 02/10/19.

[345] Council Directive 88/166/EEC of 7 March 1988 complying with the judgment of the Court of Justice in Case 131/86 (annulment of Council Directive 86/113/EEC of 25 March 1986 laying down minimum standards for the protection of laying hens kept in battery cages) *OJ L 74, 19.3.1988, 83–87.*

[346] See Council of Europe European Convention for the Protection of Animals for Slaughter available at https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/102 9.

[347] For instance, Denmark has banned halal slaughter on the grounds that animal protection must come first see https://www.independent.co.uk/news/world/europe/denmark-bans-halal-and-kosher-slaughter-as-minister-says-animal-rights-come-before-religion-9135580.html accessed 11/10/19 and see Council Decision 88/306/EEC of 16 May 1988 on the conclusion of the European Convention for the Protection of Animals for Slaughter *OJ L 137, 2.6.1988, 25–26*.

on the religious slaughter of animals for the production of halal and kosher meat.[348] The Danish Minister for Food, Agriculture and Fisheries signed a regulation which banned the ritual slaughter of animals without prior stunning. The then Minister for Agriculture and Food Dan Jørgensen stated that "animal rights come before religion."[349] However, the ban does not have much practical impact for Denmark's Jews and Muslims as the last Danish slaughterhouse willing to forgo stunning before slaughter shut down in 2004.[350]

Work on alternative housing systems to improve the welfare of laying hens resulted in a directive[351] providing minimum standards for protecting the welfare of laying hens housed in battery cages in 1988.[352] This is a trend that continues over the years due to concerns regarding the limited size of cages. Furthermore, in 1989 an indefinite ban[353] on the commercial import of skins of harp seal pups and hooded seal pups and products derived therefrom was introduced due to increasing doubts with regard to the effects of hunting on the conservation of harp seals. Exceptions were put in place for products resulting from traditional hunting by the Inuit people to provide a balance between the competing interests. The EU has approved Inuit sustainable hunting and production; therefore, sealskins from traditional hunting by the Inuit people can be traded legally, provided they are accompanied by an authorised certificate.

In conclusion, while a number of directives and regulations were introduced, the 1980s missed an opportunity to bring legislation into line with the contemporary theory and evidence regarding animal abilities and interests and their ability to suffer. For example, concern was growing about the increasing spread of factory farming during this time,

[348] Denmark is not the first country to invoke a stun first rule: Sweden and Norway have had similar bans.
[349] See "Denmark bans kosher and halal slaughter as minister says 'animal rights come before religion' "available at https://www.independent.co.uk/news/world/europe/denmark-bans-halal-and-kosher-slaughter-as-minister-says-animal-rights-come-before-religion-9135580.html accessed 12/1/20.
[350] See "Banning Traditional Animal Slaughter" available at https://www.npr.org/sections/thesalt/2014/04/09/291887381/banning-traditional-animal-slaughter-denmark-stokes-religous-ire?t=1580582330657 accessed 12/01/20.
[351] Council Directive 88/166/EEC of 7 March 1988 complying with the judgment of the Court of Justice in Case 131/86 (annulment of Council Directive 86/113/EEC of 25 March 1986 laying down minimum standards for the protection of laying hens kept in battery cages) *OJ L 74, 19.3.1988, 83–87.*
[352] Michael C. Appleby "The EU Ban on Battery Cages: History and Prospects" (2003) The Humane Society Institute for Science and Policy Animal Studies Repository 162.
[353] Council Directive 89/370/EEC of 8 June 1989 amending Directive 83/129/EEC concerning the importation into Member States of skins of certain seal pups and products derived therefrom *OJ L 163, 14.6.1989, 37–37.* amending Council Directive 83/129/EEC.

however, minimum welfare standards were introduced rather than an attempt to protect animals in a meaningful way in this growing industrialised industry.

3.1.2.3 The 1990s

Measures[354] were adopted in 1990 concerning veterinary and zootechnical[355] checks applicable in intra-Community trade in certain live animals and products. This obliged Member States to ensure that veterinary checks are carried out on live animals and products which apply to this directive. This legislation is, however, mostly concerned with trade and not animal welfare per se, ignoring animal welfare science and contemporary animal rights theory regarding the treatment of animals and their sentient and moral abilities.

Moreover, several laws were introduced in 1991,[356] which laid down principles governing the organisation of veterinary checks on animals entering the Community from third countries on disease prevention grounds. Minimum standards for the protection of calves were also addressed in 1991.[357] Prior to any legislative intervention, a report was issued in 1988 making a recommendation concerning the welfare of cattle from the Council of Europe Standing Committee on the Protection of Animals Kept for Farming Purposes, which stated that cattle should be able to make all normal movements for grooming, exercise and other behaviours.[358]

Additionally, reforms[359] providing minimum standards for the protection of pigs were introduced, which created minimum floor-size requirements for all rearing pigs.[360] The use of

[354] Council Directive 90/425/EEC of 26 June 1990 concerning veterinary and zootechnical checks applicable in intra- Community trade in certain live animals and products with a view to the completion of the internal market *OJ L 224, 18.8.1990, 29–41.*

[355] Zootechnics is the art of managing domestic or captive animals, including handling, breeding, and keeping.

[356] Council Directive 91/496/EEC of 15 July 1991 laying down the principles governing the organization of veterinary checks on animals entering the Community from third countries and amending Directives 89/662/EEC, 90/425/EEC and 90/675/EEC *OJ L 268, 24.9.1991, 56–68.*

[357] Council Directive 91/629/EEC of 19 November 1991 laying down minimum standards for the protection of calves *OJ L 340, 11.12.1991, 28–32.*

[358] Donald Broom "International Perspectives on Animal Welfare Science and Policy Including Whale Welfare and the E.U. Seal Product Ban: Animal Welfare as a W.T.O. Public Morality Issue" in *Animal Law and Welfare – International Perspectives* Chapter 3 (Springer 2016).

[359] Council Directive 91/630/EEC of 19 November 1991 laying down minimum standards for the protection of pigs *OJ L 340, 11.12.1991, 33–38.*

[360] *Ibid.*

leghold traps[361] was prohibited and as were the use of pelts and manufactured goods of certain wild animal species originating in countries which catch them by means of leghold traps or by using trapping methods which do not meet international humane trapping standards. However, the ethics of trapping of animals were not questioned, only the methods used. Furthermore, a directive[362] on the protection of animals during transport was introduced. It stipulated that animals must not be transported unless they are fit for the intended journey and suitable provisions are in place for their care during the journey and on arrival at the place of destination. It also states that animals that are injured or ill must not be transported.[363] However, this provision shall not apply to animals that are slightly injured or ill whose transport would not cause unnecessary suffering or animals that are transported for scientific research purposes approved by the competent authority.[364] However, the ethics of live transport and the significant harm this causes to animals was not discussed despite the evidence of the pain and suffering experienced by animals. Further reform[365] was also adopted in 1991 setting minimum welfare standards for veal calves; the reform prohibited the use of tethers and required new veal housing units to allow space for turning around following arguments from the European Parliament and its Agriculture Committee against the cruelty of the current methods of rearing and fattening of calves[366] and a proposal from the European Commission to phase out veal crates.[367]

Further legislation was introduced in 1992 on the conservation of natural habitats and of wild fauna and flora.[368] The aim pursued by this directive is to ensure biodiversity through the conservation of natural habitats and of wild fauna and flora in the territories of the Member States. It seeks to protect the conservation of a wide range of rare, threatened or endemic

[361] Council Regulation (EEC) No 3254/91 of 4 November 1991 prohibiting the use of leghold traps in the Community and the introduction into the Community of pelts and manufactured goods of certain wild animal species originating in countries which catch them by means of leghold traps or trapping methods which do not meet international humane trapping standards *OJ L 308, 9.11.1991, 1–4.*
[362] Council Directive of 19 November 1991 on the protection of animals during transport and amending Directives 90/425/EEC and 91/496/EEC *OJ L 340, 11.12.1991, 17–27.*
[363] Article 3 1 (a).
[364] Article 3 1 (b).
[365] Council Directive 91/629/EEC of 19 November 1991 laying down minimum standards for the protection of calves *OJ L 340, 11.12.1991, 28–32.*
[366] *Ibid* Article 3(3).
[367] Carol McKenna "The Case Against the Veal Crate" (2001) available at https://www.ciwf.org.uk/media/3818635/case-against-the-veal-crate.pdf 6.
[368] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora *OJ L 206, 22.7.1992, 7–50.*

animal and plant species. This directive has been examined regarding Finland and the hunting of wolves.[369] According to the Habitats Directive, the wolf is a strictly protected species, and all forms of deliberate capture or killing of wolves in the wild are prohibited. Derogations under the Habitats Directive mean that permits to hunt wolves can be granted by Member States under certain exceptional and specific conditions, such as to prevent severe damage to livestock when no other satisfactory alternatives are possible. The directive stipulates that such permits should not have a significant negative impact on the conservation status of the wolf population. It is argued that hunters have been taking advantage of this provision to promote hunting, such as the case in Finland. In 2019, the CJEU held that Finland had failed to scientifically demonstrate that hunting reduces poaching to such an extent that it has a favourable impact on the conservation of wolves. Significantly in the CJEU's opinion, it states the provisions of the Habitats Directive must be interpreted with consideration to the precautionary principle in Article 191(2) TFEU. Therefore, if after examining the best scientific data available, significant doubt remains as to whether a derogation will have a negative impact on conservation status, then permits should not be granted placing emphasis on the protection of nature, conservation and the environment.[370]

Animal health requirements for dogs, cats and ferrets being moved between or into Member States for commercial purposes[371] was established in 1992. This directive also applies to the movement of animals for re-homing purposes.

3.1.2.3.1 The Declaration on the Protection of Animals

Most significantly in 1992, the Declaration on the Protection of Animals was annexed to the Maastricht Treaty. While this was a welcomed development, it was not integrated into the provisions of the treaty, which does reduce its importance. This required the European

[369] Case C – 674/17 (n370).

[370] See Case C – 674/17 available at http://curia.europa.eu/juris/document/document.jsf?text=&docid=213873&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=2113461 accessed 21/5/419 and see also "European Union Court of Justice Questions Wolf Hunting Permits Granted In Finland"(2019) available at https://www.eurogroupforanimals.org/european-union-court-of-justice-questions-wolf-hunting-permits-granted-in-finland?fbclid=IwAR0Eb-P483UGW6fQOtWJ0LzsH5Jkz2tfMtgoGS0ZjGv_tZc8329cG4DEKos accessed 21/5/19.

[371] Council Directive 92/65/EEC of 13 July 1992 laying down animal health requirements governing trade in and imports into the Community of animals, semen, ova and embryos not subject to animal health requirements laid down in specific Community rules referred to in Annex A (I) to Directive 90/425/EEC *OJ L 268, 14.9.1992, 54–72*

Institutions to take account of animal welfare when considering legislation in the areas of research, transport, agriculture and the internal market. This declaration was developed due to some Member State proposals listing the protection of farm and laboratory animals as treaty objectives.[372] Legal commentators have noted that this was nothing more than a political gesture with the declaration having no direct or little indirect legal effect and did not refer to the welfare requirements of animals.[373] This was a missed opportunity for EU law to align with the scientific evidence and theory on animal abilities and their interests.

Reform in the area of animal slaughter came about in 1993[374] replacing its predecessor.[375] This directive aimed to create a balance between the human right to practice a religion and animal protection. According to this new reform, Member States retain the right to authorise religious slaughter without pre-stunning in their territory in order to respect religious freedom. Thus, the directive leaves responsibility regarding religious slaughtering rules to the religious authority but places the responsibility for the enforcement of its general legal requirements on the competent authority. It further requires that animals slaughtered in accordance with religious rites shall be spared any avoidable suffering, pain or excitement during all stages of the slaughter process and that an adequate mechanical device for restraining should be used to prevent injury when the animal is killed.[376]

In 1995 a new directive[377] was introduced on the transport of live animals and applied to all animals transported for commercial purposes. This amended the previous directive[378] and led to the introduction of several changes. The changes included that transporters of animals were made responsible for implementing the main provisions of the directive and they had

[372] Rasso Ludwig and Roderic O'Gorman, "A Cock and Bull Story? – Problems with The Protection of Animal Welfare in EU Law and Some Proposed Solutions" (2008) Journal of Environmental Law 20 (3) 368.
[373] Tara Camm and David Bowles "Animal Welfare and the Treaty of Rome – A Legal Analysis of the Protocol on Animal Welfare and Welfare Standards in the European Union" (2000) Journal of Environmental Law Vol 12 (2) 198.
[374] Council Directive 93/119/EC of 22 December 1993 on the protection of animals at the time of slaughter or killing *OJ L 340, 31.12.1993, 21–34.*
[375]Council Directive 74/577/EC of 18 November 1974 on stunning of animals before slaughter *OJ L 316, 26.11.1974, 10–11.*

[376] Servière Jacques "Science and animal welfare in France and European Union: Rules, constraints, achievements" Meat Science 98 (2014) 488.
[377] Council Directive 95/29/EC of 29 June 1995 amending Directive 91/628/EEC concerning the protection of animals during transport *OJ L 148, 30.6.1995, 52–6.3*
[378] Council Directive 91/628/EEC on the protection of animals during transport and amending Directives 90/425/EEC and 91/496/EEC *OJ L 340, 11.12.1991, 17–27.*

to be approved by competent authorities in the Member States. Furthermore, loading densities were set for farm animals, journeys exceeding eight hours must be planned in accordance with specific requirements of the directive. A specific procedure, the "route plan", was introduced to impose proper planning and to help verify the correct execution of long-distance journeys. This legislation was based on a scientific report adopted in 1992[379] and included an obligation for the Commission to submit a report to the Council on the experience acquired by the Member States since the implementation of the directive.[380] This legislation was later replaced.

There were some very significant improvements in animal protection in 1997. The first key EU directive relating to housing conditions of farmed animals was introduced. The EFSA has noted that group-reared calves with a diet of sufficient roughage and iron have much better welfare than calves in crates with a poor diet.[381] Therefore, legislation[382] phasing out the use of veal crates and inadequate diets for calves was introduced, which amended the previous 1991 directive. Furthermore, a new regulation[383] was adopted, which protects species of wild fauna and flora by regulating trade. It lays down the provisions for import, export and re-export as well as internal EU trade in the species listed in its four annexes. Reform[384] on the protection of animals during transport was also introduced in 1997. This regulation specifies locations (staging points) in which unloaded animals are kept for resting and supplied with feed and water and amended the route plan referred to in the Annex to the 1991 directive.[385] This directive was later updated and was also subject to a CJEU ruling which questioned the applicability of EU rules in non-EU countries by holding that EU rules must be complied with during transport outside of EU jurisdiction.[386] This change in view was reflective of Article 13 now being incorporated into the treaty. The court concluded that the regulation is grounded

[379] Andrea Gavinelli and Denis Simonin "The Transport of Animals in the European Union: The Legislation, its Enforcement and Future Evolutions" (2003) Veterinary Research Communications, 27 Suppl 533.
[380] Annamaria Passantino "Animal welfare and protection during transport: the current legislative framework in European Union" (2006) Ann Ist Super Sanità 42 222.
[381] See EFSA website (n294) and also Donald Broom (n308) 31 for discussion.
[382] Council Directive 97/2/EC of 20 January 1997 amending Directive 91/629/EEC laying down minimum standards for the protection of calves *OJ L 25, 28.1.1997, 24–25.*
[383] Council Regulation (EC) No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein *OJ L 61, 3.3.1997, 1–69.*
[384] Council Regulation (EC) No 1255/97 of 25 June 1997 concerning Community criteria for staging points and amending the route plan referred to in the Annex to Directive 91/628/EEC *OJ L 174, 2.7.1997, 1–6.*
[385] Directive 91/628/EEC (n378).
[386] This CJEU ruling be discussed later in this chapter.

in Article 13, which provides that animals are sentient beings and that their welfare should be considered in the formulation and implementation of agricultural policies. While this decision can be viewed as positive, it does highlight a fundamental concern. As sentient and moral beings - should they be subject to this treatment at all? A rights-approach to this issue would significantly improve this situation for animals.

Following on from the above regulation, additional standards to provide more detailed rules applicable to road vehicles used for the carriage of livestock on journeys exceeding eight hours were defined in a new Council regulation[387] in 1998 highlighting the increase in animal transportation. This regulation refers to minimal requirements for bedding material, feeding, accessibility, ventilation, partitions and water supply.[388]

Additionally, in 1998 the scope of protection for farm animals was extended.[389] EU rules regarding the protection of animals kept for farming purposes were amended to include fish, amphibians and reptiles.[390] Unlike much of the prior legislation of the 1990s, this directive did not target a specific species of farm animal like hens or veal calves. Instead, it set out general rules for the protection of animals of all species kept for producing food, clothing, or other agricultural purposes. However, Broom has noted that this directive has offered little protection to animals; this is due to the fact that some animals such as ducks are not protected under this directive.[391]Significantly, this directive does not pay regard to the abilities of animals as the focus is on their usefulness as products.

Furthermore, this directive is meant to treat animals according to their physiological and psychological needs.[392] However, it is questionable how animals can be free from distress and can express normal behaviour when they are held in enclosures.[393] Additionally, Article 3 of the directive provides that Member States must ensure animals are not caused "unnecessary"

[387] Council Regulation (EC) No 411/98 of 16 February 1998 on additional animal protection standards applicable to road vehicles used for the carriage of livestock on journeys exceeding eight hours *OJ L 52, 21.2.1998, 8–11.*
[388] Annamaria Passantino (n380) 225.
[389] Council Directive 98/58/EC of 20 July 1998 concerning the protection of animals kept for farming purposes *OJ L 221, 8.8.1998, p. 23–27* amending Council Decision 78/923/EEC.
[390] See https://ec.europa.eu/food/sites/food/files/animals/docs/aw_arch_122010_full_ev_report_en.pdf 17.
[391] Animals not protected are farmed trout, salmon, rabbits, ducks, turkeys, cattle and sheep and pet fish, dogs and cats see European Parliament 2017 report available at https://www.europarl.europa.eu/RegData/etudes/STUD/2017/583114/IPOL_STU(2017)583114_EN.pdf.
[392] Rex Hogan (n309) 304.
[393] Paola Sabbrio (n306) 36.

suffering. However, "unnecessary" is not defined.[394] Moreover, it is stated in the annex that "No animal shall be kept for farming purposes unless it can reasonably be expected, on the basis of its genotype[395] or phenotype,[396] that it can be kept without detrimental effect on its health or welfare.[397] It is therefore questionable how an industrial, intensive, factory farming environment does not have a detrimental effect on an animal's health or welfare.[398] Broom has also noted this directive follows the more old-fashioned wording of the 1976 Council of Europe Convention for the Protection of Animals Kept for Farming[399] which was written before most developments in animal welfare science. For example, it is said that owners and keepers should "ensure the welfare of animals under their care."[400] Broom contends that this does not take account of the widely held concept of animal welfare as varying from very good to very poor.[401]

This directive is based on the Five Freedoms[402] and therefore, neglects to cover the species-specific behavioural needs of animals in any comprehensive manner. For instance, the benchmark assumes that the freedom to express "normal behaviour" is safeguarded by providing, inter alia, sufficient space and proper facilities. This understanding does not capture the breadth and depth of current knowledge of the range of provisions required for animals to experience positive states. Basing the development and success of EU animal welfare policy on this benchmark may, therefore, render the EU legal framework inconsistent with animal welfare science. Moreover, while the Five Freedoms are well respected, they focus on negative aspects of welfare, for instance, "Freedom from." Broom has noted that the general idea of the Five Freedoms is not precise enough to be used as a basis for assessing the welfare of animals.[403] The behavioural needs of animals are often overlooked due to the economic nature of the measures, favouring animals' status as goods rather than as sentient

[394] Paola Sabbrio (n306) 38.
[395] An organism's genotype is the set of genes that it carries.
[396] An organism's phenotype is all its observable characteristics — which are influenced both by its genotype and by the environment.
[397] Council Directive 98/58/EC annex point 21 also see Paola Sabbrio (n306) 39.
[398] Paola Sabbrio (n306) 39 36.
[399] Donald Broom (n308) 16.
[400] Article 3.
[401] Donald Broom (n308) 16.
[402] The idea of providing for "the Five Freedoms" was first suggested in the Brambell Report in 1965. This report described the general principles for the care and use of farm animals.
[403] Donald Broom (n308) see David J. Mellor "Moving beyond the "Five Freedoms" by Updating the "Five Provisions" and Introducing Aligned "Animal Welfare Aims" (2016) Animas (Basel) 6 (10).

beings; ensuring that animals remain alive, grow and that their productivity is maintained.[404] The general expectation seems to be that providing adequate resources such as food and accommodation is sufficient to safeguard animal welfare, which is not reflective of our best science.[405]

The Zoo Directive[406] was introduced in 1999, which constitutes an essential piece of EU legislation for the management of wild animals in captivity by establishing a compulsory licensing system of zoo facilities in all Member States. In 1988, a report prepared for the European Commission, which studied the conditions in zoos and their legal framework in the different EU Member States, found "a considerable number that met none of the accepted minimums and could best be described as 'animal slums'." This study was part-funded by the European Community and identified more than 1,000 zoos in the EU Member States. The study revealed widespread animal welfare concerns.[407] The report and its findings led to the European Commission's proposal for a draft Council Zoo Directive. It aims to ensure that the keeping of animals in zoos throughout the EU is done in such a way that the conservation of wild species is preserved, and animal welfare is respected as much as possible. However, when the directive has been transposed into national legislation, it has been interpreted differently by each Member State, resulting in a lack of consistency and varying standards across the EU. In 2015, the Commission developed the EU Zoos Directive Good Practices Document to clarify further and detail the directive's provisions.[408] However, this document has never been translated into Member States languages and has been ignored by most national management authorities.[409] A European Commission evaluation report published in 2018 notes that a more effective and efficient application of the directive's requirements is

[404] See Recital 12 of Directive 2008/120/EC for the protection of pigs: "a balance should be kept between various aspects to be taken into consideration, as regarding welfare, including health, economic and social considerations and also environmental impact".
[405] Whether the Five Freedoms are sufficient as a framework for the analysis of animal welfare is open to question given the progressive nature of science. See David J Mellor (n403).
[406] Council Directive 1999/22/EC of 29 March 1999 on the keeping of wild animals in zoos *OJ L 94, 9.4.1999, 24–26.*
[407] Daniel Turner "EC Zoos Directive 1999/22: success, failure – or work in progress?" published by the Born Free Foundation *The Welfare of Animals in Zoos and EU Legal Standards* (2004).
[408] See European Commission report on the EU Zoo Directive (2015) available at http://ec.europa.eu/environment/nature/pdf/EU_Zoos_Directive_Good_Practices.pdf.
[409] See Eurogroup for Animals "Commission Report Urges Member States to Improve Animal Welfare and Conservation Efforts of Zoos" (2018) available at https://www.eurogroupforanimals.org/commission-report-urges-member-states-to-improve-animal-welfare-and-conservation-efforts-of-zoos.

needed to improve the welfare of the animals in zoos as well as the contribution of zoos to biodiversity conservation.[410] The enforcement of the Zoo Directive varies greatly from one Member State to another; therefore, the welfare of the animals also varies. Consequently, it raises the question, should animals be kept in zoos at all? There is clear evidence that animals cannot exhibit natural behaviour in a zoo environment. They are denied socialisation and the ability to fulfil their moral capacities. Furthermore, there has been recent controversy regarding zoos over breeding and culling healthy zoo animals. For example, in 2017 Denmark came under scrutiny for shooting a healthy giraffe and then feeding it to lions in the zoo.[411] It is Broom's view that "some zoo animals cannot successfully adapt to any current zoo conditions," and therefore he believes they should not be kept in zoos.[412]

Measures[413] regarding inspection and verification of good laboratory practice were also adopted. Significantly, the ethics of using animals for experimentation was not the issue at hand. Animals kept in laboratories are not only harmed because their welfare is being impaired, but also because their moral capabilities are being circumvented. They are separated and socially deprived.[414]

Additionally, legislation[415] was passed setting minimum standards for keeping egg-laying hens and effectively banning conventional battery cages, but still allowing hens to be confined.[416] Beginning in 1999, legislation was introduced phasing out the use of barren battery cages.[417] The Commission were of the opinion that there was clear evidence for poor welfare in hens kept in battery cages, but alternative housing systems still also have some disadvantages

[410] *Ibid.*
[411] See Ian Parker "Killing animals at the zoo" available at https://www.newyorker.com/magazine/2017/01/16/killing-animals-at-the-zoo and https://edition.cnn.com/2014/02/09/world/europe/denmark-zoo-giraffe/index.html both accessed 15/10/19.
[412] Broom (n308) 51.
[413] Commission Directive 1999/12/EC of 8 March 1999 adapting to technical progress for the second time the Annex to Council Directive 88/320/EEC on the inspection and verification of good laboratory practice (GLP) (Text with EEA relevance) *OJ L 77, 23.3.1999, 22–33.*
[414] See Harry Harlow's study on social separation and isolation "Total social isolation in monkeys" (1965) available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC285801/pdf/pnas00159-0105.pdf accessed 12/7/21
[415] Council Directive 1999/74/EC of 19 July 1999 laying down minimum standards for the protection of laying hens *OJ L 203, 3.8.1999, 53–57.*
[416] See Pamela A Vesilind, "Continental Drift: Agricultural Trade and the Widening Gap between European Union and United States Animal Welfare Laws" (2011) 12 Vt. J. Envtl. L. 232 for a general discussion.
[417] This is a confinement system employed in egg production in which hens must be stacked on top of each other to fit.

which have not yet been solved entirely, and therefore concluded that it was too early to ban battery cages. However, they noted that the minimum space per laying hen in battery cages should be enlarged together with the enrichment of their cages to improve their welfare.[418] Compassion in World Farming has noted that barren battery cages which are small wire cages with less space than an A4 sheet of paper each cause immense psychological and physical suffering and leave hens unable to exercise or to carry out many important natural behaviours.[419] The construction of such cages was immediately banned, and any use of such cages whatsoever was banned after 2012.[420]

3.1.2.3.2 The Protocol to the Treaty of the European Community

The most significant development in 1999[421] was the Treaty of Amsterdam annexing essentially the same text (as in the Declaration on the Protection of Animals) as a protocol to the Treaty of the European Community.[422] The introduction of the protocol represented a symbolic step forward from their previous classification as products of livestock and agricultural goods.[423] This protocol was introduced following intense pressure from animal protection groups. It introduced a clear legal obligation for the Community institutions to pay full regard to the welfare requirements of animals. It did not, however, extend the competence of the Community to include animal welfare per se within its remit. The protocol

[418] Report of the European Communities on the protection of laying hens kept in various systems of rearing (1998) available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:51998PC0135&from=EN.

[419] See Compassion in World Farming discussion on batten battery cages available at https://www.ciwf.org.uk/news/2007/11/barren-battery-cages-to-go accessed 15/11/19 In 1996, the European Commission's Scientific Veterinary Committee condemned the conventional cage, concluding:- "It is clear that because of its small size and its barrenness, the battery cage as used at present has inherent severe disadvantages for the welfare of hens" see Nick Chippindale "The 2012 EU ban on conventional cages and its effect" (2010) Nuffield International 6.

[420] Council Directive 1999/74/EC of 19 July 1999 laying down minimum standards for the protection of laying hens *OJ L 203, 3.8.1999, 53–57.*

[421] The campaign to incorporate a recognition of animals sentience started in 1988. Compassion in World Farming (CIWF) submitted a petition to the European Parliament, calling for animals to be recognised as sentient beings, capable of suffering. CIWF submitted a petition to the European Parliament with over 1 million signatures calling for animals to be recognised as sentient beings. This was accepted as a "treaty declaration" which is not legally binding, but nonetheless a significant first step on the road. In 1996, CIWF led a demonstration outside the EU Prime Ministers' conference in Amsterdam, calling for greater recognition of animal sentience in European Law. Then, in 1999 with the Treaty of Amsterdam, it became a Protocol, with legal status. See Compassion in World Farming "The Lisbon Treaty: Recognising Animal Sentience" (2009) available at https://www.ciwf.org.uk/news/2009/12/the-lisbon-treaty-recognising-animal-sentience accessed 15/4/20.

[422] Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts *OJ C 340, 10.11.1997, S1–S6* Protocol annexed to the Treaty on the European Community - Protocol on protection and welfare of animals Official Journal C 340, 10/11/1997.

[423] Diane Ryland and Angus Nurse "Mainstreaming after Lisbon: Advancing Animal Welfare in the EU International Market" (2013) European Energy and Environment Law journal 22 (3) 102

was welcomed as a momentous occasion for animal welfare in Europe. However, in light of the judgment in the Jippes case[424] involving a legal dispute over the hoof and mouth pandemic in Europe and the mandatory slaughter stipulation, the European Court of Justice had to balance the competing interests – public health and animal welfare. They interpreted the protocol in a narrow fashion that limits its efficacy in achieving improved standards of animal welfare protection which was a missed opportunity to incrementally improve the lives of animals.[425]

The protocol's obligation on both the EU institutions and Member States to pay full regard to animal welfare when formulating and implementing certain impacting EU policies[426] demonstrates an improvement for animal welfare as compared with the prior non-legally binding declaration. The protocol, for the first time, refers to animals as sentient beings. This reference has been stated to create a "sea of change in attitudes."[427] While there was no definition given as to what sentient being means, it is essentially a recognition of their ability to feel pain and pleasure. This term has been defined elsewhere for example, "One for whom its feelings matter,"[428] "One having the capacity to suffer or experience enjoyment of happiness,"[429] "One that has the awareness and cognitive ability necessary to have feelings."[430] However, the treaty did not provide a legal basis for the introduction of legislation specifically intended to improve the welfare of animals. Therefore, the protocol did not place animal welfare on the same footing as issues such as the environment or consumer affairs, for example. The protocol also left Member States free to introduce national legislation on issues such as animal welfare in circuses, equine competitions, greyhound racing, hunting with hounds, and bullfighting. Indeed, change has occurred at a national level in many jurisdictions.[431] Furthermore, there are possible derogations from the protocol, in the case of religious rites, cultural traditions and regional heritage. These

[424] This case is discussed in detail later in this chapter.
[425] Rasso Ludwig and Roderic O'Gorman (n372) 366.
[426] Diane Rylands and Angus Nurse (n301) 102 see also Andrea Gavinelli and Nelly Lakestani (n310).
[427] Andrew Linzey *Why Animal Suffering Matters: Philosophy, Theology, and Practical Ethics* (OUP 2009) 140
[428] Compassion in World Farming definition see https://www.ciwf.org.uk/farm-animals/animal-sentience/
[429] Definition by Peter Singer in *Animal Liberation* (Harper Collins 1975).
[430] Definition by Donald Broom in "Considering animals' feelings" (2014) Précis of Sentience and animal welfare.
[431] For instance, fox hunting has been outlawed in the UK, fur farming is currently the subject of reform in Ireland, there is a Canadian ban on cetacean captivity, the use of wild animals in zoos has be outlawed in a number of jurisdictions. These reforms will be discussed in detail in chapter four see 5.3 CHANGING ATTITUDES REFLECTED IN CHANGING LAWS.

exemptions are in place to allow Member States freedom to place their religious and cultural traditions ahead of animal welfare, thus, reducing the effect of the protocol in these areas.

The protocol reads as follows:

> The High Contracting Parties,
>
> Desiring to ensure improved protection and respect for the welfare of animals as sentient beings, have agreed upon the following provision, which shall be annexed to the Treaty establishing the European Community, in formulating and implementing the Community's agricultural, transport, internal market and research policies, the Community and the Member States shall pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage.

The protocol is formulated in prescriptive language – "shall pay full regard " – which is an improvement, and elevates the status of animals in EC law from mere goods or agricultural products with the first-ever reference to animals as sentient beings.[432] This prescriptive language makes it clear it is the welfare of animals[433] as opposed to their health or conservation, which must be considered.[434] The protocol was significant in at least two key regards. First, and most fundamentally, it recognised animals not as mere chattel, but as "sentient beings." Second, it required Member States to pay not minor but "full regard to the welfare requirements of animals" when setting policy on farming, transport, and animal experimentation. The protocol did have its limitations.[435] The term "animals" is not defined to state exactly which animals[436] making it unclear as to the scope of protection, and there is no elaboration on what is meant by "full regard." Most importantly, what must be questioned is whether the recognition of animal sentience is compatible with welfare provisions? On the

[432] Tamm Camm and David Bowles "Animal welfare and the Treaty of Rome – legal analysis of the protocol on animal welfare and welfare standards in the European Union" (2000) *Journal of Environmental Law*, 12 (2).
[433] Ensuring animals have good welfare conditions as opposed maintaining numbers of the species or passing any health checks.
[434] Tamm Camm and David Bowles (n432) 200.
[435] See Nicholas K Pedersen "Detailed Discussion of European Animal Welfare Laws 2003 to Present: Explaining the Downturn" (2009) available at https://www.animallaw.info/article/detailed-discussion-european-animal-welfare-laws-2003-present-explaining-downturn accessed 15/3/19.
[436] Tamm Camm and David Bowles (n432) 201.

one hand, animals are recognised as being able to experience pain and pleasure yet; the only requirement is to pay full regard to their welfare while allowing for exemptions to be made

In summary the 1990s missed many opportunities to significantly improve the lives of many animals by continuing to reform welfare legislation which is not compatible with the recognition of animals as sentient beings and is out of sync with the contemporary theory and evidence on animal abilities.

3.1.2.4 The 2000s

A number of amendments[437] to previous directives were made in 2001 including amending the 1991 directive[438] laying down minimum standards for the protection of pigs. This was due to campaigns from groups including CIWF.[439] The new provision sets forth the requirements to be met regarding holdings and flooring surfaces and lays down further rules relating to the keeping of pigs. Such standards regard maximum noise and light levels in buildings where pigs are kept. The accommodation for pigs must be constructed in such a way as to allow the animals to have access to a lying area, be physically and thermally comfortable as well as adequately drained and cleaned. [440]

In 2002 rules[441] were adopted on the registration of establishments keeping laying hens. This followed from consultation with veterinarians from a variety of European states. The Commission passed this directive from January of 2002 which expanded on the previous directive,[442] by setting out specific requirements for each country's mandatory registration systems.

[437] Commission Directive 2001/93/EC of 9 November 2001 amending Directive 91/630/EEC laying down minimum standards for the protection of pigs *OJ L 316, 1.12.2001, 36–38 and* Council Directive 2001/88/EC of 23 October 2001 amending Directive 91/630/EEC laying down minimum standards for the protection of pigs *OJ L 316, 1.12.2001, 1–4.*

[438] Directive 91/630/EEC.

[439] See Compassion in World Farming and the EU Sow Stall ban available at https://www.ciwf.org.uk/our-campaigns/other-campaigns/pigs/about-the-ban/ accessed 15/5/20.

[440] Martina Tarantola et al "Does the application of directive 2001/93/EC improve pigs' welfare and productive performances?" (2007) Italian Journal of Animal Science 6 (1).

[441] Commission Directive 2002/4/EC of 30 January 2002 on the registration of establishments keeping laying hens, covered by Council Directive 1999/74/EC *OJ L 30, 31.1.2002, 44–46.*

[442] Directive 1999/74/EC.

Significantly, in 2003 the use of new gestation crates for sows were banned. There is much scientific evidence[443] showing that the welfare of pregnant sows is extremely poor when they are confined in tethers or stalls (gestation crates); therefore, this ban was an improvement for the welfare of pigs. Also, in 2003 a new directive[444] amended the previous 1976 directive[445] regarding laws of the Member States relating to cosmetic products. In the intervening years, there was a growing demand and campaigns for animal testing to be phased out from groups such as Humane Society International.[446] This directive laid down wide prohibitions in relation to animal testing for cosmetic products and introduced fixed deadlines for phasing out of animal testing.

In 2004 measures[447] were introduced on principles of good laboratory practice which requires that the number of experiments conducted on animals be restricted given the increasing usage of animals for testing. A new regulation[448] was also adopted which lay down measures concerning incidental catches of cetaceans in fisheries and amending its predecessor.[449] This regulation was introduced due to the scientific information available, and the techniques developed to reduce incidental capture and killing of cetaceans in fisheries. However, the focus of this regulation is conservation and the environment rather than the protection of cetaceans from suffering thus ignoring scientific evidence and ethics on captivity and slaughter of cetaceans.

Additionally, the Council passed a decision for the EU to sign the revised European Convention for the Protection of Animals during International Transport following a proposal by the European Commission. This international convention increased the requirements for the

[443] EU Scientific Veterinary Committee 1997 see https://ec.europa.eu/food/sites/food/files/animals/docs/aw_arch_1997_intensively_kept_pigs_en.pdf.
[444] Directive 2003/15/EC of the European Parliament and of the Council of 27 February 2003 amending Council Directive 76/768/EEC on the approximation of the laws of the Member States relating to cosmetics products (Text with EEA relevance) *OJ L 66, 11.3.2003, 26–35.*
[445] Directive 76/768/EEC.
[446] Humane Society International website available at https://www.hsi.org/news-media/about_cosmetics_animal_testing/.
[447] Directive 2004/10/EC of the European Parliament and of the Council of 11 February 2004 on the harmonisation of laws, regulations and administrative provisions relating to the application of the principles of good laboratory practice and the verification of their applications for tests on chemical substances (codified version) (Text with EEA relevance) *OJ L 50, 20.2.2004, 44–59.*
[448] Council Regulation (EC) No 812/2004 of 26.4.2004 laying down measures concerning incidental catches of cetaceans in fisheries and amending Regulation (EC) No 88/98 *OJ L 150, 30.4.2004, 12–31.*
[449] Regulation 88/98.

protection of transported animals in Europe. It revised the existing convention adopted in 1968 and introduced improvements for animal welfare that are consistent with the Commission's proposal on animal transport and existing EU legislation. The revised convention lays down essential welfare rules that apply to all species and details the rules for the most widely traded animals, such as cattle, sheep, goats, pigs and horses.

This regulation governs the transport of live animals between EU countries and provides for checks on animals entering or leaving the EU. These rules stipulate the general conditions for animal transport, the responsibility of transporters and authorities, and enforcement mechanisms. The rules aim to prevent injury or unnecessary suffering to the animals. Despite scientific advice, several requirements, notably the limits for journey times, rest intervals, feeding and watering intervals and space allowances for animals were not amended and remained as set out in the earlier 1995 Transport Directive.[450]

In some cases, this regulation was found to be entirely out of touch with reality. For example, unweaned animals are required to be given adequate fluids in between two transport periods of 9 hours. However, it is scientifically proven that it is technically impossible to provide unweaned animals with adequate liquid on board trucks and that they do not know how to use the drinking equipment.[451] Furthermore, the EFSA concluded that parts of the regulation are not in line with current scientific knowledge.[452] While the EU focuses on welfarism, the evidence available is not given due regard. The Scientific Committee on Animal Health and Animal Welfare agree that, despite a certain amount of adaptation which varies according to the species and the conditions, welfare tends to decrease as journey length increases. Journeys, therefore, should be as short as possible, and transport conditions should be designed and operated to minimise sources of stress.[453] This regulation allows cattle and

[450] This regulation only follows some of the recommendations of the EU Scientific Committee on Animal Health and Animal Welfare Report, "The welfare of animals during transport (details for horses, pigs, sheep and cattle)" and the European Food Safety Authority "Report on the welfare of animals during transport." Also see http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583114/IPOL_STU(2017)583114_EN.pdf 43.
[451] See "Does the EU respect animal welfare during transport?" (2019) United left, European parament group available at https://www.guengl.eu/500029539-2/ accessed 30/5/19 see also Broom (n308) 43.
[452] EFSA website "EFSA assesses welfare risks to animals during transport" (2011) see https://www.efsa.europa.eu/en/press/news/110112.
[453] See Europa website (n380) 229 see also Compassion in World Farming "Animal Welfare Article of the Treaty on the Functioning of the European Union is Undermined by Absence of Access to Justice" (2014) available at https://www.ciwf.org.uk/media/7427367/article-13-tfeu-undermined-by-lack-of-access-to-justice-december-2014.pdf and Federation of Veterinarians of Europe position paper on the welfare of animals during transportation (2008) available at http://www.fve.org/uploads/publications/docs/fve_08_016_transport.pdf.

sheep to be transported for 28 hours, and pigs and horses for 24 hours, before being unloaded for 24 hours of rest. However, scientific research suggests that prolonged periods of travel confined to a small, unnatural environment can cause heightened stress responses in animals, and can often result in an animal developing abnormal behaviours.[454] However, the European Commission determined that there was no need to revise the legislative text.[455] If animal welfare cannot be guaranteed until the final destination, transportation should not take place. In 2015, new legislation[456] was introduced on the protection of animals during transport and related operations,[457] demonstrating that the previous laws were not adequate. However, the EU missed an opportunity to adopt a rights-based approach and phase out live transport of animals by electing to implement further updates and revisions to the existing rules.

In 2006 a new regulation (known as REACH - Registration, Evaluation, Authorisation and Restriction of Chemicals) was introduced.[458] One of the objectives of this regulation states that chemical testing on vertebrate animals, to ensure a high level of protection of human health and the environment, shall be undertaken only as a last resort and that duplication of tests should be limited. However, animal welfare NGOs have criticised the effectiveness of this regulation, and a 2018 review found that over 2.2 million animals have already been used in new tests for REACH registrations. This equates to an annual average of 275,000 animals.[459] This regulation lags behind the evidence now available by disregarding an animals moral worth by continuing to permit testing on sentient, moral beings.

[454] See the Federation of Veterinarians of Europe position paper: <www.fve.org/uploads/publications/docs/065_long_distance_transport_of_livestock__160927__.pdf>. See also "Opinion of the Scientific Panel on Animal Health and Welfare (EFSA) on a request from the Commission related to the welfare of animals during transport" (2004) 44 The EFSA Journal 1-36.
[455] See Eurogroup for Animals' flagship campaign to end long distance live animal transport available at http://www.eurogroupforanimals.org/wp-content/uploads/Live-transport-Eurogroup-for-Animals-BriefingOK.pdf accessed on 30/5/19.
[456] Council Regulation (EC) No 1/2005 of 22 December 2004 on the protection of animals during transport and related operations and amending Directives 64/432/EEC and 93/119/EC and Regulation (EC) No 1255/97 *OJ L 3, 5.1.2005, 1–44.*
[457] Amending Directives 64/432/EEC and 93/119/EC and Regulation 1255/97.
[458] Amending Directive 1999/45/EC and repealing Council Regulation 793/93 and Commission Regulation 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC.
[459] Katy Taylor "Ten Years of REACH — An Animal Protection Perspective" (2018) ATLA 46 347.

Reform[460] placing a ban on the import of wild-caught birds to be kept in captivity was adopted in 2007, and minimum rules[461] for the protection of chickens kept for meat production followed.[462] The latter directive aims to reduce the overcrowding of chicken holdings by setting a maximum stocking density and ensuring better animal welfare by specifying requirements such as lighting, litter, feeding, and ventilation. This was the first time that "Welfare Indicators"[463] were included in animal welfare legislation as a means of scientific assessment[464] to reinforce the scientific basis of EU regulation in this field. These welfare indicators are designed to support decision-making on the acceptable conditions for farmed animals and can be used to monitor and control programmes, implemented at farm level, to guarantee standards of animal health and welfare and to help control diseases. However, this directive does not incorporate evidence on animal capacities.

Since December 2008, the import and export of products containing cat and dog fur in the EU have been prohibited.[465] This regulation was a well-received development as traditionally, the EC did not concern itself with the welfare of companion animals which is a matter for Member States.[466] Additionally, in 2008 legislation[467] laying down minimum standards for the protection of pigs was introduced. This applies to all categories of pigs[468] and lays down

[460] Commission Regulation (EC) No 318/2007 of 23 March 2007 laying down animal health conditions for imports of certain birds into the Community and the quarantine conditions thereof (Text with EEA relevance) *OJ L 84, 24.3.2007, 7–29.*

[461] Council Directive 2007/43/EC of 28 June 2007 laying down minimum rules for the protection of chickens kept for meat production (Text with EEA relevance) *OJ L 182, 12.7.2007, 19–28.*

[462] This Directive came into force in 2010 for further discussion see Victoria Sandilands and Paul M. Hocking "Alternative Systems for Poultry: Health, Welfare and Productivity" (CABI 2012) 43.

[463] The European Commission has called for measurable animal welfare indicators to be developed to reinforce the scientific basis of EU regulation in this field. The EFSA has undertaken ground-breaking work to develop a set of scientifically measurable animal welfare indicators to be included in conclusions and recommendations. These welfare indicators support decision-making on the acceptable conditions for farmed animals and will are used to underpin monitoring and control programmes, implemented at farm level, to guarantee standards of animal health and welfare and to help control diseases. Also see EFSA website (n294).

[464] See European Commission discussion on broilers available at https://ec.europa.eu/food/animals/welfare/practice/farm/broilers_en also see Victoria Sandilands and Paul M Hocking (n462).

[465] Regulation (EC) No 1523/2007 of the European Parliament and of the Council of 11 December 2007 banning the placing on the market and the import to, or export from, the Community of cat and dog fur, and products containing such fur (Text with EEA relevance) OJ *L 343, 27.12.2007, 1–4.*

[466] Laura Donnellan "The Cat and Dog Fur Regulation: A Case Study on the European Union's Approach to Animal Welfare" (2018) Liverpool Law Rev 39 73.

[467] Council Directive 2008/120/EC of 18 December 2008 laying down minimum standards for the protection of pigs (Codified version) *OJ L 47, 18.2.2009, 5–13.*

[468] The directive applies to four categories of pigs: boars, sows and gilts, piglets and weaner and fattening pigs see Appendix 1, chapter 2.

minimum standards for their protection. It improves the quality of the flooring surfaces, increasing the living space available, introduced higher levels of training and competence on welfare issues for personnel, setting requirements for light and maximum noise levels, providing permanent access to fresh water and to materials for rooting and playing and setting a minimum weaning age of four weeks. With effect from January 2013, pregnant sows must be kept in groups instead of individual stalls during part of their pregnancy, which is a significant improvement for the welfare of sows in the EU. Apart from some exceptions (farrowing sows and boars), all pigs are to be raised in groups and must be provided with permanent access to drinking water and food of an appropriate quality at regular intervals. They must also have continuous access to a sufficient quantity of enrichment materials[469] that does not compromise their health and enables them to carry out a proper investigation and manipulation activities and fulfil their behavioural needs.[470]

Furthermore, in 2008 rules[471] were put in place that lay down minimum standards for the protection of calves and prohibiting the use of confined individual pens after the age of eight weeks. This followed on from scientific opinion on the intensive farming systems prepared by the EFSA based on a request from the Commission.[472] The directive sets out minimum dimensions for individual pens and calves kept in a group. Calves are not to be tethered[473] (except under very specific circumstances) and must be fed according to their physiological needs. Their food must contain sufficient iron, and a minimum daily ration and fibre food must be provided. This directive is reflective of our growing consumption of meat and the need to regulate this industry.

The Union developed regulations[474] in 2009 on the protection of animals at the time of killing which provided a compliance period, which was to take effect from January 2013, replacing its predecessor.[475] This regulation acknowledges the evolving level of scientific evidence in

[469] Animal enrichment is meant to improve the animals' environments.
[470] See European Commission discussion on pigs available at https://ec.europa.eu/food/animals/welfare/practice/farm/pigs_en.
[471] Council Directive 2008/119/EC of 18 December 2008 laying down minimum standards for the protection of calves (Codified version) *OJ L 10, 15.1.2009, 7–13.*
[472] See European Commission discussion on calves available at https://ec.europa.eu/food/animals/welfare\\/practice/farm/calves_en.
[473] This means to tie an animal with a rope or chain to restrict its movement.
[474] Council Regulation (EC) No 1099/2009 of 24 September 2009 on the protection of animals at the time of killing (Text with EEA relevance) *OJ L 303, 18.11.2009, 1–30.*
[475] Directive 93/119/EC.

favour of sentience in fish and states that they should be spared any avoidable pain, distress or suffering during their killing and related operations.[476] Moreover, this regulation requires a qualified person – the Animal Welfare Officer[477] – to ensure that the required standards are implemented. However, the appointment of an animal welfare officer is not compulsory for small slaughterhouses.[478] The welfare officer has full responsibility for implementing EU rules. The regulation focuses on reducing stressful or painful situations for the animal. All animals must be stunned before killing or killed instantaneously. However, this regulation provides evidence of the EU's failure to enact laws to reflect animal sentience. This regulation is not animal focused. Despite scientific evidence provided by the EFSA that the practice of shackling live poultry[479] is "extremely painful," this regulation does not aim to phase this practice out.[480] Furthermore, while slaughter in an upright position causes much less suffering than slaughter in an inverted position, the regulation permits (subject to certain conditions) the continued use of rotation boxes for the slaughter of cattle without stunning, favouring not to disrupt the status quo as these are the most commonly used slaughter methods.[481]

3.1.2.4.1 Article 13 of the Treaty on the Functioning of the European Union

To date, the most significant milestone for animal protection was introduced in 2009. The new Lisbon Treaty, in force from December 1st, 2009, includes animal sentience as an article, meaning that recognition of animal sentience is now in the main body of the treaty and carries considerably more weight. The Treaty of Lisbon was enacted and states that:

[476] Compassion in World Farming 2018 report on the welfare of farmed fish available at https://www.compassioninfoodbusiness.com/media/7434891/ciwf-2018-report__the-welfare-of-farmed-fish-during-slaughter-in-the-eu.pdf.

[477] The animal welfare officer must be in possession of a certificate of competence for all the operations taking place in the slaughterhouse for which he or she is responsible. Certificates of competence are issued by the authorities of the Member States and based on passing of independent examinations on subjects relevant for the categories of animals concerned and corresponding to the operations involved. Further details can be found in the European Commission paper *infra* 7.

[478] European Commission paper on "The Animal Welfare Officer" available at https://ec.europa.eu/food/sites/food/files/animals/docs/aw_prac_slaughter_awo-brochure_24102012_en.pdf accessed 15/9/19 2.

[479] This is where live birds are hung upside down in shackles prior to slaughter.

[480] See "The welfare aspects of the main systems of stunning and killing the main commercial species of animals"45 The EFSA Journal (2004), 1-29.

[481] See the recent Report from the Commission on systems restraining bovine animals by inversion or any unnatural position available at https://ec.europa.eu/food/sites/food/files/animals/docs/aw_practice_slaughter_com_borest_sum_en.pdf accessed on 19/07/14 also see Humane Slaughter Association available at https://www.hsa.org.uk/restraint/stun-box accessed 1/10/19.

> In formulating and implementing the Union's agriculture, fisheries, transport, internal market, research and technological development and space policies, the Union and the Member States shall, since animals are sentient beings, pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage.

The inclusion of animal welfare in the constitutional provisions of the EU treaties signifies the elevation of animal welfare as a priority issue in the EU. This puts the consideration of animal welfare on the same footing as other key principles mentioned in the same title, for instance, promote gender equality, guarantee social protection, protect human health, combat discrimination, promote sustainable development, ensure consumer protection, and protect personal data. It is, therefore, a noteworthy development.[482] Animal welfare protection has now become a stand-alone article - the acknowledgement of animals as sentient beings finds its way from the preamble of the protocol into the actual text of the new article[483] and EU law has evolved with respect to animal welfare in that animals are no longer perceived in law solely as goods. They are recognised, expressly in the treaty article, as sentient beings, and, as such, the EU's stated aim is to ensure that animals do not endure avoidable pain or suffering.[484] Unlike the declaration or protocol, Article 13 is an operative part of the treaty and therefore part of the EU's primary law.

The significance of Article 13 is that it expressly recognises that animals deserve special protection by reason of their sentience; and it places a legal obligation upon the EU and Member States to pay full regard to animals' welfare requirements when formulating and implementing policy in the areas listed (for instance, agriculture, fisheries, transport, internal market, research and technological development, and space policies). It is unclear why the EU neglect to provide a definition for sentience. Perhaps the term proved too complex to pin

[482] Darren Calley "The Aggregation of Suffering in the Regulatory Context: Scientific Experimentation, Animals and Intrinsic value" (2017) Journal of Animal Ethics 7 (1) 18 see also European Commission discussion on animal welfare available at http://ec.europa.eu/food/animal/welfare/policy/index_en.htm.
[483] Rasso Ludwig and Roderic O'Gorman (n372) 364.
[484] Diane Ryland (n583) 5.

down.[485] Its formal acknowledgement and how the term can and should be defined is subject to debate and, arguably is ineffectual in and of itself but "attests to a sea change in society's obligations to animals: that is, a shift, if only symbolic."[486] Compassion in World Farming (CIWF) believed that the incorporation of the Animal Welfare Protocol into the body of the treaty would give greater weight to the recognition of these issues. The Royal Society for the Prevention of Cruelty to Animals (RSPCA) was pleased to see the recognition of animals as sentient beings supported in this treaty. They felt it important that animal welfare issues were considered fully when formulating and implementing any policy in the EU and in individual Member States.[487] The introduction of this article was viewed as an opportunity to discuss concerns about proposed legislation in a more considered and constructive way.[488]

It can be said, however, that the legal effect of Article 13 is uncertain. Since the phrase "shall pay full regard to" does not provide any indication of the weight to be given to welfare concerns, it is arguable that Article 13 imposes only a limited obligation. How does one determine if "full regard" is given? It does not require that the institutions must integrate animal welfare concerns into Union law and policy. It is therefore unclear whether Article 13 offers the potential to break the tension between animals as products and as sentient beings.

Furthermore, EU policy and legislation permit practices, in both farming and research, which are incompatible with protecting animals adequately from pain, suffering and distress.[489] The notion of "sentient beings" is now in the treaty, however as with the previous protocol, the treaty does not define the term "sentience" in relation to animals, nor does it hint at its nature, or the range or degree of its presence within different species.[490] Importantly, while this article asserts that animals are sentient beings, it also disregards their sentience in cases of religious rites, cultural traditions and regional heritage. Member States did not want EU

[485] Rajesh Reddy "Enshrining Animal Sentience into Law: Global Developments and Implications (2020) American Bar Association available at https://www.americanbar.org/groups/tort_trial_insurance_practice/publications/committee-newsletters/enshrining_animal_sentience_into_law/ accessed on 2/5/20.
[486] *Ibid*.
[487] House of Lords select committee meeting "The Treaty of Lisbon: An Impact Assessment" (2008) available at https://publications.parliament.uk/pa/ld200708/ldselect/ldeucom/62/62.pdf.
[488] *Ibid* 228.
[489] See A-Law expert legal briefing note on Brexit, Article 13, and the debate on recognising animal sentience in law (2017) available at https://www.alaw.org.uk/wp-content/uploads/Article-13-Legal-Briefing-Note.pdf 4.
[490] Peter Fordyce "Suffering in Non-Human Animals: Perspectives from Animal Welfare Science and Animal Welfare Law" (2017) Global Journal of Animal Law 5 (1).

policy to remove States' autonomy in relation to such practices.[491] This contradiction undermines the recognition that animals are living and sentient beings.[492] These provisions continue to leave ample scope for exceptions based on respect for "the legislative or administrative provisions and customs of Member States relating in particular to religious rites, cultural traditions and regional heritage." Depending on national sensitivities, religious slaughter practices, bullfighting, as well as hunting and other customs are given leeway. The use of "in particular" suggests a non-exhaustive list that can be added to. The practical implication of Article 13 is, therefore, questionable due to its aspirational nature and derogations available to Member States.[493]

Moreover, while Article 13 asserts that animals are sentient beings, and their "welfare requirements" must be considered by humans; it fails to mention their other needs.[494] It is argued that even though animal protection is addressed in EU treaties, it is concerned with facilitating the human use of animals rather than protecting animals for their benefit.[495] Article 13 does not give a legal base nor require all animal welfare issues to be addressed, such as companion animal welfare and stray dog management. They are therefore not governed by EU rules and remain under the sole responsibility of the Member States.[496] The wording is quite open to interpretation and does not make it possible to hold anyone accountable for ignoring it.[497] Therefore, animal welfare has become entrenched within the TFEU, but there are doubts as to whether the key driver is the market or the well-being of animals per se.

The Director of Four Paws[498] Marlene Wartenberg writes:

---

[491] See A-Law briefing (n489) see also Bart Driessen "Fundamental Animal Rights in European Law" (2017) European Public Law 3 552.
[492] Paola Sabbrio (n306) 36.
[493] Laura Donnellan (n466) 16.
[494] Paola Sobbrio "The Relationship between Humans and Other Animals in European Animal Welfare Legislation" (2013) available at http://www.ledonline.it/index.php/Relations/article/view/8 6.
[495] Bruce Wagmand and Matthew Liebman *A Worldview of Animal Law* (Carolina Academic Press, 2001) 279
[496]European Society of Dog and Animal Welfare available at http://www.esdaw-eu.eu/the-eu-and-animal-welfare.html accessed 15/02/14.
[497] Elisabeth Tjärnström " Ethical Impact on EU Animal Welfare policies: the example of Article 13" (2010) First cycle, G2E. Skara: SLU, Dept. of Animal Environment and Health 7 available at http://stud.epsilon.slu.se/1572/.
[498] Four Paws is an international animal welfare organisation committed to encouraging people to treat animals with respect, compassion and understanding see https://www.four-paws.org/about-us/four-paws-about-us.

> There is a legal uncertainty in the vast derogation included in Article 13 TFEU (…) The derogations implemented by Article 13 in relation to religious rites, cultural traditional and regional heritage are almost unlimited because of the use of the term "in particular". Thus, the regulation contained in Article 13 which establishes animal welfare as an ethical value is undermined by these derogations regarding religious rites and cultural heritage; for instance, bullfighting in Spain may continue to exist thanks to these derogations.[499]

It is fair to say that the recognition of animals as sentient beings is symbolically important and reflects the evolving nature of the Union's legal framework. However, there are some inherent conflicts. Laws often fail to specify the degree of consideration to be given to animal welfare protection compared with competing economic interests, for example. There is no balancing of interests in a domestic context when designing animal protection law or accommodation of the different views of the Member States in an attempt to reach some form of consensus across the Union. Since the phrase "shall pay full regard to" does not provide any indication of the weight to be given to welfare concerns, it is arguable that Article 13 TFEU imposes only a limited obligation. It does not require that the institutions must integrate animal welfare concerns into Union law and policy. It is therefore unclear whether Article 13 offers the potential to break the link between animals as products and as sentient beings. However, the absence of protection via a supranational rights regime means that animals in Europe tend not to receive the degree of protection that relevant laws are designed to give them.

Additionally, in 2009, the new EU Cosmetic Products Regulation[500] was developed and replaced the 1976 directive. Therefore, since 2013, the use of animal testing for cosmetics products is illegal, as is the import of non-EU products tested on animals. However, advice from the EFSA on the exclusion of certain invertebrates such as decapod crustaceans was not followed demonstrating that the law is not evidence-based.[501] Importantly, the ban on animal testing applies to both cosmetics products and ingredients. However, there are limitations.

[499] Oriol Caudevilla "Book review: Animals and the Law" (2015) Global Journal of Animal Law 1 2.
[500] Regulation (EC) No 1223/2009 of the European Parliament and of the Council of 30 November 2009 on cosmetic products (Text with EEA relevance) *OJ L 342, 22.12.2009, 59–209.*
[501] See EFSA opinion on welfare of laboratory animals available at https://www.efsa.europa.eu/en/press/news/051222.

For instance, EU law only applies where there is a connection with the EU; therefore, testing within the EU or sale within the EU where the testing took place elsewhere. Furthermore, the European Commission argues that the ban only applies to cosmetic products and ingredients which are only used in cosmetics.[502]

New rules[503] were introduced, dealing with the conservation of birds and, significantly regulations[504] were adopted on trade in seal products in 2009. This regulation prohibits the placing on the EU market of all seal products subject to limited exemptions. This regulation is of great significance as it responds to the concerns expressed by EU citizens[505] about the animal welfare aspects of the seal hunt. At the same time, this regulation ensures that the fundamental economic and social interests of Inuit communities engaged in the hunting of seals as a means to ensure their subsistence are not adversely affected.[506] This piece of legislation demonstrates that animal welfare considerations can form a significant feature of EU policy.[507] The introductory paragraphs of the regulation note that "seals are sentient beings that can experience pain, distress, fear and other forms of suffering." The hunting of seals has led to expressions of serious concerns by members of the public and governments sensitive to animal welfare considerations[508] due to the pain, distress, fear and other forms of suffering which the killing and skinning of seals, as they are most frequently performed, cause to those animals.[509] In 2010, the Commission adopted an implementing regulation.[510]

---

[502] See Cruelty Free International website for further discussion available at https://www.crueltyfreeinternational.org/what-we-do/corporate-partnerships/prohibitions-cosmetics-testing-eu-and-elsewhere accessed 22/4/20.

[503] Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds *O//J L 20, 26.1.2010, 7–25.*

[504] Regulation (EC) No 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products (Text with EEA relevance) *OJ L 286, 31.10.2009, 36–39.*

[505] See European Commission Citizens' summary "Trade in seal products" available at https://ec.europa.eu/environment/biodiversity/animal_welfare/seals/pdf/citizen_summary.pdf also see European Commission "Legislative history of the file on trade in seal products" available at https://ec.europa.eu/environment/biodiversity/animal_welfare/seals/history.htm accessed 12/6/18.

[506]Recitals (1) and (4) of Regulation (EC) No 1007/2009 of the European Parliament and of the Council of 16 Sept. 2009 on trade in seal products, OJ (2009) L286/36. Also see Donald Broom (n308) 34.

[507] Ludwig Kramer "Case note: Seal Killing, the Inuit and European Union Law" (2012) Review of European Community and International Law 21 (3) 295.

[508] See European Commission Citizens' summary "Trade in seal products" available (n505).

[509] Donal Broom (n308) 554.

[510] Commission Regulation (EU) No 737/2010 of 10 August 2010 laying down detailed rules for the implementation of Regulation (EC) No 1007/2009 of the European Parliament and of the Council on trade in seal products Text with EEA relevance *OJ L 216, 17.8.2010, 1–10.*

In 2010 legislation[511] was also passed on the protection of animals used for scientific purposes given the increasing use of animals[512] as a result of an earlier process of revising European animal experimentation legislation.[513] The previous directive was seen as unsuccessful in creating an adequate minimum standard, due to the regulation of animal experimentation becoming uneven across the EU as a result of the fact that some Member States had more extensive national legislation while others had merely transposed the 1986 directive.[514] The EC sought scientific expert input in regard to animal sentience, the origin of experimental animals, and the euthanasia methods.[515] This resulted in the 2010 directive which aims to protect animals used in scientific research and which had to be implemented in the legislation of all European Member States by 2013.[516] The Parliament argued that given increased public concern over animal welfare, it was inappropriate that legislation protecting experimental animals would have "as its original basis, not the welfare of such animals, but undistorted trade between Member States."[517] This directive was described by the scientific journal *Nature* as "more than a decade of pitched battles between research advocates and animal-rights campaigners."[518] The author outlined the contention between the scientist's concerns regarding restrictions on the research they can conduct and the concerns for animal welfare.[519]

This directive harmonises animal research legislation throughout the EU to ensure high standards of animal welfare and scientific research.[520] However, there was minimal change

[511] Directive 2010/63/EU of the European Parliament and of the Council of 22 September 2010 on the protection of animals used for scientific purposes Text with EEA relevance *OJ L 276, 20.10.2010, 33–79.*
[512] Updating Directive 86/609/EEC.
[513] Ilja Richard Pavone (n520) 80 and Anna S Olsson, Sandra Pinto da Silva, David Townend, and Peter Sandøe (n343) 348.
[514] Ilja Richard Pavone (n520) 82.
[515] See Anna S Olsson, Sandra Pinto da Silva, David Townend, and Peter Sandøe (n343) 349 and see European Food Safety Authority: Scientific Panel on Animal Health and Welfare 2005 available at http://ec.europa.eu/environment/chemicals/lab_animals/pdf/efsa_opinion.pdf accessed on 30/3/19.
[516] Directive 2010/63/EU took full effect on 1 January 2013.
[517] Anna S Olsson, Sandra Pinto da Silva, David Townend, Peter Sandøe (n343) 4.
[518] See Anna S Olsson, Sandra Pinto da Silva, David Townend, and Peter Sandøe (n)343 349 and Anna S Olsson and Peter Sandøe "Regulating animal experimentation in Europe – an overview" available at http://journoportfolio.s3-website-eu-west-1.amazonaws.com/users/40129/uploads/b74c9a50-929d-4e07-a9fa-dbbd29b19d8c.pdf accessed 22/5/18 also see Alison Abbott "Lab-animal battle reaches truce" (2010) *Nature*.
[519] Alison Abbott (n518)
[520] Ilja Richard Pavone "Animal Experimentation and Animal Welfare in the Context of the European Union: Reflections on the Directive 2010/63/EU and Its Transposition in Italy" (2015) Animal Experimentation and Animal Welfare in the Context of the European Union 76.

required for the countries with more demanding legislation than for countries where legislation had been based mainly on the previous 1986 directive. Under the 2010 directive, animals can only be used in research in the EU when there is a convincing scientific justification, when the expected benefits of the research outweigh the potential risks in terms of animal suffering and when the scientific objectives cannot be achieved using non-animal alternative methods. According to this directive, project proposals involving experiments on animals must be approved in a harm-benefit-analysis (HBA) that weighs the potential benefits of the experiment against the harm inflicted on animals. Only if the benefit outweighs the harm, will the project be approved. However, it is unclear what counts as a valid benefit.[521] Despite the justifying relevance of the "outcome" and the "benefit," it remains unclear how to understand these concepts.[522] It could be argued that once a benefit for humans is identified, then harm may be inflicted upon the animals. This strikes a resemblance to the concept of unnecessary suffering, which gives a wide scope to claim some action is indeed necessary.

This legislation sets out legal requirements to implement the 3Rs principles of replacement, reduction and refinement.[523] Russell and Burch proposed the concept of the 3Rs in 1959.[524] Over the past 40 years, the 3Rs have become widely accepted ethical principles in the EU. These are the guiding principles underpinning the humane use of animals in scientific research – replace animals with non-animal methods where possible; reduce the number of animals used to a minimum while still obtaining scientifically valid results; and refine practices to reduce any possible pain, suffering, distress or lasting harm to the animals.[525] However, the

[521] Matthias Eggel and Herwig Grimm "Necessary, but Not Sufficient. The Benefit Concept in the Project Evaluation of Animal Research in the Context of Directive 2010/63/EU" (2018) Animals 8 (34).
[522] Matthias Eggel and Herwig Grimm (n521).
[523] Recital 11 for a general discussion of the provisions of this Directive see Ilja Richard Pavone (n520) and Darran Calley "The Aggregation of Suffering in the Regulatory Context: Scientific Experimentation, Animals, and Intrinsic Value" Journal of Animal Ethics, (2017) 7 (1) and also Anna S Olsson, Sandra Pinto da Silva, David Townend, and Peter Sandøe (n343).
[524] See Good Animal Practice in Science discussion on the 3R's available at https://3rs.ccac.ca/en/about/three-rs.html accessed 01/12/19.
[525] Recital 11. For a general discussion of the provisions of this Directive see Ilja Richard Pavone (n520) and Darran Calley "The Aggregation of Suffering in the Regulatory Context: Scientific Experimentation, Animals, and Intrinsic Value" Journal of Animal Ethics, (2017) 7 (1) and also Anna S Olsson, Sandra Pinto da Silva, David Townend, and Peter Sandøe (n343).

ultimate goal of replacement has yet to be realised.[526] Significantly, the use of animals in experimentation is questionable, given that they are recognised as sentient beings. This raises issues of how ethical it is to use animals for experimental purposes and how necessary and efficient this practice is.[527]

Under this directive, all EU countries must provide public statistics outlining the number of animal procedures completed each year. These are broken down in many ways, including by species, by type of research, and by severity.[528] It regulates each aspect of the chain of animal involvement: the breeding of animals for use in science, the scientists engaged in research and testing, those who have welfare responsibilities for the animals during that period, and the institutions in which research takes place.[529] There are some inconsistencies, however, in this piece of legislation. Animal welfare is part of the political scope of the EU through the Treaty of Lisbon, which makes it a legitimate issue to consider in legislation. Significantly, Article 12 of this directive states "Animals have an intrinsic value which must be respected." Therefore, animals should always be treated as sentient beings.[530] However, where restrictions are imposed, they are based on research purposes and not on the suffering of animals, and this is in contrast with the treaty's basis of protecting "the welfare of animals as sentient beings."[531]

There are further areas of concern. For example, Annex VIII of the directive divides animal procedures into three categories; mild, moderate and severe. Mild procedures are described as "procedures on animals as a result of which the animals are likely to experience short-term mild pain, suffering or distress, as well as procedures with no significant impairment of the well-being or general condition of the animals." In section III of Annex VIII, mild procedures

[526] For a breakdown of the number of animals used in experiments within the EU see http://eara.eu/en/animal-research/animal-research-statistics-europe/ accessed 01/6/19. Alternative methods have been established for details see :http://ec.europa.eu/environment/chemicals/lab_animals/3r/key_resources/portals_en.htm.
[527] See Oxford Centre for Animal Ethic's discussion on animal experimentation available at https://www.oxfordanimalethics.com/what-we-do/ethics-of-animal-experimentation/ and Kathy Archibald "Animal Research is an Ethical Issue for Humans as Well as for Animals" (2018) Journal of Animal Ethics 8 (1) and PETA "Animals used for experimentation" available at https://www.peta.org/issues/animals-used-for-experimentation/.
[528] European Animal Research Association (EARA) website available at http://eara.eu/en/animal-research/animal-research-statistics-europe/ accessed on 01/6/19.
[529] Anna S Olsson, Sandra Pinto da Silva, David Townend, and Peter Sandøe (n343) 350.
[530] Recital 12 also see Matthias Eggel and Herwig Grimm (n521) 2.
[531] Anna S Olsson, Sandra Pinto da Silva, David Townend, and Peter Sandøe (n343) 355.

are listed to include feeding of modified diets, that do not meet all the animals' nutritional needs and are expected to cause mild clinical abnormality within the timescale of the study. Moderate procedures are described as "procedures on animals as a result of which the animals are likely to experience short-term moderate pain, suffering or distress, or long-lasting mild pain, suffering or distress as well as procedures that are likely to cause moderate impairment of the well-being or general condition of the animal." Section III of Annex VIII includes some of the following: induction of tumours, or spontaneous tumours, that are expected to cause moderate pain or distress or moderate interference with normal behaviour and evoking escape and avoidance reactions where the animal is unable to escape or avoid the stimulus and are expected to result in moderate distress. Severe procedures are described as "procedures on animals as a result of which the animals are likely to experience severe pain, suffering or distress as well as procedures, that are likely to cause severe impairment of the well-being or general condition of the animal." Severe procedures include the following: toxicity testing where death is the endpoint, or where fatalities are to be expected and inescapable electric shock. This example illustrates that while the EU formally recognises animals as sentient beings, this directive treats animals as commodities with minimal regard to their suffering. It does not consider their emotional needs or many physical needs of animals and therefore, does not provide adequate protection. A rights-based approach is required in order to adequately protect animal interests. Under a welfare approach there will always be a balancing of interests, favouring human benefits.

In 2012 the EU's ban on battery cages came into effect.[532] Furthermore, the EU ban on all gestation crates became effective.[533] The non-commercial movement of pet animals was also harmonised.[534] This regulation requires that vaccination against rabies must be documented in the pet passport, or the animal health certificate as the sole requirement for dogs, cats and ferrets to travel across EU borders, with certain exceptions.

Further reform regarding trade on seal products was introduced in 2015. The original regulation, which placed a ban on the trade in seal products was amended[535] and the

[532] Directive 1999/74/EC placed a ban on the use of conventional laying cages in the EU from 1 January 2012 only permitting 'enriched' cages, barn, free range or organic systems thereafter.
[533] Regulation 1523/2007.
[534] Regulation (EU) No 576/2013 Replacing Regulation 998/2003.
[535] By Regulation 2015/1775.

repealing regulation,[536] which was subject to a dispute,[537] was introduced. This regulation provides for an Inuit exception to cater for a balancing of interests. It allows seal products which result from hunts traditionally conducted by Inuit and other indigenous communities to be placed on the Union market if the conditions under Article 3(1) of Regulation 1007/2009, as amended, have been met.

In 2016 a new regulation[538] (EU Animal Breeding Regulation) was introduced on zootechnical[539] and genealogical[540] studies and laid down conditions for the breeding, trade in and entry into the Union of purebred breeding animals and hybrid breeding pigs. This new EU Animal Breeding Regulation came into force in November 2018 and sets rules for trade in breeding animals, outlines the rights and obligations of breeders and sets rules for the entry of breeding animals in breeding books and breeding registers. Furthermore, legislation[541] relating to transmissible animal diseases aimed at minimising animal disease, and hence improving animal welfare was also introduced in 2016. This regulation does not provide rules on animal welfare, although it recognises that animal health and welfare are linked, and it requires, for the first time, that animal welfare be taken into account when considering the impacts of diseases and measures to combat diseases.[542] This Animal Health Law will take full effect from 2021.[543]

In conclusion the 2000s introduced limited change. There was no significant change to the protection of animals as the legislation continued to be adjusted and amended. The

[536] Regulation 737/2010.
[537] This case will be discussed in the next section.
[538] Regulation (EU) 2016/1012 of the European Parliament and of the Council of 8 June 2016 on zootechnical and genealogical conditions for the breeding, trade in and entry into the Union of purebred breeding animals, hybrid breeding pigs and the germinal products thereof and amending Regulation (EU) No 652/2014, Council Directives 89/608/EEC and 90/425/EEC and repealing certain acts in the area of animal breeding ('Animal Breeding Regulation') (Text with EEA relevance) *OJ L 171, 29.6.2016, 66–143.*
[539] The technology of animal husbandry.
[540] Relating to the study or tracing of lines of family descent.
[541] Regulation (EU) 2016/429 of the European Parliament and of the Council of 9 March 2016 on transmissible animal diseases and amending and repealing certain acts in the area of animal health ('Animal Health Law') (Text with EEA relevance) *OJ L 84, 31.3.2016, 1–208 .*
[542] See "General Q&A New EU Regulation on transmissible animal diseases ("Animal Health Law") March 2016" available at https://ec.europa.eu/food/sites/food/files/animals/docs/ah_law_regulation-proposal_qanda.pdf accessed 15/7/20.
[543] See report by Wildlife and Countryside Link and the UK Centre for Animal Law (A-Law) "Brexit: getting the best deal for animals" (2018) available at https://www.rspca.org.uk/documents/1494939/7712578/Brexit+-+getting+the+best+for+animals+%28PDF+4.24MB%29.pdf/0b1fece7-d734-dd0c-b787-5d7ea805604b?t=1558099775756 accessed 15/7/20.

legislation continued to trail behind our best science and theory. There is a lacuna in EU law. Article 13 recognises the sentience of animals however, sentience requires a rights-based approach. It is acknowledged that animals can suffer, yet they are still in cages. The mother-infant relationship is artificially terminated in the case of many farm, zoo, and lab animals, as well as for some companion animals. Animals are still subject to live transport. This is in spite of scientific research demonstrating that most animals are sentient, and thus have an equal interest in avoiding pain and suffering. The Treaty of Lisbon's recognition of animal sentience is a promise that failed to deliver. There is no meaningful change since the recognition of animal sentience within the EU. The legislative recognition of animal sentience was significant in catalysing discussions about animal sentience, however, animals are prevented from exercising their moral capability. Therefore, Article 13 has failed to deliver meaningful change to the daily lives of animals. Consequently, the opportunity to create a new rights-based approach to animal protection discussions, policy and legislation was missed.

The following section will examine the implications of EU law on animals and discuss the potential impact of Brexit on animal protection.

3.1.3 Implications for animal protection

The fact that EU law recognises all animals as sentient beings means that we ought to differentiate them from the other goods. Sentience signifies that an individual has some stake in their own lives and interests in their own fate. It is not coherent to consider animals as movable goods and at the same time as sentient beings.[544] EU law generally does not reflect the fact that animals ought to be protected as sentient beings. Given that animal welfare science is an evolving field, it is problematic that there has been limited progress in EU animal welfare policy and legislation for those who have a legitimate interest in animal protection. The ability to reach an agreement when formulating law and policy to afford protection to animals as sentient beings is constrained by the need to manage the preferences of the Member States about how best to protect animals and their welfare needs. The cultural and religious practices of the Member States are explicitly covered by Article 13 TFEU and must be accounted for when formulating EU-wide legislation. For some, this may cover certain contentious domestic practices, such as bullfighting and foie gras production. It is therefore

[544] Carlos Contreras "Sentient Beings Protected by Law: Analysis of Recent Changes in Colombian Animal Welfare Legislation" Global Journal of Animal Law (2016) (GJAL) 2 5.

difficult to reach, let alone to promote, a clear consensus of how to protect animal welfare in the Union. It is therefore apparent that the Union has to navigate difficult terrain in order to make progressive changes in order to protect animals adequately.

Despite the formal reference to animals in the treaty as "sentient beings", this does not really translate into the practical legal framework. In general, animal welfare is protected insofar as it is instrumental to the functioning of the internal market or agricultural production. The Lisbon amendments do not seem to fully appreciate the implications of this change in terminology, especially considering the lack of any acknowledgement of the fact animals are usually included in the term goods and products under the treaty. There is a recognition of the sentience of animals across the Union, but at the same time, animal welfare law serves to legitimise their treatment as products.[545] Our scientific understanding of animal sentience needs to be first defined and then incorporated into practice. Furthermore, EU legislation requires decisions on animal welfare to be taken in line with scientific knowledge. We already have regulations based on scientific evidence, but we choose to ignore some parts of the evidence.[546] We need to align what we know about animals with what protection the law provides. This entails an evidence-based approach and requires continuing a science-based study directed towards a better understanding of what it means and how it feels to be a sentient animal. The law should progress toward a system of protection that is evidence-based, which takes animals and their capacity to experience pain into account, but also the evidence we now have regarding animal morality and animal interests. Animals with complex social lives that include moral lives should not be re-grouped, separated, and isolated which denies the exercise of their moral capabilities. It is unlikely that welfarism can account for this harm and therefore, the current approach to animal protection must be reframed in order to bring animal protection legislation into line with a rights-based approach.

The following section will examine the contemporary issue of Brexit and will outline the possible implications of Brexit on animal protection.

3.1.3.1 The EU, Brexit and the impact on animals

[545] See Kate Sowery "Sentient Beings and Tradable Products: The Curious Constitutional Status of Animals Under Union Law" (2018) Common Market Law Review 55 (1).
[546] For example, See Art. 5(2) of Directive 98/58.

The United Kingdom (UK) officially left the EU on 31 January 2020.[547] There is discussion and concern regarding the impact this may have on animal welfare. Brooman and Sparks raise the question: "Does Brexit present a threat to animal welfare, or an opportunity for positive reform?"[548]

The EU has many protections in place but also has certain restrictions on advancing animal welfare measures, for example, live export[549] and testing on animals.[550] There is an opportunity for these welfare concerns to be addressed. The UK has been at the forefront in advancing EU animal welfare laws with a history of influencing change. This history can be traced back to 1822 with the introduction of Martin's Act[551] and The Brambell Report of 1965.[552] Furthermore, in the 1990s the UK government lobbied the EU to recognise the sentience of animals. This resulted in a protocol on animal welfare in the Treaty of Amsterdam in 1997, which was later strengthened in Article 13 of the Treaty of Lisbon.[553] However, as a result of Brexit, the UK may have less power to influence improvements to animal welfare. Although, the UK will also have greater scope to set different standards which could be higher than those set by EU legislation. Therefore, Brexit presents both threats and opportunities for animal protection.[554] The next section will outline the opportunities and threats facing the UK post-Brexit.

[547] Debating Europe "What happens if there's no Brexit trade deal?" (2020) available at https://www.debatingeurope.eu/2020/12/02/what-happens-if-theres-no-brexit-trade-deal/?fbclid=IwAR1io5tm4R1Ft6KNzVdzdHKcsEGUdt_e2RPeYWGxSFNDefawBwcsxcSS6Xk#.X9dNp9j7TIV accessed 05/12/20.
[548] Simon Brooman and Paula Sparks "Brexit: A New Dawn for Animals Used in Research, or a Threat to the 'Most Stringent Regulatory System in the World'? A report on the development of a Brexit manifesto for Animals Used in Science" (2018) Animals in Science, Sentience and Brexit 1.
[549] The EU Court of Justice has ruled, for example, that Member States cannot prohibit the live export of animals due to free movement of goods.
[550] Article 2 of the Directive 2010/63/EU states that, as a harmonising measure, it "prohibits member states from introducing greater protection for animals than the directive requires."
[551] Martin's Act 1822.
[552] See Report of the Technical Committee to Enquire into the Welfare of Animals kept under Intensive Livestock Husbandry Systems 1965 available at https://edepot.wur.nl/134379 accessed 02/12/20.
[553] Steven P McCulloch (n554).
[554] Steven P McCulloch "Brexit and Animal Welfare Impact Assessment: Analysis of the Threats Brexit Poses to Animal Protection in the UK, EU and Internationally" (2019) Animals (Basel).

3.1.3.1.1 Opportunities

It has been noted that there are opportunities for the UK to make real improvements for animals, post-Brexit.[555] The EU's policy of harmonising legislation can often limit attempts by Member States to implement higher standards in their national systems.[556] Brexit, therefore, provides an opportunity for the UK to improve the welfare of animals, both in the UK and internationally.

The UK can maintain its progressive animal protection reforms such as addressing long-distance transport. The recent announcement that there will be a ban on the live export of animals is evidence of some of the improvements the UK can implement.[557] Prior to Brexit, the UK was bound by the EU rules on the free movement of goods which apply to farm animals and therefore, Member States cannot prohibit the live export of food animals.[558]

The UK now has an opportunity to continue to be a world leader in improving animal protection.[559] While there are opportunities, there are also many threats and challenges to animal protection. The next section will examine the possible threats.

3.1.3.1.2 Threats

The Treaty on the Functioning of the European Union (TFEU) will not be part of UK law post-Brexit. Therefore, Article 13 will cease to be part of UK law.[560] The UK government argued that transposing Article 13 TFEU was unnecessary as recognition of animal sentience is implicit in the Animal Welfare Act 2006. It has been contended that a stronger duty than that in Article 13 could apply in all policy areas and would not be limited to the caveats including religious rites, cultural traditions and regional heritage that are found in Article 13.[561] However, the decision to not include the recognition of animals as sentient beings in UK law has been criticised by animal protection organisations, who argue that animals will lose a significant degree of protection. They argue that the Animal Welfare Act 2006, for instance, does not

[555] Wildlife and Countryside Link and the UK Centre for Animal Law (A-Law) report "Brexit: getting the best deal for animals" (2018) 5.
[556] Oliver Wookey (n565).
[557] BBC News "Live animal exports to be banned in England and Wales" (2020) available at https://www.bbc.com/news/uk-politics-55167473 accessed 15/12/20.
[558] Wildlife and Countryside Link and the UK Centre for Animal Law (A-Law) report (n555) 10.
[559] https://www.independent.co.uk/voices/brexit-animal-welfare-laws-boris-johnson-pets-livestock-rspca-a9296486.html.
[560] Steven P McCulloch (n554).
[561] Oliver Wookey (n565) 34.

cover wild animals, while Article 13 covers all sentient animals.[562] As a result, the UK government published a bill on sentience.[563] However, a law has not been passed and, with EU laws no longer applying, animals are arguably, in a less favourable position.[564]

The majority of animal welfare legislation in the UK is based on EU law, meaning that while its transposition is both necessary and possible, it will not be a simple task.[565] Currently 80% of animal welfare legislation comes from the EU.[566] EU animal welfare laws cover four key areas including farmed, wild, experimental and companion, that will be affected by Brexit.[567] In the farmed and wild animal context, Brexit may lead to a weakening of farm welfare standards and wildlife controls.[568] For example, the EU has prohibited veal crates[569] and barren battery cages[570] and limits the use of sow stalls.[571] Regarding experimental animals, significantly, the EU has banned the testing of cosmetics and ingredients on animals.[572]

The EU Withdrawal Act 2017[573] converts directly applicable EU regulations into UK law. However, the RSPCA contend that some EU regulations may not have corresponding national legislation, meaning that any protections conferred by regulations will most likely not be guaranteed without their adequate transposition.[574] Regarding directives, they are

[562] A-Law. A-Law Releases Legal Briefing Note on Brexit, Article 13, and Animal Sentience available at https://www.alaw.org.uk/2017/11/a-law-releases-expert-legal-briefing-note-on-brexit-article-13-and-the-debate-on-recognising-animal-sentience-in-law/ accessed 5/12/20.
[563] Animals (Recognition of Sentience) Bill 2017.
[564] See Parliament website available at https://services.parliament.uk/Bills/2017-19/animalsrecognitionofsentience.html accessed 04/12/20.
[565] Oliver Wookey "The Effect of the Brexit on Animal Welfare in the United Kingdom: A Case for Scepticism and Scrutiny" (2018) Derecho Anim. Forum Anim. Law Stud 9/2.
[566] RSPCA website "What Brexit puts at risk for animal welfare" available at https://www.rspca.org.uk/whatwedo/endcruelty/changingthelaw/brexit accessed 3/12/20.
[567] *Ibid* and also see David Bowles "What does Brexit mean for animal welfare?" (2016) Wildlife and Country link available at https://www.wcl.org.uk/what-does-brexit-mean-for-animal-welfare.asp accessed 4/12/20.
[568] Simon Brooman and Debbie Legge "Covid-19, Brexit and much more in 2020: A Bad Year for Animal Welfare?" (2020) Liverpool Law Review (2020) 41 100.
[569] Council Directive 2008/119/EC laying down minimum standards for the protection of calves.
[570] Council Directive 1999/74/EC on the Welfare of Laying Hens.
[571] Council Directive 2008/120/EC of 18 December 2008 laying down minimum standards for the protection of pigs.
[572] See Wildlife and Countryside Link and the UK Centre for Animal Law (A-Law) report (n555) where they outline that the EU has banned the testing of cosmetic products on animals within the EU since March 2009 and from March 2013 the EU also banned the sale of cosmetic products and ingredients that were animal tested after that date anywhere in the world. These bans have been recognised as a significant step towards achieving a global ban on cosmetics testing on animals.
[573] The European Union (Notification of Withdrawal) Act 2017.
[574] RSPCA "Brexit: the impact on animal welfare: Together we can improve animal welfare" available at https://politicalanimal.org.uk/wp-content/uploads/2018/01/Brexit_-overview-new.pdf accessed on 9/12/20.

likely to already be in UK legislation. They may need to be adapted as the UK will no longer be part of relevant EU bodies to which that legislation refers.[575] Significantly, the EU Withdrawal Act gives ministers the power to amend legislation without the involvement of Parliament.[576] Furthermore, Ministers will decide how to replace legislative references to EU mechanisms and institutions.[577] Therefore, much of the existing UK legislation will require adaptation to ensure that it will work properly after Brexit.

In leaving the EU, the UK finds itself outside the European Food and Safety Authority (EFSA) and therefore outside the Panel on Animal Health and Welfare (AHAW).[578] Moreover, the European Court of Justice (ECJ) no longer has an influence over the UK. Therefore the ECJ will no longer ensure that protections conferred by directives are adequately transposed into domestic legislation.[579] It is, therefore, vital that new organisations are established to develop and enforce animal welfare standards post-Brexit.[580] The UK and the EU will need to work together to protect and advance animal welfare laws.[581]

The next section will examine EU case law, tracing the evolution of the EU court's response to cases involving animal protection.

3.1.4 EU case law

The EU has adopted a number of directives to address animal welfare concerns and to guarantee a minimum level of protection to animals. However, both practice and cases brought before the CJEU indicate that the agreed minimum level of protection is not always considered sufficient by some Member States and that the implementation and enforcement of EU law in this area is far from successful.[582] The CJEU has, through its rulings, previously restricted Member States' discretion and ability to rely on treaty derogations to the free

[575] Wildlife and Countryside Link and the UK Centre for Animal Law (A-Law) report (n555) 9.
[576] See the EU Withdrawal Act 2017, section 8A also contains Henry VIII powers. Henry VIII powers enable primary legislation to be amended by secondary legislation with or without further parliamentary scrutiny. See BBC News "Brexit: Withdrawal bill gives 'excessive' power to ministers, peers warn." (2017) available at https://www.bbc.com/news/uk-politics-41426622 accessed 03/12/20.
[577] *Ibid.*
[578] Parliament debate available at https://publications.parliament.uk/pa/ld201719/ldselect/ldeucom/15/1510.htm accessed 10/12/20.
[579] Oliver Wookey (n565) 37.
[580] Wildlife and Countryside Link and the UK Centre for Animal Law (A-Law) report (n555) 5.
[581] *Ibid* 5–6.
[582] Katrin Vels "Trade restrictions on animal welfare grounds in the European Union" (2004) RGSL working papers 18 available at http://www.rgsl.edu.lv/images/stories/publications/RWP19Vels.pdf accessed on 06/01/15 6.

movement of goods in order to ensure their higher animal welfare standards have cross border EU territorial scope.[583] However, more recent cases illustrate reference to the recognition of animals as sentient beings.

There have been few decisions regarding animal welfare legislation in the EU courts. Nonetheless, some of them are particularly important as they demonstrate limitations within the legislation and judicial rulings, but also illustrate some change in approach to animal protection. The next section will examine the CJEU cases directly relating to animal protection.

1996 The Hedley Lomas case[584]

In the Hedley Lomas case, the UK were of the belief that exporting live sheep to Spain created a substantial risk to animals. They contended that Spain were not complying with the rules contained in the 1974 directive on stunning of animals before slaughter[585] and the animals would suffer treatment contrary to the directive.

The directive on stunning of animals before slaughter seeks to avoid unnecessary suffering on the part of animals when being slaughtered. Articles 1 and 2 of the directive require Member States to ensure the stunning, by appropriate approved methods, of animals for slaughter. The only significant protection for animals prior to the declaration and protocol was held in Article 36.[586] However, this case illustrates that this provision is of limited application. The principle of mutual confidence is a fundamental aspect of EU law. It implies that Member States should have trust in one another when implementing EU law. The Court of Justice restricted Member States' discretion and ability to rely on treaty derogations to the free movement of goods in order to ensure their higher animal welfare standards have cross border EU territorial scope. The court's narrow interpretation equating minimum EU legislative standards of animal welfare with total harmonisation has had the effect, thus, of limiting the advancement of animal welfare in the EU. The Commission informed the UK authorities that it considered the UK's general ban on exports of live animals to Spain to be contrary to Article 34 of the EC Treaty (restrictions on exports) and not justifiable under Article

[583] Diane Ryland (n295) 4.
[584] Case C – 5/94 *Hedley Lomas* [1996] ECR 1-2553.
[585] Directive 74/577/EEC on the stunning of animals before slaughter.
[586] Ex-Article 30.

36 (which gives power to Member States to introduce prohibitions or restrictions on imports and exports on the grounds of protecting the health and life of animals provided they are not means of arbitrary discrimination or a disguised restriction on trade.)

It was held that the UK must trust the relevant Spanish authorities and could not prohibit exportation. This case highlights the lack of discretion left to Member States, even where there are animal welfare concerns. The following case also centres on Article 36.

1998 Compassion in World Farming (CIWF)[587]

The Compassion in World Farming (CIWF) case further illustrates the limited application of Article 36. CIWF applied to the European Court of Justice for a ruling that would allow the UK government to ban the live export of veal calves to Member States that did not comply with UK animal welfare standards which are stricter than the standard set out in Directive 91/629/EEC which lays down minimum standards for the protection of calves. The CJEU ruled that the UK could not ban the export of veal calves to Spain, due to the veal crating system employed in Spain but prohibited in the UK, as a cruel and inhumane practice towards animals.[588] The Court of Justice rejected this application restating the position held in Hedley Lomas, that Member States must trust the implementation of measures by other Member States in harmonising directives. The court held that Directive 91/629 did not provide for exhaustive regulation. Therefore, the UK could not rely on Article 36 either on the grounds of public morality and policy or to protect the health of animals, to restrict the export of live calves.

Radford notes, "[t]he apparent inability of Member States to prevent practices which are widely regarded as cruel by their population raises an important constitutional issue."[589] The court's judgments in these cases on animal protection – Hedley Lomas and Compassion in World Farming, exemplify the court's cautiousness or even unwillingness in allowing recourse to Article 36 by Member States and thereby failing to demonstrate a willingness to extend

[587] Case C – 1/96 *The Queen v Minister of Agriculture, Fisheries and Food, ex parte: Compassion in World Farming Ltd* [1998].
[588] See Katrin Vels "Trade Restrictions on animal welfare grounds in the European Union" (2004) available at http://rgsl.edu.lv/images/stories/publications/RWP19Vels.pdf accessed 22/04/17.
[589] Mike Radford, "Animal passions, animal welfare and European policy making" in P Craig, C Harlow (eds), *Law-making in the European Union*, (London and Boston, 1998), W.G. Hart Legal Workshop Series, Institute of Advanced Legal Studies, 431.

legal protection to animals in these circumstances and furthermore raises an issue of sovereignty, restricting the capacity of Member States to freely take measures for the protection of animals.

The next case is noteworthy as it focuses on the Animal Welfare Protocol and its significance.

2001 The Jippes case[590]

This case involved a legal dispute over the foot and mouth disease that was present in Europe. To prevent the spread of the disease, the EU passed a community directive banning the use of preventative vaccinations and mandated compulsory slaughter. When instituting the policy of non-vaccination, the Council carried out a global assessment of the advantages and drawbacks of the system to be established and that policy, corresponding to the recommendations of the International Office of Epizootics and the practice followed by numerous countries worldwide, was not inappropriate in the light of the objective of controlling the foot-and-mouth disease.[591] The plaintiff owned a variety of farm animals and did not want to kill them, arguing that EU law embraced a general principle that animals were shielded from physical pain and suffering. Such a principle, the plaintiff argued, could only be overridden when necessary; and the compulsory slaughter directive was in direct conflict with this principle. In order to support their claim, the applicants relied on several arguments, including the protocol to the Amsterdam Treaty, which states that Member States shall pay full regard to the welfare requirements of animals. The applicants pointed out that according to Article 311 EC, the protocol forms an integral part of Community law with which the directive in question had to comply.[592]

However, the CJEU determined that animal welfare did not feature among the objectives of the treaty despite the treaty providing that full regard was to be given to the welfare requirements of animals, finding instead that animal welfare is "merely" a public interest to

[590] Case C – 189/01 H. *Jippes, Afedeling Groningen van de Nederlandse tot Bescherming van Dieren, Afedling Assen en omstreken van Nederlandse Vereniging tot Besherming van Dierer v Minister van Landbouw, Natuurbeheer en Visserij* [2001] ERC 1 – 5689.
[591] See paras 82, 84, 95-96, 100.
[592] Eleanor Spaventa, " Case C – 189/01 H. *Jippes, Afedeling Groningen van de Nederlandse tot Bescherming van Dieren, Afedling Assen en omstreken van Nederlandse Vereniging tot Besherming van Dierer v Minister van Landbouw, Natuurbeheer en Visserij"* (2002) Common Market Law Review 39 (5) 1162.

be taken into account by the institutions when exercising their regulatory power.[593] The court held that the Animal Welfare Protocol did not delineate any new important animal-friendly principles in EU law but merely codified old ones. It has been stated that the effect of its ruling was clear: it made the Animal Welfare Protocol a nullity. Rather than being a new step in a new direction and a "momentous occasion," as so many took it to be, the protocol was, according to the court, "more like a law formally recognizing the sky as blue."[594] Ludwig and O'Gorman hold that the court should not have relied on case law prior to the introduction of the protocol and in doing so, it undermined the provision.[595] The protocol states that its purpose is to "ensure improved protection of animal welfare." It has been argued that the purpose of the protocol is to attain a new level of protection, rather than restate the existing standard. The court did not deny some importance being attached to the protection of animals and their health, however; the court found it necessary to verify that the Community had taken full account of the requirements of animal welfare in adopting the contested measures.[596] This decision to downgrade the significance of the protocol by the court and thereby refuse to grant animal welfare the status of a general principle of Community law may be due to a reluctance of the court to move away from previous narrow interpretation as seen in the cases outlined above or perhaps may be due to a lack of training on the part of the judiciary to deal with cases involving animal welfare, or simply a decision to favour trade and agriculture over animal welfare.

The following case is of great importance as it deals directly with animal welfare within trade law.

2011 Seal Product's Case

Due to concerns about the animal welfare aspects of seal hunting, several EU Member States had adopted or planned to introduce, national legislation to ban the trade in seal skins and products. Consequently, the European Union adopted a regulation banning the import and placing of seal products on the EU market in 2009. The ban was subject to two exceptions. The first exception allows seal products resulting from seal hunts by Inuit and other

[593] Eleanor Spaventa (n592) 1162.
[594] Nicolous K Pederson "Overview of European Animal Welfare Laws: 2003 to Present" (2009) Animal Legal & Historical Center Michigan State University College of Law.
[595] Rasso Ludwig and Roderic O'Gorman (n372) 367.
[596] Eleanor Spaventa (n592) 1162.

indigenous communities to be marketed within the EU. The second allows the marketing of seal products which result from by-products of hunting that is regulated by national law and conducted for the sole purpose of the sustainable management of marine resources. The EU Seal Regime consists of two different legal instruments: the basic regulation[597] of the European Parliament and Council on trade in seal products and an implementing regulation[598] laying down the rules and procedures for the application of the regime.[599]

The ban was challenged multiple times, both before the CJEU and the WTO. As seal products mostly originate from outside the EU, it is argued that the EU action has been discriminatory and hence contrary to the WTO regulations. As a result, Canada and Norway challenged the validity of the EU seal product regime before the WTO, arguing essentially that the EU's animal welfare policy is not consistent and is disproportionate through a plea of illegality that challenges the Commission's implementing regulation.[600]

In the European courts, a first challenge to the regulation was brought by several Inuit associations.[601] The seal hunters challenged the basic regulation banning trade in seal products but lost because the General Court found that they lacked standing to challenge a legislative act.

This was not the final judgment on this issue as a second round of cases were taken.

2013 Inuit Tapiriit Kanatami and Others v European Commission Case T-526/10[602]

Following on from the above Seal Product's case, in the second round of cases in Luxembourg, the seal hunters argued a plea of illegality that challenged the Commission's implementing regulation.[603] They contended that the EU acted *ultra vires* by adopting the ban on the basis

[597] Regulation (EC) No 1007/2009.
[598] Regulation (EU) No 737/2010.
[599] See International Fund for Anima Welfare report available at https://s3.amazonaws.com/ifaw-pantheon/sites/default/files/legacy/2014-IFAW-brief-on-seal-regime.pdf accessed 1/5/16.
[600] Regulation 737/2010 available at https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:216:0001:0010:EN:PDF.
[601] Order of the General Court (Seventh Chamber, extended composition) of 6 September 2011 available at https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A62010TO0018%2804%29 Case T–18/10 .
[602] Judgment of the General Court (Seventh Chamber) of 25 April 2013. *Inuit Tapiriit Kanatami and Others v European Commission* Case T-526/10 available at http://curia.europa.eu/juris/document/document_print.jsf?doclang=EN&text=&pageIndex=0&part=1&mode=lst&docid=136881&occ=first&dir=&cid=1654620.
[603] Regulation 737/2010.

of Article 114 TFEU (harmonisation of rules for the establishment and functioning of the internal market). Moreover, the applicants argued that the ban violated their fundamental rights and the principles of subsidiarity and proportionality. According to the applicants, the EU-wide ban was not aimed at improving the functioning of the internal market, but rather at safeguarding the welfare of animals, an objective for which no legal basis exists within the EU treaties.

The applicants put forward three main arguments. The first and second concerned the choice of the "internal market" as a legal basis, namely the harmonisation of conditions of sale of seal products. The applicants submitted that the purpose of the regulation is the protection of animals and not the functioning of the internal market, and as animal welfare is not a legal basis in EU law, there had been a violation of the principles of subsidiarity and proportionality. The Court rejected this first argument, stating that "…it is clear from the basic regulation that its principal objective is not to safeguard the welfare of animals but to improve the functioning of the internal market…"[604] This is also in line with Article 13 TFEU which requires the Union, in formulating its internal market policy, to pay full regard to the welfare requirements of animals as sentient beings.

As a third argument, the applicants invoked the protection of human rights, including the protection of indigenous peoples and their right to be heard and the right to property. The Court also rejected this argument, stating that the regulation provides exceptions to the prohibition, for seal products derived from hunts traditionally conducted by Inuit communities and other indigenous communities for subsistence.

The seal hunters failed to convince the General Court to annul the EU-wide ban on trade in seal products. The appeal was therefore dismissed. The WTO Panel ruled that the regime constituted in principle a legitimate measure to protect moral concerns of European citizens and did not breach principles of subsidiarity, proportionality or fundamental rights.

[604] Para 35.

A subsequent 2015 appeal was also dismissed.[605] The ECJ followed the General Court and defined regulatory acts as "acts of general application other than legislative acts."[606] The ECJ also agreed with the General Court in finding that Regulation 1007/2009 did satisfy this definition.

Before the CJEU, the EU had to prove that the objective of the regime was to regulate the internal market, in order to justify recourse to Article 114 TFEU. The General Court found that this condition was fulfilled: "it is clear from the basic regulation that its principal objective is not to safeguard the welfare of animals but to improve the functioning of the internal market." However, before the WTO, the EU argued that the objective of the seal regime was to address the moral concerns of the EU public with regard to the welfare of seals.[607] The source of contention in all of these cases is that a number of countries and seal hunters were not happy with the EU's decision to damage their economic interests for reasons of protecting the health and life of animals not situated within the territory of the EU. This case is of importance as it determined that moral concerns regarding animal welfare can trump trade liberalisation commitments and justify the introduction of protectionist measures.

The next case continues the trend of more favourable judgments towards animal protection.

2012 The Brouwer case[608]

The plaintiff was a dairy farmer. In 2008 the inspection services reported that Mr Brouwer did not comply with the ban on the tethering of calves for seven individual calves on his dairy farm. The plaintiff argued that the ban on calves tethering in the directive does not apply to animals confined on dairy farms, and only applies to calves confined for rearing and fattening. The plaintiff submitted a request to the State Secretary to be exempt from the ban on the tethering of calves. When Mr Brouwer applied for agricultural payments to the State

[605] Case C – 398/13 P, *Inuit Tapiriit Kanatami II*. The full judgement available at http://curia.europa.eu/juris/document/document.jsf?text=&docid=166822&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=199510.
[606] Para 60.
[607] Para 7 367.
[608] Judgment of the Court (Sixth Chamber) of 14 June 2012 G. *Brouwer v Staatssecretaris van Economische Zaken, Landbouw en Innovatie* (Case C – 355/11).

Secretary for the year 2008, payments were reduced by 20% as a penalty for not complying with the directive laying down minimum standards for the protection of calves.

Mr Brouwer appealed this decision before the Administrative Court for Trade and Industry, and they referred two questions to the CJEU for a preliminary ruling on the interpretation of this directive. The CJEU rejected the plaintiff's argument and held that the directive applies to calves confined for rearing and fattening, but also to calves confined for dairy farming in view of the directive's objective to harmonise agricultural practices across the EU. The animal welfare provision in the TFEU was a factor influencing the CJEU, signifying a shift from animals as goods in the EU internal market to animals as sentient beings worthy of protection in themselves.[609] The court held that in view of Article 13 of the TFEU, providing that animals are sentient beings, their welfare should be taken into account in the formulation and implementation of agricultural policies. This case highlights an animal-centred approach by the judiciary.

The following case follows this trend and is significant as it centres on the controversial issue of live export and was decided after the incorporation of Article 13 into the TEFU.

2015 Zuchtvieh-Export Case [610]

The plaintiff was an export company which had contracted two trucks to transport cattle from Kempten in Germany, to Andijan in Uzbekistan, through Poland, Belarus, Russia and Kazakhstan, a total journey of 7000km (4350 miles) due to take place between 23 April and 2 May 2012. In compliance with the EU regulation on the protection of animals during transport, the plaintiff had submitted a journey log. He wanted to respect EU welfare transport rules only until the EU external border (Belarus) and not for the part of the journey taking place in Russia and Asia, representing for the animals a continuous travel time of 146 hours without food, water or rest.

The competent German authority rejected the logbook because the EU welfare transport rules[611] were not respected. The defendants argued that a number of provisions in the regulation support the position that the authority of the place of departure can approve the

[609] Diane Ryland (n666) 5.
[610] Case C – 424/13 *Zuchtvieh-Export.*
[611] Regulation 1/2005.

transport, by stamping the journey log only where the provisions of that regulation have been complied with outside the territory of the EU. The plaintiff argued that the regulation applies only to those portions of the journey occurring within the EU. The plaintiff further contended that the compliance with the regulations outside the EU jurisdiction is unrealistic and counter-productive because the resting areas in third countries are not sufficiently equipped to accommodate live animals, exposing them to risks of injury and contamination. Additionally, the EU regulations might conflict with the regulations in third countries, where authorities sometimes prohibit the unloading of animals during rest periods.

The defendants argued that the lack of proper infrastructure does not release transporters of their obligations under EU law and that it is necessary to consider the possibility that certain journeys cannot be carried out as a result of the impossibility to comply with the regulations. This brings into question whether transport outside the EU should be restricted and of course questions live export generally, given the recent controversies.[612]

The CJEU agreed with the defendants, supporting a generous construction of the regulation on the protection of animals during transport, grounded in Article 13 of the TFEU, which provides that animals are sentient beings and that their welfare should be taken into account in the formulation and implementation of agricultural policies. The CJEU ruled that animal welfare requirements during transport must also be respected when the transport is taking place outside of EU borders. The provisions of Regulation 1/2005 continue to apply even when a consignment has left the EU and until the place of destination is reached. After the ruling, it became clear that it is a legal obligation for the EU Member States to refuse to issue export certificates if there is no assurance that the EU's legislative provisions on animal welfare during transport will be complied with until final destination. In May 2020,the Dutch Food, and Consumer Product Safety Authority (NVWA) stated that it would no longer sign off on live exports of animals to non-EU countries through Russia if a control post is needed.[613]

[612] For example, the 2019 incident in which thousands of sheep died after a vessel overturned off the Romanian coast see the Guardian report available at https://www.thejournal.ie/romania-sheep-drowned-livestock-4905580-Nov2019/ accessed 15/1/20.
[613] Eurogroup for Animals "The Netherlands stop live export on animal welfare grounds" available at https://www.eurogroupforanimals.org/news/netherlands-stops-live-export-animal-welfare-.

There are still issues with adherence to this regulation. The EU Commission has reported of widespread non-compliance with EU Regulation 1/2005.[614]

It is evident that there has been a shift in the EU judiciary's response to cases involving animal protection. The EU courts have moved from a very narrow interpretation of the law as was demonstrated in Hedley Lomas and Compassion in World Farming cases to a wider interpretation which was clear in the above Zuchtvieh-Export case. This marks a significant improvement in animal protection. However, the EU has been slow to develop any new legislation over the last decade, particularly in regard to accommodating the recognition of animal sentience. Furthermore, the EU has not incorporated the evidence that is now available on animal cognition.

The next section will examine animal protection and the World Trade Organisation (WTO). There is now wide recognition of animal sentience which is not reflected in the WTO. The EU has progressed from recognising animals as solely goods or products to sentient beings. However, this recognition is not present in trade law. The 2014 the Seal Products case which will be discussed in this chapter, which has highlighted the latent conflict between ethics and economics that underlie the world's largest trade regime.

3.2 ANIMAL PROTECTION AND THE WORLD TRADE ORGANISATION

Animal protection faces many conflicts. One such conflict is trade law. The WTO was established in 1995 under the Marrakesh Agreement.[615] This international trading system is designed to eradicate barriers to international trade through the creation and enforcement of market access rules. The cornerstone of WTO rules is the principle of non-discrimination in international trade.[616] The WTO deals with the global rules of trade between nations. Its main function is to ensure that trade flows as smoothly, predictably and freely as possible.[617] There is a great challenge to balance animal welfare, competition and trade law. While most would not dispute that animal welfare is both important and legitimate; there are clear differences

[614] See CIWF " The widespread failure to enforce EU law on animal transport" available at https://www.ciwf.org.uk/media/3817823/analysis-of-fvo-reports-on-enforcement-of-transport-regulation.pdf accessed 15/5/20.
[615] See World Trade Organisation https://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr_e.htm accessed 14/3/17.
[616] *Ibid.*
[617] *Ibid.*

of opinion as to what animal welfare policies should prevail over trade obligations as cultural factors and traditional practices must be considered. This can be particularly problematic given the diverse approaches of WTO member countries to animal protection. Although there is no clear reference to animal welfare in the General Agreement on Tariffs and Trade (GATT) now incorporated into the World Trade Organisation, animal welfare organisations' attention is firstly based on the following articles:

Article III: which requires contracting parties to accord treatment "no less favourable than that accorded to like products of national origin" in respect of all regulations affecting the sale and offering for sale of those products. This article means that WTO members must be careful in applying and setting trade restrictions. However, in WTO case law, the preference of consumers should be considered when deciding whether a product is perceived as different or not.

Article XI: which limits the power of member countries to ban the import of production unilaterally. Most recently, the EU has taken decisions which completely ban certain products based on production criteria such as cat and dog fur, finished cosmetic products, ingredients for cosmetics, and seal products. In this context, animal welfare organisations are concerned because the conventional view is that WTO members cannot differentiate or restrict imports based on production methods.

Article XX: which establishes "subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination among countries where the same conditions apply, or as a disguised restriction on international trade, nothing on this, agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures or necessary to protect human morals or necessary to protect human, animal or plant life or health or relating to the natural conservation of exhaustible natural resources." This has never been tested with specific respect to animal welfare. Article XX establishes a series of general exceptions by providing the framework within which WTO members can continue to pursue measures which are otherwise inconsistent with WTO rules.

Nothing in the WTO rules prevents a country from raising its own animal welfare standards, but there are some important consequences that can occur if standards are raised: the cost

of the product increases, leaving the country and its producers who use the higher standard at a price disadvantage compared to imports produced by less animal welfare friendly methods. Under WTO law, animal welfare standards fall within the concept of non-product related process and production methods (PPMS); the making of distinctions between products based upon methods of production is currently controversial under the WTO's international trade rules.[618] With a non-product PPM, there is no observable trace of the production processes in the final product. A potential conflict occurs where a WTO member wants to prohibit or regulate agricultural imports on the basis of a production method which is considered to encourage poor animal welfare, particularly if those methods are already prohibited domestically.[619] The WTO has the authority to prevent states from developing their own trade policies and can punish any contraventions of trade law.[620] Radford notes that "this can preclude a country from obstructing the importation of a product which has been produced in a manner it regards as ethically unacceptable: in relation to, for example, the terms and conditions of the workforce, the environmental impact, or, of course, the standards of animal welfare."[621] This highlights the negative impact of trade rules on animal welfare.

It has always been a basic tenet of GATT and the WTO legal system that process and production methods are not relevant criteria on which trading partners can differentiate between goods.[622] Products that have the same physical form are to be considered to be like products by the importing country, irrespective of whether they have been produced abroad in an environmentally friendly manner or not.[623] This system has a negative impact on animal welfare. A Member State may implement laws to prohibit, for example, laws to restrict certain

[618] For a discussion of PPMs see Steve Charnovitz "The Law of Environmental 'PPMs' in the WTO: Debunking the Myth of Illegality" (2002) Yale Journal of International Law 27 (1).
[619] Eurogroup for animals 2011 report available at http://eurogroupforanimals.org/files/policies/downloads/108/the_global_trade_challenge_of_animal_welfare.pdf accessed on 15/10/14.
[620] Mike Radford "Animal Welfare Law in Britain: Regulation and Responsibility" (OUP 2001) 33.
[621] Mike Radford (n620) 133.
[622] Alan Swimbank "Like Products, Animal Welfare and the World Trade Organization"(2006) Journal of World Trade 40 (4) 687.
[623] Alan Swimbank (n622) 687.

methods of farming which are cruel to animals.[624] However, an increase in the cost of production may be a direct consequence of this law.

3.2.1 How does trade law affect animal protection?

Olga Kikou, the European Affairs Manager for Compassion in World Farming notes that animals are regarded as sentient beings while in EU territory, but the same animals are left to their fate once they are sent abroad. She notes: "this is certainly a double standard that needs to be scrutinised and eliminated."[625] She further argues that this trade in live animals is in breach of Article 13 TFEU which requires the EU and the Member States to pay "full regard to the welfare requirements of animals" in formulating and implementing EU agricultural policies.[626] She believes the "full regard" condition has not been applied in the case of exports. Moreover, she contends that besides legal obligations, there are also welfare and ethical considerations surrounding the EU live animal trade which have not been addressed despite the fact that EU institutions have been informed many times in recent years of the very serious welfare problems experienced during transport and at slaughter of EU animals.[627] In her view, economic arguments should not push aside moral and ethical considerations.[628] This view has been echoed by other groups such as Green Peace[629] and Friends of the Earth.[630] From a national perspective, this view has been presented from government parties such as the Green Party and the Solidarity Party in Ireland and has resulted in legislation such as an

[624] WTO rules and animal welfare – RSPCA Australia Information paper (2014) available at http://kb.rspca.org.au/afile/498/87/ accessed on 21/09/14.
[625] Olga Kikou "The inhumane trade in European farm animals" available at http://www.euractiv.com/sections/agriculture-food/ending-cruelty-inhumane-trade-european-farm-animals-312866 accessed on 13/03/15 where Olga Kikou, the European Affairs Manager for Compassion in World Farming notes that animals are regarded as sentient beings while in EU territory, but the same animals are left to their fate once they are sent abroad. She further adds "this is certainly a double standard that needs to be scrutinised and eliminated." She further argues that this trade in live animals is in breach of Article 13 TFEU which requires the EU and the Member States to pay "full regard to the welfare requirements of animals" in formulating and implementing EU agriculture policy. She is of the opinion that the "full regard" condition has not been applied in the case of exports.
[626] Olga Kikou (n625).
[627] Olga Kikou (n625).
[628] Olga Kikou (n625).
[629] See Greenpeace available at https://www.greenpeace.org/international/?s=animal+protection&orderby=_score.
[630] See Friends of the Earth available at https://www.foe.ie/.

upcoming probation on the fur trade,[631] and has been used as a basis for bans on animals in zoos and hunting of animals or the use of animals in research.[632]

The limitation to the potential use of animal welfare guidelines is found in Articles 1 and 111 of the GATT and in sections of the Technical Barriers to Trade (TBT) Agreement. Article 1 of the GATT contains the core most favoured nation (MFN) obligation. This obligation requires that a country must treat all products which are imported from other WTO members as equal and on a non-discriminatory basis. Therefore, if two imported products are the same or very similar, they must be treated in the same manner regardless of their origin. To overcome this rule, a member must demonstrate that the products are not "like products" or that their products have been treated in the same way, which, therefore, renders the measure non-discriminatory. For example, battery eggs and free-range cannot be distinguished.[633]

Article 111 contains the principle of national treatment which is also a non-discrimination obligation aimed at a national level. This obligation holds that a country cannot favour or afford protection to domestic products - imported products must not be treated any less favourably than domestic products. Where a Member State prevents the importation of a product, this must be based on the actual product and not on the process or production method (PPMs) used. However, the TBT Agreement provides a distinction – product-related and non-product related. In terms of "like products," non-product related PPMs are not considered in differentiating a final product to prevent distortions in competition between otherwise competitive goods.[634] This concept is the foundation of these two central principles of the WTO system. Animal production methods and the environment in which the animal is raised in, in most situations, do not affect the physical characteristics of the final product; therefore, the majority of animal welfare guidelines would be categorised as non-product related PPMs. Trade laws limit a country's ability to restrict the importation of animal-derived products that are produced using methods that would otherwise be illegal under that country's animal welfare laws. This limitation could potentially undermine improvements in

[631] Prohibition of Fur Farming Bill 2018.
[632] For instance, the REACH directive Regulation (EC) No 1907/2006 of the European Parliament and of the Council on the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH).
[633] Peter Stevenson "The World Trade Organisation Rules: A Legal Analysis of their Adverse Impact on Animal Welfare" (2001) Compassion in World Farming available at https://trade.ec.europa.eu/doclib/docs/2005/april/tradoc_122188.pdf accessed 12/3/17.
[634] See World Trade Organisation (n615).

animal welfare within a particular country.[635] A Member State may choose to reform their laws by prohibiting certain practices or methods that have a negative impact on animal welfare. This change in the method may increase costs and therefore create a product that is more costly to the consumer. However, when the consumer is faced with the option to purchase a cheaper alternative that is an imported product that has not been produced according to the more animal-friendly method, then this option undermines the animal welfare policy behind the reform.[636] Consequently, Member States may try to place restrictions or outright bans on these cheaper non-welfare friendly imports[637] which may result in a complaint to the WTO dispute panel. Animal welfare is classified as a non-product related process and production method (PPM) - WTO rules do not generally allow for distinctions to be made between products on this basis.

The second exception under Article XX of the GATT, regarding animal health, poses two difficulties. Firstly, there is a lack of clarity as to whether the term "animal health" can be interpreted to include issues of animal welfare. This section does not explicitly include the term "animal welfare." The original aim of this exception was to protect animals from the risk of disease. The argument may be made that animal welfare is a significant component of animal health, however, for this exception to be put forth, scientific evidence must show a significant link between animal welfare and its impact on animal health.[638]

The second difficulty concerns what commentators refer to as the requirement for a "jurisdictional nexus," that is, Article XX (b) only applies to the health of animals residing within the trade-restricting Member State's territory.[639] An animal residing in a foreign jurisdiction, or animals which have been exported out of the country, do not fall within the scope of Article XX (b) if the treatment of such animals does not impact upon the health of animals within the Member State's territory. However, most cases concern animal welfare standards in foreign jurisdictions, and therefore, this exception may not provide a strong basis

[635] RSPCA website "Do trade rules of the World Trade Organisation affect our animal welfare laws? available at http://kb.rspca.org.au/Do-the-rules-of-the-World-Trade-Organisation-affect-our-animal-welfare-laws_498.html accessed on 2/10/14.
[636] RSPCA website (n635) 2.
[637] RSPCA website (n635) 2.
[638] RSPCA website (n635) 4.
[639] RSCPA website (n635) 4.

to reply upon.[640] On a more positive note, there have been trade restrictions that have benefited animal welfare such as the regulation to prohibit the marketing of domestically produced and imported cosmetics that contain ingredients tested on animals.[641] Furthermore, the EU ban on cat and dog fur in 2007[642] and most recently, the Seal Products ban,[643] illustrate change is possible and demonstrate how change can be effectuated. A paradigm shift is beginning to emerge. The issues highlighted regarding trade and the impact on animals is now in the public forum. The next section will highlight the tension between trade and animal ethics and also the potential effect of Brexit, trade law and animal protection.

3.2.2 Animal protection in trade disputes

Up until recently, there was no precedent for animal welfare in trade disputes which is completely out of sync with contemporary science and theory. While there have been exceptions set out in the GATT agreement under Article XX (a) and (b), it had been unclear how these exceptions would apply should a trade dispute arise. Critics of the WTO argue that free trade principles too often result in a "race to the bottom" in which the most efficient means of production are given preference, regardless of the cost to animals.[644] Furthermore, the problems posed by the WTO rules not only have a negative effect on animal welfare but also have a negative effect on some governments in that they retreat from a strong position in defence of animals.[645] Animal laws vary from one country to the next, and there is no automatic right under international trade law to impose domestic standards on imports from third countries. What one country may value as life, may be considered as property by another. This leads to fundamental differences in the existing laws designed to protect

[640] RSPCA website (n635) 5.
[641] Council Directive 6/768/EEC as amended by Council Directive 93/5/EC on the approximation of laws of the Members States relating to cosmetic products.
[642] Regulation (EC) No 1523/2007 of the European Parliament and of the Council of 11 December 2007 banning the placing on the market and the import to, or export from, the Community of cat and dog fur, and products containing such fur.
[643] Regulation (EC) No 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products.
[644] Andrew Linzey *The Global Guide to Animal Protection* (University of Illinois Press 2013) 109.
[645] *Ibid* 109.

animals. An animal's moral status, be it a sentient being or a machine, inevitably determines how it will be viewed in the eyes of the law.[646]

Until recently there had been no mention of animal welfare in the WTO or in WTO agreements.[647] The Seal Products case is the first occasion on which the WTO dispute settlement organs were required to consider non-instrumental rationale - expressions of intrinsic moral or spiritual beliefs - as a distinct basis for trade restrictive measures. A broader implication of this ruling is that an important precedent has been set for the role of animal welfare in trade agreements. The Appellate Body has accepted in principle that animal welfare can be considered as a measure necessary to protect public morals, and this reasoning can be applied in future laws to protect other animals – in the EU and elsewhere. The public morals defence could create an opening to persuade other countries to enact morality-based trade restrictions on a wide range of products from animals raised in what the groups argue are inhumane conditions.[648] This defence has the potential to improve the treatment of animals; however, it is based on human sensitivities and not on the basis that animals are worthy of rights in themselves.

Current trade laws are incompatible with evidence of animal sentience and morality. There are many missed opportunities. Animals continue to be defined and treated as cargo. Their moral capacities are not considered. A rights-based approach would incrementally improve the lives of animals and allow then to exercise their moral capabilities.

The next section will continue to analyse the impact of trade law on animals by examining Brexit and the possible impact this may have on animals.

[646] Paige M Tomaselli "Detailed Discussion of International Comparative Animal Cruelty Laws" (Michigan State University College of Law, 2003) available at https://www.animallaw.info/article/detailed-discussion-international-comparative-animal-cruelty-laws accessed 26/08/14.
[647] Alejandro Thiermann and Sarah Babcock "Animal Welfare and international trade" Rev. ciri tech Off. nt. Epiz., (2005) 24 (2) 747.
[648] See "WTO 'morals' decision could escalate animal welfare disputes" available at http://www.politico.com/story/2014/05/wto-eu-seal-product-ban-canada-norway-107004.html accessed on 28/08/14.

3.2.3 Trade, Brexit and the impact on animals

The UK faces the problem of re-negotiating all the existing free trade agreements it had enjoyed as part of the EU.[649] While the UK has reached a trade agreement with the EU, where the UK does not conclude trade agreements with other countries, trade will be subject to the rules of the WTO.[650] This is of great significance as the WTO trade rules on restrictions for animal welfare will influence how Brexit affects animal protection.[651] Significantly, there are uncertainties as to whether animal welfare can be used as a rationale to restrict imports from other countries under WTO rules.[652] There are currently no grounds for using animal welfare as a restriction to trade under WTO rules. However, there are some exceptions and there is some precedent on using moral objections as a result of the EU's seal product ban.[653] Importantly, whether challenges made at the WTO to trade restrictions based on animal welfare would be upheld, remains unclear. Therefore, many of the potential measures that the UK could take to protect existing domestic standards could be challenged by other countries at the WTO.[654]

It is therefore argued that trade based on WTO terms would be harmful for animals as this creates a risk that UK animal welfare standards could be reduced.[655] The UK will need to be cautious when negotiating trade deals with countries that have lower welfare standards.[656] The greatest threat to farm animal welfare post-Brexit would come from UK farmers competing against imported food from countries that produce to lower standards than the UK.[657] For example, the USA administers growth hormones to cows and continue to use

[649] UK and EU trade deal available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/948119/EU-UK_Trade_and_Cooperation_Agreement_24.12.2020.pdf accessed 28/12/20 also see Tushar Behl and Deeksha Sharma "Brexit and Animal Welfare: Opportunity or Risk?" (2020) available at https://www.jurist.org/commentary/2020/04/behl-sharma-brexit-and-animal-welfare/ accessed 02/12/20.

[650] Olivia Bridge "The potential impacts of Brexit on welfare" (2019) available at https://veterinary-practice.com/article/would-a-no-deal-brexit-lead-to-compromised-animal-welfare-standards accessed 10/12/20.

[651] RSCPA website "What Brexit puts at risk for animal welfare" available at https://www.rspca.org.uk/whatwedo/endcruelty/changingthelaw/brexit accessed 3/12/20.

[652] Steven P McCulloch "Brexit and Animal Welfare Impact Assessment: Analysis of the Threats Brexit Poses to Animal Protection in the UK, EU and Internationally" (2019) Animals (Basel).

[653] RSPCA website (n651).

[654] RSPCA website (n651) also see Steven P McCulloch (n652).

[655] RSPCA website (n651).

[656] Wildlife and Countryside Link and the UK Centre for Animal Law (A-Law) report "Brexit: getting the best deal for animals" (2018) 24.

[657] Peter Stevenson "A better Brexit for Farm Animals: What the Government Must Do to Protect Welfare Standards" (2018) Food Research Collaboration, Centre for Food Policy.

conventional battery cages.[658] Species-specific slaughter regulations have not been developed and sow stalls are used in most pig production.[659] Unless consumers are willing to pay for higher welfare products, UK farmers could become uncompetitive and welfare standards in the UK could come under pressure.[660]

Moreover, there is a risk that the political will for progressive animal protection reforms will be diluted now the UK has left the EU.[661] There are, however, some opportunities, for example, to take measures to ensure that any imports into the UK whether from the EU or outside the EU, meet welfare standards equivalent to those set in the UK or be subject to a tariff. This will ensure that welfare standards across the UK are protected and improved upon.[662] The UK will continue to be an international player and can negotiate its own free trade agreements with consideration for animal welfare.[663]

3.3 CONCLUSION

This chapter set out a historical and a chronological account of the legislation in place within the EU, which seeks to provide regulation and protection of animals used as a source of trade. The inclusion of animal welfare in the provisions of the EU treaties signifies the elevation of animals to be considered as sentient beings. It indicates a move from an economic understanding of animals as products – where they are only viewed in light of their value for humans – to a moral understanding of the value attached to the needs of animals. In theory, this fundamental principle should, therefore, underlie all EU legislation and policy that has any bearing on animals. However, at present, it is not considered in all aspects.[664] Animals are recognised as "sentient beings", but they are still also classified as "agricultural" products

[658] See Compassion in World Farming "Dairy Cows" available at https://www.ciwf.org.uk/farm-animals/cows/dairy-cows/ accessed 03/12/20.
[659] RSPCA website (n651).
[660] Parliament debate **"**Brexit: farm animal welfare" (2017) available at https://publications.parliament.uk/pa/ld201719/ldselect/ldeucom/15/1510.htm accessed 19/12/20.
[661] Steven P McCulloch (n652).
[662] Wildlife and Countryside Link and the UK Centre for Animal Law (A-Law) report "Brexit: getting the best deal for animals" (2018).
[663] Oliver Wookey "The Effect of the Brexit on Animal Welfare in the United Kingdom: A Case for Scepticism and Scrutiny" (2018) Derecho Anim. Forum Anim. Law Stud 9/2 34.
[664] See European Parliament Policy Departments on Citizen's Rights and Constitutional Affairs on "Animal Welfare in the European Union" (2017) available at http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583114/IPOL_STU(2017)583114_EN.pdf 47.

within the treaty. It is this formal conflict which produces practical problems for the way in which animal welfare law and policy is developed within the Union.

Furthermore, EU legislation on animal welfare has not advanced greatly in the last number of years.[665] Despite the adoption of minimum animal welfare requirements in legal instruments and public standards, concerns still exist as to the adequacy of these baseline measures in ensuring good animal welfare practices.[666] Moreover, it is questionable whether the recognition of sentience is compatible with welfarist protection. Broom has stated, "once scientific information about animal welfare is available, ethical decisions can be taken."[667] Therefore, scientific evidence about animal welfare is significant when legislation and policies are formulated in the EU. The Animal Welfare Protocol, Article 13, the adoption of the Five Freedoms, and the multitude of species-specific legislation, paved the way for a trend toward more progressive legislation. There is a considerable body of animal welfare law, but the current standards of animal welfare legislation do not reflect the scientific reality. The law is not taking an evidence-based approach and is failing to incorporate animal cognition as a criterion in determining the appropriate protections that are required to protect animal interests adequately.

The EU recognises animals as sentient beings, yet many pieces of legislation allow for them to suffer. The scope and content of the legislative framework seem to be out of step with and does not reflect, the moral status attributed to animals in the treaty. This recognition marked a fundamental normative shift in thinking about animals and their welfare at EU level and in theory, a possible departure from, the traditional paradigm for regulating animals as economic objects. In one regard, this change is progressive and rich with symbolism. This progression in recognition of animals coincides with philosophical and scientific advances on the capacity of animals to feel and experience both positive and negative emotion, but this can also be viewed as a response to our increasing consumption and use of animals and the need to regulate this industry.[668] Furthermore, the possible implications of this development

[665] Paola Sabbrio (n306) 37.
[666] Diane Ryland (n295) 4.
[667] Donald Broom (n308) 16.
[668] In 2016, the world's meat production was estimated at 317m metric tons see "What is the true cost of eating meat?" (2018) available at https://www.theguardian.com/news/2018/may/07/true-cost-of-eating-meat-environment-health-animal-welfare accessed 12/1/20.

are far from being fully realised in the current legal framework; evidence-based legislation is needed.[669] There is a paradox in the Union framework: the increased use of animals for human purposes, on the one hand, and the increased moral concern for the well-being of animals, on the other hand. It is difficult to envisage how to reconcile empathy, compassion and concern for animals while human use of animals continues to increase.

The legal regime still does not recognise the morality and intrinsic value of animals as there is a conflict between animals as products with an extrinsic value for the benefit of humans, and animals as sentient beings with an intrinsic value of their own. The primary focus is on their use for human consumption, experimentation and entertainment. It is acknowledged that the EU has made significant advancements in relation to the development of animal welfare standards, but it is argued that there is a need to press deeper into the theoretical underpinnings and potential of the framework. Animal welfare provides interpretative guidance for the relevant legislative requirements but cannot be considered absolute – welfare alone is not sufficient. For instance, the marketing ban in the cosmetics legislation demonstrated that the legislature chose not to impose a complete ban on animal testing in the EU: instead, it balanced animal welfare against other objectives, in particular the protection of human health. Thus, there is a need for the ascription of legal rights to protect these species in line with their abilities and interests. The behavioural needs of animals are often overlooked due to the economic nature of the measure, favouring animals' status as goods rather than as sentient beings; ensuring that animals remain alive, grow and that their productivity is maintained.[670] The general expectation seems to be that providing adequate resources such as food and accommodation is sufficient to safeguard animal welfare which is not reflective of our best science.

In conclusion, while the EU has introduced change and has improved protections for animals, EU protection is not very favourable to animals. While it is significant that animals are now regarded as sentient beings, and the EU courts are enforcing rules in a more stringent manner,

[669] Peter Stevenson "European Union Legislation on the welfare of farm animals" (2012) Compassion in World Farming available at https://www.ciwf.org.uk/media/3818623/eu-law-on-the-welfare-of-farm-animals.pdf accessed 15/5/19.

[670] See Recital 12 of Directive 2008/120/EC for the protection of pigs: "a balance should be kept between various aspects to be taken into consideration, as regarding welfare, including health, economic and social considerations and also environmental impact."

it is evident that the regulations in place are not protecting animals adequately. The recognition of animal sentience does not filter through the legislation in place, and the EU does not take into account the vast evidence we now have regarding animal cognition. Furthermore, trade law trails behind our best science and legal developments by continuing to define animals as goods and failing to acknowledge their sentience or cognitive abilities, despite efforts to improve animal protection at an international level.

The current approach to animal protection must be reframed in order to bring animal protection legislation into line with a rights-based approach. Previous developments are lacking a sufficient theoretical underpinning and have left philosophical doubts, preventing animals from exercising their moral capabilities. Law has traditionally relied heavily upon science to validate its positions and reforms. For example, in the 1960s, the science of the Five Freedoms was revolutionary. However, in light of contemporary scientific knowledge regarding the sentient and moral animal's life experience, the current legal protection of animals is not in line with science or theory. A rights-based approach should be adopted beyond the human parallel, for those who occupy a moral centre. A new rights perspective would improve the protection of animals as the current and previous developments are lacking a sufficient theoretical underpinning and leave philosophical doubts.

The next chapter will examine the recognition of animal sentience in law and its effect or lack thereof in providing legal protection for animals and will further provide an overview of the issues within the current legal framework for animals. The focus is on the most critical factors affecting the effectiveness of animal protection legislation. The purpose of this chapter is to highlight that current laws offer inadequate protection. It will set out how animals' fundamental interests are not protected by analysing the shortcomings within this current system, for example, the failure to protect animals' autonomy and issues with the property status of animals.

CHAPTER 4: A CRITIQUE OF THE ANIMAL WELFARE SYSTEM

"Although we claim to take animals seriously and to regard them as having morally significant interests, we routinely ignore those interests whenever it benefits us."

Gary Francione

4. INTRODUCTION

The previous chapter provided a historical and a chronological account of EU legislation on animal protection. This demonstrated that while the EU has formally recognised animals as sentient beings, in practice, animals are not treated as such. Importantly, it raised the question of whether a welfare-based system offers adequate protection. It further analysed the WTO and the negative impact of trade on animal protection.

This chapter provides a critique of the current animal welfare system. The chapter will commence by examining the recognition of animal sentience in law. The recognition of animal sentience underpins the animal welfare movement and is, therefore, of great importance.[671] The current system is built on the concept of sentience, yet it fails to protect animals in a meaningful way. While this recognition can be viewed as positive, in practice this has proved to be ineffectual, having only symbolic importance. Furthermore, this recognition does not take into account other important interests, including autonomy and self-determination.[672] Therefore, in addition to the recognition of animal sentience, the cognitive abilities of animals should be given recognition in law.

An examination of the inherent issues within the animal welfare system will also be provided. The focus is on the most critical factors affecting the effectiveness of animal welfare legislation such as the lack of standing of animals, animal welfare as a secondary concern, and the failure to pay adequate regard to evidence of advanced animal cognition, which is currently not a criterion in the EU when drafting animal welfare legislation. Despite the classification of animals as property, cases are being taken which attempt to challenge this categorisation, which will be explored in this chapter. The failure of the current animal welfare

[671] Helen Proctor "Animal Sentience: Where are we and where are we heading?" (2012) Animals (Basel) 2 (4).
[672] Lori Mario (n781) 69.

system to adequately protect animals' fundamental interests will be analysed by examining the law's failure to protect animals' autonomy. Furthermore, conservation measures will also be considered as this measure of protection often saves animals' lives. However, it does not protect animal sentience or value animals as beings in their own right. A case study on whaling will be provided to illustrate this point.

4.1 THE CURRENT ANIMAL WELFARE MODEL: THE MERITS AND LIMITS

This section firstly examines the recognition of animal sentience and its legal implications or lack thereof. It will highlight a number of deficits both in the implementation and enforcement of this concept, including ambiguity and the non-use of this recognition in legislation. Despite the legal recognition of animal sentience, no significant change in the human-animal relationship has been observed in practice. It concludes by discussing the actualisation of this recognition and argues that in order to provide true legal protection for animals, not only does animal sentience need to be actualised in law, but it should also be coupled with the recognition of other animal interests by including evidence we now have regarding animal cognition.

4.1.1 The classification of animals as sentient beings

Jeremy Bentham is considered among the first Western philosophers to argue that animals deserve equal moral consideration on the basis of their sentience.[673] Bentham's theory[674] places sentient individuals at the centre of moral concern. He holds that since all sentient beings can experience at least some forms of pleasure and pain, they deserve equal consideration.[675] His views on animal welfare have exerted a significant influence on modern debates around animal ethics[676] and his recognition of the importance of animal sentience has been influential.

[673] Johannes Kniess (n676).
[674] There is a discussion of Bentham's theory in chapter 2 see (2.2.2 The influence of utilitarianism.
[675] *Ibid* 559.
[676] Johannes Kniess "Bentham on animal welfare" (2019) British Journal for the History of Philosophy 27 (3) also see (2.2.2 The influence of utilitarianism where Peter Singer's theory is examined, which builds on Bentham's philosophy.

Over time there has been a shift in acknowledging that animals are capable of experiencing different emotions[677] and sentience has formed a basis for extending legal protections to animals.[678] It is argued that the old paradigm of seeing animals as mere things is no longer defensible.[679] On that basis, the legal status of animals has evolved in some jurisdictions from viewing them solely as things or products to sentient beings. However, an important shortcoming of the current legal approach towards animals based in notions of sentience is the fact that the exclusive focus on pain and suffering does not adequately protect animal interests.[680] Furthermore, the implications of sentience are limited to restricting negative states as opposed to promoting positive ones, and not all animals receive protection commensurable with their sentience.[681] The following sections will examine the practical effect of this recognition or lack thereof.

4.1.1.1 Ambiguous language

The evolution in the classification of animals as sentient beings can be noted as a positive move from identifying animals as things, products or goods, and the concept of sentience is important as it underpins the animal welfare movement.[682] However, there are a number of difficulties with this classification. There is conceptual vagueness in defining sentience. When the law affirms the sentience of animals, it is unclear what exactly is being recognised. It is noted that the term is "poorly defined and understood by the scientific community, let alone by lay people."[683] There is a debate around its formal acknowledgement and how the term can and should be defined.

[677] RSPCA "What is animal sentience and why is it important? (2019) available at https://kb.rspca.org.au/knowledge-base/what-is-animal-sentience-and-why-is-it-important/ accessed 22/7/20.
[678] RSPCA (n677) also see Joe Wills "The Legal Recognition of Sentience: What Implications for Killing Animals?"(2018) Animal Justice UK available at https://www.alaw.org.uk/wp-content/uploads/Animal-Justice-UK-5-June-2018.pdf accessed 20/7/20.
[679] Sabine Brels "The evolution of the legal status of animals: From things to sentient beings?" (2017) Global Animal Network available at https://www.globalanimalnetwork.org/evolution-legal-status-animals-things-sentient-beings accessed 22/7/20.
[680] Kate Sowery (n545).
[681] Charlotte Blattner (n691) 127.
[682] Jane Kotzmann "Sentience: What It Means and Why It's Important" (2020) available at https://sentientmedia.org/sentience-what-it-means-and-why-its-important/ accessed 22/7/20.
[683] Rajesh Reddy (n693).

The Royal Society for the Prevention of Cruelty to Animals (RSCPA) defines sentience as "the capacity of an animal to experience different feelings such as suffering or pleasure."[684] Donald Broom[685] expands on this definition by detailing the abilities that a being must have to be considered sentient. According to Broom, a sentient being is able to "evaluate the actions of others in relation to itself and third parties, to remember some of its own actions and their consequences, to assess risks and benefits, to have some feelings, and to have some degree of awareness."[686] Dictionary definitions provide a similar view. The Merriam Webster definition defines sentience as "feeling or sensation as distinguished from perception and thought."[687] Similarly, the Cambridge Dictionary defines this as **"**the quality of being able to experience feelings."[688] Compassion in World Farming provides further detail, noting that "sentient animals are aware of their feelings and emotions. These could be negative feelings such as pain, frustration and fear. It is logical to suppose that sentient animals also enjoy feelings of comfort, enjoyment, contentment, and perhaps even great delight and joy."[689] Therefore, sentience has no generally accepted definition.[690]

In recent decades a number of jurisdictions[691] including the EU, have expressly recognised animal sentience. In 2009, the EU amended the Treaty on the Functioning of the European Union (TFEU) to recognise animals as sentient beings. The meaning of sentience was not established. While it is positive that Article 13 explicitly acknowledges animal sentience, the requirement that Member States pay "full regard" to animal welfare is vague and does not create a precise and enforceable duty. For instance, the EU provision prescribes no substantive outcome to be achieved. Furthermore, Article 13 applies only to "agriculture, fisheries, transport, internal market, research and technological development and space policies" and includes a number of derogations including cultural traditions and religious rites.[692]

[684] RSPCA (n677).
[685] Professor of Animal Welfare at Cambridge University.
[686] Donald Broom "Considering animal's feelings" (2014) Animal Sentience 2.
[687] Definition available at https://www.merriam-webster.com/dictionary/sentience accessed 20/7/20.
[688] Definition available at https://dictionary.cambridge.org/dictionary/english/sentience accessed 20/7/20.
[689] Definition available at https://www.ciwf.org.uk/farm-animals/animal-sentience/ accessed 20/7/20.
[690] Jane Kotzmann (n682).
[691] For example, France, New Zealand and Belgium see Charlotte Blattner "The recognition of animal sentience by law" (2019) Journal of Animal Ethics 9 (2) for a discussion of these developments.
[692] Derogations are in place for religious rites, cultural traditions and regional heritage.

Other jurisdictions, including France, built upon this development in 2015 by amending its civil code stating that "animals are living beings gifted with sentience."[693] However, this change has been described as having very little practical impact and is seen by many as mostly symbolic.[694] Outside of Europe, the Canadian province of Quebec[695] explicitly recognises animal sentience in their laws since 2015 as has Colombia.[696] Similarly, the US state of Oregon amended its animal cruelty laws to establish that "animals are sentient beings capable of experiencing pain, stress and fear."[697] Like the EU, these jurisdictions have left the term undefined and have failed to clarify what exactly they mean when they recognise animals as sentient.

Unlike the above jurisdictions, New Zealand[698] defined animal sentience when it was recognised in 2015, describing it as an opportunity to provide their own definition one that allows them to move beyond the symbolic.[699] While no definition was provided within New Zealand's Animal Welfare Act, the New Zealand Veterinary Association (NZVA) saw this as an opportunity for veterinarians to demonstrate leadership by providing a definition. The NZVA believes that "sentience is the ability to feel, perceive or experience subjectively (i.e. the animal is not only capable of feeling pain and distress but also can have positive psychological experiences, such as comfort, pleasure or interest that are appropriate to its species, environment and circumstances). To state that animals are sentient accepts that they can experience positive and negative emotions."[700] It further notes that this recognition of

[693] French Civil Code, art 515-14 also see Rajesh Reddy "Enshrining Animal Sentience into Law: Global Developments and Implications" (2020) available at https://www.americanbar.org/groups/tort_trial_insurance_practice/publications/committee-newsletters/enshrining_animal_sentience_into_law/ accessed 22/7/20.
[694] Nicolas Boring "France: Animals Granted New Legal Status" (2014) available at https://www.loc.gov/law/foreign-news/article/france-animals-granted-new-legal-status/ accessed on 22/7/20.
[695] Civil Code of Quebec, art 898.1 also see Animal Legal Defense Fund "Sentient Legislation: ALDF's Canadian Province Rankings Motivate Change" (2015) available at https://aldf.org/article/sentient-legislation-aldfs-canadian-province-rankings-motivate-change/ accessed 20/7/20.
[696] Colombian Civil Code, art 655.
[697] Or. Rev. Stat. §167.305 (1) (2017).
[698] Animal Welfare Amendment Act (No 2) 2015 amending the Animal Welfare Act 1999.
[699] New Zealand Veterinary Association website "Sentience" (2018) available at https://www.nzva.org.nz/page/positionsentience accessed 22/7/20.
[700] *Ibid.*

sentience should create a new standard for the way in which animals are treated in society, creating positive welfare states and enhancement.[701]

New Zealand's act states that the purposes of the legislation include recognising "that animals are sentient" and "to require owners of animals, and persons in charge of animals, to attend properly to the welfare of those animals." However, ambiguity is still present. For instance, what does "attend properly to the welfare of those animals" actually mean? Furthermore, while New Zealand has defined sentience and clarified the legal effect of this recognition, practices such as factory farming and hunting are still permissible.[702]

While innovative, these statements do not clarify what animals legally are. We simply know that they are distinct from things yet continue to be treated as such. In practice, definition or no definition, the recognition of animal sentience has made little impact. Despite being recognised as sentient beings in these jurisdictions, animals remain under the category of things, although they are no longer considered as such. The recognition of animal sentience creates more of "a terminological precision rather than a real transformation of the legal status of animals"[703] thus, highlighting this recognition is of symbolic importance only.

4.1.1.2 Non-use of sentience recognition in legislation or practice

This inclusion of sentience language in animal legislation should strengthen the protection offered and should result in the development of policies that prohibit human interactions that cause negative emotions in animals while encouraging circumstances that result in positive emotions. However, the acknowledgement of animal sentience does not necessarily mean that animals will benefit from this recognition. Significant implications of recognising animal sentience have not been seen, and therefore this recognition is arguably ineffectual.

[701] *Ibid.*

[702] For example, Part 1, Section 30B of the Act "Hunting or killing," the law reads: "Nothing in this Act makes it unlawful to hunt or kill — (a) any animal in a wild state; or (b) any wild animal or pest in accordance with the provisions of — [list of acts here] or (c), any other wild animal or pest; or (ca) any game animal in accordance with the provisions of the Game Animal Council Act 2013; or (d) any fish caught from a constructed pond." See Athena Copenhaver "Why New Zealand's Animal Sentience Law Falls Short" (2015) available at https://medium.com/earth-ethics/why-new-zealand-s-animal-sentience-law-falls-short-1e46b8c7c579 accessed 23/7/20.

[703] Sabine Brels (n679).

In general, the law prioritises human interests, particularly economic ones, over animals' needs to avoid pain and suffering. Animals are protected under the animal welfare system because they are sentient, which acknowledges that they have an interest in being without pain; however, this interest is weighed against the interests of humans. Furthermore, pain and suffering are regarded as bad and thus should be minimised insofar as necessary; however, limited consideration is given to non-pain related matters.[704]

At an EU level, there have been no major developments in the secondary law framework since the introduction of Article 13 of the TFEU. Animal welfare measures are still very limited in number, and most of the measures serve merely to update the existing rules and requirements. Since the recognition of animals as sentient beings, the EU has made some improvements such as the ban on the use of barren battery cages in favour of enriched cages,[705] the prohibition on animal testing for cosmetics,[706] while still allowing animals to be used in research for other purposes such as education and training[707] and placed a ban on the import of seal products,[708] while still permitting industrial agriculture and live export – all of which denies animals the chance to perform their natural behaviours and causes them pain and suffering. If animals are recognised as sentient, then they should be respected and be free to live a life free from suffering, with their fundamental interests also protected.[709] However, the majority of current EU measures demonstrate that animals in the first instance are still recognised for their value as goods and products.[710] Moreover, at an EU level, recognition of animal sentience can be overridden under the derogations, which allow exceptions for religious rites, cultural traditions and regional heritage.

Jurisdictions which have recognised animals as sentient acknowledge an animal's ability to feel pain and pleasure, yet expressly deny them protection for reasons of economics, social

[704] Eva Bernet Kempers "Animal Dignity and the Law: Potential, Problems and Possible Implications" (2020) Liverpool Law Review 41 180.
[705] See European Commission "Laying hens" available at https://ec.europa.eu/food/animals/welfare/practice/farm/laying_hens_en accessed 22/7/20.
[706] See European Commission "Ban on animal testing" available at https://ec.europa.eu/growth/sectors/cosmetics/animal-testing_en accessed 22/7/20.
[707] See European Animal Research Association "EU regulations on animal research" available at https://www.eara.eu/animal-research-law accessed on 22/7/20.
[708] European Commission "Trade in seal products" available at https://ec.europa.eu/environment/biodiversity/animal_welfare/seals/seal_hunting.htm accessed 22/7/20.
[709] Compassion in World Farming "Animals are 'sentient' in New Zealand" (2015) available at https://www.ciwf.org.uk/news/2015/05/animals-are-sentient-in-new-zealand accessed 22/7/20.
[710] Kate Sowery (n545) 28.

norms and convenience.[711] In order to adequately protect animal interests, a shift in their legal status is necessary. The recognition of animal sentience cannot just be symbolic. It should lead to crucial changes in the everyday realities of human-animal relationships. Significantly, proper implementation and enforcement of animal sentience in legislation and practice, while needed, is not sufficient as sentience guidelines do not come anywhere close to recognising autonomy, self-determination, or other important animal interests and abilities, and therefore does not offer adequate protection.[712] The following section will demonstrate why sentience guidelines do not offer sufficient protection for animals.

4.1.1.3 The actualisation of sentience in law

The change in recognition of animals as sentient beings carries with it important implications. Consideration for animal sentience requires human respect, care, prudence, and moderation in dealing with them. Significantly, should sentience be defined and actualised, this concept would not provide adequate protection under the current animal welfare system. The exclusive focus on pain and suffering creates a growing discrepancy between the evidence we now have regarding animal interests and the current legal approach to animal protection. If laws are based around animal sentience alone, leaving out other considerations such as cognition and moral capacities, there would still be a deficit in their protection. This approach ignores all the other evidence and research which has evolved beyond demonstrating animal sentience, highlighting other vast abilities and interests of animals. Importantly, suffering as the prominent concern encourages insignificant reforms.

Furthermore, the utilitarian approach that is adopted entails a harm/benefit test in which any human benefit will suffice. Therefore, human beings will always seek to draw a balance. Recognition of animal sentience is qualified through utilitarian considerations; as a result, various uses of animals are socially, culturally, and legally considered legitimate and are not subject to legal scrutiny or fundamentally questioned. Law, as we know, is anthropocentric. It is a set of principles that privileges the concept of the person, and very few entities other than human beings qualify as such.[713] Human interests still generally prevail over non-human

[711] Charlotte Blattner (n691) 132.
[712] Lori Marion (n781) 69.
[713] Maneesha Deckha, "Critical Animal Studies and Animal Law" (2012), 18 Animal L. 207.

interests. Indeed, even where animal welfare provisions exist, human interests usually pose severe limitations and exceptions to animal protection.[714] The current legislative approaches prioritise the needs of industries above the needs of the animals themselves, permitting activities that are not in an animal's interest. There is still a balancing of interests and restrictions to the protections offered. The concept is not satisfied when purely economic interests justify almost complete disregard for an animal's sentience.

The current system is inadequate for meaningfully protecting animals. The welfare system is built on humane use that does not challenge the property status of nonhuman animals.[715] The actual use of the animal is not addressed or challenged.[716] Welfarism does not reduce suffering in any significant way.[717] While the modification of confinement, for example, might make life for animals more tolerable, the reduced suffering is generally trivial in relation to the state of their existence that remains unaddressed.[718] Sentience provisions do not question animals use, just their sensations and do not take into account other evidence regarding animal interests. Animals have other interests that are worthy of protection beyond freedom from the infliction of pain, suffering or harm, which are currently not given recognition or protection. It is clear on a global scale that countries have far to progress to have the law reflect the scientific evidence. There is a need to couple sentience with cognition and introduce a rights-based approach to animal protection. The moral abilities of animals, which are currently ignored in law, should be given legal recognition.

The welfare system of protection for animals prescribes that we should not cause animals excessive or unnecessary pain; however, animals are subjected to the property regime and are, therefore, tradable, alienable and exploitable. Despite the progress that has been made, animal welfare law remains quite weak regarding its protective goals. Indeed, the focus is on reducing animal suffering against some acts of cruelty, rather than truly protecting animals in

[714] Unnecessary suffering is balanced against human needs, for example, Article 13 of the TFEU allows for human interests such as cultural practices to prevail over animal protection.
[715] Corey Wrenn "Abolitionist animal rights: critical comparisons and challenges within the animal rights movement" (2012) A journal for and about social movements 4 (2) 441.
[716] *Ibid.*
[717] Elizabeth DeCoux "Speaking for the Modern Prometheus: The Significance of Animal Suffering to the Abolition Movement"(2009) 16 Animal L. 9.
[718] *Ibid* 446.

an absolute way, against all acts of cruelty.[719] Even if sentience were fully implemented and enforced – it would not be sufficient. Recognition of sentience does not address the fundamental issues including liberation, bodily integrity and the property status of animals. Animals continue to be used as commodities with a focus only on neutralising pain and suffering, which is not enough. This approach does not prevent humans from questioning our use or ceasing certain practices. Furthermore, violations of animal sentience can usually be balanced and legally justified by prevailing human interests, as is the case in the EU. Consequently, animal sentience has not yet led to a fundamental change in the human-animal relationship in practice. Significantly, an overreliance on suffering detracts from the critical need to challenge the use of animals. In order to protect animals adequately, a rights-based approach to animal protection is required. Laws should be designed with the specific needs of those animals in mind, rather than the current model of moulding legislation around the needs of the industries that use animals.[720]

This section has demonstrated that the recognition and protection of animal sentience needs to go beyond a purely sentientist position. While the change is more symbolic than revolutionary, it is at least a first step to distinguishing animals from the category of mere things. However, a fundamental shift in legal principles aimed at protecting animals is required: one which focuses on more than pain and suffering and the moral capacities of animals. Furthermore, ultimately, animals are still placed in the category of legal objects. Despite the development of welfare reform, they fail to address the status of animals who remain subject to property law. This status significantly limits their legal protections from cruelty and neglect. Regardless of the actualisation of sentience in legislation, animals are still considered property. This new classification of animals does not separate them from the realm of property.[721] The next section will, therefore, address the property status of animals.

4.1.2 The property status of animals

Animals are considered legally to be property. For instance, while the EU has recognised animals as sentient beings, this classification did not remove animals from the category of

[719] Sabine Brels "Animal Welfare Law in the World: Evolution and Globalization" (2016) Global Journal of Animal Law 1 37.
[720] Liz Tyson *Licensing Laws and Animal Welfare: The Welfare of Wild Animals (*Palgrave MacMillan 2020).
[721] Marita Giménez-Candela "Dignity, sentience, personality: The legal relationship between animals and humans" (2018) Derecho Animal. Forum of Animal Law Studies 9 (2) 25.

property. Under the influence of the Cartesian doctrine that animals are, in essence, complicated machines without feelings, legal systems in the last two hundred years have fitted animals into the category of objects.[722] This legal status as property means that courts have been reluctant to recognise that animals have meaningful legal rights, including standing, or the ability to bring a case to court.[723]

It is time to reconsider the appropriateness of the property status of animals. As a result of this classification animals are conceptually imprisoned in the legal system, and while some laws appear to protect animal interests,[724] any meaningful effort to bring that protection to fruition quickly collides with their status as things. Animals are still placed in the category of legal objects despite the recognition of their sentience. Humans have chosen to classify animals as property – a choice that renders animals vulnerable to greater exploitation. Given the dominance of the property framework for animals, government action on the protection of animals takes the form of regulation rather than the abolition of exploitative practices.[725] This status means animals lack in fundamental legal protections. They are deprived of these protections largely because the law considers animals to be property —or legal things — instead of legal persons. Animals, therefore, generally do not have meaningful legal rights under current law.

Given the limitations of this status, legal protection for an animal often requires lawyers to find a way to connect the animal's suffering to that of a human, and hopefully reduce the animal's suffering in the process. While this is a recognition of animal sentience, animal suffering must be linked with human suffering. To rectify the needs of animals, lawyers have sought to help protect animals through human interests. A clear example is the Seal Products case[726] which relied on public morality grounds under WTO exceptions in order to protect animals from practices which are deemed to be unethical. As animals do not have legal

[722] Marie Blosh "The History of Animal Welfare Law and the Future of Animal Rights" (2012) Electronic Thesis and Dissertation Repository 803 also see Animal Legal Defense Fund at https://aldf.org/issue/animals-legal-status/.
[723] Nicole R Pallotta "Chattel or Child: The Liminal Status of Companion Animals in Society and Law" (2019) Social Sciences 8 44.
[724] For instance, the large body of EU law as well as measures taken within countries such as anti-cruelty statutes.
[725] Maneesha Deckha, "Initiating a Non-Anthropocentric Jurisprudence: The Rule of Law and Animal Vulnerability under a Property Paradigm", (2013) 50 Alta. L. Rev. 788.
[726] Regulation (EC) No. 1007/2009 of the European Parliament and of the EC Council of 16 September 2009 on trade in seal products, and subsequent related measures. This case was taken on public morality grounds.

personhood and do not have legally enforceable rights, they typically cannot bring suits on their own behalf. Therefore, they are forced to rely on humans who are personally interested in their welfare to make a claim in court in order to protect their interests, and on the state to enforce animal laws over which it has jurisdiction. They must rely on human benevolence, and therefore, there are no guarantees that animals' rights will be protected. Humans, either on their own or through organisations, have standing to protect the interests of animals, but that is far from guaranteed.[727] The plaintiff bears the burden of establishing standing. Furthermore, the plaintiff retains the burden of sustaining standing throughout the various stages of the case. If the case goes to trial, standing must be established through evidence.[728] Plaintiffs suing on an animal's behalf must establish that they - not the animal - have suffered a redressable injury.[729]

As property animals lack the legal standing required to merit protections based on their own attributes. For instance, if a person injures or kills a pet, the only remedy is to take legal action for the market value of the animal.[730] This lack of standing disregards the principle that the standing doctrine exists to ensure that litigants are those entities most directly affected by the issue, which results in a disconnect between the harm caused and possible remedies.[731] For powerless groups such as animals, the law is merely a suggestion and not effective unless members of the group who are protected by the law have standing to use those laws in court for their own protection.[732] Without legal standing, there is no legal consideration; they have no voice in what happens to them.

The status of property serves as a significant obstacle to the serious consideration of animal interests because even when the interests of the property are considered, they are balanced against the rights and interests of humans. Thus, outcomes tend to be unfavourable to

[727] Stacey L Gordon, "The Legal Rights of All Living Things" (2016) Environmental Law Institute, Washington, D.C. www.eli.org 45) For instance the NhRP has yet to be successful in their habeas corpus writs.
[728]Stacey L Gordon (n727) 54.
[729] Alexandra B Rhodes "Saving Apes with the Laws of Men: Great Ape Protection in a Property-Based Animal Law System" (2013-2014) 20 Animal L. 191.
[730] Kerri Close and Julie M Fagan "Animals are Regarded as Property in a Court of Law Can We Change the Property Status of Animals to "Living Property"?" (2013) available at https://pdfs.semanticscholar.org/b4bb/5bfc9ea9eac4c0b9b2a5438773de387265f0.pdf accessed on 15/9/17.
[731] Courtney Holdron "The Case for Legal Personhood for Nonhuman Animals and the Elimination of their Status as Property in Canada" (2013) available at https://tspace.library.utoronto.ca/bitstream/1807/42864/1/Holdron_Courtney_L_201311_LLM_thesis.pdf accessed 12/10/18.
[732] Courtney Holdron (n731).

animals due to the way the balancing exercise is set up, which results in their most basic and fundamental interests being ignored. The failure to adequately consider animal interests, if they are even considered at all, contradicts evidence demonstrating that they have interests worthy of legal protection.[733] Across the globe, animals are often used in entertainment, and in experimentation, they are often taken from their natural habitat and subjected to inappropriate care and treatment such as in zoos or privately kept primates as seen in the cases taken by the US civil rights organisation, the Nonhuman Rights Project (NhRP). This has a significant impact on the well-being of the individual animals.

The property status of animals adversely affects the ability of legislatures to impose constraints on the human uses of animals that cause great suffering to them. As property, the law sanctions their use and death. The legal status of animals as property indicates and reinforces the idea that animals are considered inferior to humans.[734] Given what humans now know about the biology and inner lives of animals - the property distinction is no longer tenable. The body of evidence proving the intelligence and emotional complexity of animals is continuing to grow, which makes a compelling case that humans need to alter their relationship with animals.[735] Their status as property is dependent on two constructions, which are: the human separateness from animals, and the dominion of humans over them. These two claims are challenged by the growing body of evidence showing that humans are not that different and superior to animals.

Some academics argue that animals should be removed from the category of property in order for them to be granted basic legal rights. Others contend that the property category could be revised in such a way as to provide more meaningful legal protections for animals. Two prominent but opposing views on the property status of animals are held by Gary Francione and David Favre. Legal experts such as Francione believe that animals must be removed from the category of property in order to be granted fundamental legal rights.[736] However, academics such as David Favre reject theories that call for the elimination of the property status of animals, and the classification of animals, or a certain subset of animals,

[733] Interests such as the right to bodily integrity and liberty.
[734] Jerrold Tannenbaum "Animals and the Law: Property, Cruelty, Rights" (1995) Social Research 62 (3).
[735] Animal cognition is discussed in detail in chapter five see 2.3 ANIMALS .
[736] Gary Francione "Reflections on "Animals, property and the law" and "Rain without Thunder" (2007) 70 Law & Contemp Probs 9 47.

such as primates, as legal persons.[737] He provides a proposed solution by offering a contrary view of the opinion held by abolitionists[738] that animals will not be able to receive legal rights so long as they remain the property of humans. He has created a new status for animals known as "living property" and proposes that animals occupy a third distinct category on the spectrum.

Favre's theory allows for an alternative to the two current legal theories – property or legal persons – by blending the two to create a new paradigm. His theory is based on "equitable self-ownership" which would allow animals to bring a legal action through a guardian ad litem.[739] He notes "that it is ethically acceptable to continue to have animals within a property status."[740] Favre explains that animals currently fall under the category of "personal property," but he argues that this is an inaccurate placement.[741] Animals obviously differ in important ways from a laptop computer, for instance. Furthermore, this classification as personal property gives them no status in the legal system for the protection of their interests. He argues that animals can possess and exercise legal rights. His new property category would allow for the creation of a new form of self-ownership in an animal, an equitably self-owned animal. He establishes animals are not humans and are not inanimate objects. By using existing concepts of property law, he believes it is possible to construct a new paradigm that gives animals the status of juristic persons without entirely severing the concept of property ownership.[742] He defines living property as "physical, movable living objects – not human – that have an inherent self-interest in their continued well – being and existence.[743]

The important distinction of living property would be that this category of property has the capacity to hold legal rights. As living property, animals would hold equitable title over themselves, although humans could continue to hold legal title. Within the category of living

[737] David Favre (n745) 1023.
[738] The Abolitionist Approach maintains that all animal use – however supposedly "humane"– is morally unjustified.
[739] See David Favre "Equitable Self-Ownership for Animals" (2000) Duke Law Journal 5.
[740] David Favre (n745) 1023.
[741] *Ibid.*
[742] *Ibid.*
[743] Favre's point has received judicial endorsement. For example, this view has recently been echoed by Judge Fahey in a NhRP case where he stated, "While it may be arguable that a chimpanzee is not a 'person,' there is no doubt that it is not merely a thing."[743] This represents an acknowledgement that our current legal status for animals is problematic and marks a progression in judicial attitude towards the need to rethink our legal classification of animals. This point will be discussed in further detail in chapter four.

property, animals would be organised into groups and rights allocated accordingly.[744] By transferring the equitable title to the animal, creating for the animal a limited form of self-ownership, Favre contends that it would thus be possible to change the animal's personhood status within the legal system. Hence, if an animal has self-owned status, it could be treated as a legal person with legally recognised interests including, inter alia, the ownership of property and tort law remedies. Favre offered the concept of "living property" for domesticated animals that would entail, in his view, more duties for owners than they currently have under anti-cruelty statutes or otherwise.[745] He presents a set of rights that would be applied along with the implementation of the "living property" status. Under Favre's theory, he does not impose any obligations on animals on the basis that no duty is placed upon human infants who do not yet understand external obligations or choices of action, and therefore it would also be inappropriate to require actions of animals that they cannot understand.[746] He concedes that these rights are not concrete in any way and are susceptible to change from legislative and court opinions. While Favre's theory could improve some of the issues with the current legal classification of animals as property, his theory still holds animals in the category of property albeit "living property" thereby continuing to allow owners to exercise sole and despotic dominion over them.

The next section demonstrates some of the issues with the property status of animals by examining prominent American cases which sought to advocate on behalf of animals and ultimately have faced challenges due to their classification as property.

4.1.2.1 The issue of legal standing for animals

Despite their classification as property, cases are being taken to challenge this categorisation and attempts have been made to work within the current system, but they often fail. The issue of legal standing for animals was highlighted in 2004 in *Cetacean Community v Bush.*[747] This case challenged the US Navy's use of sonar during wartime, and its harmful effect on

[744] David Favre (n745).
[745] David Favre, "Living Property: A New Status for Animals Within the Legal System" (2010) 93:3 Marq L Rev 1021.
[746] *Ibid* 1060.
[747] *Cetacean Cmty. v. Bush*, 386 F.3d 1169 (9th Cir. 2004).

cetaceans.[748] The legal issue centred on whether or not animals have a right to sue humans. The Ninth Circuit held that the world's whales, porpoises, and dolphins possessed Article III standing to sue under the US Constitution[749] yet lacked statutory standing. The court pointed out that fully competent humans are not the only entities to have standing – corporations, partnerships, trusts, children, and mentally incompetent individuals can all have standing; however, the court dismissed the case and a subsequent appeal on the basis that animals do not have standing under the relevant statutes[750] thus, preventing any action being taken and demonstrating the negative impact of the property status of animals.

This issue was raised again in 2018 in *Naruto v Slater*.[751] This US case was taken by People for the Ethical Treatment of Animals, Inc. (PETA). They took this case as next friend on behalf of a monkey in which they sued a photographer for copyright infringement. Naruto, an Indonesian macaque, took a number of photographs of himself, including one that became famous as the "Monkey Selfie." The defendant, Slater, published and sold a book in the United States that contained copies of the monkey selfies and stated in that book that Slater and his corporate partners are the copyright owners. According to PETA, Naruto has rights to the monkey selfies and owns that copyright, and as a result, Naruto should be afforded the protection of a claim of ownership, and the right to recover damages and other relief for copyright infringement.[752]

The court first held that PETA lacked standing as Naruto's next friend because PETA had failed to establish the requisite significant relationship with Naruto and because animals cannot be represented by a next friend. The court held that it also had to consider Naruto's standing independent of any next friend.[753] Bound by the precedent in *Cetacean Community*, the Ninth Circuit held that the animals lacked statutory standing to claim copyright infringement of

[748] It was argued that the sonar could disrupt marine and mammal behaviour and cause tissue damage, loss of hearing and disrupt feeding and mating.
[749] Under Article III, to meet the requirements of standing, the plaintiff must personally have: 1) suffered some actual or threatened injury; 2) that injury can fairly be traced to the challenged action of the defendant; and 3) that the injury is likely to be redressed by a favourable decision.
750 See case at (n747) The relevant statues included the Endangered Species Act, the Marine Mammal Protection Act, and the National Environmental Policy Act.
751 Naruto v. Slater, 2018 WL 1902414 (9th Cir. Apr. 23, 2018). The case is available at https://law.justia.com/cases/federal/appellate-courts/ca9/16-15469/16-15469-2018-04-23.html accessed 27/4/20.
752 *Ibid.*
753 *Ibid*.

photographs. The monkey lacked statutory standing because the Copyright Act does not expressly authorise animals to file copyright infringement suits.[754] Naruto's case ultimately ended with the photographer agreeing to donate 25% of his future proceeds from the use of the selfies to charities protecting crested macaque habitats.[755]

Both *Cetacean Community* and *Naruto* used the lack of statutory standing to defeat the plaintiffs' claims and highlight the legal obstacles in place due to the animals being classified as property under the animal welfare system.

Pursuing a different approach, the status of animals as property is most recently discussed in the US leading legal advocacy organisation for animals - the Animal Legal Defence Fund (ALDF), and their case involving "Justice the Horse."[756] The ALDF filed a case on behalf of an eight-year-old horse named Justice in 2018. The case seeks to recover the costs of Justice's ongoing medical care due to neglect and to also compensate him for his pain and suffering. Justice has permanent injuries that will require costly medical care for the rest of his life due to his owner's – Vercher – failure to provide him with basic care, including food and shelter. Vercher pleaded guilty to criminal animal neglect in 2017 and in the criminal plea agreement, she agreed to pay restitution only for the cost of Justice's care prior to 6 July 2017. This case seeks damages for Justice's care from that date onward. Any funds awarded to Justice through the lawsuit will be placed in a legal trust established to pay for his care. The Animal Legal Defence Fund are arguing that Justice, as a victim, can sue his abuser. If successful, this lawsuit will be the first to establish that animals have a legal right to sue their abusers in court. This case further demonstrates the issue with the property status of animals and their lack of legal standing to sue. The case was dismissed by Washington County Circuit Court holding that a non-human animal lacks legal standing to sue on his or her own behalf and is currently under appeal.[757]

[754] *Ibid.*
[755] See "Peta's Monkey Selfies Legal Battle ends Charitably" (2017) available at https://patch.com/california/paloalto/petas-monkey-selfies-legal-battle-ends-charitably accessed 15/4/20.
[756] See Animal Legal Defense Fund "Groundbreaking lawsuit argues animals have the right to sue their abuser in court" available at http://aldf.org/press-room/groundbreaking-lawsuit-argues-animals-right-sue-abusers-court/ assessed 2/5/18.
[757] See Animal Legal Defense Fund https://aldf.org/article/animal-legal-defense-fund-appeals-dismissal-of-groundbreaking-lawsuit-for-abused-horse/ accessed on 25/1/19.

The previous two sections have highlighted that protection based on notions of sentience and the property status of animals have negative consequences for animals. While animal welfare law has made many improvements to the lives of animals; there are many limitations to the protection being offered. On examination, it is held that the law is drawing conclusions that are incompatible with scientific evidence demonstrating the sentience of animals and ignoring evidence on animal morality. The current treatment is severely compromising many animals' physical and emotional well-being. When interests between human needs and desires and animal protection come into play, animals do not have any protection in place. The current legal situation raises serious issues about how society treats sentient animals. There are major conceptual flaws in the way in which the law operates. Acceptance of the status quo is a fundamental issue. If animals count, which the law suggests they do by enacting animal protection laws, then their well-being depends entirely on our willingness to offer such protection. Legislation that purports to protect animals is limited in its effect since it is founded on and interpreted through anthropocentric assumptions about animal inferiority and reside in a legal framework that subordinates animals through their property classification.[758] Animal law, as it stands, is not working. In addition to non-implementation of the recognition of animal sentience in the law, evidence of animals' capabilities and cognition are ignored. Under a rights-based approach, animals should not be classified as property. This classification disregards their moral worth and is incompatible with scientific evidence on their state of being.

The next section will examine how the current animal welfare system fails to pay regard to the cognitive abilities and autonomy of animals by discussing permitted practices using examples including great both apes and cetaceans (as these species were used as the case study for moral capacity), as well as other species.

4.1.3 Current laws do not pay regard to animal interests

A fundamental issue with the current system is the law's failure to pay regard to animal interests. There are clear examples of practices which do not protect animal cognition. Great apes and cetaceans (as well as other species) have moral capacities, therefore, like humans, these species suffer from isolation, abuse, neglect, and torture.

758 Geeta Shyam (n1043).

As animals are classified as property under the law, they can be held in zoos, used for entertainment purposes and for experimentation. This results in their confinement in environments that are unsuitable to their needs and deprives them of their autonomy and liberty. Apes are used as attractions in commercial wildlife facilities.[759] There are estimated to be more than 4,000 great apes living in zoos worldwide.[760] Furthermore, many great apes end up in captivity through the exotic pet trade. Nearly 3,000 chimpanzees, gorillas, bonobos and orangutans are illegally killed or stolen from the wild each year, according to a report from the United Nations Environmental Programme's (UNEP) Great Apes Survival Partnership (GASP). GASP – a partnership between the countries which still have great ape populations – estimates that more than 22,000 apes were killed or captured to be sold between 2005 and 2011.[761] When breeders sell chimpanzees or orangutans as exotic pets, they are removed from their mothers while still infants, within months of birth[762] they are poached for the exotic pet trade. These animals are socially deprived. Science informs us that isolating these animals from their group causes profound social problems. In most cases, normal social behaviour cannot be recovered in pets that are later released.[763]

A further example of the law disregarding animals' moral capacities is in animal research. There has been a move away from the use of apes in research, and change is occurring due to public pressure. This change is based on primatologists providing even more evidence of the emotional capabilities of chimpanzees, and the movement to support the argument that their use in biomedical research and testing should come to an end, however, issues remain.[764] While the EU has placed a ban, as have other countries,[765] jurisdictions such as the

[759] Daniel Stiles "Great Ape Trafficking: An expanding extractive business" (2016) available at https://news.mongabay.com/2016/05/great-ape-trafficking-expanding-extractive-industry/ accessed 2/5/20.
[760] 2017 figure see Richard Moore "There is a moral argument for keeping great apes in zoos (2017) available at https://aeon.co/ideas/there-is-a-moral-argument-for-keeping-great-apes-in-zoos accessed 3/5/20.
[761] John Platt "Great Apes in Crisis: Thousands Poached and Stolen from the Wild Annually available at https://blogs.scientificamerican.com/extinction-countdown/great-apes-thousdands-poached-stolen/ accessed on 3/5/20.
[762] Center for Great Apes "Apes as Pets" available at https://www.centerforgreatapes.org/treatment-apes/apes-pets/ accessed on 3/5/20 and Stephen Khan "Stop portraying wild animals as cuddly companions (and potential pets) (2016) available at https://theconversation.com/stop-portraying-wild-animals-as-cuddly-companions-and-potential-pets-57996 accessed 3/5/20.
[763] Stephen Harris "Keeping monkeys as pets is extraordinarily cruel – a ban is long overdue" (2019) available at https://theconversation.com/keeping-monkeys-as-pets-is-extraordinarily-cruel-a-ban-is-long-overdue-122278 accessed on 3/5/20.
[764] Kathleen Conlee (n767) 132.
[765] Great Ape experimentation is banned in the EU, the UK and New Zealand.

US continue to hold apes in their labs. Laboratories are an unsuitable[766] environment for apes and cause both physical and mental trauma[767] and deny the animals their liberty and a habitat suitable to their needs. In 2015 the US Fish and Wildlife Service classified all US chimps as endangered, effectively ending biomedical studies on them.[768] However, while some chimpanzees have been removed from laboratories, they have not been moved to sanctuaries.[769] There are numerous arguments as to why there has been a delay. Laboratories have been uncooperative, sanctuaries have not expanded quickly enough, and the government did not have a concrete plan for retirement, despite setting the process in motion.[770]

The welfarist system also allows for the capture of wild animals such as dolphins and orcas. A 2013 report stated that orcas are known to suffer from mental distress in captivity. [771] Orcas, in the wild, can swim up to 100 miles a day.[772] These wild animals are trained to do "tricks" for food, food that they would be able to forage for in the wild which would allow them to act instinctively and use their bodies in their natural way. In the wild, these animals would not be overweight or mentally stressed. Captivity is often being justified under the guise of conservation. Orcas in the wild can live for more than 100 years, but the average life span for one in captivity is just 12 years.[773] More than 30 years ago, an Australian Senate report found

[766] Peta website "Chimps in Laboratories" available at https://www.peta.org/issues/animals-used-for-experimentation/chimpanzees-laboratories/#:~:text=In%201995%E2%80%94after%20hundreds%20of,and%20don't%20contract%20AIDS. accessed on 2/5/20.

[767] For an outline of some of the ways in which chimpanzees suffer as objects of experiments see "Harm and Suffering" available at https://releasechimps.org/research/history accessed 2/5/20 and Kathleen Conlee "Chimpanzees in Research in Research: Past, Present, and Future" (2005) The Humane Society Institute for Science and Policy available at https://www.wellbeingintlstudiesrepository.org/cgi/viewcontent.cgi?article=1008&context=sota_2005 accessed 2/5/20

[768] See the Center for Great Apes website available at https://www.centerforgreatapes.org/treatment-apes/ accessed 2/5/20.

[769] Sara Reardon "US government rethinks how to retire research chimps (2018) Nature available at https://www.nature.com/articles/d41586-018-01324-7 accessed 2/5/20.

[770] David Grimm "Research on lab chimps is over. Why have so few been retired to sanctuaries? (2017) Science magazine available at https://www.sciencemag.org/news/2017/06/research-lab-chimps-over-why-have-so-few-been-retired-sanctuaries# accessed on 2/5/20 and David Gorman "Lab Chimps are Moving to Sanctuaries Slowly" (2017) New York Times available at https://www.nytimes.com/2017/11/07/science/chimps-sanctuaries-research.html accessed 2/5/20.

[771] See One Green Planet available at http://www.onegreenplanet.org/animalsandnature/5-reasons-you-should-never-visit-a-theme-park-that-keeps-wild-animals/ accessed 01/08/17.

[772] *Ibid.*

[773] *Ibid.*

captive dolphins and whales suffer stress and behavioural abnormalities.[774] Neuroscientist and dolphin expert Lori Marino notes that most captive cetaceans display "abnormal" behaviour. Marino argues that cetaceans can also die of boredom and lose the will to live.[775] Professor Georgio Pilleri, a Swiss cetacean biologist, argues cetacean behaviour in captivity mimics typical symptoms of prison neurosis in humans.[776] It is "equivalent to the increasingly deprecated solitary confinement of man."[777] While captive animals may not be overtly telling us they are suffering; the scientific evidence is abundantly clear. These species need the right to liberty. The 2013 American documentary Blackfish has further demonstrated the controversy and inherent issues with captivity.[778] This documentary told the story of a performing killer whale, Tilikum, that killed trainers while in captivity at Sea World due to frustration caused by nearly 20 years of intense confinement, isolation, and lack of emotional and intellectual stimulation.[779] The documentary highlighted the cruelties associated with captivity and further outlined the significantly lower lifespan of a captive whale versus a wild whale highlighting the negative consequences of captivity.

Intensive farming which involves painful procedures will often take place while in the presence of conspecifics. This, however, is an issue that has received little to no attention under the current animal welfare system. Evidence suggests that other animals brought to slaughter suffer from witnessing their conspecifics' pain and fear.[780] It is therefore questioned if humane slaughter can exist and highlights the need to introduce a new approach to animal protection. Many animals are moral beings, therefore upon witnessing their conspecifics' distress, they experience an urge to engage in caring behaviour that they cannot fulfil due to

[774] *Ibid.*
[775] Peter Singer and Jordan Sosnowski "Fascination with Wikie the talking orca says more about us than her" available at https://www.smh.com.au/environment/conservation/fascination-with-wikie-the-talking-orca-says-more-about-us-than-her-20180302-p4z2ll.html accessed 2/04/18.
[776] *Ibid.*
[777] *Ibid.*
[778] See http://www.blackfishmovie.com/ see also see "SeaWorld vs Blackfish: the film that introduced the world to the plight of Tilikum" available at https://www.telegraph.co.uk/films/2016/06/04/seaworld-vs-blackfish-the-film-that-saved-the-whales/.
[779] See "Anatomy of "The Blackfish Effect" available at https://www.huffpost.com/entry/anatomy-of-the-blackfish-_b_9511932?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAAMvT7VIKzZjw8miakYnYwperI1jQVuy_nDEgCs0wQF9h_6Doeq4LBYtWx2_DsW11Fu0paTjNiuxSAVZel9uQ_ESahCkZZZuSXYjKyo4s6kqSFOyot61YBDWGjATocUcjDPL98yBg1GjurX4_cjxAI5s73n2i9Q-mc6oUvqryZVuG accessed 15/9/19.
[780] See Kate Fowler "The Humane Slaughter Myth" (2009) available at https://www.animalaid.org.uk/wp-content/uploads/2016/10/slaughterreport.pdf accessed 12/8/21.

the presence of physical barriers. Therefore, in addition to the physical harm they may encounter this adds a new dimension to the ways in which these animals are being harmed. Laboratory animals face similar situations. Animals in laboratories may have perceptual access to procedures on other animals and will most likely be prevented from interfering. Therefore, in this context it is also important to consider whether the animals are having their moral capabilities circumvented.

This section has shown that a welfare approach to animal protection will always subjugate the needs of other animals to human desires.[781] When there is a conflict between human and animal interests, human interests almost invariably dictate the scope of animal protections in favour of humans. It is for those reasons that animal welfare guidelines while providing some safeguards, have generally failed to provide the kind of protection for animals necessary to ensure their well-being and why a rights-based approach is required.[782] The next section will examine conservation measures which also form part of the animal welfare system, in order to assess the merits and limitations of this form of protection.

4.1.4 The ineffectiveness of conservation measures

While animals can benefit from conservation efforts, they are focused on humans' interests. Conservation measures can provide better protection for animals than welfare measures as they mainly focus on protecting animals' lives; however, animal protection is a secondary concern. These measures do not take into account animals and their sentience, interests or inherent value. Both the International Whaling Commission (IWC) and the Convention on International Trade in Endangered Species (CITES) demonstrates this fact. Both pieces of legislation focus on conservation. The International Convention for the Regulation of Whaling (ICRW) refers to whales as a "great natural resource" and created the IWC to conserve and manage the practice of whaling.[783] CITES, on the other hand, is a conservation treaty focusing on the importance of biodiversity.[784] CITES also includes language of utilisation by using the terms of avoiding over-exploitation.

[781] Lori Mario "Why animal welfarism continues to fail" (2016) Animal Sentience 67.
[782] *Supra* 68.
[783] See International Whaling Commission available at https://iwc.int/home.
[784] Cinnamon Pinion Carlarne (n798) 32.

Conservation efforts are focused on humans' interests, although animals can benefit from them. Conservation measures can provide better protection for animals than welfare measures as they mainly focus on protecting animals' lives; however, animal protection is a secondary concern. These measures do not take into account animals and their interests or inherent value. CITES' aim is to ensure that international trade in wild animals and plants does not threaten their survival. It focuses on the protection of plant and animal species that are at risk of extinction or depredation.[785] CITES focuses only on the international trade in endangered species and precisely regulates the level of trade permitted for certain species, on pragmatic conservation grounds, by reference to its current conservation status and the level at which trade is impacting on that status.[786] Where live animals come into trade, there are specific rules determining the level of animal welfare, which must be applied to them during transport and reception in the receiving country, and management authorities are specifically required to implement these provisions.[787] CITES drafters established a framework to eliminate the trade of certain species and further reduce trade in other species that may be subject to future threat. CITES has a narrow remit; the focus of conservation is to preserve,[788] not welfare.

Conservation of animals is to protect species for future generations to enjoy. They focus on conserving endangered species to preserve the species and not because the individual animals have interests. Proponents of the conservation ethic argue that endangered species should be given special status solely because of their scarcity[789] and do not consider individual animals but populations and ecosystems.[790] Therefore, conservation is concerned with the environment in a broader sense, and not only with individual, sentient animals.[791] The focus of conservationist concern varies, but may well include non-sentient individuals, such as plants in the same category as sentient animals, as is the case with CITES. Furthermore, from

[785] See CITES website available at https://www.cites.org/eng/disc/what.php#:~:text=CITES%20(the%20Convention%20on%20International,does%20not%20threaten%20their%20survival.
[786] Stuart Harrop "Climate Change, Conservation and the Place for Wild Animal Welfare in International Law" (2011) J Environmental Law 23(3) 441–46 5.
[787] *Ibid.*
[788] Stuart Harrop (n786) 8.
[789] Michael Hutchins "Wildlife Conservation and Animal Rights: Are They Compatible?" (1986) The Humane Society Institute for Science and Policy Animal Studies Repository 113–114.
[790] *Ibid* 131.
[791] Kate Rawles "Conservation and Animal Welfare" (2003) Global Bioethics 16 (1) 101.

the conservationist point of view, the preservation of species, habitats and ecological communities may justify keeping them in captivity, or otherwise compromising their welfare.[792] Conservation seeks to achieve a balance between commercial interests and the growing global concern for conservation.[793] It gives little importance to the welfare of individual animals.[794]

Significantly, the CITES regime is based upon a system of permits and certificates for the authorisation of trade which has many negative effects on animals,[795] and the IWC does not focus on animal protection but on preserving the species and allows exceptions for scientific purposes, for example. The law is, therefore, failing to provide adequate protection for wild animals and does not address or recognise the sentience or interests of these animals.[796] The following section will further demonstrate this point by examining the practice of whaling and the International Whaling Commission.

4.1.4.1 Case Study: Whaling and the International Whaling Commission

Traditionally, the IWC has been dominated by the ideology of anthropocentric conservationism which seeks to protect natural resources including animal and plant species as well as their habitat, for future use.[797] Whaling is the process of hunting and killing whales and is controversial for several reasons – from conservation to animal welfare and rights concerns. Whaling policies attract attention from the environmental community, from animal rights activists, from legal philosophers and from the public at large.[798] Whaling and the International Convention for the Regulation of Whaling (ICRW) provides an example of the

[792] *Ibid* 102.
[793] *Ibid*.
[794] Matthews "Problems Related to the Convention on International Trade in Endangered Species" (1996) ICLQ 45 421, 426.
[795] See 3.2.1 How does trade law affect animal protection?
[796] See Angus Nurse "Species Justice: The Future Protection of Wildlife and the Reform of Wildlife Laws" (2013) The Green Criminology Monthly – available at https://www.greencriminology.org/monthly/feb2013/The%20Green%20Criminology%20Monthly%20-%20February%202013%20-%20Species%20Justice%20-%20The%20Future%20Protection%20of%20Wildlife%20and%20the%20Reform%20of%20Wildlife%20Laws%20by%20Angus%20Nurse.pdf accessed on 21/10/18.
[797] Robert Garner "Animal welfare, ethics and the work of the International Whaling Commission (2011) Journal of Global Ethic 7 (3) 283.
[798] Cinnamon Pinion Carlarne "Saving the Whales in the New Millennium: International Institutions, Recent Developments and the Future of the International Whaling Policies" (2005) Virginia Environmental Law Journal 24 (1) 42.

lack of protection afforded to moral, sentient beings.[799] This section will examine the International Whaling Commission (IWC) while addressing the international reaction to the moratorium and ongoing whaling. Any contemporary discussion of whaling inevitably involves scientific, political and philosophical deliberations. Humans have been whaling since the thirteenth century; however, it is only within the past eighty years that whaling nations have participated in an international dialogue about the sustainability of whaling, and it is only within the past thirty years that the morality of whaling has been a major topic of conversation given the knowledge we have now acquired about their cognitive abilities.[800] The international legal regime on whale hunting is formed by the intersection of the Convention on International Trade in Endangered Species (CITES) and the International Whaling Commission (IWC). The opening clause of the International Convention for the Regulation of Whaling states a desire to "establish a system of international regulation for the whale fisheries to ensure proper and effective conservation and development of whale stocks," which makes it apparent that the ICRW was created as a regulatory body. The ICRW established the IWC, which is the global body charged with the conservation of whales and the management of whaling.[801] The IWC is responsible for amending the Convention's Schedule of Regulations as necessary for the conservation and utilisation of whale stocks. It was given the power to amend the schedule through the designation of protected species, open and closed seasons for whaling, size limits, methods and intensity of whaling, including maximum catch limits, types of equipment which may be used, and measurement methods, among other things.[802] There are currently 87 members from countries all over the world, and the EU has observer status. All members are signatories to the ICRW. Uncertainty over whale numbers led to the introduction of a moratorium on commercial whaling in 1986; therefore, commercial whaling is forbidden by the IWC, and the international trade of whale products is banned for species which are classified as endangered under CITES.[803] This moratorium was

[799] Whales have vast cognitive abilities which are currently not taken into account by the animal welfare system. See David Mence "The cetacean right to life revisited" (2015) International Journal of Law in Context 11 (1) 17.
[800] Cinnamon Pinion Carlarne (n798).
[801] See International Whaling Commission available at https://iwc.int/home.
[802] Sarah Suhre "Misguided morality: The Repercussions of the International Whaling Commission's Shift from a Policy of Regulation to One of Preservation (1999) 12 Geo. Int'l Envtl. L. Rev. 305 2.
[803]Ian Hurd, " Whaling in Europe is dependent on the continued willingness of governments to fund it at a loss" available at http://blogs.lse.ac.uk/europpblog/2013/02/18/whaling-europe-eu-norway-iceland-greenland-faroe-islands-cites-international-whaling-commission/ accessed on 24/2/15 1.

declared by the IWC, mainly owing to uncertainties in the scientific information on global whale stocks. This remains in place although the Commission continues to set catch limits for aboriginal subsistence whaling.[804]

4.1.4.1.1 The current state of play

One of the contentious issues are the many exceptions that make it possible for some countries not to comply with the IWC's moratorium on whaling as these treaties only apply to the extent a government has agreed to within a given country. This can vary greatly and therefore, makes contemporary whale hunting more complex.[805] The main countries within Europe that currently participate in whaling are Norway, Iceland, Greenland and the Faroe Islands. Outside of Europe, Japan is a very prominent whaling country. Their membership of the IWC dictates that commercial whale hunting is banned, which has resulted in Japan's recent decision to leave. There are two caveats to this rule; firstly, this quota applies only to "commercial" catches; therefore, other kinds of whale hunting are permitted under the IWC subject to national governments ruling. For example, a national government may issue permits for whaling that is in the interests of scientific research.[806] Japan prior to their decision to leave the IWC, for instance, carried out "scientific programmes" and could market the meat of the whales captured under these programmes. This exception has been subject to recent International Court of Justice (ICJ) ruling. Conservationist groups and anti-whaling nations are convinced that Japanese research whaling, is a thinly disguised covert operation intended to boost supplies of whale meat in the marketplace where it fetches more than ten times the price of pork or beef.[807] The ICJ ordered a temporary ban on Japan's annual slaughter of whales in the Southern Ocean in 2014 after concluding that the hunts are not, as Japan claims, conducted for scientific research. However, Japan announced plans for a new "scientific" whaling programme in the Antarctic, just months after this ruling.[808] Secondly, there is an opt-out clause within the treaty where there are many amendments. As the

[804]See International Whaling Commission https://iwc.int/home accessed on 12/2/15.
[805] Ian Hurd (n803) 2.
[806] See International Whaling Commission permit section available at https://iwc.int/permits see also Mangel M "Whales, science, and scientific whaling in the International Court of Justice" (2016) 113 (51) Proc Natl Acad Sci U S A also see Ian Hurd (n803) 4.
[807] Adrienne M Ruffle (n819).
[808] International Fund for Animal Welfare website available at http://www.ifaw.org/united-states/news/japan-announces-plans-new-antarctic-whale-hunt-months-after-world-court-finds-its-scientific-wh accessed on 22/02/15.

decisions at the IWC are based on a majority vote, governments in the minority can invoke the opt-out clause and thereby are not bound by any changes. This occurred when the IWC shifted from pro-whaling to anti-whaling. As such, a member of the IWC can claim that the whaling moratorium has no effect on them.[809] Norway and Iceland are clear examples of this rule, they are both members of the IWC, yet they are not obliged by its central rule because of the objections or reservations they have lodged under the 1946 convention. Greenland is also a member but elects to whale hunt under the aboriginal exemption.[810]

The IWC's mandate covers both the management of whaling and the conservation of whales.[811] This dual mandate has led to extremely polarised positions between pro-whaling and anti-whaling states, which is jeopardising international cooperation and hindering progress towards the effective protection of all whale species. The IWC has failed to create a successful protocol for the regulation of commercial whaling.[812] While the Commission has played a significant role in bringing the world's attention to the plight of the whale, many provisions have left it unable to enforce its own regulations. It has been argued that any country that disagrees with an IWC regulation may, by filing an objection, delay its implementation and exempt itself from the regulation pursuant to the opt-out clause of the ICRW. As mentioned, despite the 1986 IWC ban on commercial whaling, some countries refuse to end their whaling operations. Some nations still operate commercial whaling activities, either because they filed an objection against the moratorium as in the case of Norway, or pursuant to the IWC's scientific research exemption as was the case with Japan. Almost immediately after the 1986 whaling ban came into effect, Japan launched its scientific whaling programme, widely recognised as a cover for its ongoing commercial whaling operation.[813] For the last 30 years, Japan has hunted whales for what it says is scientific research. This is allowed under the rules of the IWC, and the meat can be sold afterwards.[814]

[809] Ian Hurd (n803) 4.
[810] The History of Whaling and the International Whaling Commission (IWC) available at http://wwf.panda.org/?13796/The-History-of-Whaling-and-the-International-Whaling-Commission-IWC accessed 16/5/17.
[811] International Whaling Commission available at https://iwc.int/home.
[812] Adrienne M Ruffle (n819).
[813] Adrienne M Ruffle (n819).
[814] See International Whaling Commission (n806).

Furthermore, Norway only respected the IWC's whaling ban until 1993. Using a loophole in the ICRW, Norway objected to the whaling moratorium and resumed hunting for minke whales. Norway never withdrew its objection, and therefore it can legally practice commercial whaling under the IWC despite the moratorium. In exercising its legal right to engage in commercial whaling, Norway sets its own quota for the number of whales its whalers are permitted to kill for commercial reasons. This number has increased progressively, from being allowed to kill 671 minke whales in 2002 to more than 1,000 today.[815] It has been noted that Norway has stated that it does not accept cultural imperialism being imposed by the majority of the members of the IWC. They advocate for the right of local communities and people who want to exercise their cultural right to be different.[816] Like Japan, Iceland initially conducted a "scientific" whaling programme. Then, in 1992, it withdrew from the IWC.[817] When Iceland re-joined in 2004, it included a clause in its re-entry that noted objections to the whaling moratorium. In 2006, Iceland resumed commercial whaling, targeting minke and fin whales. In the 2018 season, 146 fin whales were killed, including at least two rare blue/fin whale hybrids. A dozen pregnant females were hunted. Six minke whales were also killed.[818]

Currently, Japan is the most vocal proponent in favour of commercial whaling and the world's single largest consumer of whale meat.[819] In December of 2018, Japan announced that it would withdraw from the IWC and that this withdrawal would come into effect on 30 June 2019. Commercial whaling resumed from July 2019.[820] Japan has left the IWC and its rules about hunting whales, as they contend the IWC has not furnished rules for sustainable commercial whaling. Whaling nations have all said that the practice is part of their culture,

[815] See "Norway boosts whaling quota despite international opposition" available at https://www.theguardian.com/environment/2018/mar/07/norway-boosts-whaling-quota-international-opposition accessed7/3/18.
[816] Alyson Decker (n823) 258 (quoting Norway's representative to the IWC at the 1992 annual meeting) also see Martha Howton "International Regulation of Whaling: The Consequences of Norway's decision to Hunt the Minke Whales" (1994) Hastings International and Comparative Law Review 18.
[817] International Fund for Animal Welfare website (n806).
[818] See discussion on whaling in Iceland available at https://uk.whales.org/our-4-goals/stop-whaling/whaling-in-iceland/ accessed 15/7/18.
[819] Adrienne M Ruffle " Resurrecting the International Whaling Commission: Suggestions to Strengthen the Conservation Effort" (2002) 27 Brooklyn J. Int'L. 639.
[820] See BBC news available at https://www.bbc.com/news/world-asia-46682976 accessed 2/1/19 and "Japan confirms it will quit IWC to resume commercial whaling" available at https://www.theguardian.com/environment/2018/dec/26/japan-confirms-it-will-quit-iwc-to-resume-commercial-whaling accessed 2/1/19.

and they should be able to continue in a sustainable way.[821] They are of the view that moral arguments advocating a whales' right to life are culturally biased and imperialistic, emphasising that in Japan dietary customs, religious beliefs, cultural background and emotional sensibilities are tied to the whaling industry. The whale is not only a food source but also a basis for culture.[822] In some Japanese cultures, whales are considered nothing more than big fish and do not merit any special treatment above any other food source.[823] However, it can equally be argued that just because something is derived from, or common within a culture does not make it ethically defensible. Arguments based on cultural tradition alone are insufficient to generate a right to whale.[824] Japan is now able to freely hunt species which are currently protected by the IWC, like minke whales – something which it previously could not do.[825] This commercial whaling is limited to Japanese waters and economic areas.[826]

4.1.4.1.2 Arguments against whaling

Japan's recent announcement has been the subject of much criticism[827] and is arguably out of step with the treatment of other cetaceans such as dolphins.[828] There is currently no agreement on whether animal welfare falls within the IWC's mandate - there is some consideration of the welfare of whales which has resulted from pressure, from non-whaling nations and NGOs.[829] It is inconsistent that animal welfare is not currently regarded as within the IWC's remit, and that the welfare of whales is not regarded as a factor that ought to be taken into account in discussions about whaling when there is strong worldwide opposition

[821] See Elisa Menendez "Why is whaling so important to Japan?" (2019) available at https://metro.co.uk/2019/07/01/whaling-important-japan-10095488/15/7/19.
[822] Robert William Garner (n829) 286.
[823] Alyson Decker "Save The Whales-Save The Whalers-Wait, Just Save The International Whaling Commission: A Fresh Look at The Controversy Surrounding Cultural Claims to Whale"(2006) Southern California Interdisciplinary Law Journal 16 S. Cal. Interdis. L.J. 254.
[824] University of Oxford Practical Ethics "On the Supposed Importance of Cultural Traditions for Whaling Practice" available at http://blog.practicalethics.ox.ac.uk/2014/09/on-the-supposed-importance-of-cultural-traditions-for-whaling-practice/ also see Robert William Garner (n829) 287.
825 Nathanial Gronewold "Japan quits global whaling body, will resume commercial hunt" (2018) Science.
[826] See BBC news available at https://www.bbc.com/news/world-asia-46682976 accessed 15/1/19 and RTE news available at https://www.rte.ie/news/newslens/2019/0701/1059413-japan-whaling/ accessed 1/7/19.
[827] See "Japan confirms it will quit IWC to resume commercial whaling" available at https://www.theguardian.com/environment/2018/dec/26/japan-confirms-it-will-quit-iwc-to-resume-commercial-whaling accessed 2/2/19 and "Japan confirms plan to resume commercial whaling in its waters from next year" available at https://www.independent.co.uk/environment/japan-whaling-start-2019-whales-commercial-iwc-environment-conservation-a8699381.html accessed 2/1/19.
[828] For instance, Canada has recently introduced a ban on captivity (Bill S-203). For an overview of the Canadian ban see Katie Sykes "The Whale, Inside: Ending Cetacean Captivity in Canada Canadian Journal of Comparative and Contemporary Law (2019) 5 (1) India has also placed a ban on dolphin captivity.
[829] *Ibid.*

to whaling and evidence of suffering[830] and is incompatible with the evidence we now have by preventing animals from exercising their moral capabilities. There are descriptions of whales suffering slow and painful deaths in addition to anecdotes describing the deaths of female whales carrying unborn calves or the deaths of lactating mothers leaving calves to starve.[831] It is argued that the IWC's traditional focus on anthropocentric conservation, which relies upon acceptance of the view that we have no direct duties to whales, ignores their sentience and moral capacity. It is also out of line with other international norms such as the above-mentioned Canadian ban on cetacean captivity.

The IWC was designed to conserve whales,[832] therefore, their protection depends entirely on whether it is in the interests of humans to do so. The need to conserve whale stocks was the reason behind the moratorium on commercial whaling, which, as an indirect consequence, has protected at least some whales. Finding a method of killing that reduced or eliminated the infliction of pain would not change this, since killing them, irrespective of the method used does not change the fact that their inherent value is not considered. Since whales do not have rights, it may be legitimate to sacrifice their interest in not suffering.

An assessment of the moral acceptability of whaling from an animal welfare perspective requires the weighing up of the costs to whales against the benefits to those who seek to catch them. It is accepted that the method of killing whales causes enormous suffering and is likely to be unavoidable.[833] Of minke whales killed in whaling, 60% do not die instantaneously in special permit whaling.[834] Garner contends that it is not difficult to show that the level of suffering involved in killing whales is greater than that deemed to be ethically permissible in the case of killing domesticated animals slaughtered for food.[835] For instance, the methods

[830] Robert William Garner (n797) 284.
[831] Stuart Harrop (n786) 10 For example, Japan killed 122 pregnant minke whales in its 2018 whaling season see https://www.theguardian.com/commentisfree/2018/jul/13/killing-blue-whale-disconnected-nature-sea-ignorance accessed 13/7/18.
[832] See International Whaling Commission website available at https://iwc.int/home where it is stated: *The Commission's role has expanded since its establishment in 1946. In addition to regulation of whaling, today's IWC works to address a wide range of conservation issues including bycatch and entanglement, ocean noise, pollution and debris, collision between whales and ships, and sustainable whale watching.*
[833] Robert William Garner (n797) see also Humane Society International "Whaling" available at https://www.hsi.org/issues/whaling/ and "A simple reason to stop whaling: it's cruel" available at https://www.independent.co.uk/environment/a-simple-reason-to-stop-whaling-its-cruel-63495.html.
[834]Robert William Garner (n829).
[835] Robert William Garner (n829) 284.

used to kill whales do not meet the World Organisation for Animal Health (OIE) standards.[836] OIE regulations apply to domesticated animals that are to be consumed for food. Furthermore, there is a strong case to argue that the method of killing whales involves the infliction of greater suffering than that inflicted upon most other hunted animals.[837] It is however acknowledged that while their deaths may involve greater suffering, the number of farm animals killed for consumption does exceed that of whales. An argument that is made in favour of whaling is based on cultural diversity. It has been claimed that whaling should be allowed as it represents an important part of the culture of the societies that engage in this activity. Japan, for example, claim that the consumption of whale meat reflects dietary customs, religious beliefs, cultural backgrounds and emotional sensibilities. It can, however, equally be argued that culture should not triumph animal welfare.

Although the moratorium is still in effect today, it was never expected to be permanent. In fact, the moratorium was only intended to last only until such time that scientific data could demonstrate that a return to whaling was reasonable.[838] Since the institution of the whaling moratorium, pro-whaling nations have either struggled to fit within its exemptions or openly defied its authority. The IWC has faced one challenge after another in handling the emotional topic of the regulation of whaling.[839] A rights-based approach would call for regulatory measures to be introduced with phase-out periods and compensation regimes as have been seen with fur farming bans.[840]

The humanitarian argument for making a special case for whales was strongly put over 100 years ago in the journal "Humanity" edited by the philanthropist H.S. Salt:

> No animal so unfortunate in the treatment which he receives from mankind as the largest of all animals, the whale... the whale, though in reality a warm-blooded animal,

[836] See World Organisation for Animal Health website available at https://www.oie.int/.
[837] Robert William Garner (n829) 286.
[838] Howard S Schiffman "The International Whaling Commission: Challenges from Within and Without"(2004), 10 ILSA J. Int'l & Comp. L. 367) and Diana Wagner, "Competing Cultural Interests in the Whaling Debate: An Exception to the Universality of the Right to Culture" (2004) 14 Transnat'l L & Contemp Probs 849–854.
[839] Ramsey Henderson " The Future of Whaling: Should the International Whaling Commission Create a Broadened Cultural Exemption to The Whaling Moratorium for Iceland?"(2005) GA. J. INT'L & COMP. L. 209.
[840] In the UK farms could claim for loss of earnings and the disruption caused by the need to find a new career see https://www.theguardian.com/uk/2001/dec/28/immigrationpolicy accessed 5/12/19.

> and highly sensitive to pain, is commonly regarded as a fish, and treated as if he were a cold-blooded being of low organisation.
>
> Salt maintained that the slaughter of whales, especially with the new harpoon guns, represented a 'diabolically barbarous treatment of a highly sensitive mammal' (1898: 84–5).[841]

There is little doubt physiologically that whales can feel pain and are sentient in addition to their considerable cognitive capacities, yet over a thousand whales are killed every year.

4.2 WHY WELFARE DOES NOT WORK: THE LIMITATIONS OF OUR CURRENT LEGAL FRAMEWORKS

There are many issues with the current framework. Animals lack standing, their sentience is not protected, and their abilities are ignored when implementing legislation. Furthermore, they are classified as property which limits the protections they are afforded. Welfare laws do not tend to go further than providing for animal welfare. Under the animal welfare system, if an individual or entity can justify as necessary the infliction of suffering on animals, that infliction of suffering is beyond the reach of state anti-cruelty laws, regardless of the type and degree of suffering animals experience.[842] Courts do not address the question of whether it is necessary to use animals; they address only questions about the necessity of particular acts in relation to the presumed entitlement of humans to use animals.[843] Therefore, existing laws and regulations do not adequately protect animals – improved welfare and existing regulations permit animal experimentation and factory farming, among an extensive list of legal activities that deny animals fundamental rights and a denial of their morality.[844]

---

[841] W E Marsden "Animal Welfare Issues in Geography and Environmental Education: Some British Historical Perspectives" (2001) International Research in Geographical and Environmental Education 10 (4), 403 quoting H S Salt.

[842] Tamie Bryant "Sacrificing the Sacrifice of Animals: Legal Personhood for Animals, the Status of Animals as Property, and the Presumed Primacy of Humans" (2007-2008) 39 Rutgers L.J. 247–248.

[843] Tamie Byrant (n842) 249 For instance, in the United Kingdom, the concept of "unnecessary suffering" is applied. According to the Animal Welfare Act 2006, under s.4(1)(a) and s.4(1)(d); an individual commits an offence if the animal suffers and that suffering was unnecessary. Section4(3)(a) sets out if the suffering could have been reasonably avoided or reduced. Furthermore, under s.4(3)(c) whether the conduct which caused the suffering was for a legitimate purpose is questioned. These are very ambiguous provisions and allow for much discretion.

[844] Marc Bekoff "Why 'Good Welfare' Isn't 'Good Enough': Minding Animals and Increasing Our Compassionate Footprint" (2008) The Humane Society Institute for Science and Policy Animal Studies Repository 7.

Although there is a certain acceptance that animals are capable of suffering and that protection of animals is necessary, animal welfare is not included as a direct factor in many pieces of legislation. There is often no recognition of animal interests despite the fact that science has recognised for some time that animals are sentient beings and cognitive abilities are ignored. Welfarist measures are mostly entrenched in the paradigm of "unnecessary" suffering, where the necessity of suffering is correlated with existing industry standards and economic rationales.[845] With this as the standard, almost every socially acceptable practice in relation to animals is regarded as "necessary."[846] Animals typically matter as an afterthought only after human interests, no matter how trivial, are satisfactorily addressed.

The philosophy of animal welfare or conservation is embodied by the current system. However, neither approach protects the animal because they are deserving of rights due to their own interests and inherent value. There is an inconsistency between the practice of anthropocentric conservation in the case of whales, which denies or ignores their moral standing, and the dominance of the animal welfare ethic in the way animals are treated in general. This leaves animal interests inadequately protected.

A common EU-wide conception of responsibility for sentient beings is promoted in Article 13 of the TFEU.[847] Nonetheless, the recognition of animals as sentient beings has arguably been ineffectual and only symbolic.[848] Furthermore, if this recognition was actualised, it would still not be sufficient as the moral abilities of animals are not included as a criterion. Animal welfare measures reduce animal suffering in the short term or simply regulate it. Fundamentally, welfare laws are not sufficient because existing laws and regulations still allow animals to be subjected to enduring pain and suffering and death. Therefore, a rights-based approach is required.[849]

4.3 CONCLUSION

This chapter demonstrates the problems associated with the current animal welfare system. Despite decades of welfare efforts, the majority of animals are mostly worse off than ever

[845] Maneesha Deckha (n725).
[846] Maneesha Deckha (n725) 788.
[847] Under Article 13 of the TFEU.
[848] Rajesh Reddy (n693).
[849] Marc Bekoff (n844).

before. They are subjected to increasingly invasive and harmful treatments.[850] Significantly, animal welfare measures regulate exploitation, rather than prohibit it. The recognition of animal sentience has not been actualised in law, and the current approach ignores evidence we now have regarding animal abilities and cognition.

Animal welfare laws do not adequately protect animals as they focus on minimum welfare standards and are not implemented with the view of protecting animals for their own value.[851] Animal welfare does not work. At present, there is "a thick legal wall between humans and animals."[852] Humans enjoy the status of legal persons and the benefits from fundamental rights such as those incorporated in the Universal Declaration of Human Rights. On the other side of the legal wall are things, which, by definition, enjoy no legal rights. Animals are considered property in the eyes of the law, and only legal persons have rights, property does not. Therefore, even those animals that we know possess feelings, emotions and moral capabilities[853] have no more legal standing than a shoe or a table.

The current system needs to be dismantled. Recent reforms are not effective or sufficient. There is a plethora of scientific research validating that animal welfare is more than just the reduction of pain and suffering yet the EU focus on minimising suffering. Furthermore, leading scientific researchers have demonstrated the vast moral abilities of animals. This evidence is not acknowledged or referred to when drafting new legislation. No real progress has been made in recent years because the legal, social and political structures remain, and current discussion and decisions are from a welfare or conservation approach which does not result in sufficient animal protection. Therefore, an alternative approach is required which incorporates rights-based decision making.

Having provided a critique of the current animal welfare system, it is appropriate to examine other approaches. The next chapter will examine the status of animals in jurisdictions that are closing the gap between the law and the empirical data, thereby acknowledging the scientific evidence regarding animal sentience and cognition. Chapter five will provide an analysis of

[850] Lori Mario "Why animal welfarism continues to fail" (2016) Animal Sentience.
[851] There will be a critique of the current welfare system later in this chapter see 4.1 THE CURRENT ANIMAL WELFARE MODEL: THE MERITS AND LIMITS.
[852] Term derived from Steven Wise.
[853] There is a plethora of scientific evidence demonstrating the cognitive abilities of these species. See discussion of this evidence in chapter two see 2.3 ANIMALS .

progressive examples of judicial decisions and legislative proposals, that recognise animals as subjects of rights. These jurisdictions have opened the way in beginning to challenge the current legal status of the animals. The chapter will illustrate an alternative evidence-based approach in which animals can have improved protection, including certain legal rights and demonstrates some of the ways in which this is possible. An analysis of the concept of legal personhood will be provided to demonstrate that animals can hold legal rights. An exploration of the developments that have been made regarding the treatment and protection of animals will be provided, highlighting shifting contemporary norms.

CHAPTER 5: SHIFTING CONTEMPORARY NORMS AND THE EXTENSION OF PERSONHOOD

"The issue whether a nonhuman animal has a fundamental right to liberty protected by the writ of habeas corpus is profound and far-reaching. It speaks to our relationship with all the life around us. Ultimately, we will not be able to ignore it. While it may be arguable that a chimpanzee is not a 'person,' there is no doubt that it is not merely a thing."

Judge Fahey, 2018

5. INTRODUCTION

The previous chapters highlighted that the recognition of sentience has not made a lot of difference to the status of animals. Importantly, they raised the question of whether a welfare-based system offers adequate protection and highlighted that recognition of animal sentience alone does not offer sufficient protection. This chapter explores new approaches and developments that have been taken in other jurisdictions to protect animals which demonstrate a change in views regarding how animals ought to be protected. It analyses the concept and purpose of legal personhood and examines why personhood should be extended to animals. It highlights the emergence of some judicial willingness to recognise animal rights. Furthermore, the status of animals in jurisdictions that are closing the gap between the law and the empirical data is analysed, thereby acknowledging the scientific evidence regarding animal cognition.

The purpose of this chapter is to illustrate that the granting of legal rights to animals is possible and has occurred. Therefore, this chapter examines alternative legal regimes emerging in rights. The next section will examine the concept of legal personhood before analysing how a change in attitude has resulted in some changes to our laws.

5.1 A CHANGE IN ATTITUDE: SHIFTING CONTEMPORARY NORMS

In recent years we have witnessed some change in societal attitudes towards animals, and there have been developments in how we use and protect some animals. While there is inconsistency when it comes to human treatment of animals – we are using more animals for

food and in experimentation,[854] yet when it comes to other animal uses, there is a shift in our treatment and protection in some respects which will be examined in this chapter. Steven Wise comments on the lack of literature regarding the legal protection of animals noting that as the animal rights movement has gained momentum, there have been numerous books about animals and philosophy, and animals and religion, however "only a trickle of books about animals and law has emerged."[855] This thesis contributes to augmenting the literature in animal law.

Public awareness of the plight of animals has spread in many areas, particularly in regard to their use in entertainment and their captivity. Advocacy groups have emerged throughout most parts of the world; however, in general, there has been a limited change in terms of how animals are treated and the status we afford to them.[856] In response to this growing awareness, there has been some reform regarding our treatment of animals, and these areas of reform can be utilised and built upon. For example, Argentina has granted personhood to a chimpanzee Cecilia, and the Canada has introduced a ban on cetacean captivity. These developments can be used to create opportunities for new approaches. They suggest that a change in thought is emerging. Much of this reform is due to evolving sensitivities towards animals based on new knowledge we have acquired regarding animal cognition.

This chapter will examine legal personhood and sets out new approaches that are attempting to improve legal protection for animals. It demonstrates societal shifts and changes in sensitivities, illustrating evolving norms. While these developments should not be looked at in isolation, some legal change has occurred regarding societies' view and treatment of animals. Though still rare, these instances contest law's anthropocentric values and effect. As all animals are legally classified as things, a number of lawyers worldwide have begun searching for innovative ways to make animals more visible to the law: strengthening and

[854] The number of animals used for experimental purposes is increasing see PETA website available at https://www.peta.org/issues/animals-used-for-experimentation/animals-used-experimentation-factsheets/animal-experiments-overview/ accessed 12/7/19 see also https://www.peta.org/issues/animals-used-for-food/factory-farming/ for an overview of the factory farming accessed 10/7/19.
[855] Steven Wise *Rattling the Cage* (Profile books ltd, 1999) 38
[856] George Dvorsky "The Struggle for Nonhuman Personhood" (2004) Journal of Evolution and Technology 24 (3) 1

enacting new anti-cruelty statutes, improving basic protections, and challenging animals' property status itself in an effort to grant them fundamental rights.[857]

The next section demonstrates that personhood is and can be applied beyond humans. It will demonstrate that a change in thought towards animals and personhood is beginning to emerge among the judiciary.

5.2 THE RECOGNITION OF LEGAL PERSONHOOD

Legal personhood[858] means a subject is endowed with certain legal rights within a legal system, for example, the right to own property.[859] Sir John Salmond, stated a basic definition of legal personhood, which is described as "any being whom the law regards as capable of rights OR[860] duties."[861] A legal thing, however, is "an entity with no capacity for legal rights" entitled only to treatment "as property about which legal persons have legal rights and duties."[862] Legal personhood is created when a legal construct is put in place. Certain rights are granted, and a legal relationship is created.[863] The classic example of a legal person is a natural one.[864] Humans are called "natural" persons because they are persons by virtue of being born, and not by legal decree. Certain legal rights adhere automatically upon birth, such as the right to liberty. Natural persons comprise the majority of legal persons and have served as a model for attributing legal personhood to non-natural persons.[865] If an entity, collective, or individual cannot be regarded as resembling a human being, then its legal status is far more uncertain.[866] The average adult human is presumed to have the capacity to exercise rights

[857] Cara Feinberg "Are Animals "Things"? (2016) available at Http://Harvardmagazine.Com/2016/03/Are-Animals-Things accessed 15/04/16
[858] My focus is on legal personhood.
[859] Elvia Arcelia Quintana Adriano "Natural Persons, Juridical Persons and Legal Personhood" (2017) Mexican Law Review 109.
[860] Emphasis added.
[861] John Salmond *Jurisprudence* (7th edn, Sweet and Maxwell 1924) 329.
[862] Steven Wise "The Legal Thinghood of Nonhuman Animals" (1996).23 B.C. Envtl. Aff. L. Rev. 471, 472.
[863] *Ibid* 114.
[864] The Merriam-Webster dictionary defines a natural person as a human being as distinguished from a person (as a corporation) created by operation of law see https://www.merriam-webster.com/legal/natural%20person.
[865]Alexis Dyschkant "Legal Personhood: How We Are Getting it Wrong" (2015) University Of Illinois Law Review 2078.
[866] *Ibid* 2079.

and owe duties.[867] Nonetheless, not all natural persons have the same legal rights - children, for example, are afforded fewer legal rights than adults. [868]

However, one can be a legal person without being a human being. The law considers some entities that are not natural persons as legal persons; they are just persons solely in law, not in fact.[869] This is exemplified through the categories of legal persons, including intangible entities such as corporations. Salmond further noted that "[l]egal persons, being the arbitrary creations of the law, may be of as many kinds as the law pleases."[870] Therefore, unlike the designation of natural persons, there appear to be few, if any, legally established limitations either on what kind of entity can be labelled a juridical person,[871] or what rights follow. A review of the jurisprudence suggests that states have a broad authority to designate juridical persons and to define the extent of their powers under the law.[872]

A juridical or legal person, therefore, is used to refer to an entity that is not a human being, but for which society chooses to afford some of the same legal protections and rights as accorded to natural persons. Corporations are the best example of this category. A natural person is genetically human, and a juridical person is an entity that is assigned this designation in order to be the subject of legal rights and is not granted equal rights with natural persons; such allocation of rights would have to be justified by the interests involved.[873]

Therefore, not all juridical persons will necessarily have the same legal rights. If juridical personhood is necessary to protect the interests of the entity, the rights that follow should be those that protect the interests at stake. Likewise, if juridical personhood is necessary to protect the interests of others, the rights that follow should be those that protect those interests and not symbolic rights. Similarly, even the rights of natural persons are understandably limited by the rights of other natural persons; the rights and interests of others must be factored in.[874] Importantly, legal personhood can be granted to any entity the

[867] Alexis Dyschkant (n865) 2080.
[868] Jessica Berg (n872) 373.
[869] John Salmon (n861) 330.
[870] John Salmond (n861) 337.
[871] The Merriam-Webster dictionary defines a juridical person as an that is given rights and responsibilities
[872] Jessica Berg "Of Elephants and Embryos: A Proposed Framework for Legal Personhood" (2007) Hastings Law Journal 59 380.
[873] See Jessica Berg (n872) also see Dinah Shelton **"**Nature as a legal person" (2015) available at https://journals.openedition.org/vertigo/16188 accessed 12/10/19.
[874] Jessica Berg (n872) 381.

lawmakers in a given country or jurisdiction see fit. There need be no fixed or common criteria for admission to the category of legal persons[875] as the assignments of rights to new entities is only a legal fiction. Therefore, the category of legal persons is not limited to humans and can apply to animals.

In 1894, the Supreme Court in *Lockwood, Ex Parte* decided that it was up to the states "to determine whether the word person as therein used [in the statute] is confined to males and whether women are admitted to practice law in that commonwealth."[876] This precedent continued well into the twentieth century and, in 1931, a Massachusetts judge ruled that women could not be denied eligibility to jury status because the word "person" was a term that could be interpreted by the court.[877] This illustrates that the concept of legal personhood is fluid. The rights and duties that accompany legal personhood vary with the nature of the entity. Both corporations and natural persons are legal persons, but they have different sets of legal rights and duties. The same would apply in the case of animals. Today corporations enjoy many of the same rights as citizens. Both, for instance, are entitled to freedom of speech. However, corporations do not require many of our human rights, such as the right to liberty. While this decision was to promote commerce and private enterprise, it nonetheless demonstrates that legal rights can be extended beyond humans. Corporations have no inherent intellectual, communicative, or emotive abilities, yet they are granted rights and a legal identity, albeit for human convenience. Animals have important characteristics that make them worthy of rights.[878] The law should consider the levels of cognitive ability in animals, which animals have a sense of future, for instance, in order to provide adequate protection and grant them species-specific rights.[879]

---

[875] Steven Tudor "Some Implications for Legal Personhood of Extending Legal Rights to Non-Human Animals" (2010) 35 Australian Journal of Legal Philosophy 138.

[876] This case is available at https://caselaw.findlaw.com/us-supreme-court/154/116.html.

[877] Eric Michael Johnson "The Case for Non-human Personhood" (2012) available at https://www.huffpost.com/entry/non-human-personhood_b_1336480?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAANh4FH8n0ZEZRFJM6ngv3YwQrb2y1akJSR9QmpZMrFAYsy0m49N-cC7xEJjfSv7udNB0Mtd-cZVJRoTqESSEqcuN4kiDLKGuRxTJzqpyE85ePuAy-EjwbYFvZUxCOcIgrw-q6ZhMSOzvDxJ--jNc2LcSHhiVMb5RpgLoTnXzEL2u.

[878] Theories which use cognition as a basis for rights are examined in chapter five see 2.2.3 Deontology and a rights-based approach.

[879] Donald Broom "Cognitive ability and sentience: Which aquatic animals should be protected?" (2007) Diseases of Aquatic Organisms 75 available at http://www.int-res.com/articles/dao_oa/d075p099.pdf 99.

The current welfare system of protection for animals is built upon a false Cartesian account – that they are mere things lacking in all feeling.[880] It is important for humans to qualify their worth because they cannot speak up; they cannot protest or elect government representatives who will give them rights. The purpose of personhood is to protect beings or entities that are inanimate or natural objects from being treated as a means to human satisfaction. A definition of legal personhood for animals refers to the extent to which animals have the sufficient characteristics that result in the law recognising them as beings with interests that should be legally protected, even in cases where the protection of these interests conflict with human interest in using animals.[881] Unlike companies where legal personality is, in fact, a fiction, in the case of both animals and humans, it results from their very nature as beings with a worth in their own right.[882]

There is a growing effort by some academics, lawyers, and animal activists to secure legal personhood for animals.[883] Animal personhood could fill an inherent vacuum in the workings of the animal welfare system. The assignment of rights can make a significant difference to the protection of the new rights holders in the real world.[884] For instance, a writ of habeas corpus to move a chimpanzee from unsuitable accommodation to a sanctuary as was demonstrated in Argentina[885] or granting cetaceans the right to liberty, freeing them from captivity. The point of bestowing legal personhood on animals is to protect their interests. It is argued that if rights are recognised for an inanimate thing, "why can't basic rights for an intelligent animate being such as a dolphin or ape be recognised?" A person has never been and still is not a matter of biology; rather, it is a matter of public policy. A legal person can

[880] See chapter five section 2.2.1 Animal as Automata for a discussion of Cartesian views regarding animals
[881] Taimie L Bryant "Sacrificing the Sacrifice of Animals: Legal Personhood for Animals, The Status of Animals as Property, and the Presumed Primacy of Humans" (2008) 39 Rutgers L.J. 247.
[882] David Bilchitz "Moving Beyond Arbitrariness: The Legal Personhood and Dignity of Non-Human Animals" South African Department of Environmental Affairs (2009) 68 available at http://www.repository.up.ac.za/bitstream/handle/2263/12171/Bilchitz_Moving(2009).pdf?sequence=1&isAllowed=y accessed on 01/11/15 68.
[883] Verlyn Klinkenborg "Animal Personhood: Muddled Alternative to Real Protection" (2014) Yale Environment available at https://e360.yale.edu/features/animal_personhood_muddled_alternative_to_real_protection accessed 15/6/18 and Helen Steward "Animals aren't persons, but is it time for a neologism?" (2016) Animal Sentience 155 available at http://animalstudiesrepository.org/cgi/viewcontent.cgi?article=1173&context=animsent accessed 10/04/16 6.
[884] Laurence H Tribe "Ten lessons our constitutional experience can teach us about the puzzle of animal rights: the work of Steven M. Wise" (2001) Animal Law 7 2.
[885] This case will be discussed later in this chapter see 5.3.3 Argentina and the protection of Great Apes.

have a theoretically infinite number of rights, while a thing is incapable of having any rights, even those which protect their most fundamental interests.

This section has demonstrated that being a human and being a person is legally not synonymous. There are of course objections to the granting of legal rights to animals which will be explored further in the following chapter. The next section will examine an emerging change in the legal protection and thought amongst some judiciary towards animals and legal rights, highlighting that animals' legal status may be evolving.

5.3 CHANGING ATTITUDES REFLECTED IN CHANGING LAWS

A change in legal attitude towards animals is beginning to emerge. Judges are beginning to recognise that the status of animals should evolve. In the last ten years there have been some landmark cases that demonstrate a willingness to move towards legal rights for animals. There is now a discussion on the appropriate treatment of animals from the predominant welfare paradigm to that of rights. For example, in Canada, members of the judiciary acknowledged the problematic classification of animals as property.[886] There is also progress occurring in the US with the NhRP cases and a recognition that the issue of whether animals have a fundamental right to liberty by the writ of habeas corpus must be considered[887] and significantly, in Argentina, in 2016, Cecilia, a great ape, was granted a writ of habeas corpus.[888] These cases highlight a change in judicial opinion on the appropriate legal classification of animals.

The following section will provide further context, commentary and discussion of these judgments and the impact these developments may have on animals, starting with the legal protection of great apes.

4.3.1 THE LEGAL PROTECTION OF GREAT APES

Campaigning for legal rights for animals has been underway for a number of years. The scientific evidence that many species, particularly great apes, are sentient, autonomous and

[886] See Reece v. Edmonton (City), 2011 ABCA 238.
[887] Statement made by Judge Fahey in 2018 in the New York Court of Appeal's case In the Matter of Nonhuman Rights Project, Inc., on Behalf of Tommy v. Patrick C Lavery &c., et al available at http://www.nycourts.gov/ctapps/Decisions/2018/May18/M2018-268opn18-Decision.pdf.
[888] English Translation of case 23-24.

self-determining is compelling. Consequently, attempts have been made to argue for the extension of rights to these species. The following section will discuss the Great Ape Project (GAP) and the Nonhuman Rights Project (NhRP) and the impact they have had on animal protection.

The next section will examine the Great Ape Project, which has laid the groundwork for personhood arguments for great apes.

5.3.1 The Great Ape Project (GAP)

The Great Ape Project is an international animal rights movement with the goal of extending rights to nonhuman primates. It is argued that members of this community - all great apes: humans, chimpanzees, bonobos, gorillas, and orangutans, deserve protections and rights. GAP's goal is to secure the right to life, the right to individual freedom, and the prohibition of torture for nonhuman great apes.[889] The project has led to the creation of an international organisation with the same name which aims to remove great apes from the category of property, and for their immediate inclusion within the category of persons.[890]

GAP seeks nothing less than full moral and legal personhood for great apes.[891] This project challenges the traditional moral and legal chasm drawn between humans, viewed as persons deserving strict rights, and animals, viewed as mere things having instrumental or property value solely by virtue of their usefulness to humans.[892] The project uses accounts of chimpanzees' capabilities, particularly their use of sign language as well as philosophical critiques of our anthropocentric ethical tradition, seeking equality for apes.[893] This equal consideration relates to the rights of apes, arguing that they should be respected no less than those of humans.[894] Furthermore, it is argued that court-appointed guardians or other organisations should be enabled to protect the legal rights of great apes by bringing cases on their behalf.[895] The project holds that extending legal rights to chimpanzees, bonobos,

[889] Peter Singer and Paola Cavalieri *The Great Ape Project* 1993.
[890] Peter Singer and Paola Cavalieri (n889) Adam Kolber (n897) 178.
[891] Peter Singer and Paola Cavalieri (n889) also see Adam Kolber (n897) 164.
[892] The Great Ape Project available at https://www.projetogap.org.br/en/.
[893] *Ibid.*
[894] *Ibid.*
[895] *Infra.*

gorillas, and orangutans is a fundamental requirement to prevent the continuation of torture and other violations.

The project has drawn up a declaration of rights in the following terms:[896]

> We demand the extension of the community of equals to include all great apes: human beings, chimpanzees, bonobos, gorillas and orangutans. The community of equals is the moral community within which we accept certain basic moral principles or rights as governing our relations with each other and enforceable at law.

Among these principles or rights are the following: the right to life, the protection of individual liberty and the prohibition of torture. By its terms, the declaration is intended to promote a legal position that is not intended to be merely a statement of theoretical moral philosophy.[897] GAP campaigns for a United Nations Declaration of the Rights of Great Apes. Its first step towards reaching this goal came in March 2007 when the Balearic Parliament announced its approval of the Great Ape Declaration. The resolution embraced the objective of the Great Ape Project.

The Spanish government put forward legislation to grant great apes the right to life, freedom, and to be free from torture.[898] The Environment Minister Cristina Narbona, stated that the government was not giving apes human rights and stated: "We are not talking about granting human rights to great apes, but about protecting (their) habitat, avoiding their ill-treatment and their use in various circus activities."[899] In June 2008 the Spanish Parliament's environmental committee approved resolutions supporting the Great Ape Project's mission to attain legal rights for nonhuman great apes.[900] Dr. Pedro Ynterian, former president of the Great Ape Project International, recognised the significance of this achievement, as the first

[896] See the Great Ape Project website available at www.greatapeproject.org.
[897] Adam Kolber "Standing Upright: The Moral and Legal Standing of Humans and Other Apes"(2001–2002) 54 Stan. L. Rev. 178.
[898] See Lee Glendinning "Spanish parliament approves 'human rights' for apes" available at https://www.theguardian.com/world/2008/jun/26/humanrights.animalwelfare also see Apoorva Mandavilli "Spain Gives Great Apes Legal Rights" available at https://www.discovermagazine.com/planet-earth/64-spain-gives-great-apes-legal-rights both accessed 26/8/19.
[899] Susanna Vera "Human Rights for Apes" Time magazine (2008) available at http://www.time.com/time/world/article/0,8599,1824206,00.html also see Lee Glendinning, Spanish parliament approves 'human rights' for apes, The Guardian.
[900] Paola Cavalieri "The Meaning of the Great Ape Project" (2015) Politics and Animals.

time that a parliament has announced its approval of rights for Great Primates.[901] An environmental committee advised the government to pass legislation granting great apes – gorillas, chimpanzees, bonobos, orangutans – the right to life and liberty, along with the right not to be used in experiments. The measure proposed to make it illegal to kill apes except in self-defence, to experiment on them, or even to arbitrarily confine them.[902] This was a groundbreaking event, proposing to grant nonhuman great apes fundamental legal rights, thereby treating them as legal persons and not legal things. However, after ten years, the idea has not been put into effect.[903] The Spanish government did not respond, and therefore this law was never enacted.[904] Schaffner[905] explains that no reason could be found to explain why the government did not comply but did note that given that no other country had adopted GAP this would have been quite controversial at the time.[906]

GAP has made positive developments for the rights of apes. Other projects such as the Nonhuman Rights Project have built upon this body of work and are creating a change within the legal arena. The next section will examine this project.

5.3.2 America and the Nonhuman Rights Project (NhRP) – The evolution of legal personhood for nonhuman animals in the United States

The Nonhuman Rights Project is a US civil rights organisation working to achieve legal rights for nonhuman animals and was established by the lawyer Steven Wise. It overlaps with the Great Ape Project's ambition to achieve legal personhood for primates and endeavours to address the longstanding exclusion of some animals from our legal order. Its mission is to change the legal status of certain species from things to persons which will result in possession of legal rights such as rights to bodily integrity on the basis of evolving standards

[901] See the Great Ape website's discussion on Spain's international campaign available at https://www.projetogap.org.br/en/noticia/gap-project-spain-international-launches-campaign-great-apes-living-world-heritage-2/and see also Debbie Rook "Should Great Apes have Human Rights" (2009) Web Journal of Current Legal Issues.

[902] Apes would still be allowed to be kept in captivity for conservation purposes, but then only in optimal environments.

[903] See Great Ape Project website discussion available at https://www.projetogap.org.br/en/noticia/for-a-great-apes-law-in-spain/.

[904] Joan Schaffner *An Introduction to Animals and the Law* (Palgrave MacMillan 2010).

[905] Joan Schaffner is an Associate Professor of Law at the George Washington University Law School and Directs the George Washington Animal Law Program.

[906] *Ibid.*

of morality and scientific discovery.[907] The NhRP plaintiffs are members of species who have been scientifically proven to be autonomous: currently, great apes, elephants, dolphins, and whales. Science informs us that humans are not the only species who have and value their autonomy. The NhRP argues that autonomy is a sufficient but not necessary basis for personhood and rights. Wise's criteria for personhood are that the animal must be able to desire things, to act in an intentional manner to acquire those things and must have a sense of self, i.e. the animals must know that s/he exists.[908] For Wise, practical autonomy has three elements. First, one must be cognitively complex enough to want something. Second, one must be able to act intentionally to achieve one's desires. Third, one must have a sense of self complex enough so that it matters to whether one's achieves one's own goals. Consciousness is implied in "practical autonomy." One who is not conscious cannot be autonomous.[909] Wise notes that under the current legal system animals are things whose value is instrumental with no legal rights. Persons, however, have inherent value, and they have the capacity for an infinite number of rights.[910] Even those animals that we know possess feelings, emotions and higher forms of intelligence, have no more legal standing than an object.[911]

The NhRP has represented a number of species including chimpanzees and elephants, seeking orders of habeas corpus.[912] The contention is that these species should be recognised as legal persons entitled to the basic liberty rights protected by this writ.[913] However, Wise was not the first lawyer to seek such an order. In 2005, a Brazilian court was asked to grant an order of habeas corpus in respect of a chimpanzee, Suica, living in Parque Zoobotanico Getulio Vargas known as Salvador's zoo.[914] Granting a habeas corpus writ in respect of a thing is a legal impossibility, and it was expected that Judge Lucio da Cruz would dismiss the case.

---

[907] Steven Wise (n855) also see Katrina M Albright "The Extension of Legal Rights to Animals under a Caring Ethic: An Ecofeminist Exploration of Steven Wise's Rattling the Cage" (2002) 42 Nat. Resources J. 915 916.
[908] Steven Wise (n855).
[909] Steven Wise "Nonhuman Rights to Personhood" (2013) 30 Pace Envtl. L. Rev 6.
[910] Steven Wise "The Struggle for nonhuman rights" (2015) available at opendemocracy.net /openglobalrights/steven-m-wise/struggle-for-nonhuman-rights accessed on 17/09/15.
[911] Jacksonville Journal Courier "The legal rights of non-humans" (2015) available at http://myjournalcourier.com/news/387/the-legal-rights-of-non-humans accessed 10/06/15.
[912] Habeas corpus is a proceeding to obtain a court order to produce a detained person so the legality of their custody can be determined.
[913] Daniel Davison-Vecchione and Kate Pambos "Steven M. Wise and the Common Law Case for Animal Rights: Full Steam Ahead" Canadian Journal of Law & Jurisprudence (2017) 2, 287–309.
[914] In *Favor of Suica*, 91h Criminal Court, No 833085-3/2005 (Bahia, Brazil Sept. 26, 2005) also See www.animallaw.info/nonus/cases/cabrsuicaeng2005.htm accessed on 15/07/13.

Unexpectedly he did not. The plaintiffs alleged the conditions of Suica's housing in a small coop was unsuitable for life. The housing condition was not adequate to promote the psychological well-being of Suica, causing her physical and psychological problems. Further, the plaintiffs sought her transfer to the Great Ape Sanctuary in the city of Sorocaba, Sao Paulo. Judge da Cruz realised that to admit the case would incite debate among persons and entities of the judiciary. He tried to show that the law must change and follow the current behaviour and thoughts in society. He affirmed that in 24 years in court, he had never seen one case assigned to an animal. He understood that the theme was complex and required an in-depth examination of advantages and disadvantages. Therefore, he accepted an extension of the deadline to allow the defendant to bring more information about the facts in the petition. The judge felt the case needed more attention because it was a question that had been given little discussion in the judicial branch. He stated that some conservative Brazilian jurists would probably not like this debate, but it was necessary. However, during this extension, Suica died. In Judge da Cruz's opinion, the Criminal Procedure Law must not be static but must accept some changes, and new decisions must adapt to new times. While the chimpanzee's untimely death put an end to the case, the case itself engaged with arguments that have been debated and discussed for years, albeit outside of the courtroom.[915]

This case has led to a controversial debate as to whether fundamental legal rights such as freedom from torture and slavery should be extended to certain nonhuman animals, in particular, great apes.[916] The NhRP has undertaken a long-term strategic litigation campaign focusing initially in New York. The New York State Court System is made up of various levels of trial and appellate courts. The majority of cases are decided at the trial court level, including the Supreme Court, District Court and Town Courts. Parties can appeal a decision to a higher court. Most appeals are first heard in the intermediate appellate courts,[917] which review the

[915] Tagore Trajano De Almeida Silva "Brazilian Animal Law Overview: Balancing Human and Non-Human Interests" (2010) 6 J. Animal L. 81 91.

[916] For a discussion of extending fundamental legal rights to primates see Raffael Fasel R et al "Fundamental Rights for Primates"(2016) Policy paper by Sentience Politics (1) 1–16. Also see Randall Abate and Jonathan Crowe "From Inside the Cage to Outside the Box: Natural Resources as a Platform for Nonhuman Animal Personhood in the U.S. and Australia" (2017) Global Journal of Animal Law 54
Debbie Rook "Should Great Apes have Human Rights" (2009) Web Journal of Current Legal Issues.

[917] Appellate divisions of the Supreme Court in the First and Second Departments hear appeals of decisions in cases starting in the New York City Civil and Criminal Courts. In the Second Department, the Appellate Terms also hear appeals of decisions in cases that started in the District, City or Town and Village Courts. The County

decisions of lower courts to make certain that the law was properly applied. In New York, the highest court is the Court of Appeals.

The initial four chimpanzees in question included Tommy,[918] a chimpanzee held in a shed on a trailer sales lot in Gloversville; in Niagara Falls, Kiko,[919] a chimpanzee living in a cement building on his owner's property; Hercules and Leo,[920] two chimpanzees owned by New Iberia Research Center and loaned to the Anatomy Department at Stony Brook University for use in research.

In December 2013, the NhRP filed the world's first common law habeas corpus petition on behalf of Tommy.[921] The Third Judicial Department of the Appellate Division of the New York Supreme Court delivered its judgment, in this case, finding that a chimpanzee is not a person entitled to the rights and protections afforded by the writ of habeas corpus.[922] The decisive factor was that chimpanzees are incapable of holding both rights and duties within a political community and only persons (as in human beings) are entitled to habeas corpus relief. The NhRP argued that many people lack the capacity to bear duties, but still possess fundamental rights. However, the Court stated that "(t)his argument ignores the fact that these are still human beings," without offering reasons as to why this fact must necessarily lead to the conclusion that chimpanzees may not possess the fundamental right to bodily liberty protected by a common law writ of habeas corpus.[923]

In a subsequent hearing in New York Supreme Court, Jaffe J. denied a writ of habeas corpus to another pair of chimpanzees, Hercules and Leo, on the basis of the precedent established

---

Courts in the Third and Fourth Departments, while primarily trial courts, hear appeals of decisions in cases starting in the City Courts and Town and Village Courts. There are four Appellate Divisions of the Supreme Court, one in each judicial department. The Appellate Divisions hear civil and criminal appeals from the trial courts as well as civil appeals from the Appellate Terms and County Courts.

[918] The Nonhuman Rights Project Inc, v Patrick C Lavery 2013 N.Y.

[919] The Nonhuman Rights Project, Inc., on behalf of Kiko V Carmen Presti 2013 N.Y.

[920] Nonhuman Rights Project Inc. v Stanley (2013) N.Y . Both Hercules and Leo have since been transferred to the Project Chimps Sanctuary.

[921] People of the State of New York, ex rel The Nonhuman Rights Project, on behalf of Tommy v Thomas Lavery, [2014] 124 AD 3d 148 [Tommy].

[922] *Ibid.*

[923] Matter of Nonhuman Rights Project, Inc. v Lavery, 152 AD3d 73, 78 [1st Dept 2017]; see also People ex rel. Nonhuman Rights Project, Inc. v Lavery, 124 AD3d 148, 152 [3d Dept 2014], lv denied 26 NY3d 902 [2015] [stating that chimpanzees "cannot bear any legal duties, submit to societal responsibilities or be held legally accountable for their actions"].

in the Tommy decision.[924] While Jaffe J. ultimately declined to grant habeas corpus in Hercules and Leo, she acknowledged the empathy inspired by chimpanzees' similarities to humans and considered it possible that efforts to extend rights to chimpanzees will someday succeed, describing herself as bound by the Tommy precedent only "for now." During the course of the court hearings, both Hercules and Leo were moved to a sanctuary.

Kiko's first case began in December 2013 and ended in an appeal decision to the Supreme Court in 2015 stating that seeking transfer to a sanctuary was not an appropriate use of habeas corpus since the NhRP were not seeking "immediate release."[925]

In June 2017, the First Judicial Department of the Appellate Division of the New York Supreme Court ruled on a joint hearing on the cases of Tommy and Kiko.[926] The judge, Justice Troy K. Webber, wrote that there were no changed circumstances warranting fresh consideration of their situation. The court declined to grant habeas corpus, affirming the Third Judicial Department's opinion that the inability to hold both rights and duties within a political community was decisive. In support of the cases, the NhRP offered affidavits[927] from psychologists, zoologists, anthropologists, and primatologists, who have conducted in-depth research into the behaviour, personality, cognition, intelligence, communication, and language skills of chimpanzees and other nonhuman primates. Each expert attested, collectively and generally, to the complex cognitive abilities of chimpanzees. Based on this research and the belief that chimpanzees are autonomous and self-determining, it is argued that these beings are entitled to such fundamental rights as bodily liberty and equality. The court rejected the NhRP's argument that its newly submitted evidence about the social, cognitive, and linguistic capabilities of chimpanzees translated into the ability to bear duties. The court also rejected the argument that the capacity to acknowledge legal duties should not determine a chimpanzee's entitlement to legal rights because there are certain humans, such as infants and those in comas, who possess rights despite lacking this capacity. This was

[924] The Nonhuman Rights Project, on behalf of Hercules and Leo v Samuel L Stanley Jr and State University of New York at Stony Brook, [2015] 152736/15 Supreme Court of the State of New York, New York County: IAS Part 12, online at: https://www.nonhumanrightsproject.org/content/uploads/Judge-Jaffes-Decision-7-30-15.pdf. In New York State, the Supreme Court is the lowest court [Hercules & Leo].
[925] Nonhuman Rights Project, Inc vex. Rel Kiko v Presti.
[926] Nonhuman Rights Project, Inc v Lavery (2017) NY Slip Op 04574, online at: http://www.nycourts.gov/reporter/3dseries/2017/2017_04574.htm.
[927] See for example, Jane Goodall's Affidavit available at https://www.nonhumanrights.org/content/uploads/33.-Jane-Goodall-Affidavit-Kiko.pdf.

because, unlike chimpanzees, such humans are still members of the human community.[928] The NhRP has argued that the ability to acknowledge a legal duty or legal responsibility should not be determinative of an entitlement to habeas relief, since, for example, infants cannot comprehend that they owe duties or responsibilities and a comatose person lacks sentience, yet both have legal rights. The NhRP contend that a person is an entity able to possess rights or[929] duties, not rights and[930] duties.[931] Sir John Salmond, professor of law and judge, stated a basic definition of legal personhood, which is described as "any being whom the law regards as capable of rights OR[932] duties."[933] An amicus brief was submitted in support of the NhRP by a group of seventeen philosophers with expertise in animal ethics, animal political theory, and the philosophy of animal cognition and behaviour.[934] The philosophers' brief maintains that the First Department's ruling "uses a number of incompatible conceptions of person which, when properly understood, are either philosophically inadequate or in fact compatible with Kiko and Tommy's personhood."[935] Moreover, the legal advocacy organisation the Center for Constitutional Rights, and law professors Laurence H. Tribe,[936] Justin Marceau,[937] and Samuel R. Wiseman[938] have submitted amicus curiae briefs in support of the NhRP's motion.

Leave to appeal to the New York Court of Appeals was denied by the First Department in early 2018[939] and on 8 May 2018 the New York Court of Appeals denied the motion.[940] The decision was unanimous, but Justice Eugene Fahey wrote a concurrence:

> To underscore that denial of leave to appeal is not a decision on the merits of petitioner's claim. The question will have to be addressed eventually. Can a nonhuman

[928] Case available at (n926).
[929] Emphasis added
[930] Emphasis added
[931] Relying on Salmond's definition (n861).
[932] Emphasis added
[933] John Salmond (n861) 329.
[934] NhRP Philosophers brief available at https://www.nonhumanrights.org/content/uploads/In-re-Nonhuman-Rights-v.-Lavery-Proposed-Brief-by-PHILOSOPHERS-74435.pdf 2-3.
[935] *Ibid.*
[936] Harvard Law School.
[937] University of Denver Sturm College of Law.
[938] Florida State University College of Law.
[939] See In re Nonhuman Rights Project Inc. v Lavery, 2018 NY Slip Op 61538 (App Div, First Department).
[940] In the Matter of Nonhuman Rights Project Inc. v Patrick C. Lavery, 2018 NY Slip Op 61538 (App Div, First Department) [Lavery and Kiko, Fahey concurrence].

> animal be entitled to release from confinement through the writ of habeas corpus? Should such a being be treated as a person or as property, in essence a thing?...Does an intelligent nonhuman animal who thinks and plans and appreciates life as human beings do have the right to the protection of the law against arbitrary cruelties and enforced detentions visited on him or her? This is not merely a definitional question, to be decided by a source like Black's Law Dictionary, but a deep dilemma of ethics and policy that demands our attention.

This is a significant statement which questions the legal classification of animals and highlights that this is an important issue which the judiciary are going to decide upon. He also addressed the point about complete liberation in Kiko's case, clarifying that habeas corpus can indeed be used to transfer someone from one institution to another more appropriate one. Judge Fahey concluded his opinion with a striking personal reflection noting that he continues to question whether the court was right to deny leave in the first instance. He acknowledges that the current classification of animals would have to be addressed, noting that a chimpanzee is not merely a thing.[941] It was the first time a judge from the Court of Appeals, the state's highest court, or any judge from any American high court, had written anything about the substance of the cases. This personal reflection represents a change in thought at a judicial level and acknowledges the difficulty with the current legal classification of animals and is, therefore, noteworthy.

The NhRP has also commenced proceedings in 2017 in Connecticut on behalf of three elephants, Beulah, Minnie, and Karen, also on the basis of their high levels of cognition and autonomy. The elephants were held in captivity for decades as part of a travelling circus based in Connecticut. Thus far, the Connecticut trial court has ignored the evidence the NhRP presented that elephants are autonomous beings and dismissed their habeas corpus claim that they were entitled to the fundamental right to bodily liberty because the argument was "rel(ying) on basic human rights of freedom and equality."[942] The judge in the first decision from the Connecticut Superior Court denied the claim as he contended it was both lacking in

[941] This judgment is available at http://www.nycourts.gov/ctapps/Decisions/2018/May18/M2018-268opn18-Decision.pdf.

[942] Nonhuman Rights Project, Inc. on behalf of Beulah, Minnie, And Karen v. R.W. Commerford & Sons, Inc. A/K/A Commerford Zoo, and William R. Commerford, As President Of R.W. Commerford & Sons, Inc.,.

subject matter jurisdiction and as frivolous.[943] The NhRP filed a motion to appeal in the Connecticut Superior Court, Litchfield County, asking the court to reverse its dismissal of the habeas corpus petition, which was dismissed. Beulah and Karen, died in September and March of 2019 respectively. Minnie is now the sole surviving elephant in the Commerford Zoo.[944] The NhRP are currently seeking permission to appeal. The NhRP has also taken another case on behalf of an elephant, Happy, a 47-year-old Asian elephant held alone in captivity at the Bronx Zoo. They argued on behalf of Happy and his fundamental right to bodily liberty in the New York Supreme Court, Orleans County. The hearing was the first time a US court has heard oral arguments on an elephant's legal personhood and right to bodily liberty.[945] Justice Alison Y. Tuitt stated that she is bound by precedent to deny Happy habeas corpus relief; however, she agreed Happy "is more than just a legal thing" and "should be treated with respect and dignity."[946] In the latest ruling,[947] habeas corpus relief was denied based on precedent which states that the writ of habeas corpus is limited to human beings. The NhRP maintain the court is not bound by precedent and is currently preparing to ask the Court of Appeal to hear oral arguments.[948]

While the NhRP has not yet had success pursuant to a writ of habeas corpus, they have noted a number of victories in these cases thus far, which include being granted standing to sue. This is particularly important given that lack of standing is the most common reason courts dismiss cases filed on behalf of nonhuman animals. Furthermore, the organisation secured the first-ever hearing to determine the lawfulness of a nonhuman animal's detention.

---

[943] The Nonhuman Rights Project Inc. y R. W Commerford & Sons Inc., 2017 WL 7053738 (Conn Sup Ct) see also Angela Fernandez "Legal History and Rights for Nonhuman Animals: An Interview with Steven M Wise" (2018) Dalhousie Law Journal 41.

[944] See Nonhuman Rights Project website available at https://www.nonhumanrights.org/campaigns/free-beulah-karen-and-minnie/ accessed 19/8/20.

[945] The Nonhuman Rights Project, Inc., on behalf of Happy v James J. Breheny, in his official capacity as the Executive Vice President and General Director of Zoos and Aquariums of the Wildlife Conservation Society and Director of the Bronx Zoo, and Wildlife Conservation Society.

[946] Judgment available at https://www.nonhumanrights.org/content/uploads/HappyFeb182020.pdf?fbclid=IwAR0EIp_Sf5yhAy8h2I_d0R4waBFRaaxFtkh_kKjRVB_ZH_6IDOMojgsuptk.

[947] The Nonhuman Rights Project,Inc., on Behalf of Happy v James J. Breheny, etc., et al available at https://www.nonhumanrights.org/content/uploads/2020_02581_The_Nonhuman_Rights_Pr_v_The_Nonhuman_Rights_Pr_DECISION_AND_ORDER_21.pdf accessed 18/12/20.

[948] *Ibid.*

Wise's approach is based on trying to establish a precedent within the US common law system. The disadvantage of this approach is it may not be transferrable to other jurisdictions that do not have a common law system.[949] Furthermore, it is also entirely reliant on judges and their support of this project. However, if successful, should other animals be shown to demonstrate practical autonomy, then there is a logical argument for legal personhood under common law for those animals also.

The next section will examine the limitations of a common law approach in contrast to a legislative approach.

5.3.2.1 Limitations of a common law approach vs a legislative approach

5.3.2.1.1 One size does not fit all

The NhRP plan to go from state to state until they are successful.[950] Wise notes that the US is "essentially fifty different little pyramids, with each state seeing itself as a jurisdiction unto itself."[951] For example, Justice Bentivegna in Connecticut did not refer to any of the New York cases when he dealt with the petition for the Commerford elephants.[952] This strategy highlights the challenges of using a common law approach. Not all countries have a federal system like the US. A large number of jurisdictions have a unitary court system as opposed to the US federal system.[953] This means a direct argument for animal legal personhood could be very dangerous if taken in a country with a unitary court system. If the argument is rejected and appealed to the highest court and rejected, that will serve as the governing law. Therefore, it is a risky approach with a high price for loss.

[949] See University of South Carolina School of Law website available at https://guides.law.sc.edu/c.php?g=315476&p=2108388 for a guide on which countries have a common law system accessed 23/9/20.
[950] Angela Fernandez "Legal History and Rights for Nonhuman Animals: An Interview with Steven M. Wise" (2018) Dalhousie Law Journal 208.
[951] *Ibid* 197.
[952] See NhRP website available at https://www.nonhumanrights.org/blog/next-steps-in-connecticut-elephant-rights-case/ accessed 10/12/20.
[953] In a unitary government, the power is held by one central authority but in a federal government, the power is divided between national government or federal government and local governments or state governments.

5.3.2.1.2 Cost

Rules vary across jurisdictions regarding costs. The American rule states that generally, each side pays its own costs.[954] However, the British cost rule states that the general rule is that the loser pays the winner's costs, with the exception of public interest standing.[955] The British rule for costs makes it extremely difficult for any UK, Canadian or any other organisation from a jurisdiction using a similar system to replicate the NhRP's strategy of sue again and again, expecting to lose many times before they are successful.[956]

5.3.2.1.3 Precedent, purpose and interpretation

While legislation is quite rigid in nature and precedent can be shaped according to the facts of a given case and circumstances,[957] there are many advantages of using legislation rather than trying to influence change through precedent:

a) Common law is law that is interpreted and applied by courts, therefore, once a decision has been made, if there is no change of facts, the same decision is followed again. If a judge does not rule in your favour, their decision becomes precedent, even if other judges disagree with it. Wise has noted that NhRP is looking for a Lord Mansfield, that is, a judge who is not afraid to take a position against animal slavery and to change his or her mind. However, Wise acknowledges that "if these early cases are brought at the wrong time, in the wrong place, or before the wrong judges, they may strengthen the Great Legal Wall [separating humans from nonhuman animals]."[958] This statement highlights the risky strategy of using a common law approach. Indeed, the US judiciary has recently noted "the decisions of whether and how to integrate other species into legal constructs designed for humans is a matter better suited to the legislative process."[959] This decision acknowledges the difficulties in using common law to advance legal rights for animals.

[954] See "American Rule" available at https://www.investopedia.com/terms/a/american-rule.asp#:~:text=The%20American%20Rule%20is%20a,for%20fear%20of%20prohibitive%20costs accessed 10/12/20.
[955] The court can, however, make a different order at its discretion.
[956] Angela Fernandez (n950) 209.
[957] Legislation – types of legislation, merits, supremacy un/der jurisprudence (2018) available at /https://www.lawnn.com/types-of-legislation/ accessed 7/12/20.
[958] Steven Wise "Animal Thing to Animal Person-Thoughts on Time, Place, and Theories" (1999) 5 Animal L 68.
[959] In re Nonhuman Rights Project,Inc., on Behalf of Happy, Petitioner v James J. Breheny, etc., et al available at https://www.nonhumanrights.org/content/uploads/2020_02581_The_Nonhuman_Rights_Pr_v_The_Nonhuman_Rights_Pr_DECISION_AND_ORDER_21.pdf accessed 18/12/20.

b) Common law is reactive, not proactive. Courts do not generally anticipate future situations. Decisions are made when individual cases are brought before them. The advantage of a legislative approach is that it is published before it operates or enforces. Legislation creates rules in anticipation for future cases, whereas precedent must wait for the occurrence of some dispute before the court can create any definite rule of law. The aim of legislation is to make law, whereas the main purpose of the precedent, is to interpret and to apply the law that already exists.

c) Statute law is definite and clear. Therefore, in this regard, it is superior to precedent. Statute law is ready for immediate use. In contrast, details of the case must be examined to separate the *ratio decidendi* from the *obiter dicta*.

Therefore, a legislative approach can be viewed as an appropriate and possibility more favourable mechanism by which to integrate animal rights into the legal system.

The following section will continue to examine the protection of great apes and will focus on developments made in Argentina.

5.3.3 Argentina and the protection of Great Apes

In 2016, taking its cue from the NhRP lawsuits, a habeas corpus order was filed by the Association of Professional Lawyers for Animal Rights in Argentina on behalf of Cecilia, a 30-year-old female chimpanzee.[960] This case was taken on the grounds that Cecilia has been illegally deprived of her freedom of movement and a decent life by the authorities of the zoo of Ciudad de Mendoza, Argentina. They held that her health was at risk by living in the zoo and thus the state must release Cecilia who they regard as a non-human person, who is not a thing, and therefore cannot be defined as property.[961] It was argued that Cecilia is a sentient being, who should not be treated as a thing. The arguments presented were supported by expert affidavits bearing similarity to the NhRP's case law.

Judge María Alejandra Mauricio noted that Cecilia's relationship with the human community makes her part of the cultural patrimony of the community.[962] She accepted the expert

[960] Translated judgment available at https://www.nonhumanrights.org/content/uploads/Chimpanzee-Cecilia_translation-FINAL-for-website-2.pdf.
[961] *Ibid.*
[962] *Ibid* 15.

evidence and agreed that Cecilia's well-being could not be protected in her present environment.[963] She ordered that Cecilia be immediately transferred to the Chimpanzee Sanctuary of Sorocaba, Brazil.[964] Thereby approving the habeas corpus action and recognising Cecilia, as a legal person with rights in Argentina.[965] This is a landmark judgment, in which a judge has accepted for the first time in the world's judicial history a habeas corpus order, resulting in Cecilia's immediate transfer to a sanctuary.[966] Cecilia is now considered a "non-human legal person" with the right to physical liberty and liberty of movement.[967]

This case is significant. It is an acknowledgement from members of the judiciary that chimpanzees are not just things. This is a momentous decision as it means that Cecilia is no longer property but a legal person who can be the bearer of rights. This decision defies the argument that animals cannot be granted personhood and represents a willingness amongst the judiciary to grant animals legal rights.

This example demonstrates that judicial support can be achieved. However, this is the same approach adopted by the NhRP, which may not be suitable for jurisdictions who do not have a common law system. Importantly, it does represent the possibility of a change in judicial thinking that results in legal change which can be effectuated in a very timely manner.

The next section examines some further developments which represent a move towards rights for animals. This section will analyse Colombia and a successful habeas corpus writ for a bear, Chucho which represents a first for Colombian animal law jurisprudence. Canada and their evolving legislative response to animal protection particularly the recent ban on cetacean captivity will be examined, followed by a discussion of India's declaration of cetaceans as nonhuman persons and Pakistan's recognition of animals having legal rights.

[963] *Ibid* 15.
[964] *Ibid* 16.
[965] See Great Ape Project link available at https://www.projetogap.org.br/en/noticia/the-first-20-days-of-cecilia/ and https://www.nonhumanrights.org/blog/chimpanzee-cecilia/ see also Raffael Fasel et al "Fundamental Rights for Primates" (2016) Policy paper by Sentience Politics (1) 1–16 and Markus Fraundorfer "The Rediscovery of Indigenous Thought in the Modern Legal System: The Case of the Great Apes" (2017) Global Policy 9 (1).
[966] *Infra.*
[967] See NhRP website for a discussion of this decision available at https://www.nonhumanrights.org/blog/chimpanzee-cecilia/ accessed on 10/8/18.

Finally, Switzerland and their approach to animal protection and their current initiative on primate rights will be examined.

5.3.4 Colombia

in 2017, an action was taken on behalf of a spectacle bear - Chucho. It was argued that Chucho's emotional and physical well-being was at risk by moving him from the Río Blanco nature reservation, where he lived "freely" for eighteen years, to the Barranquilla City Zoo.[968] The 28-year-old animal became one of the zoo's main attractions and was exposed to the extreme heat of the Caribbean coast. Chucho began showing signs of behavioural changes after the death of his sibling "Clarita." A case was taken by attorney and law professor, Luis Domingo Maldonado, to secure the relocation of Chucho from Barranquilla Zoo to a nature reserve in the mountains of the country's coffee-growing region, and native habitat for the endangered animal.

Maldonado filed a petition[969] for a writ of habeas corpus to demand the improvement of Chucho's emotional well-being. This was denied at first instance by the Civil Chamber of the Superior Court of Manizales.[970] The judges held that habeas corpus is a mechanism inherent to human beings; therefore, they cannot protect an animal. Maldonado challenged the ruling, arguing that there was no proper mechanism that enabled the protection of nonhuman sentient beings in Colombia, and citing the precedent of the judgment in favour of Cecilia.[971] The case continued and reached the second instance. Following the study of the proposal, Judge Luis Armando Tolosa Villabona concluded: "if fictitious legal entities [such as corporations] are subjects of rights…for what reason should those who are alive or are

[968] Andrea Padilla Villarraga "A writ of habeas corpus granted to Chucho, the bear" translated by Javier Salcedo available at https://www.nonhumanrights.org/content/uploads/Translation-Habeas-corpus-for-Chucho-1.pdf accessed 15/1/20.

[969] The Colombian court structure comprises the lower and high courts. The lower courts include superior and municipal courts namely Administrative Courts, First Instance Courts, Regional Courts and Ordinary Superior Courts. The Higher Court includes the Superior Council of the Judiciary, the Council of State of Colombia, the Supreme Court and the Constitutional Court.

[970] Original judgment available at http://static.iris.net.co/semana/upload/documents/radicado-n-17001-22-13-000-2017-00468-02.pdf English translation is available at https://www.nonhumanrights.org/content/uploads/Translation-Chucho-Decision-Translation-Javier-Salcedo.pdf.

[971] Carmen Mandel "Chucho, the Spectacled Bear, Triumphs in the Supreme Court of Justice" (2019) available at https://www.nonhumanrights.org/content/uploads/Chucho-Semana-news-translation-Carmen-Mandel.pdf accessed 05/01/20.

'sentient beings' not be so?"[972] Upon this, Judge Luis A Tolosa granted habeas corpus relief to the bear and ordered his release from the zoo and relocation to a more species-appropriate habitat.[973] This decision was challenged by the zoo's lawyers, alleging a violation of the fundamental right to due process and the principle of legality. It was subsequently revoked by Judge Fernando Castillo of the Supreme Court (Labour Chamber of Appeals).[974] Part of the rationale presented by the court is that the writ of habeas corpus was inappropriate because it was designed for persons, rational animals, not for nonhuman or irrational animals. The judge held that the foundations of the decision to grant a writ of habeas corpus to Chucho "are incompatible with the purpose for which the writ was created."[975]

An appeal was taken in 2020 in the Constitutional Court – Colombia's highest court– which denied to grant a habeas corpus writ, claiming that animals are not subjects of specific rights to determine their release from confinement.[976] The Constitutional Court is the highest court; therefore, no appeal can be taken. Chucho remains in the Barranquilla Zoo.

While Chucho's case was ultimately reversed, Judge Luis Armando Tolosa Villabona's decision represents a first for Colombian animal law jurisprudence. This approach, however, can be a lengthy process due to appeals and the time it takes to move through the court levels.

5.3.5 Canada

In the wake of the production of "Blackfish," the Canadian Parliament introduced a bill to end the captivity of cetaceans. Blackfish is a 2013 documentary film which provides an account of an orca whale in captivity in the theme park, SeaWorld. It was directed by Gabriela Cowperthwaite with the aim of uncovering the problems within the sea-park industry and captivity. Public opposition following the airing of this documentary led SeaWorld to

[972] English translation of the judgment (n970).
[973] Saskia Stucki "Habea(r)s Corpus: Some Thoughts on the Role of Habeas Corpus in the Evolution of Animal Rights" (2017) International Journal of Constitutional Law.
[974] Judgment available at https://www.semana.com/nacion/articulo/niega-corte-suprema-habeas-corpus-al-oso-de-anteojos-chucho/536929.
[975] *Ibid.*
[976] See "Columbia's Constitutional Court denies Habeas Corpus for Andean bear" available at https://thecitypaperbogota.com/news/colombias-constitutional-court-denies-habeas-corpus-for-andean-bear/23781 accessed 23/1/20.

announce in 2016 that orcas would no longer be performing in their shows.[977] This issue has gained much social and legal attention over the last several years. As a result of changing sensitivities towards animals on account of insight into their suffering and their advanced cognitive abilities, the Canadian Parliament voted overwhelmingly in 2019 to pass Bill S-203 that bans the keeping of whales, dolphins and porpoises in captivity for entertainment, as well as the trade, possession, capture and breeding of cetaceans.[978]

The legislation introduced is the Ending the Captivity of Whales and Dolphins Act which states:

> Everyone commits an offence who promotes, arranges, conducts, assists in, receives money for, or takes part in any meeting, competition, exhibition, pastime, practice, display or event at or in the course of which captive cetaceans are used for performance for entertainment purposes.[979]

Former Senator Wilfred Moore, who first introduced the legislation in 2015, said in a statement that phasing out the captivity was a "moral obligation."[980] There are an estimated 2,000 to 3,000 whales and dolphins currently held in captivity around the world. Therefore, the Canadian ban is a sign that legal change is beginning to occur.[981] Prior to the introduction of what is commonly referred to as "the Free Willy Bill", Canada has had other significant rulings regarding animals.

977 See National Geographic "SeaWorld to End Controversial Orca Shows and Breeding" available at https://news.nationalgeographic.com/2016/03/160317-seaworld-orcas-killer-whales-captivity-breeding-shamu-tilikum/.

978 See the Whale Sanctuary Project website https://whalesanctuaryproject.org/canada-bans-captivity-of-whales-dolphins-and-porpoises/ and Humane Society International Canada https://www.globenewswire.com/news-release/2019/06/10/1866481/0/en/Humane-Society-International-Canada-hails-landmark-victory-as-Canada-bans-whale-dolphin-and-porpoise-captivity.html.

979 Humane Society International/ Canada available at https://www.hsi.org/news-media/canada-bans-cetacean-captivity-and-canada-bans-cetacean-captivity/.

980 Clark Mindock "Canada passes law banning holding dolphins and whales in captivity" available at available at https://www.independent.co.uk/news/world/americas/canada-free-willy-dolphins-whales-porpoises-captivity-a8954551.html accessed 15/11/19.

981 See Canada's National Observer "Whale jails' are banned in Canada, but they're thriving elsewhere" available at https://www.nationalobserver.com/2019/11/07/opinion/whale-jails-are-banned-canada-theyre-thriving-elsewhere?fbclid=IwAR3YYK-KL_-_q2JkvIc02BFSZe2p0z0Ka9Qud7f2-jjfOKNXqLS9iPg3iJE accessed 19/11/19.

In 2015, a court in the Canadian province of Alberta[982] determined that pets are "not simply chattels." The dispute involved a woman and the keeping of her two cats in her home and the management companies' opposition to this.[983] The judge in the case, Judge Schlosser stated: "Animals might not yet have rights in the conventional sense... but the very least that can be said is that their status is evolving. Their status remains a grey area, and a large one at that."[984] This statement acknowledges the issue with the current classification of animals as property, which renders them as not being legally recognised as persons and thereby granted legal rights. This case highlights the issue with their classification as things despite the evidence which informs us that animals are sentient beings.

This ruling, which was upheld on appeal, bore similarities to the earlier case of Lucy, a 36-year-old Asian elephant being held at Edmonton's Valley Zoo. The activist group, Zoocheck[985] and the People for the Ethical Treatment of Animals (PETA) filed a notice in the Court of the Queen's Bench of Alberta seeking a declaration that the City of Edmonton, as the owner and operator of the Valley Zoo, was in violation of section 2 of Alberta's Animal Protection Act (APA)[986] by failing to uphold the positive duties of care owed to an animal in its custody. The applicants wanted to relocate Lucy to a sanctuary, maintaining that her life at the city-run zoo is harming her health and she should be moved to a US sanctuary where she can be with others given that they are highly social species. The grounds for this case were cited as being poor living conditions due to Edmonton's cold climate being unhealthy for elephants, aggravated by isolation. Lucy had been alone for four years, and there were no plans to add another elephant to the zoo.

---

[982] The Supreme Court is the highest court in Canada, the Court of Appeal falls below this, and cases generally commence in the provincial superior courts. The Canadian Court Structure is available at https://www.justice.gc.ca/eng/csj-sjc/just/07.html.

[983] See CBC news article available http://www.cbc..ca/m/touch/world/story/1.3058148 accessed on 26/05/2015.

[984] Judgment available at https://www.animaljustice.ca/wp-content/uploads/2015/05/2014abqb487.pdf.

[985] This is an animal protection charity.

[986] Alberta's Animal Protection Act, RSA 2000, c A-41, provides at section 2(1) "No person shall cause or permit an animal of which the person is the owner of the person or charge to be or continue to be in distress". Section 2(1.1) states "No person shall cause an animal to be in distress." Section 2(2) grants an exemption: "This section does not apply if the distress results from an activity carried on in accordance with the regulations or in accordance with reasonable and generally accepted practices of animal care, management, husbandry, hunting, fishing, trapping, pest control or slaughter." The term "distress" is defined at section 1(2): "For the purposes of this Act, an animal is in distress if it is (a) deprived of adequate shelter, ventilation, space, food, water or veterinary care or reasonable protection from injurious heat or cold, (b) injured, sick, in pain or suffering, or (c) abused or subjected to undue hardship, privation or neglect."

Prior to this case, in 2006, the animal protection charity, Zoocheck Canada, commissioned an elephant biologist Winnie Kiiru to assess the state of captive elephants in Canada. Kiiru's report concluded that the Valley Zoo was the worst of the seven Canadian zoos surveyed. The report recommended the relocation of both elephants to a sanctuary in a warmer climate that can meet their social and physical needs.[987] The zoo refused. They stated that Lucy does not miss being around other elephants since she considers her keepers as her herd and contended that Lucy receives excellent treatment and that moving her would be dangerous because of an existing respiratory condition. However, it has been noted that this opinion is unfounded, and there is no scientific literature or other sources which indicates that people are adequate substitutes for other members of their species or their herd.[988] In response to notice, the City of Edmonton brought a motion to strike on the following grounds: that the applicants did not have standing to seek the declaration and furthermore the application was an abuse of process because it attempted to circumvent the regulatory regimes set out in the APA.[989]

The major issue, in this case, was whether an advocacy group could receive public interest standing[990] to litigate on behalf of an animal against a decision made by a public body.[991] Justice Rooke held that the pleadings were an abuse of process, holding that the proceedings would deprive the city of the protections of a criminal court. He added that the applicants lacked standing to bring the application on Lucy's behalf.[992] The court determined that

[987] Winnie Kiiru, The Sad State of Captive Elephants in Canada (Zoocheck Canada, 2007) available at http://www.zoocheck.com/wp-content/uploads/2015/06/Sad-State-ReportREV.pdf.
[988] Tove Reece and Diane Charkiw "Elephants in Zoos: A Dead End" available at https://www.elephantsforever.co.za/docs/Zoo%20Info%20for%20Councilors.pdf accessed 5/9/19 Furthermore, the RSPCA (Royal Society for the Protection of Animals, UK) (Index 2) state that no elephant should be housed singly, especially females. The Canadian Association of Zoos and Aquaria notes that It is inappropriate to keep highly social female elephants singly and the American Zoological Association stated in 2001, that it is inappropriate to keep females (elephants) as single individuals.
[989] Reece v Edmonton (City), 2010 ABQB 538 at para 2 [Reece (QB)].
[990] Public interest standing is granted where a serious issue has been raised by a party with a direct or genuine interest and where there is no reasonable and effective alternative for the issues to come before the court.
[991] Peter Sankoff "Opportunity Lost: The Supreme Court Misses A Historic Chance To Consider Question Of Public Interest Standing For Animal Interests" (2012) 30 Windsor Y B Access Just.
[992] *Ibid.*

Zoocheck failed to meet all the factors in the public interest standing test.[993] The decision was then upheld on appeal on the basis that the proceedings were an abuse of process.

In a lengthy dissenting opinion, Chief Justice of Alberta Catherine Fraser appeared to acknowledge the changing legal attitudes towards animals and raised the question of whether elephants should have standing. While this is a dissenting opinion, it does represent changing judicial opinion regarding the protection of animals, indicating that animals could be persons under the law. Chief Justice Fraser further noted that this case should go to trial to determine the aspects of the law that impact the protection of animals in this province and the public interest in the city's compliance with the law. Justice Fraser contended Zoocheck and PETA, as organisations focused on animal protection had demonstrated long-term, sustained interest in animal protection generally as well as for Lucy.[994] Justice Fraser also said the affidavits submitted by the animal rights groups — from an ecologist, an elephant biologist and ethologist, and two veterinarians — are relevant to the case, despite the city's argument that they are irrelevant. This point is of significance as it highlights the importance of animal cognition in determining the protections that should be in place. This judgment, albeit dissenting, supports the argument that animal abilities are crucial in determining the appropriate rights they require.

Chief Justice Fraser's dissent emphasises the vulnerability of animals, questions anthropocentric values, and legitimates animal suffering as a serious issue that engages the rule of law. In doing so, the dissent departs from the standard instrumentalist approach to animals in the law. The dissent further reviews criticisms of the animal welfare regime:

> The criticisms about the animal welfare model touch on how it is actually applied in real life at various stages of the legal process: inadequate consideration of animals' interests in law-making; priority for human interests always; restrictive judicial interpretation of protective legislation; common law precepts that treat animals as

[993] The test for public interest standing involves a consideration of three factors: (1) whether there is a serious justiciable issue raised by the claimant; (2) whether the claimant has a real stake or genuine interest in the matter; and (3) whether the claim represents a reasonable and effective way to bring the matter before the courts. It is noted that while public interest standing does alleviate the limitations inherent in the traditional standing doctrine, it still remains an exception to the rule and is thus available only in the discretion of the court see Shaun Fluker "The Elephant in the Courtroom Redux" (2019) available at https://ablawg.ca/2019/07/02/the-elephant-in-the-courtroom-redux/ accessed 15/5/20.
[994] Para 95.

> property and deny them or their advocates legal standing; limitations on what constitutes legitimate legal argument; restrictions on what is accepted as evidence; and anaemic enforcement of animal protection legislation. Understanding the nature and extent of these deficiencies – more than one of which is arguably at play in this case – is important since they underscore why courts should interpret the animal protection laws we do have generously and why this case raises novel points of law not suitable for summary dismissal.[995]

She further considered a number of proposed solutions, suggesting that for animals to be adequately protected, they must be accorded some form of legal standing.[996]

The Canadian Supreme Court denied leave to appeal, and in accordance with the court's practice, reasons were not provided.[997] Peter Sankoff, a University of Alberta legal professor and expert in animal rights law, has noted the inherent issues with the property status of animals. He notes that Lucy's interests are very much impacted; however, she cannot take an action, and she is denied a human representative. Hence highlighting the issue with standing. If animals are to be protected in any meaningful way, they, or their advocates, should be accorded some form of legal standing.

This case represented a lost opportunity to become the first case to ever reach the Canadian Supreme Court on an animal law related issue.[998] Katie Sykes[999] and Vaughan Black[1000] have noted that the current system of law is not designed to allow a legal review of decisions made regarding animals because these animals are the objects of rights holders, rather than rights holders themselves.[1001] This dissent is notable as Chief Justice Fraser deviated from commonly accepted judicial approaches by considering whether Lucy might qualify for standing in her own right.[1002] Furthermore, following from this case, zoo officials decided that Lucy would be

[995] Reece v Edmonton (2011) ABCA 283.
[996] Tyler Totten, "Should Elephants Have Standing?", (2015) 6(1) UWO J Leg Stud 2.
[997] Peter Sankoff (n991).
[998] Peter Sankoff (n991) 130 also see Katie Sykes and Vaughan Black, "Don't Think About Elephants" (2012) 63 UNBLJ 145.
[999] A professor in animal law in Thompson Rivers University in Canada see her profile available at https://www.tru.ca/law/faculty-staff/faculty/katie-sykes.html.
[1000] A professor at the Schulich School of Law at Dalhousie University in Canada his profile is available at https://www.irwinlaw.com/authors/vaughan-black.
[1001] Katie Sykes and Vaughan Black (n998).
[1002] Tyler Totten (n996).

the last elephant at Edmonton Valley following this case.[1003] The Reece case highlights that there is often a discrepancy between the protections that animals are entitled to by statute and those that they actually receive. Canadian lawyer and animal law professor Rebeka Breder, commented on the recent Canadian jurisprudence stating "…If we can do it for corporations — which persons under the law are — there's no reason why a sentient living being can't be considered a person."[1004]

The Ending the Captivity of Whales and Dolphins Act highlights the success of a legislative approach. Legislation can be passed quickly but does require support or momentum to get this process started. Legislation can be amended or repealed, which is both negative and positive in terms of updating legislation but can be problematic if there is a change of will within the political agenda.

The next section will discuss India's evolving judicial approach to animal protection.

5.3.6 India

In 2000, the Kerala High Court suggested animals should have fundamental rights:

> If humans are entitled to fundamental rights, why not animals? In our considered opinion, legal rights shall not be the exclusive preserve of the humans which has to be extended beyond people thereby dismantling the thick legal wall with humans all on one side and all non-humans on the other side.[1005]

It must be noted that India is one of the world's largest producers of animal products.[1006] Therefore, Indian reforms are discussed to demonstrate alternative protections for nature and animals, and not as an example of best practice.[1007]

[1003] See "The world's coldest elephant? Activists demand Lucy's removal from Canadian zoo" available at https://www.theguardian.com/world/2017/mar/01/lucy-the-elephant-canada-edmonton-valley-zoo accessed 10/11/19.

[1004] Canadian lawyer and animal law professor Rebeka Breder commenting on the case Reece v. Edmonton (City), 2011 ABCA 238. In Sean Davidson "Non-human Persons? Animal Rights get a legal leg up" available at http://www.cbc.ca/news/world/non-human-persons-animal-rights-get-legal-leg-up-1.3058148 accessed 24/01/16.

[1005] *N R Nair v UOI*, 6th June 2000, Kerala High Court.

[1006] See European Commission map available at https://ec.europa.eu/agriculture/sites/agriculture/files/trade-analysis/map/03_07.pdf.

[1007] See the Telegraph available at https://www.telegraphindia.com/opinion/animal-protection-groups-must-distance-themselves-from-hatred/cid/1686356 accessed 14/12/19.

In 2013, the Indian government declared dolphins to be "nonhuman persons."[1008] India considered whether it is morally acceptable to allow dolphin captivity within its borders and has answered this question with a resounding no. It is the first and only nation to acknowledge cetaceans as persons who, under law, "should have their own specific rights" as sentient beings.[1009] This progressive statement is helping to pave the way towards greater public understanding that dolphins are intelligent and emotional beings who deserve to be free. [1010] The decision, outlined in a circular released by the Central Zoo Authority, states that because dolphins are by nature "highly intelligent and sensitive,"[1011] they ought to be seen as "nonhuman persons" and should have "their own specific rights."[1012] It states that it is "morally unacceptable to keep them captive for entertainment purposes."[1013] The basis for according these animal human-type rights is due to the fact that whales and dolphins exhibit attributes that are worthy of fundamental rights[1014] and also due to the public awareness of the inhumane treatment of these highly intelligent animals being kept in captivity, specifically for entertainment purposes.[1015]

Furthermore, in 2019, an Indian High Court granted "legal person or entity status to animals."[1016] This decision is contentious given the political underpinnings of the law and the cultural system in India.[1017] The High Court granted the status of legal personhood to the

[1008] In 2013 India's Ministry of Environment and Forests decided to forbid the keeping of captive dolphins for public entertainment anywhere in the country and declared that cetaceans ought to be considered nonhuman persons whose rights to life and liberty must be respected. See Erin O' Donnell and Julian Talbot-Jones "At the Intersection of the Sacred and the Legal: Rights for Nature in Uttarakhand, India" (2001) Journal of Environment Law 30 (1).

[1009] Cathy Williamson "India Announces Dolphinarium Ban" (2013) available at https://us.whales.org/2013/05/20/india-announces-dolphinarium-ban/ accessed 10/5/14 also see http://fore.yale.edu/news/item/dolphins-gain-unprecedented-protection-in-india/ 10/5/14.

[1010] See India's Minister for Environment, Forest and Climate policy paper on dolphinariums available at http://envfor.nic.in/content/policy-establishment-dolphinarium-updated-may-17-2013.

[1011] Central Zoo Authority available at http://cza.nic.in/ban%20on%20dolphanariums.pdf see also Katie Sykes "The Appeal to Science and the Formation of Global Animal Law" (2016*) European Journal of International Law* 27(2).

[1012] Central Zoo Authority (n1011).

[1013] *Ibid.*

[1014] For instance, the Declaration for Rights of Cetaceans: Whales and Dolphins which states that whales and dolphins have the right to life, liberty and well-being on the basis of the complexities of cetacean minds, societies and cultures.

[1015] Casey M Weed "The World Beyond Seaworld: A Comparative Analysis of International Law Protecting Cetacea in Captivity" (2018) Ocean and Costal Law Review 23 (2).

[1016] *Karnail Singh and others v State of Haryana* https://indiankanoon.org/doc/1036527/ also see https://www.nonhumanrights.org/blog/punjab-haryana-animal-rights/.

[1017] For a discussion of India's caste system see https://www.bbc.com/news/world-asia-india-35650616 accessed 20/9/19 also refer to (n1007).

entire animal kingdom in India, declaring the citizens of Uttarakhand to be the legal guardians of animals, responsible for their welfare and protection. This personhood is limited to only two states within India. Furthermore, the court has granted personhood to all animals within these states, but it has not clearly illustrated the rights that will accompany personhood. More clarity is required, and it has been noted that further litigation will be required either in other High Courts or at the Supreme Court to ensure personhood is granted to all animals within the country.[1018]

While it is positive that there is judicial support for legal personhood for animals, this court ruling does not make it clear what exactly this will mean for animals and therefore requires further interpretation. In contrast to a legislative approach, further clarity is required as to the exact meaning and implications of this ruling.

The following section will examine the most up-to-date jurisprudence on animal rights

5.3.7 Pakistan

On 21 May 2020, Chief Justice Athar Minallah sitting in the High Court in Islamabad held that animals in Marghazar Zoo have legal rights and should be moved to appropriate sanctuaries.[1019]

The case concerned the Marghazar Zoo of the Federal Territory of Islamabad. The zoo was under the control of the Metropolitan Corporation of Islamabad which did not have the resources to protect the welfare of the captive animals amid the coronavirus disease outbreak. The animals were being held in captivity in disturbing, small and unsuitable conditions.[1020] Chief Justice Minallah noted: “The pandemic seems to have changed the world for the time being. Has nature forced the human race to go into 'captivity' so as make it realize its dependence for survival on other beings possessed with a similar gift i.e life? Is it an opportunity for humans to introspect and relate to the pain and distress suffered by other living beings, animal species, when they are subjugated and kept in captivity and denied the

[1018] Sonia Shad “Indian High Court Recognizes Nonhuman Animals as Legal Entities” (2019) available at https://www.nonhumanrights.org/blog/punjab-haryana-animal-rights/ and Frank Jordan’s “Swiss says no to animal lawyers” (2010) available at https://www.independent.co.uk/news/world/europe/swiss-say-no-to-animal-lawyers-1917809.html accessed 15/5/20.

[1019] *Islamabad Wildlife Management Board v Metropolitan Corporation Islamabad* W.P. No.1155/2019 Judgment available at https://www.nonhumanrights.org/content/uploads/Islamabad-High-Court-decision-in-Kaavan-case.pdf accessed 8/6/20.

[1020] Judgment at page 3.

conditions and habitats created for their survival by the Creator, merely for momentary entertainment?"[1021] Thereby acknowledging the interdependence of living beings.[1022]

Significantly Chief Justice Minallah stated: "Do the animals have legal rights? The answer to this question, without any hesitation, is in the affirmative."[1023] This is the first time that Pakistan has recognised the legal rights of caged animals and which has led to their freedom. All animals must be relocated from the Islamabad Zoo to sanctuaries within a month, with a specific emphasis on Kaavan, the elephant and her three decades in the zoo, without any companion since 2012.

This ruling has brought much hope for further reform across the globe. The NhRP's executive director Kevin Schneider has noted, "We look forward to bringing this decision to the attention of the New York and Connecticut courts as we urge them to recognise our elephant clients' Happy and Minnie's right to liberty."[1024] However, it must be noted that it is possible that the Metropolitan Corporation of Islamabad may appeal against this decision in the Supreme Court.

The final section will examine Switzerland's forward-looking approach to animal protection.

5.3.8 Switzerland

Switzerland is said to be the most progressive country on animal law in the world.[1025] In 1992, by way of a national referendum, Switzerland became the first country in the world to add the protection of the dignity of the Creature into its constitution.[1026]

Switzerland is divided into twenty-six cantons. Each canton has its own constitution, parliament, government and courts.[1027] In 2016 in the Canton of Basel, a referendum proposal

[1021] *Ibid.*
[1022] Saskia Stucki and Tom Sparks "The Elephant in the (Court)Room: Interdependence of Human and Animal Rights in the Anthropocene" (2020) available at https://www.ejiltalk.org/the-elephant-in-the-courtroom-interdependence-of-human-and-animal-rights-in-the-anthropocene/ accessed 9/6/20.
[1023] Judgment at page 59.
[1024] Kamal Siddiqi "Landmark decision" (2020) available at https://tribune.com.pk/story/2237680/6-landmark-decision/ accessed 8/6/20.
[1025] See Suzana Gartner "What Can We Learn from Switzerland's Strong Animal Welfare Laws"(2018) available at https://www.suzanagartner.com/what-can-we-learn-from-switzerlands-strong-animal-welfare-laws 15/5/20.
[1026] Stefanie Schindler "The animal's dignity in Swiss Animal Welfare Legislation – Challenges and opportunities" (2013) European Journal of Pharmaceutics and Biopharmaceutics 84 (2).
[1027] See Gregory M Bovey "The Swiss Legal System and Research" (2006) available at https://www.nyulawglobal.org/globalex/Switzerland.html accessed 15/520.

was launched by the animal rights organisation Sentience Politics which fights against discrimination on the basis of species, starting with primates. The initiative argues for existing rights in the Constitution to be complemented by a fundamental right to life and to bodily and mental integrity for nonhuman primates—in other words, not to be killed, held in captivity, or experimented on.[1028] In focusing on nonhuman primates, the initiative followed the lead of the Nonhuman Rights Project (NhRP) and the Great Ape Project (GAP) which Sentience Politics believe have laid the theoretical and practical groundwork for the rights of primates.[1029] The initiative focuses on the evidence adduced by both organisations, which demonstrates that nonhuman primates possess the necessary capacities and fundamental interests for holding the rights to life and to bodily and mental integrity.[1030]

The organisation collected the 3,000 signatures necessary to trigger a referendum in the canton of Basel-Stadt. However, in 2018 the Basel-Stadt Parliament declared that it was invalid on two grounds. First, the initiative would contravene the Swiss Federal Civil Code, which, according to the Executive, determines conclusively that nonhuman animals do not qualify as legal persons under Swiss law. Second, the initiative would require the canton to enact new laws on animal welfare, an area where the federal government enjoys exclusive jurisdiction.[1031] The case then moved to the Cantonal Constitutional Court in 2019, which ruled that the referendum proposal was valid on the basis that cantons are free to "expand the circle of rights holders beyond the anthropological barrier" and must be put before voters.[1032]

The Canton of Basel-Stadt thus has the legal authority to establish rights for primates that bind its own organs subject to the vote of the people. This was a momentous ruling as the court did not see an obstacle for primate rights and therefore, did not to take issue with the idea of extending the concept of fundamental rights-holdership beyond existing categories of rights-holders. The court accepted that nonhuman primates can be holders of fundamental

[1028] Charlotte E Blattner *Protecting Animals Within and Across Borders: Extraterritorial Jurisdiction* (OUP 2019).
[1029] *Infra* (n1031).
[1030] Raffael Fasel "The Swiss primate initiative for primate rights goes to court" available at https://www.nonhumanrights.org/blog/swiss-citizens-primate-rights/ accessed 15/12/19.
[1031] Raffael Fasel and Charlotte E Blattner *"*Swiss court rules citizens allowed to vote on primate rights" available *at* https://www.nonhumanrights.org/blog/citizens-allowed-to-vote-on-primate-rights/ accessed 12/01/20.
[1032] Charlotte Blattner (n1028).

legal rights and endorsed the view that cantons are free to recognise animals as rights holders even when the federal system does not.

However, six members of the Parliament of Basel-Stadt appealed the Cantonal Constitutional Court's decision before the Swiss Federal Supreme Court. The Supreme Court delivered its judgment in 2020. They determined the initiative as legally permissible. This decision enables the electorate in the city canton to vote on the fundamental rights of primates.[1033] The Federal Supreme Court emphasised that the cantons' constitutional law has repeatedly provided impetus for legal developments in the past and that this is also a question that could result in the further development of rights and it is not the role of the court to block such a development. As of yet, it has not been decided when the Basel electorate will be able to vote on the initiative.[1034]

While this is a very welcome initiative, it is also a very specific type of reform. It is of limited application as it only applies to specific legal systems that have a direct democratic system. If successful, it will allow for the incorporation of fundamental rights of primates into the Swiss Constitution. However not all jurisdictions have such a system or indeed a constitution. Furthermore, it can take years from the time such initiatives are launched to gather the necessary signatures until they make it onto the ballot.[1035]

5.4 CONCLUSION

This chapter provides new approaches that have been taken in other jurisdictions to protect some animals, to demonstrate that personhood can and is extended beyond humans. This chapter analysed the development of societal views for the purpose of demonstrating that personhood can be extended beyond humans. It has been asserted that before the abolition of slavery and women's liberation, both slaves and women were considered different from

[1033] See Sentience Politics website available at https://sentience-politics.org/de/initiative-ist-zulaessig-basel-stadt-darf-ueber-grundrechte-fuer-primaten-abstimmen/ accessed 16/9/20.
[1034] *Ibid*.
[1035] See "Swiss region to vote to enshrine primate rights" available at https://www.barrons.com/news/swiss-region-to-vote-to-enshrine-primate-rights-01600276813 accessed 21/9/20.

the dominant class and this difference was used as a justification for their property status, as it is with animals today.[1036]

Lessons can be learned from the new approaches set out in this chapter. This chapter demonstrates how personhood may evolve and how relationships with animals may be recognised in the future. Legal arguments in favour of animal legal personhood are stronger when considered in light of pre-existing recognition of legal personhood; they propose that if inanimate objects are granted the status of legal persons, then they could be extended to sentient beings like animals. By considering animals as objects, we deny their intrinsic value.

Importantly, this chapter questioned whether animals can be defined as a person under the law. Personhood is an ever-evolving legal construct. To be a legal person, one does not need to be human. Granting rights to one species does not require all animals to be provided with the same. Therefore, if we grant cetaceans, primates, or any other species legal personhood, their abilities should be taken into consideration with their legal standing. If we accept that personhood denotes only human beings, then this narrow interpretation would deny many existing legal persons. By granting personhood status to some animals, with individual rights under the law, it would obligate governments to protect their interests. While a new structure of being may be challenging to establish at first, countries such as Argentina provide inspiring proof that it is both possible and necessary.

[1036] Kendra Frew "From Property to Personhood: Can Nonhuman Animals Make the Transition?" (2014) Animal Law Compendium part 1 6.

The next chapter will set forth recommendations for reform. Furthermore, it will demonstrate why rights and not welfare are necessary. A rights-based approach to animal protection is proposed and discussed.

CHAPTER 6: TIME FOR A PARADIGM SHIFT

"If possessing a higher degree of intelligence does not entitle one human to use another for his or her own ends, how can it entitle humans to exploit non-humans?"

Peter Singer

6. INTRODUCTION

The previous chapters have established that the law is not providing adequate protection for animals. They further demonstrated that a number of jurisdictions have introduced additional legislation, including legal rights to improve protections for animals. Much of this reform is due to the evidence that is now available on animal capabilities and a recognition of their moral capacities.[1037] It has also provided a theoretical framework which supports the granting of legal rights to animals based on their morality.[1038] The purpose of this chapter is to demonstrate why rights and not welfare, should be granted to moral species, to protect their interests adequately. The chapter will begin with setting out why a legal rights-based approach is essential. It will then outline the conclusions of this study and will set out recommendations for reform.

6.1 WHY A LEGAL RIGHTS-BASED APPROACH IS ESSENTIAL

The legal foundations of man's relationship with animals were laid down in a time when it was not generally accepted that many animals are sentient and have many capabilities. As long as animals are our property, we will only be required to treat them humanely, which of course overrides an animal's fundamental interests in many cases. This thesis has demonstrated that welfare does not offer adequate protection, and there is a need to incorporate legal rights. We have redrafted legislation, improved regulations and introduced new measures. This welfarist approach has been tried and tested many times over, yet more animals are suffering because more animals are in the system. When one looks at the number of animals used in factory farming and experimentation, it is clear that the numbers continue to grow and not decrease.[1039] A discussion of existing animal welfare obligations showed that

[1037] See 2.3 ANIMALS .
[1038] See 2.2 ANIMAL RIGHTS THEORY: ANIMAL AS AUTOMATA TO UTILITARIANISM AND DEONTOLOGY.
[1039] See "Experiments on Animals: Overview" available at https://www.peta.org/issues/animals-used-for-experimentation/animals-used-experimentation-factsheets/animal-experiments-overview/ .

animal welfare does not sufficiently remedy the current treatment of animals.[1040] There is a considerable body of animal welfare law and, this approach can result in improvements, but the current standards of animal welfare legislation do not take into account the scientific reality. They still operate on the assumption that animals lack any capacity for moral choices, identity or even sentience. The law needs to bridge the gap between those assumptions and the scientific reality.

Even Posner who strongly argues against animal rights has noted:

> No doubt the most aggressive implementations of animal rights thinking would benefit animals more than commodification and a more determined program of enforcing existing laws against cruelty to animals. But those implementations are unlikely, and so the modest alternatives are worth serious consideration.[1041]

Critics of a rights-based approach tend to focus on the false-assumption that animal rights are equivalent to human rights. However, rights should be species-specific. At the most fundamental level, all animals (human and nonhuman) share two very basic natural rights, which seem to be inarguable from any reasonable standpoint and yet are reserved for humans exclusively. The first is the right to life, and the second is bodily liberty - to be freed from being held in confinement or captivity against one's will.

While it is true that animal welfare has improved the lives of many animals, for instance, European animal welfare legislation has reduced the cruelty against animals,[1042] there are still severe limitations that animals' property status poses to how animals are treated under anti-cruelty statutes. Animals' property status is an additional problem to the general anthropocentric valuation engrained in the current legal system.

However, it is arguable that as long as animals have no rights, essentially their well-being remains a compromise between welfare obligations imposed on their owners and those owners' economic interests. While animal welfare laws do exist to protect animal property,

[1040] Bart Driessen "Fundamental Animal Rights in European Law" (2017) European Public Law 23 (3) 37.
[1041] Richard A Posner. "Animal Rights: Legal, Philosophical, and Pragmatic Perspectives" in Cass Sunstein and Martha C Nussbaum, *Animal Rights: Current Debates and New Directions* (OUP 2004) 51, 74.
[1042] The improvements and developments in the legal protection afforded to animals were discussed in chapter five see 5.3 CHANGING ATTITUDES REFLECTED IN CHANGING LAWS.

they have many limitations. They regulate exploitation, rather than prohibit it.[1043] Judges will refer to past court cases and history when making current rulings, and it is extremely difficult to implement anything new.[1044] While legal standing and further legislation could improve the welfare of animals, retaining the property status of animals reinforces their objectification. Currently, the legal test for cruelty assumes that some animal suffering is "necessary" to accommodate human needs and desires.

6.2 CONCLUSIONS OF THIS STUDY

According to the current legal framework, animals are considered things. Animal protection regulations worldwide and their application to the protection of the fundamental interests of animals are insufficient, since under current law the central interests of animals are not protected anywhere, and in practice, their interests are subordinated to even trivial human ones, such as for entertainment. The law has not incorporated the empirical evidence we now have in relation to the moral abilities of animals into the protections in place. Against this backdrop, it was argued that the law needs to make a paradigm shift in the way animals are protected. The aim of the research was to demonstrate that the law needs to be evidence-based as science is constantly advancing in the field of animals and the law needs to keep up with the scientific findings regarding their moral capabilities. In order to adequately protect animals, it is imperative to understand their interests.

Therefore, the goals of the thesis were to question the adequacy of the current system of protection and develop a case for the inclusion of some legal rights for animals. To achieve the goals set out, the thesis examined the current framework of animal protection. Specifically, it explored the shortcomings of this system. It provided a complex picture of the legal problems surrounding the protection afforded to animals. It further examined the current legal protection, theoretical findings and scientific evidence to form a pluralistic case for the extension of rights to animals to create a dynamic of change. This thesis has shown that animals have the capacity for morality, thereby establishing a moral and legal

[1043] Geeta Shyam "The legal status of animals: The world needs to rethink its position"(2015) Alternative Law Journal available at https://www.altlj.org/feature-articles/980-the-legal-status-of-animals-the-world-rethinks-its-position.

[1044] Geeta Shyam (n1043) This point has also been illustrated in the NhRP cases see 5.3.2 America and the Nonhuman Rights Project (NhRP) – The evolution of legal personhood for nonhuman animals in the United States.

entitlement that behoves us to respect these interests and create a duty to protect animals. The evidence adduced demonstrated that animals have interests in their own right, and thus they have a moral worth that cannot be reduced simply to their usefulness to others. The possession of interests is a necessary and sufficient condition for holding rights.[1045] This thesis made a normative claim that the law needs to incorporate rights to adequately protect animal morality. It provided a scientific perspective to this discussion and appreciated the need to ensure that science is reflected in our laws. It acknowledged the need to be aware of the reality of science, the legal protection in place and the theoretical debate.

This thesis took a new perspective by providing a critique of existing laws and developing a case for the extension of rights, by combining empirical data, theoretical debate and legal arguments. This thesis did not rely on one school of thought but instead combined science, theory and law by developing chapters which focus on the current system of protection, alternative approaches and shifting contemporary norms, evidence of animal capabilities and intertwined varying theories and legal arguments to provide a cumulative argument. Furthermore, the thesis addressed critics and arguments against legal rights for animals. This thesis does not seek to reduce the status of humans. Humans already have their interests protected. However, it is necessary to use the human system to extend rights to animals. The thesis examined this issue through a different lens and makes a helpful contribution to future theory. It makes an important contribution to progress moral and legal issues concerning animals.

The following are the findings of this study:

1. The current system is not providing adequate protection to animals. The welfare system compromises many animals' physical and emotional well-being and violates their fundamental rights.

2. A review of the scientific literature regarding animal capabilities and morality cannot be conclusive. However, it is imperative that we continue to investigate animal capacities and approach the issue of animal protection with scientific rigour

[1045] Alasdair Cochrane and Steve Cooke "Humane Intervention: The International Protection of Animal Rights" (2016) available at https://lra.le.ac.uk/bitstream/2381/37111/2/Humane_InterventionFFD_REDRAFT2.pdf accessed on 7/2/17.

and incorporate into legal practices those findings that have ethical significance. The reality and value of other species regarding morality should be acknowledged in law.

3. Animals are owed reasoned scientifically informed laws. In order to provide appropriate protection, it is imperative that legal protection is in line with animal interests and abilities. Welfare laws are not protecting animals adequately. Current legislation and policy regarding animal welfare trails behind our best science regarding animal cognition, reflecting ignorance of and a serious discontinuity with such findings.

4. The rights-based view is morally preferable according to this thesis, in that it focuses on the animals and their own entitlement to a decent life. There is a theoretical basis for rights based on morality. Animal welfare laws largely fail to achieve their purposes for most animals, therefore, there is a need for incremental changes to laws relating to animals.

5. Fundamental rights can and have been extended to animals. A change in thought among the judiciary is beginning to occur. New approaches to animal protection are emerging. Animals have been granted legal rights as this thesis has demonstrated, or steps are being taken on the road towards personhood for animals whereby individual animals are endowed with basic rights of their own.

As part of my contribution to knowledge, the following section will set forth recommendations for reform.

6.3 RECOMMENDATIONS FOR REFORM

This thesis set out to critique the current system and provide a case for the extension of rights to animals. Further research is required to prescribe a solid solution to the problems identified in this thesis. On evaluation of the findings made in this thesis, this section proposes a number of suggestions that could pave the way for the introduction of rights for animals.

6.3.1 A rights-based approach to decision making

Animal welfare laws largely fail to achieve their purposes for most animals, therefore, a new conceptual framework is required. The current legislation is outdated and no longer fit for

purpose and must expand in line with evidence and theoretical frameworks. This thesis recommends the need to re-examine and re-imagine animal protection legislation to incorporate a rights-based approach to animal protection which would bridge the gap between science, theory and law. Accordingly, this thesis advocates for the introduction of a rights-based approach to animal protection in order to enable laws to meet their primary purpose of protecting animal interests. Rights discourse is required as this approach addresses much of what animal welfare cannot. Many animals do have moral status, meaning their interests should be taken into account when making decisions that affect them, therefore, a rights-based approach should underpin animal protection laws.

In order to incorporate a rights-based approach into animal protection laws, a number of changes and amendments to the current system are required. The law should focus on animals as moral beings, rather than on human behavior. This approach would require all animals to be equally protected by the law, meaning that animals would not be excluded from legal protections solely on the basis of their species or their use by humans. The introduction of a rights-based approach into animal protection laws would better assist legislation to meet the purposes of protecting animal interests which is well supported by both science and moral theory. It is submitted that the means of protection could be in the form of a new framework for incorporating discussions of animal sentience and interests with a rights-based approach to decision making. A new organisation could be established. This thesis advocates for a paradigm shift of using a rights-based approach in these new bodies.

This could be achieved by developing impartial, independent national advisory committees that are vested with the responsibility of ensuring public policy and legislation is developed with a greater consideration of animal sentience and animal interests, with a focus on incorporating a rights-based approach to animal protection. The purpose of these committees would be to ensure that governments employ a rights-based approach to the formulation and implementation of both policy and legislation.

The establishment of governmental animal protection bodies would be paramount to a paradigm shift towards rights for animals.[1046] These bodies could have a number of

[1046] For example, while related to welfare, Scotland have introduced an animal welfare commission. A total of twelve commissioners were recruited through open advertisement and sit on the commission in an individual

representatives from relevant groups such as vets, lawyers, animal behaviourists, animal protection groups as well as laypersons.[1047] These organisations should examine law in the context of a greater awareness of sentience, developing law based on the science of sentience, moral abilities, and the philosophical reason.

They should be vested with a number of responsibilities including but not limited to the following:

1. Propose possible changes in legislation to protect animals in line with a rights-based approach to animal protection.

2. Examine current laws to identify areas that need to be amended in line with a rights-based approach to animal protection.

3. Identify new policy areas of concern.

4. Generate reports that reflect the committee's concerns.

5. Hold briefing sessions throughout the year in line with a designated work plan with short-term and long-term goals.

6. Monitor implementation of new and amended legislation.

To achieve the above responsibilities, these committees must have the relevant expertise and have adequate funding and administrative support. These committees could take inspiration from other animal focused committees:

UK Sentience Committee

The UK Sentience Bill aims to replace the loss of recognition of sentience in the UK which previously had a duty to "pay full regard" to the welfare requirements of animals in the

capacity and not as representatives of particular groups or organisations. The commission comprises persons from veterinary background, law, animal welfare experts and interest groups including the SPCA and Dog's trust.

[1047] Inspiration could be taken from the previously mentioned Scottish Animal Welfare Commission. Other areas could be used to develop this type of body for example, mental health tribunals who have representatives from a medical background, legal background as well as laypersons see https://www.mhcirl.ie/for_H_Prof/Mental_Health_Tribunals/ see also Written evidence submitted by the Royal Veterinary College (AWB0024) "Response to the Call for evidence: Animal Welfare (Sentience) Bill" available at https://committees.parliament.uk/writtenevidence/37700/pdf/ accessed 20/7/21.

formulation and implementation of policy as an EU member state under Article 13 of the TFEU. The new Sentience Bill aims to establish an animal sentience committee, which is empowered to report on whether the government has paid due regard to the ways in which the policy might have an adverse effect on the welfare of animals as sentient beings.[1048]

The Animal Sentience Committee will ensure that animal sentience is properly taken into account in both new and existing government policy in England. The role of the committee will be to review and confirm that due regard is being given to the welfare of animals as sentient beings in the formulation and implementation of policy across government. However, it will not be concerned with the substance of policy but with the policy-making process.[1049] It is noted that safeguards must be put in place to ensure that the proposed committee will be independent and have the necessary expertise and powers to be effective.[1050] There is limited information relating to the committee membership in the Bill however, recruitment will be through open competition and in accordance with the Governance Code on Public Appointments.[1051]

The Animal Sentience Committee have the potential to better the lives of sentient creatures. It can facilitate streamlining consideration of animal welfare impacts in policymaking. Radford and O' Donoghue note that the:

> immediate role will be to promote and encourage ministers and officials to demonstrate that they have taken account of the impact of their policies on the welfare of animals as sentient beings. In doing so it will encourage transparency and accountability. However, given the appropriate membership, powers, remit and leadership, we can foresee the ASC becoming a body of international significance in demonstrating how the science of animal sentience can be successfully and effectively incorporated into public policy-making.[1052]

[1048] Steven McCulloch "Animal Sentience: The Conservatives would be batty to vote against it" (2021) available at https://www.politics.co.uk/comment/2021/08/05/animal-sentience-the-conservatives-would-be-batty-to-vote-against-it/ accessed 7/8/21.
[1049] Mike Radford and Molly O' Donoghue EFRA Select Committee "Scrutiny of the Animal Welfare (Sentience) Bill" (2021) available at https://committees.parliament.uk/writtenevidence/37901/pdf/ accessed 20/7/21.
[1050] UK Parliament "Animal Welfare(Sentience) Bill" available at .https://committees.parliament.uk/work/1274/animal-welfare-sentience-bill/ accessed 20/7/21.
[1051] *Ibid* .
[1052] Mike Radford and Molly O' Donoghue (n1049).

This highlights how impactful and important a dedicated, impartial committee which focuses solely on animal protection can be.

Scottish Animal Welfare Commission

The function of the Scottish Animal Welfare Commission is to protect wild and companion animals[1053] while also providing scientific and ethical advice to government.[1054] The commission focus on how the welfare needs of sentient animals are being met by developing policy, possible legislative and non-legislative routes to further protect the welfare of sentient animals and the research requirements to provide an evidence base for future policy development.[1055] The commission specifically look at how our current policies take account of the welfare needs of sentient animals and what improvements could be made.[1056] Twelve commissioners with varying expertise including veterinarians, animal welfare experts and members of animal welfare NGOs were recruited through open advertisement and sit on the commission in an individual capacity and not as representatives of particular groups or organisations.[1057]The commission produce an annual report setting out how it has delivered against the work plan which sets out short-term and long-term plans. The report will be laid before the Scottish Parliament thereby ensuring productivity and accountability of the commission. This commission has met its aims and is thus far successful.[1058]

New Zealand National Animal Welfare Advisory Committee

Animal welfare in New Zealand falls within the responsibility of the Ministry for Primary Industries, with the help of two other agencies at the national level. The National Animal

[1053] UK Animal Welfare Commission (previously the Farm Animal Welfare Commission) in provide advice on farm animals and the Zoo Expert Committee advise all GB administrations on animals used in scientific procedures.
[1054] See Scottish Animal Welfare Commission available at https://www.gov.scot/groups/scottish-animal-welfare-commission/ accessed 12/7/21.
[1055] *Ibid.*
[1056] See the Scottish Animal Welfare Commission Regulations 2020 available at https://www.legislation.gov.uk/ssi/2020/177/pdfs/ssipn_20200177_en.pdf accessed 12/7/21
[1057] See Scottish Animal Welfare Commission (n1054).
[1058] See Scottish Animal Welfare Commission Minutes from March 2021 available at https://www.gov.scot/publications/scottish-animal-welfare-commission-minutes-march-2021/ accessed 7/7/21.

Welfare Advisory Committee (NAWAC) has been established as an independent body to advise the relevant Minister and is entrusted with preparing detailed rules on the treatment of animals. [1059] Furthermore, the National Animal Ethics Committee advises the Minister on issues relating to the use of animals in research, testing and teaching.

NAWAC gives the government minister responsible for animal welfare advice on the welfare of animals in New Zealand, animal welfare research needs, and legislative proposals. Importantly, NAWAC continues to integrate the idea of animal sentience in its work, including in codes and standards as they are developed and reviewed. They have guidelines that set out a number of key points including the role of science in creating standards and inclusion of society's ethical values and opinions.[1060] NAWAC can recommend different types of regulatory and non-regulatory approaches to manage risks to animal welfare, including earlier responses to problems before they become severe.[1061]

While all three committees are welfare focused and therefore have different terms of reference, they can offer a source of inspiration. All three committee integrate animal sentience and give an insight into committee composition. Furthermore, lessons can be learned by examining these committees. Importantly, there is little point in having strong legal protections in place if there is not also sufficient funding and other resources in place to enforce the laws. It is commonly the case with animal protection laws that there are limited resources and a lack of expertise. Significantly, NAWAC has repeatedly said its work is limited by lack of funding. It has made very slow progress on producing regulations and has a very limited work programme each year due to its lack of adequate resources.[1062] Moreover, there are concerns that the UK Animal Sentience Committee has a narrow role[1063] and concerns have been raised regarding the membership of this committee highlighting the need for

[1059] National Animal Welfare Advisory Committee Available at https://www.mpi.govt.nz/animals/animal-welfare/national-animal-welfare-advisory-committee/ accessed 15/8/21.
[1060] *Ibid*.
[1061] See "NAWAC GUIDELINE 14: Determining level of intervention" available at accessed 15/8/21.
[1062] Animal Protection Index "Executive summary" (2020) available at https://api.worldanimalprotection.org/sites/default/files/api_2020_-_new_zealand_0.pdf accessed 15/8/21.
[1063] It has been noted that the role of the sentience committee is "limited to reviewing the process by which relevant policy is formulated and implemented. The substance of policy and the weight to be given to competing considerations in determining policy will remain entirely in the hands of ministers and, ultimately, Parliament" see Mike Radford and Molly O' Donoghue (n1049)

members to have an expertise in animal sentience.[1064] These shortcomings must be acknowledged when creating new bodies.

6.3.1.2 Enforcement: Standing to assert the legal rights

In order to supplement the creation of new animal rights focused committees, the issue of standing must also be addressed.[1065] At a domestic level, there are several ways in which human beings can act on behalf of animals to promote their interests. The given jurisdiction would have to establish a legal basis (laws, regulations, and so on). The existing legal institution of guardianship is serviceable for furthering the interests of animals. Animals could be represented by human beings, just like any other litigant who lacks ordinary (human) competence; for example, the interests of children are protected by prosecutors, and also by trustees and guardians in private litigation brought on children's behalf.[1066] In the case of companies, these nonhuman parties could not appear in court to seek remedy for injuries unless human spokespersons were allowed to argue on their behalf.

Desmond's Law[1067] is a further example of how human representation can give animals a voice in court.[1068] Under the new law in the state of Connecticut in the US, judges have discretion over whether to appoint an advocate in an animal abuse case. Prosecutors or defense attorneys may request them. The advocates, who are pro bono attorneys or supervised law students, assist the court by gathering information, writing briefs, and making recommendations to the judge.[1069] Advocates under Desmond's Law do not represent the animal. In Switzerland a system of animal lawyers was introduced in criminal cases, in the Canton of Zurich from 1991 – 2010.[1070] Animal rights could be exercised collectively, such as by vesting protection organisations with the right to take legal action and appeal decisions, in line with the situation that currently exists in countries with animal organisations such as the

[1064] Mike Radford and Molly O' Donoghue (n1049)
[1065] Jane Kotzmann and Gisela Nip, Bringing Animal Protection Legislation Into Line With its Purported Purposes: A Proposal for Equality Amongst Non-Human Animals, 37 Pace Envtl. L. Rev. 247 (2020)
[1066] Cass Sunstein Animal Rights: Current Debates and New Directions (OUP 2006) 391–392.
[1067] See "In one state, abused animals get a legal voice in court" available at https://apnews.com/e0b2e676ae1447a09fab4c8807ac0dea/State-experiments-with-court-advocates-for-abused-animals accessed 05/06/18.
[1068] Animal Legal Defense Fund website available at https://aldf.org/article/unique-connecticut-law-allows-court-appointed-advocates-to-represent-animals/ accessed 5/9/19.
[1069] *Ibid*
[1070] See International Animal Law and Ethics Consultant available at http://www.afgoetschel.com/en/

Royal Society for the Prevention of Cruelty to Animals.[1071] An animal lawyer or an animal protection body could be established[1072] to monitor, protect and promote animal rights.[1073] The task of representing animal interests could be carried out by special officers within government departments. For example, in Ireland, the Child and Family Agency[1074] is mandated with protecting children – the same concept could be applied to animal protection. Moreover, in the Swiss primate initiative, the court stated that "the task of representing primates' interests could be carried out by special officers at the cantonal department for veterinary services, by the agency mandated with protecting children and adults, by an ombudsperson, or by an independent legal advocate for primates."[1075] The court added primates' rights could also be exercised collectively, such as by vesting protection organisations with the right to take legal action and appeal decisions.

The main objection to this type of enforcement is, of course, the cost. Government funding would need to be set aside to ensure appropriate funds are available. Many animal protection organisations are awarded government funding, albeit a small amount. Therefore, the allocation of funding is vital to ensure the rights granted are enforced.[1076] Change does come at a cost, but it is necessary. The cost and challenges also bring with them benefits for both humans and animals.

[1071] See RSPCA website available at https://www.rspca.org.uk/.

[1072] See Centre for Animals and Social Justice available at http://www.casj.org.uk/animal-protection-commission where an animal protection commission is advocated.

[1073]An animal protection body would be legally mandated to protect and promote animal rights.

[1074] Child and Family Agency website is available at https://www.tusla.ie/ The Child and Family Agency was established on 1 January 2014 and is now the dedicated State agency responsible for improving well-being and outcomes for children. A similar system applies in Environmental law and Mental Health law.

[1075] For further details see Raffael Fasel and Charlotte E Blattner available *at* https://www.nonhumanrights.org/blog/citizens-allowed-to-vote-on-primate-rights/.

[1076] In Ireland for example, our main animal welfare charity the ISPCA were granted government funding €410,000 in 2018 see https://www.ispca.ie/news/detail/thank_you_to_the_department_of_agriculture_food_and_the_marine. However, the ISPCA spent €3.8m in 2018 on rescuing and caring for mistreated animals. A reported 85% of the spend came from public donations and legacies from wills see https://www.irishexaminer.com/breakingnews/ireland/record-number-of-calls-to-iscpa-926610.html accessed 14/09/19. It is, however, conceivable that more funding could be allocated to successfully support an enforcement body. Using Ireland as an example, €16.8 million was granted to the greyhound industry in 2018 and 2019 and this funding increased to €19.4 million in 2020. This is an industry that is losing support. An allocation from this fund serves to support an enforcement body see https://www.thejournal.ie/greyhound-industry-ross-4777297-Aug2019/.

It is acknowledged that further research needs to be undertaken on this proposal and the recommendations made are a starting point in the conversation and discussion on possible recommendations and reforms.

6.4 CONCLUDING REMARKS

This research supports the conclusion that the current system needs to undergo a paradigm shift. It argues that moral animals are deserving of legal rights. As a matter of consistency and legitimacy, these species should be granted suitable legal rights. This thesis has demonstrated that the legal system does and can grant legal rights to animals. It does not argue that animals must be given all human rights, it seeks to establish species-specific rights. A key claim of this thesis is that the law needs to be evidence-based. It highlights that the current framework is not sufficient, and animals need their fundamental interests to be protected. It is acknowledged that the insights given, and the proposals made in this thesis are just a first step in the longer journey towards legitimate and effective animal rights.

TABLE OF CASES

European Union

Case C - 169/89 Gourmetterie Van de Burg [1990] ECR 1-2143 (Red Grouse)

Case C - 5/94 Hedley Lomas [1996] ECR 1-2553

Case C - 1/96 The Queen v Minister of Agriculture, Fisheries and Food, ex parte: Compassion in World Farming Ltd [1998]

Case C - 189/01 H. Jippes, Afedeling Groningen van de Nederlandse tot Bescherming van Dieren, Afedling Assen en omstreken van Nederlandse Vereniging tot Besherming van Dierer v Minister van Landbouw, Natuurbeheer en Visserij [2001] ERC 1 -5689

Case C - 355/ G. Brouwer v Staatssecretaris van Economische Zaken, Landbouw en Innovatie 11 Judgment of the Court (Sixth Chamber) of 14 June 2012

Case C - 424/13 Zuchtvieh-Export GmbH v Stadt Kempten, Judgment of the Court (Fifth Chamber) of 23 April 2015

Case C - 398/13 Inuit Tapiriit Kanatami and Others v European Commission and Others Opinion of Advocate General of 9 March 2015

Case T-18/10 RII-INTP Inuit Tapiriit Kanatami and Others v Parliament and Council Order of the General Court (Seventh Chamber) of 6 September 2011

Case T-526/10 Inuit Tapiriit Kanatami and Others v European Commission Judgment of the General Court (Seventh Chamber) of 25 April 2013

United States

Cetacean Cmty. v. Bush, 386 F.3d 1169 (9th Cir. 2004)

Sierra Club v. Morton, 1972 405 U.S. 727

In re Nonhuman Rights Project, Inc. ex rel. Hercules and Another v. Stanley, 49 Misc.3d 746, 773 (Sup Ct. N.Y. Cty. 2015)

In re Nonhuman Rights Project, Inc. ex rel. Kiko v. Presti, 124 A.D.3d 1334, 1334 (4th Dept 2015) ("Presti"), lv. denied, 26 N.Y.3d 901 (2015)

Nonhuman Rights Project, Inc. v Lavery, 152 AD3d 73, 78 [1st Dept 2017]

Nonhuman Rights Project, Inc. v Lavery, 124 AD3d 148, 152 [3rd Dept 2014]

Nonhuman Rights Project Inc, v Lavery 2014 N.Y. Slip Op. 08531

Nonhuman Rights Project Inc, v Lavery 2013 N.Y.

Nonhuman Rights Project Inc. v Lavery, 2018 NY Slip Op 61538 (App Div, First Department)

Nonhuman Rights Project Inc. v Stanley (2013) N.Y.

Nonhuman Rights Project Inc. v Stanley 2015 NY Slip Op 25257

Nonhuman Rights Project Inc. behalf of Beulah, Minnie and Karen v R. W Commerford and Sons, Inc., et al. 2019 (AC 41464)

Nonhuman Rights Project, Inc., on behalf of Kiko v Carmen Presti 2015 N.Y. Slip Op. 00085 (N.Y. App. Div. 2015)

Nonhuman Rights Project, Inc., on behalf of Kiko v Carmen Presti 2013 N.Y.

Nonhuman Rights Project, on behalf of Hercules and Leo v Samuel L Stanley Jr and State University of New York at Stony Brook, [2015] 152736/15 Supreme Court of the State of New York

Nonhuman Rights Project, Inc., on behalf of Happy v James J. Breheny, in his official capacity as the Executive Vice President and General Director of Zoos and Aquariums of the Wildlife Conservation Society and Director of the Bronx Zoo, and Wildlife Conservation Society, Supreme Court of the State of New York [4th dept. 2019]

India

Lalit Miglani v State of Uttarakhand & others (30 March 2017), WP (PIL) 140 of 2015 (Uttarakhand High Court, India)

Mohd. Salim v State of Uttarakhand & others, WPPIL 126/2014, Uttarakhand High Court at Nainital, 2017. Indian Courts, Judgments - High Court of Uttarakhand at Nainital, India

Naruto v. Slater, 2018 WL 1902414 (9th Cir. Apr. 23, 2018).

N. R. Nair v UOI, 6th June 2000, Kerala High Court

Canada

Reece v Edmonton (City), 2010 ABQB 538 [Reece (QB)].

Reece v Edmonton 2011 ABCA 238

UK

Somerset v Stewart (1772) 98 ER 499

Brazil

In Favor of Suica, 91h Criminal Court, No 833085-3/2005 (Bahia, Brazil)

Pakistan

Islamabad Wildlife Management Board v Metropolitan Corporation Islamabad W.P. No.1155/2019

TABLE OF LEGISLATION

European Union

Council Directive 74/577/EEC of 18 November 1974 on stunning of animals before slaughter Official Journal L 316, 26/11/1974

Council Directive 76/768/EEC of 27 July 1976 on the approximation of the laws of the Member States relating to cosmetic products. OJEC L262 of 1976-09-27

Council Directive 77/489/EEC of 18 July 1977 on the protection of animals during international transport OJ L 200, 8.8.1977

Council Decision 78/923/EEC of 19 June 1978 concerning the conclusion of the European Convention for the Protection of Animals kept for farming purposes OJ L 323, 17.11.1978

Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds OJ L 103, 25.4.1979

Council Directive 83/129/EEC of 28 March 1983 concerning the importation into Member States of skins of certain seal pups and products derived therefrom OJ L 91, 9.4.1983

Council Directive 85/444/EEC of 27 September 1985 amending Council Directive 83/129/EEC concerning the importation into Member States of skins of certain seal pups and products derived therefrom OJ L 259, 1.10.1985

Council Directive 85/511/EEC of 18 November 1985 introducing Community measures for the control of foot- and-mouth disease OJ L 315, 26.11.1985

Council Directive 86/113/EEC of 25 March 1986 laying down minimum standards for the protection of laying hens kept in battery cages OJ L 95, 10.4.1986

Council Directive 88/166/EEC of 7 March 1988 complying with the judgment of the Court of Justice in Case 131/86 (Annulment of Council Directive 86/1)

Council Directive 86/609/EEC of 24 November 1986 on the approximation of laws, regulations and administrative provisions of the Member States regarding the protection of animals used for experimental and other scientific purposes OJ L 358, 18.12.1986

Council Directive 88/166/EEC of 7 March 1988 complying with the judgment of the Court of Justice in Case 131/86 (annulment of Council Directive 86/113/EEC of 25 March 1986 laying down minimum standards for the protection of laying hens kept in battery cages) OJ L 74, 19.3.1988

Council Directive 89/370/EEC of 8 June 1989 amending Directive 83/129/EEC concerning the importation into Member States of skins of certain seal pups and products derived therefrom OJ L 163, 14.6.1989 amending Council Directive 83/129/EEC

Council Directive 90/425/EEC of 26 June 1990 concerning veterinary and zootechnical checks applicable in intra-Community trade in certain live animals and products with a view to the completion of the internal market OJ L 224, 18.8.1990

Council Directive 91/496/EEC of 15 July 1991 laying down the principles governing the organization of veterinary checks on animals entering the Community from third countries and amending Directives 89/662/EEC, 90/425/EEC and 90/675/EEC

Council Directive 91/629/EEC of 19 November 1991 laying down minimum standards for the protection of calves OJ L 340, 11.12.1991

Council Directive 91/630/EEC of 19 November 1991 laying down minimum standards for the protection of pigs OJ L 340, 11.12.1991

Council Directive of 19 November 1991 on the protection of animals during transport and amending Directives 90/425/EEC and 91/496/EEC OJ L 340, 11.12.1991

Council Directive 91/629/EEC of 19 November 1991 laying down minimum standards for the protection of calves OJ L 340, 11.12.1991

Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora OJ L 206, 22.7.1992

Council Directive 93/119/EC of 22 December 1993 on the protection of animals at the time of slaughter or killing OJ L 340, 31.12.1993

Council Directive 95/29/EC of 29 June 1995 amending Directive 91/628/EEC concerning the protection of animals during transport OJ L 148, 30.6.1995

Council Directive 97/2/EC of 20 January 1997 amending Directive 91/629/EEC laying down minimum standards for the protection of calves OJ L 25, 28.1.1997

Council Directive 98/58/EC of 20 July 1998 concerning the protection of animals kept for farming purposes OJ L 221, 8.8.1998 amending Council Decision 78/923/EEC

Commission Directive 1999/12/EC of 8 March 1999 adapting to technical progress for the second time the Annex to Council Directive 88/320/EEC on the inspection and verification of good laboratory practice (GLP) (Text with EEA relevance) OJ L 77, 23.3.1999

Council Directive 1999/74/EC of 19 July 1999 laying down minimum standards for the protection of laying hens OJ L 203, 3.8.1999

Council Directive 1999/22/EC of 29 March 1999 on the keeping of wild animals in zoos OJ L 94, 9.4.1999

Commission Directive 2001/93/EC of 9 November 2001 amending Directive 91/630/EEC laying down minimum standards for the protection of pigs OJ L 316, 1.12.2001, 36–38 and Council Directive 2001/88/EC of 23 October 2001 amending Directive 91/630/EEC laying down minimum standards for the protection of pigs OJ L 316, 1.12.2001

Commission Directive 2002/4/EC of 30 January 2002 on the registration of establishments keeping laying hens, covered by Council Directive 1999/74/EC OJ L 30, 31.1.2002

Directive 2003/15/EC of the European Parliament and of the Council of 27 February 2003 amending Council Directive 76/768/EEC on the approximation of the laws of the Member States relating to cosmetic products (Text with EEA relevance) OJ L 66, 11.3.2003

Council Directive 2007/43/EC of 28 June 2007 laying down minimum rules for the protection of chickens kept for meat production (Text with EEA relevance) OJ L 182, 12.7.2007

Directive 2010/63/EU of the European Parliament and of the Council of 22 September 2010 on the protection of animals used for scientific purposes Text with EEA relevance OJ L 276, 20.10.2010

Council Directive 2008/120/EC of 18 December 2008 laying down minimum standards for the protection of pigs (Codified version) OJ L 47, 18.2.2009

Council Directive 2008/119/EC of 18 December 2008 laying down minimum standards for the protection of calves (Codified version) OJ L 10, 15.1.2009

Directive 2004/10/EC of the European Parliament and of the Council of 11 February 2004 on the harmonisation of laws, regulations and administrative provisions relating to the application of the principles of good laboratory practice and the verification of their applications for tests on chemical substances (codified version) (Text with EEA relevance) OJ L 50, 20.2.2004

Council Directive (EEC) 79/409 on the conservation of wild birds [1979] OJ L103/01

Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds OJ L 20, 26.1.2010

Council Regulation (EEC) No 3626/82 of 3 December 1982 on the implementation in the Community of the Convention on international trade in endangered species of wild fauna and flora OJ L 384, 31.12.1982

Council Regulation (EEC) No 3254/91 of 4 November 1991 prohibiting the use of leghold traps in the Community and the introduction into the Community of pelts and manufactured goods of certain wild animal species originating in countries which catch them by means of leghold traps or trapping methods which do not meet international humane trapping standards OJ L 308, 9.11.1991

Council Regulation (EC) No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein OJ L 61, 3.3.1997

Council Regulation (EC) No 1255/97 of 25 June 1997 concerning Community criteria for staging points and amending the route plan referred to in the Annex to Directive 91/628/EEC OJ L 174, 2.7.1997

Council Regulation (EC) No 411/98 of 16 February 1998 on additional animal protection standards applicable to road vehicles used for the carriage of livestock on journeys exceeding eight hours OJ L 52, 21.2.1998

Council Regulation (EC) No 812/2004 of 26.4.2004 laying down measures concerning incidental catches of cetaceans in fisheries and amending Regulation (EC) No 88/98 OJ L 150, 30.4.2004

Council Regulation (EC) No 1/2005 of 22 December 2004 on the protection of animals during transport and related operations and amending Directives 64/432/EEC and 93/119/EC and Regulation (EC) No 1255/97 OJ L 3, 5.1.2005

Commission Regulation (EC) No 318/2007 of 23 March 2007 laying down animal health conditions for imports of certain birds into the Community and the quarantine conditions thereof (Text with EEA relevance) OJ L 84, 24.3.2007

Regulation (EC) No 1523/2007 of the European Parliament and of the Council of 11 December 2007 banning the placing on the market and the import to, or export from, the Community of cat and dog fur, and products containing such fur OJ L 343, 27.12.2007

Regulation (EC) No 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products (Text with EEA relevance) OJ L 286, 31.10.2009

Regulation (EC) No 1223/2009 of the European Parliament and of the Council of 30 November 2009 on cosmetic products (Text with EEA relevance) OJ L 342, 22.12.2009

Council Regulation (EC) No 1099/2009 of 24 September 2009 on the protection of animals at the time of killing (Text with EEA relevance) OJ L 303, 18.11.2009

Regulation (EU) No 737/2010 of 10 August 2010 laying down detailed rules for the implementation of Regulation (EC) No 1007/2009 of the European Parliament and of the Council on trade in seal products Text with EEA relevance OJ L 216, 17.8.2010

Regulation (EU) 2016/1012 of the European Parliament and of the Council of 8 June 2016 on zootechnical and genealogical conditions for the breeding, trade in and entry into the Union of purebred breeding animals, hybrid breeding pigs and the germinal products thereof and amending Regulation (EU) No 652/2014, Council Directives 89/608/EEC and 90/425/EEC and repealing certain acts in the area of animal breeding ('Animal Breeding Regulation') (Text with EEA relevance) OJ L 171, 29.6.2016

Regulation (EU) 2016/429 of the European Parliament and of the Council of 9 March 2016 on transmissible animal diseases and amending and repealing certain acts in the area of animal health ('Animal Health Law') (Text with EEA relevance) OJ L 84, 31.3.2016

Bolivia

Law of Mother Earth Law 2009 (Ley de Derechos de La Madre Tierra)

Colombia

Colombian Civil Code 1873

Costa Rica

Wildlife Protection Act 1972

England and Wales

The Hunting Act 2004

France

French Civil Code 1804

Ireland

Prohibition of Fur Farming Bill 2018

The Wildlife Amendment Act 2010

Scotland

Fur Farming (Prohibition) (Scotland) Act 2002

The Protection of Wild Mammals Act 2002

Sweden

Animal Protection Act 1998

Canada

Alberta's Animal Protection Act 2000

Civil Code of Quebec 1991

Ending the Captivity of Whales and Dolphins Act 2019

New Zealand

Animal Welfare Act 1999

Te Awa Tupua (Whanganui River Claims Settlement) Act 2017

BIBLIOGRAPHY

Books

Beckoff M, Allen C and Burghardt G*, The Cognitive Animal: Empirical and Theoretical Perspectives on Animal Cognition* (MIT Press, 2002)

Bekoff M and Pierce J, *Wild Justice: The Moral Lives of Animals* (University of Chicago Press 2010)

Bentham J, *Principles of Morals and Legislation* (Hafner, 1789)

Broom S and Legge, D *Law Relating to Animals* (Cavendish Publishing Limited, 1997)

Byrne R and Whiten W, *Cognition in monkeys, apes and man* (Oxford University Press, 1998)

Cantor A and Emel J, *New Water Regimes* (MDPI AG, 2018)

Cavalieri P, *The Animal Question: Why Non-Human Animals Deserve Human Rights* (Oxford University Press, 2001)

Cochrane A*, An introduction to animal and political theory* (Palgrave Macmiilan, 2010)

Cochrane A, *Animal Rights Without Liberation* (Columbia University Press, 2012)

Cohen C and Regan T, *The Animal Rights Debate* (Rowman and Littlefield Publisher Inc, 2001)

Cownie F, *Legal Academics: Culture and Identities* (Hart, 2004)

Darwin C, *The Descent of Man and Selection in Relation to Sex* (John Murray, 1871)

De Waal F, *Chimpanzee Politics: Power and Sex among Apes* (2nd edn Johns Hopkins University Press, 1989)

De Waal F, *Good natured: The origins of right and wrong in humans and other animals* (Harvard University Press, 1996)

De Wall F, *Primates and Philosophers: How morality evolved* (Princeton University Press, 2016)

De Waal F, *The bonobo and the atheist: In search of humanism among the primates* (W. W. Norton & Company, 2014)

Edward N. E, *Education for Animal Welfare* (Springer, 2011)

Fouts R and Tukel Mills S, *Next of Kin – What Chimpanzees Have taught Me About Who We Are* (William Morrow & Co, 1997)

Fouts R et al, *Next of Kin: My Conversations with Chimpanzees* (HarperCollins, 1997)

Franklin J, *Animal rights and moral philosophy* (Columbia University Press, 2005)

Garner R, *The Political Theory of Animal Rights* (Manchester University Press, 2005)

Goodall J, *The Chimpanzee of Gombe: Patterns of Behaviour* (Belknap Press, 1986)

Herzing D and Johnson C, *Dolphin Communication and Cognition* (MIT Press, 2015)

Immanuel K, *Lecture on Ethics* (translated by L Infield, 1963)

Kelch T*, Globalization and Animal Law: Comparative Law, International Law and Internal Trade* (Kluwer Law International, 2011)

Kurki V, *A Theory of Legal Personhood* (OUP, 2019)

Linzey A, *The Global Guide to Animal Protection* (University of Illinois Press, 2013)

Linzey Andrew, *Why Animal Suffering Matters: Philosophy, Theology, and Practical Ethics* (OUP, 2009)

Margolis E et al, The Oxford Handbook of Philosophy of Cognitive Science (Oxford Handbooks Online, 2012)

Naffine N, *Law's Meaning of Life: Philosophy, Religion, Darwin and the Legal Person* (Hart Publishing, 2009)

Nakanishi Y, *Contemporary Issues in Environmental Law: The EU and Japan* (Springer, 2016)

Pettit P, *The Birth of Ethics: Reconstructing the role and nature of ethics* (OUP 2018)

Rachels J, *The Moral Implications of Darwinism* (OUP, 1990)

Radford M, *Animal Welfare Law in Britain: Regulation and Responsibility* (OUP, 2001)

Raz J, *The Morality of Freedom* (OUP, 1988)

Regan T, *The Case for Animal Rights* (2nd edn, University of California Press, 2004)

Repko A and Szostak R, *Interdisciplinary Research: Process and Theory* (3rd edn, Sage 2017)

Rodger F and Tukel Mills S, *Next of Kin - What Chimpanzees Have taught Me About Who We Ar*e (William Morrow & Co, 1997)

Rowlands M, *Can Animals be Moral?* (OUP, 2014)

Salmond J, *Jurisprudence* (7th edn, Sweet and Maxwell, London, 1924)

Sandilands V and Hocking P, *Alternative Systems for Poultry: Health, Welfare and Productivity* (CABI, 2012)

Savage-Rumbaugh S, *Ape language: From conditioned response to symbol. Animal intelligence* (Columbia University Press, 1986)

Savage-Rumbaugh S et al, *Apes, language, and the human mind* (OUP, 1998)

Schaffner Joan, *An Introduction to Animals and the Law* (Palgrave MacMillan, 2010)

Singer P and Cavalieri P, *The Great Ape Project: Equality Beyond Humanity* (St. Martin's Press, 1996)

Singer P, *Animal Liberation* (HarperCollins, 1975)

Stone C, *Should Trees have standing* (Oxford University Press, 2010)

Savage-Rumbaugh S, Shanker S, and Taylor T*, Apes, Language and the Human Mind* (OUP, 2001)

Sunstein C, *Animal Rights: Current Debates and New Directions* (OUP, 2006)

Wagmand B and Liebman M, *A Worldview of Animal Law* (Carolina Academic Press, 2001)

Waldau P, *Animal Studies: An Introduction* (Oxford University Press, 2013)

Watkins D and Burton M*, Research Methods in Law* (Routledge, 2013)

Wise S, *Unlocking the Cage: Science and the Case for Animal Rights* (Perseus Press, 2002)

Wise S, *Rattling the Cage: Toward Legal Right for Animals* (Basic books, 2000)

Book Chapters

Broom D, "International Perspectives on Animal Welfare Science and Policy Including Whale Welfare and the E.U. Seal Product Ban: Animal Welfare as a W.T.O. Public Morality Issue" in Robertson I, *Animal Law and Welfare – International Perspectives* (Springer, 2016)

Cartmill E and Maestripieri D, "Socio-cognitive specializations in nonhuman primates" in the *Oxford Handbook of Comparative Evolutionary Psychology* (OUP, 2016)

Cownie F and Bradney A, "Socio-legal studies: A challenge to the doctrinal approach" in Watkins D and Burton M (eds), *Research Methods in Law* (Routledge, 2011)

Epstein R, "Animals as objects or subjects of rights" in Sunstein C and Nussbaum M *Animal Rights: Current Debates and New Directions* (OUP, 2004)

Fouts R and Fouts D, "Chimpanzees' use of sign language" in Wise S *Rattling the Cage: Toward Legal Rights for Animals* (Perseus Publishing, 2000)

Fouts D, Fouts R and Van Cantfort T, "The infant Loulis learns signs from cross-fostered chimpanzee" in Gardner R, Gardner B and Van Cantfort T, *Teaching sign language to chimpanzees* (University of New York Press, 1989)

Herman L, "Exploring the cognitive world of the bottlenose dolphin" (2002) in Beckoff M, Colin A and Burghardt G, *The Cognitive Animal: Empirical and Theoretical Perspectives on Animal Cognition* (MIT Press, 2002)

Herman L, "Vocal, social, and self-imitation by bottlenose dolphins" in Nehaniv C and Dautenhahn K, *Imitation in animals and artifacts* (MIT Press, 1993)

Huffman M and Richard W, “Diversity of medicinal plant use by chimpanzees in the wild” in Wrangham R, McGrew W, de Waal F and Heltne P, *Chimpanzee cultures* (Harvard University Press, 1994)

Kelly J, “Cetacean Cognition Specialisation” in Shackelford T and Vonk J, *The Oxford handbook of Comparative Psychology* (OUP, 2016)

Nicolson N, “Infants, mothers, and other females” in Smuts B et al, *Primate Societies* (University of Chicago Press, 1986)

O' Donovan D, “Socio-Legal Methodology: Conceptual Underpinnings, Justifications and Practical Pitfalls” in Cahillane L and Schweppe J, *Legal Research Methods: Principles and Practicalities* (Clarus Press, 2016)

Posner R, “Animal Rights: Legal, Philosophical, and Pragmatic Perspectives” in Sunstein C and Nussbaum M, *Animal Rights: Current Debates and New Directions* (OUP, 2004)

Radford M, “Animal passions, animal welfare and European policy making” in Craig P, Harlow C (eds), *Law-making in the European Union*, (Longman, 1998)

Rowland M, “Utilitarianism and Animals” in Singer P, *The Case for Animal Liberation* (Palgrave Macmillan, 2009)

Sheskin M and Santos L, “The Evolution of Morality: Which Aspects of Human Moral Concerns Are Shared with Nonhuman Primates?” in Shackelford T and Vonk J, *The Oxford handbook of Comparative Psychology* (OUP, 2016)

Sunstein C, Introduction: What Are Animal Rights? in Sunstein C and Nussbaum M, *Animal Rights: Current Debates and New Directions* (OUP, 2004)

Articles

Abate R and Jonathan S, “From Inside the Cage to Outside the Box: Natural Resources as a Platform for Nonhuman Animal Personhood in the U.S. and Australia” (2017) Global Journal of Animal Law 54

Abbott A,“Lab-animal battle reaches truce” (2010) Nature 464

Albright K, “The Extension of Legal Rights to Animals under a Caring Ethic: An Ecofeminist Exploration of Steven Wise's Rattling the Cage” (2002) 42 Nat. Resources J. 915

Anderson J and Gallup G, “Which primates recognise themselves in mirrors?” (2011) PLoS Biol 9(3)

Anderson R, Waayers R and Knight A, “A new vision for Orca – Human relationships and research” (2016) available at http://wearesonar.org/2016/08/31/new-vision-orca-human-relationships-research/

Archibald K, “Animal Research Is an Ethical Issue for Humans as Well as for Animals” (2018) Journal of Animal Ethics 8

Bartlett S, “Roots of Human Resistance to Animal Rights: Psychological and Conceptual Blocks” (2002) 8 Animal L 143

Beaudry J, “From Autonomy to Habeas Corpus: Animal Rights Activists Take the Parameters of Legal Personhood to Court” (2016) Global Journal of Animal Law 10

Bekoff M, “Why “Good Welfare” Isn’t “Good Enough”: Minding Animals and Increasing Our Compassionate Footprint” (2008) The Humane Society Institute for Science and Policy Animal Studies Repository 7

Beran M and Rumbaugh D, “ 'Constructive' enumeration by chimpanzees (Pan troglodytes) on a computerized task” (2001) Animal Cognition 4 (2)

Bernet Kempers E, “Animal Dignity and the Law: Potential, Problems and Possible Implications” (2020) Liverpool Law Review 41

Berg J, “Of Elephants and Embryos: A Proposed Framework for Legal Personhood” (2007) Hastings Law Journal,59 (2)

Beyer G, “Pet Animals: What Happens When Their Humans Die?” (2000) 40 SANCLR 617

Bilchitz D, “Moving Beyond Arbitrariness: The Legal Personhood and Dignity of Non-Human Animals” South African Department of Environmental Affairs (2009) 68 available at

http://www.repository.up.ac.za/bitstream/handle/2263/12171/Bilchitz_Moving(2009).pdf?sequence=1&isAllowed=y

Blandy S, “Socio-legal approaches to property law research” (2014) Property Law Review 3 (3)

Bonbon E, “Regional Steps Towards A Common Animal Welfare Approach in Europe” (2012) available at https://www.oie.int/doc/ged/D13888.PDF

Blattner C, “The recognition of animal sentience by law” (2019) Journal of Animal Ethics 9 (2)

Branham A, “Overview of Philosophy and Animals” (2005) Animal Legal & Historical Center

Braslau-Schneck S et al, “Grounding conceptual knowledge in modality-specific systems” (1994) Trends in Cognitive Science 7 84

Brels S, “Animal Welfare Law in the World: Evolution and Globalization” (2016) Global Journal of Animal Law 1 37

Brels S, “The evolution of the legal status of animals: From things to sentient beings” (2017) available at https://www.globalanimalnetwork.org/evolution-legal-status-animals-things-sentient-beings

Brooman S and Legge D, “Covid-19, Brexit and much more in 2020: A Bad Year for Animal Welfare?” (2020) Liverpool Law Review 41

Brooman S and Sparks P “Brexit: A New Dawn for Animals Used in Research, or a Threat to the ‘Most Stringent Regulatory System in the World’? A report on the development of a Brexit manifesto for Animals Used in Science” (2018) Animals in Science, Sentience and Brexit

Broom D,“Cognitive ability and awareness in domestic animals and decisions about obligations to animals” Applied Animal Behaviour Science (2010) 123

Broom D, “Considering animals’ feelings” (2016) Animal Sentience 5

Broom D, “Sentience and animal welfare: New thoughts and controversies Response to Commentary on Broom on Animal Welfare” (2016) Animal Sentience

Brosnahan P, “New Zealand's Animal Welfare Act: What is its value Regarding Non-Human Hominids?”(2000) 6 Animal L. 185

Bryant T, “Similarity or Difference as a Basis for Justice: Must Animals be Like Humans to Be Legally Protected from Humans?” (2007) 70 Law & Contemp. Probs. 207

Bryant T, “Sacrificing the Sacrifice of Animals: Legal Personhood for Animals, the Status of Animals as Property, and the Presumed Primacy of Humans” (2007-2008) 39 Rutgers L.J. 247

Byrne R and Whiten W, “Cognitive Evolution in Primates: Evidence from Tactical Deception” (1992) Man, New Series, 27 (3)

Boring N, “France: Animals Granted New Legal Status” (2014) available at https://www.loc.gov/law/foreign-news/article/france-animals-granted-new-legal-status/

Call J et al, “‘Unwilling’ versus ‘unable’: chimpanzees’ understanding of human intentional action” (2004) Developmental Science 7 (4)

Calley C, “The Aggregation of Suffering in the Regulatory Context: Scientific Experimentation, Animals and Intrinsic value” (2017) Journal of Animal Ethics 7 (1)

Camm T and Bowles D, “Animal Welfare and the Treaty of Rome – A Legal Analysis of the Protocol on Animal Welfare and Welfare Standards in the European Union” (2000) Journal of Environmental Law 12 (2)

Carlarne C, “Saving the Whales in the New Millennium: International Institutions, Recent Developments and the Future of the International Whaling Policies” (2005) Virginia Environmental Law Journal 24 (1)

Caudevilla O, “Book review: Animals and the Law” (2016) Global Journal of Animal Law

Cavalieri P, “The Meaning of the Great Ape Project” (2015) Politics and Animals 1

Charles N, “My Family and Other Animals: Pets as Kin” (2008) Sociological Research Online 13(5)

Charnovitz S, “The Law of Environmental “PPMs” in the WTO: Debunking the Myth of Illegality” (2002) Yale Journal of International Law 27(1)

Charpleix L, “The Whanganui River as Te Awa Tupua: Place-based law in a legally pluralistic society” (2017) The Geographical Journal 184 (1)

Chartier G, ”Natural Law and Animal Rights” (2010) 23 Can. J. L. & Jurisprudence 33

Close K and Fagan J, “Animals are Regarded as Property in a Court of Law Can We Change the Property Status of Animals to “Living Property”?” (2013) available at https://pdfs.semanticscholar.org/b4bb/5bfc9ea9eac4c0b9b2a5438773de387265f0.pdf

Cochrane A and Steve Cooke S, “Humane Intervention: The International Protection of Animal Rights” (2016) available at https://lra.le.ac.uk/bitstream/2381/37111/2/Humane_InterventionFFD_REDRAFT2.pdf

Cohen C, “The case for the use of animals in biomedical research” (1896) The New England Journal of Medicine 1896

Colwell R, “Legal Personality of Natural Features: Recent International Developments and Applicability in Canada” (2017) Environmental Law Clinic University of Victoria

Connor R et al, “Social Evolution in toothed Whales” (1998) Trends in Ecology and Evolution 13 (6)

Connor R et al, “Complex social structures, alliances stability and mating access in a bottlenose dolphin 'super-alliance'“ (2001) Proceedings of the Royal Society B: Biological Sciences 268 (1464)

Contreras C, “Sentient Beings Protected by Law: Analysis of Recent Changes in Colombian Animal Welfare Legislation” (2016) Global Journal of Animal Law 2

Cupp R, “Moving Beyond Animal Rights : A Legal/Contractualist Critique”(2009) 46 San Diego L. Rev

Cupp R, “Edgy Animal Welfare” (2018) Denv. L. Rev. 95 Pepperdine University Legal Studies Research Paper No. 2018/11

Cupp R,“Litigating Nonhuman Animal Legal Personhood” (2018) 50 Texas Tech Law Review Legal Studies Research Paper Series Paper Number 2017/10

Cupp R, “Children, chimps, and rights: arguments from “marginal” cases” (2013) 45 Ariz. St. L.J. 1

Daly T, O’ Flynn S and O’ Sullivan M, (2018) “The Infuriating Resilience of the Fur Trade in Ireland: Part 1” Irish Law Times, 12

Daly T, O’ Flynn S and O’ Sullivan M, (2018) “The Infuriating Resilience of the Fur Trade in Ireland: Part 2” Irish Law Times, 11

Davidson S, “Non-human persons? Animal rights get legal leg up”(2015) available at http://www.cbc.ca/news/world/non-human-persons-animal-rights-get-legal-leg-up-1.3058148

Davison-Vecchione D and Pambos K, “Steven M. Wise and the Common Law Case for Animal Rights: Full Steam Ahead” (2017) Canadian Journal of Law & Jurisprudence XXX 2

De Almeida Silva T, “Brazilian Animal Law Overview: Balancing Human and Non-Human Interests” (2010) 6 J. Animal L. 81

Decker A, “Save The Whales-Save The Whalers-Wait, Just Save The International Whaling Commission: A Fresh Look at The Controversy Surrounding Cultural Claims to Whale”(2006) Southern California Interdisciplinary Law Journal 16 S. Cal. Interdis. L.J. 254

Deckha M, “Critical Animal Studies and Animal Law” (2012), 18 Animal L. 207

Deckha M, “Initiating a Non-Anthropocentric Jurisprudence: The Rule of Law and Animal Vulnerability under a Property Paradigm” (2013) 50 Alta. L. Rev. 788

DeCoux E, “Speaking for the Modern Prometheus: The Significance of Animal Suffering to the Abolition Movement” (2009) 16 Animal L. 9

DeMeo R, “Defining Animal Rights and Animal Welfare: A Lawyer's Guide”(2017) Florida Bar Journal 91-AUG Fla. B.J. 42

Dewey T, “Calling off the Hunt: The Morality of Supporting a Ban on Commercial Whaling” (2007) Animal Legal & Historical Center

Donnellan D, “The Cat and Dog Fur Regulation: A Case Study on the European Union’s Approach to Animal Welfare” (2018) Liverpool Law Rev 39

Driessen B, “Fundamental Animal Rights in European Law” (2017) European Public Law 3

Duckler G, “Two Major Flaws of The Animal Rights Movement” (2008) 14 Animal L. 179

Duncan I, “The changing concept of sentience” (2006) Applied Animal Behaviour Science

Dvorsky G, “The Struggle for Nonhuman Personhood” (2004) Journal of Evolution and Technology 24 (3)

Ebus B, “Colombia’s constitutional court grants rights to the Atrato River and orders the government to clean up its waters” (2017) available at https://news.mongabay.com/2017/05/colombias-constitutional-court-grants-rights-to-the-atrato-river-and-orders-the-government-to-clean-up-its-waters/

Eggel M and Grimm H, “Necessary, but Not Sufficient. The Benefit Concept in the Project Evaluation of Animal Research in the Context of Directive 2010/63/EU” (2018) Animals 8 (3)

Emblin R, “Colombian Court grants the Atrato River rights and protection” (2017) available at https://thecitypaperbogota.com/news/a-colombian-court-gives-the-atrato-river-constitutional-rights/17311

Emery N, “The Mentality of Crows: Convergent Evolution of Intelligence in Corvids and Apes” (2004) Science 306

Epstein R, “Animals as Objects, or Subjects, of Rights” (2002) (John M. Olin Program in Law and Economics Working Paper No. 171

Daly E, “The Ecuadorian Exemplar: The First-Ever Vindications of Constitutional Rights of Nature” (2012) RECIEL 21(1)

Evans E“ Constitutional Inclusion of Animal Rights in Germany and Switzerland: How Did Animal Protection Become an Issue of National Importance?” (2010) Society and Animals 18

Fasel R, Blattner C, Mannino A, and Baumann T, “Fundamental Rights for Primates” (2016) Policy paper by Sentience Politics

Favre D, “Living Property: A New Status for Animals Within the Legal System” (2010) 93 Marq L Rev 1021

Feinberg C, “Are Animals “Things”? (2016) available at Http://Harvardmagazine.Com/2016/03/Are-Animals-Things

Fernandez A, “Legal History and Rights for Nonhuman Animals: An Interview with Steven M. Wise” 2018 Dalhousie Law Journal 41

Fitzpatrick S “Animal morality: what is the debate about?” (2017) Biol Philos 32

Flannery S, “The thirteenth amendment won't help free willy” (2012) 15 Scholar: St. Mary's L. Rev. & Soc. Just. 29

Fordyce P, “Suffering in Non-Human Animals: Perspectives from Animal Welfare Science and Animal Welfare Law” (2017) Global Journal of Animal Law 5 (1)

Fouts R, “Apes, Darwinian Continuity, and the Law” (2004) Animal Law 10

Francione G, “Animal Welfare and the Moral Value of Nonhuman Animals” (2010) Law, Culture and the Humanities 6(1)

Francione G, “Animals as Property” (1996) 2 Animal L. I

Francione G, “Animal law animal rights theory and utilitarianism: relative normative guidance” (1997) 3 Animal L. 75

Francione G, “Animal rights and animal welfare” (1996) 48 Rutgers L. Rev. 397

Francione G,”Animal law animal rights theory and utilitarianism: relative normative guidance” (1997) 3 Animal L. 75

Fraundorfer M, “The Rediscovery of Indigenous Thought in the Modern Legal System: The Case of the Great Apes” (2017) Global Policy 9 (1)

Frew K, “From Property to Personhood: Can Nonhuman Animals Make the Transition?” (2014) Animal Law Compendium part 1 6

Funes Y, “The Colombian Amazon Is Now a ‘Person’, and You Can Thank Actual People” Environmental Justice available at https://earther.gizmodo.com/the-colombian-amazon-is-now-a-person-and-you-can-thank-1825059357

Gardner A and Gardner B, “Teaching Sign Language to a Chimpanzee” (1969) Science 664

Garner R, “Animal rights, political theory and the liberal tradition” (2002) Contemporary Politics 8(1)

Garner R, “Animal welfare, ethics and the work of the International Whaling Commission” (2001) Journal of Global Ethics, 7 (3)

Garner R, ‘Political Ideology and the Legal Status of Animals’ (2002) 8 Animal Law

Gavinelli A and Lakestani N, “Animal Welfare in Europe” (2010) Derecho Animal 1 (1)

Gavinelli A and Simonin D, “The Transport of Animals in the European Union: The Legislation, its Enforcement and Future Evolutions” (2003) Veterinary Research Communications, 27 Suppl 533

Gerritsen V, “Animal Welfare in Switzerland – constitutional aims, social commitment and a major challenge.” (2013) Global Journal of Animal Law 1

Goodkin S, “The Evolution of Animal Rights” (1986-1987) 18 Colum. Hum. Rts. L. Rev. 259

Goodman E, “Animal Ethics and the Law” (2006) Temple Law Review 79 (1291) 1300

Gordon S, “The Legal Rights of All Living Things” (2016) Environmental Law Institute, Washington, D.C. www.eli.org 45

Gould J, “Animal Cognition” (2004) Current Biology 14 (10) 372

Grear A, “It’s wrongheaded to protect nature with human-style rights” (2019) available at https://www.humansandnature.org/it-is-wrongheaded-to-protect-nature-with-human-style-rights

Greene N, “The first successful case of the Rights of Nature implementation in Ecuador.” Global Alliance for the Rights of Nature available at http://therightsofnature.org/first-ron-case-ecuador

Griffin D and Speck G, “New evidence of animal consciousness” (2004) Animal Cognition 7

Gronewold N, “Japan quits global whaling body, will resume commercial hunt” (2018) Science

Hare B, Call J and Tomasello M, “Do chimps know what conspecifics know?”(2001) Animal Behaviour 61

Harris D R, “The development of socio-legal studies in the United Kingdom” (1983) 3 Legal Studies

Harrop S, “Climate Change, Conservation and the Place for Wild Animal Welfare in International Law” (2011) J Environmental Law 23(3)

Henderson R, “ The Future of Whaling: Should the International Whaling Commission Create a Broadened Cultural Exemption to The Whaling Moratorium for Iceland?”(2005) GA. J. INT'L & COMP. L. 209

Herman L, “ What Laboratory Research Has Told Us about Dolphin Cognition” (2010) International Journal of Comparative Psychology 23 (3)

Herman L, “Comprehension of sentences by dolphins” (1984) Cognition 16

Herman L, “What Laboratory Research Has Told Us about Dolphin Cognition”(2010) International Journal of Comparative Psychology 23

Herman L, Morrel-Samuels P and Pack A “Bottlenosed dolphin and human recognition of veridical and degraded video displays of an artificial gestural language” (1990) Journal of Experimental Psychology 11 (2)

Herman L et al, “Dolphins (Tursiops truncatus) comprehend the referential character of the human pointing gesture” (1999) J Comp Psychol 113

Hill I, “Against the Utilitarian Argument for Animal Liberation: A Criticism of Peter Singer “(2010) 6

Holdron C, “The Case for Legal Personhood for Nonhuman Animals and the Elimination of their Status as Property in Canada” (2013) available at

https://tspace.library.utoronto.ca/bitstream/1807/42864/1/Holdron_Courtney_L_201311_LLM_thesis.pdf

Hoot W, Palmer R, and Patel A, “Nature's Rights: Rivers, Tress, Whales and Apes” available at http://www.brightergreen.org/files/rivers,trees,%20whales%20apes__policybrief9.18.14.pdf

Horgan R and Gavinelli A, “The expanding role of animal welfare within EU legislation and beyond” (2006) Livestock Science 103 (3)

Howton M, “International Regulation of Whaling: The Consequences of Norway’s decision to Hunt the Minke Whales” (1994) Hastings International and Comparative Law Review 18

Hsiao E, “Whanganui River Agreement: Indigenous Rights and Rights of Nature” (2012) 42:6 Environmental Policy & L 371

Hughes E and Meyer C, “Animal Welfare Law in Canada and Europe” (2000) 6 Animal Law 23

Humphreys R, “Contractarianism: On the Incoherence of the Exclusion of Nonhuman Beings” (2008) available at http://www.personal.ceu.hu/percipi/archive/200802/03_rh.pdf

Hurd I, “ Whaling in Europe is dependent on the continued willingness of governments to fund it at a loss” available at http://blogs.lse.ac.uk/europpblog/2013/02/18/whaling-europe-eu-norway-iceland-greenland-faroe-islands-cites-international-whaling-commission/

Huss R, “Valuing man's and woman's best friend: the moral and legal status of companion animals” (2002) 86 Marq. L. Rev. 47

Hutchison A, “The Whanganui River as A Legal Person” (2014) 39 Alternative L.J. 179

Inoue S and Matsuzawa T, “Working memory of numerals in chimpanzees “ (2007) Current Biology 1 (23)

Ireland Moore L, “A Review of Animal Rights: Current Debates and New Directions” (2005) Animal Law 11

Jaakkola K, Guarino E, Rodriguez M and Hecksher J, “Switching strategies: a dolphin’s use of passive and active acoustics to imitate motor actions” (2013) Animal Cognition 16 701

Jacques S, “Science and animal welfare in France and European Union: Rules, constraints, achievements” (2014) Meat Science 98 484

Janik V and Slater, “Vocal learning in mammals” (1997) Advanced Study Behaviour 26

Janik V et al, “Signature whistle shape conveys identity information to bottlenose dolphins” (2006) Proc Natl Acad Sci USA 103 (21)

Janik V, “Whistle matching in wild bottlenose dolphins (Tursiops truncatus)” (2000) Science 289 1355

Johnson C, “Observing Cognitive Complexity in Primates and Cetaceans” (2010) International Journal of Comparative Psychology 23 596

Johnson L, “Pushing nepa’s boundaries: using nepa to improve the relationship between animal law and environmental law” (2009) 17 N.Y.U. Envtl. L.J. 1367

Jones R, “Science, sentience, and animal welfare” (2013) Science and Engineering Ethics 20(2)

Kauffman G and Martin P, “When Rivers Have Rights: Case Comparisons of New Zealand, Colombia, and India” (2018) available at http://files.harmonywithnatureun.org/uploads/upload585.pdf

Kikou O, “The inhumane trade in European farm animals” available at http://www.euractiv.com/sections/agriculture-food/ending-cruelty-inhumane-trade-european-farm-animals-312866

Klinkenborg V, “Animal Personhood: Muddled Alternative to Real Protection” (2014) Yale Environment available at https://e360.yale.edu/features/animal_personhood_muddled_alternative_to_real_protection

Kolber A, “Standing Upright: The Moral and Legal Standing of Humans and Other Apes”(2001-2002) 54 Stan. L. Rev.

Korsgaard C, “A Kantian case for animal rights” (2012) available at http://www.people.fas.harvard.edu/~korsgaar/CMK.Animal.Rights.pdf 5

Korsgaard C, “Personhood, Animals and the Law.” (2013) Think 12 (34)

Kotzmann J, “Sentience: What It Means and Why It’s Important” (2020) available at https://sentientmedia.org/sentience-what-it-means-and-why-its-important/

Kramer L, “Case note: Seal Killing, the Inuit and European Union Law” (2012) Review of European Community and International Law 21 (3)

Kriesell H et al, “Identification and Characteristics of Signature Whistles in Wild Bottlenose Dolphins (Tursiops truncatus) from Namibia” (2004) PLoS One. 9(9)

Kurki V, “Animals, Slaves and Corporations: Analyzing Legal Thinghood” (2017) German Law Journal

Leavens D, Bard K, Hopkins W, “The mismeasure of ape social cognition” (2017) Animal Cognition 22

Lee N, “In Defense of Humanity: Why Animals Cannot Possess Human Rights” (2013-2014) Regent University Law Review 26 (2)

Lewis and Clark legal symposium, “Ten Years of Animal Law at Lewis & Clark Law School: Remarks: The Evolving Legal Status of Chimpanzees” (2003) 9 Animal L. 66

Linzey A, “The Ethical Case for European Legislation Against Fur Farming” (2006-2007) 13 Animal L. 147

Livingston M, “Desecrating the ark: animal abuse and the law's role in prevention” (2001) 87 Iowa L. Rev. 1

Lubinski J, “The cow says moo, the duck says quack, and the dog says vote! the use of the initiative the initiative to promote animal protection” (2003) 74 U. Colo. L. Rev. 1109

Ludwig R and O’ Gorman R, “A Cock and Bull Story? —Problems with the Protection of Animal Welfare in EU Law and Some Proposed Solutions” (2008) Journal of Environmental Law, 20 (3)

Mangel M, ”Whales, science, and scientific whaling in the International Court of Justice. Proc Natl Acad Sci U S A. 2016 Dec 20;113(51)

Marder M, “Should plants have rights?” (2013) available at http://www.michaelmarder.org/articles-etc/texts-in-pdf/

Marino L, “Cetacean Brain Evolution: Multiplication Generates Complexity” (2004) International Journal of Comparative Psychology 17 11

Marino L, “Dolphin Cognition” (2004) Current Biology 14 (21)

Marino L and Colvin C, “Thinking Pigs: A Comparative Review of Cognition, Emotion, and Personality in Sus domesticus” (2015) The Humane Society Institute for Science and Policy Animal Studies Repository

Marino L and Frohoff T, “Towards a new paradigm of non-captive research on cetacean cognition” (2011) PLoS ONE 6 (9)

Mario L, “Why animal welfarism continues to fail” (2016) Animal Sentience 7 (5)

Marsden W, “Animal Welfare Issues in Geography and Environmental Education: Some British Historical Perspectives” (2001) International Research in Geographical and Environmental Education 10 (4)

Martin-Ordas G, Haun D, Colmenares F and Call J, “Keeping track of time: evidence for episodic-like memory in great apes” (2010) Animal Cognition 13

McCullagh K, “The moral status of animals” (2005) UCL Juris Review 12 45

McDougal L, “REVIEW: Should Trees Have Standing? By Christopher D. Stone (1974) 49 Tul. L. Rev. 265

Melis A, Hare B and Tomasello M, “Chimpanzees only recruit the best collaborators” (2006) Science 311

Mellor D, “Moving beyond the “Five Freedoms” by Updating the “Five Provisions” and Introducing Aligned “Animal Welfare Aims” (2016) Animas (Basel) 6 (10)

Mence D, “The cetacean right to life revisited” (2015) International journal of Law in Context 11 (1)

Menendez E, “Why is whaling so important to Japan?” (2019) available at https://metro.co.uk/2019/07/01/whaling-important-japan-10095488/ 15/7/19

Mercado E et al, “ Memory for action events in the bottlenose dolphin” (1999) Animal Cognition 2

Mercado E et al, “Memory for recent actions in the bottlenose dolphin (Tursiops truncatus): repletion of arbitrary behaviors using an abstract rule” (1998) Animal Learning and Behavior 26

Michel M and Schneider Kayasseh E, “The Legal Situation of Animals in Switzerland: Two Steps Forward, One Step Back – Many Steps to go” (2011) Journal of Animal Law VII

Miller G, “The Rise in Animal Law” (2001) Science magazine 332 (6025)

Mount N, “Can a river have legal rights? A different approach to protecting the environment” (2017) available at https://www.independent.co.uk/environment/river-legal-rights-colombia-environment-pacific-rainforest-atrato-river-rio-quito-a7991061.html

Monso S “Animal morality: what it means and why it matters” (2018) The Journal of Ethics 22

Nattrass K, “Und Die Tiere” Constitutional Protection for Germany’s Animals (2004) 10 Animal L. 283

Newman A, “Governments now extending human rights to rivers” (2017) available at https://www.thenewamerican.com/tech/environment/item/25859-governments-now-extending-human-rights-to-rivers

Nielsen L and Calle M, “Systemic Implications of the EU – Seal Products Case” (2013) 8 Asian J. WTO & Int’l Health L & Pol’y 41

Nissani M, “ Ten cheers for interdisciplinarity: The case for interdisciplinary knowledge and research” (1997) The Social Science Journal 34 (2)

Nobis N, “Tom Regan on ‘kind’ Arguments Against Animal Rights and For Human Rights” 2014 Animal Studies Repository available at https://animalstudiesrepository.org/acwp_sata/17/

Nobis N, “Animals and Ethics 101: Thinking Critically About Animal Rights” (2016) Open Philosophy Press.

Nordin I “Animals don't have rights: A philosophical study” (2001) available at http://www.libertarian.co.uk/lapubs/philn/philn062.pdf

Nurse A, ”Species Justice: The Future Protection of Wildlife and the Reform of Wildlife Laws” (2013) The Green Criminology Monthly – available at https://www.greencriminology.org/monthly/feb2013/The%20Green%20Criminology%20Monthly%20-%20February%202013%20-%20Species%20Justice%20-%20The%20Future%20Protection%20of%20Wildlife%20and%20the%20Reform%20of%20Wildlife%20Laws%20by%20Angus%20Nurse.pdf

Nussbaum M, “Animal rights: The need for a theoretical basis” (2001) Harvard Law Review 114 (5)

O’ Donnell E and Talbot-Jones J, “At the Intersection of the Sacred and the Legal: Rights for Nature in Uttarakhand, India” (2001) Journal of Environment Law 30 (1)

O’ Donnell E and Talbot-Jones J, “Creating legal rights for rivers: Lessons from Australia, New Zealand and India” (2018) Ecology and Society 23 (1)

O’ Donnell E and Talbot-Jones J, “Will giving the Himalayas the same rights as people protect their future?” available at https://pursuit.unimelb.edu.au/articles/will-giving-the-himalayas-the-same-rights-as-people-protect-their-future

Olsson A, Pinto da Silva S, Townend D, and Sandøe P, “Protecting Animals and Enabling Research in the European Union: An Overview of Development and Implementation of Directive 2010/63/EU” (2016) ILAR Journal 5 (3)

Osvath M and Martin-Ordas G, “The future of future-oriented cognition in non-humans: theory and the empirical case of the great apes” (2014) Phil. Trans. R. Soc. B 369

Osvath M and Osvath H, “Chimpanzee (Pan troglodytes) and orangutan (Pongo abelii) forethought: self-control and pre-experience in the face of future tool use” (2008) Animal Cognition 11 (4)

Pack A and Herman L, “Sensory integration in the bottlenosed dolphin: immediate recognition of complex shapes across the senses of echolocation and vision” (2015) J Acoust Soc Am 98

Pallotta N, “Chattel or Child: The Liminal Status of Companion Animals in Society and Law” (2019) Social Sciences 8 (5)

Passantino A, “Animal welfare and protection during transport: the current legislative framework in the European Union” (2006) Ann Ist Super Sanità 42 (2225)

Patterson F and Linden E, “The Education of Koko” (1981) available at http://www.koko.org/sites/default/files/root/pdfs/teok_book.pdf ed

Pavone I, “Animal Experimentation and Animal Welfare in the Context of the European Union: Reflections on the Directive 2010/63/EU and Its Transposition in Italy” (2015) Animal Experimentation and Animal Welfare in the Context of the European Union 76

Pedersen N, “Detailed Discussion of European Animal Welfare Laws 2003 to Present: Explaining the Downturn” (2009) The Animal Legal and Historical Center available at https://www.animallaw.info/article/detailed-discussion-european-animal-welfare-laws-2003-present-explaining-downturn

Pederson N, “ Overview of European Animal Welfare Laws: 2003 to Present” (2009) Animal Legal & Historical Center Michigan State University College of Law 16 Animal L. 65

Pepperberg I and Lynn S, “Possible levels of animal consciousness with reference to grey parrots (Psittacus eritiacus)” (2001) Am Zool 40 12

Plass S, “Exploring animal rights as an imperative for human welfare” (2010) 112 W. Va. L. Rev. 406

Plotnik, de Waal and Reiss, “Self-recognition in an Asian elephant” (2006) Proc Natl Acad Sci U S A 103 (5)

Posner R, “Animal Rights” (2000) 110 Yale L.J. 527

Proctor H et al, “Searching for Animal Sentience: A Systematic Review of the Scientific Literature” (2013) Animals (Basel) 3 (3)

Proctor H, Carder G and Cornish A, “Searching for Animal Sentience: A Systematic Review of the Scientific Literature” (2013) Animals 882

Quintana Adriano E, “Natural Persons, Juridical Persons and Legal Personhood” (2017) Mexican Law Review 109

Reddy R, “Enshrining Animal Sentience into Law: Global Developments and Implications” (2020) available a https://www.americanbar.org/groups/tort_trial_insurance_practice/publications/committee-newsletters/enshrining_animal_sentience_into_law/

Reece T and Charkiw D, “Elephants in Zoos: A Dead End” available at https://www.elephantsforever.co.za/docs/Zoo%20Info%20for%20Councilors.pdf

Reiss and McCowan, “Spontaneous vocal mimicry and production by bottlenose dolphins (Tursiops truncatus): Evidence for vocal learning” (1993). J Comp Psychol 107

Reiss D and Marino L, “Mirror self-recognition in the bottlenose dolphin: A case of cognitive convergence”(2001) Proc Natl Acad Sci U S A 98 (10)

Reiss D, McCowan B and Marino L, “Communication and other Cognitive characteristics of bottlenose dolphins” (1997) Trend in Cognitive Science 1 (4)

Rendell L and Whitehead H, “Culture in whales and dolphins” (2001) Behavioural and Brain Sciences 24 (02)

Rhodes A, “ Saving Apes with the Laws of Men: Great Ape Protection in a Property-Based Animal Law System” (2013-2014) 20 Animal L. 191

Rogers L and Kaplan G, “Think or Be Damned: The Problematic Case of Higher Cognition in Animals and Legislation for Animal Welfare (2005-2006) 12 Animal L.

Rook D, “Should Great Apes have Human Rights” (2009) Web Journal of Current Legal Issues 1

Ruffle A, “Resurrecting the International Whaling Commission: Suggestions to Strengthen the Conservation Effort” (2002) 27 Brooklyn J. Int'L. 639

Russell S, “Corporate Personhood for Trees, Rivers and Nature?” available at https://newsmaven.io/indiancountrytoday/archive/corporate-personhood-for-trees-rivers-and-nature-MFe1eYpiLEuiHJE3vFCk_w/

Ryland D, “Advancing Animal Welfare: State, Society and Economy” available at http://eprints.lincoln.ac.uk/12375/7/12375%20Open%20access%20submitted%20draft%20Andrzej%20Frycz%20Modrzewski%20Krak%C3%B3w%20University%20in%20cooperation%20with%20the%20Jagiellonian%20University%20(3).pdf

Ryland D and Nurse A, “Mainstreaming after Lisbon: Advancing Animal Welfare in the EU International Market” (2013) European Energy and Environment Law Journal 22 (3)

Sabbrio P, “The relationship between humans and other animals in European animal welfare legislation” (2013) Relations 1 (1)

Sanders K, “Beyond Human Ownership? Property, Power and Legal Personality for Nature in Aotearoa New Zealand” (2018) Journal of Environmental Law 30 (2)

Sankoff P, “Opportunity Lost: The Supreme Court Misses a Historic Chance to Consider Question of Public Interest Standing for Animal Interests” (2012) 30 Windsor Y B Access Just (2)

Satz A, “Animals as Vulnerable Subjects: Beyond Interest-Convergence, Hierarchy, And Property (2009) 16 Animal L. 65

Schiff D, “Socio-Legal Theory: Social Structure and Law” (1976) Modern Law Review 13

Schiffman H, “The International Whaling Commission: Challenges from Within and Without”(2004), 10 ILSA J. Int'l & Comp. L. 367)

Schmahmann D and Polacheck L, “The Case Against Animal Rights” (1995) Boston College Environmental Law Review 22 (4) 749

Seed A et al, “Intelligence in Corvids and Apes: A Case of Convergent Evolution?” Ethology (2009) 115

Shad S, “Indian High Court Recognizes Nonhuman Animals as Legal Entities” (2019) available at https://www.nonhumanrights.org/blog/punjab-haryana-animal-rights/

Shelton D, “Nature as a legal person” (2015) available at https://journals.openedition.org/vertigo/16188

Shyam G, “The legal status of animals: The world needs to rethink its position” Alternative Law Journal available at https://www.altlj.org/feature-articles/980-the-legal-status-of-animals-the-world-rethinks-its-position

Singer P, “Progress for elephants and the animal rights movement” (2015) available at http://www.msnbc.com/msnbc/progress-elephants-and-the-animal-rights-movement

Singer P and Sosnowski J, “Fascination with Wikie the talking orca says more about us than her” (2018) available at https://www.smh.com.au/environment/conservation/fascination-with-wikie-the-talking-orca-says-more-about-us-than-her-20180302-p4z2ll.html

Sobbrio P, “The Relationship between Humans and Other Animals in European Animal Welfare Legislation” (2013) available at http://www.ledonline.it/index.php/Relations/article/view/8 6

Sowery K, “Sentient Beings and Tradable Products: The Curious Constitutional Status of Animals Under Union Law” (2018) Common Market Law Review 55 (1)

Spaventa, E, “Case C - 189/01 H. Jippes, Afedeling Groningen van de Nederlandse tot Bescherming van Dieren, Afedling Assen en omstreken van Nederlandse Vereniging tot Besherming van Dierer v Minister van Landbouw, Natuurbeheer en Visserij” (2002) Common Market Law Review 39 (5)

St. Pierre D, “The Transition from property to people: The road to the recognition of rights for nonhuman animals” (1998) Hastings Women's Law Journal 9 (2)

Stevenson P, “European Union Legislation on the welfare of farm animals” (2012) Compassion in World Farming available at https://www.ciwf.org.uk/media/3818623/eu-law-on-the-welfare-of-farm-animals.pdf

Stevenson P, “The World Trade Organisation Rules: A Legal Analysis of their Adverse Impact on Animal Welfare” (2001) Compassion in World Farming available at https://trade.ec.europa.eu/doclib/docs/2005/april/tradoc_122188.pdf

Steward H, “Animals aren’t persons, but is it time for a neologism?” (2016) Animal Sentience 155

Stone C, “Should Trees Have Standing? Toward Legal Rights for Natural Objects” (1972) South. Calif. Law Rev.1972 45

Suhre S, “Misguided morality: The Repercussions of the International Whaling Commission's Shift from a Policy of Regulation to One of Preservation (1999) 12 Geo. Int'l Envtl. L. Rev. 305 2

Swimbank A, “Like Products, Animal Welfare and the World Trade Organisation”(2006) Journal of World Trade 40 (4)

Sykes K, “The Appeal to Science and the Formation of Global Animal Law” (2016) European Journal of International Law 27 (2)

Sykes K, “The Whale, Inside: Ending Cetacean Captivity in Canada Canadian Journal of Comparative and Contemporary Law (2019) 5 (1)

Sykes K and Black V, “Don’t Think About Elephants” (2012) 63 UNBLJ 145

Sztybel D, “The Rights of Animal Persons” Animal Liberation Philosophy and Policy Journal, (2006) 4 (1)

Tannenbaum J, “Animals and the Law: Property, Cruelty, Rights” (1995) Social Research 62(3)

Tannenbaum J, “What is animal law?”(2013) 61 Clev. St. L. Rev. 891

Tarantola M et al, “Does the application of directive 2001/93/EC improve pigs’ welfare and productive performances?” (2007) Italian Journal of Animal Science 6 (1)

Taylor K, “Ten Years of REACH – An Animal Protection Perspective” (2018) ATLA 46 347

Thiermann A and Babcock S, “Animal Welfare and international trade” (2005) Rev. ciri tech Off. nt. Epiz., 24 (2)

Thomas D, “Some Aspects of Socio-Legal Research at Yale” (1931) American Journal of Sociology 37 (2)

Thompson R and Oden D, “Categorical Perception and Conceptual Judgments by Nonhuman Primates: The Paleological Monkey and the Analogical Ape” (2000) Cognitive Science 24 (3)

Tjärnström E, “Ethical Impact on EU Animal Welfare policies: the example of Article 13” (2010) First cycle, G2E. Skara: SLU, Dept. of Animal Environment and Health 7 available at http://stud.epsilon.slu.se/1572/

Tomaselli P, “Detailed Discussion of International Comparative Animal Cruelty Laws” (Michigan State University College of Law, 2003) available at https://www.animallaw.info/article/detailed-discussion-international-comparative-animal-cruelty-laws

Totten T, “Should Elephants Have Standing?” (2015) 6 (1) UWO J Leg Stud 2

Tracy R, “Fido is One of a Kind: Looking Beyond Fair Market Value in Damages Against Pets” (2013) available at https://pdfs.semanticscholar.org/23a2/7a3bf41f337bd8ea4cb1d35031e47adad742.pdf accessed 15/9/17

Tribe L, “Ten lessons our constitutional experience can teach us about the puzzle of animal rights: the work of Steven M. Wise” (2001) Animal Law 7

Tudor S, “Some Implications for Legal Personhood of Extending Legal Rights to Non-Human Animals” (2010) Australian Journal of Legal Philosophy 35

Tuohey J, “Fifteen years after “Animal Liberation”: has the animal rights movement achieved philosophical legitimacy?” (1992) The Journal of Medical Humanities

Vels K, “Trade Restrictions on animal welfare grounds in the European Union” (2004) available at http://rgsl.edu.lv/images/stories/publications/RWP19Vels.pdf

Vesilind P, “Continental Drift: Agricultural Trade and the Widening Gap between European Union and United States Animal Welfare Laws” (2011) 12 Vt. J. Envtl. L. 232

Villanueva G, “The ‘Bible’ of the animal movement: Peter Singer and animal liberation 1970-1976” (2016) History Australia 13

Villavicencio Calzadilla p and Kotzé L, “Living in Harmony with Nature? A Critical Appraisal of the Rights of Mother Earth in Bolivia” (2018) Transnational Environmental Law 20

Wagner D, 'Competing Cultural Interests in the Whaling Debate: An Exception to the Universality of the Right to Culture' (2004) 14 Transnat'l L & Contemp Probs 849 -854

Warneken F et al, “Spontaneous Altruism by Chimpanzees and Young Children “ (2007) PLoS Biol 5(7)

Weed C, “The World Beyond Seaworld: A Comparative Analysis of International Law Protecting Cetacea in Captivity” (2018) Ocean and Costal Law Review 23(2)

Westerman A, “Should Rivers Have Same Legal Rights as Humans? A Growing Number of Voices Say Yes” (2019) available at https://www.kcur.org/post/should-rivers-have-same-legal-rights-humans-growing-number-voices-say-yes#stream/0

White S, “Companion Animals: Members of the Family or Legally Discarded Objects?” (2009) 32(3) University of New South Wales Law Journal 852

Whiten A, “Imitation and cultural transmission in apes and cetaceans” (2001) Behavioural Brain Sciences 24

Whittemore M, “The Problem of Enforcing Nature’s Rights Under Ecuador’s Constitution: Why The 2008 Environmental Amendments Have No Bite” (2011) Pacific Rim Law & Policy Journal 20 (3)

Wicklund P, “Abrogating property status in the fight for animal rights” (1997) 107 Yale L.J. 569

Wills J, “The Legal Recognition of Sentience: What Implications for Killing Animals?”(2018) Animal Justice UK available at https://www.alaw.org.uk/wp-content/uploads/Animal-Justice-UK-5-June-2018.pdf

Williamson C, “India Announces Dolphinarium Ban” (2013) available at https://us.whales.org/2013/05/20/india-announces-dolphinarium-ban/

Willows A and Baines – Rock M “Two perspectives on animal morality” (2018) Zygon 53(4)

Wise S, “Animal Thing to Animal Person--Thoughts on Time, Place, And Theories” (1999) 5 Animal L. 61

Wise S, “Rattling Cage defended quoting Nussbaum M. “Animal Rights: The Need for a Theoretical Basis”(2001) Harvard Law Review 114 1548

Wise S, **“**Legal Personhood and the Nonhuman Rights Project**,”** (2010) 17 Animal Law 1

Wise S, “Legal Status of Nonhuman Animals,” **(**2002) 8 Animal Law 1

Wise S, “Animals are persons, too” Earth Island Journal (2015) available at http://www.earthisland.org/journal/index.php/eij/article/animals_are_persons_too/

Wise S, “The struggle for nonhuman rights” (2015) available at www.opendemocracy.net /openglobalrights/steven-m-wise/struggle-for-nonhuman-rights

Wood A, “Kant on Duties regarding Nonrational Nature” (1998) Proceedings of the Aristotelian Society Supplement LXXII 95

Xitco M et al, “Spontaneous pointing by bottlenose dolphins (Tursiops truncatus)” (2001) Anim Cogn 4

Websites

Animal Legal Defense Fund “Sentient Legislation: ALDF’s Canadian Province Rankings Motivate Change” (2015) available at https://aldf.org/article/sentient-legislation-aldfs-canadian-province-rankings-motivate-change/

Affidavit of psychologist James Anderson which was attached to Non-Human Rights Project case law available at https://www.nonhumanrightsproject.org/content/uploads/Suffolk-Ex.-4-Anderson-Affidavit-to-VP.pdf

Animal Defenders International http://www.ad-international.org/animals_in_entertainment/go.php?id=2528

Animal Legal and Historical Center https://www.animallaw.info/article/detailed-discussion-european-animal-welfare-laws-2003-present-explaining-downturn

Animal Legal Defense Fund at http://aldf.org/press-room/groundbreaking-lawsuit-argues-animals-right-sue-abusers-court/

Animal Legal Defense Fund at https://aldf.org/issue/animals-legal-status/

Animal Legal Defense Fund available at https://aldf.org/article/animal-fighting-facts/animal-fighting-state-laws/

Animal Legal Defense Fund https://aldf.org/article/animal-legal-defense-fund-appeals-dismissal-of-groundbreaking-lawsuit-for-abused-horse/

Animal Legal Defense Fund website available at https://aldf.org/article/unique-connecticut-law-allows-court-appointed-advocates-to-represent-animals/ accessed 5/9/19

Animal Rights debate between Peter Singer and Richard Posner in Slate magazine (2001) available at https://www.utilitarian.net/singer/interviews-debates/200106--.htm

AP news https://apnews.com/e0b2e676ae1447a09fab4c8807ac0dea/State-experiments-with-court-advocates-for-abused-animals

ASPCA available at https://www.aspca.org/animal-cruelty/dogfighting/closer-look-dogfighting

ASPCA https://www.aspca.org/animal-cruelty/dogfighting/closer-look-dogfighting many countries have banned the use of wild animals in circuses

BBC news https://www.bbc.com/news/world-asia-46682976

BBC news https://www.bbc.com/news/world-asia-china-42532017

Blackfish movie http://www.blackfishmovie.com/

Cambridge dictionary available at https://dictionary.cambridge.org/dictionary/english/sentience

Compassion in World Farming available at https://www.ciwf.org.uk/farm-animals/animal-sentience/

CBC http://www.cbc.ca/news/world/non-human-persons-animal-rights-get-legal-leg-up-1.3058148

CBC news article available http://www.cbc.ca/m/touch/world/story/1.3058148

Central Zoo Authority available at http://cza.nic.in/ban%20on%20dolphanariums.pdf

Centre for Animals and Social Justice available at http://www.casj.org.uk/animal-protection-commission

Cetacean Rights https://www.cetaceanrights.org/

Child and Family Agency website is available at https://www.tusla.ie/

Christophe Boesch affidavit attached to case law issued by the Nonhuman Rights Project available at https://www.nonhumanrightsproject.org/content/uploads/Suffolk-Ex.-5-Boesch-Affidavit-to-VP.pdf

Christophe Boesch affidavit attached to case law issued by the Nonhuman Rights Project point available at https://www.nonhumanrightsproject.org/content/uploads/Suffolk-Ex.-5-Boesch-Affidavit-to-VP.pdf

Clark Mindock “Canada passes law banning holding dolphins and whales in captivity” available at https://www.independent.co.uk/news/world/americas/canada-free-willy-dolphins-whales-porpoises-captivity-a8954551.html

CNN https://edition.cnn.com/2014/02/09/world/europe/denmark-zoo-giraffe/index.html

Community Environmental Legal Defense Fund, Press Release available at https://celdf.org/2017/05/press-release-colombia-constitutional-court-finds-atrato-river-possesses-rights/

Compassion in World Farming available at https://www.ciwf.org.uk/news/2007/11/barren-battery-cages-to-go

Compassion in World Farming “Animals are ‘sentient’ in New Zealand” (2015) available at https://www.ciwf.org.uk/news/2015/05/animals-are-sentient-in-new-zealand

European Commission “Laying hens” available at https://ec.europa.eu/food/animals/welfare/practice/farm/laying_hens_en

European Commission “Ban on animal testing” available at https://ec.europa.eu/growth/sectors/cosmetics/animal-testing_en

European Animal Research Association “EU regulations on animal research” available at https://www.eara.eu/animal-research-law

European Commission “Trade in seal products” available at https://ec.europa.eu/environment/biodiversity/animal_welfare/seals/seal_hunting.htm

European Commission “Does the EU respect animal welfare during transport?” (2019) United left, European parament group available at https://www.guengl.eu/500029539-2/

European Commission paper on “The Animal Welfare Officer” available at https://ec.europa.eu/food/sites/food/files/animals/docs/aw_prac_slaughter_awo-brochure_24102012_en.pdf

European Commission http://ec.europa.eu/health/ph_risk/committees/04_scher/docs/scher_o_110.pdf

European Food Safety Authority https://www.efsa.europa.eu/en/press/news/051222

EU Scientific Veterinary Committee https://ec.europa.eu/food/sites/food/files/animals/docs/aw_arch_1997_intensively_kept_pigs_en.pdf

Europa https://ec.europa.eu/info/law/law-making-process/applying-eu-law_en

European Animal Research Association (EARA) website available at http://eara.eu/en/animal-research/animal-research-statistics-europe/

European Society of Dog and Animal Welfare available at http://www.esdaw-eu.eu/the-eu-and-animal-welfare.html

Four Paws https://www.four-paws.org/about-us/four-paws-about-us

Friends of the Earth available at https://www.foe.ie/

Fur Free Alliance https://www.furfreealliance.com/fur-bans/ and https://www.peta.org/issues/animals-used-for-clothing/animals-used-clothing-factsheets/inside-fur-industry-factory-farms/

Great Ape Project https://www.projetogap.org.br/en/noticia/gap-project-spain-international-launches-campaign-great-apes-living-world-heritage-2/

Great Ape Project https://www.projetogap.org.br/en/noticia/the-first-20-days-of-cecilia/ and https://www.nonhumanrights.org/blog/chimpanzee-cecilia/

Greenpeace available at https://www.greenpeace.org/international/?s=animal+protection&orderby=_score

Huffington post https://www.huffpost.com/entry/anatomy-of-the-blackfish-_b_9511932?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAAMvT7VIKzZjw8miakYnYwperI1jQVuy_nDEgCs0wQF9h_6Doeq4LBYtWx2_DsW11Fu0paTjNiuxSAVZel9uQ_ESahCkZZZuSXYjKyo4s6kqSFOyot61YBDWGjATocUcjDPL98yBg1GjurX4_cjxAI5s73n2i9Q-mc6oUvqryZVuG

Humane Slaughter Association available at https://www.hsa.org.uk/restraint/stun-box

Humane Society International https://www.hsi.org/issues/whaling/

Humane Society International https://www.hsi.org/news-media/saving-dogs-from-chinas-dog-meat-trade/

Humane Society International/ Canada available at https://www.hsi.org/news-media/canada-bans-cetacean-captivity-and-canada-bans-cetacean-captivity/

Independent.co.uk https://www.independent.co.uk/news/uk/home-news/hunts-illegal-hundreds-autumn-season-figures-animal-rights-hunting-ban-england-wales-a8286336.html

Independent.co.uk https://www.independent.co.uk/news/uk/politics/theresa-may-fox-hunting-vote-abandon-overturn-ban-latest-animals-andrew-marr-857-a8146161.html

India's Minister for Environment, Forest and Climate policy paper on dolphinariums available at http://envfor.nic.in/content/policy-establishment-dolphinarium-updated-may-17-2013

International Animal Law and Ethics Consultant available at http://www.afgoetschel.com/en/

International Fund for Anima Welfare report available at https://s3.amazonaws.com/ifaw-pantheon/sites/default/files/legacy/2014-IFAW-brief-on-seal-regime.pdf

International Fund for Animal Welfare website available at http://www.ifaw.org/united-states/news/japan-announces-plans-new-antarctic-whale-hunt-months-after-world-court-finds-its-scientific-wh

International Whaling Commission https://iwc.int/home

ISPCA website available at https://www.ispca.ie/news/detail/thank_you_to_the_department_of_agriculture_food_and_the_marine

Jacksonville Journal Courier "The legal rights of non-humans" (2015) available at http://myjournalcourier.com/news/387/the-legal-rights-of-non-humans

Jane Goodall's Affidavit for the NhRP available at https://www.nonhumanrights.org/content/uploads/33.-Jane-Goodall-Affidavit-Kiko.pdf

Karnail Singh and others v State of Haryana https://indiankanoon.org/doc/1036527/

Laura Bridgeman One Green Planet "Dolphins Are Persons Too, Why it's Time We Recognize Legal Rights of Animals" available at http://www.onegreenplanet.org/animalsandnature/dolphins-are-persons-too-why-its-time-we-recognize-legal-rights-of-animals/

Marc Beckoff Psychology Today "Why justice for animals is the social movement of our time" available at https://www.psychologytoday.com/blog/animal-emotions/201603/why-justice-animals-is-the-social-movement-our-time

Merriam Webster Dictionary available at https://www.merriam-webster.com/dictionary/sentience

National Geographic https://www.nationalgeographic.com/animals/2019/03/orcas-captivity-welfare/

National Geographic https://news.nationalgeographic.com/2016/03/160317-seaworld-orcas-killer-whales-captivity-breeding-shamu-tilikum/

National Observer https://www.nationalobserver.com/2019/11/07/opinion/whale-jails-are-banned-canada-theyre-thriving-elsewhere?fbclid=IwAR3YYK-KL_-_q2JkvIc02BFSZe2p0z0Ka9Qud7f2-jjfOKNXqLS9iPg3iJE

New York news https://www.nyunews.com/2018/04/15/04-16-news-chimp/ accessed 16/04/18

New Yorker magazine https://www.newyorker.com/magazine/2017/01/16/killing-animals-at-the-zoo

New Zealand Veterinary Association website available at https://www.nzva.org.nz/page/positionsentience

NhRP Philosophers brief available at https://www.nonhumanrights.org/content/uploads/In-re-Nonhuman-Rights-v.-Lavery-Proposed-Brief-by-PHILOSOPHERS-74435.pdf 2-3

NhRP website available at https://www.nonhumanrights.org/blog/chimpanzee-cecilia/

Nonhuman rights project http://www.nonhumanrightsproject.org/2014/12/22/argentine-appeals-court-rules-orangutan-has-right-to-habeas-corpus/

Nonhuman Rights Project http://www.nonhumanrightsproject.org/2013/11/07/empathy-in-chimpanzees/

Nonhuman rights project website available at http://www.nonhumanrightsproject.org/

One Green Planet available at http://www.onegreenplanet.org/animalsandnature/5-reasons-you-should-never-visit-a-theme-park-that-keeps-wild-animals/

One Green Planet available at https://www.onegreenplanet.org/animalsandnature/banning-wild-animals-in-circuses/

One Green Planet https://www.onegreenplanet.org/animalsandnature/10-countries-that-have-banned-wild-animals-in-circuses/

Oxford Centre for Animal Ethics https://www.oxfordanimalethics.com/what-we-do/summer-school-2017/

PETA http://www.peta.org/blog/peta-study-shows-a-staggering-increase-in-animal-use-in-experiments/

PETA https://www.peta.org/blog/victory-bolivia-bans-use-animals-circuses/

PETA https://www.peta.org/features/fur-bans-fur-free-future/

PETA https://www.peta.org/features/ringling/ This was deemed as “the cruellest show on Earth”

Peter Singer, wired.com “There Is No Good Reason to Keep Apes in Prison” available at http://www.wired.com/2015/05/peter-singer-no-good-reason-keep-apes-prison/

RSPCA https://kb.rspca.org.au/what-is-the-rspcas-view-on-dolphins-in-captivity_635.html and https://www.humanesociety.org/resources/marine-mammals-captivity accessed 01/10/17

RSPCA website “Do trade rules of the World Trade Organisation affect our animal welfare laws? available at http://kb.rspca.org.au/Do-the-rules-of-the-World-Trade-Organisation-affect-our-animal-welfare-laws_498.html

RSPCA “What is animal sentience and why is it important? (2019) available at https://kb.rspca.org.au/knowledge-base/what-is-animal-sentience-and-why-is-it-important/

RTE news “Indian Supreme Court rules rivers are not people” available at https://www.rte.ie/news/2017/0707/888557-india-rivers/

RTE News https://www.rte.ie/news/newslens/2019/0701/1059413-japan-whaling/

“Research Methods: Doctrinal Methodology” available at https://uweascllmsupport.wordpress.com/2017/01/18/research-methods-doctrinal-methodology/

"Sacred Rivers in India, New Zealand Granted Legal Personhood" available at https://rlp.hds.harvard.edu/news/sacred-rivers-india-new-zealand-granted-legal-personhood

Science magazine https://www.sciencemag.org/careers/2016/03/elsewhere-science-funding-animal-research-and-more

ScienceDaily available at https://www.sciencedaily.com/releases/2017/08/170831091457.htm

"The Fight for Legal Rights for Animals"2014 debate available at https://thedianerehmshow.org/shows/2014-04-28/fight-legal-rights-animals

"Theoretical Research" available at https://www.sciencedirect.com/topics/computer-science/theoretical-research

Teagasc website available at https://www.teagasc.ie/media/website/animals/beef/Managing-Welfare.pdf Teagasc is the semi-state authority in the Republic of Ireland responsible for research and development, training and advisory services in the agri-food sector

Tetsuro Matsuzawa affidavit attached to NhRP case law available at https://www.nonhumanrightsproject.org/content/uploads/Suffolk-Ex.-9-Matsuzawa-Affidavit-to-VP.pdf

The British Hen Welfare Trust available at https://www.bhwt.org.uk/egg-industry/enriched-cages/

The Great Ape Project https://www.projetogap.org.br/en/world-declaration-on-great-primates/

The Great Ape Project website available at www.projetogap.org

The Guardian https://www.theguardian.com/world/2008/jun/26/humanrights.animalwelfare

The Guardian https://www.theguardian.com/environment/2018/dec/26/japan-confirms-it-will-quit-iwc-to-resume-commercial-whaling

The Guardian https://www.theguardian.com/environment/2018/mar/07/norway-boosts-whaling-quota-international-opposition

The Guardian “Foxhunting ban being ignored, say environmental groups” available at https://www.theguardian.com/uk-news/2018/dec/26/foxhunting-ban-being-ignored-say-environmental-groups

The Guardian “Bolivia bans all circus animals” available at https://www.theguardian.com/world/2009/jul/31/bolivia-bans-circus-animals accessed 17/09/19

The Guardian https://www.theguardian.com/environment/2011/apr/10/bolivia-enshrines-natural-worlds-rights

The Guardian https://www.theguardian.com/environment/2018/dec/26/japan-confirms-it-will-quit-iwc-to-resume-commercial-whaling

The Guardian https://www.theguardian.com/environment/2018/dec/28/revealed-industrial-scale-farms-receive-millions-in-subsidies

The Guardian https://www.theguardian.com/environment/2019/feb/12/nearly-a-fifth-of-eu-budget-goes-on-livestock-farming-greenpeace

The Guardian https://www.theguardian.com/science/2016/jul/20/rise-in-number-of-animals-used-in-uk-research-home-office-report-shows

The Guardian https://www.theguardian.com/world/2017/mar/01/lucy-the-elephant-canada-edmonton-valley-zoo

The Guardian https://www.theguardian.com/world/2017/mar/16/new-zealand-river-granted-same-legal-rights-as-human-being

The History of Whaling and the International Whaling Commission (IWC) available at http://wwf.panda.org/?13796/The-History-of-Whaling-and-the-International-Whaling-Commission-IWC

The Independent “Denmark bans kosher and halal slaughter as minister says ‘animal rights come before religion’” http://www.independent.co.uk/news/world/europe/denmark-bans-

halal-and-kosher-slaughter-as-minister-says-animal-rights-come-before-religion-9135580.html

The Independent https://www.independent.co.uk/environment/a-simple-reason-to-stop-whaling-its-cruel-63495.html and https://www.bbc.co.uk/newsround/46715160

The Independent https://www.independent.co.uk/environment/japan-whaling-start-2019-whales-commercial-iwc-environment-conservation-a8699381.html

The Irish Examiner https://www.irishexaminer.com/breakingnews/ireland/record-number-of-calls-to-iscpa-926610.html

The Irish Examiner https://www.irishexaminer.com/breakingnews/ireland/cabinet-signs-off-on-phased-ban-on-fur-farms-933015.html

The Irish Times https://www.irishtimes.com/news/ireland/irish-news/irish-fur-farmers-feel-the-chill-as-ban-phased-in-across-eu-1.3943287?mode=amp&fbclid=IwAR34b0dMY-BkrAOefk4h3pGyzbGoqodFXIPZc-LXogEy27-Fl4C5eGm_Jm4

The Irish Times https://www.irishtimes.com/news/ireland/irish-news/ban-on-use-of-wild-animals-in-circuses-as-of-2018-welcomed-1.3286010

The Journal https://www.thejournal.ie/greyhound-industry-ross-4777297-Aug2019/

The Merriam-Webster dictionary https://www.merriam-webster.com/legal/natural%20person

The Telegraph available at https://www.telegraphindia.com/opinion/animal-protection-groups-must-distance-themselves-from-hatred/cid/1686356

The Telegraph https://www.telegraph.co.uk/culture/books/8916880/To-the-Spanish-bullfighting-is-much-more-than-a-sport.html and https://www.irishexaminer.com/sport/columnists/paul-rouse/coursing-the-debate-that-divides-441021.html

The Telegraph https://www.telegraph.co.uk/films/2016/06/04/seaworld-vs-blackfish-the-film-that-saved-the-whales/

University of Oxford Practical Ethics “On the Supposed Importance of Cultural Traditions for Whaling Practice” available at http://blog.practicalethics.ox.ac.uk/2014/09/on-the-supposed-importance-of-cultural-traditions-for-whaling-practice/

Whale and Dolphin Conservation https://uk.whales.org/our-4-goals/stop-whaling/whaling-in-iceland/

Whale and Dolphin Conservation website available at http://us.whales.org/whales-and-dolphins/brain-power

Whale and Dolphin Conservation website available at https://uk.whales.org/our-4-goals/stop-whaling/

Whale Sanctuary Project website https://whalesanctuaryproject.org/canada-bans-captivity-of-whales-dolphins-and-porpoises/ and Humane Society International Canada https://www.globenewswire.com/news-release/2019/06/10/1866481/0/en/Humane-Society-International-Canada-hails-landmark-victory-as-Canada-bans-whale-dolphin-and-porpoise-captivity.html

Winnie Kiiru, Zoocheck “The Sad State of Captive Elephants in Canada” available at http://www.zoocheck.com/wp-content/uploads/2015/06/Sad-State-ReportREV.pdf

World Organisation for Animal Health website available at https://www.oie.int/

World Trade Organisation https://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr_e.htm

World Wildlife Fund https://www.wwf.org.uk/updates/what-impact-chinas-ivory-ban

Worldwide Circus Bans at http://www.ad-international.org/animals_in_entertainment/go.php?id=281

“What is Empirical Research?” available at http://www.writeawriting.com/academic-writing/empirical-research/

“WTO ‘morals’ decision could escalate animal welfare disputes” available at http://www.politico.com/story/2014/05/wto-eu-seal-product-ban-canada-norway-107004.html

Policy and research papers

Egan S, UCD Working Papers in Law, Criminology & Socio-Legal Studies Research Paper No.19/2017 The Doctrinal Approach in International Human Rights Scholarship

Fasel R, Blattner C, Mannino A and Baumann T "Fundamental Rights for Primates" (2016) Policy paper by Sentience Politics (1)

India's Minister for Environment, Forest and Climate policy paper on dolphinariums available at http://envfor.nic.in/content/policy-establishment-dolphinarium-updated-may-17-2013

The Federation of Veterinarians of Europe position paper: <www.fve.org/uploads/publications/docs/065_long_distance_transport_of_livestock__160927__.pdf>. See also "Opinion of the Scientific Panel on Animal Health and Welfare (EFSA) on a request from the Commission related to the welfare of animals during transport", 44 The EFSA Journal (2004), 1-36

Vels K "Trade restrictions on animal welfare grounds in the European Union" (2004) RGSL working papers 18 available at http://www.rgsl.edu.lv/images/stories/publications/RWP19Vels.pdf

Reports

Broom D, "Animal Welfare in the European Union" (2017) European Parliament Policy Department, Citizen's Rights and Constitutional Affairs, available at https://www.researchgate.net/profile/Donald_Broom/publication/315721435_Animal_Welfare_in_the_European_Union/links/58dea012aca272059aaac6f2/Animal-Welfare-in-the-European-Union.pdf

Compassion in World Farming "The welfare of farmed fish during slaughter in the European Union" (2018) available at

https://www.compassioninfoodbusiness.com/media/7434891/ciwf-2018-report__the-welfare-of-farmed-fish-during-slaughter-in-the-eu.pdf

European Commission “Restraining systems for bovine animals slaughtered without stunning (2015) available at https://ec.europa.eu/food/sites/food/files/animals/docs/aw_practice_slaughter_com_borest_sum_en.pdf

European Commission “Attitudes of Europeans towards Animal Welfare” (2016) available at ec.europa.eu

European Commission “The welfare of animals during transport (details for horses, pigs, sheep and cattle” (2002) available at https://ec.europa.eu/food/sites/food/files/safety/docs/sci-com_scah_out71_en.pdf

House of Lords select committee meeting “The Treaty of Lisbon: An Impact Assessment” (2007-8) available at https://publications.parliament.uk/pa/ld200708/ldselect/ldeucom/62/62.pdf

The European Food Safety Authority “Report on the welfare of animals during transport” (2002) available at ec.europa.eu

Wildlife and Countryside Link and the UK Centre for Animal Law (A-Law) “Brexit: getting the best deal for animals” (2018) available at https://www.rspca.org.uk/documents/1494939/7712578/Brexit+-+getting+the+best+for+animals+%28PDF+4.24MB%29.pdf/0b1fece7-d734-dd0c-b787-5d7ea805604b?t=1558099775756

Dissertations

Blosh M, “The History of Animal Welfare Law and the Future of Animal Rights” (2012) Electronic Thesis and Dissertation Repository 803