

# **ANIMAL RIGHTS**

## **A MORAL AND LEGAL DISCUSSION ON THE STANDING OF ANIMALS IN SOUTH AFRICAN LAW**

Dissertation prepared by Kirsten Youens in fulfilment of Environmental Law Masters 2001

**ABSTRACT**

Animals have been exploited, used, tortured and killed by humans since time began. Although there has been a parallel trend of caring for animals, given the unsurpassed destruction of animals that takes place today, this trend has achieved very little. Never before in the history of humankind has there been such cruelty on such a massive scale. There is no doubt that there is a need to recognise animals as having interests and requiring special and comprehensive legal protection. It is unlikely that there is going to be a change in legislation arising out of the public's moral shift in attitude as the attitude of society is unlikely to change voluntarily. Therefore, it is necessary to enforce such a change by granting animals legal standing in South African law.

## CONTENTS

1	INTRODUCTION .....	4
2	RIGHTS AND LEGAL STANDING IN SOUTH AFRICAN LAW.....	7
3	THE HUMAN USE OF ANIMALS .....	10
	3.1 Animals in Farming .....	10
	3.1 Animals in Research .....	12
	3.2 Animals in Entertainment.....	13
	3.3 Cultural and Religious Use of Animals.....	15
	3.4 In summary .....	16
4	SOCIAL ATTITUDES.....	18
5	MORALITY AND PHILOSOPHY.....	19
6	LEGISLATION AND LEGISLATIVE ANALYSIS (SOUTH AFRICA).....	23
	6.1 National Legislation.....	25
	6.1.1 The Constitution 108 of 1996.....	25
	6.1.2 Animal Protection Act 71 of 1962 .....	25
	6.1.3 Societies for the Prevention of Cruelty to Animals Act 169 of 1993 .....	27
	6.1.4 The Performing Animals Protection Act 24 of 1935.....	29
	6.1.5 Sea Birds and Seals Protection Act 46 of 1973.....	29
	6.1.6 The Meat Safety Act 40 of 2000 .....	29
	6.1.7 The Animal Health Act 7 of 2002.....	30
	6.1.8 The Hazardous Substances Act 15 of 1973 .....	31
	6.1.9 National Principles, Norms and Standards for the Sustainable Use of Large Predators In South Africa .....	31
	6.2 Provincial Legislation .....	32
	6.3 Local laws .....	34
	6.4 In summary .....	35
7	INTERNATIONAL LAW COMPARISON.....	36
8	INTERNATIONAL TREATIES.....	43
9	WELFARE VERSUS RIGHTS .....	43
10	CHANGING ATTITUDES IN SOUTH AFRICA .....	44
11	THE WAY FORWARD .....	48
12	CONCLUSION .....	54
13	BIBLIOGRAPHY .....	57

**'I hold that, the more helpless a creature, the more entitled it is to protection by man from the cruelty of man'<sup>1</sup>**

## 1. INTRODUCTION

The exploitation of animals by humans is as deeply entrenched in 2003 as the exploitation of our fellow humans was in South Africa in 1948.<sup>2</sup> The progress in human rights that has characterised our century and, in South Africa, our last ten years, appeared no less radical to our predecessors as the liberation of animals appears now. All animal exploitation predates any quest of animal or even human rights and it is our responsibility to seek moral guidance in the enlightened principles of justice and compassion that have shaped the ideals of our recent history<sup>3</sup>.

Perhaps, after only recently acknowledging and putting into place the Bill of Rights for human rights<sup>4</sup>, it is too soon to expect South Africa to bring the argument for animal rights into the fray. However, the environment has been given the benefit of a surplus of legislation<sup>5</sup> for its protection and it is submitted that it is illogical and somewhat backward

---

<sup>1</sup> Mohandas Karamchand Gandhi (1927) *An Autobiography* 1982.

<sup>2</sup> Reference being to our Apartheid era. However, human exploitation dates back to the days of colonisation when the Dutch East India Company was formed in the Cape in 1652. The need for labour was so urgent that the Dutch also brought in slaves from their Eastern Empire, and from regions on both sides of Africa, within the first decade of settlement. This controversial decision cast a long shadow. The Cape had become a society composed of distinct and unequal legal groups. Whites would retain this status for three-and-a-half centuries, despite various attempts at emancipation over the years.

<sup>3</sup> Interestingly, ancient civilisations such as the Ancient Egyptians, considered certain animals sacred. It was thought that some gods and goddesses represented themselves on earth in the form of a single representative of a specific species, and honouring that species of animal would please the god or goddess associated with the animal. The animal believed to be the incarnation of the god or goddess lived a pampered life in and near the temples and religious centres. For example, many deities were depicted as cats, both domestic and wild, and they were seen as benevolent, sacred animals. The human race was not considered superior to the animal world; both had been created by the gods to share the earth as partners. These attitudes toward animals are reflected not only in the Egyptian religious beliefs, but also in the general attitudes toward the animal kingdom at large. However, the belief that animals share the afterlife with humans resulted in the burial of many animals in family tombs. Some were buried at the time of their natural death because of their special significance, but many were killed and buried as part of funerary ritual or worship activities.

<sup>4</sup> The Bill of Rights (Interim Constitution and finalised in the Constitution of South Africa 106 of 1994), enshrined the principle that human beings could no longer be treated in our law as mere tools of the powerful or of the State, but that they possess inherent value and must be permitted to live their lives according to their own wishes in so far as they do not infringe upon the rights of others.

<sup>5</sup> Examples being the Environment Conservation Act 73 of 1989, the National Environmental Management Act 107 of 1998, the National Forests Act 84 of 1998, the National Water Act 36 of 1998 and the National Heritage Resources Act 25 of 1999. Although the definition of 'environment' in the National Environmental Management Act includes animals, the Act can hardly be read as a progressive act for the protection of animals.

to afford the protection to the habitats of certain animals and not to the animals themselves.<sup>6</sup>

The issue of animal rights is deeply philosophical due to the fact that common sense thinking is divided on it. Animals exist on the borderline of our moral concepts; the result being that they are occasionally awarded a strong moral status, while at other times they are denied any kind of moral status at all. For example, public outrage is strong when knowledge of operations as puppy mills<sup>7</sup> is made public but when it is pointed out that the conditions in a factory farm are just as bad as, if not much worse, than the conditions in a puppy mill, the usual response is that those animals do not merit concern. The Chinese fur trade of dogs and cats is strongly disapproved and yet the fur trade in the rest of the world, of a variety of different animals, is condoned.<sup>8</sup> As Scully observes, 'one may view the creatures as morally incidental, as soulless beings for whom no bell ever tolls and to whom one has no moral duties.'<sup>9</sup> This disparity of thought gives rise to the philosophical question of what place animals have in an acceptable moral system. We are still living in a world where animals are simply seen as resources, livestock, pests, obstacles or something to hang on a wall. There is no place in today's world for an animal with its own purpose in the world apart from the designs of man!<sup>10</sup>

Animal rights and environmental concerns have become part of a paradigm shift, which is evident not only in law (in environmental issues more so than animals) but also in philosophy, science and theology. This change is characterised by the rejection of the notion that humans have unlimited licence to dominate other life forms. The pretence that humans can exist in isolation and in domination of all other living creatures on our

---

<sup>6</sup> This thinking stems from the homocentric world in which we live where, homosapiens consider themselves superior to other sentient beings and the environmental legislation is not for the protection of the environment on a purely unselfish level, but rather for the benefit of humans to ensure their present and future survival. The concept of sustainable development expounded in virtually every environmental document and in our National Environmental Management Act is the concept of ensuring development meets the needs of **present and future generations**. It is unlikely that the present and future generations of all species was not was thought of at the time this phrase was coined.

<sup>7</sup> After World War II, when farmers were seeking alternative methods of making money when traditional crops failed, the US Department of Agriculture encouraged the raising of puppies as a crop. Retail pet outlets grew in numbers as the supply of puppies increased, and puppy production began. However, the puppy farmers had little knowledge of canine husbandry and often began their ventures with little money and rundown conditions. They housed their dogs in chicken coops and rabbit hutches, provided little socialization, and often ignored veterinary care because they couldn't afford to pay. Animal welfare organizations such as the Humane Society of the US investigated conditions at these farms and eventually were successful in focusing national attention on the repulsive conditions at "puppy mills."

<sup>8</sup> Matthew Scully *DOMINION The Power of Man, the Suffering of Animals, and the Call to Mercy* (2002) St Martin's Press New York.

<sup>9</sup> Op cit note 8 at 121.

<sup>10</sup> Op cit note 8 at 106.

planet is no longer morally acceptable<sup>11</sup>. The further pretence that the exclusion of others from the benefits of compassion and justice can be justified by our 'status' as the dominant species is untenable. However, the animal welfare movement began centuries ago<sup>12</sup> and yet so little has been achieved.

Animals have been denied rights as a result of a fear that ascribing such rights will threaten the freedom of those in power. Ascribing rights to animals threatens the freedom of some human beings to use them as they see fit, or to further their own particular ends. However, this exploitation<sup>13</sup> can no longer be justified. There is also a fear that if we grant moral value to some animals (like dolphins or great apes) then we will have to grant it to all – cows, pigs and chickens. 'We would like to help our figurative dolphin, still squeaking and thrashing in the net. But to do so, it seems, would overthrow the whole moral universe.'<sup>14</sup> Power is no longer the measure of moral worth. There is no moral justification for trapping or farming animals for wearing their furs<sup>15</sup> or for using animals to test cosmetics for toxicity or household or agricultural products or new drugs which are similar to products already marketed. There is no moral justification for using animals in research whenever effective alternative techniques are available, for animal farming, or for the abuse of animals for our entertainment.

---

<sup>11</sup> The usual manner of justifying the claim that animals are not equal to human beings is to point out that only humans have some property, and then argue that that property is what confers a full and equal moral status to human beings. Some philosophers have used the following claims on this strategy: (1) only human beings have rights; (2) only human beings are rational, autonomous, and self-conscious; (3) only human beings are able to act morally; and (4) only human beings are part of the moral community. (See generally '*Animal Ethics*' Research paper by Scott Wilson, Department of Philosophy, University of California.)

<sup>12</sup> For example, in Britain, the Society for the Prevention of Cruelty to Animals was founded in 1824. Also, Edith Goode and Alice Morgan Wright were pursuers of rights for women and animals during their lifetimes – 1882-1970 and 1881-1975 respectively.

<sup>13</sup> Some people do not see it as exploitation but rather as the 'sustainable use' of animals. This is the argument where humans are placed at the top of the hierarchy, dominant over all creatures- essentially the same as the claim that animals are not equal to humans. According to Aristotle, there is a natural hierarchy of living beings. The different levels are determined by the abilities present in the beings due to their natures. While plants, animals, and human beings are all capable of taking in nutrition and growing, only animals and human beings are capable of conscious experience. This means that plants, being inferior to animals and human beings, have the function of serving the needs of animals and human beings. Likewise, human beings are superior to animals because human beings have the capacity for using reason to guide their conduct, while animals lack this ability and must instead rely on instinct. It follows, therefore, that the function of animals is to serve the needs of human beings. This, according to Aristotle, is "natural and expedient" (Regan and Singer, 1989 at 4).

<sup>14</sup> Op cit note 8 at 138.

<sup>15</sup> An argument may be put forward regarding the use of fur for non-fashion purposes such as wearing fur for warmth as the Eskimos do. Designer Oleg Cassini offers a range of "furs" such as Seal, 100% Acrylic, Fox 40% Acrylic and 60% Modacrylic. Cassini states, "Fur is the most ancient part of the human culture, [from a time] when humans had to protect themselves against the cold and they had to kill to eat. But we are not at that stage anymore. We can choose a different way. Evolution has permitted us to look at new horizons." (HSUS News, Fall 1998). Cassini calls his new fake fur "Evolutionary Fur" because he believes 'modern, urban, civilized, moral man has evolved beyond killing in order to live, that we don't need to kill animals anymore. We can all live, bloodshed free, on grains and vegetables, wearing synthetics'.

## 2. RIGHTS AND LEGAL STANDING IN SOUTH AFRICAN LAW

In Wille's principles of South African Law<sup>16</sup>, a legal right, although not easy to define, is referred to as 'an interest conferred by, and protected by the law, entitling one person to claim that another person or persons either give him something, or do an act for him, or refrain from doing an act.' There is much debate as to whether a person who may have legal rights must accordingly also be subject to corresponding legal duties<sup>17</sup>. Although the definition of a right refers to a 'person', the definition includes juristic persons such as companies and corporations. Thus, a corporation may also acquire rights, become subject to duties, sue and be sued.

According to R.G Frey,<sup>18</sup> a right is to have a claim to something or against others. Although Frey states that Feinberg's analysis of rights is drawn up with legal rights in mind, it can be extended to moral rights.<sup>19</sup> It is submitted that law and morality are, of necessity, connected – laws often affect public morality (albeit forcefully) and often, public morality determines laws. In order to establish a right in a legal case one must use moral arguments, present moral reasons and discussion. Dworkin<sup>20</sup> refers to the Bill of Rights in the Constitution of the United States and states:-

'The difficult clauses of the Bill of Rights, like the due process and equal protection clauses, must be understood as an appeal to moral concepts rather than laying down particular conceptions. Therefore, a court that undertakes the burden of applying these clauses fully as law must be prepared to frame and answer questions of political morality'<sup>21</sup>

Therefore, it can be said that constitutional law (at least) cannot logically be separated from moral philosophy. Animals are objects of moral concern and accordingly should be considered as recipients of legal rights.<sup>22</sup>

---

<sup>16</sup> Eighth Edition 1991 at 38.

<sup>17</sup> See Hahlo and Kahn Legal System 81-2 and Estate Orpen v Estate Atkinson 1966 (2) SA 639 C at 641.

<sup>18</sup> Interests and Rights The Case Against Animals at 8 with reference to Joel Feinberg 'Duties, Rights and Claims' *American Philosophical Quarterly*, iv (1996) at 137-44.

<sup>19</sup> Op cit note 18 at 249. There is some debate as to whether this extension is correct and Frey's article expounds on this. Ultimately, Frey states that claims to rights 'do not play the serious and decisive roles in morals which they play... in the law.' Therefore, rather than resolving anything in morals, claims to rights simply 'emphasize the unsatisfactory state in which the issues remain'.

<sup>20</sup> Dworkin, Ronald *Taking Rights Seriously* Cambridge Mass. Howard University Press (1977).

<sup>21</sup> As set out in Bernard E Rollin *Animal Rights and Human Morality* (1981) at 75.

<sup>22</sup> For a more detailed discussion see op cit note 20 at 76.

Thomas Berry<sup>23</sup> extends the concept of moral philosophy to a spiritual one. He states that the 'universe is communion of subjects, not a collection of objects. As subjects the component members of the universe are capable of having rights.'<sup>24</sup> Referring to rights in their original (as opposed to legal) sense, Berry equates the having of rights with existence – 'rights originate where existence originates' and that every member of the Earth Community has the right to be, the right to inhabit and the right to fulfil its role in the ever-renewing processes of the Earth Community. Thus, each member has the right to life, the right to live in its own habitat and the right to interact with the other members of the Earth Community.

Of great interest is the determination that the difference in rights 'is qualitative not quantitative' – that human rights cannot be the same as those of a tree or a fish. A fish will have fish rights and a bird will have bird rights. The fact that humans have rights does not mean that all other members of the Earth Community have none<sup>25</sup>.

*Locus standi in judicio* is the capacity to litigate or personal capacity to sue without assistance. Essentially, every natural person of full legal capacity has the right to sue and be sued in a court of law as every person who has suffered harm, or who has a legitimate interest to protect, should be granted an opportunity to seek redress. There are certain instances where, due to the operation of either statute or rules of common law, restrictions are placed upon a natural person's capacity to litigate and, there are accordingly, some natural persons who either cannot sue or be sued.<sup>26</sup> Of importance for the purpose of this paper is the fact that there are some natural persons such as minors, mentally-ill persons, prodigals and insolvents, who cannot litigate without the assistance of another person who has the necessary *locus standi*. It is these persons who have a curator or guardian appointed to them by the High Court.

Generally, a party to litigation must have a direct and substantial interest in the subject matter. However, in terms of the infringement of rights in terms of chapter 2 of the Constitution<sup>27</sup>, anyone listed in section 38 of the Constitution has the right to approach a

---

<sup>23</sup> *The Origin, Differentiation and Role of Rights* as reproduced in Cormac Cullinan's *Wild Law* (2002) at 113.

<sup>24</sup> Cormac Cullinan *Wild Law* (2002) at 113.

<sup>25</sup> *Ibid.*

<sup>26</sup> For example, judges, members and officers of parliament and provincial councils, diplomats, alien enemies and fugitives from justice.

<sup>27</sup> Constitution of the RSA 108 of 1996.



competent court, alleging that a right in the bill of rights has been infringed or threatened, and the court may grant appropriate relief.<sup>28</sup>

In terms of section 38, the persons who may approach a court are:

- (a) anyone acting in their own interest;<sup>29</sup>
- (b) anyone acting on behalf of another person who cannot act in their own name;<sup>30</sup>
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;<sup>31</sup>
- (d) anyone acting in the public interest,<sup>32</sup> and
- (d) an association acting in the interests of its members.<sup>33</sup>

The common law has been substantially changed by this provision as the common law relating to *locus standi* was restrictive in that a direct substantial interest was required by a litigant. The question of *locus standi* has generated a substantial amount of litigation, in particular by persons involved in the field of environmental law.<sup>34</sup> An action “in the public interest” is a novel and valued approach and amounts to the revival of the *actio popularis* found in Roman law.<sup>35</sup>

The Constitution does not confer a cause of action on animals. It does provide for people acting on behalf of another person who cannot act in his or her own name, and it is submitted that it is this concept of granting standing to non-humans that should be expanded to include animals.

An originalist interpretation of the Constitution might conclude that it was not the legislature’s intention to grant standing to anyone who is not a human. However, standing is given to many non-human entities such as trusts, corporations, municipalities and even ships.<sup>36</sup> It is this concept that will be addressed in this paper.

---

<sup>28</sup> See generally Van Huyssteen v Minister of Environmental Affairs & Tourism 1995 9 BCLR 1191 (C); 1996 1 SA 283 (C); Retrofit (Pvt) Ltd v Posts & Telecommunications Corporation (Attorney-General intervening) 1995 9 BCLR 1262 (ZS).

<sup>29</sup> Section 38(a).

<sup>30</sup> Section 38(b).

<sup>31</sup> Section 38(c).

<sup>32</sup> Section 38(d).

<sup>33</sup> Section 38(e).

<sup>34</sup> Wildlife Society of SA v Minister of Environmental Affairs & Tourism of the RSA 1996 9 BCLR 1221 (Tk); 1996 3 SA 1095 (Tk): see Van Reenen 1995 SA Journal of Environmental Law and Policy 121.

<sup>35</sup> Buckland A Textbook of Roman Law 694–695.

<sup>36</sup> Stone, Christopher D. *Should trees have standing? Towards Legal Rights for Natural Objects* (1974).

### 3. THE HUMAN USE OF ANIMALS

#### 3.1 Animals in Farming

Meat production in developing countries has increased by 127% in the last 20 years and to satisfy the demand for meat Factory farms (intensive farming) has become the standard method of farming.<sup>37</sup> Egg, pork and other meat farming in the developing world is increasingly moving towards intensive farming to satisfy the demand. According to information from 'Animal Voice' South Africans consume 8 million broiler chickens every week. The production of poultry, per capita has increased by nearly 1000% in the last 40 years.<sup>38</sup> Although the European Union has recognised the need to adopt a more humane farming methods after serious public pressure and ethical concerns, Governments in developing countries such as South Africa do not seem willing to adopt this more humane form of farming and are increasingly adopting the discredited European and US systems in the quest for inexpensive meat, milk and eggs. It is inevitably funded and encouraged by private enterprise in the search for short-term commercial and macro-economic gains.

Termed the 'Livestock Revolution' by Compassion in World Farming, it seeks to increase agricultural production through technology and artificial inputs. Not only does this type of farming have serious effects on human health,<sup>39</sup> hunger<sup>40</sup> and the destruction of traditional livestock<sup>41</sup> but immense animal suffering is caused by intensive systems – including mutations, breeding deformities and their inability to perform natural behaviour. According to Jim Mason<sup>42</sup> the factory farm 'pulls our society one long, dark step backward from the desirable goal of sane, ethical relationship with other beings and the natural world'.<sup>43</sup> The livestock revolution began in the years before World War II. The first mass producers were able to turn out large flocks of chickens all year round once poultry experts discovered that when vitamin A and D were added to the feed, chickens could be raised indoors as they no longer needed sunlight and exercise for proper growth.

<sup>37</sup> <http://www.ciwf-livestock-revolution.co.uk>.

<sup>38</sup> "Animal Voice" newsletter Spring 2002.

<sup>39</sup> Examples being: Vaccines, antibiotics result in over-use by humans, carcinogens detected in meat supplies, bacteria results in outbreaks of food borne diseases and transmission of animal diseases such as swine fever and encephalitis.

<sup>40</sup> Factory farmed animals consume valuable feed that could otherwise be used to feed humans.

<sup>41</sup> The diversity of domestic animal breeds is dwindling rapidly and FAO data suggests that 30% of all breeds are threatened with extinction.

<sup>42</sup> Mason J 'Brave New Farm?' *In Defence of Animals* Edited by Peter Singer (1985).

<sup>43</sup> Op cit note 42 at 90.

Inevitably, these new methods caused problems and birds began to peck each other to death, eat each other's remains and contagious diseases in the confined sheds were rampant. However, breakthroughs in the industry continued and it was discovered that burning the tips of the chickens' beaks with a blow torch reduced incidences of cannibalism. Within a year a debeaking<sup>44</sup> machine was invented. Foremost in the developments were sulphur drugs and antibiotics which, when included in the feed, staved off disease in the crowded cages. Within a few years poultry breeders had developed the prototype for a chicken that grew to market weight in about seven weeks – half the amount of time a normal chicken would. In the 1960s husbandry experts incorporated the principles of confinement, mass-production, waste removal and automated feeding for other farm animal species by inventing a slatted floor built over gutters or holding pits. This enabled farmers to confine large animals indoors to be held to rigid production schedules.<sup>45</sup> There is no longer an economic incentive to care about the welfare of farm animals. All that is considered is what the population requires – the cutting of costs, increased profits, and the satisfaction of our palates. No thought goes to the animals.<sup>46</sup>

Billions of animals are slaughtered for food every year by the meat and dairy industries. As the human population grows and economic competition increases, so will the need for factory farms and huge livestock operations. According to Scully <sup>47</sup> '38 million cows and calves are slaughtered annually in the United States. 250 million turkeys are processed annually and 8 billion chickens.' Further to this, to meet growing demand, these animals 'are genetically designed by machines, inseminated by machines, fed by machines, monitored, herded, electrocuted, stabbed, cleaned, cut and packaged by machines...'

The fact that cats and dogs are eaten in eastern countries has often been the cause of an outcry in Western countries. For some reason, the thought of eating cats and dogs is more offensive to some people than the thought of eating chickens and pigs. Perhaps if the farming of cattle and sheep was as offensive to the sensibilities as the killing of what

---

<sup>44</sup> Many chickens die from the shock of being debeaked as do many calves or pigs who are prematurely weaned or castrated without anaesthetic.

<sup>45</sup> Generally, see Jim Mason's essay on the plight of farm animals op cit note 42.

<sup>46</sup> Op cit note 8 at 284. At new plants 300 to 400 cows are slaughtered every hour – and nothing will stop the line – not even a live animal. See generally op cit note 8 at 284 regarding information from a worker at an abattoir in Washington State, whose job was to cut off hooves of strung-up cattle. Although the cattle are supposed to be dead when they reach him but, according to him, they are often not. 'They blink....They make noises. The head moves, the eyes are open and still looking around. They die piece by piece.'

<sup>47</sup> Op cit note 7 at 284.

are seen as pets in our society, more would be done to stop eating all animals, regardless of their 'status' in society.

### 3.1 Animals in Research

The exact number of animals used in science and education is not known. In South Africa specifically there is a veil of secrecy over the use of animals in research and very little is known compared to the rest of the world.<sup>48</sup> In the United States it is conservatively estimated that at least 27 million animals are used each year for experimentation,<sup>49</sup> in Britain in 1989 about 3 million animals were used for experimental purposes and more when routine scientific procedures are included in the count.<sup>50</sup> There is a variety of research that falls within the category of medical research including burn experiments,<sup>51</sup> the infliction of tumours, the breaking of bones and bruising of flesh as a preliminary study to traumatic shock and brain research. Often the research is more psychological than physical and commonly involves electric shocks, blinding, aggression research and stress experiments.<sup>52</sup>

The European Union (EU) governments have recently been put under pressure to agree new rules for the cosmetics industry.<sup>53</sup> In a series of votes in the European Parliament on 11 June 2002, MEPs backed a strict package of animal welfare measures which cover the development of new cosmetics. The anticipated legislation will apply to all new cosmetic products and possibly a ban on cosmetic companies relocating their testing laboratories outside the EU. Currently there are 14 types of tests used on new products sold in the EU for a range of complications including eye irritation, carcinogenicity and skin irritation. Within five years of adoption of the new EU law, possibly 2008, 11 of these tests would be phased out and replaced with animal-free alternatives.<sup>54</sup> The industry will have a further five years to replace another three tests which are judged more difficult to replicate. There was to be an immediate ban on selling products in the EU containing ingredients tested on animals where alternative methods have been validated. According to the Independent, 38 000 animals are used for testing in the EU every year for the development of cosmetics. Chris Davies, a liberal Democrat MEP said 'If the price to be

---

<sup>48</sup> Personal discussions with members of SAAV and Steve Smit, founder of Justice for Animals, formerly FALCON.

<sup>49</sup> <http://www.animalagenda.org>.

<sup>50</sup> Regan T 'Ill-gotten Gains' *Animal Experimentation The Consensus Changes* Edited by Gill Langley 1989.

<sup>51</sup> The immersion of a part or whole of an animal's body in boiling water, use of hot plates and blow torches.

<sup>52</sup> Any of the previous methods can be used to induce stress as well as loud noises or random blasts of air. The effects of these on the animal's stress levels are then studied.

<sup>53</sup> The Independent, London 12 June 2002.

<sup>54</sup> Ibid.

paid to end animal cruelty is that consumers do without yet another deodorant, or even bubblier bubble baths, then its one worth paying.<sup>55</sup>

It is assumed that such research has its goals in the advancement of human knowledge.<sup>56</sup> However, Regan points out that having ‘inherent value’<sup>57</sup> morally prevents others from treating one as ‘mere receptacles’ or resources for others. Accordingly, medical research done on animals in the name of possibly benefiting others is morally untenable.<sup>58</sup> The lack of accountability and transparency in South Africa is particularly unacceptable. Professor Oderberg in *Applied Ethics* (referred to by Scully)<sup>59</sup> states that animals are subjected to horrific suffering in experiments that ‘are for the most part pointless if not positively harmful to us...’. He scathingly reports that humans treat animals ‘far more viciously and with far more cruelty than at any time in the history of civilisation. We have found ways never before imagined to torture and maim animals and make their lives a misery... where often the most important thing being researched is the latest lipstick or face cream.’

### 3.3 Animals in Entertainment

Thousands of animals, both exotic and domestic, are forced to live their lives in cages, on chains or in other forms of confinement or restraint in order to perform in circuses, aquatic shows, television shows, bull fights, rodeos and other arenas. These animals are deprived of the privileges of a natural life and are forced to endure cruel and inhumane training, travelling and confinement. In South Africa, baby elephants are often sold for use as circus animals or to zoos where the ‘genetically-imposed wild spirit’ of these elephants must be broken by their trainers.<sup>60</sup> Hunting is also classified as a form of

---

<sup>55</sup> Op cit note 53.

<sup>56</sup> Carl Cohen has a vigorous debate with Tom Regan on the need for animal experimentation. See generally Carl Cohen and Tom Regan *THE ANIMAL RIGHTS DEBATE* (2001).

<sup>57</sup> Those individuals who are the ‘subject of life’ See Regan’s work op cit note 14 at 38.

<sup>58</sup> There is much debate on the pros and cons of vivisection and the various theories for the abolition of the use of animals in research. See generally the works of Tom Regan and Mary Midgley as well as *The Animal Rights/Environmental Ethic Debate The Environmental Perspective* edited by Eugene C Hargrove 1992, *Animal Experimentation, The Consensus Change* edited by Gill Langley 1989, *The Case for Animal Experimentation, An Evolutionary and Ethical Perspective* Michael Allen Fox 1986 and *The Unheeded Cry, Animal Consciousness Animal Pain and Science* by Bernard E Rollin 1990.

<sup>59</sup> Op cit note 8 at 341.

<sup>60</sup> Chris Mercer and Beverly Pervan *For the Love of Wildlife* Kalahari Raptor Centre (2000) at 229. Read 229 for detail on the appalling case of the Tuli elephants, where baby elephants (under the requisite CITES certificate and conservation authorities stamp of approval) were darted from helicopters and removed from their distressed mothers in the Northern Tuli Game Reserve of Botswana. The reason for this was that they were to be trained at a site near Pretoria for ‘bush clearing work and related tasks’. The training involved being battered about the face with long heavy poles, whipped with sjamboks to the point of urinating in terror and pain. Training apparatus included a hook with a steel point affixed to the point, a nail rod consisting of a stout pole with a drill bit affixed to the end, a bull whip and a sjambok. Bare chains and hobbles caused raw open lesions around the

amusement where humans stalk animals from a vehicle and kill the animals for sport. In some cases the animal is not killed instantly and is tracked for days while it slowly dies from its wound. In the United States, the number of animals maimed or crippled by hunters is several times that of those actually killed and recovered.<sup>61</sup>

South Africa is a tourist destination for the purposes of game hunting. Many game farms are established for the main reason not to preserve wildlife, but to make a great deal of money by allowing people to destroy it. Often the people who pay for these safaris believe they are doing it in the interest of conservation. As Mercer and Pervan point out in their book *For the Love of Wildlife*,<sup>62</sup> the stress levels of animals who are confined and pursued by hunters are extremely high. At the sight of a human or motor vehicle, the animals stampede and 'their panic is obvious to a person with any heart at all.'<sup>63</sup> They further state that game hunting is 'an affront to morality, spiritualism and to all religions that regard brutality to living beings as atheist. By smashing up the wholeness of the natural world (most notably the magnificent predators) and recovering from the wreckage only those life forms which can be used as alternative livestock, hunting farms trivialise the exquisite; de-personalise living creatures, reducing them to mere numbers which are harvested or 'removed' at the convenience of the master species as they normalise sadism making cruelty routine'.<sup>64</sup>

Captivity does not simply deny animals freedom but is often detrimental to them in other respects as well. For example, ten chimpanzees die for every one chimpanzee that is delivered alive to the United States and Europe.<sup>65</sup> More significantly, animals as entertainment teach humans a false sense place in the natural order – it defines the difference between humans and animals in that they are there for our pleasure, to be used for our purpose. Morality requires that we learn to respect other species and live as 'one species among many rather than one species over many.'<sup>66</sup> Finding joy at the expense of another species' suffering is immoral in the very deepest sense.

---

ankles and legs of the orphaned elephants. They were deprived of food, water and sleep so that their trainer's dominion was enforced.

<sup>61</sup> For various arguments for hunting see James A. Swan's books on the 'positive psycho-spirituality of ethical hunting': *Nature as a Teacher and Healer*, *In Defense of Hunting* and *The Sacred Art of Hunting*.

<sup>62</sup> Chris Mercer and Beverly Pervan *For the Love of Wildlife* Kalahari Raptor Centre (2000).

<sup>63</sup> Op cit note 62 at 225.

<sup>64</sup> Op cit note 61 at 225.

<sup>65</sup> Jamieson D, 'Against Zoos' op cit note 21 at 108.

<sup>66</sup> Op cit note 65 at 117.

### 3.4 Cultural and Religious Use of Animals

In the African culture, animals play an important role in the lives of the people. Perhaps the most enduring link is the religious association. According to Tyrrell and Jurgens<sup>67</sup> the 'meaning of cattle lies deep in their hearts and is entwined with the roots of traditional history, society and religion.'<sup>68</sup> And yet, in the same reference, Tyrrell and Jurgens describe a Thembu ceremony during which a cow is skinned alive. Goats, sheep and poultry<sup>69</sup> are also sacrificial animals and those deaths witnessed by Tyrrell and Jurgens were slow and painful.

A Thembu 'bringing-back' ritual involved the sacrifice of a goat and a cow. After preparing the goat for the sacrifice, 'Shange emerged from his room with a spear – the sacrificial spear of the lineage, used on all such occasions. When not in use it was stored under his bed. It was very blunt and he had to make several attempts before he succeeded in piercing the goat's hide... upwards into the thorax...The desperate yelling of the goat filled the shadows but found no response in the impassive faces of those present...On this occasion the goat died in about fifteen minutes. Throughout this period the goat was repeatedly stretched to enlarge the gall bladder.....In addition, Shange slapped the goat repeatedly with his flat hand, each time eliciting a scream of agony.'<sup>70</sup>

The 'coming-out' ceremony of an *isangoma*<sup>71</sup> involves the priest-diviner sucking the blood from the sacrificial animal while it still lives. The Nguni marriage ceremony requires the killing of two cows – one from the groom's family and one from the *lobola*<sup>72</sup> cattle. A ceremony to induce rain, the training of an *isangoma* and many other instances in the Zulu culture require animal sacrifice.<sup>73</sup> These sacrifices may be made in celebration or in instances where the ancestors are seen to be displeased. It is preferable that an animal screams during slaughter as this is a sign that the ancestors are happy with it and if it does not, it is usually necessary to slaughter another animal that the ancestor spirit will accept.<sup>74</sup> Accordingly, every effort is made to ensure the animal makes as much noise as possible – the knife or spear will be moved around in the wound, the animal will be hit or its tailed pulled.

---

<sup>67</sup> Barbara Tyrrell and Peter Jurgens *African Heritage* (1986).

<sup>68</sup> Op cit note 67 at 205

<sup>69</sup> Death brought about by means of a safety pin being inserted into the brain. Op cit note 67 at 203.

<sup>70</sup> Op cit note 67 at 188 and 189.

<sup>71</sup> Priest-diviner. The official communicator with the ancestors and the interpreter of their wishes.

<sup>72</sup> Bride price, paid in cattle. Op cit note 67 at 152.

<sup>73</sup> Eileen Jensen Krige *The Social System of the Zulus* (1950) at 291.

<sup>74</sup> Ibid.

Scully delves into the realm of Safari Club International (a hunting club) and is biblical justification of hunting.<sup>75</sup> According to Scully, 'dominion has become a quest for subjugation without limits, cruelty to animals a sin without judgement.'<sup>76</sup> and our own human rights, are not an abstract proposition but rather a practical response to "the most fundamental of all moral problems: Human evil."<sup>77</sup> However, the Book of Genesis does not only refer to man's dominion but also to a blessing that God gives every living creature. In Psalms 104: 10-18 it states 'He sendeth the springs into the valleys... the wild asses quench their thirst. By them shall the fowls of the heavens have their habitation, which sing among the branches...'. It is not in the spirit of the Book to slaughter, en masse or torture unrelentingly. It does not say that 'Go forth to selleth every creature that moveth. It doesn't say you can baiteth and slayeth and stuffeth everything in sight either, let alone deducteth the cost.'<sup>78</sup> The Lord of Mercy would not condone the practice of humans today. 'Creation was given and entrusted to humankind as a duty, representing not a source of suffering but *the foundation of a creative existence in the world*.'<sup>79</sup>

### 3.5 In summary

Companion animals<sup>80</sup>, the breeding and trapping of animals for fur for the purpose of fashion, "sport", religious practices and superstitions are all circumstances in which the cruel treatment of animals can be found and in which such treatment is accepted by society as 'normal'.

Cruelty to animals has a historical continuity to the present and, although there has also been a parallel continuity of compassion towards animals, it has not been effective enough. The concentration of cruelty in factory farming is unique to the competitiveness

---

<sup>75</sup> Op cit note 8. There are references to the Safari Club throughout the book.

<sup>76</sup> Op cit note 8 at 313.

<sup>77</sup> Ibid.

<sup>78</sup> Op cit note 8 at 313.

<sup>79</sup> His Holiness Pope John Paul II, *Crossing the Threshold of Hope* (New York : Knopf, 1994) at 20.

<sup>80</sup> Cruelties include lack of care, abuse and breeding of 'pure' breeds to the extent that they have serious deformities such as the inability to breathe or see properly. The breathing difficulties and heart problems of bulldogs are genetically and physiologically linked to the selection for foreshortened faces. There is some evidence that German shepherd aggressiveness, much prized by trainers and the military, is genetically linked to hip dysplasia. The Irish setter has been bred with an exclusive concerns for aesthetics to the point of imbecility. Daschunds suffer from genetically based spinal defects that result in paralysis and tend to have diabetes and Cushing's syndrome. Dalmations get bladder stones, apparently as a result of a genetic linkage with coat colour. (See generally Bernard E. Rollin *Animal Rights and Human Morality* Prometheus Books, New York 1981 at 158, 162 and 163).



of our times. This self-interest is compounded by ignorance of animal natures, particularly of their sentience<sup>81</sup> and their capacity for enjoying pleasurable experiences.

Kolber's article in the *Harvard Law Review*<sup>82</sup> contains an extract of Martha Nussbaum's review of Steven Wise's book :-

'We live, many of us in affectionate relationships with dogs and cats and horses. And yet a large population of us not only eat meat and eggs and wear leather, but we also collaborate in the appallingly cruel conditions under which those goods are produced these days, involving the torture of calves, chickens and pigs.... [W]e have not defined very clearly the conceptual framework we should use to articulate philosophically what sympathy tells us in our lives...Meanwhile however, there are animals like [the apes that Wise describes] leading lives of agony, and there are the activists, like Steven Wise, ready to move ahead the practical legal recommendations, even in the absence of conceptual and theoretical consensus.'

South Africa is not exempt from the rest of the world in its cruelty to animals. South Africa, and the rest of Africa, is unique in that it is privileged to have wildlife heritage that surpasses that of the rest of the world. And yet, there appears to be a general lack of regard for the wildlife of Africa, particularly by government. Mercer and Pervan in their book *For the Love of Wildlife*<sup>83</sup> state that the persecution of wildlife in Southern Africa has been institutionalised. "It starts right at the top with regional government policy; it is enshrined in the Constitutions; it contains the law and government administration, and it runs rife through human society in the form of hunting and poaching. Even the wildlife conservation charities have fallen into the trap of aiding and abetting this evil".<sup>84</sup>

South Africa, despite its large game parks and many conservation bodies, contributes to the world-wide abuse of animals, wild or not. The price of wild animals at game auctions is on the increase. According to Mercer and Pervan, in 2000 a Roan antelope was worth US \$ 20 000. No-one, including the conservation authorities and wildlife conservation

---

<sup>81</sup> Capable of suffering.

<sup>82</sup> Adam Kolber 'NOTES Standing Upright: The Moral and Legal Standing of Humans and Other Apes' *Stanford Law Review* October 2001 at 165.

<sup>83</sup> Op cit note 62.

<sup>84</sup> Op cit note 62 at 219.

groups care where these animals go once they are sold, provided large amounts of money are raised in their sale. With the support and encouragement of the government authorities, people are permitted to destroy South Africa's animals.<sup>85</sup>

#### 4. SOCIAL ATTITUDES

Societal attitudes towards animals are evident in certain accepted phrases such as "more than one way to skin a cat", squealing like a stuck pig" and "flogging a dead horse". Children are taught nursery rhymes that include lines such as "four and twenty blackbirds baked in a pie", the Big Bad Wolf eats Red Riding Hood's grandmother and is ultimately killed by the hunter; the three blind mice have their tails cut off with a carving knife. Children are taken to zoos and circuses and, without them (or, often, their parents) being aware of it, are taught to laugh at the humiliation or the caged suffering of animals.

According to Dr Andre Menache<sup>86</sup> dissection and vivisection should be removed from school syllabuses. He states that if schools remove this from the curriculum it conveys a moral message and avoids the very real risk of desensitising young students.<sup>87</sup> Dr Theo Capaldo<sup>88</sup> believes that the use of animals in school dissections leads to the harmful use of animals in medical, psychological and veterinary training. He believes that the people that are performing experiments that they believe to be cruel and 'ethically repugnant' are physically harmed. The internal conflict can result in long-term psychological trauma.<sup>89</sup>

This kind of teaching does not foster an attitude of animal empathy. Social cognitive learning theorists,<sup>90</sup> like other behaviourally-orientated psychologists, believe that all behaviour, except for a few reflexes, is learned. Observational learning is the most important form of learning<sup>91</sup> and although it is a fairly complex process, three aspects are highlighted:- the observer must pay attention to the model, the observer must retain the observed behaviour (depending on a number of factors<sup>92</sup>) and the observer then

---

<sup>85</sup> See also op cit note 8 at 100 for general discussion on US Government issues regarding corruption in US Fish and Wildlife Service where one official stated 'It's our mission to serve hunters... much like welfare agencies serve welfare recipients.'

<sup>86</sup> Former SA Veterinarian, President of Doctors and Lawyers for Responsible Medicine based in the UK. "Humane Education News" Spring 2002.

<sup>87</sup> Op cit note 86 at 6.

<sup>88</sup> American Psychologist, "Humane Education News" Spring 2002.

<sup>89</sup> Op cit note 88 at 7.

<sup>90</sup> Werner Meyer, Cora Moore, Henning Viljoen *Psychology From individual to Ecosystem* Third Edition Heinmann 2002.

<sup>91</sup> Op cit note 90 at 305

<sup>92</sup> Such as the relationship between the observer and the model and the model's behaviour and attributes

reproduces the behaviour. Society is teaching our children to view the feelings of animals as irrelevant. Society is teaching our children to view animals as a source for our use and entertainment.

It is socially acceptable to serve lamb on the spit – in fact it is often seen as a draw-card to a social event. It is also considered acceptable to order foie gras<sup>93</sup> or veal<sup>94</sup> at a restaurant. And yet if one states one's vegetarianism, an immediate justification is expected.

A trip from South Africa to Maputo will establish a clear indication of the general attitude of people to animals on this continent. Animals such as rabbits, buck<sup>95</sup> and birds are strung up on the side of the road to entice passing travellers but their legs, wings, backs and beaks are broken to prevent them from fleeing. The reason they are not killed is that, apparently, they will not sell for a high price if they are dead. Pigs in Mozambique are hung from trees and meat carved off them while they are alive - meat will last longer on a live pig than on a dead one. As far as the author is aware, there is no government institution or wildlife authority doing anything to prevent this barbaric cruelty.

## 5. MORALITY AND PHILOSOPHY

The 'interests of animals may be considered in two ways – the first refers to the advancing or promoting the animal's interests and the second to preventing loss of such

---

<sup>93</sup> This is French for fat liver. It is the fattened liver of (usually) duck. To produce foie gras, a duck or goose is restrained and a metal pipe is pushed down the bird's throat and into the stomach. A massive quantity of corn is pressure-driven down the pipe, often causing rupture of the bird's stomach or oesophagus. Vomiting is prevented by tying an elastic band around the bird's throat. This force feeding takes place 3 to 5 times a day for a month and transforms the liver to six to twelve times its usual size.

<sup>94</sup> In the production of veal, calves cannot be allowed to develop muscles and are therefore shut tightly into stalls about two feet wide where they are unable to move more than a few inches forwards and backwards and cannot stretch out into their natural sleeping posture. There is no straw on the floor and they are chained around the neck so they are unable to even groom themselves. Being fed a diet which deliberately omits iron in order to make them anaemic and their flesh pale, they suffer constantly from diarrhoea and antibiotics are used on an ongoing basis to keep them alive. In nature, calves will suckle four times a day but in these crates there is nothing to suckle on. If a person approaches, the calves will frantically try to suckle a shirt or a finger in a desperate need for its mother. Many calves do not survive the four months and farmers have established the maximum weight at which losses will cut into the profits – 350 pounds and then the calves are killed. Published scientific research indicates that calves confined in crates experience 'chronic stress' and require approximately five times more medication than calves living in more spacious conditions. The veal crate and anaemic diet are outlawed in Europe. See <http://veal.google.com>.

<sup>95</sup> 'Next to the pot-holed tarmac road lies a young duiker antelope ewe, her head lolling unnaturally to one side. She cannot move because her back has been broken. The heavy trucks roar past, whipping up the dust and swirling it into her bleeding eyes. Nearby there is a wild rabbit, hanging by his ears in a position where he can appeal to passing motorists. Crucified, but still alive. Between them lies a pelican, its beak tied with tambo, a fibre rope made from the inner bark of trees. As you watch, a cigarette-smoking hawker walks up carrying a struggling crane. With practised ease, he snaps the poor bird's beak between his fingers, and the breaks, one after

interests by reducing or eliminating animal suffering as far as possible and by refraining from acts of cruelty to them'.<sup>96</sup> In practice it is much more difficult to promote animal well-being that it is to attend to unnecessary animal suffering. It is easier to perceive that we are not giving consideration to the interests of animals if we kill them unnecessarily for food, cause suffering through recreational hunting and other forms of amusement or use them with indifference to suffering in the laboratory, in farming and other commercial activities than it is to actually promote animals' interests to a position of equal consideration as our own.

The Moral Equality theorists such as Regan and Singer argue that not only do animals have direct moral status, but they also have the same moral status as human beings. According to theorists of this kind, there can be no legitimate reason to place human beings and animals in different moral categories, and so whatever grounds our duties to human beings will likewise ground duties to animals.<sup>97</sup>

According to Singer in his publication of *Animal Liberation* (1975), the attempt to grant all and only human beings a full and equal moral status does not work. We must either conclude that not all human beings are equal, or we must conclude that not only human beings are equal. Singer suggests that the first option is too counter-intuitive to be acceptable; so we are forced to conclude that all animals are equal, human or otherwise. Singer also argues that if we were to rely on rationality, autonomy and the ability to act morally as the basis of determining moral status, then we would justify a kind of discrimination against certain human beings that is analogous to racism and sexism. Racists violate equal consideration by giving more consideration to the interests of the members of their own race.<sup>98</sup> Sexists violate equal consideration by giving more consideration to the interests of those of a particular gender and speciests, 'give greater weight to the interests and members of their own species when there is clash between their interests and those interests of another species.'<sup>99</sup>

It is Singer's view that '[t]here is no logically compelling reason for assuming that a difference in ability between two people justifies any difference in the amount of

---

another, with audible cracks, first its wings and its legs.' Excerpt taken from *For the Love of Wildlife* op cit note 62 at 218.

<sup>96</sup> Brown, L *Cruelty to Animals: A Moral Debt* (1988).

<sup>97</sup> Unfortunately, Singer's theories have recently been cast in a bad light since the publication of his book *Rethinking Life and Death* where he states that 'Human babies are not born self-aware, or capable of grasping that they exist over time. They are not persons. Hence their lives would seem to be no more worthy of protection than the life of a fetus.' Op cit note 8 at 210.

<sup>98</sup> Peter Singer *Animal Liberation* 2<sup>nd</sup> edition 1990 at 48.

<sup>99</sup> Op cit note 98 at 58.

consideration we give to their interests'.<sup>100</sup> Similarly, he states that, to avoid speciesism, we must treat the interests of all sentient beings equally. Singer argues that animals are capable of suffering and are due some moral consideration. He argues that animals' interests ought to receive equitable consideration with regard to human interests and challenges the attitude that animals are ours to use in whichever way we see fit. Kolber states that a potential objection to Singer is that this concept is too remote from human sentiment to provide meaningful guidance to our actions<sup>101</sup> and if we try to treat the interests of all beings equally, we will 'so disperse our concern for others that we erode whatever non-self-serving interests human nature has granted us'.<sup>102</sup>

According to Regan in 'The Case for Animal Rights',<sup>103</sup> animals have rights in just the same way that human beings do.<sup>104</sup> However, Regan believes it is a mistake to ground an equal moral status on utilitarian grounds, as Singer attempts to do. According to Regan, we must conclude that animals have the same moral status as human beings and that moral status is grounded on rights, not on utilitarian principles. Regan argues for his case by relying on the concept of inherent value. According to Regan, any being that is a subject-of-a-life is a being that has inherent value. A being that has inherent value is a being towards which we must show respect; in order to show respect, we cannot use it merely as a means to our ends. He argues that the fundamental moral wrong is not that animals are kept in close and stressful confinement or in isolation, or that their pain and suffering or their needs are ignored. The wrong goes far deeper than that to a fundamental wrong that animals are viewed as 'lacking independent value, as resources for us – as, indeed, a renewable resource'.<sup>105</sup> Giving animals more space or more anaesthetic will not remedy this fundamental wrong – only the total dissolution of commercial animal agriculture will do so. And, for similar reasons, morality requires nothing less than the total elimination of hunting and trapping for commercial and sporting ends.<sup>106</sup>

---

<sup>100</sup> Ibid.

<sup>101</sup> Op cit note 82 at 187.

<sup>102</sup> Ibid.

<sup>103</sup> An essay in *In Defence of Animals* Edited by Peter Singer (1985).

<sup>104</sup> For general argument against animal rights see R.G Frey *Interests and Rights: The Case Against Animals*.

<sup>105</sup> Op cit note 104 at 25.

<sup>106</sup> Singer and Regan are not the only philosophers that debate the issue of animal rights. There are many theories such as Radical Speciesism, Two Factor Egalitarianism, the Utilitarian Principle and Contractarianism. (See generally *People, Penguins and Plastic Trees* Basic Issues in Environmental Ethics. Second Editions Ed. Christine Pearce and Donald Vande (1994).

Christopher Stone<sup>107</sup> refers to ‘moral pluralism’ and argues that we need a diversity of moral frameworks with different principles and approaches – we cannot depend on finding one unified body of principles that can provide the answer to every situation.<sup>108</sup> However, whatever moral status we choose to grant a species, so must that moral status be granted to all.<sup>109</sup> In moral reasoning, identical creatures cannot be worthy or unworthy of moral consideration; this dog or dolphin or elephant morally significant and others not. And once this moral status has been granted, it cannot change, depending on the arbitrary wishes of humankind. Scully’s rule is never to support or advocate any moral act that he would not be prepared to witness in person. ‘When we shrink from the sight of something, when we shroud it in euphemisms, that is usually a sign of inner conflict, of unsettled hearts, a sign that something has gone wrong in our moral reasoning.’<sup>110</sup>

Scully states<sup>111</sup> that cruelty is not only a denial of the animal’s nature but a betrayal of our own. ‘If we are defined by reason and morality, then reason and morality must define our choices, even where animals are concerned.’ To simply refuse to not eat meat, despite the situation in the factory farms, or to refuse not to wear fur, or use animal-tested cosmetics, despite the cruelty it inflicts, shows a profound lack of morality; that humankind’s pleasures are biased and disordered. The fact is either they (being person, cow, chicken or dog) suffer, or they do not suffer. Either that suffering has moral value or it does not have moral value. Either there is a God or their isn’t. ...Either we have duties of kindness or we do not.<sup>112</sup>

It can be said that before there can be effective legislation to prevent cruelty to animals, we need to get our moral and social house into order. Statutory law is coercive, with disobedience countered by legal sanction, but there is no inbuilt moral obligation to obey. International law is morally binding on signatory nations, but it has no external

---

<sup>107</sup> Stone, Christopher D, *Earth and Other Ethics. The Case for Moral Pluralism*, New York, Harper and Row 1987.

<sup>108</sup> R.G Frey in *Interests and Animal Rights: The Case Against Animals* argues against rights for animals. In his book he argues that animals do not possess interests or moral rights. This conclusion he equates with his over-all view about moral rights and therefore his denial of moral rights to animals extends to a denial of moral rights to humans. He states that humans have no moral right to ‘an animal’s confinement in zoos, to its ceaseless drudgery and labour on our behalf, to its persistent exploitation in the name of cosmetics, clothing, entertainment and sport, to its blindness, dismemberment, and ultimate death in the name of science, and, to be sure, to its appearance on our dining-tables’ (at 169). He argues that the issue is whether our treatment of animals is right and justifiable, and the answers cannot consist in an appeal to or reliance on moral rights but in establishing acceptable theses of rightness and justification and the adequacy of the normative ethics of which these theses are a part.

<sup>109</sup> Op cit note 7 at 310.

<sup>110</sup> Op cit note 7 at 321.

<sup>111</sup> Op cit note 7 at 303.

<sup>112</sup> Op cit note 7 at 310.

enforceability. Moral obedience to humane statutes can come into effect only once citizens' attitudes and values are informed and consistent with the purposes of the statutes themselves. Enforcement of anti-cruelty legislation is lax, with insufficient funds allocated for inspection purposes or the courts awarding trivial penalties, both problems reflecting the confusion and apathy in the public mind on this moral question. However, perhaps the question that needs to be answered is not whether it is necessary to get our moral and social house into order before legislation may be enacted to provide legal standing for animals, but whether it is necessary to enact the legislation in order to change the moral and social attitudes of people who would otherwise not consider changing.

As the world exists now, animals are part of a 'moral void of human desires and situational ethics.'<sup>113</sup> Circumstances, human need and cultural perception determines the value of animals. As millions of animals are tortured and killed every year, we 'avert our eyes and accept it as an honest philosophical difference'<sup>114</sup> of opinion. The fact that creatures cannot act morally towards us in no way diminishes our ability to act morally towards them. The creatures are owed dutiful human care...'<sup>115</sup>

## 6. LEGISLATION AND LEGISLATIVE ANALYSIS (SOUTH AFRICA)

At common law animals are regarded as corporeal property in which rights of ownership may be exercised. Animals may therefore be used, destroyed or exploited at the discretion of the owner and as the law confers no legal rights upon animals, they do not inherently enjoy any legally recognised right to life or to humane treatment or use. Legislation containing prohibitions against cruelty to animals are constructed so as not to interfere with the ordinary exercise of property rights in animals and are enacted to prohibit only the infliction of pain and suffering which is unnecessary or unreasonable. In other words, an act causing pain or suffering is only cruel if it not reasonable or necessary in the circumstances. In terms of Ford v Wiley, (1889) 23QB 203, pain is only reasonable or necessary if the purpose of the infliction of the pain outweighs the suffering. If a reasonable person would regard it as being disproportionate to the benefit achieved, the infliction of pain would not be reasonable or necessary.

---

<sup>113</sup> Op cit note 7 at 192.

<sup>114</sup> Ibid.

<sup>115</sup>Op cit note 8 at 340.

These laws are essentially taking the people as the primary objects of moral concern, rather than the animals themselves. Their focus is homocentric – they may impose duties on human beings but these duties do not give rise to corresponding rights for animals. Gary L. Francione states that anti-cruelty statutes ‘reinforce and support the status of animals as property’<sup>116</sup> He believes that anti-cruelty states are primarily to prevent the detrimental impact that cruelty to animals has on the moral development of human beings. Again, reflecting the attitude of treating animals in “instrumental terms” and the essential property interests in animals.<sup>117</sup>

In Rex v Moato<sup>118</sup> the appellant was charged and convicted of a contravention of section 3 (1) of Act 8 of 1914. In order to separate the dogs belonging to the complainant and the accused, which had begun fighting in the street, the accused picked up a hoop and hit the dog of the complainant therewith, causing it serious injuries. It was held that the accused’s conduct, **while acting in the defence of her own property**, did not amount to a contravention of the section. The actual suffering that may have been caused to the animal was not taken into consideration. Van den Heever J stated that ‘the object of the legislation was not to confer legal rights upon animals and this prohibition is not intended to provide them with protection. The aim is obviously to prohibit a person from being so cruel to an animal as to give offence to the finer feelings and sensibilities of other persons.’

Similarly, in S v Edmunds<sup>119</sup> it was held that ‘it is not the mistreated dog who is the ultimate object of concern....Our concern is for the feelings of other human beings, a large proportion of whom...identify themselves with a tortured dog or horse and respond with great sensitivity to its sufferings. Random “reasonable and necessary” acts of cruelty are forbidden by law and yet the traditional or institutional acts of cruelty are permitted. These laws forbidding cruelty do hint at animals having rights against the cruelty of humankind. If a person is unreasonably cruel to an animal which belongs to him, the only grounds on which the person can be punished is by recognising a moral claim of the dog. The issue is how far these rights may extend. There is no reason why, if one can say animals should not be cruelly treated, why one cannot say they should actually be treated better.

---

<sup>116</sup> Gary L. Francione *Rain Without Thunder THE IDEOLOGY of the Animal Rights Movement* (1994) at 133.

<sup>117</sup> Ibid.

<sup>118</sup> 1947 (1) SA 490 (O).

<sup>119</sup> 1968 (2) PH H398 (N).



Unfortunately, this logic is fragile. It is submitted that it would be far more appropriate to penalise the cruel treatment of animals for the reason of animals being sentient beings, worthy of protection from any form of suffering and having rights of their own. Despite the illogical approach of the legislation, it will now be discussed.

## 6.1 National Legislation

### 6.1.1 The Constitution 108 of 1996

Despite South Africa having one of the most liberal Constitutions in the world, it does not extend the rights contained in the Bill of Rights to animals – it does not even provide an obligation on people to treat animals without cruelty and in a humane manner.

### 6.1.2 Animal Protection Act 71 of 1962

The object of the Act is to consolidate and amend the laws relating to the cruelty to animals. Protection<sup>120</sup> under the act is given to domestic animals<sup>121</sup> such as horses and cattle, sheep, goats, pigs, fowls, ostriches, dogs and cats, as well as any wild animals<sup>122</sup>, wild birds or reptiles in captivity or under the control of a person. The only regulations made under the Act govern the power of officers of a society for the prevention of cruelty to animals relating to the seizure of animals and the prohibition of the killing of dogs for commercial purposes.

The offences in respect of animals include ‘any person who overloads, overdrives, overworks, ill-treats, neglects, infuriates, tortures or maims<sup>123</sup> or cruelly<sup>124</sup> beats, kicks, goads or terrifies any animal or confines, chains, tethers or secures any animal unnecessarily or under such conditions or in such a manner or position as to cause that animal unnecessary suffering or in any place which affords inadequate space, ventilation, light, protection or shelter from heat, cold or weather.’ It further provides

<sup>120</sup> When reading the offences listed in Section 2, in conjunction with the definition of ‘animal’ in Section 1, it is difficult to understand how factory farming and vivisection are managed by this Act.

<sup>121</sup> Section 1 – definition of ‘animal’ in terms of the Act.

<sup>122</sup> Wild animals in captivity or under the control of a person enjoy protection under the Act. Animals, birds and reptiles that are wild, enjoy none.

<sup>123</sup> *S v Gerwe* 1977 (3) SA 1078 (T) deals with the words “torture” and “maim” and that they must be given their ordinary meaning, that being ‘the infliction of bodily pain as punishment or as a means of persuasion’ in the case of torture and ‘to mutilate’ in the case of maim. It was held that stabbing a dog did not qualify as a form of torture or maiming.

<sup>124</sup> In the context of the Act this refers to the infliction of unreasonable or unnecessary pain. (*R v Heldberg* 1993 NPD 507) The mere infliction of pain alone is not a contravention of the prohibition.

prohibits starving, underfeeding or poisoning any animal.<sup>125</sup> The Act makes such actions a criminal offence subject to a fine and/or imprisonment. The Act does not prevent a person from killing an animal – the prohibition lies in the method of killing, in other words the unnecessary infliction of pain and suffering. However, section 2(3) empowers the Minister of Justice to prohibit killing<sup>126</sup> of an animal in order to use its skin or other parts for commercial purposes. Interestingly, responsibility for all activities which amount to an offence are deemed to be committed by the owner of the animal, and the court may award damages in cases where a person has incurred expenses, such as veterinary attention, as a result of the offence.<sup>127</sup>

It was said in Society for the Prevention of Cruelty to Animals, Standerton v Nel<sup>128</sup> that the Animal Protection Act confers ‘wide powers’ on societies for the prevention of cruelty to animals. These powers, in terms of the Act, include authorising any officer of such society to enter any premises where an animal is kept for the purpose of examining the conditions under which the animal is kept. No warrant is necessary if consent of the owner/occupier is obtained and if not, the officer may enter by order of a magistrate.<sup>129</sup> The officers also have the powers of arrest and seizure.<sup>130</sup>

As a general rule it may be said that it is not unlawful to inflict pain on animals in defence from attack of an animal,<sup>131</sup> for the purposes of chastisement or training, and surgery designed to make the animal more useful.<sup>132</sup> The use of live animals in research is also not unlawful. As, shockingly, South Africa has no specific legislation regarding scientific research and vivisection<sup>133</sup>, it falls to be governed by the abovementioned Act. Thus, the

---

<sup>125</sup> See generally section 2 of the Act which sets out the offences in (1)(a)–(s).

<sup>126</sup> By notice in the *Government Gazette*.

<sup>127</sup> Section 4.

<sup>128</sup> 1988 (1) SA 42 (W) at 44H.

<sup>129</sup> Section 8(1)(a).

<sup>130</sup> Section 8(1)(b)-(d).

<sup>131</sup> S v Nkhulmeli 1986 (3) SA 102 (V) and R v Sibeko 1951 (2) SA (E).

<sup>132</sup> Such as spaying, neutering, dethroning and branding. (Although the counter-argument to neutering and spaying is that this is in the interests of any possibility of unwanted animals being brought into the world and not being cared for.) Owners remove their cat’s claws to prevent them from scratching the furniture, ‘debark’ their dogs to prevent them from annoying the neighbours, Dobermans and other dogs have their ears cropped and tails docked for aesthetic reasons.

<sup>133</sup> In a response to a statement released by the South Africans for Abolition of Vivisection (SAAV) in October 1997, the Minister stated that ‘there is no national policy on the export of primates and the DEA&T is in the process of consulting various stakeholders in order to develop a national policy on the use of animals in research experiments and the export of primates to other countries. Animals are currently being used in medical research in South Africa, for the benefit and well-being of society.’ This statement was made six years ago and absolutely no ground has been covered to draft any national policy on vivisection or the export of animals to other countries for that purpose.

In 1997 Minister of Environmental Affairs and Tourism (Minister Jordan) was approached by the CAPE organisation who wanted to export primates to SANOFI Laboratories in France for the purpose of testing pharmaceutical products. The Minister liaised with the Provincial MEC and insisted on firm assurances from SANOFI Laboratories that the Primates would ‘only be used for the testing of pharmaceutical products and

lawfulness of experiments of animals is determined by the same criteria of necessity and appropriateness that regulate other forms of treatment of animals<sup>134</sup>. The infliction of pain and suffering upon wild animals in the course of hunting is also not affected by the Act.<sup>135</sup>

This Act fails to cover all animals in its scope. It fails to address the issues of animals used in testing (it certainly cannot be said that such animals are kept in well-ventilated, adequately housed areas) or the issues of animals used in farming. The concept of 'unnecessary suffering' is obviously an extremely loose one given the fact that zoos, circuses and battery chickens are all 'legal'. The Act fails to place any constraints on those owners who partake in the abovementioned activities and it seems that, essentially the Act is directed only at 'companion animals.' Even this is hard to believe considering the acceptable cruelties that are prevalent.<sup>136</sup>

Essentially, the measure of criminality is not on the effect on the health and welfare of the animal, but rather the intentions and needs of the human perpetrator. Needless-to-say, prosecutions under this Act are rare.

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

The Act states in its long title that its purpose is to provide for the control of societies for the prevention of cruelty to animals and for matters connected thereto. It provides for the establishment of a Council<sup>137</sup> which has as its objects the prevention of ill-treatment of animals by 'promoting good treatment by man', promoting the interests of societies and to take cognisance of the application of laws affecting animals and societies and to make representations in connection therewith to the appropriate authority. It refers to a number of associated acts<sup>138</sup> as well as to the functions, powers and duties of the Council and the board.

---

would be treated in a humane manner'. The Minister's response to a statement released by the South Africans for Abolition of Vivisection (SAAV) in October 1997 was that the necessary assurances were received from SANOFI and the Minister recommended to the Provincial MEC that the ban on the export of indigenous animals be lifted in this instance and the province thereafter approved the export. The Minister stated that all requests for export permits should be subject to 'similar rigorous investigation ... until national policy on the export of primates is in place.'

<sup>134</sup> The South African Medical Research Council (established in terms of the Medical Research Council Act 19 of 1969) includes guidelines for the use of animals in medical research. These are aimed at minimising the suffering caused to animals without compromising the scientific validity of the research. It places an onus on the researcher to seek out the least traumatic technique to carry out the research effectively.

<sup>135</sup> These activities are supposedly regulated by the various provincial ordinances.

<sup>136</sup> See note 80.

<sup>137</sup> Section 2.

<sup>138</sup> The Animal Protection Act 71 of 1962; the Performing Animals Protection Act 24 of 1935; the Medicines and Related Substances Control Act 101 of 1965; the Veterinary and Para-Veterinary Professions Act 19 of 1982; the Animals Diseases Act 35 of 1984 and the Abattoir Hygiene Act 121 of 1992.

What constitutes 'ill-treatment' was put to the test in R v W<sup>139</sup> where, the accused, having tied a chain around a cow's neck in an effort to prevent it from straying onto other people's lands, caused a sore about 5 inches long and two inches wide on the cow's neck. It was held that there was nothing to suggest that the accused ill-treated the animal with the intention of causing it unnecessary suffering and therefore there was no evidence to confirm the accused's plea. In R v Makaza and Others<sup>140</sup> Beadle CJ stated that 'if the Legislature had wished to prohibit snaring animals with wire snares because of the cruelty involved in this form of capture, one would expect it to have done so in specific terms. The offence of snaring is, however, coupled with many other forms of capturing animals.....methods of capture which cause less pain and suffering than most other forms. It is true that the Act prohibits the use of wire snares for destroying game which is damaging crops....But there is nothing in the Act which prevents the Minister from issuing a permit for the capture of game by means of a wire snare, should he be so advised.' The anthropocentric basis of such laws (and resultant decisions) is that the already weak anti-cruelty laws are further diluted by stipulations that make acts of cruelty only violations if they are performed 'intentionally' and provided they judge believes the 'pain and suffering' to be 'necessary' or not.

The Society for the Protection of Cruelty to Animals has had some success in court prior to its using its power in terms of the Act. In Society for the Prevention of Cruelty to Animals, Standerton v Nel and Others 1988 (4) SA 42 (W), the SPCA brought an application for an order interdicting the first respondent from holding a rodeo with a live bull-riding competition. The submission made on behalf of the respondent was that the applicant's rights regarding animal welfare were narrowly circumscribed by the Animal Protection Act 71 of 1962 and that they had no clear right or *locus standi* to act beyond those powers. The Court found that there was no merit in this point and held further, that with the vast powers granted to it under the Act, it would be surprising if the applicant did not have the lesser power to prevent the injury being apprehended. The applicant qualified as an organisation to seek an interdict in appropriate cases where harm, injury or cruelty was apprehended. The interdict was granted. In terms of the current Act, legal standing is automatically provided for.

---

<sup>139</sup> 1960 (4) SA 692 (SR).

<sup>140</sup> 1969 (2) SA 209 (R).

#### 6.1.4 The Performing Animals Protection Act 24 of 1935

The Act is 'to regulate the exhibition and training of performing animals and use of dogs for safeguarding'<sup>141</sup> and provides that a magistrate may issue a licence to a 'fit and proper'<sup>142</sup> person for exhibiting and training of performing animals. The only mention of the requisite treatment of such animals is contained in section 7 where it is stated that the Minister may make regulations prescribing the method and form of confinement and accommodation of any animals class and 'any other reasonable requirement which may be necessary to prevent cruelty or suffering in the exhibition, training, maintenance, use or travelling of animals in respect of which a certificate has been granted.'<sup>143</sup> The only regulations promulgated under the Act provide the conditions subject to which a licence is held and include the licensee taking such steps as are necessary to ensure any wild or vicious animals are 'so trained or exhibited or the dogs so used for safeguarding cannot escape control.'<sup>144</sup> There are no regulations pertaining to the training, transport or caging of animals. It is submitted that this Act is a misnomer in that it does not protect performing animals in any way whatsoever.

A fine of R4000 or imprisonment for up to twelve months is the penalty for contravening the Act<sup>145</sup>. The Act does not apply to animals that are confined or trained for military, police or sporting purposes or the purpose of an agricultural show, horse show, dog show, caged bird show or any public zoological gardens.<sup>146</sup>

#### 6.1.5 Sea Birds and Seals Protection Act 46 of 1973

The objects of this Act were to provide for the control over certain islands and rocks, for the protection and the control of the capture and killing of sea birds and seals, for the disposal of the products of sea birds and seals and for matters incidental thereto.

#### 6.1.6 The Meat Safety Act 40 of 2000

This Act essentially deals with the safety standards of animal products, to regulate the importation and exportation of meat and to establish meat safety schemes rather than

---

<sup>141</sup> Long Title .

<sup>142</sup> Section 2(a).

<sup>143</sup> Subsections (c) and (d).

<sup>144</sup> Regulation 3(2).

<sup>145</sup> Section 8.

set any anti-cruelty standards in respect of abattoirs. Section 11 deals with the essential national standards that need to be complied with and subsection (h) states that ‘an animal presented for slaughter at an abattoir must be handled humanely during loading, transportation, off-loading, housing, immobilising and killing as prescribed in accordance with the requirements in the Animal Protection Act, 1962.’ How it is possible for the abattoirs to comply with the requirements in the Animal Protection Act when it clearly states that the offences in respect of animals include ‘any person who ill-treats, terrifies any animal or confines, chains, tethers or secures any animal unnecessarily or under such conditions or in such a manner or position as to cause that animal unnecessary suffering or in any place which affords inadequate space, ventilation, light, protection or shelter from heat, cold or weather’, is unclear. It is simply not possible to be humane in the abovementioned procedures. If abattoirs comply with this requirement it does not say much for the test for ‘humane standards’.

Further to this, it is an offence to use on or to attach to any animal any equipment, appliance or vehicle which will cause injury to such an animal. Without going into a detailed description of the procedures that take place in abattoirs, it is safe to assume that these requirements cannot possibly be satisfied. Section 11 has as its chief concern (as set out in subsections (a) – (s) with the exception of (h)), the safety of the meat for human consumption.

#### 6.1.7 The Animal Health Act<sup>147</sup>

This Act replaces the Animal Diseases Act 1984 and states that the Act is to promote *inter alia*, animal health and to regulate the importation and exportation of ‘animals and things’. Essentially, however, it is to provide measures to control animal diseases<sup>148</sup>. It defines an animal as ‘any mammal, bird, fish, reptile or amphibian which is a member of the phylum vertebrates, including the carcass thereof’ and ‘any invertebrate which is prescribed as animal’ for the purposes of the Act.<sup>149</sup> It refers to ‘owner’ in relation to animals or things...’ thus continuing with the concept of animals being property of humans, for the benefit of humans and without any rights of their own.

---

<sup>146</sup> Section 9.

<sup>147</sup> Act No. 7 of 2002.

<sup>148</sup> Long title.

<sup>149</sup> Section 1.

### 6.1.8 The Hazardous Substances Act 15 of 1973

The regulations relating to the control of the sale of cyanide for use in poison-firing apparatus<sup>150</sup> gives the health authority of a province power to give approval to a person 'who loads cyanide cartridges for use in a poison-firing apparatus.'<sup>151</sup> These poison firing apparatus are used for the control of problem animals.

Regulations relating to the control over fluoroacetic acid (mono), its salts and derivatives<sup>152</sup> provides for a problem animal controller to obtain a poison collar for the killing of 'problem animals' – defined as 'a predator which causes stock losses.'

### 6.1.9 National Principles, Norms and Standards for the Sustainable Use of Large Predators in South Africa<sup>153</sup>

The principles, norms and standards define wild predators, captive predators, captive-bred predators and canned hunting. It is a policy document at the moment and its aims are inter alia to 'promote ethical hunting of large predators'; 'to regulate the control of damage-causing animals';<sup>154</sup> 'to protect the rights of owners of properties neighbouring those on which large predators are introduced' and 'to ensure sustainable use of large predators'. Section 4 deals with the keeping and breeding of captive large predators in so far as a management plan and a business plan must be prepared and that they may not be kept as pets. It specifies micro-shipping and fencing arrangements but fails to set any kind of welfare standards at all.

The definition of 'canned hunting' allows the hunting of captive bred predators provided they are not actually in captivity at the time they are killed by the hunter. A bow and arrow may be used to hunt large predators and the hunting of captive bred predators is allowed if the provincial nature conservation official certifies that the animal has been rehabilitated to 'wild' status.

For inexplicable reasons, large predators may be kept in captivity for commercial purposes, but not for welfare purposes. There are no provisions in the document which pertain to the welfare of these predators. There are no requirements regarding cage or

---

<sup>150</sup> GNR 1486 14-11-86.

<sup>151</sup> Definitions Section 1.

<sup>152</sup> GNR 1488 14-11-97.

<sup>153</sup> GNR 25090 GG 13 June 2003.

<sup>154</sup> Defined as "large predators causing damage to property or which are a threat to human life..."

camp sizes, nor any other provision to ensure the reasonable welfare of the predator prior to its death.

The archaic attitude of the policy documents is reflective of South Africa's attitude to its wildlife. The animals of our country are considered to be nothing more than property, to be used (albeit "sustainably") at will. It will be of no use in combating the canned hunting industry – in fact it expands it to include 'lion, leopard, cheetah, wild dogs and hyaena'.

There are several other statutes that deal with animals in indirect and direct ways, but will not be dealt with at this as their implementation is for the convenience of humans, rather than animals.<sup>155</sup>

## 6.2 Provincial Legislation

Despite the renaming and reallocation of the provinces, the nature conservation ordinances that applied to the previous four provinces are essentially the same and apply to the nine new provinces. It is therefore necessary to deal with the four 'old' ordinances, namely the Nature and Environmental Conservation Ordinance 19 of 1974 (Cape),<sup>156</sup> Nature conservation Ordinance 12 of 1983 (Transvaal),<sup>157</sup> Nature Conservation Ordinance 8 of 1969 (Orange Free State),<sup>158</sup> and the Nature Conservation Ordinance 15 of 1974 which has since been supplemented by the KwaZulu-Natal Nature Conservation Management Act 9 of 1997 and the KwaZulu-Natal Nature Conservation Amendment Acts.<sup>159</sup>

The concept behind these laws is to protect species listed in the respective schedules in various ways. In the KwaZulu-Natal Ordinance, for example, with regard to endangered mammals it states that 'no person shall sell, purchase or exchange in any manner whatsoever any indigenous mammal or exotic mammal, save in accordance with the permit granted in terms of section 84.'<sup>160</sup>

---

<sup>155</sup> The Game Theft Act 105 of 1991 is an example of this. The Act was brought into effect to address the concerns over acquisition and loss of ownership of game. It provides in Section 2(2)(a) that a person who keeps game on land that is 'sufficiently enclosed' shall not lose ownership if that game escapes from such enclosed land.

<sup>156</sup> Applies to the Western Cape, Eastern Cape and Northern Cape and to some areas of the North West.

<sup>157</sup> Applies to Gauteng, Northern Province and North West Province.

<sup>158</sup> Applies to the Free State Province.

<sup>159</sup> Acts 5 of 1999 and 7 of 1999.

<sup>160</sup> Section 81.



The KwaZulu-Natal Nature Conservation Act<sup>161</sup> deals with 'wild animals or game' in chapter 3, including the hunting, buying, selling or captivity thereof. Section 17 provides the basic requirements that are necessary for dealing with animals in captivity such as the provision of clean drinking water and adequate water for bathing. Sections 29-34 deal with the establishment and maintenance of zoos in an administrative sense.

In each of these provincial laws, the general approach is to protect species listed in the respective schedules through absolute protection, permit requirements, hunting methods and specific hunting seasons and classify animals into 'specially protected', 'protected', 'ordinary,' 'exotic', 'indigenous' and other categories.<sup>162</sup> Bothma and Rabie<sup>163</sup> state '[f]inally, although legal classification of wild animals may seem rational from a human point of view, it is based on the arrogant assumption that man, himself a creature harmful to the environment, is free to decide which animal is useful, useless or harmful, with the corresponding adverse or beneficial for the classified animals. Although there is no alternative to this, those responsible for compiling categories of species should reflect on the consequences of their decisions and appreciate the moral judgements they are making.'

The Problem Animal Control Ordinance<sup>164</sup> is provincial legislation of the Eastern Cape and deserves a mention at this point. It is so archaic in its content that it allows for the formation of a club by 'any six or more persons who are not Black'.<sup>165</sup> The purposes of these clubs is for combating 'problem animals' which are defined as 'animals doing damage referred to in the Schedule<sup>166</sup> or any animals which has been declared a problem animal. The clubs may maintain a pack of hounds exclusively for the purpose of hunting and combating problem animals.<sup>167</sup> Unbelievably, section 12 states that 'no action, either civil or criminal, shall lie against any club or any member thereof for doing any act authorised by, or ancillary to the powers conferred...by this ordinance or for any unintentional damage resulting from any such act or for the unintentional killing or injuring of stock or game...'

---

<sup>161</sup> 29 of 1992.

<sup>162</sup> For a detailed discussion on the four 'old' ordinances see chapter 9 *Wilderness and the Law* Pd Glavovic 1995 and 'Wild Animals, Forests and Plants' *Environmental Law in South Africa* Jan Glazewski 2000.

<sup>163</sup> As read in 'Nature Conservation: An Analysis of the Legal and Philosophical Priorities for the Protection of Wildlife, a Diminishing Resource in South Africa' Ridl J at 76.

<sup>164</sup> 26 of 1957.

<sup>165</sup> Section 4(1).

<sup>166</sup> Black-eared Jackal, Lynx, Vagrant Dog.

<sup>167</sup> Section 9(1).

Further to this, a person who obstructs the club or 'fails to render such reasonable assistance' to the club in the exercise of its powers, is guilty of an offence.<sup>168</sup> It is also an offence to be in possession of a problem animal unless it is *inter alia*-

- (a) a local authority or body controlled or subsidised by the state;
- (b) a person who has a licence in terms of the Performing Animals Protection Act 24 of 1935;
- (c) a person who, with the written permission of the Director, keeps an animal in captivity or is using an animal for scientific purposes.

Merver and Pervan condemn the nature conservation authorities of South Africa. They believe that nature conservation departments overlook the best interests of the wild animals in their charge – what should be the fundamental consideration in every case. They cite a number of examples where the failure of the nature conservation authorities to apply this concept is all too evident.<sup>169</sup>

It is unfortunate that South Africa's wildlife laws are essentially governed by these varying ordinances, and in the case of KwaZulu-Natal, the Act. It seems logical to abandon these and enact new legislation that governs the country as a whole.

### 6.3 Local Laws

From the Durban perspective, the Bylaws refer to animals in the context of the Early Morning Market. The Bylaws stipulate that 'the killing and cleaning of poultry at the depot must be done by the owner of the bird or his representative' and that the 'person doing the killing shall be attired in clean clothing' and 'shall place or cause to be placed all refuse arising from the killing in the receptacles in the depot provided for that purpose.'<sup>170</sup> In the context of the Early Morning Market, certain aspects of the animals' welfare were considered such as a prohibition on tying their legs together and that they 'shall not be left in crates or boxes for longer than is necessary for the delivery to be made to the buyer.' It further provides that the Director may take all such steps as he may deem advisable to prevent or stop the infliction or suffering, cruelty or rough-handling on any poultry or birds'.<sup>171</sup> The extent to which animals in general are protected is summed up in Section E.8 which states that 'no person, being in a street or public place, shall by any means wilfully frighten, tease or enrage any animal.'

---

<sup>168</sup> Section 13.

<sup>169</sup> Op cit note 60 at 222 and 223.

<sup>170</sup> Section A.5.

<sup>171</sup> Section A.7.

#### 6.4 In summary

The legal protection afforded to animals in South Africa is largely based on the concept of them being the property of humans. Without taking into account the reason behind the protection, at least it can be said that some (however inadequate) protection exists. Importantly, however, our laws do not apply to the use of animals for food, food production, clothing or the use of animals for entertainment, medical or scientific purposes. In some instances the legislation even provides for the purposeful eradication of certain animals such as predators or 'problem animals'. The wildlife conservation laws are meagre.

Our law may be seen to give its meagre protection to animals in both direct and indirect ways. Direct in that the animals themselves are given some interest such as to be given food and not to be cruelly beaten unnecessarily. Indirectly, interests have been given in the relationship that animals have with humans – they may not be cruelly beaten as it is offensive to human sensibilities. However, animals have no legal rights and virtually any interest possessed by an animal can be traded provided the human benefit is sufficient. The laws prohibit 'unnecessary' suffering but this does not prevent humans from using animals for experimentation, food, dog racing, ritual sacrifice or as exhibits. It can hardly be said that any of this is necessary. The legal requirements of not inflicting unnecessary suffering on animals assumes, according to Francione, that it is only a question as to how this power is to be exercised.<sup>172</sup> Ultimately, virtually all use of animals is deemed to be necessary regardless of how trivial the human interest may be compared to how serious the animal interest is to be ignored. The hideous cruelties that take place in the raising and slaughter of animals in factory farms or feed lots have developed while the term "unnecessary suffering" has been part of our law. As Garner states (as set out by Francione<sup>173</sup>) if the unnecessary suffering standard "is, indeed, flexible enough to eliminate the "worst excesses" of animal exploitation, it is difficult to understand how animal agriculture, which represents by far the largest number of animals exploited in an institutionalised context, transformed in the way it did.

The law often actually allows for the infliction of pain or death as part of training or disciplining an animal and there are many cases (particularly in the US) where animals

---

<sup>172</sup> Op cit note 115 at 129.

<sup>173</sup> Op cit note 115 at 138.

are killed or injured to protect property rights.<sup>174</sup> Such treatment is institutionalised in that there is a social recognition that the exploitation has some legitimate value for human beings. Once an activity is legitimate, animal suffering becomes acceptable and is therefore assumed to be ‘necessary in terms of the law.’ Our law provides a strange dichotomy – the statutes that do provide anti-cruelty legislation versus those that legally encourage it. Those that provide anti-cruelty legislation propose minor punishments and the law enforcement thereof is poor. Gary Francione’s perception and, it is submitted, the correct perception, of property rights is that they have not diminished over time. The US legal system prohibits state interference with life, liberty or property – thereby establishing property rights on the same level as ‘arguably more fundamental rights in life and liberty.’ In fact, in some instances where humans do not wish to view their animals as property, the law will not accept this.<sup>175</sup> Regulating animal exploitation as opposed to prohibiting any form of animal exploitation, will not help to recognise the fact that animals have interests that cannot be traded, irrespective of the benefits to humans. If our legal system continues to resist moving in this direction, the system is not likely to recognise non-property related interests of animals.

Animals must, at the moment, depend on regulatory and other law enforcement to assist them as they are unable to demand or enforce their own rights. As Adam Kolber states (in his article: “Standing Upright: The Moral and Legal Standing of Humans and Other Apes”<sup>176</sup> ) ‘when regulators and police are too busy or uninterested to pursue violations of animal cruelty and related laws, private parties may try to step in. While these private parties might be thought to be ideal to help protect animals (notably because they invest in their own resources), they are frequently limited from bringing suits on behalf of animals due to constitutional and statutory limits on access to federal courts.’<sup>177</sup> Although this statement relates to the position in the United States, the problems experienced in South Africa are similar.

## 7. INTERNATIONAL LAW COMPARISON

An important comparison to our various provincial ordinances is the United States’ Endangered Species Act of 1973 which sets out a series of steps for ‘determining whether a species is at risk of extinction, removing the cause of its endangerment and

---

<sup>174</sup> Op cit note 115 at 134.

<sup>175</sup> Op cit note 116 at 129.

<sup>176</sup> Op cit note 82 at 193.

<sup>177</sup> Ibid.

returning the species to a viable state'<sup>178</sup>. The major stages are listing a species as threatened or endangered, providing immediate protection and prohibition of acts that will further jeopardise the species, developing and implementing recovery plans and delisting the species once it has been restored to a viable state. Once a species is listed, the Act requires the designation of a 'critical habitat' which is defined as the minimal area that is needed to supply the species with its immediate survival needs.<sup>179</sup> The Act also provides immediate protection to a species which is threatened or endangered.

Although the system of categorisation of species<sup>180</sup> is unfortunately applied in the United States' Act too, overarching legislation implemented to protect, rather than categorise for the purpose of hunting, is more proactive and close to achieving a status of animal rights law than our current ordinances provide. Currently, it is possible to hunt an endangered species in South Africa provided the requisite permit is required. Whether a permit is obtainable or not is dependant upon the various permit offices in the various provinces.<sup>181</sup> This is an untenable situation and needs to be addressed through the implementation of National legislation. As Glavovic pointed out in 1995, there is an 'urgent need in South Africa for a newly conceived plan of legal protection, the need for re-assessment of the legal dispensation for [wilderness and wildlife]<sup>182</sup> protection with current perceptions of their values.'<sup>183</sup>

The Great Ape Project<sup>184</sup> was published in 1993 and begins with a 'Declaration on Great Apes' that establishes moral and legal rights for apes in the United States. According to the Declaration, it is intended to promote a moral and legal position that is not intended to be merely a statement of theoretical moral philosophy. The Declaration states three

---

<sup>178</sup> Carroll, R et al. Strengthening the Use of Science in Achieving the Goals of the Endangered Species Act: An assessment by the Ecological Society of America 1996.

<sup>179</sup> Section 3 of the Act.

<sup>180</sup> Speciesism is defined in the *Oxford English Dictionary* as 'discrimination against or exploitation of certain animal species by human beings, based on an assumption of mankind's superiority.' Its implications are similar to those of racism and sexism, in that established societal prejudices have profound effects on the treatment of entire species or populations.

<sup>181</sup> There has been much press coverage on the fate of Baixhina, the black rhino for which a hunting permit was requested from the Northern Province permit office earlier this year. Although it was not granted, she has to be closely watched to see whether she is moved to another province which may have less strict controls. In a telephone conversation with the permit officer in the KwaZulu-Natal permit office it was ascertained that KZN is not allowing the hunting of Baxhornis Major (indigenous to South Africa) at the moment but will allow the hunting of Baxhornis Minor which is not indigenous and which there is only one in the country. It is in the particular conservation authorities' discretion as to whether the hunting of the black rhino may be resumed at any stage.

<sup>182</sup> Author's parenthesis.

<sup>183</sup> Glavovic, PD 'Wilderness and the Law' (1995) 331.

<sup>184</sup> *A Declaration of Great Apes* at [www.greatapeproject.org](http://www.greatapeproject.org). The book, *Rattling the Cage: Towards Legal Rights for animals*, written by Steven Wise and published in 2000, has developed into the Great Ape Project and an organisation through which a number of scholars, scientists and activists demand recognition of moral and legal rights for great apes.

principles to protect great apes namely, a right to life,<sup>185</sup> the protection of individual liberty,<sup>186</sup> and a prohibition on torture.<sup>187</sup> The Declaration demands ‘the extension of the community of equals to include all great apes’. The Great Ape Project anticipates the concept of guardians being appointed by the courts to protect the legal rights of apes and to bring suits on their behalf. The Project seeks nothing less than full moral and legal standing for great apes.

No other country has granted any animal anything near the kind of rights set out in the Great Ape Project although some countries have enacted protection for apes. As previously discussed, the UN is implementing laws to prevent the testing of cosmetics on animals but biomedical research on great apes was banned in Britain in 1996<sup>188</sup> as the cognitive and behavioural capacities makes it unethical to use them in research. According to New Zealand’s Animal Welfare Act 1999<sup>189</sup> ‘research, testing, or teaching’ great apes is not permitted unless a government official in charge of animal welfare has approved it and such activity benefits the ape species. Such approval can only be given if the official is satisfied that the activity benefits the individual ape or the ape species and ‘the benefits [of the activity] are not outweighed by the likely harm[s]’<sup>190</sup> According to Kolber,<sup>191</sup> the enactment of these protections is largely due to the effort of the Great Ape Project and its New Zealand counterpart.

The Great Ape Project is a first in the world insofar as granting rights to animals is concerned. Kolber argues that the Great Ape Project is having an effect on the laws governing animal protection and experimentation, and moral and legal issues raised by the Project have implication beyond only great apes. His paper focuses on the Great Ape Project as ‘it has demonstrated its ability to influence legalisation and its philosophical foundations lie at the heart of much of the “animal liberation” movement’.

Still focussing on the United States, the Animal Welfare Act (AWA)<sup>192</sup> is the federal law that governs the humane care, handling, treatment and transportation of animals used in

---

<sup>185</sup> The lives of members of the community of equals are protected – they may not be killed except in very strictly defined circumstances such as self-defence. (The community of equals include all great apes – human beings, chimpanzees, bonobos, gorillas and orang-utans.)

<sup>186</sup> The members of the community of equals must not be arbitrarily deprived of their liberty; if they should be imprisoned without due legal process, they have the right to immediate release. (Op cit note 183.)

<sup>187</sup> ‘The deliberate infliction of severe pain on a member of the community of equals...is regarded as torture, and is wrong.’ (Op cit note 184.)

<sup>188</sup> Steven M Wise, *Rattling the Cage: Towards Legal Rights for Animals* 5 (2000).

<sup>189</sup> <http://www.maf.govt.nz/> (section 85(1)).

<sup>190</sup> Section 85(5).

<sup>191</sup> Op cit note 8 at 165.

<sup>192</sup> Op cit note 82.

laboratories. It does not, however, prohibit any experiments – its simply sets minimum housing and maintenance standards for confined animals. The Act also covers dealers who sell animals to laboratories, animal exhibitors, carriers, dog and cat breeders, puppy mills, zoos, circuses and roadside menageries. It specifically excludes retail pet stores, state and county fairs, livestock shows, rodeos, purebred dog and cat shows and ‘fairs and exhibitions intended to advance agricultural arts and sciences’. Regulations to the Act specify the minimum requirements for handling, care, housing, treatment, transportation, feeding, watering, sanitation, ventilation, lighting, shelter, veterinary care and separation by species.

According to PETA,<sup>193</sup> although the Act has the potential to improve the living conditions for all animals covered by the Act, the enforcement of the Act is lacking. The responsibility falls to a division of the USDA known as the Animal and Plant Health Inspection Service (APHIS) with only 85 inspectors. PETA also states that budgetary constraints and strong opposition from animal breeders, pharmaceutical companies and experimenters have also helped towards poor enforcement of the Act. According to PETA, there are nearly 1500 research facilities in the US, over 1800 exhibitors and 4400 dealers which should be inspected annually. 85 inspectors have to cover 8000 facilities nationwide. In March 1992, the USDA’s Inspector General stated that APHIS was not in a position to ensure humane treatment of animals at all facilities. At 284 facilities examined in the audit by USDA, 46 had received no annual inspection and out of 156 that were in violation of the law, 126 had had no follow-up inspection. According to Scully<sup>194</sup> “the AWA is a collection of hollow injunctions, broad loopholes, and light penalties when where are any at all”.

Criticisms aside, the Animal Welfare Act is an Act to which South Africa has no comparable legislation. There is nothing in South African law to manage the humane treatment of animals used in experiments, in entertainment and the like.

The British government<sup>195</sup> is currently drafting an Animal Welfare Bill, which seeks to update and encompass most animal welfare legislation covering all situations where animals are kept by humans. The Bill is expected to be released by the end of 2003. Current UK Animal Welfare Legislation is similar to South African legislation and includes

---

<sup>193</sup> People for the Ethical Treatment of Animals. See [www.peta.org/mc/facts/](http://www.peta.org/mc/facts/).

<sup>194</sup> Op cit note 8 at 383.

<sup>195</sup> See <http://www.defra.gov.uk> for more information. All information on British legislation obtained from <http://defra.gov.uk>.

the Protection of Animals Act 1911 which is the cornerstone of legislation in England and Wales that protects both domestic and wild animals from cruelty. The Act makes it an offence generally, to treat an animal cruelly or to cause unnecessary suffering. It prohibits a number of specific acts, such as animal baiting or fighting, and administering noxious substances to animals.

Anyone can instigate court proceedings under the Act, but prosecutions are usually brought by the police or animal welfare organisations (the RSPCA secures most of its animal cruelty convictions under this legislation). Only the police, however, have powers of arrest and seizure.

The Wildlife and Countryside Act 1981 (WCA) is the principal legislation in Britain for the protection and conservation of wildlife and its habitat. It is supplemented by the Conservation (Natural Habitats) Regulations 1994, implementing Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora.

This Act also deals with the use of animals in experiments in that it states that:- no person may apply a regulated procedure to an animal unless he holds a personal licence, the procedure is applied as part of a programme of work specified in a project licence, and the place where the procedure is carried out is a place specified in the personal licence and the project licence. Essentially it is an administrative act rather than an animal welfare act.

The Performing Animals (Regulation) Act 1925 Act applies to Great Britain, and requires any person who exhibits or trains performing animals to register with their Local Authority. The Act covers all situations involving the training and/or exhibiting of performing animals in circuses, cabaret, at shows and displays in zoos, and special events.

It gives Local Authorities and the police powers to inspect premises where performing animals are trained and exhibited, or kept for the purpose. A magistrate's court may, on consideration of a related complaint of cruelty by a police or local authority officer, make an order against the accused person, restricting or prohibiting them from training/exhibiting performing animals.

It is recognised that the Act does not provide circus animals with the standards of welfare normally associated with a licensing regime. Section 3(1)(a) of the Act does, however,



empower Local Authorities and the police to inspect circus winter quarters 'at all reasonable times', as places where performing animals are 'kept for training or exhibition'. Any unnecessary suffering of animals witnessed could give grounds for proceedings, either under the 1925 Act itself (if cruelty is seen to accompany training), or under the Protection of Animals Act 1911.

The Pet Animals Act 1951 provides that anyone in Britain in the business of selling animals as pets requires a licence under the Pet Animals Act 1951. The Act covers basic animal welfare needs such as suitable accommodation (size, temperature, lighting, ventilation and cleanliness), food and drink, monitoring, precautions against disease, and arrangements for fire or other emergency. Local Authorities have the inspection powers necessary to enforce the Act, involving veterinary surgeons or practitioners as necessary, and have the power to prosecute offenders. Offences include selling animals as pets without a licence, being in breach of licence conditions, selling pets in a street or public place (including from a market barrow or stall), selling pets to persons under 12 years of age, and obstruction of an inspection.

The Zoo Licensing Act, which came into force in April 1984, makes it an offence to operate a zoo without a licence issued by a Local Authority. A zoo is defined in the Act as an establishment where wild animals are kept for exhibition (other than a circus or pet shop) to which members of the public has access, with or without charge for admission, on more than seven days in any period of twelve consecutive months. The definition includes not only traditional urban zoos, but also, for example, safari parks, butterfly houses, aquaria and other similar establishments.

In pursuance of Section 9 of the Zoo Licensing Act 1981, the Secretary of State, specified Standards of Modern Zoo Practice - standards with respect to the management of zoos and the animals in them. The standards bring the licensing and requirements of UK zoos in line with the requirements of the EU Zoo Directive and provide a framework for the Secretary of State's Standards of Modern Zoo Practice including food, the provision of a suitable environment the provision of animal healthcare and giving the animals the opportunity to express their most normal behaviour.

As is the case in South African law, animals in the United States are not recognised as legal persons who can have their own legal standing. However, there have been a

number of suits in the United States where animals have been cited as plaintiffs<sup>196</sup> which is a dramatic difference from South African case law. Unfortunately, most of these US cases do not directly address the *locus standi* issue.

Article III of the U.S Constitution limits the jurisdiction to federal courts to “cases or “controversies”.<sup>197</sup> In Baker v Carr<sup>198</sup> it was held that litigants must have a personal stake in the outcome of the controversy. A plaintiff must prove legal standing by demonstrating that he or she has suffered an injury-in-fact<sup>199</sup> that was caused by the defendant’s action and that a favourable judicial ruling will redress the plaintiff’s injury.<sup>200</sup> The Animal Welfare Act<sup>201</sup> has certain requirements imposed by the Administrative Procedure Act (APA)<sup>202</sup> which provides for judicial review to any person “suffering legal wrong because of an agency action within the meaning of the relevant statute.”<sup>203</sup> The Supreme Court, in Bennet v Spear<sup>204</sup>, held that “a plaintiff’s injury must arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked by the suit.” Therefore, in cases brought under the Animal Welfare Act (AWA), the Act must either implicitly or explicitly grant that plaintiff a cause of action. If animals had legal standing under the AWA, private plaintiffs could represent them to enforce the laws protecting them.

According to Kobler,<sup>205</sup> attempts to bring suit on behalf of animals often fail because humans cannot meet the injury-in-fact requirement. His submission is that if animals were granted the standing to sue, they could easily satisfy this requirement when suffering from violations of the AWA. The animal’s human representative or guardian could then show that the violation of the AWA caused the animal injuries that can be remedied by appropriate action.

---

<sup>196</sup> *Spotted Owl v Hodel*, 716 F Supp 479 (WD Wash 1988), *Loggerhead Turtle v City Council* 896 F Supp 1170 (MD Fla 1995); *Tree Boa v Witt* 918 F Supp 879 (DVI 1996).

<sup>197</sup> U.S CONST. Art III, § 2 cl.1.

<sup>198</sup> 369 U.S 186 (1962).

<sup>199</sup> *Lewis v Casey* 518 US 343, 349 (1996).

<sup>200</sup> *Lujan v Defenders of Wildlife*, 504 US 555, 560-61 (1992).

<sup>201</sup> 7 USC, 2131-2159 (2001).

<sup>202</sup> 5 USC (1994).

<sup>203</sup> *Ibid.*

<sup>204</sup> 520 US at 162.

<sup>205</sup> *Op cit* Note 82 at 195.

## 8. INTERNATIONAL TREATIES

The IUCN, Species Survival Commission (1999) categorised selected species of flora and fauna depending on their vulnerability into what is known as the Red Data Book. Although this concept has been localised into the South African Red Data Book Series<sup>206</sup> it is not a legislative document and cannot be implemented through law. It is however, a reference point that will be exceptionally valuable if and when its concepts can be incorporated into our law.

South Africa became a signatory to the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) in 1975. CITES is a treaty which controls trade in flora and fauna and products thereof by categorising them into different degrees of protection<sup>207</sup>. The import or export of these species requires the prior grant and presentation of a CITES permit, which permit will only be granted when certain conditions are met.<sup>208</sup> Unfortunately, South Africa has not enacted legislation to give effect to CITES other than through the vague and varied enforcement of the provincial ordinances.

South Africa became a signatory to the Convention on the Conservation of Migratory Species of Wild Animals (the Bonn Convention)<sup>209</sup> in 1991. Essentially the objective of the Convention is to protect migratory species through strict protection of endangered species and migratory species that are vulnerable.

## 9. WELFARE VERSUS RIGHTS

There are two animal 'liberation' movements – the welfarists and the rightists. The animal welfare view is essentially that animals are to be treated humanely and, as sentient beings, and should be protected from unnecessary cruelty. Animal exploitation is seen as a necessary evil but one which should be as humane as possible.<sup>210</sup> Animal rightists believe that animals should not be used as a resource and need to be treated

<sup>206</sup> The Series is not without its problems such as the exclusion of all invertebrates (except butterflies) from its contents and its reiterating the concept of categorisation.

<sup>207</sup> This concept of categorising is similar to the one adopted in our conservation ordinances.

<sup>208</sup> These being : export/import of the species will not be detrimental to the survival of that species in the wild; the specimen was not obtained in contravention of the laws of protection of fauna and flora of that State; the living specimen will be so prepared and shipped as to minimise the risk of injury, damage to health or cruel treatment; in South Africa an import permit is required for all specimens including those on Appendix II and III of CITES. See generally <http://www.cites.org.za>.

<sup>209</sup> See <http://www.polity.org.za/govdocs/speeches/1999> for the notes for the opening of the 6<sup>th</sup> meeting of the conference of the Bonn Convention held in South Africa.

<sup>210</sup> Op cit note 116 at 1.

with respect.<sup>211</sup> Animal rightists require the abolition of animal exploitation rather than simply its regulation.

Francione argues that the rights theorists seek the removal of the property status of animals and that all subjects-of-a-life must have fundamental interests that cannot be sacrificed simply for human benefit. He sets out several criteria to achieve these two notions<sup>212</sup>:-

1. The prohibition of reasonably identifiable behaviour and the animal's right to claim (through a representative) the protection of this right;
2. The prohibition must end a salient part of the institution of exploitation;
3. The prohibition must recognize and respect a non-institutional animal interest ie, animals as themselves and not as property of humans;
4. The animal interests cannot be tradable;
5. The prohibition shall not substitute an alternative and supposedly more humane form; of exploitation.

He argues further that animal welfarism 'is structurally defective and conceptualises the human/animal conflict in ways that ensure that animal interests never prevail.'<sup>213</sup> The rights theory, on the other hand, provides more guidance for the eradication of the property status of animals rather than simply the eradication of animal suffering. The status and plight of animals is worse now than it ever has been which indicates that the welfarist approach is not adequate enough. The way forward therefore must be to grant animals standing – **to grant animals rights**.

Scully does not enter the animal rights versus animal welfare debate. He does, however, refer to animal welfare as a 'moral opportunity to fill our own lives with acts of compassion'<sup>214</sup> and not a moral problem to be solved in statutes.

## 10. CHANGING ATTITUDES IN SOUTH AFRICA

Given the legislation and the lack of proposed amendments thereto, there appears to be little in the way of change in South Africa. The National Environmental Management: Biodiversity Bill is potentially useful but falls short of what is needed. It can be said that

---

<sup>211</sup> Author's discussion with Steve Smit, founder of animal rights organisation Justice for Animals (formerly FALCON). See also [http://www.justiceforanimals.co.za/animal\\_rights.html](http://www.justiceforanimals.co.za/animal_rights.html).

<sup>212</sup> Op cit note 116 at 194 – 203.

<sup>213</sup> Op cit note 116 at 4.

<sup>214</sup> Op cit note 116 at 398.

public morals need to change and from that change will develop public demand for more effective legislation. Already there are growing demands made by animal welfare organisations such as the Kalahari Wildlife Sanctuary and the pressure is slowly being exerted on government.

Steve Smit of Justice for Animals is confident that there is an attitude shift towards a more enlightened and morally aware society as far more people are working towards rights for animals than ever before. Scully contemplated there being a general uneasiness about human mistreatment of animals because of humans beginning to realise that they should be feeling uneasy about it.<sup>215</sup> He discusses the need to understand the difference between habits and needs, traditions and eternal laws and that 'the fur salon... [is] not the centre of the moral universe.'<sup>216</sup>

In an unprecedented act in defence of wild animals in South Africa, Mercer and Pervan prepared a 'Boycott Discussion Document'<sup>217</sup> (BDD) to be 'served upon all roleplayers in environmental management, from those animal rights and welfare organisations throughout the world who might be prepared to endorse and actively support a call for a general international tourism boycott.....to join with the animal welfare community in persuading government' to meet a number of demands. These are :-

1. The captive breeding of predators for hunting and the hunting of captive bred predators be banned.<sup>218</sup>
2. The conditions under which the 2500 captive lions are presently being held will be regulated in consultation with the animal welfare community.
3. Wildlife sanctuaries operating under the auspices and policies of the American Sanctuary Association and TAOS will be recognised and promoted.
4. Close consultation between the nature conservation officials and the animal welfare community on all matters affecting animal welfare, including policy formation as well as the granting of permits for hunting or keeping animals in captivity, will be promoted.
5. No prosecution involving animal welfare or confiscations of wildlife may take place without prior consultation with the animal welfare community.

---

<sup>215</sup> Op cit note 8 at 43.

<sup>216</sup> Op cit note 8 at 45.

<sup>217</sup> Personal discussions and correspondence with Chris Mercer of the Kalahari Raptor Centre. 'The Boycott Discussion Document. Complaints of the Animal Welfare Community' (2003).

<sup>218</sup> See discussion on the National Principles, Norms and Standards for the Sustainable Use of Large Predators.

6. In order to promote the involvement of the animal welfare community in wildlife management, and to act as a watchdog, a member elected by the community will sit on the board of South African National Parks as well as in the proposed National Institute for Biodiversity, as well as on the Boards of all provincial Boards.
7. The turning of our national and provincial parks into hunting and game capture<sup>219</sup> farms must be stopped forthwith,<sup>220</sup> and a full EIA undertaken, in which *inter alia* the possible effects of an international tourism boycott be assessed. The prohibition against hunting and other harmful commercialisation in national parks must be carried forward into the new Protected Areas Bill, and section 95<sup>221</sup> deleted.
8. An immediate prohibition be imposed upon the killing of so-called problem animals by farmers,<sup>222</sup> including the use of poison or gin traps.
9. Disciplinary action be brought against named officials who have wasted millions in public funds because of their own abuse of authority.

---

<sup>219</sup> The BDD contains an excerpt from a 27 page research document prepared by Michele Pickover, Xwe African Wild Life Investigation and Research Centre founder. (BD at 16). According to Pickover, the Kruger National Park has 'traded-in the large-scale killing of elephants for the more lucrative game capture, selling and translocation of animals, including rhino, elephants and lions. They say they have to sell animals in order to support conservation.' According to the document, the SANParks Annual reports state: "Game, by products and plant sales" were R11 847 404 in 2000; R8 858 441 in 1999; R3 812 033 in 1998 and R3 137 741 in 1997. Kruger National Park has also sold lions to well-known canned lion breeders and unscrupulous trades such as Riccardo Ghiazza (of the Tuli elephant saga). In 2000, at least 19 lions were sold to people known to be associated with canned lion hunting. These included a pride of 13 lions comprising 3 females, 2 males and 8 cubs sold to Piet Slabbert – a canned hunter and breeder who owns a hunting farm in the Free State.

Game capture operations are cruel – there is no regard for the animal or its social structures, the removal of males for trophies affects the gene pool of the species, pregnant mothers lose babies due to stress, mothers of unweaned young are captured and the babies are left to die or are killed.

<sup>220</sup> Op cit note 138 at 14. The allegation made by Pickover is that the gravest threat to the Kruger National Park's preservation is their own mismanagement and commercialisation programmes. Pickover believes, and supports this contention in her report, that, in order for the South African government to make national parks destinations for trophy and sport hunters, the government is investigating changing the National Parks Act and/or changing the status of parks to that of 'reserves' or 'wildlife areas'. Pickover alleges that zoning areas within Parks and Transfrontier Parks for 'consumptive resource utilisation' is simply a euphemism for killing animals for sport. Further to this, there is, according to Pickover, a sharing of 50% of the profits from commercial hunting of animals that have been shot and wounded in adjacent private reserves and then either dies or is killed in the Kruger National Park.

<sup>221</sup> Park managers, with ministerial approval may "carry out or allow any commercial activity, or any activity aimed at raising funds, provided it does not threaten the survival of the species."

<sup>222</sup> The killing of problem animals is facilitated and approved of by conservation officials and it lifts all the controls on 'humane' methods of hunting. When the Kalahari Raptor Centre attempted to save three caracals from being shot by a farmer, the nature conservation officials (after much slander and administrative fighting on the part of the officials) removed the animals from the KRC property and took them to the Bloemfontein Zoo. According to the August 1996 edition of the South Africa Journal of Science, research has shown that in an effort to exterminate 'problem animals', hundreds of thousands of animals (mostly non-problem animals) are killed. Over a period of thirty years, the Oranjejag hunt club alone has exterminated about 106 000 animals in the Free State. 65 415 were harmless Cape Foxes, 4892 harmless African Wild Cats and 56 Brown Hyena. Mercer and Pervan state that "[t]he scale of the inhumanity and wasted slaughter caused by the Problem Animal Control Ordinances, and the hunt clubs such as Oranjejag which operated under these Ordinances, are a national scandal and deserve a judicial committee of enquiry". Op cit note 62 at 22.

Compensation should be awarded to those animal welfarists who have suffered as a result of such abuses.<sup>223</sup>

One would think that these demands were not of the kind that needed to be made.<sup>224</sup> However, on the face of it, there is a wonderful conservation ethic in South Africa, run by the Departments of Conservation and the vast Trans-Frontier Park, and yet underneath the façade lies corruption, greed and a startling non-conservation ethic.<sup>225</sup>

In a further attempt to resolve what has become an impossible situation regarding the canned lion hunting industry, the Kalahari Raptor Centre served a Letter of Demand on Minister Vali Moosa and the MECs for Nature Conservation in all nine provinces. They have been requested to remedy their unlawful conduct by:-

- reconsidering all permits granted to captive predator breeders by a person with the legal authority to do so;
- notifying the animal welfare community to arrange an inspection in loco of the breeding facility;
- giving the animal welfare community the opportunity to prepare a report on the issues and to suggest standards of welfare and permit conditions to cover areas of concern;
- in the meantime, declaring a moratorium on the issue of permits for the hunting of lions and the export of any lion/predator trophies.

Failing the respondents complying with the above, legal proceedings will be brought to ban all captive breeding of predators for hunting purposes and a ban on the sale of their body parts.

The outcome of these legal proceedings will reflect profoundly on the attitude of South Africa in respect of wild animals and their rights. It is preferable that there be a complete ban on the captive breeding of predators but perhaps that would be asking too much too soon.

It is this kind of forceful attitude that needs to be taken on behalf of all animals, not simply the wild predators. It is this attitude that is necessary for South Africa to move

---

<sup>223</sup> See the BDD for a number of examples of harassment of people running animal welfare organisations. There are many examples of corruption and bias on the part of nature conservation officials.

<sup>224</sup> The National Principles, Norms and Standards for the Sustainable Use of Large Predators has been published since these demands were made – showing a complete lack of concern or interest shown in the demands made by the Kalahari Raptor Centre.

forward into a future in which animals can be considered as recipients of legal rights through the extension of a moral, spiritual, ethical (and ultimately legal) change of attitude. Or it is submitted, a legal change first and then a moral, spiritual and ethical change of attitude.

Unfortunately, social attitudes are not going to change. According to Scully<sup>226</sup> we have to wonder 'from what authority we get even these most basic moral standards and prohibitions we think of as common decency and the minimal requirements of law. Historically.... We get our belief in human equality from the tradition of natural law... [this] marks the key insight of mankind in our understanding of the world and our moral progress within it.... [Natural law] lays down a set of non-arbitrary standards and laws on which to base the standards and laws we make for ourselves. This key insight is that all moral truth arises from the nature of things... Suddenly all is not arbitrary and we have a fixed point of reference, an intelligent basis for calling one thing good and another bad... Natural law provides formal support for commonsense morality and "its most basic and revolutionary insight is the same for [animals] as for us.'<sup>227</sup>

## 11. THE WAY FORWARD

How we decide to treat animals can affect our legal regimes relating to the environment, animal welfare, endangered species, agriculture, farming and animal experimentation. Our treatment of animals raises questions about the principles that underlie human morality.

There is a need to recognise the existence of all other species who, by virtue of their sentience and independent existence, make strong moral claims upon human beings for their consideration and protection from harm caused by humans. As a result of the neglect and ignorance of rights of animals, there exists a global culture of callous indifference to the suffering and rights of animals. By reason of their vulnerability to the acts of humans and the inability to protect themselves or present their interests, animals require special and comprehensive legal protection. Not only is this vital in order to ensure the fundamental rights of all animals to experience life free from human-caused harm but also as a means to put into effect our moral responsibility to not harm other species – either directly or indirectly.

---

<sup>225</sup> See generally, BDD.

<sup>226</sup> Op cit note 8 at 299.



Stone, in his essay 'Should Trees Have Standing' puts forward an argument that legal rights have been given to inanimate right-holders such as trusts, corporations, joint ventures and municipalities. He refers to a case in which a ship was seized by pirates, and after capture, the United States condemned and sold 'the offending vessel'. Justice Story quoted Chief Justice Marshall from an earlier case: 'This is not a proceeding against the owner; it is a proceeding against the vessel for an offence committed by the vessel; which is not a lesser offence'.<sup>228</sup> The fact that inanimate objects are given rights in law and living objects are not, is according to Stone, illogical. He therefore proposes that legal rights should not only be given to animals to a certain degree, but to the natural environment as a whole.

Our law currently criminalises dog beating by creating a prospective liability for the dog beater. In no accepted sense do the statutes create a right in the dog. Similarly, the statutes that compel farmers or circus owners to provide minimally "humane" standards at the risk of some kind of prosecution or the loss of their licences. The law has attempted to protect animals but legal rights are not required or applied. If, to use Stone's argument, our law affords rights to foetus's<sup>229</sup> and mentally ill persons, as well as to trusts and corporations, it is not unthinkable to confer rights onto animals other than humans.

It is not necessary to accept arguments about the characteristics or sentience of animals in order to grant standing to animals. It is merely necessary to recognise certain obligations to protect animal interests. The legislation could further the concept of animal standing without upsetting constitutional standing requirements. It is possible to include this by way of an addendum to Section 24 of the Constitution. Mercer and Pervan suggest the following:-

'A. All wild animals shall have the following legally enforceable rights which rights shall be written into the Constitutions of all Southern African nations:

- 1 The right to live free from physical or mental cruelty.
- 2 The right to live undisturbed in all existing proclaimed game reserves.
- 3 The right to share unproclaimed wilderness areas free from human persecution.

---

<sup>227</sup> Op cit note 8 pg 304.

<sup>228</sup> Stone, CD 'Should Trees Have Standing and other Essays on Law, Morals and the Environment' (1996) at 3.

<sup>229</sup> *Pinchin v Santam Insurance* 1963 (2) SA 254 (W).

- 4 The right to protection of the law against any person who violates these rights.<sup>230</sup>

It is submitted that this should be widened to include all animals and not only wild animals. In combining Merver and Pervan's suggestion with the Declaration for great apes, an amendment to the Constitution that promotes both a moral and a legal position is set out as follows:-

'All animals shall have the right to:-

1. life;<sup>231</sup>
2. the protection of individual liberty;<sup>232</sup>
3. live free from torture,<sup>233</sup>
4. liberty;
5. live undisturbed in their own habitat;
6. protection of the law against any person (juristic or otherwise) who violates these rights

In order to enforce these rights, our law should provide for actions to be brought in an animal's own name and interest, for the calculation of damages to include an accounting of the interests of the animal and for the judgment be applied for the benefit of the animal.<sup>234</sup> In a few cases in the United States standing was given to animals such as the Northern Spotted Owl<sup>235</sup> and the Mt Graham Red Squirrel<sup>236</sup> but very few have been filed in the name of the animal only, unjoined by a natural person or association as back-up plaintiff. As a result, one cannot know what the courts would have decided on the standing issue if standing had rested on the animal only.

As the High Court in South Africa is the upper guardian of all minor children, to provide for 'the best interests of the child' so should a designated commission be the guardian of all animals. If an animal rights commission were established in South Africa it may not be necessary to bring animal liberation or animal cruelty matters to court but rather to the

<sup>230</sup> Op cit note 62 at 247.

<sup>231</sup> In other words, they may not be killed except in very strictly defined circumstances such as self-defence.

<sup>232</sup> Arbitrary deprivation of their liberty would include imprisonment without due legal process.

<sup>233</sup> This would be defined as the deliberate infliction of pain.

<sup>234</sup> These are the general elements of legal persona for the natural environment that Stone sets out in his book (op cit note 36) and the author has narrowed down these elements apply to animals only as opposed to the natural environment as a whole.

<sup>235</sup> Northern Spotted Owl v Hodel 716 F. Supp 479 (W.D Wash 1988) and Northern Spotted Owl v Lujan 906 F Supp 621 (W.D Wash 1991).

<sup>236</sup> Mt Graham Red Squirrel v Yeutter 930 F 2d 703 (9<sup>th</sup> Cir 1991). See also the Silver Springs Monkey case : Pacheco and Francione 'The Silver Springs Monkeys' *In Defence of Animals* p135 and op cit note 80 at 161.

commission for a hearing. The commission and the hearings could be run in a manner similar to the Town and Regional Planning Commission or the Estate Agents Appeals Board but consisting of members from the animal rights movement and the field of law. Obviously, any situation in which a guardian or trustee is empowered to speak for a ward, the argument will depend on what the law provides. Thus, legislation needs to be enacted which provides for the concept of animal rights and gives animals legal standing in our law.

Stone puts forward an argument for establishing a guardian<sup>237</sup> for future generations in line with the Malta Proposal that was submitted in preparation for the Rio 'Earth Summit' Conference in 1992. Stone's argument is not to establish a guardian solely to protect the future generations of *humans* but he proposes the establishment of guardians for several natural objects such as marine mammals, Antarctic fauna or various cultural sites such as the Sphinx. In so doing he is taking the animal rights concept a step further by providing for the rights of animals of the world today as well as all future generations of animals. He details where the guardian should be situated, what the official functions and objectives of the guardian should be.<sup>238</sup>

Mercer and Pervan further their proposal for an addendum to the Constitution set out above with the following:-

- B. The High Courts shall act as Upper Guardian of all wild animals, and may appoint curators to carry out such investigations or duties as the Court may direct in order to protect the rights of animals.
- C. Any person shall have locus standi in judicio to bring to the attention of the Upper Guardian any breach of the rights of animals.
- D. Any order made by a Judge acting as Upper Guardian shall be binding on the State and any officials or persons who flout such order shall be subject to arrest for contempt of Court.<sup>239</sup>

The author expands this by suggesting:-

1. It is recognised that that animals deserve the consideration and protection from harm caused by humans;

---

<sup>237</sup> Stone, C 'Should We Establish a Guardian for Future Generations?' Op cit note 36 at 65.

<sup>238</sup> Op cit note 236 at 70,71 and 72.

<sup>239</sup> Op cit note 62.

2. It is recognised that there is neglect and ignorance of the rights of animals that has contributed to a global culture of indifference to the suffering and rights of animals;
3. To assert that animals, by reason of their vulnerability to the acts of humans and their inability to protect themselves or to present their interests, require legal protection, all animals have the right to:-
  - a) life;<sup>240</sup>
  - b) the protection of individual liberty;<sup>241</sup>
  - c) live free from torture;<sup>242</sup>
  - d) protection of the law against any person (juristic or otherwise) who violates these rights;
4. The High Courts shall act as Upper Guardian of all animals, and may appoint curators to carry out such investigations or duties as the Court may direct in order to protect their rights.
5. Any person shall have *locus standi in judicio* to bring any action or application to the High Court for any breach of the abovementioned rights.

Given the dramatic nature of these rights, an Animal Rights Introduction Act should be promulgated immediately in order to soften the blow by paving the way with an introduction of more basic animal rights. This should include:-

1. Animals that are currently subject to commercial trading should be protected by law to ensure buyers and sellers provide every requirement for the animals' physical, behavioural and psychological needs. No other animals should be introduced to the commercial trade for slaughter, experimentation or other forms of exploitation. Industry involved in the trade of animals should prepare to downgrade in size in anticipation of an outright ban that will be put into effect with the introduction of animal rights into the Constitution.
2. Government regulations concerning conditions of breeding, sale and care of commercially traded animals should protect the interests of the animals over the commercial interests of the traders or breeders. Commercial breeding 'factories' should begin downsizing in anticipation of an outright ban that will be put into effect with the introduction of animal rights into the Constitution.

---

<sup>240</sup> In other words, they may not be killed except in very strictly defined circumstances such as self-defence. Alternatives to meat as a source of food are available. Certain exceptions (for religious or cultural purposes will be made on application to Court).

<sup>241</sup> Arbitrary deprivation of their liberty would include imprisonment without due legal process.

<sup>242</sup> This would be defined as the deliberate infliction of pain.

3. The State should provided funding, resources and powers to agencies or societies responsible for investigating cases of cruelty and abuse and to establish further agencies if necessary.
4. Economic and business incentives should be provided by government for the purpose of developing commercial alternatives to products and processes that derive from, or are otherwise associated with, the use of animals.
5. The use of animals in entertainment, in any form whatsoever, must be prohibited.
6. The killing of animals for sport, and all associated capture or breeding therefore, be prohibited. A change in import policies would have to be put into effect simultaneously – banning the import or export of wildlife products. Kenya banned sport hunting in 1977 and in its main newspaper the Daily Nation stated that “the massacre of animals for sport is unAfrican and an abomination... countries such as South Africa and Zimbabwe refuse to see what is essentially a simple truth : The only way to guarantee the future of the world’s wildlife is to ruthlessly destroy the market for animal products.”<sup>243</sup>
7. The use of animals in research be limited and ultimately, prohibited.
8. That perpetrators of violence or deliberate injury on another animals be brought to justice and made to suffer penalties of adequate proportion.

The Act should institute the guardian concept and establish the High Court as Upper Guardian for the hearing of transgressions of the Animals Rights Introduction Act and other actions brought on behalf of other animals.

The law has frequently been used to advance the *mores* of society. The law has acknowledged the vulnerability of for example, children as potential victims, and granted them certain rights. Animal rights will advance the cause and well-being of animals far more than any animal anti-cruelty ever could.

‘Rights are concerned with justice while welfare is merely altruism. Perversely, welfare can be inimical to the long-term interests of animals, because by concentrating on the size of cages and humane stunning, you can end up forgetting about the victim’s fate. Animal welfare may lead to killing with kindness but they still die at our hands.’ The likely future is that we will continue to deny justice to those hamstrung by the lack if a human tongue.’<sup>244</sup>

---

<sup>243</sup> Op cit note 8 at 362.

<sup>244</sup> Noel Sweeny UK Lawyer – Quoted in “Animal Voice” Spring 2002.

Sweeney believes that a Minister of Justice for Animals is vital in a country committed to animal well-being.

## CONCLUSION

In the words of Tom Regan :

‘Their pain, their suffering, their loneliness, their innocence, their death. Anger. Rage. Pity. Sorrow. Disgust. The whole creation groans under the weight of the evil we humans visit upon these mute, powerless creatures. It *is* our hearts, not just our heads, that call for an end to it all, that demand of us that we overcome, for them, the habits and forces behind their systematic oppression. All great movements, it is written, go through three stages: ridicule, discussion<sup>245</sup>, adoption. It is the realisation of this third stage, adoption, that requires both our passion and our discipline, our hearts and our heads. The fate of animals is in our hands. God grant we are equal to the task.’<sup>246</sup>

It is the author’s submission that South Africa is still in the ridicule stage of this potentially great movement. Lawyers, scholars and people in general most often greet the concept of animal rights with amusement. Vegetarianism is dismissed as ‘radical animal rights nonsense’.<sup>247</sup> ‘If you express concern for the fur bearer... his or her paw all but severed by the time the trapper comes along for the forking and bludgeoning, or huddled for its entire life in a tiny cage in 32 degree temperatures – why, then, you must be one of those ridiculous, killjoy fanatics. A bore. But rise in defense of a coat – now there’s a mark of a serious man. Likewise, express qualms about some little delicacy like foie gras... and that makes you petty and trifling and sentimental... But reach for the knife and the crackers, never mind the damned duck, and then you’re thinking straight.’<sup>248</sup> There is much to be done to provoke the movement into its second stage, that of discussion,

---

<sup>245</sup> The reference by Tom Regan is to a quote by John Stuart Mill who goes on to say: “We find ourselves near the beginning of a fundamental revolution in the way humanity relates to the rest of the animal kingdom. The animal liberation movement is currently in a state of twilight between the first and second stages – those who champion the cause of animals face rampant ridicule and vehement opposition, but at the same time the need for a fundamental re-assessment of our treatment of animals is becoming more widely recognised.”

<sup>246</sup> Regan, T ‘A Case For Animal Rights’ *In Defence of Animals* 1985 25.

<sup>247</sup> Op cit note 8 at 313.

<sup>248</sup> Op cit note 8 at 120.

particularly as many of our legal systems not only legalise, but encourage the exploitation of our animals. Cormac Cullinan<sup>249</sup> describes the need of a new governing system, the need to change our understanding of law and human governance. Cullinan places a strong emphasis on Thomas Berry's philosophy that it is necessary to define the current obstructive concepts of law and governance in order to establish new ones that will strengthen relationships between all members of the 'Earth Community'.<sup>250</sup>

Cullinan suggests the encouragement of practises that respect the Earth Community, that we do away with degrading laws and practices, that we reprioritise by placing the Earth before, for example, 'freedom of trade and freedom of contract'.<sup>251</sup> By bringing wisdom back, by reducing the distance between the decisions that are made and the impact they create and by applying the concepts summarised above, Cullinan believes we may move towards Earth jurisprudence.

Humans generally will have contradictory views about animals – benevolence on the one hand and disregard on the other. 'As a matter of conscience, however, we must each ask ourselves which outlook is truer, which is closer to our heart, which attitude leaves us feeling better and worthier when we act upon it, and then follow that conviction where it leads. And when we fail to act consistently with our own moral principles, when we profess one thing and do another, we must be willing to call that error by its name. It is hypocrisy.'<sup>252</sup>

It may be unrealistic to imagine a world where wearing fur is a crazy notion of the past and laboratories and feedlots are an embarrassing blip on the screens of history. However, it is also morally pessimistic not to imagine or work towards a world where animal interests are not ignored and exploited and animals are not tortured and killed on a massive scale. Why is it pessimistic? Because justice and compassion and the moral need of humankind requires this new world – it is part of a social evolution where animals are no longer regarded as property in the minds of humans or in the pages of statutes, but as juristic persons in their own right. There is no moral code that defends the human use of animals, no religion that sanctions it. There is fear to progress the movement, an avoidance of confronting the problem. However, the animal rights movement is like many great social and moral causes that are incorporated into law – concepts that were

---

<sup>249</sup> Op cit note 25.

<sup>250</sup> See Cullinan's book for more information on Earth jurisprudence, the earth community, earth governance and wild law generally.

<sup>251</sup> Op cit note 248 at 214.

<sup>252</sup> Op cit note 8 at 309.

once viewed as a threat to civilized society but now accepted as the extension of civilised values.<sup>253</sup>

ooo0ooo

---

<sup>253</sup> Op cit note 8 at 351.



## BIBLIOGRAPHY

1. Brown, Les *Cruelty to Animals – The Moral Debt* (1988)
2. Buckland A Textbook of Roman Law 694–695
3. Carroll, R et al. 'Strengthening the Use of Science in Achieving the Goals of the Endangered Species Act: An assessment by the Ecological Society of America' (1996)
4. Carl Cohen and Tom Regan *The Animal Rights Debate* (2001)
5. Cronjé D S P, *The South African Law of Persons and Family Law* (1994)
6. Cullinan Cormac, with a foreward by Thomas Berry *Wild Law* Siber Ink 2002
7. Dworkin, Ronald *Taking Rights Seriously* Cambridge Mass. Howard University Press (1977)
8. Eileen Jensen Krige, *The Social System of the Zulus* (1950)
9. Fox, Michael Allen, *The Case for Animal Experimentation – An Evolutionary and Ethical Perspective* (1986)
10. Frey RG, *Interests And Rights The Case Against Animals* (1980)
11. Fuggle R F and Rabie MA, *Environmental Management in South Africa* (1983)
12. Gary L Francione *Rain Without Thunder THE IDEOLOGY OF THE ANIMAL RIGHTS MOVEMENT* (1996)
13. Ghandi, Mohandas Karamchand, (1927) *An Autobiography* (1982)
14. Glavovic P D, *Wilderness and the Law* (1995)
15. Glazewski Jan, *Environmental Law in South Africa* (2000)
16. Hahlo and Kahn Legal System 81-2
17. Hargrove, Eugene C, *The Animal Rights / Environmental Ethics Debate – The Environmental Perspective* (1992)
18. Holmes Rolston III *Philosophy Gone: Wild Essays in Environmental Ethics* (1986)
19. Kerbs, JR & Davies, NB *An Introduction to Behavioural Ecology* (1987)
20. Kolber Adam, "Notes Standing Upright: The Moral and Legal Standing of Humans and Other Apes *Stanford Law Review* [Vol.54.163]
21. Langley, Gill *Animal Experimentation – The Consensus Changes* (1989)
22. Mercer Chris and Pervan Beverley, drafted in discussion with the animal welfare community of the Kalahari Raptor Centre. 'The Boycott Discussion Document. Complaints of the Animal Welfare Community' (2003).
23. Mercer Chris, and Pervan Beverley, *For the Love of Wildlife* Kalahari Raptor Centre (2000)

24. Meyer Werner, Moore Cora, Viljoen Henning, *Psychology From Individual to Ecosystem* Third Edition Heinmann (2002)
25. Piece Christine, Van de Veer Donald, *People, Penguins, and Plastic Trees* (1995)
26. Regan Tom, Singer Peter, *Animal Rights and Human Obligations* (1976)
27. Regan Tom, *The Case For Animal Rights* (1983)
28. Regan Tom, *Defending Animal Rights* (2001)
29. Ridl J, Nature Conservation : An Analysis of the Legal and Philosophical Priorities for the Protection of Wildlife, a Diminishing Resource in South Africa
30. Rollin, Bernard E. *Animal Rights and Human Morality* (1981)
31. Rollin, Bernard E. *The Unheeded Cry – Animal Consciousness Animal Pain and Science* (1989)
32. Scully M, *DOMINION The Power of Man, the Suffering of Animals, and the Call to Mercy* 2002 St. Martin's Press New York
33. Singer P (ed) *In Defence of Animals* (1985)
34. Singer Peter, *Practical Ethics* 21 2<sup>nd</sup> edition 1993
35. Stone ,CFD, *Should Trees Have Standing? And other Essays on Law, Morals and the Environment* (1996)
36. Stone, Christopher D *Should trees have standing?- Towards legal rights for Natural Objects* (1972)
37. Stone, Christopher D, *Earth and Other Ethics. The Case for Moral Pluralism*, New York, Harper and Row (1987)
38. Stone, Christopher D, *Should Trees Have Standing?* (1972)
39. Tyrrell, Barbara and Jurgens, Peter *African Heritage* (1986)
40. The Independent Newspaper, London 12 June 2002
41. Van Reenen 1995 SA Journal of Environmental Law and Policy 121
42. Wilson S, 'Animal Ethics' Department of Philosophy, University of California (2001)
43. Wise Steven M, *Rattling the Cage: Towards Legal Rights for Animals* (2000)
44. Werner Meyer, Cora Moore, Henning Viljoen *Psychology from Individual to Ecosystem* (2002)

### **Statutes**

1. Abattoir Hygiene Act 121 of 1992
2. Animal Protection Act 71 of 1962

3. The Animal Health Act No. 7 of 2002
4. Constitution of South Africa 106 of 1994
5. Convention on International Trade in Endangered Species of Wild Fauna and Flora
6. Convention on the Conservation of Migratory Species of Wild Animals (the Bonn Convention)
7. Durban City By-Laws
8. Environment Conservation Act 73 of 1989
9. Game Theft Act 105 of 1991
10. KwaZulu-Natal Nature Conservation Management Act 9 of 1997
11. KwaZulu-Natal Nature Conservation Amendment Act
12. Hazardous Substances Act 15 of 1973
13. Meat Safety Act 40 of 2000
14. Medicines and Related Substances Control Act 101 of 1965
15. National Environmental Management Act 107 of 1998
16. National Forests Act 84 of 1998
17. National Heritage Resources Act 25 of 1999
18. National Water Act 36 of 1998
19. Nature and Environmental Conservation Ordinance 19 of 1974
20. Nature Conservation Ordinance 12 of 1983
21. Nature Conservation Ordinance 8 of 1969
22. Nature Conservation Ordinance 15 of 1974
23. Performing Animals Protection Act 24 of 1935
24. Problem Animal Control Ordinance 26 of 1957
25. Societies for the Prevention of Cruelty to Animals Act 169 of 1993
26. Sea Birds and Seals Protection Act 46 of 1973
27. Veterinary and Para-Veterinary Professions Act 19 of 1982

### **Web Sites**

1. <http://www.animallawintl.org/>
2. <http://www.animalagenda.org>
3. <http://www.cites.org.za/>
4. <http://www.ciwf-livestock-revolution.co.uk>
5. <http://www.cnn.com/>
6. <http://www.defra.gov.uk>

7. <http://www.greatapeproject.org>
8. <http://www.instituteforanimalrightslaw.org/>
9. <http://www.justiceforanimals.co.za>
10. <http://www.maf.govt.nz/biosecurity/legislation>
11. [http://www.melbourne.net/animals\\_australia/specials/charger.html](http://www.melbourne.net/animals_australia/specials/charger.html)
12. <http://www.peta.org/>
13. <http://www.polity.org.za/govdocs/speeches/1999>
14. <http://www.sentientbeings.org/>
15. <http://www.utm.edu/research/iep/>
16. <http://www.veal.googei.com>

### Case Law

1. Wildlife Society of SA v Minister of Environmental Affairs & Tourism of the RSA  
1996 9 BCLR 1221 (Tk); 1996 3 SA 1095 (Tk)
2. Lewis v Casey 518 US 343, 349 (1996)
3. Lujan v Defenders of Wildlife, 504 US 555, 560-61 (1992)
4. Estate Orpen v Estate Atkinson 1966 (2) SA 639 C at 641
5. Pincham v Santam Insurance 1963(2) SA 254 (W)
6. Northern Spotted Owl v Hodel 716 F. Supp 479 (W.D Wash 1988)
7. Northern Spotted Owl v Lujan 906 F Supp 621 (W.D. Wash 1991)
8. Mt Graham Red Squirrel v Yeutter 930 F 2d 703 (9<sup>th</sup> liv 1991)
9. Van Huyssteen v Minister of Environmental Affairs & Tourism 1995 9 BCLR 1991
- ©
17. Ford v Wiley (1889) 23QB203
18. Rex v Moato 1947 (1) SA 490 (O)
19. S v Edmunds 1968 (2) PH H398 (N)
20. Society for the Prevention of Cruelty to Animals, Standerton v Nel 1988 (1) SA 42  
(W)
21. S v Gerwe 1977 (3) SA 1078 (T)
22. S v Nkhulmeleni 1986 (3) SA 102 (v)
23. R v Sibeko 1951 (2) SA (E)
24. R V W 1960 (4) SA 692 (SR)
25. R v Makaza and Others 1969 (2) SA 209 (R)
26. R v Heldberg 1993 NPD 507

