The Emergence of a Transjudicial Animal Rights Discourse and Its Potential for International Animal Rights Protection

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Abstract

In recent years, the topic of animal rights has found its way from the periphery to the center of scholarly, judicial, political, and societal enquiry. In an increasing number of jurisdictions, references to animal rights are now being made by the courts. In some cases it can be seen in bold and sweeping judicial declarations that animals have rights, and at other times in more timid judicial acknowledgments that animals should have such rights. This article looks at the way the discourse has gained traction in a bottom-up manner, identifying the common elements in the domestic recognition of animal rights throughout different jurisdictions. It identifies the various justifications for animal rights, the necessity (or lack thereof) of personhood for animal rights, the interconnections between animal rights and nature, and those between human and animal rights, as the most important themes that stand central in this emerging discourse. Finally, it discusses the potential of this transjudicial animal rights discourse to contribute to the protection of animal rights at the international level.

1 Introduction

What was once a fringe social movement has found its way into domestic courtrooms as judiciaries across the world have started engaging in the animal rights debate. Judges seem increasingly willing to enact new and (re-)interpret existing law in pro-animal ways. Many have expressed sympathies for the cause, while others have gone further and explicitly recognized that animals have rights. There is still, however, a lack of such recognition in the majority of domestic jurisdictions and at the regional/international level, which means a global network of animal rights law is yet to emerge. Anne Peters has noted that animal rights will be most effective if they exist on a global scale at multiple levels: domestic, regional, and international.[1] This is because without a global standard, issues of transboundary animal abuse (e.g., large-scale, trans-border normalisation and commercial outsourcing) would remain

[1] Anne Peters, "Introduction" *in* Anne Peters (ed), *Studies in Global Animal Law* (vol 290, Berlin, Heidelberg: Springer 2020), 9.

unaddressed.[2] But without state consent, the majority of existing international institutions do not have the authority or the capability to impose stricter animal protection rules on sovereign states. Likewise, customary international law cannot develop without state consent, and general principles are impossible to have in the absence of state adoption at the domestic level. This means that global animal rights law must grow from the bottom-up, through the initial acceptance of legal rights for animals at the domestic level and the subsequent entrenchment of these rights in regional/international law through instruments, customary international law, and general principles of law. Our focus for this article is on the potential contribution of the emerging transjudicial animal rights discourse for the development of international animal rights law as an element of global animal law.

This article argues that the way animal rights are now being recognized by domestic courts in various parts of the world provides a foundation for such a bottom-up growth of international animal rights law. We do not argue that there is already such a law, but merely that a discourse is emerging which can be the bedrock for its development.

Following a comprehensive review of all reported animal rights cases, we have selected the ones that illustrate the emergence of a judicial animal rights discourse.[3] The strongest evidence of such a discourse is cases where courts expressly recognize that they are trying to contribute to a law of animal rights, and then enact or interpret law in a manner consistent with such a position. There is slightly weaker evidence in cases where courts act to protect animal rights without expressly saying that that is their intent, or in cases where courts speak the language of fundamental animal rights but in fact only protect animal welfare, or, on a generous reading, claim to protect animal rights while acknowledging such significant limitations that they effectively render proper rights protection negligible. After making our selection, we have divided these cases according to the themes identified as the most prominent in the emerging discourse. First, we discuss different justifications for animal rights (i.e., positivist, natural, and cultural or religious); second, the relationship between animal rights and personhood (specifically, whether the latter is a condition for the former); third the

[2] Anne Peters, "Toward International Animal Rights" *in* Anne Peters (ed), *Studies in Global Animal Law* (vol 290, Berlin, Heidelberg: Springer 2020), 112.
[3] The list of jurisdictions in which important decisions have been rendered includes Argentina, Belgium, Brazil, Colombia, Ecuador, France, India, Pakistan, South Africa, Switzerland, and the United States of America.

connections between animal rights and nature (in relation to wildlife conservation and the more ecocentric interpretation of animal rights); and fourth, the relationship between animal rights and human rights and duties (ranging from independence/interdependence to balancing in conflict cases, which results in the limitation of either the rights of humans or animals). The final section then reflects on the potential of this emerging discourse for the protection of animal rights at the international level.

The term 'animal rights' is used to denote a legal paradigm in which animals' fundamental rights (taken henceforth to refer also to cognate concepts such as dignity and personhood) are recognized and protected, abolishing animals' status as legal things.[4] This means that they are regarded as subjects of fundamental legal rights, rather than mere objects of property rights. Under such a paradigm, the exploitation of animals by humans is strictly prohibited.[5] This paradigm can be contrasted with animal welfarism, which denotes the position that while animals should be protected in law against 'unnecessary' suffering, they still remain objects of law that are used by humans for their purposes. So, welfarism only aims to improve the treatment of animals by humans, while still allowing for their exploitation. Welfarism, in other words, does not attempt to dismantle the legal presuppositions that make animal exploitation possible and permissible.[6]

2 Justification for Animal Rights

Different justifications for the recognition of animal rights are possible. We distinguish between a (2.1) positivist justification, (2.2) natural law justification, and (2.3) cultural or religious justification.

2.1 Positivist Justification

First, the recognition of animal rights by courts can be justified on positivist grounds by claiming that the courts are simply giving expression to rights that already exist in positive law, e.g., statutes. In other words, the underlying assumption is that the law-maker has already (implicitly) recognized animal rights by adopting certain laws to

[4] see generally Gary Francione & Robert Garner, *The Animal Rights Debate: Abolition or Regulation?* (New York: Columbia University Press 2010).
[5] ibid.
[6] ibid.

this effect. Here, animal welfare and anti-cruelty laws, particularly if they are read together with civil code provisions that redefine the legal status of animals, are often taken as conferring rights upon animals. Framed as such, the courts are not 'creating' animal rights through judicial action, but rather affirming animal rights that are already part of the valid law of a particular legal system. The positivist justification for animal rights usually lies at the base of animal rights recognition in civil law traditions, where judges generally have less freedom than those in common law jurisdictions to create new laws or influence the meaning or effect of existing laws through interpretation. Positivist justifications can thus arguably be seen as legal tools for social justice in these cases, to recognize and protect rights where the judiciary's hands are otherwise tied. However, the status and rights of animals are determined first and foremost by codified statutes and are in this sense static unless and until the relevant statutory code is amended by the legislature. So, e.g., questions about whether common law doctrines like *habeas corpus* can be used to move perceptions of animals as property towards the view that they are persons with fundamental rights simply do not arise in the civil law context. For instance, in continental Europe, references to animal rights almost always have a positivist grounding.

Explicit consideration to animal rights was given in a 2019 Belgian case about the ownership of a dog following a divorce, by the Court of Appeal of Antwerp.[7] The court asserted that as of "anno 2019, animals have legal rights."[8] It cited the Belgian Animal Protection Act 1986, together with the fact that animals are excluded from administrative seizure in the Civil Code, as the legal bases for such rights.[9]

In a later Belgian case from 2021, a lower Antwerp court grounded animal rights in an existing Civil Code article recognizing animals as sentient beings with specific biological needs.[10]

In France, similar remarks have been made by courts. In a 2021 case before the Administrative Tribunal of Paris, the issue concerned the legality of euthanasia performed on a dog by law enforcement authorities.[11] The court first considered

[7] No 2019/FA/46 (29 April 2019, Hof van Beroep Antwerpen) (trans the authors).
[8] ibid [8].
[9] ibid.
[10] AR 21/957/1 (1 April 2021, Rechtbank Antwerpen) (trans the authors).
[11] N° 2017962, AJDA 2021 (5 November 2020, Tribunal administratif de Paris) (trans the authors), [1, 3].

whether the European Convention for the Protection of Pet Animals 1987 might have protected the dog's life.[12] It also considered the recognition of the animal sentience in Article 13 of the Treaty on the Functioning of the European Union 1958 and in various provisions of the French Civil Code, but in the end concluded that the euthanasia had not infringed the rights of the dog.[13] At the 2020 appeal before the Council of State, the judgment was that the dog's right to life had not been violated."[14] As Neli Sorchirca argues, by verifying that the dog's right to life had been violated, the court confirmed that such a right exists.[15] The court would not have needed to take sides on the issue of a violation if, as a matter of law, the right did not exist.[16]

In a 2022 Argentinian case concerning 55 dogs in a puppy mill, a Buenos Aires court recognized the dogs as subjects of rights based on their existing protection in positive law.[17] The court stated that "the norms that ensure their life, liberty and protection lead us to the conclusion that they deserve special recognition, in order to provide them with effective judicial protection and, therefore, this allows us to conclude, as the prosecution asserts, that they should be recognised as subjects of rights."[18] It referred to domestic anti-cruelty statutes and international animal rights instruments (such as the Universal Declaration of Animal Rights 1978; the Declaration of Cambridge 2012; the Charter of the Law of the Living 2021; the Treaty of Amsterdam 1997, and the Treaty of Lisbon 2007) as sources for these rights, suggesting that animal rights are already at least implicitly recognized therein.[19]

Two notable cases of positivist animal rights grounding come from the United States of America, which, unlike the other jurisdictions mentioned here, is not a civil law one.

In *Cetacean Community v Bush* (2004), the United States Court of Appeals stated that, "Animals have many legal rights, protected under both federal and state laws. In

[12] ibid [11].
[13] ibid [3].
[14] N° 446808 (1 December 2020, Conseil d'Etat) (trans the authors).
[15] Neli Sorchirca, "Le droit à la vie d'un animal consacré par le juge administratif ?" (*Dalloz Actualités* 2021) *available at* <https://consultation.avocat.fr/blog/neli-sochirca/article-39979--le-droit-a-la-vie-d-un-animal-consacre-par-le-juge-administratif.html> (trans the authors). see also Jean-Pierre Marguénaud, "Une Révolution Théorique: L'extraction Masquée Des Animaux de La Catégorie Des Biens" [2015] *La Semaine Juridique* 495.
[16] ibid.
[17] Nº 42.081/2022 (17 August 2022, Poder Judicial de la Ciudad de Buenos Aires, Argentina) (trans the authors) [hereafter: *Puppy Mill case*].
[18] ibid.
[19] ibid.

some instances, criminal statutes punish those who violate statutory duties that protect animals."[20] It thus extracted such rights out of the existing statutes protecting animals.

Then, in *Tilikum v Sea World* (2012), a Californian district court, while denying that the constitutional right against involuntary servitude could apply to captive orcas, observed that its denial was not the same thing as saying that animals had no legal rights.[21]

It should be noted that the positivist justification usually does not corroborate fundamental animal rights. Judgements relying on this line of reasoning are typically better understood as affirming a form of 'simple', 'thin', or 'welfare' rights that, within animal law, are generally not accepted as granting animals much effective legal protection.[22] However, even if such rights are a very basic form of limited recognition, they are still evidence of a judicial willingness to engage with animal rights questions.[23]

2.2 Natural Law Justification

In contrast to the positivist justification, the natural law justification holds that animals are entitled to rights by their very nature. This position argues that the characteristics of animals, such as sentience or intelligence, or their similarities to humans, are a sufficient basis for declaring that animals have fundamental legal rights. Extending legal rights to animals is, under this view, the automatic consequence of the fact that animals naturally have the relevant characteristics. Here, courts are the ones 'creating' animal rights through judicial action. They do not refer to existing statutes as the primary source of their rights, but rather to the capacities of animals, for instance as sentient beings, or intelligent creatures. In other words, the judgment itself, not some then-existent law, is the source of the relevant animal rights. Often, these judgements transpose human rights to animals. The natural law justification for

[20] *Cetacean Community v. Bush*, 386 F. 3d 1169 (2004) (20 October 2004, United States Court of Appeals, Ninth Circuit), 1175.
[21] *Tilikum, Katina, Corky, Kasatka, and Ulises, five orcas, by their Next Friends, People for the Ethical Treatment of Animals, Inc., Richard "Ric" O'Barry, Ingrid N. Visser, Ph.D., Howard Garrett, Samantha Berg, and Carol Ray vs. Sea World Parks & Entertainment, Inc. and Seas World, LLC* (2012) Case no 11cv2476 JM(WMC) (8 February 2012, United States District Court, Southern District of California), *passim*.
[22] Saskia Stucki, "Towards a Theory of Legal Animal Rights: Simple and Fundamental Rights" (2020) 40 *Oxford Journal of Legal Studies* 533, *passim*.
[23] ibid.

animal rights is found particularly in common law jurisdictions where judges have greater power to enact new laws.

In Pakistan, early expressions of judicial support for animal rights drawing on a natural law justification can be found. In *Arif v S.H.O. City Police* (1994), the court outlined the various inalienable constitutional rights of humans and rhetorically asked, "If the Constitution is guaranteeing such wide protection of the citizens, why not the same protection to the cattle and animals of the country? [*sic*]"[24] Some of the animal rights the court thus suggested include treatment in accordance with the law; prohibitions against actions detrimental to life, liberty, bodily integrity, reputation, and property, except in accordance with the law; and equal protection of the law.[25]

Then in India, the Kerala High Court in *Nair v. UoI* (2000) dealt with the validity of a notice banning the training and exhibition of certain animals.[26] It found that both the Indian state and citizens are obligated to protect and improve the environment, to safeguard wildlife, to have compassion for other living beings, and to refrain from inflicting unnecessary pain and suffering on them.[27] To this end, the court noted that lack of humanness did not preclude entitlements to a dignified life with humane treatment and without cruelty or torture, and that humans were not the sole holders of rights:

> Many believe that the lives of humans and animals are equally valuable and that their interests should count equally. [...] Therefore, it is not only our fundamental duty to show compassion to our animal friends, but also to recognise and protect their rights. In this context, we may ask why not our educational institutions offer a course on "Animal Rights Law" with an emphasis on fundamental rights as has been done by the Harvard Law School recently. If humans are entitled to fundamental rights, why not animals'? In our considered opinion; legal rights shall not be the exclusive preserve of the humans which has to be extended beyond people thereby dismantling the thick legal wall with humans all

[24] *Muhammad Arif v. S.H. O. City Police, Depalpur and 5 others* [PLD 1994 Lahore 521] (Lahore High Court), [8].
[25] ibid [8].
[26] *N.R. Nair and others etc. etc. vs. Union of India and others* AIR 2000 Kerala 340 (6 June 2000, Kerala High Court) [hereafter: *Nair*].
[27] ibid [4, 9].

> on one side and all non-human animals on the other side. While the law currently protects wild life and endangered species from extinction, animals are denied rights, an anachronism which must necessarily change.[28]

It is worth noting that here the court's justification for recognising and protecting animal rights appears to draw on their superiority, but also utility, to humans, as well as their innate capacities.[29] And while the court did rhetorically ask why animals should not be entitled to *fundamental* rights if humans are,[30] it also seemingly conflated fundamental rights with anti-cruelty 'rights'.

In a seminal Indian case, *Abdulkadar v Gujarat* (2011), the Gujarat High Court addressed various animal welfare violations associated with keeping birds captive in cages, often accompanied by brutal treatment. Such captivity, the court said, is "absolutely inhuman[e], atrocious and against the rule of nature and in violation of the right of the birds to move freely in the sky/air, and in breach of provisions of the Prevention of Atrocities on Animals Act." "[N]othing can be more heinous", it added, "than such acts and there cannot be more glaring examples of atrocity and inhumanity [which] cannot be tolerated and continued for a day."[31] The infliction of pain and suffering on others, including animals, is barred in India under both statutory and constitutional law.[32] However, the court did not stop there; it went so far as to say that the fundamental right of birds "to live freely in the open sky" is not dependent on statutory or constitutional law.[33] Herein lies the main significance of this decision—the illegality of confinement stems from an inherent right needing no explicit legal support. Ruling that keeping birds in cages is tantamount to illegal confinement against their wishes and against their fundamental right "to move freely", the court held that the only appropriate order that could be issued in the interests of justice "would be to enlarge the birds free in the sky / air", in order to respect their rights.[34] "When everybody is talking about fundamental rights of the citizen, such as, right to

[28] ibid [13] (Judge Narayana Kurup).
[29] ibid.
[30] ibid.
[31] *Abdulkadar vs. State of Gujarat* SCR.A/1635/2010 (12 May 2011, Gujarat High Court at Ahmedabad), [8.05*ff*, 8.09*ff*] (Judge MN Shah).
[32] ibid [8.08].
[33] ibid [8.08] (Judge MN Shah).
[34] ibid [8.11-8.12] (Judge MN Shah).

live freely, right to food, right to move freely etc. a day has come to think about the rights of the birds and animals[…].”[35] Hereby the court indicated a shift in thinking about fundamental rights—from being the sole domain of humans to also encompassing animals. This demonstrates the early stages of an emerging discourse in favour of animal rights proper, as needing no explicit positive law in their support.

In the Indian case of *Sharma vs. HP* (2013), the High Court of Himachal Pradesh relied on the fact that animals have emotions and feelings like humans to conclude that they could not be subjected to miseries.[36]

In America, in *NhRP v Stanley* (2015), while denying a writ of *habeas corpus* for two captive chimpanzees, Hercules and Leo, the New York Supreme Court acknowledged that the historic mistreatment of groups of humans treated as the property of others, such as women, slaves, and indigenous persons, could be relevant to the case of animals,[37] and stated that:

> [T]he parameters of legal personhood have long been and will continue to be discussed and debated by legal theorists, commentators, and courts, and will not be focused on semantics or biology, or even philosophy, but on the proper allocation of rights under the law, asking, in effect, who counts under our law.[38]

In other words, personhood is not contingent on positivist divisions, but natural allocations.

In an Argentinian case concerning the orangutan Sandra (2015), an administrative and tax court in Buenos Aires upheld a lower court’s decision that Sandra was a sentient, non-human subject or person, rather than an object or thing, with fundamental rights to whom obligations were owed, including an entitlement to wellbeing and against

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[35] ibid [8.09] (Judge MN Shah).
[36] *Ramesh Sharma vs. State of Himachal Pradesh* 2013 (3) ShimLC 1386 (26 September 2014, Himachal Pradesh High Court at Shimla) [hereafter: *Sharma*], [83ff].
[37] *In the Matter of a Proceeding under Article 70 of the CPLR for a Writ of Habeas Corpus, The NonHuman Rights Project, Inc., on behalf of Hercules and Leo, Petitioner v. Samuel L. Stanley Jr., M.D., as President of State University of New York at Stony Brook, a/k/a Stony Brook University, and State University of New York at Stony Brook, a/k/a Stony Brook University, Respondents* (Index No. 152736/15) (29 July 2015, Supreme Court of the State of New York, New York County) [hereafter: *Stanley*], [23] (Judge Barbara Jaffe). see further [22-23].
[38] ibid [23] (Judge Barbara Jaffe).

mistreatment.[39] The court took the view that decisions about the superiority or inferiority of animals reflect the inequalities and relationships of dominion in human societies.[40] There is no natural barrier, therefore, to courts recognizing non-human beings as legal persons and the holders of legal rights.[41]

A year later in the same country, a court in Mendoza decided that the captive chimpanzee Cecilia (2016) could not properly be classified at law as a thing, because that would render her an inanimate object rather than a living being.[42] The court reached this decision even though Argentinian civil and commercial laws classify animals as things.[43] It is therefore a good example of a strong natural law justification: the capacities of animals that require their recognition as rights-holders were held to *overrule* their positive law status as things. The court was of the opinion that, as a consequence of their sentience and capacities, animals possess inherent, fundamental legal capacity, personhood, and rights that are not fully protected by anti-cruelty legislation: "A chimpanzee is not a thing, he is not an object that can disposed of like a car or a building. Great apes are legal persons, with legal capacity but incompetent to act as it is corroborated by the evidence in this case that chimpanzees reach the intellectual capacity of a 4 year old child."[44] The fundamental rights of animals must be protected through legislation, in line with "the evolutionary degree that science has determined they can reach."[45] The logical conclusion of this is that animals need not be granted the same rights as humans, so long as it is finally accepted and understood that the former are "living sentient beings, with legal personhood"; "they are assisted by the fundamental right to be born, to live, grow and die in the proper environment for their species. Animals and great apes are not objects to be exposed like a work of art created by humans."[46] Explaining why the legal personhood and inherent rights of great apes appeared "contrary to the applicable positive laws", the court held that "this is only an appearance that comes out only in certain doctrine sectors that are not aware

[39] *"Asociacion de Funcionarios y Abogados por los Derechos de los Animales y Otros contra GCBA sobre Amparo"* (21 October 2015, Juzgado No 4 on Contentious Administrative and Tax Matters) (trans the authors).
[40] ibid [IV].
[41] ibid [V].
[42] *"Presented by A.F.A.D. about the Chimpanzee 'Cecilia' – Non Human Individual"* (P-72.254/15) (3 November 2016, Judicial Power Mendoza, Tercer Juzgado de Garantías Mendoz), (trans Ana María Hernández Martí) [hereafter: *Cecilia case*], 23-24. see further.
[43] ibid 28.
[44] ibid 24 (Judge María Alejandra Mauricio).
[45] ibid 27 (Judge María Alejandra Mauricio).
[46] ibid (Judge María Alejandra Mauricio).

of the clear incoherence of our legal system that states that animals are things while it also protects them from animal cruelty, legislating for this even within criminal law."[47] Animal cruelty legislation, it stressed, indicated "a strong presumption" of the capacity of animals to feel cruelty and to suffer, which must therefore be avoided, and, where it occurs, criminally punished.[48] Commenting on the evolving nature of rights recognition, the court highlighted similarities in this evolution to cover expanding groups of humans and to cover animals:

> [...] we cannot deny that as a rule of undeniable experience, societies evolve in their moral conducts, thoughts, and values, and also in its legislations. More than a century ago most of the individual rights that are expressly recognized today in the constitutions of the different countries and by the Human Rights International Treaties were ignored and in some cases they were even overlooked, or worse, insulted like the rights related to gender perspective.
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> At present, we can see an awareness of situations and realities that although are have been happening since immemorable times, they were not recognized by social figures. That is the case of gender violence, marriage equality, equal voting rights, etc. There is an identical situation with the awareness of animal rights.[49]

The court not only granted a writ of *habeas corpus* but also asked for the legal resources needed to end the captivity in inappropriate conditions of various other animals.[50] This case thus has implications beyond Cecilia's captivity and is thus far more consequential.

A similar line of reasoning was taken the following year in Colombia, where a detailed judicial opinion on the status of animals accompanied the granting of a writ of *habeas corpus* for the spectacled bear Chucho (2017).[51] The Supreme Court of Justice noted

[47] ibid 24 (Judge María Alejandra Mauricio).
[48] ibid (Judge María Alejandra Mauricio).
[49] ibid 19-20 (Judge María Alejandra Mauricio).
[50] ibid 30-33.
[51] Colombia, *Del oso de anteojos de nombre "chucho"* (AHC4806-2017) (26 July 2017, Corte Suprema de Justicia República de Colombia, Sala de Casación Civil) (trans Javier Salcedo) [hereafter: *Chucho case*]. This case was subsequently overruled in Expediente T-6.480.577 - Sentencia SU-016/20 (23 January 2020, La Corte Suprema de Justicia de Colombia).

that because animals have traditionally been regarded as things over which humans can exercise property rights, the capacity of animals "to feel or suffer has been ignored, and they have been submitted to the assaults of conquering and arbitrary man."[52] But all of the life sciences, the court observed, including biology and philosophy, are tearing down this notion.[53] Colombian law classifying animals as goods or property was now, therefore, "out of date and fossilized with respect to the social changes that have risen around the topic of animal welfare in recent times."[54] Noting the historical origins of thinghood, the court added that such a status had historically also been afforded to human slaves.[55] The court recalled provisions of Colombian law under which animals were recognised as sentient beings, and their interests protected as such, including the curtailment of the full exercise of property rights over them.[56] Turning to the question of recognizing sentient non-human beings as legal persons and the holders of rights, the court held a "new analysis of human rationality, self-consciousness and development must start" by acknowledging the natural reality that humans are also living "animals that give birth, are born, breathe, and die".[57] Moreover, human survival depends on understanding "that human beings are not the sole holders of rights".[58] "So what precludes us from acknowledging the other truly living sentient 'animated' realities with a juridical personhood, going beyond the traditional conception of nature as an object that humans have a duty to preserve?"[59] The court held that if fictitious legal entities can be rights-holders and persons, by virtue of a legal fiction, then so can living sentient beings, who "can authoritatively claim such a condition, in virtue of their possessing it due to their very essence. [...] Undeniably, the other sentient beings are also subjects of rights."[60] So, because of their sentience and capacity to suffer, non-human animals are necessarily rights-holders whom the law protects.[61] It further explained:

> The point is not to grant them rights in every respect analogous to those that human beings enjoy, and therefore think that bulls, parrots, dogs or

[52] ibid [2.4.4] (Judge Luis Armando Tolosa Villabona).
[53] ibid.
[54] ibid (Judge Luis Armando Tolosa Villabona).
[55] ibid.
[56] ibid [2.4.4, 2.4.5.2]. see further.
[57] ibid [2.4.3] (Judge Luis Armando Tolosa Villabona). see further.
[58] ibid (Judge Luis Armando Tolosa Villabona). see further.
[59] ibid (Judge Luis Armando Tolosa Villabona). see further.
[60] ibid [2.4.3-2.4.4] (Judge Luis Armando Tolosa Villabona).
[61] ibid [2.4.5.4] (Judge Luis Armando Tolosa Villabona).

> trees, etc., will have their own courts, their own fairs and festivities, their own Olympic Games or colleges; nor that the other elements of nature must bear the same prerogatives or guarantees that human beings possess, but rather those which correspond to, or are fitting to or suit their species, rank and group. The point is to include within the chain of life a universal morality, a public ecological global order and, in virtue of the interdependency and interaction that prevail between humans and nature, conferring to animals the safeguard they deserve against the irrational efforts of contemporary mankind to destroy our habitat.[62]

This is an important passage on the operationalisation of animal rights—they must be afforded in accordance with species capacities, in order to safeguard relevant interests: "the protection of nonhuman animal rights is not similar to the protection that must be granted to human rights, since their causes, contents and purposes differ."[63] The court also elucidated, in concrete terms, what this means for animals.[64] It listed the entitlements of non-human animals, to include freedom, prospering "with the least possible pain", and living a natural life "with the standards that suit their status and condition, but essentially in a responsibly preserved habitat in the biotic chain".[65]

> The context expounded in the former sections demonstrates the existence of a copious doctrine that abounds with norms and international instruments, as well as with jurisprudential precedents, and of a robust philosophical framework that openly acknowledges nonhuman animals and other subjects as "*nonhuman sentient beings*" that are holders of rights and are entitled to the protection of the Constitutional State if they are ever threatened or harmed.[66]

Divorcing rights-holding from duty-bearing, the court said that the notion that rights-holding is contingent on duty-bearing "is tantamount to instantiating a completely selfish and reductionist individualistic or collectivistic form of anthropocentrism".[67] In reconsidering who is a rights-holder, the principle that such a being must be

[62] ibid [2.4.4] (Judge Luis Armando Tolosa Villabona).
[63] ibid [2.4.5.3] (Judge Luis Armando Tolosa Villabona).
[64] ibid *passim*.
[65] ibid [2.4.5.4] (Judge Luis Armando Tolosa Villabona).
[66] ibid [2.4.5.4] (Judge Luis Armando Tolosa Villabona).
[67] ibid [2.4.5] (Judge Luis Armando Tolosa Villabona). see further.

reciprocally bound by duties must be relaxed, resulting in the acceptance henceforth that "nonhuman sentient subjects are subjects of rights despite not being reciprocally constrained by duties."[68] Therefore, "Animals are right-holders that are free of duties, entities that cannot be burdened by obligations because they are sentient subjects of rights of whom we, precisely, are guardians, representatives and informal agents in charge of their care."[69] In relation to the applicability of the writ of *habeas corpus*, the court found that while it was a "constitutional tool designed to safeguard the supra-legal guarantee of freedom of human persons, it is not ill-suited to protect" sentient animals who are subjects of rights.[70] What this means is that "nonhuman animals can legitimately demand, through the intermediation of any citizen," protection of their physical integrity, care and upkeep, and reinsertion "into their natural habitat once an analysis adjusted to each circumstance is concluded."[71]

In *NhRP v Lavery; NhRP v Presti* (2018), the New York Appellate Division judgment denying the writ of *habeas corpus* to Hercules and Leo in *NhRP v Lavery; NhRP v Presti* (2017)[72] was upheld by the State of New York Court of Appeals, but in a concurring opinion Judge Eugene Fahey of the New York Court of Appeal wrote at length about why the decision made him uncomfortable.[73] "The inadequacy of the law as a vehicle to address some of our most difficult ethical dilemmas," he wrote, "is on display in this matter."[74] Profound ethical and policy questions about whether an "intelligent animal who thinks and plans and appreciates life [much] as human beings do [has] the right to protection of the law against arbitrary cruelties and enforced detentions [being] visited on him/her" demand attention.[75] Treating a chimpanzee as though s/he had no right to liberty that could be protected by *habeas corpus* meant regarding the chimpanzee as "entirely lacking independent worth, as a mere resource

[68] ibid (Judge Luis Armando Tolosa Villabona). see further.
[69] ibid (Judge Luis Armando Tolosa Villabona). see further.
[70] ibid [2.4.5.4] (Judge Luis Armando Tolosa Villabona).
[71] ibid (Judge Luis Armando Tolosa Villabona).
[72] *In the Matter of Nonhuman Rights Project, Inc., on Behalf of Tommy, Appellant, v Patrick C. Lavery et al., Respondents; In the Matter of Nonhuman Rights Project, Inc., on Behalf of Kiko, Appellant, v Carmen Presti et al., Respondents* 152 AD3.d. 73 [1st Dept 2017] (8 June 2017, New York Appellate Division, First Department) [hereafter: *Tommy; Kiko case*].
[73] *In the Matter of Nonhuman Rights Project, Inc., on Behalf of Tommy, Appellant, v. Patrick C. Lavery, &c., et al., Respondents; In the Matter of Nonhuman Rights Project, Inc., on Behalf of Kiko, Appellant, v. Carmen Presti et al., Respondents* 31 N.Y.3d 1054 [2018], Concurring Opinion of Judge Fahey (8 May 2018, State of New York Court of Appeals) [hereafter: *Tommy; Kiko case CO*].
[74] ibid 5 (Judge Eugene M Fahey).
[75] ibid 5 (Judge Eugene M Fahey).

for human use, a thing the value of which consists exclusively in its usefulness to others."[76] In other words, the implication was that the chimpanzee should not be treated as a means to human ends. It should instead be considered "whether the chimpanzee is an individual with inherent value who has the right to be treated with respect," in which case the question of whether such an individual has a fundamental right to liberty, protected by *habeas corpus*, "is profound and far-reaching."[77] Furthermore, he wrote, people ought not to ignore equally important questions about their relationships to all the life around them.[78] While chimpanzees are arguably not persons, neither are they mere things.[79] Hence, the court's refusal to deviate from that paradigm was effectively a "refusal to confront a manifest injustice"[80] on the misplaced basis of an either/or proposition.[81] Moreover, the judgment was contradicted by the fact that chimpanzees exist on the same "continuum of living beings" as humans and "share at least 96% of their DNA with humans".[82] The court had refused to confront the complexities involved in recognising that chimpanzees are "autonomous and intelligent creatures."[83]

In still another and more recent American case, *NhRP v Breheny* (2020), although the New York Supreme Court denied a writ of *habeas corpus* to the captive elephant Happy, it did affirm that she was "an intelligent, autonomous being who should be treated with respect and dignity, and who may be entitled to liberty."[84]

Rather recently in India, in *Bhatt v UoI* (2018), the High Court of Uttarakhand turned to the literature on animal rights and personhood to decide a case about cruelty and brutality towards animals, that mirrors *Singh v Haryana* (2019) in the High Court of Punjab and Haryana.[85] Both courts approvingly cited the Supreme Court *Nagaraja*

[76] ibid (Judge Eugene M Fahey).
[77] ibid 5, 7 (Judge Eugene M Fahey).
[78] ibid 7 (Judge Eugene M Fahey).
[79] ibid (Judge Eugene M Fahey).
[80] ibid 6 (Judge Eugene M Fahey).
[81] ibid (Judge Eugene M Fahey).
[82] ibid (Judge Eugene M Fahey).
[83] ibid (Judge Eugene M Fahey).
[84] *Happy*, 16 (Judge Alison Y Tuitt).
[85] *Narayan Dutt Bhatt vs Union Of India And Others* 2018 SCC OnLine Utt 645 (4 July 2018, Uttaranchal High Court) [hereafter: *Bhatt*], *passim*; *Karnail Singh and others v State of Haryana* 2019 SCC OnLine P&H 704 (31 May 2019, Punjab and Haryana High Court at Chandigarh) [hereafter: *Singh*], [15]. see further [15*ff*].

decision (2014)[86].[87] They referred to scientific evidence about the complex, human-like capacities of animals for emotion, intelligence, self-awareness, and altruism.[88] They made an extensive review of historic anti-cruelty legislation and philosophical and religious teachings.[89] Most significantly, the courts approvingly referenced the expansive literature on animal rights and personhood, on issues such as animal interests grounding animal rights, autonomy not sufficing to ground all rights, animal rights as protecting animals from humans as opposed to from each other, and personhood being plausibly extended to animals based on their innate capacities.[90] So, to bolster their pro-animal position, the courts drew on a wide array of sources, ranging from hard scientific evidence to religious philosophy. The courts recalled, as others have done before them, the constitutional duty in India to have compassion for all living beings, and the duty of the state to protect and improve the environment and safeguard the country's wildlife.[91]

> We have to show compassion towards all living creatures. Animals may be mute but we as a society have to speak on their behalf. No pain or agony should be caused to the animals. Cruelty to animals also causes psychological pain to them. In Hindu Mythology, every animal is associated with god. Animals breathe like us and have emotions. The animals require food, water, shelter, normal behavior, medical care, self-determination.[92]

Finding that animals have rights to life, bodily integrity, honour, and dignity, the courts rejected their treatment as mere property.[93] It was accepted that animal rights are threatened by environmental degradation.[94] "The entire animal kingdom," the courts declared, including birds and fish, are "legal entities having a distinct persona with the corresponding rights, duties and liabilities of a living person."[95] The citizens

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[86] *Animal Welfare Board of India vs A. Nagaraja and Ors* (2014) 7 SCC 547 (7 May 2014, Supreme Court of India) [hereafter: *Nagaraja*].
[87] *Bhatt*, *passim*; *Singh* [69, 93-93].
[88] *Bhatt*, [80, 91]; *Singh*, [75]. see further.
[89] *Bhatt*, [80, 87-91]; *Singh*, [76, 82-85, 89]. see further.
[90] *Bhatt*, [91-92]; *Singh*, [86-87].
[91] *Bhat,t* [96]; *Singh*, [91].
[92] *Bhatt*, [83] (Judge Rajiv Sharma); *Singh*, [78] (Judge Rajiv Sharma). see further.
[93] *Bhatt*, [84]; *Singh*, [79].
[94] ibid. see further [84*ff*]; [79*ff*].
[95] *Bhatt*, [99(A)] (Justice Rajiv Sharma); *Singh*, [95(29)] (Justice Rajiv Sharma).

of their respective states were declared to be "persons in *loco parentis* as the human face of the welfare/protection of animals."[96] The courts were not, however, inclined to prohibit permitted uses of animals, provided they were subject to welfare limitations.[97] These cases essayed a useful review of the animal rights literature, which adds to the growing case law discourse on these topics. However, while the declarations in favour of animal rights made by the courts should at face value have wide-ranging implications for the status of animals, it is somewhat offset by the welfare directions that follow/precede, thereby casting doubt on the 'rights' of animals. Of course, another way of looking at it would be that the welfare measures were imposed in the event that derogations from animal rights were made for the oft-cited grounds of human necessity.

In the seminal Pakistani case of *IWMB v MCI* (2019), the Islamabad High Court granted freedom to a captive elephant Ka'avan.[98] The court began by asking some basic questions. It noted that the Pakistani Constitution, like most others, was "framed by humans for regulating themselves," and as such was "the basic law laying down rules as to how humans are to be governed."[99] It explained that fundamental constitutional rights and the writs that can be issued by constitutional courts to protect them are limited in context to "only one living species, i.e., humans" because constitutions only contemplate 'persons' or 'citizens', but not other living beings such as animal species.[100] So, it asked, "Do […] 'animals' […] who share the gift of life with humans, have legal entitlements and thus enforceable 'rights'? Does the Constitution impose any duty or duties on the State and humans regarding the welfare of other species such as animals, their conservation and protection?"[101] Do animals have rights that are independent of the human obligation "to protect, preserve and conserve such species?"[102] Does cruelty to animals breach the human right to life?[103] The court made an extensive survey of animal rights jurisprudence and instruments around the world, as well as of the way various religions and philosophies believe animals should be

[96] ibid.
[97] *Bhatt*, [99]; *Singh*, [95].
[98] *Islamabad Wildlife Management Board through its Chairman v Metropolitan Corporation Islamabad through its Mayor & 4 others* (W.P. No.1155/2019) (21 May 2020, Islamabad High Court (Judicial Department)) [hereafter: *Ka'avan case*].
[99] ibid [1] (Chief Justice Athar Minallah).
[100] ibid (Chief Justice Athar Minallah).
[101] ibid [1] (Chief Justice Athar Minallah).
[102] ibid [2-3] (Chief Justice Athar Minallah). see further.
[103] ibid [2].

treated.[104] The court concluded that there is universal consensus on the sentience of animals (in that animals have the ability to feel and to perceive), that the notion of the importance and sacredness of respect for life includes all life forms, that animals are not inferior to humans and serve their own specific and distinct purposes, that animals deserve compassion, care and respect, and that humans have a duty of care to protect animals from harm and from unnecessary pain and suffering.[105] The court found it indisputable that animals were not mere things or property, and that they did not deserve cruelty.[106] It identified the man-made obstacles to the full recognition of animal rights and personhood.[107] Strikingly, it held that "An infant, a comatose or a mentally challenged person is not different to an animal. It has never been the case of those arguing on behalf of animals to recognise that they have the same rights enjoyed by the human species."[108] To the question of whether animals have legal rights, the court held in the affirmative "without any hesitation":

> Life, therefore, is the premise of the existence of a right. […] An object or thing without 'life' has no right. A living being on the other hand has rights because of the gift of 'life'. An animal undoubtedly is a sentient being. It has emotions and can feel pain or joy. […] Like humans, animals also have natural rights which ought to be recognized. […] Humans cannot arrogate to themselves a right or prerogative of enslaving or subjugating an animal because the latter has been born free for some specific purposes.[109]

Importantly, in its directions, the court went beyond simply granting relief to Ka'avan. It granted the same relief to other animals held in captivity in the case concerned, and prohibited new animals from being kept in the zoo in question until it had suitable facilities and resources.[110]

In Ecuador, the Constitutional Court has recognised that wild (and possibly also domesticated) animals are subjects of rights, in a ruling in which it reviewed lower

[104] ibid [6].
[105] ibid. see further.
[106] ibid [7]. see further.
[107] ibid. see further.
[108] ibid (Chief Justice Athar Minallah). see further.
[109] ibid [7] (Chief Justice Athar Minallah). see further, also for a catalogue of animal rights.
[110] ibid [8].

court decisions in a *habeas corpus* action filed on behalf of the monkey Estrellita (2022).[111] Even though the monkey died while the case proceeded, the court found the writ to be applicable.[112] In the context of natural law, the court found that what rights an animal precisely enjoys, depends on his/her species "since each species has its own protection needs that stand out for their own characteristics and qualities; therefore, their demands for legal protection will be different."[113] Some rights are only applicable to specific species, depending on their exclusive properties, e.g., the right to respect and conserve the areas of distribution and migratory routes, is a right that can only be protected in those species of animals with migratory behaviours.[114] This recognition of animal rights has potential consequences for the legislative and executive branches in Ecuador. The Constitutional Court ordered the Ministry of Environment to adapt its regulations to the standards of its ruling, adopting "a normative resolution that determines the minimum conditions to be met by animal keepers and caretakers in accordance with the minimum criteria or parameters of this final judgement, particularly the appreciation of such animals as subjects of rights with intrinsic value."[115] The National Assembly was ordered to "debate and approve a law on animal rights, in which the rights and principles developed in this final judgement are included, including the minimum criteria or parameters established" within the next two years.[116] This appears to be the only judgement in which a legislature was ordered to codify animal rights.

Overall, the natural law justification seems to provide a stronger grounding for animal rights. Rather than stretching existing doctrine sometimes to the limits of absurdity, such an approach relies on natural facts to determine issues of rights-holdership. However, cases such as Estrellita show that the distinction between a natural law and positivist justification is not always easy to make. Even if they take the nature of animals as sentient beings or their capacities as the starting point for rights-recognition (which we considered a natural law justification), courts usually at least partly infer animal rights from some positive legal source.

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[111] No 253-20-JH/22 (27 January 2022, Corte Constitucional del Ecuador) (trans Animal Law & Policy Program, Harvard Law School) [hereafter: *Estrellita case*].
[112] ibid.
[113] ibid [89] (Judge Teresa Nuques Martínez).
[114] ibid [99] (Judge Teresa Nuques Martínez).
[115] ibid [182] (Judge Teresa Nuques Martínez).
[116] ibid [183] (Judge Teresa Nuques Martínez).

2.3 Cultural or Religious Justification

In countries like India and Pakistan, a separate kind of justification for animal rights can be found. Often, in poetic discourses, animal rights are connected to particular (cultural or religious) world views that view animals in a different manner than we are typically used to in the Global North. The idea is that positive law does not adequately reflect the cultural and/or religious value of animals, and should be adjusted accordingly. Such justification is thus related to the natural law justification, yet is sufficiently different to warrant its own discussion in that it is closely connected to a diversity of cultural and religious views. [117] In these regions, usually embodying the common law tradition, judges have considerable discretion to enact new laws and make innovative interpretations of existing laws.

In an early Indian case, *PFA v Goa* (1997), dealing with the legality of bullfights, the Bombay High Court found it indisputable that animals, like people, have a right to life without cruelty, and that this right had not been properly recognised by humans, necessitating anti-cruelty legislation.[118] The court drew a useful distinction between the *existence* of a right and its *recognition*. The clear obligation state agencies have to enforce anti-cruelty legislation meant that immediate steps needed to be taken to ban organised animal fights, a view that effectively makes the anti-cruelty rule absolute.[119] The court recalled Justice Krishna Iyer's words lamenting the torture of animals in India despite the teachings of various religious texts, and stressed that humanism and compassion cannot be divided by being withheld from non–human species: "all life is too divinely integral to admit of such an unnatural dichotomy as man and animal in the wholeness of ecology."[120] The Quran, the court recalled, takes the same view.[121]

In addition to natural law underpinnings, the court in *Nair* (2001) also asserted that Indians find "the same soul represented [i]n all the living beings on this planet", an idea that finds constitutional expression.[122]

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[117] This section has been partly taken from the ongoing PhD thesis of Ankita Shanker: Ankita Shanker, *Personhood, Fundamental Rights, and the Animal: Resolving the Principle-Provision Inconsistency of Positive Law through Global Animal Rights Law* [doctoral thesis].
[118] *People for Animals vs. The State of Goa* 1997 (4) Bom CR271 (1997, Bombay High Court).
[119] ibid.
[120] ibid (Judges RK Batta and RMS Khandeparkar).
[121] ibid.
[122] *Nair*, [4] (Judge Narayana Kurup).

In a later Indian case, *Gujarat Vs. Jamat* (2005), ruling on the validity of a ban on the slaughter of cows in certain circumstances, the Supreme Court recalled that the Indian Constitution makes it a fundamental duty of Indian citizens to have compassion for living beings: "the weak and meek need more of protection and compassion."[123] The court based its reasoning against cruelty to animals on India's cultural and religious heritage and the teachings derived therefrom, as well as animals' utility to humans.[124]

As we have seen, the courts in *Bhatt* (2018) and *Singh* (2019) based their reasoning, in part, on philosophical and religious teachings.[125]

In the *Kaavan case* (2019), the court began and ended its judgment with various references to religious injunctions against cruelty to animals.[126] "It is inconceivable" the court declared, "that, in a society where the majority follow the religion of Islam, [...] an animal could be harmed or treated in a cruel manner."[127] Thereby, it gives a strong example of a religious justification for animal rights, reading maltreatment of animals as contrary to the religious underpinnings of society.

Even if animal rights have been sometimes arrived at through a religious justification, it is questionable whether this is a desirable judicial route. An unfalsifiable belief system does not a solid grounding for law make. The cases we have taken into account for the purposes of this article are those favourable to animal rights. It is entirely possible that a religious basis of reasoning might also have the opposite outcome: restricting animal rights in one way or another.

3 Animal Rights and Animal Personhood

A second theme that comes forward in the animal rights cases, is the relation between rights and legal personhood. We distinguish between cases in which (3.1) legal

[123] *State of Gujarat Vs. Mirzapur Moti Kureshi Kassab Jamat and others* (2005) 8 SCC 534 (26 October 2005, Supreme Court of India) [hereafter: *Jamat*], 18-19, 21 (Chief Justice of India RC Lahoti). see further.
[124] ibid 21. see further, also *passim*, for an appraisal of and references to legislation and jurisprudence prohibiting the slaughter of healthy cows, which, while undoubtedly having religious, environmental, and/or economic underpinnings, can still support a conclusion in favour of animal protection.
[125] *Bhatt*, [80, 87-91]; *Singh*, [76, 82-85, 89]. see further.
[126] *Ka'avan case*.
[127] ibid [6] (Chief Justice Athar Minallah).

personhood is regarded a condition for animal rights and (3.2) cases in which animal rights are recognized *without* any reference to personhood.

3.1 Animal Rights through Personhood

In many of the animal rights cases that are the result of *habeas corpus* procedures, the question of legal personhood is crucial. Here, many courts have treated personhood as a *sine qua non* for fundamental rights. Scholars such as Visa AJ Kurki have questioned the necessity of personhood as a condition for rights, arguing that personhood and rights-holdership are mutually independent.[128] Nevertheless, in many of the animal rights cases, the question of personhood comes up, especially in those involving the *habeas corpus* procedure.

In *NhRP v Stanley* (2015), the court grappled with the question of whether the writ of *heabeas corpus* could be extended to chimpanzees, for which it needed to determine whether they could be treated as persons at law.[129] It observed that the similarities between humans and chimpanzees inspire the sort of empathy that is felt for beloved companion animals, and that ongoing efforts to extend legal rights to chimpanzees were understandable in those terms and might someday succeed.[130] Courts, it said, are generally "slow to embrace change" and sometimes "seem reluctant to engage in broader, more inclusive interpretations of the law; if only to the modest extent of affording them greater consideration."[131] The court recalled Justice Anthony M. Kennedy's observation in the United States Supreme Court case of *Lawrence v Texas* (2003), in which the court ruled on the unconstitutionality of criminal penalties for homosexual sodomy, that courts can be bound at times to truths that seem "proper and necessary" but which appear to later generations to be oppressive.[132] The pace of the process by which courts re-evaluate societal norms and the appropriateness of judicial restraint has, *per* the United States Supreme Court case of *Obergefell v Hodges* (2015), which granted same-sex couples the right to marry, been

[128] see eg Visa AJ Kurki, *A Theory of Legal Personhood* (Oxford University Press 2019); "Legal Personhood and Animal Rights" (2021) 11 *Journal of Animal Ethics* 47.
[129] *Stanley*.
[130] ibid 32 (Judge Barbara Jaffe).
[131] ibid (Judge Barbara Jaffe).
[132] ibid (Judge Barbara Jaffe), citing *Lawrence v Texas* 539 U.S. 558 (2003) (26 June 2003, Supreme Court of the United States), 579 (Justice Anthony M Kennedy).

accelerating.[133] But in the case of the chimpanzees the court felt bound by precedent to deny the writ.[134] So, despite clear sympathies for the animals and acknowledgment of the problems created by societal norms and judicial restraint, the court nonetheless could not rule in their favour.

Dealing with the same issue in *Tommy; Kiko* (2017), the judgment of the New York Appellate Division was that granting fundamental rights to animals, while "laudable" a mission, was "better suited to the legislative process."[135] Here, the court felt that common law was not the appropriate tool to afford such protection to animals. It reflects a form of judicial restraint in which judges are unwilling to take on novel interpretations of the laws they find are better-suited to legislators to change.

In his concurring opinion on appeal, Judge Fahey wrote that he had personally struggled with whether the court's decision was the right one.[136] And although he agreed to deny the appeal, he expressed his misgivings about whether the court should have initially denied the writ.[137] This is perhaps the strongest example of a judge sympathising with the pro-animal litigation before him, as he lists various factors that can be taken as arguments for why the litigation should succeed. His palpable unease in this case reminds us of the binding nature of legislation and precedent, which operate to prevent judges from acting according to their conscience.

In the *Happy case* (2020), the New York Supreme Court denied a writ of *habeas corpus* to Happy, feeling constrained by prior jurisprudence, holding that since the elephant was not at law a person she could not be illegally imprisoned.[138] The better remedy would be, again, for the legislature to determine that animals have fundamental rights.[139]

In these cases, absence of a finding on animal personhood militated against protection of animal interests. Another theme we find is that courts, despite expressing sympathy

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[133] ibid 32-33, citing *Obergefell et al. v Hodges, Director, Ohio Department of Health, et al.* US 135 S Ct 2584 [2015] (26 June 2015, Supreme Court of the United States), 2595 (Justice Anthony M Kennedy).
[134] ibid 33 (Judge Barbara Jaffe).
[135] *Tommy; Kiko case*, 7 (Judge Tony K Webber).
[136] *Tommy; Kiko case CO*, (Judge Eugene M Fahey).
[137] ibid 6-7 (Judge Eugene M Fahey).
[138] *The NonHuman Rights Project on Behalf of Happy against Breheny, James J.* (Bronx Cnty. Ct. 2020), Decision and Order (18 February 2020, Supreme Court of the State of New York, County of Bronx) [hereafter: *Happy case*], 16 (Judge Alison Y Tuitt).
[139] ibid (Judge Alison Y Tuitt), citing *Tommy; Kiko*, 397 (Judge Tony K Webber).

for the claims raised, have time and again found themselves bound by precedent to change the status of animals as non-persons, and therefore unable to act to protect, or even recognize, their legal rights.

3.2 Animal Rights without Personhood

In many cases of animal rights, particularly from the civil law tradition, no reference to legal personhood is made. And where it is made, courts often imply or express that personhood is not necessary for animals to have rights. So, whereas in the common law context when *habeas corpus* is invoked, the first question raised in litigation about whether animals have rights is whether or not the animal is a legal person, in the civil law tradition animal rights can enter judicial deliberations in a different manner: questions about animal rights can arise even when the law regards animals as the property of legal persons.[140] Even though such developments do not directly support an animal rights-based approach under public law, they do strengthen the position of animals under private law, by increasingly distinguishing them from 'legal things' that are just property. Sometimes, this is even reflected in legislation, as many continental European civil codes distinguish animals from other legal things.[141]

In the 2019 Belgian case, the court asserted that the position of animals in Belgian society was changing; animals can no longer be considered as mere goods, but should rather be thought of as quasi-goods.[142] This helped persuade the court that the dog concerned should be able to see both his former owners, even though only one held the property rights over him.[143] While the court thus attached substantial weight to animal interests (which it referred to as "rights"), it did so without removing animals from the category of property.

This issue also stood central in a case before the Constitutional Cantonal Court of Basel, Switzerland (2020).[144] The dispute arose when the Grand Council of Basel-Stadt

[140] see Visa AJ Kurki, *A Theory of Legal Personhood* (Oxford: Oxford University Press 2019), *passim*.
[141] Such special status exists for animals in the following continental European jurisdictions: Austria, §285a ABGB *Allgemeines bürgerliches Gesetzbuch* since 1988; Belgium, Art 3.38-39 BW *Burgerlijk Wetboek* since 2021; Czech Republic, Art 494 OZ *Občanský Zákoník*; since 2012, France, Art 515-14 CC *Code Civil* since 2015; Germany, §90a BGB *Bürgerliches Gesetzbuch* since 1990; Spain, Art 333bis CC *Código Civil* since 2022; Switzerland, Art 641a ZGB *Zivilgesetzbuch,* since 2002; Moldova Art 458 CC *Codul Civil* since 2002; The Netherlands, Art 3:2a BW *Burgerlijk Wetboek* since 2016.
[142] No 2019/FA/46 (29 April 2019, Hof van Beroep Antwerpen) (trans the authors), [8].
[143] ibid [10].
[144] VG.2018.1. (15 January 2019, Constitutional Court of Basel-Stadt) (trans the authors).

decided that a proposal by an NGO, Sentient Politics, to hold a referendum on the question of whether primates have fundamental rights could not go forward because it was legally invalid.[145] The referendum would have altered by cantonal vote the legal status of primates, which is a matter determined by the federal Civil Code.[146] The court did not engage in a debate over whether animals had rights or what they were.[147] It did say, however, that cantons could extend legal rights "beyond the anthropological barrier" to primates *without* altering their legal status in the Civil Code.[148] So, according to the court, in order to have their fundamental rights protected in public law, there is no need for animals to have legal personhood for private law purposes.[149] The decision implies that animals can be recognized as having rights to life and bodily integrity whilst leaving their status as property unchanged.[150]

In the 2021 Belgian case, the court again affirmed that as quasi-goods animals have legally cognizable rights and that these could be legally grounded in an existing Civil Code article recognizing animals as sentient beings with specific biological needs.[151]

Another 2021 Belgian case before the Court of Appeal in Brussels asserted that the idea of animals in family law was changing.[152] "Taking into account the changing position of animals in general and the dog especially in our society and law," the court commented, and in determining which ownership claim to the dog should be respected, it was relevant to take into account the interests of the dog himself.[153] While using the language of ownership, the court still took the interests of the dog into consideration when determining who could exercise ownership rights over him/her.

The reverse is also true of some decisions. In the *Cecilia case* (2016), the judgment was clarified as not to be interpreted as granting to great apes civil and commercial legal rights, but is merely about placing them in an appropriate category—that of non-

[145] Kantonsblatt No 4, 59 (10 January 2018, Grand Council of Basel-Stadt).
[146] VG.2018.1. (15 January 2019, Constitutional Court of Basel-Stadt).
[147] ibid *passim*.
[148] ibid [3.7.3].
[149] For a discussion, see Charlotte E Blattner & Raffael N Fasel, "The Swiss Primate Case: How Courts Have Paved the Way for the First Direct Democratic Vote on Animal Rights" (2021) *Transnational Environmental Law* 1.
[150] For a discussion, see ibid.
[151] AR 21/957/1 (1 April 2021, Rechtbank Antwerpen) (trans the authors).
[152] No 2021/FA/177 (22 June 2021, Hof van Beroep Brussel) (trans the authors).
[153] ibid [2.1].

human legal persons.[154] This implies that animals can be persons without having some or perhaps all fundamental rights.

Despite the contested nature of legal personhood, it is clear that it plays an important role in the discussion of animal rights in case law, especially in those concerning doctrines preconditioned on the existence of a person, such as the writ of *habeas corpus*.

4 Animal Rights and Nature

A third theme that comes forward in the animal rights cases is the connection and interlinkages between animal rights and the environment. First, some courts (4.1) recognize the common basis of animal rights and the conservation and protection of nature, while others go even further, (4.2) endorsing an ecocentric interpretation of animal rights.

4.1 Animal Rights and Environmental Protection

In a number of cases, we see that animal and environmental protection are presented as interlaced notions, regardless of whether the latter is used to justify the existence of the former.

In South Africa, the Constitutional Court, in *NSPCA v MoJCD* (2016), considered the question of whether the NSPCA could initiate private legal proceedings for animals under the Criminal Procedure Act.[155] In the course of deciding that they could, the court pointed to the connection between animal protection and protection of the environment, arguing that animal welfare is connected with the constitutional right to have the environment protected through legislative and other means. "Animal welfare and animal conservation," the court held, "together reflect two intertwined values."[156] This integrative approach thus links the suffering of individual animals to conservation, and points to the fact that promoting respect and concern for individual animals reinforces broader environmental protection efforts, and *vice versa*.

[154] ibid 25-26, 28 (Judge María Alejandra Mauricio).
[155] *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development and Another,* ZACC 46 (8 December 2016, Constitutional Court of South Africa) [hereafter: NSPCA].
[156] ibid [58] (Judge Sisi Khampepe).

In the later South African case of *NCSPCA v MEA* (2019), the High Court relied on similar reasoning in a matter concerning quotas for trade in animal products.[157]

In the *Puppy Mill case* (2022), the court referred to environmental protection provisions to base its recognition of animal rights on. It stated that:

> the protection of environmental rights has constitutional roots since the legislators expressly recognized it. In fact, in section 41 of the National Constitution, it was established that all inhabitants enjoy the right to an environment that is enjoying the right to a healthy environment and have the duty to preserve it. In addition, the Constitution of the City of Buenos Aires, in section 27, paragraph 5, promotes the protection of urban fauna and respect for its life: it controls its health, avoids cruelty, and controls its reproduction with ethical methods.[158]

Such environmental protection provisions were then built upon to reach the conclusion that animals, in fact, are subjects of rights already. In these cases, we see a clear judicial recognition of the links between animal protection and environmental protection, a recognition that Werner Scholtz has argued is often missing from academic discussions of animal rights.[159] The absence of such discourse is counterintuitive, given the interdependence of the natural world among itself.

4.2 Ecocentric Animal Rights

In some cases, animal rights are linked to, or perceived to be embedded in, an ecocentric worldview in which animals are valuable as part of the natural environment. Animal rights seen as part of a broader movement that challenges the anthropocentric underpinnings of the law from the perspective of earth jurisprudence and the rights of nature movement. A more radical integration of animal rights and nature protection is found in the ecocentric interpretation of animal rights. This is remarkable because

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[157] *National Council of the Society for Prevention of Cruelty to Animals v Minister of Environmental Affairs and Others,* ZAGPPHC 337 (6 August 2019, High Court of South Africa).
[158] *Puppy Mill case*, 2.
[159] Werner Scholtz, "Injecting Compassion into International Wildlife Law: From Conservation to Protection?" (2017) 6 *Transnational Environmental Law* 463, *passim*; "'Ethical and Humane Use', Intrinsic Value and the Convention on Biological Diversity: Towards the Reconfiguration of Sustainable Development and Use" (2021) 30 *Review of European, Comparative and International Environmental Law* 73, *passim*.

in some scholarship, animal rights and the rights of nature are said to be inherently incompatible,[160] primarily because the environmental connection for some scholars raises the prospect that individual animals can be sacrificed for the greater good of the ecosystem. However, as will be seen, this need not always be the case.

In the *Ka'avan case* (2019), we saw that the court started its reasoning by recalling the Covid-19 pandemic as an impetus for humans to re-consider their relationship with the natural world.[161] Though reference is made to ecological balance, this is not used as a grounding for animal rights, but as a means of bolstering them. In other words, animal rights are treated as a stand-alone subject.

In Brazil, in what has come to be known as the *Wild Parrot case* (2019), the Superior Court of Justice considered an appeal against a release order and fine for the illegal capture and restraint for 23 years of a blue-fronted parrot, a member of a wild and protected species.[162] The court explicitly rejected the Kantian, individualistic, and rational perception of legal rights.[163] It held that the Brazilian Constitution should be read to establish an "ecocentric jurisprudential matrix".[164] In order to recognise and guarantee the rights of non-human animals, the court found it appropriate to interpret the Constitution and legal texts in the context of both national and foreign jurisprudence and doctrine.[165] The relevant provision formulated an anthropocentric human right to the environment but could be broadened in scope by making "non-human animals and life in general" the holders of legal rights.[166] "It is necessary," the court wrote, "to develop the discussion about the recognition of dignity to non-human animals, and, consequently, the recognition of rights, and shift the way that people relate to each other and to other living beings."[167] It also noted the emergence of "new ecological values that feed contemporary social relations and demand a new ethical conception" in which not only human life but also other forms of life forms are

[160] see generally Mark Sagoff, "Animal Liberation and Environmental Ethics: Bad Marriage, Quick Divorce" (1984) 2:2 *Osgoode Hall Law Journal* 297.
[161] *Ka'avan case*, [1] (Chief Justice Athar Minallah).
[162] Recurso Especial No 1.797.175 – SP. (21 March 2019, Superior Tribunal de Justiça) (trans the authors) [hereafter: *Wild Parrot case*]. see further Kristen Stilt, "Rights of Nature, Rights of Animals" (2021) 134 *Harvard Law Review Forum* 276. It should be noted that Brazil lacks a doctrine of precedent, meaning that the judgments are only relevant to the specific case at hand.
[163] ibid [IV].
[164] ibid (Minister Geraldo Og Nicéas Marques Fernandes).
[165] ibid.
[166] ibid (Minister Geraldo Og Nicéas Marques Fernandes).
[167] ibid (Minister Geraldo Og Nicéas Marques Fernandes).

protected from objectification or commodification.[168] It stated that, "This view of nature as an expression of life in its entirety enables [...] law to recognize the environment and non-human animals as beings of their own value, therefore deserving respect and care, so that the legal system grants them rights and dignity."[169] In the judgement, there are two striking innovations, both anchored in the Brazilian Federal Constitution,: the express recognition of the rights of non-human beings, and the potential for them to be seen as fundamental rights. The court thus reconciled two strands of jurisprudence: the ecocentric discourse about the rights of nature on the one hand, and the discourse on the legal protection of individual animals on the other. The judgment is an isolated instance of animal rights recognition in Brazilian law and its direct consequences have been limited. It does illustrate, however, the way an animal-rights-oriented discourse in courts can read into existing, anthropocentric legal paradigms new and more promising meanings.

Such ecocentric perspective was also found in the *Chucho case* (2017).[170] The Supreme Court of Justice opined that humans have become "immoderate and irresponsible" in their treatment of animals.[171] The court held that the law needed to shift its worldview from anthropocentrism to what it called ecocentric-anthropism:

> We are not yet aware of the shift that must be made to an ecocentric-anthropic worldview—not to a radical and senseless ecocentrism that despises anything human or to a form of nature fanaticism, but to an ecological-anthropic conception in which human beings are the main wardens of the universe and the environment, and which promotes a universal and biotic citizenship.[172]

Throughout its opinion, the court referred to environmental reasons and justifications for its decision.[173]

[168] ibid (Minister Geraldo Og Nicéas Marques Fernandes).
[169] ibid (Minister Geraldo Og Nicéas Marques Fernandes).
[170] *Chucho case*.
[171] ibid [2.4.1] (Judge Luis Armando Tolosa Villabona).
[172] ibid [2.4.2] (Judge Luis Armando Tolosa Villabona).
[173] ibid *passim*.

Reverting to the *Estrellita case* (2022), the emphasis on ecocentrism is arguably the main focus of the judgment.[174] First, the court made clear that, "Within the levels of ecological organization, an animal is a basic unit of ecological organization, and being an element of Nature, it is protected by the rights of Nature and enjoys an inherent individual value", unmistakeably adopting an ecocentric approach towards animal rights.[175] It further stated that:

> Law in modern times has been characterized by a marked anthropocentrism, whereby the human being has been considered the center of all legal expression. This approach has been accompanied by an evident speciesism by means of which the human being has been denying, to a greater or lesser extent, the valuation and protection of animals and other species of Nature.[176]

Even though the court stated that "animals cannot be equated to human beings, since their nature and essence is not fully compatible with that of human beings", this would not "mean that they are not subjects of rights, but rather that their rights should be observed as a specific dimension – with their own particularities – of the rights of Nature".[177] Animals were thus seen as more than tools for ecological balancing. This case offers a remarkable new view on the way in which animal rights can be incorporated in a more ecocentric legal paradigm. The court held that animal rights must be analysed in line with the interspecies principle and the principle of ecological interpretation.[178] Wild animals thus have, according to the court, a basic right to exist and more specifically "the right not to be hunted, fished, captured, collected, extracted, kept, retained, trafficked, traded or exchanged," as well as "the right to the free development of their animal behavior".[179] These rights then produce two different legal consequences, "one of a positive nature and the other of a negative nature; these being: (i) on the one hand, the obligation of the State to promote, protect and ensure the development of the free behavior of wild animals; and, (ii) the prohibition for the State or any person to intervene, impede, interfere or hinder this free development."[180]

[174] *Estrellita case*.
[175] ibid [73] (Judge Teresa Nuques Martínez).
[176] ibid [75] (Judge Teresa Nuques Martínez).
[177] ibid [83] (Judge Teresa Nuques Martínez).
[178] ibid.
[179] ibid (Judge Teresa Nuques Martínez).
[180] ibid [114] (Judge Teresa Nuques Martínez).

Apart from these substantive dimensions, the rights of animals should also have a procedural dimension, "by which they can – independently of the actions and appeals in the ordinary justice system – achieve the protection of their rights by means of jurisdictional guarantees according to the purpose and concrete claim."[181]

This trend, most commonly observed in jurisprudence from South American courts, seems to take a holistic approach towards animal rights as part of a broader, non-anthropocentric view of environmental protection. In fact, the important common thread is the treatment of animal rights in the context of an ecocentric discourse, as was also the case in South Africa. This is largely missing from the North American and continental European jurisprudence and may reflect regional ecocentric or biocentric world views.[182] For the purpose of protecting fundamental animal rights, this can have negative as well as positive consequences. On the one hand, the interlinkage can have the strategic advantage of associating the emerging animal rights movement with the success of the rights of nature movement. On the other hand, if animal rights only have legitimacy to the extent that they contribute to environmental protection then they are not fundamental rights in the traditional sense: they can be sacrificed when they conflict with other protected interests. So, where a court bases much of its opinion on the environmental value of animals, this detracts somewhat from the pro-animal thrust of its ruling. The opinion then appears not protect animal rights *qua* animal rights but *qua* environment rights, with animals being treated as a mere means to the end of environmental protection, as opposed to an end in themselves. The attempt to marry two formerly separated fields of law is nonetheless an interesting contribution to the discourse.

5 Animal Rights and Human Rights/Duties

A fourth theme that comes forward in the animal rights cases is the relationship between human and animal rights. We can distinguish between two sets of instances: whether animal rights are (5.1) determined independent of human rights or (5.2)

[181] ibid [181] (Judge Teresa Nuques Martínez).
[182] One should be careful to generalise in this regard, as some of the rights of nature-laws seem to be informed by a specific eco-theological perspective that does not adequately represent indigenous thinking at all: see Mihnea Tănăsescu, *Understanding the Rights of Nature: A Critical Introduction* (Verlag, Bielefeld: [Transcript Publishing] New Ecology 2022).

derived from human rights/duties, and whether (5.3) animal rights limit human rights or (5.4) human rights limit animal rights.

5.1 Animal Rights Independent of Human Rights

In some cases, there is clear recognition that animals have intrinsic, and not merely instrumental, value and that the law should protect them as the beings that they are, not just because they satisfy human interests. In other words, the law no longer requires legitimation of animal protection through the lens of human interests. The recognition of intrinsic value symbolises a step beyond anthropocentrism or welfarism, as it implies that animals are valuable as individuals, rather than merely propagating the protection of animals as an objective of (human) public interest. Where animal rights are derived independently of other rights, they are more difficult to subjugate to those other rights.

An example of such case is *NSPCA v MoJCD* (2016), where the court grounds animal rights in their intrinsic value rather than instrumental use to humans.[183] The court made a number of interesting observations. It said, for example, that "animals have shifted from being 'mere brutes or beasts' to 'fellow beasts, fellow mortals or fellow creatures' and even to being seen as 'companions, friends and brothers'."[184] And it maintained that "the rationale behind protecting animal welfare has shifted from merely safeguarding the moral status of humans to placing intrinsic value on animals as individuals."[185] The court thus implies that animals are recognised as individuals through laws that aim to protect them. The court also emphasised the important role bodies such as the NSPCA play in representing animals in court, championing "the norm that we do not accept acts of cruelty against those who cannot defend themselves."[186]

According to Scholtz, the notion of intrinsic value could serve to shift the focus in environmental law from the protection of species to the protection of individual animals, which would then open the door to judicial recognition and enforcement of

[183] *NSPCA*.
[184] ibid [1] (Judge Sisi Khampepe).
[185] ibid [57] (Judge Sisi Khampepe).
[186] ibid [1] (Judge Sisi Khampepe).

animal rights.[187] It would bring the protection of individual animals as a matter of right within the ambit of environmental law.[188]

As we have seen in the *Wild Parrot case* (2019), the court found that the holistic view of nature taken in that case enabled the law to recognize not only animals, but also the environment, as entities in their own right, with their own value, who deserve care and respect.[189] The court emphasised that the legal protection of animals should no longer be based on human dignity or human compassion, but instead on "the very dignity inherent in the existence of nonhuman animals."[190]

In the South African case of *Smuts v Botha* (2022), decided by the Supreme Court of Appeal, the question was whether the publication on social media by an animal rights activist of photographs of trapped animals who had died from dehydration infringed the privacy rights of the abuser, whose name and address were published with the photographs. [191] Citing the earlier *NCSPCA v Openshaw* case (2008), the court sided with the animal rights activist, holding that, "It is axiomatic that animals are worthy of protection not because of the reflection that this has on human values but because, […] 'animals are sentient beings that are capable of suffering and of experiencing pain and unfortunately, humans are capable of inflicting on suffering on animals and causing them pain'."[192]

Again, in the *Estrellita case* (2022), in discussing several trends in the legal protection of animals throughout the world, the court held that "the recognition of animals as subjects of rights constitutes the most recent phase in the development of their legal protection, which is based on the recognition of animals as living beings with an intrinsic value that makes them holders of rights."[193] Though it took an essentially ecocentric approach, the court emphasized that "animals should not be protected only

[187] ibid 80.
[188] ibid.
[189] *Wild Parrot case*, *passim*.
[190] ibid [IV] (Minister Geraldo Og Nicéas Marques Fernandes).
[191] *Bool Smuts and Another v Herman Botha* (887/20) ZASCA 3 (21 January 2022, Supreme Court of Appeal of South Africa) [hereafter: *Smuts*].
[192] ibid [24] (Judge RS Mathopo) citing *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* (462/07) [2008] ZASCA 78 (RSA) (30 May 2008, Supreme Court of Appeal of South Africa). see further Amy Wilson, "Animal Law in South Africa: 'Until the lions have their own lawyers, the law will continue to protect the hunter'" (2019) 10/1 dA. *Derecho Animal, Forum of Animal Law Studies* 35.
[193] *Estrellita case*, [77] (Judge Teresa Nuques Martínez).

from an ecosystemic perspective or with a view to the needs of human beings, but mainly from a perspective that focuses on their individuality and intrinsic value."[194]

The assertion that the law should recognize animals as intrinsically valuable individuals, regardless of any value they may have for humans is crucially different from a traditional anthropocentric approach in which animals are typically protected only insofar as is consistent human goals, and in which animal pains and human benefits are weighed against each other to determine whether a certain action is permissible or not. Such approaches do not substantially improve either the legal position of animals or their material wellbeing. In contrast, in the cases discussed in this subsection, judges refer to animals as sentient beings, dignified creatures, intrinsically valuable individuals, and vulnerable beings. Animals are not lumped into categories according to their use value but are instead viewed as individuals worthy of direct moral consideration.

5.2 Animal Rights through Human Rights and Duties

In a number of cases, animal rights have been extracted from certain human rights and duties, meaning the latter have been broadened in scope to cover the interests of animals. This approach precludes the need to adopt new laws aimed at animals by simply extracting their rights from existing laws. It can thus be a powerful tool in the belt of judicial activism.

Taking the reasoning in *Sharma* (2013) on the fundamental duty of Indian citizens to have compassion for animals[195] further, the court in *Nagaraja* (2014) distinguished anthropocentric legislation from ecocentric legislation, rendering the former (in this case, a state legislation) repugnant to the extent that it clashed with the latter (in this case, a Union legislation read with constitutional provisions).[196] By imposing the obligation to read welfare provisions in line with constitutional mandates, the court strengthened the pro-animal leaning of these provisions. This is a strong endorsement of the pro-animal sentiments in both constitutional and statutory law in India. The court extracted animal rights, to wellbeing and against the infliction of unnecessary pain and suffering, from duties imposed on humans under welfare/anti-cruelty

[194] ibid [79] (Judge Teresa Nuques Martínez).
[195] *Sharma*, [55, 79].
[196] hereafter: *Nagaraja*, [73, 76]. see further [76].

legislation, which can not only be enforced but violations of which can also be met with legal sanctions.[197] The intent of such laws to prevent cruel behavior implies a duty to refrain from it and, therefore, no right to engage in it.[198] These statutory protections for animals, the court opined, needed to be strengthened by elevating them to fundamental rights (as it noted had been done by some countries), creating constitutional constraints on behavior that would secure the "honour and dignity" of animals, as well as protecting them from cruelty.[199] It would then be less likely that protection for animals would be overridden by other concerns. The court also extracted animal rights from human rights, offering a bold, expanded interpretation of the human right to life—it now includes the right to life of the animals on whose existence human life is directly or indirectly dependent and who have more than "instrumental value for human-beings".[200] Moreover, an animal's right to life is held to include not just mere existence or survival but also various other entitlements, including living with "intrinsic worth, honour and dignity," being treated in a dignified and fair manner, not being tortured by humans, and not being subjected the "the infliction of unnecessary pain or suffering."[201] Parliament, the court said, should amend welfare legislation to provide effective deterrents and adequate penalties and punishments for violations to meet the object and purpose of the legislation, and should elevate animal rights to a constitutional status capable of protecting animals.[202] Of particular relevance is the fact that the court began its judgement by acknowledging the significance of issues of animal rights. In this sophisticated analysis of animal rights, the court made some important distinctions, primarily that between statutory rights and fundamental rights. It extracted animal rights from statutory (and arguably also constitutional) human duties, as well as constitutional human rights, creating a strong foundation for the existence of animal rights. This case still does not concern fundamental animal rights, but the case itself acknowledges such, and makes an argument for elevating statutory rights to the status of fundamental rights to provide robust protection for animal interests.

[197] ibid [27-29, 32, 43, 62, 76].
[198] ibid [28]. see further.
[199] ibid [56] (Judge KS Panicker Radhakrishnan).
[200] ibid [62] (Judge KS Panicker Radhakrishnan). see further, also for a catalogue of animal rights.
[201] ibid (Judge KS Panicker Radhakrishnan). see further, also for a catalogue of animal rights.
[202] ibid [77].

As we have seen in the *Wild Parrot case* (2019), legal rights of non-human animals (and living beings in general) were extracted from the human right to the environment.[203]

In the *Ka'avan case* (2019), the court noted that the human right to life ("the most fundamental amongst human rights"), as well as human development, are dependent on the appropriate treatment animals:

> The welfare, wellbeing and survival of the animal species is the foundational principle for the survival of the human race on this planet. Without the wildlife species there will be no human life on this planet. It is, therefore, obvious that neglect of the welfare and wellbeing of the animal species, or any treatment of an animal that subjects it to unnecessary pain or suffering, has implications for the right of life of humans [...] Cruel treatment and neglect of the wellbeing of an animal in captivity, or exposing it to conditions which do not meet the animals behavioural, social and physiological needs, is an infringement of the right to life of humans.[204]

Here, the court seemed to subscribe to the view that the existence of animal rights is contingent on a corresponding duty for or right of humans, and that this duty is couched in terms of conservation and the right to life. However, given the rest of the judgement, this does not detract from the pro-animal-rights trend of this decision.

The cases in which human rights and/or duties are read as giving rise to animal rights demonstrate an interesting route to the latter that may be copied in different jurisdictions that do not yet protect animal rights in their positive law. The derivation of animal rights from duties, in particular, is an interesting judicial move. As duties and rights may as well be regarded opposite sides of the same coin, the affirmation that animals have rights derived from human duties seems consistent.[205] In any case, humans would need to recognize their duties towards animals in order to make animal

[203] *Wild Parrot case*, [IV].
[204] *Ka'avan case*, [6-7] (Chief Justice Athar Minallah).
[205] see eg Clare McCausland, 'The Five Freedoms of Animal Welfare Are Rights' (2014) 27 *Journal of Agricultural and Environmental Ethics* 649.

rights effective in practice. Therefore, human duties and animal rights necessarily go hand-in-hand.

5.3 Animal Rights as Limiting Human Rights

The recognition that animals are valuable in and of themselves and therefore ought to be the direct beneficiaries of legal protection can be construed as imposing limits on the exercise of human rights. As will be seen, animal interests have been balanced against human interests in religion, privacy, employment, and property—and in all cases were understood to curtail these interests to some extent, and sometimes even to override them.

In *Nair* (2001), the right to carry on a trade or business is subject to reasonable restrictions and does not extend to activities that result "in the infliction of unnecessary pain and suffering on [...] animals."[206]

In the Indian case of *AWBI v PEST* (2009), the Supreme Court imposed a duty on Indian citizens to have compassion for dogs, whom it held cannot be killed indiscriminately.[207] The court acknowledged that it was indubitable that human lives must be saved and suffering due to dog bites caused by administrative lapses should be avoided.[208] However, finding that local authorities had various duties to manage the stray dog population, the court held, "we are disposed to think for the present that a balance between compassion to dogs and the lives of human being, which is appositely called a glorious gift of nature, may harmoniously co-exist."[209]

In *Sharma* (2013), the court evaluated the relative status of human and animal rights.[210] The court appeared to favor animal rights when the clash between human and animal interests involved religious sacrifice.[211] The crux of the decision was that since animal sacrifice was not an integral or fundamental part of the Hindu religion preventing sacrifice would not significantly alter the fundamental character of the

[206] *Nair*, [8-9] (Judge Narayana Kurup). see further.
[207] *Animal Welfare Board of India v People for Elimination of Stray Troubles and Ors.* (2009) SLP(C) 691/09 (2009, Supreme Court of India), 5.
[208] ibid.
[209] ibid 12-13 (Justices Dipak Misra Siva Kirti Singh).
[210] *Sharma*.
[211] ibid. see further.

religion, and would not therefore violate constitutional protections of religion.[212] First, the court found that historic custom and culture do not justify practices that are embedded in and reflect violence, "cruelty, superstition, fear and barbarism" or otherwise go against the spirit and philosophy of the Indian Constitution or the "basic principles of a progressive and civilised society."[213] The court referred to "the vision of the founding fathers of the Constitution of liberating society from blind adherence to traditional superstitious beliefs *sans* reason or rational basis."[214] Moreover, the court held that animal sacrifice no longer had any social sanction and was "based on superstition and ignorance". Rituals and traditions once-prevalent in early civilisation have "lost their relevance", outlived their utility, and have no place in the modern era of "reasoning and scientific temper".[215] They must therefore be "substituted by" and "give way to" "new rituals" and traditions "based on reasoning and scientific temper."[216] The judgment dealt a heavy blow to superstitions, declaring that they "have no faith in the modern era of reasoning."[217] Therefore, barbaric practices initiated against innocent animals could not be justified.[218] This holding, while apparently ambitious in its dismissal of rituals and traditions, is significant in a historical context in which culture and religion have been seen as uninfringeable and have been used to perpetuate various forms of cruelty against animals. The court also stressed the need for a pragmatic approach to social reform, to build a new social order and help society to progress and stand against what it described as social evils.[219] The court likened the Hindu animal sacrifice at issue to a number of other historic social evils (e.g., Sati, female feticide, child marriage, and untouchability), pointing out that although they had continued since time immemorial "and were deeply ingrained in the social milieu", they had now been almost entirely eradicated through education, reform movements, and judicial intervention.[220] This highlights the court's role in abolishing harmful practices, such as animal sacrifice, as an extension of its historic role in abolishing other practices that were harmful to groups of humans. The likeness between both sets of practices was judicially acknowledged, which is a step towards improving the

[212] ibid.
[213] ibid [7-8, 15, 28, 70] (Judge Rajiv Sharma). see further.
[214] ibid [46, 63, 72] (Judge Rajiv Sharma). see further.
[215] ibid [73*ff*] (Judge Rajiv Sharma). see further.
[216] ibid (Judge Rajiv Sharma). see further.
[217] ibid (Judge Rajiv Sharma). see further.
[218] ibid (Judge Rajiv Sharma). see further.
[219] ibid [74].
[220] ibid [8, 15, 72*ff*] (Judge Rajiv Sharma).

treatment of animals. Moreover, the fact that animal protection is in line with societal progress was also indicated, the logical conclusion of which would be that animal protection would intensify as society develops. The court also observed that the right to religion protected by the Indian Constitution was not absolute, because its practice could be regulated to protect, e.g., public order, health, and morality.[221] Moreover, the right to religious freedom had to be read in the context of constitutional provisions that create obligations for animal protection.[222] The court also stressed the constitutional obligation "to promote the health, safety and general welfare of citizens and animals."[223] The court's insistence that animal sacrifice was not an essential or integral part of Hinduism but merely a superstitious, unessential, and extraneous accretion to it, was bolstered by reference to Hindu teachings, where the core philosophy was one of non-violence and a reverence for loving, serving, and never hurting others.[224] The Constitution was held to be above religious or personal values or laws, and no one had the right to issue/dictate any mandate that violates basic animal rights, constitutional provisions, or other validly-enacted law, any of which would be illegal:

> The animals have emotions and feelings like us. Religion cannot be allowed to become a tool for perpetuating untold miseries on animals. If any person or body tries to impose its directions on the followers in violation of the Constitution or validly enacted law, it would be an illegal act[.][225]

The root of the obligation to recognise and protect basic animal rights thus lies in the likeness animals have to humans, particularly in the expression of emotions and feelings.[226] When animal sacrifices inflict pain and suffering on animals they violate both the spirit of Hinduism and animal welfare laws, and thus denigrate the responsibility people have to care for animals and show them respect.[227] The

[221] ibid [31, 40*ff*, 46*ff*]. see further, esp [31, 43, 48], also for references to legislation and jurisprudence prohibiting the slaughter of healthy cows (here, as weighed against the Muslim practice of sacrificing cows), which, while undoubtedly having religious, environmental, and/or economic underpinnings, can still support a conclusion in favour of animal protection.
[222] ibid [79-81].
[223] ibid [71] (Judge Rajiv Sharma).
[224] ibid *passim*. see further.
[225] ibid [83*ff*] (Judge Rajiv Sharma). see further.
[226] ibid [75] (Justice Rajiv Sharma). see further.
[227] ibid *passim*.

constitutional mandate to have compassion for all living beings was referred to as the "magna carta for protecting the life of animals," imposing what it called a fundamental duty on citizens of India to protect wildlife and have compassion for living beings.[228] Laws were, therefore, to be interpreted and applied in ways consistent with the "intrinsic worth, honour and dignity" of animals, save in exceptional cases of human necessity.[229] To protect basic animal rights and allow humans and nature to live together harmoniously, the court invoked various provisions of the Indian Constitution and the doctrine of *parens patriae*, and issued a series of mandatory directions prohibiting or banning animal sacrifice.[230] This is a particularly significant decision because the court arguably favoured animal rights when they came into an apparent conflict with human rights (though, technically, the court held that the impugned practice was not protected by the relevant human right).

In *Nagaraja* (2014), the court declared that animal rights were a matter of "seminal importance."[231] The case weighed the rights of animals against cruel treatment against the rights humans have, allegedly on cultural grounds, to engage in organised bullfighting.[232] The court stressed the need to approach the question, first and foremost, from the perspective of the welfare, wellbeing, and best interests of the animals, rather than from the perspective of the people engaged in bullfighting, since the issue was one of welfare of sentient beings over whom humans have dominion.[233] This is an interesting reversal of the usual practice whereby courts judge welfare interest from the perspective of humans who want to use animals, rather from that of the animals themselves, whose interests such laws are purportedly designed to protect. As other courts have done previously, it took a dim view of what it called the "cruel, barbaric, inhumane and savage" nature of Jallikattu (bullfighting), where the bulls are expected and assumed to suffer in silence, because they are presumed to be both "dumb and helpless".[234] The doctrine of *parens patriae* can be an effective counter to this presumption, especially in the context of legislation and principles of state policy which say that welfare provisions "should be liberally construed in favour of the weak

[228] ibid [55, 79] (Judge Rajiv Sharma). see further.
[229] ibid [55] (Justice Rajiv Sharma). see further.
[230] ibid [75, 84-85]. see further.
[231] *Nagaraja*, [1] (Judge KS Panicker Radhakrishnan).
[232] ibid.
[233] ibid [12, 31, 37].
[234] ibid *passim* [19, 21, 30] (Judge KS Panicker Radhakrishnan).

and infirm," and that courts should strike down laws that prevent the achievement of the ultimate objectives and purposes of animal welfare laws.[235] Finding that bull-fighting is sadistic and perverse, the court held that the practice ignored the inherent worth of animals, treating them instrumentally as a means to a human end.[236] The court again stressed that animal welfare laws and any animal rights and freedoms they support must be read in the light of constitutional mandates to have compassion for living beings: "All living creatures have inherent dignity and a right to live peacefully and right to protect their well-being which encompasses protection from beating, kicking, over-driving, over-loading, tortures, pain and suffering etc."[237] The notion that human life is distinct from that of animals belies an anthropocentric bias and overlooks "the fact that animals have also got intrinsic worth and value."[238] Another provision in light of which welfare legislation must be read was held to be that imposing a fundamental constitutional duty on Indian citizens to treat animals in accordance with a scientific temperament that also allows for "benevolence, compassion, mercy, etc."[239] The court also launched an assault on speciesism:

> Speciesism as a concept used to be compared with Racism and Sexism on the ground that all those refer to discrimination that tend to promote or encourage domination and exploitation of members of one group by another. One school of thought is that Castism, Racism and Sexism are biological classification, since they are concerned with physical characteristics, such as, discrimination on the ground of caste, creed, religion, colour of the skin, reproductive role etc. rather than with physical properties, such as the capacity for being harmed or benefited.
>
> We have got over those inequalities like Castism, Racism, Sexism etc. through Constitutional and Statutory amendments [...]. When such statutory rights have been conferred on animals, we can always judge as to whether they are being exploited by human-beings.[240]

[235] ibid [26, 46] (Judge KS Panicker Radhakrishnan).
[236] ibid [27] (Judge KS Panicker Radhakrishnan).
[237] ibid [32, 56] (Judge KS Panicker Radhakrishnan).
[238] ibid (Judge KS Panicker Radhakrishnan).
[239] ibid [58] (Judge KS Panicker Radhakrishnan).
[240] ibid [59-60] (Justice KS Panicker Radhakrishnan). see further.

However, the "right to life and security" of species is always "subject the law of the land," and thus can be restricted on grounds of "of human necessity."[241] Drawing on national and international perspectives on animal rights, the court concluded all species have an inherent right to live and to be protected by the law.[242] The court further said that the honor and dignity of animals cannot be arbitrarily abridged.[243] Although it found that eating animal flesh and conducting animal experimentation are unacceptable societal manifestations of speciesism, they have been and could be allowed under the doctrine of necessity.[244] Other human uses of animals, however, say for "[e]ntertainment, exhibition or amusement", including bull-fighting, would not fall under a necessity exemption. Treating bulls as though they had only instrumental value for providing human "pleasure, amusement and enjoyment" ought to be illegal, as supported by historical reforms, and could not be allowed just because it was sanctioned by culture or tradition.[245] The court also remarked that the once-fundamental human right to property had been downgraded to a legal right, which allowed for better animal protection, because animals are legally recognized as property across the world.[246] The court took the view that tougher penalties should be imposed on people who engage in bull-fighting and on the enforcement officers who failed to stop it.[247] And it lamented the lack of an international agreement on animal welfare and protection:

> United Nations, all these years, safeguarded only the rights of human beings, not the rights of other species like animals, ignoring the fact that many of them, including Bulls, are sacrificing their lives to alleviate human suffering, combating diseases and as food for human consumption. International community should hang their head in shame, for not recognizing their rights all these ages, a species which served the humanity from the time of Adam and Eve.[248]

[241] ibid (Judge KS Panicker Radhakrishnan). see further, also for a catalogue of animal rights.
[242] ibid [51] (Judge KS Panicker Radhakrishnan).
[243] ibid.
[244] ibid [31, 60]. see further [59-60].
[245] ibid [31, 42-43, 61] (Judge KS Panicker Radhakrishnan). see also *N. Adithayan v. Travancore Devaswom Board and Ors.* (2002) 8 SCC 106 (3 October 2002, Supreme Court of India).
[246] ibid [55].
[247] ibid [62] (Judge KS Panicker Radhakrishnan).
[248] ibid [47] (Justice KS Panicker Radhakrishnan).

In another Indian case, *PFA v Mohazzim* (2015), the Delhi High Court applied the *Nagaraja* decision (2014) to find that the bird trade violates the fundamental rights of birds, to live with dignity and fly freely in the sky.[249] It was, the court said, "settled law that birds have a fundamental right to fly and cannot be caged and will have to be set free in the sky", for which they are meant.[250] It noted disapprovingly various welfare violations associated with the bird trade and concluded that humans have no right to treat them cruelly or keep them in small cages even for business or other purposes.[251]

The Bombay High Court turned to the *Nagaraja* decision (2014) in the Indian case of *ABCT v MCGM* (2015) to hold that the human duty to have compassion for animals is fundamental and to find that using horse-drawn carriages for joyrides violated anti-cruelty legislation.[252] It ordered the end of the practice and the rehabilitation of the horses used.[253]

In an Indian case before the High Court of Chhattisgarh, *Singhvi v UoI* (2017), the decision in *Jamat* (2005) was relied upon to deal with an issue of human-elephant conflict.[254] Grounding its conclusion that animals have rights in directive principles of state policy and the fundamental constitutional duties of citizens, the court held that their "enforcement and preservation [...] depend largely upon the self-imposed or, otherwise enforced, restrictions that the humans should maintain; individually, collectively, and through the institution of governance; against invading the life and territories of animals."[255] "A salutary principle, accepted worldwide, for proper management of such a scenario is to uphold the right of the animals to say "Leave Us Alone".[256] The court concluded its decision by issuing a series of directions to prevent human-animal conflicts.[257] The court's finding that humans need to maintain restrictions on their behaviour, preventing invasions into the lives and territories of

[249] *People For Animals vs Md Mohazzim & Anr* 2015 (3) RCR (Criminal) 94 (15 May 2015, Delhi High Court) [5] [hereafter: *Mohazzim*].
[250] ibid [5] (Justice Manmohan Singh).
[251] ibid.
[252] *Animals and Birds Charitable Trust and Others vs Municipal Corporation of Greater Mumbai and Others* 2015 (4) Bom CR1 (8 June 2015, Bombay High Court) [37-40, 49].
[253] ibid.
[254] *Nitin Singhvi vs Union of India* (LAWS(CHH)-2017-4-97) (18 August 2017, Chhattisgarh High Court).
[255] ibid [11-12] (Chief Justice of India Thottathil B Radhakrishnan). see further.
[256] ibid (Chief Justice of India Thottathil B Radhakrishnan). see further.
[257] ibid [15].

animals, reflects a willingness to curtail human behaviour and thus arguably also interests and rights in favour of animal rights.

There is one last Indian case worthy of note here: *Maulekhi v Uttarakhand* (2018), where the High Court of Uttarakhand applied the decision in *Mohazzim* (2015) to emphasise that birds have a fundamental right not to be kept in small cages and thus banned the use of battery cages in Uttarakhand.[258] Moreover, the court requested the Union of India to consider framing India's anti-cruelty legislation and rules on the basis of Law Commission recommendations, within six months.[259]

In the *Wild Parrot case* (2019), the court found that there are "limitations to the fundamental rights of human beings based on the recognition of non-human interests".[260]

In *Smuts* (2022), the court found that, "The commercial farming activities of [the animal abuser in question] and the practices used by him to carry out these activities carry a very modest expectation of privacy from the perspective of what society would consider reasonable."[261] The judgement contains a significant restatement of animal rights as recognised in South African law. Importantly, South African courts had not previously taken the view that the protection of animals could legitimately constrain the human right to privacy.

All these cases have limited human activities, interests, or rights in favour of animals in one way or the other. If animals did not have rights, human interests would automatically prevail. So, even cases that do not refer to animal rights but do take animal interests as a limit to human rights can be understood as part of the emerging transjudicial animal rights discourse.

[258] *Mrs Gauri Maulekhi vs State Of Uttarakhand And Another* (2016) Writ Petition (PIL) No.198 of 2016 (14 August 2018, High Court of Uttarakhand at Nanital), [19, 21].
[259] ibid [21(J)].
[260] *Wild Parrot case*, [IV] (Minister Geraldo Og Nicéas Marques Fernandes).
[261] *Smuts*, [20] (Judge RS Mathopo).

5.4 Human Rights as Limiting Animal Rights

At the same time, we sometimes see judges making exceptions to animal rights, limiting the former in a substantial way in favour of human rights. Usually, such limits facilitate human uses of animals, often using the language of necessity.

In the Indian case of *Maulekhi v Uttarakhand; PFA v Uttarakhand* (2011), the High Court of Uttarakhand ruled on animal sacrifices, finding that they are to be permitted under anti-cruelty legislation only if, *inter alia*, they are undertaken to feed people and if no unnecessary pain or suffering are inflicted.[262] The court thought sacrifices to appease the gods were unnecessary but declined to prohibit them if they complied with animal welfare requirements.[263] This suggests that animal interests can only be subjugated to *certain* human interests and that the mere exercise of religion is not one of them. While it is unclear if the court was supporting animal rights proper (with rights here being subject to restrictions, e.g., borne out of necessity) or mere welfare rights, it is clear that subjugation of the interests of animals needs strong justification.

And as we have seen, *Sharma* (2013), *Nagaraja* (2014), *Bhatt* (2018), and *Singh* (2019) all carved out exceptions for human necessity from what are otherwise strong pro-animal-rights judgements.[264] While recognising animal rights, the courts still allowed leeway for derogations due to alleged 'necessity' of humans.

In the *Chucho case* (2017), the court was cautious to maintain that its views on animal rights should not adversely impact various forms of animal use and exploitation that serve human interests:

> This attribution of rights cannot be conceived as a novelty in our worldview, but as the proportional, horizontal and broad development and extension of the juridical principles that human persons enjoy to other sentient beings. This extension does not undermine the agroindustrial advancements that ensure the vital sustainability of humankind, nor the acquisition of essential medical progresses, the

[262] *Gauri Maulekhi vs. State of Uttarakhand and others; People for Animals, Dehra Dun v State of Uttarakhand and others* Writ Petition (PIL) No. 77 of 2010; Writ Petition (PIL) No. 73 of 2010 (19 December 2011, High Court of Uttarakhand at Nanital), [7*ff*].
[263] ibid [5, 9*ff*].
[264] *Bhatt*, [99]; *Singh*, [95]; *Sharma*, [55]; *Nagaraja*, [31, 42-43, 51, 61-62].

> pursuit of bio-technological achievements attained in ethical and responsible ways, nor the rational use of natural resources required to meet the alimentary needs of human beings. […]
>
> In an ethical and ontological sense, rights cannot be an exclusive endowment of human beings. However, the point of recognizing the legal status of nonhuman animals is not that of restricting human rights, nor promoting paltry, opportunistic, chauvinistic or uncompromising ends that could hinder scientific research benefiting human beings or that could impede the satisfaction of vital needs of men and women suffering from hunger and permanent needs. Also, the purpose of such a recognition is not defending an acrimonious and recalcitrant political partisan propaganda, nor promoting bare animal welfare movements or a senseless vegetarianism.[265]

So though on the face of it this Colombian case makes strong statements for animal personhood and rights that could alter the status of animals, all this is undermined by its allowing of exceptions to animal rights in the form of accepted uses of animals by humans that effectively cover most animal exploitation by humans.

In the *Estrellita case* (2022), the court elaborately discussed the consequences of the recognition of animal rights for some practices involving animals, such as eating meat, stating that, "particularly with regard to the relationship of human beings with other animals, insofar as human beings are predators, and being omnivorous by nature, their right to feed on other animals cannot be forbidden."[266] In other words, it held that animals can still be killed for human consumption, even if their rights are recognized. Without referring to necessity in this regard, the exception seems rather broad; one's appetite for meat products can hardly legitimize the violation of another's right to life under accepted legal principles governing fundamental rights.

Even though it is conceivable that fundamental animal rights could be overridden by necessity in some particular instances, the way in which this exception has been

[265] *Chucho case*, [2.4.5.3] (Judge Luis Armando Tolosa Villabona). This case was subsequently overruled in Expediente T-6.480.577 - Sentencia SU-016/20 (23 January 2020, La Corte Suprema de Justicia de Colombia).
[266] *Estrellita case*, [104] (Judge Teresa Nuques Martínez).

interpreted until now has the potential to cover nearly all major exploitation of animals permitted under existing legal regimes. This raises the question of how meaningful animal rights can be if their realization is compromised by humanist considerations. What is particularly problematic in this regard is that judges already give shape to such exceptions to animal rights the moment they acknowledge that animals have rights to begin with. Even if animal rights could be limited by human rights in specific cases, it renders rights-recognition merely notional to have such exceptions whittled in from the start. It remains to be seen whether derogations for necessity would still be possible once animal rights become fundamental, as some courts have acknowledged they currently are not (but need to be).

6 Towards International Animal Rights Protection[267]

In domestic courts, judges seem increasingly willing to enact new and (re-)interpret existing laws in ways that include consideration of animal rights. The animal rights cases that have come up throughout the world can be interpreted either as isolated instances of animal rights that can only have impact in their particular context, or as a trend that surpasses the boundaries of domestic law. In this article, we suggest that the judgements can be read as (6.1) contributing to a kind of transjudicial animal rights discourse. And that such discourse has the potential to provide an impetus for the eventual (6.2) protection of animal rights at the international level.

6.1 The Emergence of a Transjudicial Discourse

In a globalized world, judgements are no longer isolated instances that only have relevance in the domestic context. As Mary Ann Glendon notes, we see "brisk international traffic in ideas about rights" conducted by judges.[268] Increasingly, "courts are entering into forms of judicial dialogue" that may be regarded as transcending jurisdictions.[269] This is also the case for references to animal rights. As has become clear, courts are referring to each other in their judgements, noting cases that from jurisdictional bases across the world. This is most evident in the *Ka'avan case* (2019),

[267] Parts of this section have been published in the following blog: Ankita Shanker, "Animal Rights and Personhood: Past, Present, and Future" (January 2020, The UK Centre for Animal Law, The A-Law Blog), *available at* <https://news.alaw.org.uk/2021/01/15/animal-rights-and-personhood-past-present-and-future/>.
[268] Mary A Glendon, Rights Talk: The Impoverishment Of Political Discourse (Free press, 1993), 158.
[269] Anne-Marie Slaughter, "A Typology of Transjudicial Communication" (1994) 29 *University of Richmond Law Review* 99.

where the court made a comprehensive appraisal of pro-animal jurisprudence across the globe.[270] And in the *Wild Parrot case* (2019), the court built on recent jurisprudence from other South American jurisdictions, as well as continental European approaches to animal rights.[271] The common themes identified above may be recognized as contributing to the shaping of what we refer to as 'transjudicial animal rights discourse', which could function as the foundation for robust international animal rights protection. However, for this to happen, the caselaw in this regard must become more widespread, uniform, and consistent across and amongst jurisdictions. So far, this has not always been the case.

There are several reasons why the legal recognition of animal rights has made labored progress, even in jurisdictions where judgments recognizing rights have been rendered.

First, courts often merely discuss philosophy instead of elaborating a veritable animal rights jurisprudence. Moreover, many courts ground animal rights in human or environmental protection, ignoring any independent justification for animal rights. These factors combine to provide a weak grounding for animal rights.

Second, courts often conflate the protection of animal rights with welfare or anti-cruelty protection—e.g., animal rights are mentioned in *obiter*, with the *ratio* of the judgement only relating to animal welfare. On a related note, even courts that recognise animal rights, whether expressly or implicitly, accept that they are subject to exceptions on grounds such as human necessity—exceptions that cover the vast majority of human uses of animals. Thus, animal rights are often subjugated to human rights, and are easily overridden drawing on such exceptions. And even the cases that do uphold animal rights proper typically affect individual animals rather than animals generally, and/or do so on a case-by-case basis rather than laying down general legal principles that can transcend the particular case. Moreover, the material impact of pro-animal jurisprudence on animals is limited as a practical matter. The cases we have discussed here have not, therefore, proven to be an effective counterweight to the dependence of human societies on the exploitation of animals. So, although animal

[270] *Ka'avan case*.
[271] *Wild Parrot case*.

rights have been read into domestic law in some jurisdictions, the real impact for animals has been limited.

Third, even the limited recognition of animal rights we have in some jurisdictions is confined to only a handful of domestic courts, rather than the judiciary as a whole. Unless judgments go on appeal, they tend to go unnoticed even within the jurisdiction, let alone by stakeholders abroad, such as foreign judiciaries.

Fourth, there is only a limited amount the judiciary can do to recognize animal rights and make them effective absent a supportive legislative framework. And in civil law jurisdictions, this problem is even more pronounced, since judges have no discretion to enact new law, meaning animal rights need to be incorporated into or linked to the civil code status of animals. Moreover, courts have less perceived legitimacy than legislatures as the originators of rights, and that is important because it impacts how animal rights are enjoyed, how they are enforced, and how they interact with other rights regimes.[272] Judicial recognitions of animal rights are controversial, because they are not subject to the direct, periodic scrutiny of a democratic process and may not, therefore, elicit broad public support.[273] The risk from an animal rights perspective of having courts at the vanguard of rights recognition is that their decisions are very narrowly framed and legislatures can easily override them.[274] Rights are on a firmer footing if they are legislated,[275] but there is a risk here, too. The process of legislative scrutiny will inevitably raise questions about whether greater and more meaningful recognition of animal rights will diminish the uses people can make of animals and whether, therefore, from a human-use perspective animal rights can only be considered workable if the protections they afford are carefully circumscribed.[276] Or to put it differently, individual judges in individual cases may be willing to go much further in both the theoretical and practical recognition of animal rights than a

[272] private correspondence with Joshua Jowitt.
[273] ibid.
[274] ibid.
[275] ibid. see also Eva Bernet Kempers, "Transition Rather Than Revolution: The Gradual Road Towards Animal Legal Personhood through the Legislature" (2022) *Transnational Environmental Law, First View* 1 (Cambridge University Press).
[276] ibid.

democratically-elected legislature.[277] But gradual change might still be the most effective way forward. As Sam Groom has noted:

> [T]he more sudden and stark the judicial diversion from the status quo, the more likely that Parliament would step in and remove the judge-made rights by legislation. […] Incremental advances in legal animal rights may therefore be desirable for sustainable progress. […] It would be difficult for animal advocates to recover from the position of having a favourable judgment cancelled out by democratically-elected legislators.[278]

Lastly, with a few notable exceptions, courts typically refer only to domestic laws in their judgments. For their decisions to one day contribute to an international law on animal rights, courts would arguably need to refer to international standards as well, including through references to case law from other jurisdictions. However, in the current absence of widely accepted transnational standards, the likelihood of that happening is limited.

Overall, however, our view is that, notwithstanding the limitations we have just rehearsed, the transjudicial discourse on animal rights that has developed, is developing, and will continue to develop in domestic courts, is valuable because it illustrates the possibility that meaningful legal change for animals can originate from the bottom up in legal and political systems, rather than from the top down.

6.2 An Impetus for International Animal Rights Protection?

Even in its presently limited form, the emerging transjudicial discourse on animal rights demonstrates a growing consensus that animal protection is a matter of rights, and not just a matter of welfare or public interest. There could be further implications, as the discourse could serve as the basis for legally-binding animal rights laws to emerge at the international level. Such international protection of animals could eventually come about in three ways: through the (a) adoption of international declarations and/or conventions on animal rights, (b) entrenchment of certain animal

[277] see eg the judgements rendered by Indian Justice Rajiv Sharma.
[278] Sam Groom, "Explain the potential significance of granting legal personhood to animals in the UK" (2019) 3:1 *UKJAL* 12, 14. see further 13-14.

rights in customary international law, and (c) emergence of general principles of law that underlie the domestic animal laws of various nation states.[279] Under any of these, the legal rights of animals would then be recognized and enforceable on an international level, independent of judicial decisions in particular cases in individual domestic jurisdictions.[280]

(a) International Instruments

Non-binding and binding international instruments on animal rights can be enacted by a consensus of states, who come together to negotiate, draft, and adopt such instruments. The preceding discussion of case law demonstrates a willingness on the part of judiciaries in a good number of states to recognize and protect animal rights. If this trend gains sufficient traction, this sentiment is also likely to be represented among the representatives chosen to participate in treaty negotiations.

(b) Customary International Law

Customary international law requires *opinio juris* on a legal obligation to act in a certain way. Some courts arguably appear to hold such a belief already, when they adjudicate in favour of animals by drawing on jurisprudence from other jurisdictions as well as their own domestic laws.[281] In other cases, courts allude to international legal standards for animal rights, signifying their belief that such standards in fact exist.[282] If more cases are decided on the same basis, the existing body of case law would not only reflect a shared practice but also a *communis opinio* of the international community of states.[283] And this could then be the start of a process that would eventually crystallize into a binding customary legal obligation on states to recognize and protect animal rights. However, as it stands, state practice and the accompanying *opinio juris* is neither uniform nor universal, given that most of (with the notable exception of Indian caselaw) it is rooted in isolated judgements in a limited number of

[279] private correspondence with Anne Peters.
[280] see eg Caley Otter, Siobhan O'Sullivan, & Sandy Ross, "Laying the Foundations for an International Animal Protection Regime" (2012) 2 *Journal of Animal Ethics* 53; Oscar Horta, "Expanding Global Justice: The Case for the International Protection of Animals" (2013) 4:4 *Global Policy* 371. Anne Peters, "Toward International Animal Rights" *in* Anne Peters (ed), Studies in Global Animal Law (vol 290, Berlin, Heidelberg: Springer 2020).
[281] see eg *Ka'avan case; Wild Parrot case*.
[282] see eg *Puppy Mill case*; *Nagaraja*.
[283] Harmen van der Wilt, "State Practice as Element of Customary International Law: A White Knight in International Criminal Law?" (2019) 20 *International Criminal Law Review* 784.

jurisdictions. Yet, the weight given to such judgements is growing as modern theorists postulate that a customary international law of animal rights could develop based on the actions of courts alone.[284]

(c) General Principles of Law

General principles of law can be discerned from the domestic laws of states, by looking beyond these laws to the principles that ground them.[285] Such principles might be discerned from the interpretations of domestic laws by states, because as the adhesive that holds a body of law together, these principles assist in the interpretation of law, e.g., a general principle of animal equality would result in fundamental rights laws being interpreted in a manner that treats the rights of animals on par with those of humans. So rulings to such effect can plausibly be traced back to such principles, and as the rulings become denser and more widespread, general pro-animal principles would likely emerge.

There is a long way to go before we reach a point where we can convincingly make an argument for the existence of international animal rights law. It is, however, worth noting already that any such entrenchment of animal rights should take an inclusive, bottom-up approach rather than be a top-down imposition, tailored to address the interests and incorporate the perspectives of local communities.[286] It would thereby represent a truly global approach to animal rights that avoids the pitfalls of representing exploitation issues and ameliorative perspectives from the Global North alone, as is often criticized of international human rights law.[287]

7 Conclusion

Animal rights have been finding their way into decided cases in various regions of the world. Some courts have been willing to take the subject very seriously and have discussed at length the justification for rights, the conditions under which they can be protected, and the implications of such rights for the legal rights of humans. In this article, we examine a broad cross-section of these cases, and argue that taken all together they constitute an emerging transjudicial animal rights discourse. Even

[284] ibid.
[285] private correspondence with Anne Peters.
[286] ibid.
[287] Ankita Shanker & Shama BH Abbasi, "The Relegated Rights of Subjugated Persons", *forthcoming*.

though the discourse has diverse origins and takes different forms in different countries, it shares common elements, which we have identified. These common elements can, and we think should, serve as the starting point for international efforts to forge new law for animal rights protection. As legal systems around the world beyond those highlighted here take up the discourse and become increasingly open to the possibility that other-than-human beings can possess rights, the viability and likelihood that international animal rights protection will be successful steadily increases.