The Anthropomorphic Hegemony of Subjectivity: Critical Reflections on Law and the Question of the Animal

Villiers, J. de

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THE SOUTH AFRICAN LAW JOURNAL

VOL 136
(Part 2)
2019

NOTES

LAW AND THE QUESTION OF THE ANIMAL: A CRITICAL DISCUSSION OF *NATIONAL SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS v MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT*

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INTRODUCTION

The academic field of animal law has grown exponentially over recent years, largely in response to the relentless efforts of the animal liberation movement. Yet, despite a growing academic interest and increasing legislative reform, it is hard to find evidence of meaningful change in the lives and deaths of animals. Theoretical and practical efforts have predominantly focused on legal reform as the key that will unlock the cage of oppression. In turn, these efforts bear witness to the fact that the law fails adequately to incorporate the animal's fundamental interests. The object or property status of animals is widely regarded as foundational to the problem of animal subjugation, and a considerable amount of ink has been spilled on the scientific and moral (il)logic of this categorisation in the face of morally relevant and subjectlike-traits manifested by so many animals (see Gary Francione *Animals, Property and the Law* (1995); Gary Francione *Rain without Thunder: The Ideology of the Animal Rights Movement* (1996); Tom Regan *The Case for Animal Rights* (1983); Tom Regan *Defending Animal Rights* (2001)). The law has however resisted embracing and protecting the animal as a legal subject.

The recent decision by the Constitutional Court in *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development & another* 2017 (1) SACR 284 (CC) reflects a radical shift in the traditional legal approach to the animal, and could potentially facilitate much needed change in our treatment of animals. In assessing the applicant's right to privately prosecute cases of animal cruelty, the court considered the plight of the animal and in the process of doing so, made significant pronouncements that destabilise the substratum of the animal's legal status. This position is however not consistently maintained and the ruling ultimately reflects the court's struggle to metabolise logically its construction and destruction of

'the animal'. At issue, as I have previously illustrated, is anthropocentrism as a quasi-transcendental limit of legal discourse (see Jan-Harm de Villiers 'Metaphysical anthropocentrism, limitrophy, and responsibility: An explication of the subject of animal rights' (2018) 21 *PER/PELJ* 1). Being unable to erase or circumvent this inherent characteristic of the law, the ruling entangles discordant ideologies and embodies inconsistencies that render it puzzling and paradoxical.

In the first part of this note I position the National Society for the Prevention of Cruelty to Animals ('the NSPCA') historically and ideologically within the animal advocacy movement in order to contextualise the issues before the court and facilitate a discussion of the theoretical and ideological incongruences of the judgment. I then summarise the facts and litigation history in the second part, tracing how the trial developed from the high court to the Supreme Court of Appeal, and ultimately the Constitutional Court. Lastly, I critically analyse the Constitutional Court's judgment. I first comment on the court's approach to the dualistic private prosecution scheme set out in the Criminal Procedure Act 51 of 1977 ('the CPA'), arguing that the court erred in not addressing the constitutionality of s 7(1)*(a)* of the CPA. I then discuss the court's engagement with the question of the animal, which forms the focus of this note. I argue that whilst there is much to admire in the court's ruling, and that it has the potential radically to transform the legal status of the animal, it confuses and vacillates between two incompatible perspectives and is ultimately unable to navigate successfully the challenges that the question of the animal poses.

BACKGROUND

The Society for the Prevention of Cruelty to Animals ('the SPCA') looms large in the history of a unified effort at addressing the plight of animals — a movement which originated in the eighteenth century. Prior to that time, animal protectionism was sporadic and we mainly find isolated examples of lone acts of kindness towards animals, like the 1567 decree of Pope Pius V that condemned bullfighting. Organised attempts to protect animals were however largely absent (Helena Silverstein *Unleashing Rights: Law, Meaning and the Animal Rights Movement* (1996) 29). The structured animal advocacy movement came to force in the 1800s and divided into two camps soon after its formation, one calling for an improvement of the conditions in which animals live and die, and the other advocating the total abolition of human (ab)use of animals. These two branches are respectively known as the animal welfare or humane movement, and the animal rights movement (which originated as the anti-vivisection movement).

Following a sixty-year period of anti-animal-cruelty literature, the 1800s saw the formation of a united attempt aimed at addressing the plight of animals in England. These works condemned blood sports like cock throwing and cockfighting, and advanced the notion that humans have a moral duty of care and compassion towards animals (ibid at 30). Even though

these works were written from the fringes and widely regarded as 'eccentric', they slowly penetrated the general public and laid important groundwork for change: 'the writers were, so to speak, the artillery bombarding a position from a reasonably safe distance; the brunt of the fighting had to be done by the Members of Parliament' (Charles D Niven *History of the Humane Movement* (1967) 55).

The fight for humane legislation commenced in 1800 when a Bill aimed at the suppression of bullbaiting was introduced into Parliament by Sir W Pulteney. Although the majority of Parliament opposed the Bill, it nevertheless stimulated considerable public debate on the issue of animal welfare (ibid at 58). In 1809 a more comprehensive Bill aimed at preventing 'wanton and malicious cruelty to animals' passed in the House of Lords before it was rejected in the House of Commons (Gerald Carson *Men, Beasts, and Gods: A History of Cruelty and Kindness to Animals* (1972) 49). England's first animal protection legislation criminalising cruelty to animals would only see the light of day several years later in 1822 when Richard Martin saw through the adoption of the Martin's Act, which specifically forbade cruelty to cattle (Roderick Nash *The Rights of Nature: A History of Environmental Ethics* (1989) 25). While Martin initially aimed for a broader scope, the final act only protected larger domesticated animals and excluded owner-inflicted cruelty to animals (ibid). This period also saw a rise in structured efforts outside of the legislature and in 1824 Martin, together with other English humanitarians, organised the SPCA with the main objective of utilising the newly enacted legislation to improve the welfare of animals (Carson op cit at 53). The SPCA is widely considered to be the first animal protection organisation and recognised as the founding father of the animal welfare movement (Silverstein op cit at 31). Despite struggling early on, the SPCA started gathering momentum in 1840 when Queen Victoria directed that the society become the Royal SPCA. This facilitated the formation of new branches and similar organisations across Europe (Carson op cit at 54).

The 1860s saw the birth of a new branch of animal advocacy that extended its scope of concern beyond the welfare movement's now narrow focus on domesticated animals. The anti-vivisection movement, led by Frances Power Cobbe, focused on protecting animals used in scientific experimentation (Silverstein op cit at 31). Soon after its formation, the anti-vivisection movement split into two camps, one demanding the complete eradication of scientific experimentation on animals, and the other striving to minimise the suffering inflicted on animals used in experiments. This dissonance also effected a more significant split in the larger animal advocacy movement, solidifying a division between the anti-vivisectionists and the animal welfare camp. Notwithstanding these schisms, the anti-vivisectionists achieved significant success, passing a bill aimed at protecting laboratory animals in 1876 and forming several new anti-vivisection groups across Europe (ibid).

Animal welfare advocacy quickly spread to the United States where Henry Bergh, inspired by events in England, introduced the philosophy of animal welfare during the 1860s. Bergh's labours culminated in the first anticruelty statute being adopted by the New York state legislature in 1866, stipulating:

> 'Every person who shall, by his act or neglect, maliciously kill, maim, wound, injure, torture or cruelly beat any horse, mule, cow, cattle, sheep or other animal belonging to himself or another, shall upon conviction be adjudged guilty of a misdemeanor.' (Cited in Niven op cit at 108.)

Bergh also founded the American Society for the Prevention of Cruelty to Animals, which was the first humane society in the Western hemisphere (ibid). Shortly thereafter in 1872, the Cape of Good Hope SPCA was established as the first animal welfare organisation and founder of the SPCA movement in South Africa. Today we find close to one hundred autonomous SPCAs across South Africa, governed by the Societies for the Prevention of Cruelty to Animals Act 169 of 1993 ('the SPCA Act').

The SPCA Act requires that all members register with the NSPCA, a juristic person established in terms of s 2(1) of the Act. Section 3 of the Act sets out the objects of the NSPCA, which include the prevention of ill-treatment of animals (s 3*(c)*), taking cognisance of laws affecting animals and making representations to appropriate authorities against this background (s 3*(e)*), and doing anything reasonably necessary for the achievement of its objects (s 3*(f)*). Section 6 of this Act bestows powers on the NSPCA in order to achieve its objectives, including the appointment of skilled persons as inspectors and employees (s 6(2)*(c)*), the confiscation of an animal reasonably believed to be ill-treated (s 6(2)*(d)*(vi)) and the power to defend and institute legal proceedings in connection with its functions (s 6(2)*(e)*). These functions and correlative powers are far-reaching, especially when interpreted against the larger animal welfare legislative framework.

The SPCA Act should be read and interpreted alongside the Animals Protection Act 71 of 1962 ('the AP Act'), the latter being the primary piece of animal protection legislation aimed at consolidating and amending laws relating to the prevention of cruelty to animals. Section 6(1) of the SPCA Act specifically classifies the NSPCA as a society for the prevention of cruelty to animals for the purposes of s 8 of the AP Act. The AP Act sets out a broad list of animal cruelty offences (s 2(1)*(a)–(r)*) and once again endows any society for the prevention of cruelty to animals with a broad range of powers (s 8(1)*(a)–(d)*).

Despite these wide-ranging functions, or perhaps precisely because of the lack of delineation, the NSPCA has historically struggled to implement the AP Act, and their efforts to facilitate the prosecution of animal cruelty have been frustrated by the National Prosecuting Authority ('the NPA'). Uncertainty about the NSPCA's nature, mandate and powers contributed to its impotence. Certain state agencies have labored (or rather lazed) under the assumption that the NSPCA is authorised to enforce the AP Act on the government's behalf, whilst other have interpreted the SPCA Act as merely regulating the NSPCA as a juristic person under private control rather than creating a licensed statutory body as such (Michelè Pickover *Animal Rights in South Africa* (2005) 71; see also *Hansard*, 25 November 1993 at 14066).

This state of affairs becomes more disconcerting if one considers the high number of animal cruelty incidences and the absence of a government

agency with the intention or capacity to implement the AP Act effectively. The matter of animal welfare supposedly rests with the Department of Agriculture, Forestry and Fisheries ('the DAFF'), yet there is no branch assuming responsibility for this issue (Pickover op cit at 71). The DAFF however finds itself in a precarious position, being simultaneously tasked with the exploitation of animals and the implementation of animal protection legislation. It has for a long time been voicing unease about 'being both player and a referee', and has expressed the intention to pass the legislation back to the Department of Justice, which was previously tasked with the administration of animal welfare legislation (ibid at 8). The question of capacity forms another central issue. The Minister of Agriculture already expressed concern about the state of animal welfare when the SPCA Act was enacted in 1993, stating (*Hansard*, 25 November 1993 at 14065):

> 'The responsibilities of animal welfare organizations are becoming greater as urbanisation in South Africa accelerates, and animals in many disadvantaged communities are in dire need of basic animal care. The State is and will probably remain unable to provide these services. This poses an enormous challenge to the SPCAs to extend their services to these disadvantaged communities ... .'

Notwithstanding this set of circumstances, the NSPCA has been faced with state opposition in attempts to fulfil its statutory mandate. Unsatisfied with the NPA's unwillingness to prosecute what the NSPCA alleges to be clear crimes of animal cruelty, the NSPCA has repeatedly attempted to institute private prosecutions in terms of the CPA. The CPA distinguishes two categories of private prosecution. Section 7 of the CPA permits private prosecution on the basis of a certificate nolle prosequi, providing as follows:

> '(1) In any case in which a director of public prosecutions declines to prosecute for an alleged offence —
>
> *(a)* any private person who proves some substantial and peculiar interest in the issue of the trial arising out of some injury which he individually suffered in consequence of the commission of the said offence; ...
>
> may ... either in person or by a legal representative, institute and conduct a prosecution in respect of such offence in any court competent to try that offence.
>
> (2)
>
> *(a)* No private prosecutor under this section shall obtain the process of any court for summoning any person to answer any charge unless such private prosecutor produces to the officer authorised by law to issue such process a certificate signed by the [director of public prosecutions] that he has seen the statements or affidavits on which the charge is based and that he declines to prosecute at the instance of the State.
>
> *(b)* The [director of public prosecutions] shall, in any case in which he declines to prosecute, at the request of the person intending to prosecute, grant the certificate referred to in paragraph *(a)*.
>
> *(c)* A certificate issued under this subsection shall lapse unless proceedings in respect of the offence in question are instituted by the issue of

the process referred to in paragraph *(a)* within three months of the date of the certificate.

(d) The provisions of paragraph *(c)* shall apply also with reference to a certificate granted before the commencement of this Act under the provisions of any law repealed by this Act, and the date of such certificate shall, for the purposes of this paragraph, be deemed to be the date of commencement of this Act.'

Section 8 of the CPA regulates private prosecution under statutory right, stating:

'(1) Any body upon which or person upon whom the right to prosecute in respect of any offence is expressly conferred by law, may institute and conduct a prosecution in respect of such offence in any court competent to try that offence.

(2) A body which or a person who intends exercising a right of prosecution under subsection (1), shall exercise such right only after consultation with the [director of public prosecutions] concerned and after the [director of public prosecutions] has withdrawn his right of prosecution in respect of any specified offence or any specified class or category of offences with reference to which such body or person may by law exercise such right of prosecution.

(3) A [director of public prosecutions] may, under subsection (2), withdraw his right of prosecution on such conditions as he may deem fit, including a condition that the appointment by such body or person of a prosecutor to conduct the prosecution in question shall be subject to the approval of the [director of public prosecutions], and that the [director of public prosecutions] may at any time exercise with reference to any such prosecution any power which he might have exercised if he had not withdrawn his right of prosecution.'

After becoming aware of the sacrificial slaughtering of two camels by a religious group in November 2010, NSPCA inspectors attended the site and observed what they considered to be cruel and inhumane treatment that clearly contravened the AP Act. During the sacrifice, the two camels had to endure eight and three attempts respectively at slicing open their throats so that they could bleed out. After witnessing this, an inspector stepped in and shot both camels in order to relieve them of their suffering (*National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development* (CC) para 4). Following this incident, the NSPCA referred the matter to the NPA for prosecution and furnished the prosecutors with supporting evidence. After the NPA declined to prosecute the case, the NSPCA applied for a certificate nolle prosequi in terms of s 7(1)*(a)* of the CPA in order to institute a private prosecution. As in previous instances, the NPA refused to issue the certificate, arguing that only a 'private person' can institute a private prosecution in terms of s 7 of the CPA.

LITIGATION HISTORY

The high court's decision

The NSPCA brought a constitutional challenge to this interpretation of s 7(1)*(a)* of the CPA in *National Society for the Prevention of Cruelty to Animals v*

Minister of Justice and Constitutional Development [2014] ZAGPPHC 763. The NSPCA reasoned that there is no rational basis for the dissimilar treatment of juristic persons and natural persons, arguing that juristic persons are consequently deprived of equal protection and benefit of the law. Relying on s 9(1) and s 38*(a)* and *(d)* of the Constitution of the Republic of South Africa, 1996, the NSPCA argued that the differentiation does not serve a legitimate governmental purpose and is therefore irrational and unconstitutional (para 4).

The court confirmed the position as set out in *Barclays Zimbabwe Nominees (Pvt) Ltd v Black* 1990 (4) SA 720 (A) at 726H and held that ss 7 and 8 of the CPA empower only natural persons and public bodies with the right of private prosecution, whilst companies and other legal persons are excluded from this right (para 15). In terms of s 8(4) of the Constitution, the court considered the nature of the right in question and the nature of the particular juristic person in order to determine whether the juristic person was entitled to the right. The right provided by s 7 of the CPA constitutes an exception to s 179(1) of the Constitution, which provides for a single NPA established in terms of an Act of Parliament. The purpose of s 7 of the CPA is to allow those who have some substantial or peculiar interest in the offence at hand to vindicate their private interests, and simultaneously to prevent natural and juristic persons without such interests from doing so (paras 14–16). Taking into account the objects, functions and powers of the applicant, the court confirmed its nature as a juristic person to be that of a public body performing a public function, rather than a private company (para 21).

After accepting that s 7(1)*(a)* of the CPA contains a differentiation which amounts to discrimination, the court proceeded to determine whether such discrimination is unfair or not, emphasising at the outset that not all rights in the Bill of Rights are for the benefit of juristic persons. Considering the factors identified in *Harksen v Lane NO & others* 1998 (1) SA 300 (CC), the court concluded (in para 28) that 'the differentiation as well as the discrimination is not unfair, but is designed to serve a legitimate governmental purpose. It also appears that there is a rational relationship between this purpose and the differentiation.' The court hence upheld the constitutionality of the provision.

The court also observed in passing that the purpose of s 8 of the CPA is to allow public bodies that have been conferred the right of private prosecution through statute 'to institute a private prosecution in instances where offences have been committed which concern the public interest as determined by legislation' (para 29). Whilst the NSPCA is indeed a public body, the court lamented that s 6(2)*(e)* of the SPCA Act does not confer such right of private prosecution on the NSPCA, commenting that 'if such a right were to be conferred upon the applicant, it would enable the applicant to more effectively execute its functions' (ibid).

The Supreme Court of Appeal's decision

The NSPCA appealed the high court decision and continued its constitutional challenge to s 7(1)*(a)* of the CPA. In *National Society for the Prevention of*

Cruelty to Animals v Minister of Justice and Constitutional Development 2016 (1) SACR 308 (SCA) the appellant contended that s 7(1)*(a)* of the CPA is non-compliant with ss 1*(c)* and 9(1) of the Constitution, and asserted that both natural and juristic persons ought to be capable of enforcing the right to institute a private prosecution (para 13). The relief claimed by the appellant was to have the word 'private' excised from s 7(1)*(a)* of the CPA (para 6).

The court first commented on the materiality of s 8 of the CPA, noting that the NSPCA was previously expressly authorised to institute private prosecution by s 12 of the Prevention of Cruelty to Animals Act 8 of 1914, which was repealed by the AP Act. Reading s 8 of the CPA together with the SPCA Act, the court emphasised that the NSPCA is not authorised to institute private prosecution under statutory right (paras 10–12).

The court then applied the test articulated in *Prinsloo v Van der Linde & another* 1997 (3) SA 1012 (CC) para 25 to determine whether the differentiation inherent in s 7(1)*(a)* of the CPA is rational in serving a governmental purpose and thus in line with the rule of law and the principle of equality before the law, as entrenched respectively in ss 1*(c)* and 9(1) of the Constitution (paras 14–16). Since the appellant conceded that the regulation of private prosecution constitutes a legitimate governmental purpose, the court focused on establishing whether a rational connection can be established between this purpose and the provisions of s 7(1)*(a)* of the CPA. The court articulated the legal position as follows in para 19:

> 'The rationality threshold is low. The connection must not be arbitrary but must be based on a reason that does not have to be the most efficient or the only reason. Put differently, the question is whether there is an acceptable reason for the limitation of private prosecutions contained in s 7(1)*(a)*. This question must be answered within the context of the whole s 7 and s 8 of the CPA, s 179 of the Constitution and the provisions of the [National Prosecuting Authority Act 32 of 1998].'

The court concluded that a decision by the NPA to decline prosecution, which constitutes a prerequisite for a private prosecution, must be grounded in sound reasons and that the policy of limiting private prosecutions to exceptional cases thus 'c[ould] not be faulted' (para 25). The court strongly reiterated that 'private prosecutions in terms of s 7 of the CPA are only permitted on grounds of direct infringement of human dignity' and that this forms the rationale behind s 7(1)*(a)* of the CPA and the exclusion of juristic persons from instituting private prosecutions (para 28). As the exclusion of private prosecutions not stemming from the infringement of human dignity was, in the court's view, 'rationally related to the legitimate government purpose of limitation of private prosecutions', the court upheld the constitutionality of s 7(1)*(a)* of the CPA (para 28).

The Constitutional Court's decision

In *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development & another* 2017 (1) SACR 284 (CC) the NSPCA appealed the decision of the Supreme Court of Appeal and, in addition to the

constitutional challenge to s 7(1)*(a)* of the CPA, advanced an alternative argument based on s 6(2)*(e)* of the SPCA Act read with s 8 of the CPA. Section 6(2)*(e)* of the SPCA Act provides:

> '(2) In order to perform its functions and to achieve the objects of the Council the board may — ...
>
> *(e)* defend legal proceedings instituted against the Councils and institute legal proceedings connected with its functions, including such proceedings in an appropriate court of law or prohibit the commission by any person of a particular kind of cruelty to animals, and assist a society in connection with such proceedings against or by it.'

The applicant argued that s 8 of the CPA empowers statutory bodies to conduct private prosecutions under a statutory right, and since the NSPCA is indeed a 'statutory body performing a statutory public interest function', the power to 'institute legal proceedings' as set out in s 6(2)*(e)* of the SPCA Act encompasses the authority to institute criminal proceedings (para 21). The court emphasised that its approach of interpreting legislation within constitutional bounds 'requires that a statute be read holistically as constitutionally compliant where possible', and identified the issue before the court as necessitating that the NSPCA be correctly situated within the private prosecution framework provided by the CPA (para 26). The court approached this inquiry by first looking for the NSPCA's potential prosecutorial powers in s 8 of the CPA, emphasising that its nature as a statutorily created public body made this the appropriate point of departure (paras 26–7).

Section 8 of the CPA requires that the right to institute private prosecution be 'expressly conferred by law'. The court held that use of the term 'expressly' in legislation does not necessarily require explicit articulation through the use of specific words and that 'it may indicate that the meaning of a provision must be clear and inconvertible, being conveyed with "reasonable clearness" or "as a necessary consequence" ' (para 33). The court followed a purposive and contextual interpretive approach to s 6(2)*(e)* of the SPCA Act by holistically considering 'the specific statutory language; its textual, historical, and social context; and the constitutional values which underpin it' (para 34). The court found the NSPCA's statutorily conferred power to 'institute legal proceedings connected with its functions' under s 6(2)*(e)* of the SPCA Act to be 'broad and permissive', neither distinguishing between civil and criminal proceedings, nor excluding either (para 36). In order to determine the types of legal proceedings that the NSPCA is empowered to institute, its functions as determined by the SPCA Act and surrounding statutory scheme needed to be considered (para 37).

The AP Act establishes the animal welfare framework within which the NSPCA operates and explicitly empowers societies for the prevention of cruelty to animals (of which the NSPCA forms the primary example) to effect the culture of animal welfare envisaged by the AP Act (paras 38–9). The larger part of the provisions in the AP Act relates to animal cruelty offences, which logically suggests that the legal proceedings emanating from this piece

of legislation will mainly be criminal cases. As the NSPCA is specifically tasked with promoting the objectives of the AP Act, the power to 'institute legal proceedings connected with its functions' has to be interpreted to include the prosecution of offences (para 46). The court took into consideration that the right of private prosecution was previously explicitly conferred on the NSPCA by the 1914 SPCA Act, and that the AP Act, which repealed that earlier Act, is intentionally silent on the question of private prosecution. At the time of the AP Act's enactment in 1962, the Minister of Justice opposed the provision bestowing the right to privately prosecute without the safety valve of supervision by the prosecutorial authority. As the current CPA provides for such oversight in s 8(2) and 8(3), the basis for excluding the power of private prosecution in 1962 is no longer applicable (paras 49–50). This interpretation best harmonises the NSPCA's powers and objectives within the legislative framework and its historical development, and gives effect to the primary objective of the NSPCA: to prevent animal cruelty (para 53).

The court considered the significance of the NSPCA's critical role in the history of animal protection and the value of animal welfare in our current constitutional dispensation, explicitly connecting animal welfare with 'the right to have the environment protected' under s 24 of the Constitution (para 58). Tracing a lineage of animal cruelty cases that started in 1929, the court emphasised the progressively robust protection of animal welfare by South African courts (paras 54-9). Whilst solidifying the animal's legal status as property, the court in *R v Smit* 1929 TPD 397 held that an animal had to be killed in a 'humane' way which caused minimal suffering. The purpose of animal welfare legislation was considered in *R v Moato* 1947 (1) SA 490 (O) and held to protect the finer sensibilities and emotional wellbeing of humans rather than animal interests per se, an approach which was upheld in *S v Edmunds* 1968 (2) PH H398 (N). The minority judgment in *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* 2008 (5) SA 339 (SCA) para 38 departed from this view, arguing that animal protection legislation 'recognises that animals are sentient beings that are capable of suffering and of experiencing pain. And they recognise that, regrettably, humans are capable of inflicting suffering on animals and causing them pain.' (For a wider discussion of the implications of this judgment, see Arthur van Coller 'The minority defending the interests of the vulnerable [An evaluation of the minority judgment in *NCSPCA v Openshaw* 2008 5 SA 339 (SCA)]' (2011) 22 *Stellenbosch LR* 306.) This sentiment was upheld in *South African Predator Breeders Association v Minister of Environmental Affairs and Tourism* [2009] ZAFSHC 68 and *South African Predator Breeders Association v Minister of Environmental Affairs and Tourism* [2011] 2 All SA 529 (SCA), whilst the court in *S v Lemthonghtai* 2015 (1) SACR 353 (SCA) para 20 emphasised the duty 'to protect and conserve our biodiversity', and held that 'constitutional values dictate a more caring attitude towards fellow humans, animals and the environment in general'.

The court argued that the historical trajectory of animal welfare protection and the unique and critical role of the NSPCA in our polity demand a

contextual and purposive reading of the SPCA Act, which 'must be taken to include the right to prosecute' (para 61). The court subsequently set aside the orders of the high court and Supreme Court of Appeal, and declared that s 6(2)*(e)* of the SPCA Act read with s 8 of the CPA conferred the statutory right of private prosecution upon the NSPCA (para 65). Regarding the constitutionality of s 7(1)*(a)* of the CPA, the court followed the approach in *Director of Public Prosecutions, Transvaal v Minister of Constitutional Development & others* 2009 (4) SA 222 (CC) para 222, which determined that the core responsibility of a court is the adjudication of 'live disputes' and that it is 'possibly an intrusion into the role of the legislature for a court to pronounce judgments on constitutional issues in the absence of a dispute affecting the rights of the parties to the litigation'. The court argued that the constitutionality of s 7(1)*(a)* of the CPA was no longer a 'live dispute that implicates the NSPCA's rights', as the power to privately prosecute had already been conferred in the judgment (para 63). Consequently, the constitutionality of s 7(1)*(a)* of the CPA was not considered.

ANALYSIS

The dualistic private prosecution scheme in the CPA

As the decision in the Constitutional Court does unfortunately not give clarity on the constitutionality of s 7(1)*(a)* of the CPA, we will likely see further litigation aimed at empowering juristic persons to institute private prosecution. It has already been argued, in response to the high court ruling in 2014, that there is a need for legal reform in this regard and it has been recommended that the law be amended expressly to confer the right of private prosecution on companies, as is the case in countries such as the United Kingdom, Australia, Zimbabwe and Kenya (see Jamil Ddamulira Mujuzi 'Private prosecutions and discrimination against juristic persons in South Africa: A comment on *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development & Another*' (2015) 15 *AHRLJ* 580).

The court's approach of considering private prosecution under s 8 of the CPA as a neutral alternative to private prosecution under s 7 of the CPA however warrants closer inspection. Some scholars have argued that prosecution under statutory right in s 8 of the CPA, whilst identified as a 'private prosecution' in the CPA, is not a true private prosecution (J J Joubert (ed) *Criminal Procedure Handbook* 12 ed (2017) 86). A body or person intending to institute private prosecution under s 8(1) first has to consult with the director of public prosecutions concerned who, secondly, has to withdraw 'his right of prosecution in respect of any specified offence or any specified class or category of offences with reference to which such body or person may by law exercise such right of prosecution' (s 8(2) of the CPA). The director of public prosecutions may furthermore, under s 8(2), 'withdraw his right of prosecution on such conditions as he may deem fit, including a condition that the appointment by such body or person of a prosecutor to conduct the prosecution in question shall be subject to the approval of the director of

public prosecutions, and that the director of public prosecutions may at any time exercise with reference to any such prosecution any power which he might have exercised if he had not withdrawn his right of prosecution' (s 8(3) of the CPA). It is thus clear that private prosecution under s 8 of the CPA remains completely under the control of the director of public prosecutions, and that the NSPCA's prosecutorial powers could potentially be substantially curtailed under this section.

Reflecting on the reason why the NSPCA was denied the power of private prosecution when the SPCA Act was enacted in 1962, the court, somewhat ironically, explicitly found that the CPA of 1955 did not provide for a dualistic prosecution scheme under both a statutory right and a certificate nolle prosequi (paras 49–51). The 'safeguard of [director of public prosecutions] supervision' about which the Minister of Justice was concerned at the time, has been incorporated into s 8 of the current CPA, and by granting the NSPCA the power of private prosecution under this section the historical concern was rendered immaterial. The court however failed to appreciate the effect of such 'oversight by the prosecutorial authority' on the NSPCA and why prosecution under s 7 might be preferable to s 8. Put simply, the difference between ss 7 and 8 of the CPA does not merely concern the body upon which the right of private prosecution is conferred. The NSPCA is disenfranchised under s 8, and the court's failure to take this into account and regard the constitutional challenge to s 7(1)*(a)* as a 'live dispute' constitutes an oversight, in my opinion.

The question of the animal

The court's concern with the animal as a subject of legal knowledge and its willingness to address the question of the animal in relation to law is remarkably progressive and, considered from this perspective, renders this decision a landmark ruling in the South African jurisprudence. The question of the animal is notably absent from the high court and Supreme Court of Appeal's rulings, whilst the Constitutional Court's decision clearly situates and responds to the animal in relation to the animal's marginal legal status. (For a differentiation between human-centric and animal-centric approaches to animal protection, see Bonita Meyersfeld 'Non-human animals and the law: The fable of power' (2012) 27 *SA Public Law* 54.) In the process of doing so, the court also inevitably exposes law's (in)ability to metabolise logically its construction of animal life and the problematic surrounding the representation of animals in a (legal) system that is fundamentally anthropocentric.

After tracing the development of case law on animal cruelty, the court summarised the progression as follows (para 57):

> 'Therefore, the rationale behind protecting animal welfare has shifted from merely safeguarding the moral status of humans to placing intrinsic value on animals as individuals.'

This is a momentous pronouncement and I believe its implications should be carefully considered so that we can meaningfully reflect on law's relation to animal subjugation, both as architect of what might be called an

anthropocentric culture, and as possible facilitator of animal liberation (see Karin van Marle 'Law's time, particularity and slowness' (2003) 19 *SAJHR* 239 on the value of slowness and critical reflection in contemplating the different dimensions that configure a particular situation and engaging law accordingly). In sketching the background to this case, I illustrated that the SPCA has always advocated a welfarist approach and has focused on legislative reform aimed at ensuring that the animals we utilise are treated humanely. The theoretical underpinnings of this approach can be found in utilitarian philosophy, which has embraced the animal on account of sentience; that is, the animal's aptitude for experiencing pain and pleasure, and concomitant preference in avoiding the former and pursuing the latter. Animal welfarists thus acknowledge that the animal's interest in avoiding suffering merits protection, but it is essentially a qualified interest in not suffering 'unnecessarily'. No particular practice causing suffering or even death can be ruled out in advance within the utilitarian framework. Rather than eradicating suffering, the utilitarian welfare approach seeks to balance the (animal) suffering against the (human) pleasure derived from the utilisation (of the animal). It ultimately centers on a utilitarian balancing: 'the right choices will be those that produce the largest aggregate balance of pleasure over pain or ... the largest net balance of satisfaction over dissatisfaction' (Martha Nussbaum 'The capabilities approach and animal entitlements' in Tom Beauchamp & R G Frey (eds) *The Oxford Handbook of Animal Ethics* (2011) 236). If we examine the current AP Act, we see that the word 'unnecessarily' or 'unnecessary' appears at least eight times in s 2 alone. Section 2(1)*(b)* only prohibits a person from 'confin[ing], chain[ing], tether-[ing] or secur[ing] any animal unnecessarily or under such conditions or in such a manner or position as to cause that animal unnecessary suffering'. Similarly, s 2(1)*(c)* only forbids 'unnecessarily starv[ing] or under-feed[ing] or deny[ing] water or food to any animal'. This conversely means that it may be necessary and permissible to starve the animal under certain circumstances. As 'unnecessary' is not defined in the Act, standard practices constitute the norm and 'necessity', and only acts of gratuitous violence are ultimately recognised as contravening the Act.

The court supported a utilitarian philosophy in parts of the judgment, inter alia when it emphasised that 'the prevention of *unnecessary* cruelty to animals — including those *which we may use for service or food* — is a goal of our society' (para 45, emphasis supplied). Here the court reinforces the object or utility status of animals, and it needs to be noted that the necessity of human use of animals as such is never questioned. As is characteristic of the welfarist model, 'only questions about the necessity of particular acts in relation to the presumed entitlement of humans to use animals' are addressed (Taimie Bryant 'Sacrificing the sacrifice of animals: Legal personhood for animals, the status of animals as property, and the presumed primacy of humans' (2008) 39 *Rutgers LJ* 249). Notably, the utilitarian aggregation of consequences does not recognise every individual life as an end in itself, but allows for lives to be utilised as means for the ends of others (Nussbaum op cit at 237).

This approach can be starkly juxtaposed with the animal rights approach, which demands that we view animals as inviolable subjects with intrinsic worth and categorically abolish all human use of animals. Animal rightists reject utilitarian balancing and argue that the rightness of an action towards the animal is reliant upon recognition of, and respect for, the animal's moral rights. This approach is grounded in natural law and natural rights theory, and views animals as inviolable subjects with inherent worth separate from their usefulness to humans. Animal rightists reject any utilisation of the animal and argue that a craving for meat consumption, leather products and hunting cannot justify violation of the animal's bodily integrity. Whilst the interest in not suffering undoubtedly warrants protection, animal rights theorists argue there are other (and indeed more fundamental) interests at stake that need to be recognised and protected as well. The interest in not suffering is indeed secondary to the interest in not being treated instrumentally in a system of institutionalised exploitation when the suffering emanates from that very utilisation.

By regarding animals as possessing moral rights, these theorists bestow a distinctive moral status on animals. This moral status fundamentally counters a view of animals as utility objects or the property of humans, a view that welfarists readily accept. By recognising the animal as an 'individual' with 'intrinsic value', the court thus also suggests, albeit paradoxically, that the foundation for animal protection has shifted from an external utilitarian calculus towards an understanding of animals as individuals whose experiential lives fare well or ill for them independent of their usefulness to others. The notion of animals as 'subjects-of-a-life' developed by pioneering animal-rights philosopher Tom Regan resonates here, and the most obvious transference concerns a destabilisation of the (human) subject/(animal) object dichotomy entrenched in our law (see Regan *The Case for Animal Rights* op cit at 243). Regan's egalitarian ethics advances a shared subjectivity as the ethically relevant property possessed by both human beings and animals that establishes animals as individual co-subjects with rights that cannot be overridden or violated in the pursuit of maximum utility. This subjectivity (or being subject-of-a-life) is a more intricate property than the simple sentience grounding utilitarian claims, highlighting different dimensions of animal life and foregrounding the advanced abilities and complex existence of animals that extend beyond the preference for avoiding pain. As Regan *Defending Animal Rights* op cit at 42–3 states:

> 'Like us, [animals] possess a variety of sensory, cognitive, conative, and volitional capacities. They see and hear, believe and desire, remember and anticipate, and plan and intend. Moreover, as is true in our case, what happens to them matters to them. Physical pleasure and pain–these they share with us. But they also share fear and contentment, anger and loneliness, frustration and satisfaction, and cunning and imprudence; these and a host of other psychological states and dispositions collectively help define the mental lives and relative well-being of those humans and animals who (in my terminology) are "subjects of a life".'

Similarly, other theorists have also critiqued welfare theory against 'the complex cognitive and social lives of animals', arguing that many valuable experiences like self-recognition and mourning are not forms of pain or pleasure as understood within the utilitarian framework and that utilitarianism consequently 'gives us a weak, dangerously incomplete way of assessing our ethical choices' (Nussbaum op cit at 236). Animal rights theorists like Regan thus aim to remove animals from the category of objects or receptacles, and to award them non-instrumental, inherent value as subjects (see Regan *The Case for Animal Rights* op cit at 232–65). This status as subject is accompanied by protection that reaches well beyond the interest in not suffering (unnecessarily). The dissonance between these two perspectives can forcefully be illustrated through an engagement with the set of facts that ultimately gave rise to the NSPCA's application. Under a utilitarian welfare perspective, the religious slaughtering of the two camels cannot be prohibited as an a priori rule or principle. At issue, rather, is the question of maximum aggregative utility with regard to the practice of religious slaughtering. In contradistinction to the utilitarian welfare approach, the animal rights framework regards the two camels as individual subjects with certain rights that can in principle not be violated in pursuit of the greatest good for the greatest number. The camels are granted these rights precisely because they are considered beings with intrinsic value, rather than mere resources that should be figured in our calculative deliberations. The practical implications of the rights view are abolitionist rather than reformist. If (as the court proclaimed) 'the rationale behind protecting animal welfare has shifted ... to placing intrinsic value on animals as individuals', the pertinent question is by what right can we continue to engage with animals as objects to be used as we see fit? The two ideologies that respectively regard animals as utility objects and individuals with intrinsic worth are fundamentally at odds, rendering the court's judgment internally fissured and philosophically unsound.

The court's vacillation between what I have previously argued to be two ideologically incompatible perspectives (see Jan-Harm de Villiers 'Animal rights theory, animal welfarism and the "new welfarist" amalgamation: A critical perspective' (2015) 30 *SA Public Law* 406) is a symptom of the law's struggle to incorporate and embrace that which is other to the system. The law originates in fundamentally anthropocentric discourse that has ab initio legitimised animal exploitation and is antithetical to the animal's interests. Law's struggle logically and ethically to take account of its construction and destruction of the animal relates to its limitation of only being able to digest legally acceptable terms and concepts. Whilst the court acknowledges the nuanced problematic surrounding the legal categorisation and treatment of animals as objects, a meaningful response to this realisation inevitably requires the considerable effort of bending legal constructs so that they can accommodate animal life. The court's integrative approach of absorbing animal suffering into the environmental right in the Constitution reflects one such effort (see paras 57–8). Whilst an extensive discussion of the short-

comings of this approach falls beyond the scope of this note, it needs to be emphasised that this approach ultimately entails a rather creative (re)interpretation of a *human* right rather than recognition of the animal as individual with intrinsic value, thus presenting another theoretical and ideological incongruence in the court's approach. I furthermore find the approach of resorting to the construct of human rights to protect the interests of animals to be a tragic contradiction. Human rights are grounded in the very structure of subjectivity that has been constructed on an underlying foundation of man's non-identity with animals and affirms precisely the interpretation of man that has been used to refuse animals moral standing for centuries (see Jacques Derrida & Jean-Luc Nancy '"Eating well," or the calculation of the subject: An interview with Jacques Derrida' in Eduardo Cadava, Peter Connor & Jean-Luc Nancy (eds) *Who Comes after the Subject?* (1991) 96–119; Matthew Calarco *Zoographies: The Question of the Animal from Heidegger to Derrida* (2008) 1–14, 103–49).

As could be expected, the animal (subject) presented the court with various dilemmas and I believe the ruling illustrates my previous argument that any meaningful transformation towards animal liberation would require fundamental changes in forms of subjectivity and relationality at a conceptual level, rather than a resort to existing discourses and constructs that remain expressive of their anthropocentric constitutive presuppositions (see De Villiers 2018 *PER/PELJ* op cit). Such an approach fails adequately to frame and address the pertinent issues at stake in the contestation of animal subjugation. The subjugated status of the animal is the result of complex schemata of power and domination that span numerous historical, institutional, and cultural discourses and practices. My central concern is that approaches that fail to take on the laborious, time-consuming task of confronting anthropocentrism, or the 'set of relations and systems of power that are in the service of those who are considered by the dominant culture to be fully and properly human' (Matthew Calarco *Thinking Through Animals: Identity, Difference, Indistinction* (2015) 25) will foreclose the possibility of destabilising and moving beyond the classical humanism that lies at the heart of animal subjugation. There is undeniable congruence between law and anthropocentric culture and to the extent that the legal order continues to celebrate and sustain the very oppression in question, my sense is that we need a rigorous problematisation of law and right(s) rather than a pragmatic utilisation of the law in the hope that more law might be better law. My intention with this note was to make a small contribution in service of this ambitious purpose.

CONCLUSION

Although the ruling arguably raises more questions than it provides answers, it is especially pertinent and timely given the review of the animal protection legislation that is presently underway. The current AP Act thoroughly reflects, in both philosophy and language, a view of animals as objects that

exist for human utilisation and mechanises the animal, inter alia through repeated references to the 'destruction' of the animal (see ss 3(1)*(a)*, 4(3)*(b)* and 5(1) of the AP Act). With this, the animal is deprived of the dignity of being able to 'die' and relegated to the status of an object that can only be destroyed. The apposite questions, then, are to what degree will the court's pronouncement on the shift in the law's view of animals be transposed into the new legislation, and how will animal liberation advocates utilise this judgment going forward?

Whilst I remain cautious and sceptical of a resort to (existing) legal constructs in service of animal liberation, I locate the primary significance of this judgment at the level of potentially facilitating a shift towards the extension of legal rights to animals, rather than mere increased (private) prosecution of animal cruelty cases. This opinion inevitably raises several important questions regarding law's limits, whether or not law can be reflexive and ethically consistent. The task of *thinking* becomes increasingly essential and with that, the ethical imperative to place the animal at the centre of enquiry and to challenge the institution of law itself as a mechanism of social change.