

ANIMALS AND THE LAW: CONCEPTUAL FOUNDATIONS

PRESENTATION BY DR DAVID BILCHITZ

SOUTH AFRICAN INSTITUTE FOR ADVANCED CONSTITUTIONAL, PUBLIC,
HUMAN RIGHTS AND INTERNATIONAL LAW

davidb@saifac.org.za

www.saifac.org.za



Introduction: A New Constitutional Dispensation

'The Animals of the World exist for their own reasons. They were not made for human any more than black people were made for white, or women for men' (Alice Walker)

- New Constitutional Dispensation fundamentally changes South African legal order
 - Every area of law requires re-consideration in light of the values enshrined in the Constitution
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Shift of new Constitutional Order

- ❑ Mureinik: shift is from a culture of 'authority': authority respected for its own sake
 - ❑ Shift to a 'culture of justification': all exercises of power must be justified
 - ❑ Need for a re-shaping of basic concepts and categories of the law
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The Constitutional order and Animals

- ❑ What then are the implications of the new Constitutional order on animals?
 - ❑ What changes are required in the way we conceive of animals in the law and categories them?
 - ❑ What concrete changes are required in order to realise the new ethos of the Constitution?
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PRESENTATION OUTLINE

- ❑ The Traditional Categorisation of Animals in the Law
 - ❑ The Impact of Animal Protection Legislation: does it change the way animals were conceived?
 - ❑ If animals are entities with value in their own rights, what is the impact upon their status in the Constitution?
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Presentation Outline

- ❑ Principle and Pragmatism in the Animal Debate
 - ❑ Rights approach/Welfare approach in relation to Animals in South Africa
 - ❑ A Revised Animal Protection Act: What are the Foundations?
 - ❑ A Revised Animal Protection Act: Some initial question?
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The Traditional Categorisation

Persons

- ❑ Law of persons defines a person as 'a being or entity or association which is capable of having legal rights and duties' (Sinclair)
 - ❑ Personhood means that any person is recognised as having legal interests in their own right
 - ❑ Only persons can claim rights in Bill of rights and common law rights
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Persons and Things

- ❑ Natural persons: 'all human beings irrespective of, for example, their age, mental capacity, and intellectual ability' from moment of birth until death
 - ❑ Legal persons can be entities created by law that are recognised as having interests in their own right
 - ❑ What about non-human animals? Traditionally classified as 'things' or 'property' in the law.
 - ❑ Their interests are not considered in their own right and they are not entitled to protections of fundamental rights and other common law rights
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The Impact of the Animal Protection Act

Animal Protection Act

- ❑ Animal Protection legislation developed to protect against horrific cruelty occurring in England during industrial revolution
 - ❑ SA initial act of Union: Prevention of Cruelty to Animals Act of 1914 replaced by Animal Protection Act of 1962
 - ❑ Main offences of Act: prohibits range of Acts that, whether intentionally or negligently' inflict 'unnecessary suffering upon animals'
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What is impact of Act on status of animals?

- Does Act directly protect animals and confer certain legal rights upon them?
 - Or does Act simply protect certain human or community interests?
 - Reflects two views of the obligations humans have to animals:
 - Direct duty view
 - Indirect duty view
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The Sensibility View

- 'The aim of the legislation was not to elevate animals to legal personhood and this prohibition is not designed to give them protection. The aim was clearly to forbid a legal person to act with such cruelty towards an animal that the finer feelings and sensibilities of their fellow humans would be harmed thereby' (S v Moato, 1947)
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Major problems with this view

- ❑ Why should private acts of cruelty offend individual sensibilities?
 - ❑ Mere offence in democracy is not a reason for limiting rights of others
 - ❑ Must be a valid reason for limiting such rights
 - ❑ Hard to account for strong sensibilities against animal cruelty in the absence of a belief that 'animals deserve protection in their own right and for their own sakes' (Feinberg)
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The Indirect Duty View

- ❑ Kant: cruel behaviour towards animals develops bad characteristics or behaviours towards humans
 - ❑ Empirical research: correlation between animal abuse and domestic violence against women and children
 - ❑ Serial killers offence commence violent activities against animals
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Problems with this view

- Nozick points out that hitting baseball with a bat does not 'significantly increase the danger of doing the same to someone's head: Am I not capable of understanding that people differ from baseballs and doesn't this understanding stop the spillover? Why should things be different in the case of animals?'
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Problems with this view

- Animals are not baseballs: animals are sufficiently similar to human being in having a significant interest in not being subjected to suffering
 - If the interest in avoiding severe suffering is sufficient to grounds such a prohibition in the case of humans, why not in the case of non-human animals?
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A Legal Shift?

- ❑ *NSPCA* judgment: Cameron in minority recognises that views in *Moato* are 'erroneous'.
 - ❑ Purpose of animal welfare legislation is 'to protect welfare of animals directly, though the legislation did not seek to confer rights on animals'.
 - ❑ Statutes recognise 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. The statutes thus acknowledge the need or animals to be protected from human ill-treatment'
 - ❑ Animals remain objects of the law and not subjects according to Cameron and need an appointed agent to be their 'guardian and voice'
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Analysis

- ❑ Important judicial pronouncement
 - ❑ Animals recognised in their own right as having interests of crucial importance
 - ❑ First problem: Duty to avoid inflicting suffering, however, implies right of animal to avoid having suffering inflicted upon it
 - ❑ Second Problem: strange that Cameron retains classification: on what basis can we still justify consigning animals to status as legal objects?
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Towards Rights for Animals

- ❑ Young children or the mentally ill also don't have a voice of their own but they are legal subjects
 - ❑ Importantly, they are also not capable of having duties, yet they still have rights and are recognised as persons
 - ❑ If animals have similar interests of their own, they should be recognised as having similar rights.
 - ❑ Moreover, there then seems to be no rational basis upon which to deny that animals are not simply property.
 - ❑ In a Constitutional Order that rejects arbitrariness, such a classification must be rejected and animals must be brought within the category of 'natural persons'.
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The Shifting the Status of Animals in the Law

Constitutional Problems: Human Dignity

- ❑ Foundational values of SA Constitution: equality, freedom and *human* dignity
 - ❑ Human dignity involves recognition of worth and value of each human
 - ❑ Reaction against apartheid South Africa: treatment of black people with lack of 'dignity'
 - ❑ Equal worth accorded to whites whilst all other groups treated as being lesser
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Is Dignity only for humans?

- ❑ Problem arises in assumption that only humans have worth
 - ❑ Why should all and only humans be the only beings capable of having worth?
 - ❑ Unjustifiable prejudice in favour of our own species and similar to racism and sexism if no basis
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Dignity and Humanity

- ❑ Humans have more sophisticated capacities which ground dignity
 - ❑ Yet, some humans (infants, mentally ill) do not have sophisticated capacities and we still grant them rights protecting their fundamental interests
 - ❑ If this is so, there is no non-arbitrary basis upon which to deny that non-human animals with *similar capacities* should also have rights protecting their fundamental interests
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Dignity and Variability

- Dignity can relate to all forms of life that possess both abilities and deep needs
 - Many types of creatures seek to live and flourish as the kind of beings they are
 - All creatures should be entitled to 'a wide range of capabilities to function, those that are essential to a flourishing life, a life worthy of the dignity of each creature' (Martha Nussbaum, *Frontiers of Justice*)
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Constitutional Problems: Environmental Right

- ❑ Section 24: protects environmental rights
 - ❑ Does not distinguish between animals and plants, stones and rivers
 - ❑ Allows sentient creatures to be treated as 'things' without interests of their own
 - ❑ Allows framework of 'sustainable use' and exploitation to gain hold
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The Constitutional Amendment Route

- ❑ Recognising animals as having rights and person could be done through an express Constitutional amendment
 - ❑ Occurred in Switzerland and Sweden
 - ❑ Occurred in Germany to deal with conflicts between human and animal rights
 - ❑ Amendment unlikely in SA
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The Constitutional Interpretation Route

- ❑ SA Constitution can convincingly be interpreted to recognise interests of animals
 - ❑ Application clause of the Constitution (Section 8)
 - ❑ Bill of Rights applies to all natural persons
 - ❑ If this category is extended (as it should be if we wish to remove arbitrariness), then Bill of Rights could apply to non-human animals.
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The Constitutional Interpretation Route

- ❑ Another approach: why not recognise animal as 'legal persons'?
 - ❑ If an artificial legal fiction can be entitled to protections under the Bill of Rights, then why not sentient beings who have fundamental interests?
 - ❑ Natural persons route is more desirable as recognises similarity of human and animal as coming from their intrinsic natures
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The Constitutional Interpretation Route

- ❑ Important to recognise that protection of fundamental rights will vary depending on the capabilities of a person
 - ❑ Infant has a right to freedom and security of the person but cannot claim political rights or rights to freedom of religion
 - ❑ Similarly, animals will not have a right to vote but need:
 - Rights to bodily integrity
 - Habitat appropriate to needs
 - Right to be free from all forms of violence
 - Right not to be deprived of the means of living
 - Rights to live lives good for them on their own terms
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The Statutory Reform Route

- ❑ This would require statutory reform
 - ❑ Statutory reform can enshrine revised understanding
 - ❑ Problem lies in conflict between human and animal rights (Limitation clause would have to be used)
 - ❑ This would recognise that both scientific and moral understandings of animals have shifted since the passing of the Animal Protection Act in 1962
 - ❑ This would seek to reflect the shift in the way animals are conceived and treated in concrete provisions of law
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Principle and Pragmatism

South African Society and Law Reform

- Rudimentary protection of animal rights will require wide-ranging changes in human practices
 - Prohibit circuses
 - Fur
 - Hunting
 - Meat-eating
 - SA society strongly meat-eating and impossible in any conceivable future to conceive of such a ban
 - How do we avoid law being on collision course with social expectations?
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Law as Evolutionary

- ❑ Social movements have taken time to achieve justice
 - ❑ Lesbian and gay equality took ten years from decriminalisation to marriage (very short in fact)
 - ❑ Gradual process needed for recognition of animal rights
 - ❑ Conceptual framework outlined through which gradual process can unfold
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Progressive Realisation

- ❑ In relation to social rights, recognised that full realisation not possible immediately
 - ❑ Concept developed of the 'progressive realisation' of social rights
 - ❑ No deliberately retrogressive measures could be taken
 - ❑ There are minimum core obligations to certain essential levels of a right
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Progressive Realisation of Animal Rights

- ❑ Full realisation not possible at present
 - ❑ Work on developing a minimum core of rights to which animals are entitled
 - ❑ Deliberately retrogressive steps banned
 - ❑ Plan developed for realisation of rights over time
 - ❑ Justification must be required for limiting rights of animals
 - ❑ Least restrictive means used to violate rights of animals
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Rights versus Welfare Perspective

- ❑ Often division between rights and welfare animal organisations
 - ❑ Rights perspective recognises inherent value of animals and right to live lives of value
 - ❑ In principle: strong principled position
 - ❑ Pragmatically: rights advocates educate and argue for change but views cannot be fully realised until wholesale social change
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Rights versus Welfare Perspective

- ❑ Welfarists see themselves concerned to alleviate animal suffering
 - ❑ Prepared to work with abusive practices and industries
 - ❑ Sometimes seen to condone abusive practices: 'creating bigger cages, not getting rid of cages'
 - ❑ Principle: underlying principle must be similar to animal rights person (may be some differences)
 - ❑ Practice: need to avoid sense of condoning abuse whilst practically seeking to attain better position of animals
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Law Reform: Small difference between Rights and Welfare

- Given practical limitations on law reform possibilities given existing societal expectations, it seems that there is very little difference between rights and welfare perspectives for practical purposes
 - For a rightist, in the shorter-term it remains good to reduce animal suffering
 - For the welfarist, in the longer-term, it helps to change attitudes to animals and recognise them as having interests in their own right
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Example: Limitations and Least Restrictive Means

- Recognise certain rights and requirement for justification
 - Limitation clause in SA requires least restrictive means to be adopted when violating rights
 - Not all exercises of human freedom can justify violations of animal rights
 - If courts recognise legitimacy of meat-eating in society (which they will for the time being), what are the least restrictive means?
 - Can make major gains for animals
 - No sow stalls
 - No castration with no anaesthesia
 - No battery farming
 - No cosmetic testing
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Towards Statutory Reform

- Must recognise that animals are sentient beings with interests in their own right deserving of protection
 - Must provide substantive protections
 - Must provide effective legal procedures
 - Must provide effective enforcement
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Some Questions regarding a revised APA

- ❑ Does Animal Protection Law cover all practices relating to Animals or do we have separate pieces of Legislation?
 - ❑ How will it deal with Human-Animal Conflict?
 - ❑ How do we integrate APA legislation and environmental legislation?
 - ❑ The Animals Covered by the APA
 - Need universal coverage of all sentient creatures
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Some Questions Regarding the APA

- ❑ Are the offences adequately expressed?
Can we make sense of the notion of 'unnecessary suffering'?
 - ❑ Would it not be better to refer to offences created that violate rights of animals and then grant defences in relation to limitations of those rights?
 - ❑ What increase in penalties is necessary? (1 year or R20 000 currently)
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Some Questions Regarding the APA

- Is a criminal law framework for protection of Animals Adequate?
 - Given abuse occurs often in private places, don't we need an analogue to Domestic Violence Act which allows proactive interventions with easier procedures?
 - Are enforcement powers adequate?
 - Which agencies should be empowered to enforce and by whom are they funded?
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Conclusion

- ❑ Constitutional order requires us to re-evaluate way in which law has developed in relation to animals
 - ❑ Recognition needs to be instantiated in law of value of animals and their entitlement to respect and decent treatment
 - ❑ Statutory reform may be best way to achieve lasting change for animals in the shorter term
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Conclusion

□ Indian court:

'though not homo sapiens, they are also being entitled to dignified existence and humane treatment sans cruelty and torture...Therefore, it is not only our fundamental duty to show compassion to our animal friends but also to recognise and to protect their rights...If humans are entitled to fundamental rights, why not animals?'
