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The Elephant in the Courtroom:
The Universality of Rights vs the Uniqueness of Human
Animals in the Law

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Table of Contents

	Page
I. Background	4
1.1 Research Proposal	6
1.2 Methodology	7
1.3 Structure of Research Thesis	8
1.4 Delimitations	9
2. Introduction	11
II. DEFINITIONAL ASPECTS	13
1. Distinguishing Rights	13
1.1 Human Animals	13
1.2 Nonhuman Animals	14
2. State Party Obligations	15
2.1 Rights for humans	15
2.2 Rights for non-humans	16
3. Lawful Sanctions	19
3.1 Legal Attribution of Rights	19
3.2 Anti-Cruelty Rights	20
3.3 Welfare Rights	22
4. Legal Conceptualisation of Rights	24
4.1 Dignity and Inherent Value	24
4.2 Innate vs. Created Rights	26
4.3 The Legal Protection of Moral Rights	27
III. LEGAL EXCLUSION FROM RIGHTS LAW	29
1. Discrimination	31
1.1 The Exclusionary Nature of Human Rights Law	31
1.2 Speciesism	32
2. Self-interest	34
3. Property Status of Living Beings	36
4. Contractual Nature of Rights	39
5. Sameness and the Uniqueness of the Human animal	40
IV. THE UNIVERSALITY OF RIGHTS	42

1.	Natural Right Foundations of Rights	32
2.	Definition and Concepts of Rights	42
3.	The Distinction between Natural and Legal Rights	46
4.	The Blurring of Natural and Legal Rights	47
5.	Privileging Positivism in the Rights Discourse	49
6.	The Evolution of Rights Law as a Movement towards greater Inclusion	50
	6.1 Suffering as a Basis for Rights Inclusion	50
	6.2 Legal Duty to Act Morally	51
	6.3 Eliminating the presence of Violence, Exploitation and Behaviours contrary to Humanity	53
	6.4 Evolving Social Thought	54
V.	RECENT DEVELOPMENTS	56
1.	Expansion of Legal Rights	56
	1.1 Personhood Rights	56
	1.2 Nonhuman Animal Legal Standing	58
	1.3 Legal personality and Slavery	64
	1.4 Legal Consideration of Nonhuman Persons	67
2.	The Interconnectedness of Rights	69
	2.1 Extrapolating Oppression	69
	2.2 Environmental Impacts	70
	2.3 Health Impacts	71
3.	Other Developments	72
	3.1 Partial Rights and the Expansion of Legal Personality to Nature	72
	3.2 International Legislative Development	73
	3.3 Recommendations	75
4.	CONCLUSION	77
	Bibliography	79
	Annex I: Legal Jurisprudence	91
	Annex II: Abbreviations	96

*“All animals are equal,
but some are more equal than others”*

Animal Farm, George Orwell (1945)

I. Background

The elephant in the courtroom is a metaphor for the overt problem facing the human rights discourse concerning the reluctance to recognize rights beyond the human animal. The growing global development of animal rights law in both the legislature and the judiciary of many jurisdictions, exposes the ethical dilemma of human rights that has been the defining characteristic of codified rights since their conception. The dual nature of rights; protecting and excluding from protection, demands a constant rethinking to ensure that rights are true to their foundations. Nonhuman animals are at the forefront of the pursuit of humanity as the protection of inherent dignity is the foundation of international rights law and the protection of all inherent dignity is therefore crucial to the legitimacy of the law and the continued development of legal rights.

The central argument of this thesis is that dignity is the basis of rights,¹ all animals have dignity and therefore all animals should have rights, both human and nonhuman. Although human animals have equal rights codified in law this does not mean that equality should be across species, rights do not have to be equal to bring justice. Rather rights should provide the adequate level of protection to ensure the safeguarding of the dignity internal to the being. The dilemma of rights is that rights are both inherent and natural, as well as constructed and artificial. The existence of rights should cooperate with the protection of dignity to provide a legitimate grounding for the law.

Since the inception of legal rights the protection of inherent dignity in law has been characterized by an ever-changing, constantly expanding concept of a person, those which can be the bearer of legal rights. I argue that the current structure of international human rights law is fundamentally flawed as it does not protect dignity, rather it protects human animals through the identification of rights as being grounded in exclusively human dignity. On this basis, the law issues protections depending on their characteristics of a group and excludes groups from protection that lack those characteristics. The attribution of rights in this form is in opposition to the universalist, anti-discriminatory rhetoric of dignity rights. The body of work recognizes the limited rights that nonhuman animals currently have in many legal systems but contends that these are unsatisfactory under international human rights law which recognizes dignity and strives to protect that inherent value.² I put forward the argument that for the sake of humanity which underpins international human rights law, the arbitrary exclusions of animals other than human outside of the scope of the law is detrimental to the legitimacy of the law. To pursue the argument contesting the justifiability of exclusion from rights protection I analyze the foundations of human rights law, the development of interpretation and application of the law

¹ Recognizing that these rights derive from the inherent dignity of the human person: Preamble, ICCPR 1976, Comments of the Human Rights Committee General Comment No. 29: Article 4: Derogations during a State of Emergency”, HRI/GEN/1/Rev.9, 13(a)

² United Nations Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), Convention on Biological Diversity (CBD): Welfare legislation that protects specific nonhuman animals for the purpose of human animal interests in biodiversity

and the evolution of the removal of arbitrary disenfranchisement of rights under the law for all animals, human and nonhuman.

Throughout, I use the term human animal to refer to what is commonly more known as humans to emphasize the connection between humans and animals as both are part of the animal kingdom. I use the term nonhuman animals to refer to all other animals, vertebrate and invertebrate that do not include humans. I reject the terms human and animal as it exacerbates the distinction between human and nonhuman animals. Scholars working in this field use a common language approach to differentiate between human animals and nonhuman animals in order to highlight the distinctions as well as the commonalities between the categories. The language used is critical to convey that animals already have rights, albeit exclusively human animals, therefore bridging the possibility for all other animals to be included in the rights framework.

Similarly the use of language employed to refer to rights will always be from a neutral basis of rights. Although I critique international human rights law I refer only to only international rights law as opposed to creating a separate branch of rights such as animal rights, which to a certain extent already exist in the world. The reason I want to move away from this strategy is that the creation of a distinct category does not provide a neutral basis for the deconstruction of rights themselves as they will always be attributed to a certain specie and therefore be hierarchized. International environmental law and the corresponding environmental rights is a prime example of this in which recognition of rights beyond the human animal has developed in international law, however this development is humancentric. I employ a rights based approach to critique the fundamental foundations of rights and their attribution and this cannot be done if the language of rights predetermines the beneficiaries of the rights as being human. Additionally, I use the term rights even when referring to what would commonly be known as human rights in order to remove the link between rights and humans which provides the basis of the assumption of the humanness of rights. The use of this language helps to disassociate rights from the human animal to consider rights as being applicable to all beings depending on the requisite for rights which is innate dignity and not specific group membership to the human animal species. This removes the presumption that the recognition of rights in the nonhuman animal is the transposition of human rights to animals.

The use of rights language in general terms is used for the purpose of reimagining the framing of rights around the problems they are used to alleviate such as harm and suffering. Rights are then the necessary protections attributed in the existence of dignity and sentience. These concepts are present across all forms of animal life and underpin my methodological approach which is the use of human rights law to protect rights in nonhuman animals. My method does not aim to extend human rights to animals but instead to question the human animal created artificial boundaries that exclude nonhuman animals from rights. These rights are not human rights, but the protections necessary to ensure dignity . My argumentation appeals to the concepts of human rights language in that the notions of universality, inalienability and dignity in order to determine personhood and eligibility. Rights are therefore framed around the human, as this is how we as

human have created and defined them, but they are not inseparable or dependent on the human therefore the language used supports the claim that rights can exist without the human.

1.1 Research Proposal

The current research in this area draws upon the inherent worth of nonhuman animals to assert the presence of fundamental rights such as the rights to life and freedom from suffering.³ Respect for these minimum freedoms form the basis of humanity and are a realistic baseline for rights beyond the human animal which can be incorporated into the human rights discourse. Literature in this field concerns the analyzation of the reasons behind exclusion from the rights discourse and how law should be altered to become grounded in morality rather than motivated by self-interest to expand rights to the nonhuman animal.⁴ I build upon this concept focusing on the tensions between rights, both natural and legal and the deficiencies in the international rights discourse. I assert that the law should expand the restrictions of human animals in the name of humanity and this would result in the expansion of rights protection to nonhuman animals. I argue on the basis that laws should curb oppression as much as they should protect vulnerability. The expansion of rights law and the limitation of oppressive infringement of rights is an already existing field of study in the rights discourse which I build on to improve the quality of the law and to assesses whether the current legal structure is in line with the notion of humanity. To substantiate my claim, I research the protections of dignity in the law and the methods that the law uses to quantify the rejection of protection in nonhuman animals.

The field of research I wish to add to is firstly to human rights law, deconstructing the actions of human animals against nonhuman animals that are legitimated by the law yet run contrary to principles of morality and natural justice. Secondly, I wish to look at the parameters of rights law in relation to nonhuman animal subjects, determining whether the current exclusion of nonhuman sentient beings from the human rights discourse is arbitrary. Research into this subject is a crucial for the advancement of rights law as questions concerning the legitimacy of the law seek to remove the potential for arbitrary deprivation to prevent further violations in the world. I explore how the value of the law is detrimentally affected when the application of the law is limited by concepts that are contrary to its existence. I frame my analysis on how the aim of international rights instruments is to remove notions of discrimination, oppression and exploitation and question whether the exclusion of nonhuman animals from the rights framework runs contrary to this ideal. If these instruments create and reproduce the very environments they were intended to prevent, human rights law will be fundamentally flawed. The human rights ethos will benefit from questioning its validity and searching for gaps in the law to create a movement for continued improvement.

³ Regan, T. (1985), *The Case for Animal Rights*, Berkeley, CA: University of California Press

⁴ Sunstein, C. and Nussbaum, M. (2004), *Animal Rights: Current Debates, New Directions*, Oxford University Press

My research attempts to fill in the gap in this field of scholarship by changing the focus from inclusion towards the removal of exclusion. Scholars in this area predominantly focus on the *inclusion* of nonhuman animals by legal *expansion* of human rights law. I suggest rather that human animal history has been characterized by exclusion from the rights regime, when marginalized groups receive just treatment it is the removal of arbitrariness that results in justice and not the expansion of the rights discourse. I suggest that the inherent dignity of nonhuman animals provokes a reconfiguration of human rights law into simply rights law of which human animals, the environment and nonhuman animals are represented. I draw upon the recent integration of the environment in international law, which protects rights for the environment itself as well as for human animals. This recognition of the interconnectedness of the world and the need to restrict human animal activity to protect the rights of all living beings presents an opportunity to include nonhuman animals in the international legal framework both for human animals and nonhuman animals themselves. The issue of nonhuman animal rights is important to consider in rights law as it concerns the fundamental matter of dignity, that is a commonality of all animals. If dignity exists and can be legally encroached, then the ramifications for accepting rather than limiting violations extend beyond the nonhuman animal species. Nonhuman animal rights are a pivotal consideration for the progression of international human rights law as the inconsistent application of rights provokes the instability of legal protection. If dignity is the precursor to rights, all those with dignity should have rights, the additional prerequisite of humanness is a transgression away from morals and towards ideologies. The deconstruction of the law is necessary to expose the power structures that deny rights, and then to prevent the application in correspondence with these power structures. This research in the area is critical as the constant probing of the constructed parameters around legal rights attribution is necessary to prevent the arbitrary exclusion from protection. History has shown that the law can be a vehicle of harm as it provides the possibility of stripping away dignity rights protection through the devaluation of life. The exclusion that is inherent in the assignment of rights is problematic for the assessment of the fundamental legitimacy of rights law if the exclusion cannot be justified.

1.2 Methodology

Contrary to what the human intuition may be, I argue, based on the analysis in my thesis that international human rights law, with an emphasis on ethics and moral philosophy of law, is fundamentally flawed as the limits excluding right protections are arbitrary and this is to the detriment of the law. I argue that restricting rights based on species is contrary to the *Universal Declaration of Human Rights* (UDHR) which founded on natural law aims to provide protection whilst at the same time restricting tyranny and abuse. From this I assess the politics of inclusion and exclusion in determining legal rights juxtaposed with the notions of natural law and justice upon which the UDHR was framed. I assess the human struggle for inclusion of rights and how dominance, hierarchical structures and power test the limits of the law. I argue that the evolution of the law for nonhuman animal's mirrors that of human animals, in that it focuses on restricting harm. The continuance of the lack of recognition of rights in nonhumans evidences the law being

bound by legal precedence and it fails to live up to the ideological declarations in international law.

My research focuses on the commonality of dignity between human and nonhuman animals, the foundation of rights in dignity and the differentiation between legal rights protection that is afforded. I will research the constructed parameters of human rights law and why the limits of rights are around the human animal. The critiquing of the reasons for exclusion from the attribution of rights will determine the arbitrariness of the law. I will review the possible arbitrariness of the limits against for nonhuman animals against the development of law for human animals involving arbitrary exclusion from the protection of the law. My aim of proving that the humanness of rights is illogical will be based upon the assessment of case law spanning the last two centuries. I will assess the trajectory of judicial challenges to legislative interferences of dignity and the resulting expansion of the law in the recognition of this dignity for human animals. I will contrast this with the recent jurisprudence for nonhuman animals and how this caselaw is a contemporary challenge of the legal status which has been seen before in the courts for other marginal groups in the human species. The judicial process is important in terms of the legitimacy of international human rights law as judicial challenges illustrate the destabilisation of the law and the validity of the law. I further assess the divergence between legislation and case law and whether international customs are reflected in both the legislative and judicial sphere.

I will consider the issue from the viewpoint of human animals in the rights discourse and how rights for nonhuman animals are inherent in international human rights law theory as the intrinsic morality of ourselves as human animals warrants the noninterference. I consult the works of philosophical thinkers such as *Bentham* and *Locke* and their theories on responsibility and preventing the presence of violence that can overflow into the human animal domain. I analyze the utilitarian notion of rights from the works of Singer to support my proposition that consideration should be given to those with dignity when balancing interests. This supports my argument that dignity is the basis for rights as consideration on those grounds is the inclusion of nonhuman animals in the rights discourse. I reflect on the scholarship of *Regan* to support my argumentation that the inherent value of nonhuman animals predicates their inclusion in the law as a legal person. This, as supported by Francione, would relinquish the property status and remove the underlying oppressions that prevent the protection of dignity. Additionally, I will provide an overview of national legislative developments to illustrate my argument that nonhuman animal dignity is recognized, therefore international protections of this dignity should be codified in law.

1.3 Structure of Research Thesis

In order to analyse the arbitrariness of the limits that international human rights law places on rights through the attribution of legal protection I assess the natural law foundations of rights and the constant reimagining of legal parameters. From this I can determine the deficiencies in the law

and the possibility of expansion of the international rights framework beyond the human animal species.

In **chapter one**, I introduce the concept of rights, their function and the tension between natural rights and legal rights that characterize the international rights discourse. I provide an overview of the problematic consequences of having a dualistic approach to rights upon which I further explore later in the thesis. In **chapter two** I outline the current international and national rights framework and the corresponding protections for human and nonhuman animals. I assess the adequacy of the legal framework in relation to the protection of dignity and finalise the chapter with a comparative review of the origins of rights. In **chapter three** I explore the tension between legal and natural rights focusing on the theme of inclusion/exclusion from legal protections. I assess the rationalization for the exclusion from the scope of rights law and how the law can digress from morality to be used as a tool to devalue dignity. I implore the use of jurisprudence to illustrate examples of arbitrary exclusion from the law. I compare the parallels in the human animal exclusion from rights protection to that of nonhuman animals, particularly in the property status of living beings that devalued human slaves during the slave trade and the commercial use of nonhuman animals by human animals. Finally, I provide a philosophical assessment of the legal reasoning to deny the protection of dignity in the form of legal rights. The argument put forward in this section is that the historical trajectory of human rights law has, at a certain point, opted for an arbitrary exclusion. This exclusion should be open to constant scrutiny by human rights lawyers to ensure the continued development of the law. In **chapter four** I investigate the critical components of rights to determine whether the attribution of rights or non-attribution is legitimate under international law. I consult natural rights theories to provide an overview of what characteristics attract legal rights protection and I use these ideas to support a framework for how rights should be attributed if they were to be attributed in consolidation with moral rights. In **chapter five** I look at development of nonhuman animal rights and how the idea of a person is moving away from its legal basis in the human animal, towards a moral understanding based in universality. Finally, I conclude the thesis with a look at the interrelatedness of rights and interferences and how human animals are only part of the inherent worth of the world that requires protection. I propose that the consideration of other interests is necessary for the benefit of international human rights law.

1.3 Delimitations

The thesis will focus the link between rights that have their foundations in dignity and the protection of this dignity. For this I will examine the parameters of legal protection of dignity and therefore the recognition of rights. The critique of international human rights law that I engage in advances the notion that without the legal protection of all forms of legally recognised dignity, the creation of harm, suffering and oppression will occur. Therefore in order for international human rights law to be true to their foundations the dignity of certain groups cannot be forsaken as this provides the potential for the devaluation of human rights.

Whilst I recognise during my thesis the significance of interconnectivity between human animals, nonhuman animals and the environment and how this interconnectivity shapes the growing recognition of rights and dignity outside the human animal. I do not however focus on the interconnectivity of the world in order to critique the exclusion of nonhuman animals from rights law. The international movement towards rights recognition beyond the human animal has primarily acknowledged the value beyond the human animal for the purpose of the *human* enjoyment of rights. For this reason I only explore the link between the interconnectivity of rights and enjoyment of rights beyond that of a contextual example of the current barriers of protection are being constantly revised. Instead I focus on using a human rights based approach to rights for nonhuman animals. I focus on how human animals have rights stemming from their dignity and how nonhuman animals therefore should have their rights recognised as they possess the same prerequisite dignity. I do however refer to the interconnectivity of the world to support my argument for the removal of the humanness surrounding rights as this provides further motivation for human animals in a human centric form as the current parameters around rights are to the detriment of human made law as well as the survival of the human species. My main imperative argues that the fundamentals of rights are themselves compromised as a harmful practice is accepted that goes against rights law, but as a supplementary argument the interconnected oppression that stem from this harm against nonhuman animals go beyond the directly affected group, therefore the interconnectivity of rights is used to strengthen my main argument.

The relationship between capitalism and rights violations has been subject to much debate in the human rights field with many scholars asserting that capitalism sustains the oppression of rights holders preventing their enjoyment of their rights due to the resulting economic benefits that are a product of their exploitation. During my thesis I acknowledge that rights are violated and groups are oppressed in the pursuit of economic gain. I do not however focus on capitalism as being the cause of the removal of nonhuman animals in international rights law. I discuss the economic exploitation of human animal slaves and compare this to the use of nonhuman animals for economic gain alluding to the fact that it is in fact capitalism as the driving factor. However I introduce this as economic and self-interests that perpetuate the exclusion of rights-holders from the rights discourse. My reasoning for omitting a critique of capitalism is that every single State engages in the oppression and exploitation of nonhuman animals, yet not all States have a capitalist economic structure. Capitalism can be argued to be a system that is intertwined with rights violations and oppressions as profits are the aim. Instead I focus on the problem being the necessity for the legal recognition of rights which no economic system or system of government should be permitted to override. For example, slavery is illegal as a concept under international law. Although it may exist throughout the world, human animals have international legal protections against this practice to protect their dignity. It is therefore illegal to engage in a form of economic structure that uses slavery, including capitalism. On the other hand, nonhuman animals do not have any international legal protections against slavery and the suffering that nonhuman animals face when enslaved is legal under any economic structure. On this basis, it is not necessary to overthrow capitalism in order to protect the dignity of rights holders. Exploitation and oppression are not uniquely capitalist, yet it is acknowledged that capitalism is

a motivator for these attributes. For these reasons I will not focus my argumentation on a particular economic or political structure.

On a similar basis I have tried to garner a diverse set of case law from both western and non-western States. My argumentation is primarily Eurocentric due to my proximity and experience, however my approach is that rights are universal and therefore rights in nonhuman animals would reflect this ideal.

2. Introduction

The preconditions for legal rights attribution has little consensus in the field. Human animals are the centre of rights discourse with numerous codified legal instruments establishing the legal parameters of rights around human animals. The suffering of nonhuman animals that are excluded from legal rights protection is well-documented.⁵ Still, the otherwise extensive rights discourse has yet to afford sufficient attention to suffering beyond the human animal. Scientific advances have brought growing recognition of both the inherent value of nonhuman animals and their ability to suffer in social thought.⁶ Combined with the disdain for arbitrary discrimination and violence within the world, the status of nonhuman animals is becoming recognized as a pressing issue in the fight for humanity. Human animal interest in the economic benefits that result from the exclusion of nonhuman animals from the rights framework has left the legal status for nonhuman animals mostly unchallenged by the public, governments and the courts. The complexities, and resulting deficiencies in conceptualizing rights have underpinned this problematic development. Perhaps more importantly, the lack of attention given to the conflation between humanity and humanness has engendered an emboldened impunity for acts prohibited under rights law, when they are used outside the law. Its manifestations create an environment for which rights are attributed along the lines of discrimination, a treatment that is morally prohibited in universal rights ideology. The review at hand seeks to focus on understanding the relevant institutional shortcomings of the international legal framework of rights by investigating the interrelationship between codified legal rights and the natural rights upon which they are supposed to derive.

The UDHR posits that the intersection of dignity and rights warrants the establishment of legal protections. The use of rights as a legal mechanism to ensure the protection of moral rights, have been codified into international law for human animals. The UDHR declares rights as being “inalienable” entitlements that are cannot be taken or given, only recognised.⁷ Rights outside of the human animal have been subject of much local and international concern, and the exclusivity of rights both for human animals and nonhuman animals have been widely documented in

⁵ Such as nonhuman animals that are used for scientific testing, food, in entertainment and in fashion.

⁶ Sentience recognized in nonhuman animals: *The Cambridge Declaration on Consciousness*, 7 July 2012, Written by Low, P and edited by Panksepp, J. Reiss, D. Edelman, D. Van Swinderen, B. Low, P and Koch, C, University of Cambridge

⁷ Preamble, Universal Declaration Human Rights, 1948

caselaw around the world.⁸ International standards have long prohibited torture, cruel treatment and enslavement under customary law predating the enactment of posited law. Further restriction and regulation are provided by regional international treaties proving the implementation of universal norms of these absolute prohibitions in the international arena. The history of jurisprudence illustrates the constant expansion of the limits arbitrarily placed around rights recognition. The ability of legal doctrines to distinguish themselves from moral law through posited interpretation provides the unstable nature of the law which requires the constant revision of the legal parameters around rights. The exclusion of certain groups from rights protection has attracted attention in the legal discourse for decades. Rights law is dynamic in that social consciousness is ever-changing and driving the inclusion of many formerly excluded groups. The historical non-recognition of legal rights in entitled groups illustrates that the creation of legal rights is a political process which is not without the corresponding power structures that underlie the legal system. Groups that have been deprived the privilege of rights recognition have historically been done so because exploitation, self-interest and the maintenance of unjust power distribution.

⁸ As will be discussed further in the subsequent chapters

II. DEFINITIONAL ASPECTS

1. Distinguishing Rights

International law does not provide a uniform approach to understanding the elements of what constitutes a right and how a right is subsequently attributed. The tension between the natural law recognising the existence of a right with the posited law trying to conceptualise whether that right should be protected, has meant that the implementation of rights law for both human and nonhuman animals has been inconsistent since the establishment of international legal norms. Strict categories of determinative factors for the classification of rights have been avoided.

1.1 Human Animals

International legal instruments recognise, codify and protect rights for human animals acting as a guideline for the implementation of national legislation. Each State is obligated to implement legislation in accordance with international norms as well as having a duty to protect these rights. Violations of innate rights of human animals are attributed to the failure of the State and its duty to uphold the fundamental norms encoded in international legislation.⁹ The preamble of the ICCPR states that rights derive from inherent dignity. The recognition of legal rights however derives from human recognition of that dignity. The development of legal rights has been the struggle for recognition of natural rights. Legal rights holders have rights. Without legal recognition of rights there is legal validation of interference of innate rights. The legitimisation of this interference is enabled under the law if it is justified with legal reasoning.¹⁰ The deprivation of legal recognition occurs when an arbitrary distinction is drawn between groups for the purposes of inclusion and exclusion. Those with the power to define the legal components of applicability of rights are the dominant group. This group has the power to be part of the rights discourse and the privilege of being a rightsholder. The power to control the limits of rights lies within the legislature and the judiciary. These branches are responsible for establishing legal norms and upholding legal truths in the public interest. History has shown the dichotomy between rights and justice in the legal system through the evolution of landmark legal decisions removing disenfranchisement. These cases evidence that law can act as a mechanism to provide the ability to contort rights attribution to reflect the certain ideals of justice. Those with the responsibility and power to determine the legal agenda can frame rights from their perspective and in their interests. Discriminatory barriers to rights recognition can be constructed and legitimised on this basis, despite the dissonance with universal moral norms.¹¹ Legal rationale for the non-attribution of legal right holder status rests upon the devaluation of intrinsic rights and the reconstruction of humanity regarding those excluded.

⁹ Preamble, Universal Declaration of Human Rights 1948

¹⁰ For example, the Geneva Conventions stipulating the acts of legitimate killing that would not encompass a contravention of the right to life.

¹¹ Singer, P. (2000), *Equality for animals?* in *Ethics, Human and Other Animals: An Introduction with Readings*, Edited by: Hursthouse, R. London: Routledge, p171

Numerous human animal atrocities have occurred since the enactment of international rights law such as genocide, war crimes and crimes against humanity. This evidences that despite the legal codification of human animal rights the ability to remove groups from the protection of rights is possible under the law. The removal of universality from the rights discourse through the subjugation of certain groups heightens the tension between natural rights and legal rights. The framing of rights as an exclusive concept is permeated in the determination of legal right holder status. The detachment between natural rights and the law creates the ability to legalise violence as it becomes socially acceptable.¹² Difference and discrimination become the means to create a barrier to rights. An example of this is the commodification of beings as living property for economic benefits. Whilst slavery is regarded as morally wrong, it brings with it huge advantages for the benefactor, which was the driving force of the legal acceptance of this practice. The establishment of tyrannical practices is to legitimise the legality of the practice. The practice can be constructed as legitimate through the subordination of the subject, denying the inherent dignity. The dominant persons are the beneficiaries of the exploitation and therefore it is in their interests to construct the law to uphold those interests. Devaluation can be culturally entrenched as a rational basis for rights exclusion. The devaluation by appealing to difference appeals to moral reasoning as it rests upon a formal equality logic in which different attributes warrant different rights. The separate but equal laws of the United States of America are an example of the movement from natural rights due to the legitimacy of the practice under codified legislation. Segregation was deemed constitutionally valid even though the doctrine overtly subordinated one group on account of their race.¹³ The classification of certain groups as inferior provides a rational basis to exclude bona fide rights holders from legal protections. The preference of excluding members from society was a societal interest, founded on discriminatory ideals. Law and the attribution of legal rights can reflect this social preference when the interests of the powerful are privileged over the considerations of the affected. Discrimination acts as a ground for the non-consideration of interests upon which the subjective interests of a certain group are deemed inferior. The dominant group therefore has the power to oust the consideration for rights attribution which then results in exclusion from rights altogether.

1.2 Nonhuman Animals

No binding instrument of international law directly prohibits the taking of a nonhuman animals life or the torture of nonhuman animals.¹⁴ The European Union regulates the practice of killing and inflicting harm upon nonhuman animals, whilst recognising their existence as sentient beings.¹⁵ Almost all individual States in the world have domestic legislation regulating these

¹² MacDonald, D.B (2006), *Pushing the Limits of Humanity? Reinterpreting Animal Rights and "Personhood" Through the Prism of the Holocaust*, Journal of Human Rights, Vol.5, No.4, p417-437

¹³ *Plessy v. Ferguson*, 163 US 537 (1896)

¹⁴ There are in existence international instruments that prevent or regulate the killing of certain animals, such as endangered species for reasons of conservation of diversity (CITES), but nothing that creates an absolute prohibition on these practices

¹⁵ Article 13 of Title II, *Treaty of Lisbon* (2009)

practices, and to some extent prohibiting these practices. However, the exploitation in the form of killing and the torture of nonhuman animals is legalised in every single State in varying degrees. Legal protective measures are primarily for the regulation of human animal behaviour, limiting the violence and preventing acts that are contrary to humanity. Increasingly, the inherent sentience of animals is transforming the law into considering nonhuman animal interests as a basis for limiting human animal actions that cause harm. In 2009 international law, the Treaty of Lisbon, outlined the importance of the protection of nonhuman animals for the sake of the animals themselves as sentient beings. This statutory recognition of sentience in animals beyond the human animal was based on the scientific evidence found in the *Cambridge Declaration on Consciousness*. The study declared that human animals are not unique in their consciousness.¹⁶ Nonhuman animals are declared to be self-aware, able to experience suffering and have a sense of selfhood.¹⁷ Sentience for many is the fundamental basis for rights attribution. Singer considers sentience as the capacity for suffering, this asserts that the subject has an interest, that may be necessary to protect. Sentience on this basis it is a vital characteristic for moral consideration of rights.¹⁸ Moreover, Singer concludes that the principle of equality demands that we should have equal considerations of interests. Despite the scientific evidence equating the harm of nonhuman animals and human animals, nonhuman animals receive minimal legal protection. The moral and legal rights of nonhuman animals do not correspond in the way that they do for human animals. Nonhuman animals do not receive adequate consideration of their interests in correspondence with their suffering. The sentience of nonhuman animals is obscured so that the worth of an animal is only considered regarding their worth for human use.

2. State Party Obligations

2.1 Rights for humans

Human animals have created rights protection through the codification of rights in international law. The legalisation of customary norms occurred in the late twentieth century, yet customary international law still forms as the guiding principles of international law.¹⁹ Legal rights recognition and protection for human animals stems from the UDHR. This international instrument designates rights to human animals on account of their “inherent dignity”.²⁰ Rights are recognised as being non-exclusive and universal therefore they are recognised as innate and “inherent” to “members of the human family”.²¹ The creation of subsequent legal instruments regarding rights ensure the binding nature of the obligation to protect rights and the necessary codification of these concepts into national law is to provide an enforcement of the duties to

¹⁶ Andrews, K. (2014), *The Animal Mind: An Introduction to the Philosophy of Animal Cognition*. Taylor and Francis. p51

¹⁷*The Cambridge Declaration on Consciousness*, 7 July 2012, Written by Low, P and edited by Panksepp, J. Reiss, D. Edelman, D. Van Swinderen, B. Low, P and Koch, C, University of Cambridge

¹⁸Singer, P. (1985), *In Defense of Animals*, The Second Wave, Oxford: Basil Blackwell, Prologue

¹⁹ Goldsmith, J. and Posner, E. (2007), *The limits of international law*, Oxford University Press, p21

²⁰ Preamble, Universal Declaration Human Rights, 1948

²¹ Preamble, Universal Declaration Human Rights, 1948

protect rights.²² International law places limitations upon the State to prevent the interference of rights obligating States to cooperate with the international community and sacrificing some of their sovereignty in the observance of rights.²³ This mechanism outlined as part of the preamble of the UDHR acknowledges the power imbalance intrinsic to international relations between the right holder and the State and seeks to limit the power of the State over a rights holder to ensure their access to rights. Human nature has a long history of violence, domination and destruction. The ensuing suffering that is caused from this is to be limited through the institution of the rights discourse.²⁴ The principles of universality and non-discrimination seek to remove the power imbalance by perpetuating an equality status for all rights to have consideration.

2.2 Rights for non-humans

Much like human animals, non-human animals have a complex history of exclusion from rights law. Currently, there is no existing non-human animal treaty that is agreed to on an international basis. Whilst many treaties exist involving animals they pertain to the use of animals by human-animals²⁵ and the conservation of animals as part of the biodiversity of the planet²⁶. The commodification of non-human animals means that their rights recognition and protection is confined by their classification as property. There exists no protection of nonhuman animal rights which involve the consideration of the inherent value non-human animals as “ends themselves”²⁷ that is universally codified. International legislation does recognise that “animals are sentient beings”²⁸ and thus certain non-human animals are entitled to minimum standards regarding the protection of nonhuman animal rights.²⁹ The protections assigned to non-human animals are in regard to their welfare, with negative freedom rights protecting them from suffering. The non-human animals which are assigned the entitlement to this protection are those which serve a function for human animal usage. The European Union (EU) Directive 98/58/EC 1998³⁰ acknowledges the inherent suffering that non-human animals experience in its “Five

²² International Covenant on Civil and Political Rights 1966, International Covenant on Economic, Social and Cultural Rights 1966, and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984

²³ Preamble, Universal Declaration Human Rights, 1948

²⁴ Best, S (2009), *Minding the Animals: Ethology and the Obsolescence of Left Humanism*, International Journal of Inclusive Democracy

²⁵ European Convention for the Protection of Animals Kept for Farming Purposes No. 87 of 10 March 1976, European Convention for the Protection of Animals for Slaughter No. 102 of 10 May 1979, European Convention on the Protection of Pet Animals No. 125 of 13 November 1987, European Convention for the Protection of Vertebrate Animals Used for Experimentation and other Scientific Purposes No. 123 of 18 March 1986

²⁶ United Nations Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), Convention on Biological Diversity (CBD)

²⁷ Kant, I (1785), *Groundwork of the Metaphysics of Morals: A Commentary*, Oxford University Press, 2011, p377

²⁸ Lisbon Treaty 2009: Treaty on the Functioning of the European Union Article 13

²⁹ European Union Directive 98/58/EC 1998

³⁰ Based upon the European Convention for the Protection of Animals kept for Farming Purposes, Treaty No.145, 1992

Freedoms”³¹ protections and therefore aims to minimise this suffering, albeit only in the animals that have commercial worth to human animals. The incremental dismantling of the exclusivity of rights has progressed incrementally from the EU Directives, to considerations outside the commercial use of non-humans. Examples of legislative advancements for non-human animal rights include the declassification of “animals” as objects in the Civil Codes of Switzerland, Germany and Austria.³² The subjective legal status of non-human animals removes the barriers to rights recognition that were placed on them when classification as a lifeless object.

The acknowledgement of suffering for non-human animals and the consequential regulatory attempts to minimise that suffering is present in the domestic legal systems of almost every country in the world. Anti-cruelty legislation aims to controls of behaviour which causes harm that stands to “outrage the conscience of mankind” and run contrary to “social progress”³³. This is achieved through the regulation of behaviour of human animals in their relations with non-human animals. The legal prohibitions against acts of cruelty exist to regulate societal behaviour from the moral implications that stem from the violent acts. Studies made by the Humane Society of the United States show that there are links between cruelty committed against non-human animals and subsequent violence in human animals.³⁴ Non-human animals benefit from anti-cruelty legislation however the intended purpose is for the benefit of human animals. Evidence of this is illustrated as the anti-cruelty legislation removes violence that is considered a danger to humanity in that it may spill over into human relations and the exhibited violent behaviour is not considered necessary therefore it is condemned. The infliction of violence and suffering on non-human animals at the hands of human animals on factory farms is legally permitted despite its cruelty as this practice is publicly accepted.³⁵ The legalisation of suffering against non-human animals goes against the principle of inherent sentience that is internalised in international rights law and international legal conventions such as the EU Directives. These legislative developments illustrate a gradual progression in the law in the direction of inclusion of nonhuman animals. The recent creation of legal measures recognise the inherent dignity and vulnerability that exists beyond the human animals and have sought to amend the preexisting legislation that prevents their protection. This global development of law for nonhuman animals in numerous jurisdictions, signifying the acceptance that nonhuman animal rights are at the forefront for international human rights law.

Globally States have codified rights for non-human animals into their domestic legislation. Switzerland became the first country to constitutionally recognise non-human animals in 1992, acknowledging their inherent dignity and the need to protect this³⁶ serving as a precedent for the

³¹ Freedom from hunger and thirst; discomfort, pain, injury and disease; fear and distress and freedom to express normal behaviour.

³² Article 641(a)(2)(1) Swiss Civil Code 10 December 1900 (Amendment 1 January 2017)

³³ Preamble, Universal Declaration Human Rights, 1948

³⁴ http://www.humanesociety.org/issues/abuse_neglect/qa/cruelty_violence_connection_faq.html [[<https://perma.cc/JT6B-LQFF>] (Apr. 25, 2011)]

³⁵ Blumenauera. E (2016), *Changing Humanity: Fifteen Years of Progress in Animal Welfare Protection*, Volume 22(2), Animal Law Review

³⁶ Article 120 Swiss Federal Constitution 1999

reclassification of non-human animal rights. New Zealand legally recognised animals as sentient beings³⁷ and proposed an amendment that recognises the legal rights of non-human animals. The rights not to be deprived of life and not to be subjected to torture were recognised for great apes.³⁸ Germany recognised non-human animal rights on the same level as the basic rights of human animals within the Constitution, conferring a constitutional right to have State protection³⁹. The Spanish parliament recognised in 2008 the right to life and freedom from torture for non-human animals (specifically primates regarding scientific research).⁴⁰ The rights that have been formally codified into the legislatures of the above States acknowledge the innate rights of non-human animals as autonomous beings. In South Korea, a 2007 revision to the national Animal Protection Law stated that “everyone should recognise the dignity and inherent value of animal’s lives” to protect animals to “guarantee their normal lives”⁴¹. These examples of legislative recognitions of nonhuman animals draw upon the natural law concepts of the UDHR in which the innate worth of a life attracts protection.

The inexistence of an international normative framework establishing universal minimum legal standards is in opposition to the global legal discourse, in which almost every State has varying degrees of nonhuman animal protection. The global consensus to prevent inhumane acts and to protect the rights of nonhuman animals should be reflected in the law. This approach would unify the moral development of States as well as placing nonhuman animals on the global political agenda. A proposal to codify non-human animal rights into international law in the form of a set of non-binding principles has been put forward by the World Animal Protection⁴² in 2000. The *Universal Declaration on Animal Welfare* (UDWA) would create an intergovernmental recognition of minimum standards considering humane treatment like that of the UDHR. The declaration would provide international recognition of the inherent sentience⁴³ of all vertebrate⁴⁴ animals and the mechanisms necessary to protect those with sentience from harm.⁴⁵ The codification of a universal legal instrument would ensure that the interests of nonhuman animals are recognised and considered by legally obligating States to implement the established norms. It would pave the way for legally recognised rights and it will contribute to the moral development of humanity in the prevention of exclusion non-human animals in the universal rights discourse.

³⁷ Section 4(i) Animal Welfare Amendment Act (No. 2) New Zealand 2015

³⁸ Section 85 Animal Welfare Act of 1999 New Zealand

³⁹ Paragraph 20a of Basic Law for the Federal Republic of Germany 1949

⁴⁰ Fitzgerald, E. A. (2015), *[Ape]rsonhood*, The Review of Litigation, Vol.34, p337

⁴¹ Article 3 Animal Protection Amendment Act 2007 of South Korea

⁴² WHAT KIND OF AN ORGAN IS THIS?

⁴³ Article 1 Universal Declaration on Animal Welfare 2011

⁴⁴ Article 3 Universal Declaration on Animal Welfare 2011

⁴⁵ International Fund for Animal Welfare (IFAW) :

<http://www.ifaw.org/united-states/our-work/political-advocacy/udaw-universal-declaration-animal-welfare>, <https://www.globalanimallaw.org/database/universal.html>, Accessed 15 May 2017

3. Lawful Sanctions

This part outlines the definitional dynamics (interpretational variations, gaps and limitations) of rights both pertaining to human and nonhuman animals and how this difficulty exacerbates the legal sanctioning of potential rights violations. The cases that are outlined illustrate the propensity of the law to legitimise violations of natural rights, thus conferring the tension between national and international law.

3.1 Legal Attribution of Rights

The concept of rights holds an inherent juxtaposition between protection and harm. To protect rights, rights must be defined and protective mechanism established. The establishment of legal rights can be a harmful practice as the inclusion of some creates the exclusion of others. The creation of defining concepts of rights is a task done by human animals. These human animals are part of a group that has interests and preferences, the power structures that the human animals are a part of will be reproduced in the legal rights parameters they create. Legal rights cannot be separated from the underlying interests and hierarchies which formulate them. The power structures that define rights use law to complement rights in its recognition and protection, as well as being the tool that removes access to naturally endowed rights. In this sense, legal rights have a propensity to exacerbate the very environment in which they were created to eliminate.

The legitimisation for the exclusion from legal rights is justified with legal reasoning. Legal rights created by States should be established through reasoning which appeals to the foundations of codified law which are the principles of natural justice found in the UDHR and subsequent instruments. The prominence of legal rights both nationally and internationally, privileging the idea that legal rights are valid rights.⁴⁶ Legal rights are fixed and based in reason, this pre-supposedly rational nature of rights privileges statutory rights as the paramount. Bentham wrote extensively about the prominence of legal rights suggesting that natural rights are “nonsense upon stilts” stating that there are no rights without the law.⁴⁷ This interpretation of rights can create a dissociation of the interrelationship between law and morality removing legal rights from their foundations. Under this principle the legal determination of rights can oust moral considerations. A cognitive dissonance between law and morality means that the interpretation of an act and the resulting suffering can be condoned once it is legal. The exclusion from rights is therefore accepted as valid as law is the only legitimate form of rights. The formation of legal rights without adherence to natural law is illegitimate per Thomas Aquinas. The philosopher condemned strictly posited law as it is without morality, the considerations between good and evil. Even when moral considerations are made legal rights are

⁴⁶ Hart, H.L.A. (1973), *Bentham on Legal Rights*, in *Oxford Essays on Jurisprudence*, Second Series, edited by Simpson, A.W.B, Oxford University Press, p171-201

⁴⁷ Bentham, J. (1843), *Anarchical fallacies: Being an Examination of the Declarations of Rights issued during the French Revolution*, in *The Works of Jeremy Bentham*, Bowring, J, William Tate: London

a manmade construct, therefore the conceptual analysis of legal rights requires the scrutinization of the underlying preferences. Legal rights are formed upon pre-existing belief systems; the innate hierarchies extrapolate in the rights that are created and this is intentional to maintain the status quo. The legal rights makers benefit from the preexisting power position of which they are a part of, the codification of rights is used to legitimise the system. Posited legal rights reflect the legal regime with rights established in the preference of the rights makers. Those with the privilege of inclusion in the rights framework can be wilfully ignorant to the immorality of a practice as reliance is placed upon legitimacy. This intentional misrepresentation of the law is then more likely when there is a beneficial self-interest. Humanity can therefore be contorted using law to legitimise cruel practice. Devaluation, discrimination and exclusion are the methods to ensure the continuation of these practices upon which legal rights are framed.

In the alternative, the lack of legal codified rights can illustrate the divergence between law and morals. Whilst morals are subjective and can be distorted to reflect self interests, widely held morals and beliefs should be codified into law in order to establish minimum legal standards. The inclusion of nonhuman animals in anti-cruelty and welfare law, establishes their legal status as potential bearers of harm. This legislation is present amongst the majority of member states. Whilst there is no international law setting the minimum standards, the existence of nonhuman animal legal protection across the world could be argued to create a customary moral minimum standard. If there is international consensus that nonhuman animals have dignity and should therefore be treated with respect (as evidenced internationally in the EU Directives as well as being present in the legislation of the majority of individual member States) then it ought to be codified universally on an international basis. This codification would provide a platform for further development in rights law regarding controversial human animal practices such as factory farming and nonhuman animal experimentation as it would establish a basis of rights for nonhuman animals and a limitation of rights for human animals.

3.2 Anti-Cruelty Rights

Many scholars⁴⁸ argue that nonhuman animal sentience is adequately considered and this therefore does not denote the attribute of legal rights. The enactment of anti-cruelty legislation at the end of the eighteenth century recognised the necessity to restrain the absolute rights of human animals. Anti-cruelty laws do not endow legal rights for nonhuman animals, rather they restrict human animal rights over the nonhuman animal's lives. The utilitarian notion of rights for nonhuman animals provides protection but not in their interest, in human animal interest. The interests of the nonhuman animals are considered as the regulation of human animal behaviour. The movement to prevent cruelty to nonhuman animals is for the protection of human animals as to prevent violence that could overspill into human animals.⁴⁹ A study by the Humane Society of

⁴⁸ Degenhardt, B. (2005), *Statistical Summary of Offenders Charged with Crimes against Companion Animals*, Report from the Chicago Police Department. Found at http://www.humanesociety.org/issues/abuse_neglect/qa/cruelty_violence_connection_faq.html

⁴⁹ Locke, J (1690), *Essay on Human Understanding*, Chapter 9, p29

the United States found that 65% of persons arrested for nonhuman animal abuse crimes have been previously arrested for crimes against human animals. The interrelationship between law and morality is present in the vilification of cruelty. Cruelty can be described as inhuman treatment; acts of cruelty would therefore be contrary to natural law principles upon which international rights law is founded. Under international law cruelty is condemned. It is a fundamental customary norm to prevent the intentional pain to others. Several international treaties codify absolute prohibitions on cruel behavior. Article 5 UDHR and article 7 ICCPR provide that no one shall be subjected to torture or to cruel, inhuman or degrading treatment. Article 3 of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment⁵⁰ states that no State shall permit or tolerate torture of any other cruel, inhuman or degrading treatment. The intent of international law is to discourage the use of cruelty completely. This protection extends to nonhuman animals as an indirect duty for human animals.⁵¹ Almost every State has some form of anti-cruelty legislation signifying the legal importance of preventing this immoral practice. The aim of such protection over nonhuman animals is to prevent cruel behaviours of human animals as well as to protect the society that can be harmed when they view these acts of cruelty. The restriction of private acts of cruelty evidences that cruelty is intolerable as a behaviour and additionally it is an indirect legal recognition of animal suffering. Legislative restrictions seek to limit this suffering and in doing so recognises the legal right to not suffer.

The legal system disproportionately attributes legal protections to nonhuman animals. The legal privileges are afforded only the nonhuman animals that are regarded as valuable in the human animal perspective, irrespective of the capacity to suffer. For nonhuman animals that are close to human animals such as companion animals, these nonhuman animals are deemed valuable in a humanist perspective. Therefore, nonhuman companion animals receive greater protections of their rights to life in many States. France amended their Civil Code concerning companion animals redefining their legal status from mere property to that of living, sentient beings. The amendments will ensure that the nonhuman animals will receive greater protections of their rights in the form of welfare rights. Less privileged nonhuman animals continue to hold the property status upon which only anti-cruelty legislation which interest lies in the well-being of the human animal will regulate the treatment. Legislation for nonhumans prevents cruelty in its absolute form, classifying such acts as torture. For nonhuman animal's cruelty has an unorthodox interpretation which prevents only *unjustified* cruelty. This interpretation of the limitation of cruelty within the law permit the continued exploitation of nonhuman animals. Certain cruel acts are accepted as legitimate as the ends justify the means. The ends are human animal benefits and the means are cruelty against animals deemed inferior. Anti-cruelty laws prohibit *purposeless* conduct against nonhuman animals with the law resistant to restrict pain which is "incidental and unavoidable" in connection to this purpose.⁵² Public support for protection from cruelty is overwhelming however there is wide public acceptance of cruel

⁵⁰ adopted by the General Assembly on 9 December 1975

⁵¹ Regan, T. (2001). *Defending Animal Rights*, University of Illinois Press, p4

⁵² Schmahmann and Lori J. Polacheck, (1995), *The Case Against Rights for Animals*, 22 British Columbia Environmental. Affairs Law Review 747, p762

practices such as factory farming and vivisection as these practices serve a purpose.⁵³ It is socially acceptable to protect unless there is a good reason not to. Cary Wolfe writes that any action can be legitimised as having a purpose when the discourse is maintained by those with the power to shape it in their self-interests.⁵⁴ The combination of a degraded status of a sentient being as well as self-interest from a powerful group can contort the morality of the law to legitimise a cruel purpose.

Ultimately anti-cruelty legislation extends only to human interest, the creation of welfare legislation for nonhuman animal protection extends law further to the consideration of the interest of the nonhuman animal. The enactment of legislation beyond human animal interest evidences the legally necessity of both recognizing and protecting the inherent worth of nonhuman animals. The commonality of suffering in animals both human and nonhuman is the crucial issue for legal ethics.⁵⁵ Anti-cruelty legislation and welfare legislation illustrate human animal acceptance of the enforcement of moral rights for nonhuman animals.⁵⁶ Welfare legislation seeks to balance human animal interests and nonhuman animal interests to provide the greatest sense of legal justice. The development of expanded legal rights for nonhuman animals in the form of welfare rights therefore dictate that anti-cruelty legislation does not purport morally justifiable ends for sentient beings.

3.3 Welfare Rights

Cruelty can be legitimised in the law, if the ill-treatment has a purpose. All practices that inflict “unnecessary” pain on sentient beings are not compatible with humanity. The reduction of suffering is promoted when interests between nonhuman animals and human animals collide. Welfare initiatives provide a recourse to minimise the suffering in non-human animals. This “humane” treatment thereby recognises the inherent sentience of non-human animals. The sentience of non-human animals is protected by the application of legal limitations upon their suffering. Welfare legislation permits non-human suffering when it is in human interest. The Council of Europe created several nonhuman animal welfare treaties regulating the treatment of nonhuman animals. The *European Convention for the Protection of Pet Animals*⁵⁷ prohibits “unnecessary pain, suffering or distress” against nonhuman animals. This legislation is problematic as firstly it only protects a certain group of *valuable* nonhuman animals, that warrant this privileged status due to their closeness to human animal relationships. Secondly, this treaty permits the *necessary* cruelty to nonhuman animals. The regulation of harm in law is provided

⁵³ Lovvorn, J. (2006), *Animal Law in Action: The Law, Public Perception, and the Limits of Animal Rights Theory as a Basis for Legal Reform*, 12 *Animal Law* 133, p138

⁵⁴ Wolfe, C. (2003), *Animal Rites: American Culture, the Discourse of Species, and Posthumanist Theory*, University of Chicago Press, p8

⁵⁵ Nussbaum, M.C (2000), *Animal Rights: The Need for a Theoretical Basis* review of Wise, S.M, *Rattling the Cage: Toward Legal Rights for Animals*, Cambridge, Massachusetts: Perseus Books, p1525

⁵⁶ Anderson, E. (2004), *Animal Rights and the Values of Nonhuman Life*, in Sunstein, C. and Nussbaum, M. *Animal Rights: Current Debates, New Directions*, Oxford University Press, p57

⁵⁷ 1987, No.125

by welfare legislation that limits suffering. Welfare legislation aims to improve the conditions of cruelty without affecting the legal status of the nonhuman animal as property. This legal protection is insufficient to protect the sentience of the subject as the economic self-interest of the benefactor trumps the protection of inherent dignity.⁵⁸

The intensive factory farming of nonhuman animals illustrates the indifference to nonhuman animal suffering.⁵⁹ Factory farming is a massive-scale wanton cruelty built for maximum profit with widespread public acceptance. The suffering of nonhuman animals for food is equal to if not more harmful than morally abhorrent practices that have been prohibited such as hunting. The innate cruelty in the treatment of using nonhuman animals for food involves acts that would be construed as torture if they were applied against human animals. Legally acceptable suffering is justified if it fits into the dominant cultural or economic norms.⁶⁰ When the law focuses on reducing the suffering and not ending the suffering, the rights of those suffering are not adequately considered. Welfare legislation is morally objectionable as it causes unjustifiable harm. Once the legitimacy of a harmful practice is accepted, every necessary justification is brought forward to facilitate the exploitation.⁶¹ Welfare regulations ensure that even if excruciating pain results from such practices it falls outside the scope of anti-cruelty legislation. Therefore, there are limits to the welfare paradigm in the protections that can be provided.⁶² The protections are inadequate to protect sentient beings from suffering, from a rights perspective welfare laws provide a legal legitimacy to the violation of rights. The consignment to the category of a legal thing enables this removal of the subjective consideration of nonhuman animals. The dissent in the Canadian case of *Reece*⁶³ highlights the species hierarchy that privileges human animal subjectivities and interests at the expense of nonhuman interests.⁶⁴ This case resulted in a ruling which adhered to welfare practices even though unjustifiable harm was clearly apparent. From this verdict, the appropriate consideration of a sentient being's suffering cannot be made if the subject has a property status as a ruling would be in the interest of the property owner and not the subject of harm itself. The use of nonhuman animals in their imprisonment, enslavement and killing is morally unjustifiable no matter how humane the steps to these ends are. The legal justifications frame these acts outside of the rights discourse, excluding nonhuman animals from moral consideration. The exclusion maintains the status quo of systematic violence and oppression over nonhuman animals. This exclusion is created in human interest therefore denying adequate consideration of animal interest. The denial of nonhuman animal interest is justified as nonhuman animals have property status which does not warrant moral consideration.

⁵⁸ Regan, T. (2005), *Empty cages: Facing the challenge of animal rights*. Rowman & Littlefield, p40

⁵⁹ Williams, N. M. (2008). *Affected ignorance and animal suffering: Why our failure to debate factory farming puts us at moral risk*, *Journal of Agricultural and Environmental Ethics*, Vol.21, No.4, 371-384.

⁶⁰ Deckha, M. (2013), *Initiating a Non-Anthropocentric Jurisprudence: The Rule of Law and Animal Vulnerability under a Property Paradigm*. *Alberta Law Review*, Vol.50, Article 4, p785

⁶¹ Francione, G. (2000), *Introduction to Animal Rights*, Temple University Press, p59

⁶² *Reece v. Edmonton (City of)*. *Ethics* 241. 7 (2011) ABCA 238, 513 AR 199

⁶³ *Reece v. Edmonton (City of)*. *Ethics* 241. 7 (2011) ABCA 238, 513 AR 199

⁶⁴ Deckha, M. (2013). *Initiating a Non-Anthropocentric Jurisprudence: The Rule of Law and Animal Vulnerability under a Property Paradigm*. *Alberta Law Review*, Vol.50, Article 4, p784

Rights law acknowledges suffering as the basis for providing legal protection. For nonhuman animals, the suffering is addressed with welfare law. Welfare legislation fails to address the fundamental element. Welfare legislation focuses not on eliminating the wrong but rather managing the wrong.⁶⁵ A more humane fundamental wrong is at odds with international rights law such as the conventions regarding torture and racial discrimination which have an elimination rhetoric attached to the suffering concerned.⁶⁶ The refusal to protect against the suffering which is so central to international law is an intentional exclusion from rights protection. History in rights law with human animals shows that this exclusion is possible when the subject is not recognised as an end in itself.⁶⁷ The removal from moral consideration is for the self-interest of the powerful group which sets the parameters of consideration of rights law. Human animals remove nonhuman animals from consideration privileging their own interests. The removal of self-interest by treating nonhuman animals as an end in themselves is justice, it is a moral duty to consider the suffering outside of one's interest and for the betterment of the law.

4. Legal Conceptualisation of Rights

The legal basis of rights is problematic in terms of protection as the foundations of rights have no fixed meaning.⁶⁸ Rights are prescribed from principles of universal morality that have their basis in ethical concepts of humanity, altruism and justice. These notions as a source for legal interpretation have a meaning and scope that is subject to constant change depending on the priorities of those in power. Despite this, rights as a concept are innate and therefore fixed to the holder of the rights. The fragility of rights is connected only to the legal recognition and subsequent protection of the rights. As rights are transcendental there is a moral obligation to legally recognise and protect. The concept of rights would suggest that any deviance to the respect of rights is acting outside the scope of justice into the realm of self-interest.

4.1 Dignity and Inherent Value

Legal rights should be assigned in reflection of the protection of inherent dignity.⁶⁹ International human rights law has been characterized by the evolution of the expanded protection of dignity in international legal instruments in the pursuit of justice.⁷⁰ In its conception, the UDHR laid the foundation stating that “inherent dignity...is the foundation of freedom, justice and peace in the

⁶⁵ Regan, T. (1986). A Case for Animal Rights, in Fox M.W. and Mickley L.D. *Advances in Animal Welfare Science* (1986/87), Martinus Nijhoff Publications, Boston p179

⁶⁶ International Convention on the Elimination of All Forms of Racial Discrimination 1963

⁶⁷ Donovan, J. (1990), *Animal Rights and Feminist Theory*, Signs, Vol. 15, No. 2, p345

⁶⁸ Douzinas, C. (2012), *The paradoxes of human rights*, Constellations 20, Vol.1

⁶⁹ Griffin, J. (2010), *Human Rights and the autonomy of International Law*, Besson, S., and Tasioulas, J. *The Philosophy of International Law*. Oxford University Press, p341-342.

⁷⁰ Optional Protocol to International Covenant on Economic, Social and Cultural Rights, Preamble: “Considering that...recognition of the inherent dignity... is the foundation of...justice” (10th December 2008)

world”. Further the UN Charter entrenched in the preamble the principles of “dignity and worth” as the basis for the establishment of “conditions under which justice and respect” are maintained. Subsequent legal instruments have used the concept of inalienable dignity as a basis of the legal rights protection that is afforded.⁷¹ The international legal instruments signify that dignity and the inalienability of rights are amalgamated concepts in which rights can be interpreted to be apparent based on dignity. Legal personhood is formed on the notion of dignity on the presumption that all persons have dignity. From this basis, it could be forwarded that all those with dignity are persons, providing the possibility for nonhuman animals to be recognized as legal persons. The idea of dignity as being the central foundation of rights implores the notion that rights are not exclusively human. Legal protections afforded to nonhuman animals have been afforded based on primarily the *treatment* with dignity.⁷² This regulates the behavior of human animals to restrict their own rights in order for them to live a dignified existence.

Dignity in the nonhuman animal has been explicitly recognized in several jurisdictions on account of the sentience of the nonhuman animal life.⁷³ The Constitution of India⁷⁴ secures the right to life for persons, in which the species of the person is not proclaimed. Recent case law recognized that nonhuman animal life fell within the Article. In addition to this the constitution of Germany amended their constitution in 2002 to recognize the nonhuman animals and to provide constitutional protections of that inherent dignity. The constitution in Switzerland similarly recognizes and protects the inherent dignity of nonhuman animals. The right of nonhuman animals to live with dignity has been interpreted in case law in several jurisdictions around the world. The *Jalikattu*⁷⁵ case in India recognized five fundamental rights of nonhuman animals in which the right to live in dignity was the basis of these freedoms.⁷⁶ The judgment found that “All living creatures have inherent dignity and a right to live peacefully...which encompasses protection from ...tortures, pain and suffering etc”.⁷⁷ The court reflected upon national and international views of dignity concluding that “every species has an inherent right to live and shall be protected by law”,⁷⁸ The court recognized the constitutional rights of nonhuman animals “in order to secure their honour and dignity”⁷⁹ elevating the protection of nonhuman animals from that of statutory protection to constitutional protection. The court exclaimed that nonhuman animal dignity is guaranteed under the constitutional provisions that are “the magna

⁷¹ IICPR Preamble: “Liberty, Justice and World peace have as foundation the recognition of the inherent dignity”, ICESCR Preamble: “in accordance with the principles...of the inherent dignity and of the equal and inalienable right”, CAT Preamble: “Recognizing that those rights derive from the inherent dignity of the human person...”

⁷² Article 51A(g) in The Constitution of India 1949: “to have compassion for living creatures

⁷³ Article 120: Gene Technology in the Non-Human Field, Swiss Federal Constitution, Constitution of India 1949: Article 21: “no person shall be deprived of his life...”

⁷⁴ 1949

⁷⁵ *Animal Welfare Board of India vs A. Nagaraja & Ors* on 7 May, 2014

⁷⁶ “Five Freedoms” adopted by the World Organisation for Animal Health 1965

⁷⁷ Para 32 *Animal Welfare Board of India vs A. Nagaraja & Ors* on 7 May, 2014

⁷⁸ Para 51 *Animal Welfare Board of India vs A. Nagaraja & Ors* on 7 May, 2014

⁷⁹ Para 56 *Animal Welfare Board of India vs A. Nagaraja & Ors* on 7 May, 2014

carta of animal rights”.⁸⁰ The court recognized a fundamental right to life for nonhuman animals under the constitution in regard to their dignity, the judge stated the “right to dignity and fair treatment is, therefore, not confined to human beings alone, but to animals as well”.⁸¹

The court submitted that the protection of nonhuman animal dignity was a movement that was present in the legislature of many other States in the world. The recognition of innate dignity forms the basis of legal protections. It can be contended on this basis, that if dignity is the prerequisite for rights and personhood status then the lack of protection of that dignity is an arbitrary deprivation of rights. Salt argues that “if a man has rights then animals undoubtedly have rights”.⁸² If it is a universal concept that dignity attracts rights then the law should be used as a mechanism to ensure such protection. The dignity of human animals is protected on this notion under the UDHR and its subsequent legal provisions, yet nonhuman animals are not afforded these rights on an international basis as their dignity is not recognized. Even in the States in which dignity of the nonhuman animal is enshrined in the constitution, practices that are the antithesis of dignity, that are prohibited against *human dignity* continue to be perpetrated against nonhuman animals.⁸³ Nonhuman animals are placed outside of the scope of the law as they do not receive the benefit of its protection. It is evident that those with recognized dignity should have rights, yet nonhuman animals are excluded from that right through the means of posited law. History illustrates the battle for the recognition of human dignity, in which I will further explore the legal exclusion of human animals in the remainder of this thesis. I propose that the law should remove the barriers around rights that are set around species membership to fulfil the protection of dignity which is at the heart of humanity and international law.

4.2 Innate vs. Created Rights

Legal rights are derivative of moral rights which are *universal*, *equal* and *inalienable* because the inherent dignity and conscience in rightsholders as well as the desire to promote an existence on the foundation of freedom, justice and peace.⁸⁴ International law dictates the minimum standards of treatment of others that are within the ideals of a human moral framework. Rights are distributed to maintain the basic ideological threshold and to curtail behaviour that runs contrary to it. In practice exclusion from rights is possible as legal rights are suppressed through their manufacturing along the lines of chauvinism.⁸⁵ The creation of specific supplementary international legislation such as *Convention on the Elimination of all forms of Discrimination*

⁸⁰ “charter for animal rights” in correspondence with Article 51A(g) and(h) in The Constitution Of India 1949

⁸¹ Para 62 *Animal Welfare Board Of India vs A. Nagaraja & Ors* on 7 May, 2014

⁸² Salt, H. (1894), *Animals’ Rights: Considered in Relation to Social Progress*, New York: Macmillan & Co, p46

⁸³ For example enslavement, torture and killing for human animal use in the meat industry, scientific industry and the entertainment industry

⁸⁴ Universal Declaration of Human Rights 1948

⁸⁵ Ash, K (2005) *International Animal Rights: Speciesism and Exclusionary Human Dignity*, Animal Law Vol.11, p195-213.

*Against Women*⁸⁶ denotes the ability of exclusion in the law and the necessity for additional protections to ensure inclusion along the lines of universality of rights. The evolution of legal doctrine has evidenced that exclusion from the rights framework is possible due to the imbalance of power in international relations. The parameters of inclusion and exclusion are dictated by the framing of rights as being dependent on legal reasoning. Legal rights on this basis are assigned rather than being internal. The hierarchical nature of legal reason results in the stripping of innate rights within the legal framework.⁸⁷

4.3 The Legal Protection of Moral Rights

Rights act as a vehicle for justice in international law. A right serves as the defence of a subject's interest, to which the subject is entitled to in law. A legal right is a recognition of innate natural rights and protection of that right in the form of a mechanism to avoid interference with that right. The UDHR minimum standards for the recognition of rights acknowledges that rights are both intrinsic and the protection is necessary for peace and justice. The UDHR promotes altruistic acts "in the spirit of brotherhood"⁸⁸ to recognise rights and therefore minimise suffering.⁸⁹ The obligation of States to act within the rights framework sets humanity as both an end itself⁹⁰ as well as being the goal for international relations. The idea of humanity as the necessity of the avoidance of creating harm and suffering especially on those more vulnerable was outlined by the metaphysician Locke in his essay "Thoughts on Education". He stated that we should aim to have virtuous traits instilling compassion and humanity for all lives. The protection of rights as a moral venture is instilled in international law in the condemnation of practices that are so fundamentally contrary to the very thread of human existence. Practices such as torture and slavery are acts that are considered the antithesis of natural justice therefore the protection from these practices form customs in international law. It is the *opinio juris* that certain acts should be prohibited and certain fundamental rights are to be protected. These prohibitions are *jus cogens* norms that form overriding principles of international law. The prohibition of these practices is considered a peremptory norm as they cause insurmountable suffering, promoting values that are contrary to justice. The prohibition of practices creates moral rights of non-distinction and non-interference to uphold these values and moral obligations to prevent these practices. The notions of non-distinction and non-interference signify that rights are inherent as suffering is a consequence. The philosopher Jeremy Bentham's ideas pertaining to the limitation of suffering recognises and legitimises the inherent rights in the "subjects of a life"⁹¹. The utilitarian philosopher Peter Singer, like Bentham, considers the capacity to suffer as

⁸⁶ Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) 1979

⁸⁷ Koskeniemi, M. (1997), *Hierarchy in International Law: A Sketch*, 8 EUR. Journal International Law, p566

⁸⁸ Article 1 UDHR

⁸⁹ Korsgaard, C.M (2013), *Kantian Ethics, Animals, and the Law*, Oxford Journal of Legal Studies, Volume 1, p632

⁹⁰ Korsgaard, C.M (2013), *Kantian Ethics, Animals, and the Law*, Oxford Journal of Legal Studies, Volume 1, p632

⁹¹ Regan, T (1985), *The Case for Animal Rights*, Berkeley, CA: University of California Press

a vital characteristic for the allocation of rights.⁹² The consideration of suffering attracts moral protections and moral scrutiny as to how rights should be balanced.⁹³ His theory is simply that pain and suffering is bad therefore it should be minimised. Using this approach all beings that suffer are taken into consideration.

Legal rights ensure the ethical consideration of another's suffering as they place a legal obligation as opposed to a moral obligation to protect that right through non-interference. Without the conferral of a duty to the rightholder respect of rights and the limitation of suffering could not be guaranteed.⁹⁴ Without a legal obligation there would be less incentive to respect rights as the minimisation of suffering would be dependent on your own conscience and can be easily displaced if it is not in your self-interest.⁹⁵ Legal rights legitimise moral rights and as they obligate us to act morally.⁹⁶ The development of a legal framework for the purpose of protecting rights from interference is substantiated through the regulation of State. The State guarantees rights protection through its adherence to the obligation to avoid interference of rights and by fulfilling the positive duty to act to protect those that are vulnerable to an interference of their rights. Without a legal system that guarantees rights, relationships with one another would be characterised by the unilateral domination of the powerful over the weak.⁹⁷ In international relations the State provides a form of coercion acting on behalf of the interests of others to ensure true fulfilment of rights in an unequal society.⁹⁸ The UDHR and other sources of international rights law act as a barrier of protection from the fundamental power imbalance in international relations.⁹⁹ The creation of law to protect rights is a mechanism in an environment of "tyranny and oppression".¹⁰⁰ International law limits the power in the international sphere by defining the limits of the sovereignty of the State and holding the State accountable.¹⁰¹ The State becomes a moral agent owing a duty outside the State interests and instead in the interests of the moral patient through this sanctioned limitation of harm.

⁹² Singer, P (1989), *All animals are equal*, in *Animal Rights and Human Obligations*, Regan, T. and Singer, P. eds, Englewood Cliffs: Prentice Hall

⁹³ Gruen, L (2003), *The moral status of animals*, in: Zalta E (ed) Stanford encyclopedia of philosophy. <http://plato.stanford.edu/entries/moral-animal/> Accessed 12 May 2017

⁹⁴ Ash, K (2005) *International Animal Rights: Speciesism and Exclusionary Human Dignity*, Animal Law Vol.11, p195-213.

⁹⁵ Mill, J. S (1869), *On Liberty*, London; Longman, Roberts and Green Co. 4th Edition

⁹⁶ Korsgaard, C (2012) *A Kantian Case for Animal Rights*, in Hanni, J, Michel, M, and Kuhne, D, *Animal Law: Tier und Recht*, Zurich, Dike Verlag, p18

⁹⁷ Korsgaard, C (2012) *A Kantian Case for Animal Rights*, in Hanni, J, Michel, M, and Kuhne, D, *Animal Law: Tier und Recht*, Zurich, Dike Verlag, p18

⁹⁸ Mill, J. S (1869), *On Liberty*, London; Longman, Roberts and Green Co. 4th Edition, Chapter 1

⁹⁹ Peters, A (2016), *Liberté, Égalité, Animalité: Human-Animal Comparisons in Law, Transnational Environmental Law*, Cambridge University Press, p9

¹⁰⁰ Preamble, Universal Declaration of Human Rights 1948

¹⁰¹ Cavalieri, P (2001), *The Animal Question: Why Non-Human Animals Deserve Human Rights*, tr. Catherine Woolard, Oxford University Press, p130

III. LEGAL EXCLUSION FROM RIGHTS LAW

Legal rights concern the classification, differentiation and the resulting separation of groups within the law. Codified fundamental legal rights stem from the attributes of one group that is collectively identified as having inherent natural rights that necessitate legal protection.¹⁰² The legal recognition of one group as rightsholders sets a standard defining the attributes necessary to be established for rights to be protected. Different characteristics perpetuate the separation between us and them. A separation removes the being from the realm of rights, to outside the framework of law. For example, slavery was justified through legal and other representations of Africans as a “separate species”¹⁰³. The commodification of beings with natural rights is enabled when a living being is separate to that of a person with rights. The slave therefore deserves unequal treatment as there is nothing in common with the two parties. This exclusion from the moral community with the classification of a non-person.¹⁰⁴

The legal reasoning for the classification of being unable to hold rights or unworthy of having rights is based upon the assumption of superiority. No legal consideration is given to those which do not have the attributes of the group chosen to be in the natural possession of rights. The legal status of property for living beings establishes a hierarchy between beings and maintains the hierarchy as equal consideration of interests will not be taken resulting in the violation of rights that are not established in law. Legislatures are unable to adequately impose constraints upon the usage of those without legal rights, resulting in domination and exploitation. This conundrum highlights the importance of being both a moral and a legal person for the formulation of rights. The legal classification of property results in the removal of rights for living beings as it ensures that their interests are subordinated. The lives of living property become secondary, as does the consideration of their lives. The interests are instead interpreted through the lens of the property owner. Property law confers rights and duties of a person over the object, recognising the inherent worth of the subject but only through the lens of the owner. This creates a protective custody.¹⁰⁵ Legal rights can extend to the notion of cruelty and inhumane treatment in their usage. The protection regulates the actions of owners over their property. The protection of property extends to the perceived usefulness to human interest.¹⁰⁶ The interest of the right holder over their lives is protected, yet the interests of property are

¹⁰² Preamble, *African Charter on Human and Peoples Rights* 1986

¹⁰³ Deckha, M (2012), *Toward a Postcolonial, Posthumanist Feminist Theory: Centralizing Race and Culture in Feminist Work on Nonhuman Animals*, Special Issue: *Animal Others*, *Hypatia* Vol.27, No.3, p539

¹⁰⁴ Francione G (2010), *Animal Welfare and the Moral Value of Nonhuman Animals*, *Law Cult Humanit* Vol.6, No.1, p26

¹⁰⁵ Bilchitz, D. (2009) *Moving Beyond Arbitrariness: The Legal Personhood and Dignity of Non-human Animals*, *South African Journal on Human Rights*, Vol.25, No.1, p38-72.

¹⁰⁶ Satz, A.B, (2009), *Animals as Vulnerable Subjects: Beyond Interest–Convergence, Hierarchy, and Property*, 16 *Animal Law*, Vol. 65

outweighed by the rightholders.¹⁰⁷ Suffering is permitted as those classes as property, be it slaves or non-human animals, as their suffering is outweighed by the self-interests of rightholders.¹⁰⁸ Law becomes a tool of self-interest in which those with legal rights have the power to be able to exclude and deny rights in order to permit a practice of exploitation.

Rights are attributed on a legal basis to those with the requisite qualities to attract such a level of protection. Legal rights implore the notions of moral rights in that they should be a non-exclusive attribute based upon vague notions of inherent worth and inalienable value from which a rightholder cannot be separated. This description of rights is problematic as it merely states that rights exist but the rights framework fails to establish why rights are attributed to those that have them. Law which is bound by fixed principles provides an ever-changing evolution of the concept of rights. Legal expansion of rights has mirrored social progression and the breakdown of the exclusivity of rights is a fundamental characteristic of rights attribution. Article one UDHR implores that as human animals are “endowed with reason and conscience” that they “should act towards one another in the spirit of brotherhood”. This motherhood statement asking for the peaceful relations of the human animal species has been interpreted as being a prerequisite for the rights that are then bestowed within the Declaration. Assessment of reason and consciousness have been used as a point of exclusion from the legal rights framework on this ground. Slavery of human animals was maintained on the falsity that they lacked the ability to reason, due to their difference in race which rendered them inferior.¹⁰⁹ Slaves were assessed based on their race as having function that only extended to what their master gave them, they were “living tools” that was lifeless and emotionally detached. This legal reasoning was permitted as it reflected social attitudes regarding the inherent value of beings classified as the other. The assessment was arbitrary ignoring the experience of a being with a life, reducing their experience by separating their commonalities with the dominant group of persons in which rights were held to be inherent. The consequent removal of rights permitted the unequal treatment of objectification and subjugation. Non-human animals have been classified as things that do not exhibit reason, therefore they are viewed not deserving of the level of consideration that rights attract. Non-human animals can attract protection, but this is a lower level of protection that is reflective of their worth as a life without reason. Focus is placed on the usage of non-human animals as what the philosopher Descartes described as “machines” reducing their experience to *malfunctioning*, therefore denying their experience.¹¹⁰ This theory classified non-human animals as things as opposed to persons. This classification created a fundamental difference in perception between non-human animals and human animals, a difference in which legal rights reflect. A motivation for these classifications is to enable the exploitation as if slaves cannot reason, they do not deserve rights and they can therefore be used as living tools. Legal reasoning becomes a methodology to assert the power structures over different groups legitimising their domination. The rights framework then acts as a tool of exclusion by the powerful for their own benefit.

¹⁰⁷ Francione, G. (1993), *Personhood, Property and Legal Competence*, in Cavalieri, P. and Singer, P. *The Great Ape Project*. New York: St. Martin's Griffin, p248–257.

¹⁰⁸ Singer, P. (1975), *Animal Liberation*. New York: Harper Collins

¹⁰⁹ Collard, A. (1987), *Freeing the animals*, Trivia, Vol10, p6-23

¹¹⁰ Harrison, P (1992), *Descartes on Animals*, The Philosophical Quarterly, Vol. 42, No. 167, p219-227

Legal rights are a product of the “naturally superior” intelligence and cognitive abilities of human animals. It is argued that legal rights are catered to those in which they were created to protect.¹¹¹ The interpretation of legal rights is to provide a level of protection upon which can be entered into as a contract. A certain level of intellect is necessary to ascertain that persons can be protected but only by society and only if they are part of that society. The social contract theory places an obligation upon the government to protect natural rights through legal mechanisms, however in order to attract this protection of rights one must accept societal responsibility.¹¹² The courts are hesitant to interpret legal rights as anything less than that that is contractual. Non-human animals are not privy to rights as “unlike humans, they cannot submit to societal responsibilities or be held legally accountable for their actions”.¹¹³ The emphasis on the Rawlsian contractual theory of justice in which the attribution of rights are based upon the reciprocal notion of acts. It is a prerequisite that something must be done to merit the possession, otherwise the possession is morally arbitrary.¹¹⁴ In this sense, “rights are not free” instead they come at the cost of responsibility.¹¹⁵ The inclusion of non-human animals in the legal system would then be incompatible if they cannot uphold the foundation of legal rights. The incompatibility with the legal framework however should not negate the right to protection. An example is with children; they do not have the ability to engage in the legal process yet it would seem unjust if they were to be stripped of their rights and protections on this basis.

1. Discrimination

1.1 The Exclusionary Nature of Human Rights Law

In order for legal concepts such as legal rights to be legitimately recognised as law must be legally justified. Legal justice and moral justice do not have to be unified but rights law does have to correlate with a sense of moral justice to be in line with the international justice ideology of the rights discourse. Legalism perpetuates the disenfranchisement of rights for those with subordinate powers. The legal institutions can formulate the criteria for which rights are protected and this is interpreted by the legislature to reflect the dominant views in society. Slavery, which still exists in some forms today, was legal under the United States of America

¹¹¹ Posner, R. (2004), *Animal Rights: Legal, Philosophical, and Pragmatic Perspectives*, in Sunstein, C. and Nussbaum, M. *Animal Rights: Current Debates, New Directions*, Oxford University Press, p57

¹¹² Cup, R.L (2013), *Children, Chimps, and Rights: Arguments from 'Marginal' cases*, Arizona State Law Journal, Vol.45 No.1, p13

¹¹³ Judge Karen K Peters, presiding judge Appellate Division of the New York State Supreme Court in the case of “Tommy’s case” Nonhuman Rights Project v Lavery No. 518366 New York Application, December 4, 2014

¹¹⁴ Vickery, T. (2013), *Where the Wild Things Are (Or Should Be): Rawls' Contractarian Theory of Justice and Non-Human Animal Rights*, Macquarie Law Journal, Volume 11, No.23

¹¹⁵ Cup, R.L (2007), *A Dubious Grail: Seeking Tort Law Expansion and Limited Legal Personhood as Stepping Stones Toward Abolishing Animals' Property Status*, Texas: Southern Methodist University Law Review 60

Constitution despite there being a Bill of Rights guaranteeing the enjoyment of liberty.¹¹⁶ Legal interpretation of the Fifth Amendment clause guaranteeing rights was not applicable to slaves on the basis that they were not persons but property.¹¹⁷ This devaluing of life is the exercise of dominion of one group over another. It concerns the lack of coherence with natural rights principles in which those with their own lives are demoted to the category of things as opposed to persons.¹¹⁸ The exclusion from legal rights mirrors the societal hierarchies that exist at the time of the legal formation of the rights. The hierarchy is then constantly reproduced through the denial of rights protection. The first peoples of Australia were viewed as being inferior to the European settler during the colonisation of Australia. When the Constitution was drafted, indigenous Australians were excluded from representation on this discriminatory basis of difference and their lack of rights recognition and exclusion is evident in the unequal distribution of rights protection. Indigenous Australians were denied basic rights on the basis that they were not classified as citizens thus denying them the ability to have rights attributed to them.¹¹⁹

1.2 Speciesism

The deprivation of moral consideration afforded to nonhuman animals is justified on the notion that differences equate to different rights. Rights law has a history of preference for sameness and exclusion based upon difference. International instruments¹²⁰ denote that exclusion from rights based on difference alone is an arbitrary exclusion if the difference is irrelevant. The exclusion on the grounds of an irrelevant difference is a discrimination, an intentional mechanism to deny. Richard D Ryder defined the moral discrimination of nonhuman animals with the term *speciesism*. Speciesism is the deprivation of moral consideration on the grounds of species.¹²¹ Speciesism parallels with other forms of discrimination such as racism and sexism that represent a biased behavior or prejudice in favor of interests of the members of our own group against the interests of the members of others. Ryder questioned the idea that if all animals (both nonhuman and human) are on the same physical continuum, in that they avoid pain, then they should also be on the same moral continuum.¹²² The human animal experience of feeling pain and having protections to prevent that pain was the basis of ethical protections that are the foundation for rights. If as Ryder suggests, nonhuman animals have the experience of suffering then they should then also qualify for protections. To deny the recognition for protection and mechanism to prevent suffering would be done based on difference alone. The difference being

¹¹⁶ "No person shall... be deprived of life, liberty, or property, without due process of law": Fifth Amendment United States of America Constitution

¹¹⁷ *Dred Scott v Sandford* 60 United States 393(1856)

¹¹⁸ Bilchitz, D. (2009) *Moving Beyond Arbitrariness: The Legal Personhood and Dignity of Non-human Animals*, South African Journal on Human Rights, Vol.25, No.1, p38-72.

¹¹⁹ See *Commonwealth of Australia Constitution Act* 1900

¹²⁰ Universal Declaration Human Rights 1948

¹²¹ Ryder, R.D. (1989), *Animal Revolution: Changing Attitudes Toward Speciesism*, Second Edition, Berg, 2000

¹²² Ryder, R.D. (1975), *Victims of Science: The Use of Animals in Research*, Davis-Poynter

the non-conformance to the specie, the rights are denied as the subject does not belong to the specie group. This exclusion is considered a ground of discrimination as specie is a morally irrelevant characteristic on par with race or gender.¹²³ When the exclusion from the recognition of legal rights to provide adequate legal protection is based on non-membership to the human animal group, it is determined to be speciesism as it is a narrow interpretation of rights applicability with no relevant ground for disqualification. This form of categorisation and disentanglement identifies subjects “by a single trait and then denies them protection across the board”¹²⁴ which can only be classified as a form of discrimination.

Nonhuman animals are classified as sentient beings; the law does not protect this sentience as the law does not qualify nonhuman animals as worthy of moral consideration. Legal reasoning does not rest upon scientifically backed rationale but instead upon traditional hierarchical notions that distinguish human animals and nonhuman animals as separate types of status holders. Speciesism is the assumption that human animals are superior creating an arbitrary distinction between human animals and nonhuman animals that provides the legal possibility for an environment of exploitation.¹²⁵ Despite the growing number of scientific advancements refuting the concept of nonhuman inferiority, the suffering of nonhuman animals intensifies each year. Currently billions of nonhuman animals are intensively used for human animal purposes, despite the morality of the practices the law considers them legal. Human interest is the determining factor for the legal status of nonhuman animals and the subordination of nonhuman animals based on difference sustains this exploitation. Human animals as a powerful group can legitimately have a lack of restraint over the lives of vulnerable nonhuman animals due to the lack of adequate legal protection. The encroachment of rights of those considered inferior is a direct consequence of inadequate legal rights protection. An example of this is with the *Tuskegee Syphilis Study*¹²⁶ which was conducted using black males as a subject for the experiments. The unethical treatment of the patients in the experimentation violated the participants rights through the immoral practices. This case is infamous as a reminder of the overarching duties that human animals have to protect, rather than exploit the vulnerable. The lack of legal mechanisms recognising the inherent worth of the subjects perpetuated the societal perception that certain subjects are without rights, and therefore no moral duty is owed to them. Without the institution of enforceable rights a relationship of domination exists.¹²⁷ This presence of oppression is contradictory to international legal norms as consideration must go beyond self interest.¹²⁸

¹²³ Wolfe, C. (2009), *Human, All Too Human: "Animal Studies" and the Humanities*, PMLA: Journal of the Modern Language Association of America, Vol.124, No.2, p568

¹²⁴ *Romer v. Evans*, 517 U.S. 620 (1996) at 633

¹²⁵ Benton, T. (1984). *Marx on Humans and Animals*, in Sean Sayers & Peter Osborne, *Socialism, Feminism, and Philosophy: A Radical Philosophy Reader*, Routledge, Chapter 11, p258

¹²⁶ *Tuskegee Study of Untreated Syphilis in the Negro Male, 1932-1972*, conducted by the United States Public Health Service

¹²⁷ Korsgaard, C (2012) *A Kantian Case for Animal Rights*, in Hanni. J, Michel. M, and Kuhne. D, *Animal Law: Tier und Recht*, Zurich, Dike Verlag, p18

¹²⁸ Steinbock, B. (1978), *Speciesism and the Idea of Equality*, *Philosophy*, Vol.53, No. 204

2. Self-interest

International treaties define rights as universal and inherent, the legal transposition of these rights requires the interpretation of vague ideals into concrete obligations. This process implores the preferencing of criterion in which rights are already formulated (before the enactment of the UDHR) and subsequently creating exclusion based around these biases. In order to become a rightsholders one must have the privilege of holding the necessary attributes dictated by the lawmakers in order to attract protection of innate natural rights. Legal justification for exclusion generates barriers to rights which are often arbitrary yet legitimate as created by legal institutions. Legal rights are distinct from natural rights, yet their relationship is intertwined as in order for natural rights to be legitimate they must be legal and in order for them to be legitimate legal rights they must be based on natural rights. Legal rights must therefore be reflective of international universal rights law. A constant questioning of the artificial boundary of legal rights is necessary in order to deconstruct the normalisation of unnatural exclusions.¹²⁹ Even within the human animal criterion the history of rights for human animals is a history of extending rights to the disenfranchised.¹³⁰ The codification of universal legislation for human animals was intended to be truly inclusive yet legal systems continue to partake in the creation of legal parameters to rights and the devaluation of those outside of the constructed boundary. The exclusion of certain groups is the refusal of interests and this exclusion is an act of domination by the powerful over the weak.¹³¹ The legal system is a power structure that has the ability of establishing the qualifications for rights. This allocation of rights in the legal system is hierarchical creating relationships of inferiority and superiority.¹³² The human-centric approach provides an exclusionary set of rights protection that is based around a system created to serve the needs and interest of human animals.¹³³ The parameters created in order to fulfilment the eligibility of rights is a set of criteria that is in the interest of the group it involves. The current legal system is based on the assumption of human animal superiority upon which all non-humans fail to live up to and are excluded from the rights discourse. The legal assessments, justifications and reasonings for the refusal of non-human animal rights and exclusion from the rights discourse are based upon anthropomorphism. Human animals are the centre of law thus privileging the norm of a rights holder in which everybody must reach this standard. The fact that human animals overwhelmingly benefit from this exclusion of non-human animals in the sense that they can use animals, the ability to exclude maintains the structure of oppression.¹³⁴

¹²⁹ Deckha, M. (2015), *Postcolonial Feminism Liberal Feminism's (Humanist) 'Sister'?* In the book *feminisms of discontent: global contestations*, Barnes, A. Oxford University Press, p16

¹³⁰Posner, R. A. (2000). *Animal Rights*, reviewing Wise, S. M *Rattling the Cage*, Yale Law Review, No.527.p532

¹³¹ Donovan, J. (1990), *Animal Rights and Feminist Theory*, Signs, Vol. 15, No. 2, p350-375

¹³² Koskenniemi, M. (1997), *Hierarchy in International Law: A Sketch*, 8 EUR. Journal International Law

¹³³ Wise, S. (2000), *Rattling the Cage: Toward Legal Rights for Animals*, Cambridge, Perseus Books, p566

¹³⁴ Adams, C.J. (2006), *An Animal Manifesto Gender, Identity, and Vegan-Feminism in the Twenty-First Century*, Vol.12, No.1, p120–128

The power to create these parameters by the dominant group legitimises the entitlement to deprive for their own benefit.¹³⁵

The creation of a mechanism to protect rights could have arguably only concerned human animals as the interference of rights is done at the hands of non-human animals. The legal prohibitions and duties regarding rights was a human-animal system for human-animal protection from the actions of human-animals. The law is human.¹³⁶ Human rights are a human-animal reaction to a human-animal problem. As law is fundamentally human, rights become human. Law as a product of human animal actors is a tool for human animal issues and human animal interests. The human animal centred-ness of law can consequently create an environment in which the law entrenches the interests of humans animals over all others.¹³⁷ Examples of this notion is with the international legal protections provided to non-humans such as the *Convention on International Trade in Endangered Species of Wild Flora and Fauna*,¹³⁸ in which the law is from a human-interest narrative.¹³⁹ The ideology that places the human animal as the centre premeditates human animal interest as being the main objective. The human animal as the centre is a self-assigned position of power and privilege in the legal rights framework.¹⁴⁰ Human animals assert control in the determination the parameters of inclusion and exclusion for rights protection and therefore rights themselves.

Law reflects the socially constructed boundary through the imposition of the inclusion/exclusion dichotomy of rights law. Despite the codification of legal rights internationally in the UDHR there is not a continent that has not used the classification of rights to exclude and deny rights, even within the species for example with the genocides in Rwanda, the former Yugoslavia, Cambodia and Chile. These examples of gross violations of rights illustrate that law can be manufactured to exclude certain members of groups for a particular interest. Rights are founded in interests and the law is a balance of these interests. However, the weight of interests are structurally biased reflecting the societal power structures. A higher value of suffering is assigned to those with perceived “lower moral significance”. Historically, this has meant that many marginalized groups, for example women, children, non-whites and non-humans. It is undeniable that slaves suffered yet their suffering was acceptable as although they had the capability of suffering which should therefore be minimised, they had not had the same moral value attributed to them as there was for legal rightsholders. Scientific discovery can also serve to forward exclusionary agendas such as the interpretation of Darwinism as a hierarchy of evolution upon which the eugenics movement was based and upon which the subordination of

¹³⁵ Smith, W.J. (2010), *A Rat is a Pig is a Dog is a Boy: The human cost of the animal rights movement*, New York, NY: Encounter Books

¹³⁶ Deckha, M. (2013). *Initiating a Non-Anthropocentric Jurisprudence: The Rule of Law and Animal Vulnerability under a Property Paradigm*. Alberta Law Review, Vol.50, Article 4, p784

¹³⁷ Deckha, M. (2013). *Initiating a Non-Anthropocentric Jurisprudence: The Rule of Law and Animal Vulnerability under a Property Paradigm*. Alberta Law Review, Vol.50, Article 4, p783

¹³⁸ (CITES) 1975

¹³⁹ Otomo, Y. and Mussawir, E. (2013), *Law and the Question of the Animal: A Critical Jurisprudence*, Oxford: Routledge, p208

¹⁴⁰ Deckha, M. (2015), *Postcolonial Feminism Liberal Feminism's (Humanist) 'Sister'?* In the book *feminisms of discontent: global contestations*, ashleigh barnes, Oxford University Press, p4

non-humans lies.¹⁴¹ The “master mentality” is prominent in the belief systems that maintain the legitimacy for law and for this reason the law reproduces exclusionary rights allocations to maintain the system of oppression.¹⁴²

3. Property Status of Living Beings

Law divides the world into persons or things, those with the right to exercise power and those to which power can be exercised over. The distinction between these legal classifications is a hierarchy in which a person has rights and duties and a thing can be owned as property.¹⁴³ Living property in the form of beings classified as things reduces beings to an object that can be used for a purpose. Living beings can be classified as property depending upon their legal assessment of how they fit into the rights framework. Aristotle distinguished between types of lives that exist, there is a political being (*bios*) and the bare-life being (*zoe*).¹⁴⁴ The political being that which can act of free will attracts legal rights that are to be protected as opposed to the bare-life which attracts a protective status for the life itself. The judicial power makes the distinction between the two existences, determining the legal status. Beings believed to lack free will were classified as property.¹⁴⁵ Slaves, women and non-human animals were and still are denied legal rights due to their legal property status. Property cannot possess legal rights as they the object of the exercise of someone else’s rights.¹⁴⁶ The conceptualisation of living beings as property permits the control of their usage by those with power.¹⁴⁷ Law sanctions the ownership of property, in terms of the control over an object. The classification of slaves as property, excluded from the moral community because their differences, meant that they were excluded from the legal protections and stripped of their rights. Retrospectively it can be said that slaves were dehumanised therefore the basis of their exclusion from the rights discourse was the racial difference. This exclusion is arbitrary as it does not consider the inherent worth of a being, through their existence but rather prematurely dismisses any consideration of inherent value due to a different characteristic.

The categorising of natural living persons as things objectifies their status, subordinating them to a degraded class with degraded rights. The subjectivities are erased and they are then viewed

¹⁴¹ Peterson, J. (2013), *Of Non-Human Bondage: Great Apes, Blind Eyes and Disorderly Company*, Journal of Animals and Natural Resource Law, Vol. 9, p85

¹⁴² Bilchitz, D. (2009) *Moving Beyond Arbitrariness: The Legal Personhood and Dignity of Non-Human Animals*, South African Journal on Human Rights, Vol.25, No.1, p38-72.

¹⁴³ Trahan, J.R. (2008), *The Distinction Between Persons & Things: An Historical Perspective*, 1 Journal of Civil Law Studies, p9

¹⁴⁴ Agamben, G. (1998), *Homo sacer: Sovereign power and bare life*. Stanford University Press.

¹⁴⁵ Fitzgerald, E. A. (2015), *[Ape]rsonhood*, The Review of Litigation, Vol.34, p337

¹⁴⁶ Francione, G. (2004), *Animals—Property or Persons?* in Sunstein, C. and Nussbaum, M. *Animal Rights: Current Debates, New Directions*, Oxford University Press

¹⁴⁷ Diamond, C (2000), *The Difficulty of Reality and the Difficulty of Philosophy*, in Cavell, S. Diamond, C. McDowell, J. Hacking, I. and Wolfe, C. *Philosophy and Animal Life*, New York: Columbia University Press, p. 74

as material objects for subjugation.¹⁴⁸ The commodification is based on a self-interest of the powerful to deny rights to ensure dominion. The exclusion of women was a deliberate act of social organisation in which the relationship of inferior and superior was justified using legal reasoning. Legal reason is hierarchical,¹⁴⁹ as it separates those with value from those without. The powerful denying rights to the weak has been legitimised through law through the classification of certain groups as being invaluable, in that they have a lesser moral value. Moral value attracts moral consideration of interests and moral rights to protect those interests. If something is concerned as not having moral value or an inferior moral value it may still have value, but only so far as in the interests of those with moral value. The legal doctrine of coverture¹⁵⁰ is an example of the devaluation of legal status. Women in the United Kingdom (as well as many other jurisdictions) were when married, legally under the control of her husband. Under this doctrine a woman could not own or inherit property or have access to the same level of rights as a man, without a man. Under this doctrine women faced a legal degradation of rights that was not reflective of natural justice. This access to rights illustrated that women, although legal persons are lesser value than men and therefore their allocation of legal rights were of a lesser character.¹⁵¹ Women become “living property”¹⁵² under the law and the legislation recognising their moral worth asserts an objective duty to protect this value and not a subjective right, as their inherent worth does not warrant this. The law has been used to deny rights to certain groups and this is accepted as legitimate as legal reasoning has justified this disenfranchisement. The legal system values sameness over difference and the differentiation between genders created a logic that differential treatment is necessary in a formal equality sense.¹⁵³ This sameness logic of universal rights can be used to exclude the experiences of others.¹⁵⁴ Instead of interpreting natural rights as being equal *despite* differences, it implores the ideology that the subject for natural rights is assumed. All of those that differ from those assumed to be the centre of the law for rights recognition are not valued the same, thus not deserving of the same rights. The sameness principle of equality is a masculine orientation of the law in which the bias for rights is set to males and women have to seek inclusivity in the rights legal discourse through the assertion that they are the same in order to receive equal rights.¹⁵⁵ The civil rights movement for Black Americans illustrated a similar approach to rights in that inherent moral worth was evident for all peoples yet differential treatment was legally justified as there was a different lesser value assigned to those that were different to the

¹⁴⁸ Donovan, J, (1990), *Animal Rights and Feminist Theory*, Signs, Vol. 15, No. 2, p362

¹⁴⁹ Koskenniemi, M, (1997), *Hierarchy in International Law: A Sketch*, 8 EUR. Journal International Law, p566

¹⁵⁰ Abolished under the United Kingdom: *Married Women's Property Act 1870* (33 & 34 Vict. c.93)

¹⁵¹ David Favre, (2010), *Living Property: A New Status for Animals Within the Legal System*, 93 Marquette Law Review p1023

¹⁵² David Favre, (2010), *Living Property: A New Status for Animals Within the Legal System*, 93 Marquette Law Review p1023

¹⁵³ Deckha, M, (2015), *Postcolonial Feminism Liberal Feminism's (Humanist) 'Sister'?* In the book *feminisms of discontent: global contestations*, ashleigh barnes, Oxford University Press, p15

¹⁵⁴ Deckha, M, (2015), *Vulnerability, Equality, and Animals*, Canadian Journal of Women and the Law, Special Issue:After Equality, Vol 27, No.1

¹⁵⁵ Deckha, M, (2013), *Animal Advocacy, Feminism and Intersectionality*, Deportate, Esuli, Profughe 23, p54

dominant group. A critique of this construct of legal rights is that the approach to rights recognition is that the evidence that the subordinate class is denied rights is based on the acknowledgement of a deprivation of rights. To attain the legal rights the subordinate group is then compelled to prove their sameness with the dominant group in order to attain the same level of rights. This rational legalistic approach reaffirms the inclusion/exclusion dichotomy in rights law, drawing law further away from ideas of natural justice.

The human animal has distinguished themselves from the animal. This removal and categorisation permeates the othering of nonhuman animals, with the differences enabling the differential, inferior treatment.¹⁵⁶ The property status of nonhuman animals allocates violations of rights only to the property holder under the law. Any cruelty to the nonhuman animal is only recognised if it causes an economic injury to that of the owner. The ambivalent relationship towards nonhuman animals ensures that living beings enjoy no legal rights. Nonhuman animals are property; human animals are person.¹⁵⁷ Rights are therefore human animal and rights over nonhuman animals is the norm. Nonhuman animals are placed outside the scope of rights law given little to no consideration.¹⁵⁸ The designation of nonhuman animals as property implicates them as being ineligible for rights and impedes them from any consideration of their interests. This legal classification establishes a hierarchy between beings which acts as a justification for the classification and use as property. Property is that which can belong to another. It is something that can be owned or possessed, used or disposed of.¹⁵⁹ Nonhuman animals exist for the use of human animals and their life is under the control of human animals.¹⁶⁰ The legal system confers moral acceptance on the use of nonhuman animals as human animal resources.¹⁶¹ Parallels to human animal's slavery illustrate that a constructed hierarchy justifies the exclusion from the moral community and the resulting property status. A basic tenet of the law is that the equal right of non-commodification of life is conferred to all those with recognised inherent dignity, irrespective of their differences.¹⁶² Nonhuman animals are excluded from this right. However, the property status of nonhuman animals faces growing challenges with many cases opposing this classification reaching superior courts. The ability of nonhuman animals to suffer in the same ways as human animals is the catalyst for the rejection of the property status as it is a counter-claim against the absolute right of human animals. The formation of societies for the prevention of cruelty to nonhuman animals (SPCA) and the legal protection which followed highlights the transition to challenge the absolute human animal interest. Welfare legislation has progressed since its initial formation, gradually moving from the sphere of human interest to

¹⁵⁶ Kheel, M. (1993), *From Heroic to Holistic Ethics: The Ecofeminist Challenge*, in Gaard, G. *Ecofeminism: Women, Animals, Nature*. Philadelphia: Temple University Press, p244

¹⁵⁷ Francione G. (1996), *Animals as Property*, 2 *Animal L.* Vol.1, No.16

¹⁵⁸ Francione, G. (2000), *Introduction to Animal Rights*, Temple University Press, p59

¹⁵⁹ Property: Merriam-webster dictionary, <https://www.merriam-webster.com/dictionary/property>
Accessed May 12

¹⁶⁰ Singer, P. (2000), *Equality for animals?* in *Ethics, Human and Other Animals: An Introduction with Readings*, Edited by: Hursthouse, R. London: Routledge, p171

¹⁶¹ Francione G (2010), *Animal Welfare and the Moral Value of Nonhuman Animals*, *Law Cult Humanit* Vol.6, No.1, p25

¹⁶² Sunstein, C. and Nussbaum, M. *Animal Rights: Current Debates, New Directions*, Oxford University Press, p351

prevent cruelty towards nonhuman animal interest to safeguard their life. Legal opinion has gradually shifted recognising the rights of nonhuman animals and protections from causing suffering has altered the legal classification as merely property. These new laws reflect society's acknowledgement that nonhuman animals have interests, interests that warrant protections.¹⁶³

4. Contractual Nature of Rights

Scholars state that “only humans have duties, therefore only humans have rights”.¹⁶⁴ The ability to fulfil duties is dependent on capacity, and the ability to fulfil the human animal idea of duties requires capacity equivalent to the human animal. A major setback to the contractual basis of rights argument is that the idea of rights allocation being dependent on cognition is not in line with the principle of non-exclusivity ideals of the UDHR. Rights are not something that have to be opted into on the basis of exchange, they are not dependent on an action or an ability, instead they are intrinsic, they cannot be given as much as they cannot be taken away. In the case of *Tommy*¹⁶⁵ the chimpanzee upon which a writ of habeas corpus was brought forward the Court dismissed the motion on account of the notion that rights are inseparable from corresponding duties.¹⁶⁶ This interpretation of rights as being reciprocal prevents the possibility of rights protection for those that have the inability to accept or actively submit themselves to the compulsory precursor to eligibility. Human animals lacking the cognitive abilities are the proof by contradiction that there is no moral relevant ability that should deny non-human animals that also share the inability to prove their worth for rights protection. Cupp writes that rights are not free, they come with societal costs¹⁶⁷ Opponents of legal rights for nonhuman animals rely upon the link between rights and responsibilities. Nonhuman animals are not able to grasp the interdependence of obligations as they do not have a moral sense of what is rights and wrong. This has been interpreted as nonhuman animals lacking morality, therefore they are unable to be a moral consideration in the allocation of rights. Rights in this sense are claim rights, which has a corresponding duty. Many human animals are unable to bear the responsibilities related to claim rights. This inability does not render them as without rights, instead they have legal rights allocated to them in relation to their ability. The intrinsic rightsholder status of a human animal is transformed into legal terms using liberty rights. Liberty rights do not impose an obligation upon the rightsholder, as they are unable to fulfil this criterion¹⁶⁸. Instead a liberty right ensures the protection of the rightsholder by limiting the rights of another person to ensure that there is no encroachment. The recognition of rights is not dependent on the fulfilment of criteria and the prescription of rights is not a privilege of which you must qualify. Liberty rights protect the

¹⁶³ David Favre, (2010), *Living Property: A New Status for Animals Within the Legal System*, 93 Marquette Law Review p1023

¹⁶⁴ Scruton, R. (2000), *Animal Rights and Wrongs*, Metro Books

¹⁶⁵ Nonhuman Rights Project v Lavery No. 518366 New York Application, December 4, 2014

¹⁶⁶ Nonhuman Rights Project v Lavery No. 518366 NY App Dec 04 (2014)

¹⁶⁷ Cupp, R.L (2007), *A Dubious Grail: Seeking Tort Law Expansion and Limited Personhood as Stepping Stones Toward Abolishing Animals' Property Status*, Southern Methodist University Law Review, Vol.60, No.3

¹⁶⁸ Hohfeld, W.N, (1920), *Fundamental Legal Conceptions, As Applied in Judicial Reasoning and Other Legal Essays*, Yale University Press

innate value in the vulnerable, the deprivation of these rights would be disingenuous to the worth of bona fide rights holders. Moreso, it would create an environment in which those that are more powerful as they have the privilege of rights, have the means to override the innate dignity of those that are vulnerable and denied rights. The lack of ability to engage in the reciprocal nature of rights leaves these subjects in a state of increased vulnerability as they cannot assert their rights. A continuum of injustice will occur if the vulnerable are not protected as they will exist in intolerable conditions and cannot campaign to have their conditions improved.

Nonhuman animals cannot engage in this system of contractualist reciprocity, yet their inability should not strip them of protection just as it does not for human animals that have the inability. The sphere of justice of law recognises liberty rights as a matter of fairness.¹⁶⁹ The legal protection of basic entitlements to those with the inability to engage in reciprocal rights recognises that they have dignity and deserve respect.¹⁷⁰ It engages the interdependence of rights and duties between different rightsholders and the obligations should be attributed according to their ability. This model recognises not only that the subject needs and deserves recognition, but that it should be distributed in different ways depending on that need.¹⁷¹ Welfare legislation recognises the inherent sentience and vulnerability for nonhuman animals and provides protections based on this assessment. Whilst these protections are limited, they do restrict human animals preventing torture, cruelty and aim to limit suffering in nonhuman animals. This legislation illustrates the interspecies interdependence and the need to act within the ideals of humanity through the protection of vulnerability. The legal recognition of rights towards those with the inability of reciprocity is a truly ethical act, within the means of humanity. Feminist scholars argue the reliance on contractualism and rationality is a masculine concept that relies upon sameness. The incorporation of difference and the stewardship of those that are unable to confer a benefit is to work within the realms of the law maintaining the deprivation of harm as the goal.¹⁷² A movement towards empathy rather than self-interest recognises the moral value of nonhuman animals. The existence of moral denotes that they have rights and justice demands that these rights should be protected as a matter of the law.¹⁷³

5. Sameness and the Uniqueness of the Human animal

Law establishes the parameters of rights. The transposition of natural rights into legal rights is decided by the legal institutions. It is a fundamentally human process in which legal institutions which are a human animal creation classify the requisite characteristics to provide protections that will support the human animal existence. Societal norms shape the law as the law which is used as a tool to serve the community, and therefore the legal institutions should transpose the sanction of community morals into law. A state of legal hegemony exists in rights law as the

¹⁶⁹ Nussbaum, M. (2011), *Creating Capabilities: The Human Development Approach*, Belknap Press

¹⁷⁰ Regan, T. (2005). *Empty cages: Facing the challenge of animal rights*. Rowman & Littlefield, p42

¹⁷¹ Butler, J. (2004), *Precarious Life: The Powers of Mourning and Violence*, London: Verso, p. 45

¹⁷² Deckha, M. (2013), *Animal Advocacy, Feminism and Intersectionality*, *Deportate, Esuli, Profughe* 23, p53

¹⁷³ Regan, T. (2004). *The Day May Come: Legal Rights for Animals*, *Animal Law* Vol.10, No.11, p18

implementation of the law reflects the hierarchy that is prevalent in society. The institutionalised dualism between the dominant and subordinate is actualised in the legal mechanisms that are constructed upon this existence. To have protection of your natural rights you must be classified as having the legal status of a rightsholder. The history of expansion of legal rights show that the attribution of legal rights is based upon constructed political markers of the types of lives deserving of the utmost value and dignity.¹⁷⁴ The framing of law has the capacity to marginalize certain groups from the status which they deserve. Rights are “unstable, indeterminate, empty abstractions”¹⁷⁵ that are therefore useless. Rights are assigned under law and become a tool of the elite, made to ensure the rights and power of a privileged group and ensure the dominance over a subordinated group. The social construction of law has served to disenfranchise many beings from legal rights protection.¹⁷⁶ Law represents “an elastic fiction of a socially constructed group with the intention to exclude others”¹⁷⁷.

In terms of natural rights, legal rights must be attributed in a sense that would bring justice and fairness to result in compliance with the ideals of humanity. Law can represent a constructed idea of humanity. Humanity can serve as a prejudice upon which inclusion in this dialogue preferences those who invented this notion. For this reason, the assumption of rights for the human species is unchallenged. Humans are presupposed as being morally significant and becoming the measuring stick for legal rights. Consequently, there is an exclusion of beings as they do not fit this mould because their species.¹⁷⁸ In this regard “Humanity is a prejudice of which we animals at least are free.”¹⁷⁹ Rights attribution is defined by the human animal as being the norm. Non-human animal rights then exist outside the scope of the law as human animals define the inclusion into the rights framework. It is however in the interest of human animals to define rights as being unique to humans as the existence of human animal’s rests upon the exclusion of animals. The active removal of non-human animals from rights discourse is due to the interrelationship of difference and the practice of exploitation.

¹⁷⁴ Deckha, M, (2006), *The Salience of Species Difference for Feminist Theory*, Hasting Womens Journal, Volume 17, Issue 1, Article 2, p8

¹⁷⁵ Posner, E, (2014), *The Twilight of Human Rights Law*, Oxford University Press

¹⁷⁶ Deckha, M, (2006), *The Salience of Species Difference for Feminist Theory*, Hasting Womens Journal, Volume 17, Issue 1, Article 2, p6

¹⁷⁷ Deckha, M, (2006), *The Salience of Species Difference for Feminist Theory*, Hasting Womens Journal, Volume 17, Issue 1, Article 2, p6

¹⁷⁸ Singer, P, (1985), *In Defense of Animals*, The Second Wave, Oxford: Basil Blackwell, p3

¹⁷⁹ Friedrich Nietzsche, (1982), *Daybreak: Thoughts on the Prejudices of Morality*, trans. R. J. Hollingdale, Cambridge University Press, p329

IV. THE UNIVERSALITY OF RIGHTS

In her seminal work, Arendt explains that rights are a “right” underscoring the significance of considering the rights as a privilege.¹⁸⁰ Considerations of rights when deciding upon allocation reveals the inherent dichotomy between legal and moral considerations. Some commentators have argued that this “right to rights” removes the rights discourse away from its natural law foundations.¹⁸¹ The concept of rights have been critiqued by prominent voices as being vague and open to interpretation and for these reasons, being susceptible to use as a tool for exclusion. Conversely, the legal interpretation of natural rights creates an exclusivity through the classification of universality. The identifying of rights in some, automatically excludes others. The legal recognition of rights and the creation of legal protection creates legal boundaries around rights and eventually the concept of rights become legalised, in the sense that they are only valid if recognised through law. Accordingly, the legitimacy of rights and for that matter the non-applicability of rights must be approached with some degree of caution.

1. Natural Right Foundations of Rights

Rights as defined in international law as being “universal”, “inalienable”¹⁸² and as an “entitlement...without distinction of any kind”¹⁸³, have been subject of much local and international concern regarding the extent of application of legal rights to non-human animals. Posited international law is framed around natural law ideals and aims to safeguards the rights of human animals upon which all States are bound to implement into their respective legal systems. Rights law illustrates a discontent between posited law and natural law with the positive enactments of law having the ability to remove fundamental rights protections that are enshrined in the laws of nature. The arbitrary removal of rights protection is possible in the legal system when certain groups are interpreted as being excluded. Group membership or the lack of is as framed as the basis for this exclusion, which is legally legitimised through appealing to natural law by the denial of moral character for the concerned group. A lack of moral character denotes a lack of moral consideration of whether rights are applicable. Throughout human history the system has provided legitimization of atrocities that would constitute as crimes against humanity.¹⁸⁴ Crimes against humanity are considered to include acts of murder, enslavement and other inhumane acts.¹⁸⁵ The against beings with inherent dignity was later condemned by the international community. However, the ability for such abhorrent acts to have legal character illustrates the law can be used as a tool of exclusion when its interpretation separates from its moral foundations. The actions that nonhuman animals face every single day at the hands of human animals include the systematic killing of billions of sentient being for food and clothing

¹⁸⁰ Goldoni, M. and McCorkindale, C. (2012), *Hannah Arendt and the Law*, Hart Publishing

¹⁸¹ Arendt, A. (1994), *The Origins of Totalitarianism*, New York, Harcourt Books, p292

¹⁸² Preamble, Universal Declaration Human Rights, 1948

¹⁸³ Article 2, Universal Declaration Human Rights, 1948

¹⁸⁴ For example, the transatlantic slave trade

¹⁸⁵ Article 6(c), *Charter of the International Military Tribunal*, 8 August 1945

each year, the torture for scientific testing and the mass enslavement of sentient beings in zoos. These practices are legal, albeit regulated through welfare and anti-cruelty legislation. The practices themselves are universally condemned under international law as they are a violation of dignity.¹⁸⁶ The practices are not limited, regulated or restricted, they are absolutely prohibited. However, the application of this condemnation does not apply to nonhuman animals. The application of this law for human animals is based on dignity, the exclusion of nonhuman animals from the protection of these practices is because it is *human animal dignity* that is the measure of worth. This interpretation of rights attribution is dangerous as it deviates from universal concepts of dignity, placing specific group characteristics and the requirement for sameness paves the way for exclusion based on difference. This notion is extremely dangerous in the rights discourse as it can predicate the devaluation of groups that are different, even in the human animal species. The classification of these practices as legal pose substantial ethical issues for the international rights discourse, if it is the intention of the law to remove all acts considered barbarous. The acceptance of exclusion on the basis of difference provides a potential for the legalization of crimes against dignity, when they are already accepted in the international realm.

The actions that human animals practice over nonhuman animals have been enacted using this premise of devaluation, in which legal rights have ignored natural rights, using the ideologies of the State as a motivation rather than preexisting natural law as the standard for all posited law. The redefining of posited law considering higher law has resulted in a history of reimagining the lines of inclusivity for rights. There are many examples of this found in the legal amendments afforded to protect marginalized groups, a few landmark examples are the desegregation of schools in the United States of America¹⁸⁷ and the removal of exclusionary barriers around marriage.¹⁸⁸ The evolution of social thought, guided by advances in science have forced the legislatures and judiciaries to question the parameters of inclusions and exclusions in the rights discourse. The delegitimization of power structures that control the law have revealed the discriminatory basis upon which exclusionary doctrines have been created. The dynamic character of legal rights for human animals poses the possibility of the removal of exclusivity for rights for the nonhuman animal. The barrier for the recognition of rights of non-human animals is constructed down specie lines. Drawing upon the principle of non-discrimination enshrined in international law, reflections upon the legal exclusion of living beings from the rights discourse because their group membership is necessary. The severe ethical consequences from the removal of rights for nonhuman animals based on their group membership is in opposition to the absolute prohibitions of acts of slavery and treatment that is “inhuman”. The legitimacy of rights law should be revised considering natural justice to determine whether the parameters of exclusion are arbitrarily drawn and whether they should be reimagined. The core mechanisms that human rights law has combatted are the intrusions of inalienable dignity that have been enabled through devaluation of life. The formation of several different conventions protecting women,¹⁸⁹ children,

¹⁸⁶ International Criminal Court (ICC), *Elements of Crimes*, 2011, ISBN No. 92-9227-232-2

¹⁸⁷ *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954)

¹⁸⁸ *Obergefell v. Hodges* 576 U.S (2015)

¹⁸⁹ CEDAW

¹⁹⁰ disabled persons,¹⁹¹ and LGBTQ persons¹⁹² for example have sought to protect inherent dignity. The creation of these supplementary provisions indicate that additional protections are necessary for marginalized groups to protect their dignity from domination and exploitation.

Fundamental rights including freedom from slavery, torture and the right to life are peremptory norms in international law. Customary international law prohibits the interference of these rights as they are seen to be so fundamental to existence that there can be no derogation.¹⁹³ This legal practice has its roots in theories of natural justice in which law and morality are intertwined.¹⁹⁴ The development of legal principles of rights law classify right as being “universal”, “inherent” and inalienable” illustrating that rights that are not conferred but are possessed as natural rights simply by existing. The enactment of Charter of the United Nations¹⁹⁵ codifies the international standards for rights discourse concerning natural rights. Chapter one of the Charter outlines the purposes and principles of international relations are to “suppress acts of aggression”, act “in conformity with the principles of justice”¹⁹⁶ and “take other appropriate measures to strengthen universal peace”¹⁹⁷. The Charter is a soft-law foundation of the international legal system regulating international relations that will ensure the protection of rights. Subsequent binding legal instruments have been developed from the Charter internalising the natural rights norms into binding legislation.

Rights are defined as a moral or legal entitlement that attracts a protection.¹⁹⁸ The rights discourse is framed around the notion that rights whilst innate can be violated and that protections from violations are therefore necessary for reasons of natural justice. The creation of international rights law for the purpose of protecting the sanctity of life occurred in the wake of the Holocaust. Natural rights were diminished by the Nazi regime which used the law to re-classify certain groups as being excluded from rights protection. The removal of rights was legitimate as the legal powers had established the parameters of rights within the legal framework. The discriminatory exclusion of certain groups from their rightholder status was held to be in a crime against humanity.¹⁹⁹ After the atrocities of the Holocaust were legally condemned on an international basis, the need for legislation which would be a framework to prevent the abuse of power was introduced. The UN Charter was established to create an

¹⁹⁰ CRC

¹⁹¹ CRPD: Convention on the Rights of Persons with Disabilities 2006

¹⁹² Human Rights Council, Protection against violence and discrimination based on sexual orientation and gender identity (adopted 30 June 2016) - A/HRC/RES/32/2

¹⁹³ Article 38(1)(b) International Court of Justice Statute 1945: customary international law is described as "evidence of a general practice accepted as law."

¹⁹⁴ Chartier, G. (2010) *Natural law and animal rights*, Canadian Journal of Law and Jurisprudence, Vol. 23 (1) p33-46

¹⁹⁵ 1945

¹⁹⁶ Article 1(1) Chapter 1: Purposes and Principles, Charter of the United Nations 1945

¹⁹⁷ Article 1(2) Chapter 1: Purposes and Principles, Charter of the United Nations 1945

¹⁹⁸ Legal Right. Black's Law Dictionary (2nd edition), Accessed May 8

<http://thelawdictionary.org/legal-right/>

¹⁹⁹ *The I.G Farben Trial, Trial of Carl Krauch and Twenty-Two Others*, United States Military Tribunal Nuremberg (14th August, 1947-29th July, 1948)

environment which illustrated that when ethics condemn the law must punish.²⁰⁰ The subsequent enactment of the UDHR united morality and law to set the minimum legal standards obligating States to interpret laws considering natural justice principles. International law prescribed that natural rights were inherent and preexisting as their protection was dependent on the negative freedom of non-interference. The privileging of natural rights as the standard for posited rights established morality as the foundation of law. Natural rights constituted a higher law above the law of the State with the intention that natural rights could not be removed for future generations.

2. Definition and Concepts of Rights

In the liberal democratic framework rights, can be viewed as an interest, such as an interest to live or be free from harm.²⁰¹ Rights are both ethical and legal concepts denoting a privilege or entitlement to the protection that interest.²⁰² Rights exist both naturally, within rightsholders and rights are created in law to protect naturally existing rights. The legal protection of rights creates the establishment of normative rules of behaviour such as restrictions on rights to ensure the non-infringement of others rights. The granting of legal rights provides a protective status for the subject in order to protect their moral value. Legal recognition of inalienable rights is a prerequisite for the granting of legal rights. Human animals are collectively assumed to be legal rights holders on account of the UDHR. Nonhuman animals do not have such legal status. For human animals, rights are codified in the UDHR. This international instrument denotes the protections that are owed to beings, in light of their humanity.²⁰³ The subsequent legal instruments adopted by United Nations Member States are framed upon the ideals in the UDHR. As a result, international law encapsulates notions of natural law and morality in order to determine those whom are entitled to the said protections. The inherent dignity of the human animal provides the entitlement to the legal protection of rights, a privilege that has throughout history has developed to extend to an ever-widening group. The evolution of rights legislation illustrates that the advancement of the law relies upon the changing parameters of inclusion and exclusion.

Legal classification and qualification for rights draws upon questions of morals and ethics with social movements changing the face of rights legislation. The expansion of human rights to animals, or more accurately the recognition of nonhuman rights, is a growing sentiment found in many different States around the world. For the past two hundred years since the establishment of animal welfare protections in legislation in Western legal jurisdictions, case law has challenged human practices that encroach onto the lives of animals. The last forty years has seen

²⁰⁰ Nussbaum, M.C, (2000), *Animal Rights: The Need for a Theoretical Basis*, reviewing Wise. S, (2000), *Rattling the Cage: Towards Legal Rights for Animals*, Cambridge, MA: Perseus Books

²⁰¹ Bentham, J. (1987) *Anarchical Fallacies*, in Waldon, J. (Ed.) *Nonsense upon Stilts*, New York: Methuen

²⁰² Legal Right. 2017. In Merriam-Webster.com. Retrieved May 8, 2017, from <https://www.merriam-webster.com/dictionary/legalright>

²⁰³ Preamble, Universal Declaration Human Rights, 1948

the shift of perspective from that of the human only and how the interference will be burdensome for human society to that of the animal and how the animal itself will be harmed. International legislation preventing the extinction of certain species²⁰⁴ provides common consensus on the lowest form of protection that should be afforded to nonhuman animals. However, the limited application of this treaty in its target group provides inadequate for a whole class of nonhuman animals. The current legal climate on a national basis evidences commonalities across jurisdictions of the need to protect the inherent worth of nonhuman animals. Unfortunately, this trend is not universalized in codified legal instruments on the international stage. The concept of the expansion of rights beyond the human species does however pose much resistance in many forms ranging from the dehumanising of the human to the difficulties of incorporating other interests in an already complicated terrain. The movement towards the recognition of rights beyond the human species stimulates the human rights discourse in that it questions the legitimacy of the law. The idea of the creation of nonhuman animal rights provokes a response determining the role in which humans take on the planet, their accountability and the legitimacy of their institutions whilst dismantling power structures in the process.

3. The Distinction between Natural and Legal Rights

The legal development of rights illustrates a complete contrast to the notion of innate universality, as rights must be formalised. Arendt argues that the creation of legal rights provides a realistic account of rights that flow from a system of contradiction, the idea that humanity and morality are independent of persons and cultures.²⁰⁵ It is precisely this notion which highlights the political nature in the legal conceptualisation of rights. Legal reasoning is used to justify the formation of the legal rights and this results in the forming of groups of inclusion and exclusion in the rights framework. Legal reasoning circumvents the universal international norms providing parameters upon rights, framing them as a privilege upon which many rights holders are arbitrarily excluded. Legal rights are dependent on the right to have rights²⁰⁶, a form of recognition placing rights as a constructive concept moving away from the principles of natural law. Rights in this sense are a form of power, those with them have the power to protect themselves as they are visible within the law.²⁰⁷

The evolution of legal rights has shown from history, that the transposition of naturally endowed rights can be classified as being excluded from the legal rights framework. The legal system plays a fundamental role in the institutionalising the protection of rights. Rights become legal in character and the realisation of rights then must be quantified with legal justification. The

²⁰⁴ United Nations Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)

²⁰⁵ Arendt, H (1998), *The Human Condition*, University of Chicago Press, Second Edition..

²⁰⁶ Arendt, H (1958), *The Decline of the Nation-State and the End of the Rights of Man*, Origins of Totalitarianism New York: Meridian, p297

²⁰⁷ Williams, P.J (1987), *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, Harvard C.R.C.L. Review 22, 401, 431

responsibility for the implementation of rights lies primarily with institutions that secure rights through the means of defining them. Bentham describes this use of negative sanctions as an inherently political role in which the limitation of harm can demand selective harm.²⁰⁸ The inception of the legal recognition of rights perpetuates the inherent oppressive and hegemonic function of the law.²⁰⁹ Legal reason is dependant on classification to substantiate justification, this classification creates differentiation. Due to the nature of law as a fixed notion upon which certain characters have to be satisfied to attract inclusion, this entails the exclusion of certain groups that fail to fulfil the criteria that is set. This exclusion sets a preference for those that fit into a certain category in order to receive a certain benefit, thus rights law becomes inherently discriminatory.²¹⁰ Legal rights warrant the existence of the legal *denial* of rights. The parameters upon which the legality of the denial of rights are set are on the grounds of sameness, therefore the granting of legal rights depends on the ability to fulfil the required elements within certain fixed criteria. The denial of legal rights can be justified with legal reasoning on the basis of difference. Although the denial of legal rights can be legally justified on these grounds, it may still be morally unjustifiable on account of the imposed arbitrary parameters of legal rights.²¹¹ The “othering” of groups from legal rights framework normalises the perception of difference as an exclusionary factor and how the existence in difference attracts a differential treatment.²¹² The habitual practice of othering institutionalised the exclusion or exclusivity in the rights law. The universality of international rights law becomes detached from legal rights as the paradox of difference is then the defining factor of rights.

4. The Blurring of Natural and Legal Rights

Legal rights are rights codified in international treaties that obligate respect and protection. Infringements of those rights are prohibited and remedies for violations are available both to alleviate the suffering of the victim and to ensure that further violations do not occur.²¹³ A legal right is a right that exists under the rules of a legal system for the purposes of securing such right.²¹⁴ For this reason, under the rule of law, the creation of a legal right also creates a limitation upon others to prevent the interference with this recognized right. The legal recognition of rights is imperative in order to provide legitimate protection. The horizontal nature of the international legal system places the State as central to rights protection. Rights are protected on a State level with international norms and international rights obligations pressuring States to uphold and protect rights within their jurisdiction. Legal rights are created by State legislatures and should be done so in coordination with international law upon which

²⁰⁸ Cavalieri, P (2001), *The Animal Question: Why Non-Human Animals Deserve Human Rights*, tr.

Catherine Woolard, Oxford University Press, Preface p4

²⁰⁹ Peters, A (2016), *Liberté, Égalité, Animalité: Human–Animal Comparisons in Law, Transnational Environmental Law*, Cambridge University Press, p

²¹⁰ Young, I.M, (1990), *Justice and the Politics of Difference*, Princeton University Press, p191

²¹¹ LaFollette, H, and Shanks, N. (1996), *The origin of speciesism*, *Philosophy*, 71, p60

²¹² Shapiro. K, (1990), *Animal Rights Versus Humanism: The Charge of Speciesism*, *Journal of Humanistic Psychology*, Vol.30, p15

²¹³ Article 8, *Universal Declaration of Human Rights*, 1948

²¹⁴ Cassese, A. (1990), *Human Rights in a Changing World*, Philadelphia: Temple University Press, p2

all States are bound. Legal rights are distinct from natural rights as they are subsequent, man-made and constructed. The construction process of legal rights involves the determination and assessment of relevant qualities for the attribution of rights. The legislature and courts use “evolving standards of morality, scientific discovery, and human experience”²¹⁵ for the legal assessment of rights attribution. Discretion is inherent in the deciding upon the parameters of legal rights. Freedom in the preference of the rights that are to be protected, the groups of persons of rights that are to be protected and due to this the criteria, that is relevant in the assignment of legal rights. It is problematic when legal rights are privileged as the law is presumed to be neutral and objective. Instead the creation of law is inherently preference based process with those that decide the outcome capable of legitimising discrimination.²¹⁶

Legal rights provide the biggest legal gap between non-human animals and human animals.²¹⁷ International law, which based upon natural law ideals specifically includes only human animals rights as being legally worthy of protection. The inclusion of human animals does not demand the exclusion of non-human animals from legal protection of their rights, nor can law go so far as to suggest that rights do not exist. The human animal creation of a system of rights to ensure rights implicitly recognises the existence of rights in this act. The non-recognition of rights belonging to non-human animals is a consequence of the manmade rights protection framework. Legal reasoning enables the denial of self-evident truths on the basis of rationalised brutality due to the acceptance as this state being the cultural norm. An overwhelming presence of superior force is the “state of nature” in international relations and this existence is reproduced in legalised interference of rights.²¹⁸ For nonhuman animals the formulation of legal rights legitimises harm. Non-human animals are excluded from being part of the rights narrative due to their inability to participate and they are unable to rally to have their rights recognised. The compounding effect on the exclusion is the tradition of dominance over nonhuman animals which impedes the recognition of inherent rights. Once self-interest is present violations can be legally justified with prevailing interests by shifting the concept of humanity in the favour of the powerful.²¹⁹ The legitimacy of a practice becomes accepted through the means of legal justification and becomes normalised within society. An example of this is with the lawful killing of nonhuman animals in factory farming. The killing of a living being can be legally justified if it is deemed necessary. The othering of persons outside the law enables the domination of those groups. The conflation of natural and created rights can create the erasure of rightsholders status as legal rights are presumed legitimate and preference over natural rights. The consequence of the legal process of the categorisation of legal rights is that lives are legitimately devalued. Acts against beings such as killing can be deemed “necessary” for

²¹⁵ Wise, S. President of Nonhuman Rights Project, www.nonhumanrightsproject.org

²¹⁶ Charlesworth, H. (1994). What are ‘Women’s International Human Rights’?. *Human rights of women: National and international perspectives*, 58, 61, p65

²¹⁷Peters, A (2016), *Liberté, Égalité, Animalité: Human–Animal Comparisons in Law, Transnational Environmental Law*, Cambridge University Press, p18

²¹⁸Peters, A (2016), *Liberté, Égalité, Animalité: Human–Animal Comparisons in Law, Transnational Environmental Law*, Cambridge University Press, p9

²¹⁹ Bolliger, G. (2016), *Animal Dignity Protection in Swiss law: Status Quo and Future Perspectives*, *Schriften zum Tier im Recht*

purposes of food, war or many other instances that shape the daily lives of nonhuman animals and the historical atrocities of mankind. The connections between dominance, the killing of nonhuman animals, and the killing of human animals become clear.²²⁰ In these instances the law acts as a tool of oppression shaping society around the structures of power and preventing opposition as the legality acts as a legitimisation.

5. Privileging Positivism in the Rights Discourse

The legal methods of allocating rights assume positivistic epistemology to be the entire truth.²²¹ The validity of rights become entrenched in the strict application of legal truths. Reliance on solely posited laws that attribute rights to a certain group (human animals) means that “universal laws are left meaningless”²²² as the consequence of positivism. This approach avoids a subjective approach that considers those outside of the scope of the posited law. Thus, logical, realistic scientific facts can be disregarded, if they are deemed non-applicable for consideration if the subject has no standing for consideration. Conventional understandings of rights reveal a humanist bias interpreting rights as uniquely human animal. Despite Darwin's findings that there are no distinctly human animal characteristics, rights law has been based around this contrary premise.²²³ Elsewhere critics of the exclusionary nature of human animal rights law note the consideration of nonhuman animals are readily dismissed as through the acceptance of welfare legislation. The inherent suffering permitted within welfare legislation creates an environment of moral schizophrenia for nonhuman animals. Biased preconceptions against defining rights as anything other than human, is illustrated in the lack of international legislation protecting the inherent suffering of nonhuman animals as well as the lack of engagement from judiciary to recognise standing in nonhuman animals. The ever-growing series of legal cases contesting the lack of rightsholder status of nonhuman animals illustrates that the issue has not been adequately remedied.

The cases involving nonhuman animal rights coming before the courts in numerous jurisdictions highlight an instability in the present state of the law regarding rights allocation. The cases seek to question the human animal practices as much as nonhuman animal classification. John Stuart Mill wrote that in the assessment of the consequences of a particular act to determine if it is an immoral practice; it is necessary to take nonhuman animals into account.²²⁴ He argued that nothing is more natural or universal to human animals than to “estimate the pleasures and pains of others as deserving of regard exactly in proportion to...ourselves”. Consequentialism provides a basis for the ethical reflection of human animal actions. The idea that suffering is the measure

²²⁰ Adams, C.J (1990), *Sexual Politics of Meat: A Feminist-Vegetarian Critical Theory*, New York: Continuum, p186

²²¹ Northrop, F.C.S.C (1964), *The Epistemology of Legal Judgments*, 58 *Northwestern University Law Review*, 732, 743, p738

²²²Northrop, F.C.S.C (1964), *The Epistemology of Legal Judgments*, 58 *Northwestern University Law Review*, 732, 743, p736

²²³ Darwin, Charles (1859), *On the origin of species by means of natural selection*, London

²²⁴ Locke J (1690) *Essay on Human Understanding*, chapter 9, p.29.

for rights, as it is a rational consequence from harm, provides an expansive view of rights. Legal rights would be attributed based on an attribute that is shared by the living, thereby the law would be a tool of compassion.²²⁵ A compassionate approach relies upon the correspondence of the moral and legal rights. The interdependence of rights is necessary in order to adhere to ideas of justice.²²⁶ Moral rights are supplement by posited legal rights which act as a vehicle for justice. As Dworkin argues legal rights “trump” other interests providing the most morally correct outcome when faced with conflicting interests.²²⁷ The relationship between the moral and legal spheres of rights ensure that justice and fairness trump the general good²²⁸ Cary Wolfe states that the current rights structure is unsatisfactory in its ethical protections.²²⁹ The privileging of legal rights in the legal discourse removes the ability of those placed outside of the legal framework to garner legal consideration. Strict legal precedent rules further isolates those excluded preventing legal progression. Law constructs, defines, regulates and entrenches norms that are widely unchallenged due to their perceived legitimacy.²³⁰ In order for rights law to be authentic they must be derivative of their founding ideals. Griffins concept of rights is that they ought to be grounded in substantive values that appeal to rationality and morality.²³¹ These values call for the consideration of potential rightsholders and the assessment of any arguments to restrict harm. Currently the lack of legislation and lack of legal standing attributed to nonhuman animals removes this rational basis of rights. By predicating rights and human-ness as being congruent, the rights discourse becomes stagnant unable to react to the evolving challenges of a changing world or the progression of social thought.

6. The Evolution of Rights Law as a Movement towards greater Inclusion

6.1 Suffering as a Basis for Rights Inclusion

Contrary to the current status of the human institution of rights law, rights are universal, intrinsic and inherent on the basis of the ability to suffer harm. Customary law denotes certain acts as being inherently wrong as they cause suffering promoting an environment that is contrary to the principles of justice. The progression for the removal of suffering is paramount in international law and the rights framework is a mechanism to achieve this goal. Singer suggests that if a being suffers then there can be no moral justification for refusing to take that

²²⁵ Derrida, J. (2002) *The Animal That Therefore I Am (More to Follow)*, Trans. David Wills, Critical Inquiry 28, p395

²²⁶ Henkin, L. (1989), *Universality of the Concept of Human Rights*, The Annals of the American Academy, 506, p10–16

²²⁷ Dworkin, R. (1977), *Taking Rights Seriously*, Cambridge, Massachusetts, Harvard University Press, p155

²²⁸ Tasioulas, J. (2010), *Taking Rights out of Human Rights*, in Ethics 120, p647 – 678.

²²⁹ Wolfe, C. (2010), *Before the Law: Animals in a Biopolitical Context*, University of Chicago Press, p9

²³⁰ Otomo, Y. and Mussawir, E. (2013), *Law and the Question of the Animal: A Critical Jurisprudence*, Oxford: Routledge, p383

²³¹ Griffin, J. (2008), *On Human Rights*, Oxford University Press

suffering into consideration.²³² The recognition of sentience based upon the notion that all animals, both human and non-human suffer should bring with it the moral duty to avoid the creation of that suffering. The moral duty extends to the respect and, therefore protection of the intrinsic value of the subject of a life.²³³

The legal proliferation of rights acknowledges that moral consideration should be given to those that suffer. In practice, due to exclusionary interpretations of legal reasoning the moral obligation to prevent suffering does not warrant a legal obligation to prevent suffering. The legal classification of rights for human animals ensures that suffering is eliminated whereas for non-human animals suffering is merely reduced.²³⁴ The justification for the exclusionary interpretation of rights is that the law guaranteeing rights is constructed upon species lines. Despite the principles of equality and non-discrimination being prevalent in international rights law non-human animals have been legally classified as existing outside the scope of the moral community. The inherent worth of non-human animals as living, sentient “subjects of a life” is reduced to a classification of property. The formulation of non-human animals as having property status of and being an inanimate “things” takes away their ability to attract moral protection and therefore the necessary legal protection to ensure their rights. The protection of the rights of non-human animals extends to their worth in proximity to human animal interests. Notions that are inconsistent with universal international principles exist as the law is used as a mechanism to exclude. The suffering of nonhuman animals can be legally permissible if there are attempts to *reduce* it, cruelty can be legal if it is defined as *necessary*. This classification propagates the exploitation of human animals over non-human animals. In this regard the law not only fails to protect the most vulnerable lives from suffering, but perpetuates the ability to impose suffering as justifiable on the grounds of discrimination, a principle that runs contrary to universal rights. Rights are a non-exclusive concept anything less is would subvert not only the idea of what is right but the very idea of justice.²³⁵

6.2 Legal Duty to Act Morally

The philosopher Rawls observed that the ability to suffer implicates a duty of compassion and humanity.²³⁶ This reciprocity model acknowledges the interdependence of obligations and vulnerability.²³⁷ The Rawlsian idea that fairness is justice mandates a moral status that obligates protection should be applied on the basis of suffering alone. This idea suggests that certainly it is wrong to be cruel by causing harm to animals does not go so far as to recognise that legal rights

²³² Singer, P. (1975), *Animal Liberation: A New Ethic of Our Treatment of Animals*, New York: Harper Collins, chapter 4, p77

²³³ Regan, T (1985), *The Case for Animal Rights*, Berkeley, CA: University of California Press

²³⁴ Deckha, M. (2013), *Initiating a Non-Anthropocentric Jurisprudence: The Rule of Law and Animal Vulnerability under a Property Paradigm*, Alberta Law Review, Vol.50, No.4

²³⁵ Cavalieri, P (2001), *The Animal Question: Why Non-Human Animals Deserve Human Rights*, tr. Catherine Woolard, Oxford University Press, p192

²³⁶ Rawls, J. (1999), *A Theory of Justice*, Harvard University Press, Revised Ed, p118

²³⁷ Butler, J. (2004), *Precarious Life: The Powers of Mourning and Violence*, London: Verso, p. 45

exist. Vulnerable persons require protection according to the natural law norms embedded in the UDHR. The concept that rights can be founded without the moral evaluation of the subject's attributes is considered to be "truly ethical" as there is no expectation of reciprocity.²³⁸ Instead there is a focus on the moral evaluation of the treatment for the subject shifting the focus from the agent to the patient. In law, there is a substantial difference between the recognition of rights for the moral agent and the moral patient. The moral agent automatically has rights protection due to the participation in society, the moral patient requires protection only and not rights as the latter does not garner ethical standing.²³⁹ Bioethics, the study of ethical issues in relation to law, politics and biology in this instance concern the relationship between the subjective treatment of the patient (the harm and protection from harm) and the objective definition of the legal or institutional spheres. Scholars of this field have stated that the objective sphere cannot override the expanded theory of rights codified in the UDHR. It can only define the sphere of concern (types of harm) and the specific classes (types of patients) to be legally ratified, but it is imperative that this must be within the rights framework.²⁴⁰ This theory provides that the subject and the harm must always be covered by law when they are within the rights framework. Therefore, when there is harm to the subject's rights, the law must provide a protection in order to be in the true sense of justice. This interpretation of justice can provide an avenue for "animal rights and human obligations"²⁴¹ if the law is to reject the notion of capacity as a precursor to rights. In order to fulfil a moral duty, there must be an intrinsic ethic of care and empathy in the human animal.²⁴² An extension of understanding and consideration outside oneself is necessary in order to fulfil the ideals of compassion and humanity.

The focus of rights law remains on duties and agency yet if the focus of rights was to be on the possibility of harm it would be subjective, focusing vulnerability and victims.²⁴³ Bentham argues that the ability to suffer enables interests to be taken into account.²⁴⁴ The subjects experience of harm determines their intelligence and emotional ability. For non-human animals, the ability to suffer pain is apparent. Scientific studies conducted against non-human animals prove that they can suffer pain through their choosing preferences to avoid such pain.²⁴⁵ The ability to suffer pain as a threshold for rights fulfils a lower basis than that of cognition and this is closer to the natural justice concepts of international rights law which provide protection on an indiscriminate basis. The legal allocation of rights is out of sync with the concept of rights recognition in

²³⁸ Wolfe, C. (2010), *Before the Law: Animals in a Biopolitical Context*, University of Chicago Press, p45

²³⁹ Wolfe, C. (2010), *Before the Law: Animals in a Biopolitical Context*, University of Chicago Press, p45

²⁴⁰ Cavalieri, P (2001), *The Animal Question: Why Non-Human Animals Deserve Human Rights*, tr. Catherine Woolard, Oxford University Press, p131

²⁴¹ Regan, T. and Singer, P. (1989), *Animal Rights and Human Obligations*, eds, Englewood Cliffs: Prentice Hall

²⁴² Donovan, J (2006) Feminism and the Treatment of Animals: From Care to Dialogue, *Signs*, Vol.31, No.2, p324

²⁴³ Cavalieri, P (2001), *The Animal Question: Why Non-Human Animals Deserve Human Rights*, tr. Catherine Woolard, Oxford University Press, p127

²⁴⁴ Bentham, J. (1781), *An Introduction to the Principles of Morals and Legislation*, edited by Burns J.H and Hart, H.L.A., London: Methuen, (1982)

²⁴⁵ *The Cambridge Declaration on Consciousness*, 7 July 2012, Written by Low, P and edited by Panksepp, J. Reiss, D. Edelman, D. Van Swinderen, B. Low, P and Koch, C, University of Cambridge

international norms. The application of legal rights is controlled on a State-level but it should be in accordance with international legal principles. International law only codifies the absolute protections for rights of human animals, yet the context of rights is that they are available to all including many which are not able to engage in the reciprocal requirements the legal discourse sets as a requisite for rights. The marginal case arguments in which all human animals are able to have access to rights protection despite some lacking the ability to enter into a social contract, evidences that there is no reasonable set of criteria for moral worth that clearly separates human animals from non-human animals.²⁴⁶ Thus the ability to suffer becomes the material fact. Therefore, legislation illustrates that justice can only be achieved when the legal boundaries are reflective of the definition of humanity which declares vulnerability for suffering as grounds for attracting rights to ensure protection from that suffering.

The harmful practices against nonhuman animals such as factory farming or scientific testing interfere with the intrinsic value of life. Instead the subject of a life is reduced to a means rather than an end in itself.²⁴⁷ The moral duty to respect and protect that inherent value would mean the creation or rights that end these practices. These laws already exist in international rights law but only exclusively for human animals, not to prohibit the acts themselves.

6.3 Eliminating the presence of Violence, Exploitation and Behaviours contrary to Humanity

The history of legal rights for human animals has evidenced that the legal system disproportionately attributes legal privileges to some human animals over others, despite the explicit universality pertaining to human animals in the UDHR. Segregation and Apartheid are one of the many examples of the lack of legal recognition of inalienable equal rights. Rights that cannot be given or taken away were capable of interference as they were legal violated under these regimes. The legitimate violations of rights were due to the perception of difference and the social hierarchy that is attributed to that difference. Law becomes a tool for the formalisation of legal rights rests upon the basis that on group dictates the criteria for inclusion and exclusion. The universal tenets of rights simply existing irrespective of differences places all the different rightsholders on an equal basis whereas the legal allocation of rights exhibits a power imbalance in which the powerful exclude the powerless by controlling the parameters for inclusion. The legal system strips rights holders of their natural attributes and manipulates the rights framework to suit the needs of these with the power to do so.²⁴⁸ Rights become a privilege to be granted by the law, those without that privilege are deemed naturally inferior.²⁴⁹ The practice of distinguishing between classes of difference is an intentional effort to elevate the

²⁴⁶ Bilchitz, D. (2009) *Moving Beyond Arbitrariness: The Legal Personhood and Dignity of Non-human Animals*, South African Journal on Human Rights, Vol.25, No.1, p38-72.

²⁴⁷ Tester, K. (2014), *Animals and Society (RLE Social Theory): The Humanity of Animal Rights*, Routledge Library Editions: Social Theory, p10

²⁴⁸ Collard, A. (1987), *Freeing the animals*, Trivia, Vol10, p6-23

²⁴⁹ Collard, A. (1987), *Freeing the animals*, Trivia, Vol10, p6-23

status of one's own group and denigrate the status of the other.²⁵⁰ The invention of rights employs the language that has been deemed legitimate by the international community yet in actuality the allocation of rights is based on a system of oppression decided by those with the absolute right.

At present there is a thick legal wall between humans and nonhuman animals.²⁵¹ Human animals as members of the "human family" have their rights protected through legal instruments such as the UDHR. The legal rights framework presupposes that rights are human. Legal rights are human animal inventions designed to fit within the human animal system for human animal interests. On the other side of the legal wall there are nonhuman animals whose protection extends to their perceived interest to human animal. The legal system maintains a dualism between persons and things upon which human animals are persons able to have legal rights and nonhuman animals are things able to be used as property. The two diametrically opposed legal statuses create a state of moral schizophrenia in the legal system. Francione coined the term moral schizophrenia to describe the contradictory nature of the law towards nonhuman animals. Welfare legislation recognises that nonhuman animals are sentient beings able to suffer in the same way that human animals are, yet the law facilitates the use of nonhuman animals that is contrary to the protection that the inherent sentience would attract. The law and the legal system is the primary culprit for the facilitation of the exploitation of animals.²⁵² The division of legal recognition legitimises the property status of nonhuman animals and the subsequent exploitation. A multitude of reasons uphold the differentiation between legal statuses and the corresponding legal rights of human and nonhuman animals. Perhaps the most convincing is the fact that nonhuman animal exploitation is a billion-dollar industry upon which human animals solely profit. The construction of law upon the human animals created hierarchy defends the modus operandi. A reconceptualisation of power is necessary in order to remove nonhuman animals from the margins and under the protection of the law. The ethical dilemma which results is that the very rights that protect human animals from abuse facilitate the abuse of nonhuman animals on the grounds of economic self-interests which is in opposition to moral universal norms upon which the law is built.

6.4 Evolving Social Thought

The legal recognition of rights provides an enforceable obligation to respect and protect rights. In reference to natural rights this is no more than an altruism,²⁵³ in which beings possess rights, yet they do not have *the* right in the sense that they cannot access that right. Rights exist but only

²⁵⁰ Black, J.E, (2003), *Extending the rights of Personhood, Voice, and Life to Sensate Others: A Homology of Right to Life and Animal Rights Rhetoric*, Communication Quarterly, p314

²⁵¹ *N.R. Nair and Ors v. Union of India and Ors* 2001 (3) SCR 353, 6th June 2000, Kerala High Court

²⁵² Francione G. (1996), *Animals as Property*, 2 Animal L. Vol.1, No.16

²⁵³ Arendt, H (1977), *Between Past and Future; Eight Exercises in Political Thought*, Harmondsworth: Penguin, p156

to the degree which they are respected²⁵⁴. History has shown that mass injustice can occur without the legal recognition of innate rights as there are no mechanisms to obligate non-interference and remedies to assert the duty. In order for rights to be actualised in practice legal sanctions from violation of the rights have to be used to coerce the respect of rights. The legal realisation of rights becomes a reactionary process in which protections are created to prevent future violations of a right that is currently being taken away. The legal reasoning becomes based upon the foundations of natural justice as the legal right recognition arises from a humane reaction to tyranny.²⁵⁵ The assignment of legal sanctions creates corresponding rights that are man-made conceptualisations of natural rights. Rights then become a man-made phenomenon that exist as politicised natural freedoms.

²⁵⁴ *The Struggle for Human Rights*, Address by Mrs. Eleanor Roosevelt, U.S. Representative to the Commission on Human Rights, at Paris, (September 28 1948)

²⁵⁵ Arendt, H (1958), *The Decline of the Nation-State and the End of the Rights of Man*, Origins of Totalitarianism New York: Meridian, p297

V. RECENT DEVELOPMENTS

1. Expansion of Legal Rights

1.1 Personhood Rights

Legal challenges to the non-recognition of nonhuman animal interests have increased significantly over the past five decades.²⁵⁶ Case law evidences the evolution of moral consciousness in regard to nonhuman animals with judgments questioning the limitations of the property status of nonhuman animals and the exclusionary parameters of personhood in the law. Legal recognition of personhood is the prerequisite to bear rights.²⁵⁷ Legal personality is the status of being a “person”. It is a juridical construct which has parameters beyond the natural person.²⁵⁸ A human animal is synonymous with being a person in the law. The definition of a person is a human animal as well as another entity recognised by law as having the rights and duties of a human being.²⁵⁹ The legal standard for rights is framed around the human animal. However, the recognition of legal personhood in nonhuman forms illustrates the opportunity to recognise rights beyond the human animal in the name of justice. This distinction between human animal and person frames rights as being dependent on something other than group membership of the human animal, thus rendering the exclusionist parameter arbitrary. Personhood relies on capabilities as either a moral agent holding duties or a moral patient the holder of rights. Wise suggest that personhood is the “capacity to hold at least one right”.²⁶⁰ A case of legal personhood for a nonhuman ape currently before the Supreme Court in the United States of America upon the contractualist definition of rights for determining legal personhood. The petitioner in the case filed a letter to the editors of Black’s Law Dictionary requesting the correction of the definition of a legal person to be “an entity recognised by law as having the rights *or* duties of a human being”. The existing definition is erroneous as it does not consider the marginal cases of human animals that are able to engage in duties at which point their rights would not be stripped away. The editors of the legal dictionary apologised for the error and stated that the next edition of the dictionary will be corrected as such.²⁶¹ This amendment is

²⁵⁶ Sunstein, C. and Nussbaum, M. *Animal Rights: Current Debates, New Directions*, Oxford University Press, p357

²⁵⁷ Kurki, V.A.J and Pietrzykowski, T. (2017), *Legal Personhood: Animals, Artificial Intelligence and the Unborn*, Springer International Publishing

²⁵⁸ *Roe v Wade* 410 U.S. 113 (1973)

²⁵⁹ Person, *Black's Law Dictionary*, Sixth Edition, p791

²⁶⁰ Steven M. Wise, (2010), Legal Personhood and the Nonhuman Rights Project, 17 *AnimalLaw* 1, p1

²⁶¹ <https://www.nonhumanrights.org/media-center/04-11-17-media-release-blacks-law/> Accessed 17 May 2017

crucial for the development of rights law as many cases have relied upon this contractual nature of rights to deny protection to nonhuman animals.

In order to have rights protection legal recognition of personhood is necessary. In most legal jurisdictions nonhuman animals are property that can be owned, not persons that are capable of rights. Favre argues that animals can have their interests protected in law, without modifying their legal nature.²⁶² However, the property status of nonhuman animals has been challenged by many legal cases and judgments criticising this barrier to legal personhood. For human animals the history of legal rights developments have seen boundaries that are not in line with the moral law upon which all posited law should be measured broken down.²⁶³ For nonhuman animals and their existence as living, sentient beings the recognition of legal personhood requires the consideration of moral law upon which posited law is framed. Protecting nonhuman animal rights under the international legal framework needs to appeal to principles of natural justice, which are not limited to human animals.²⁶⁴

Legal evolution illustrates that concept of a legal person is not fixed, the inclusion of those which are formally excluded defines the notion of legal personhood as being unlimited.²⁶⁵ The development of the parameters for what can constitute as a legal rights holder has illustrated that it is the absence of relevant differences that propels the change in legal status.²⁶⁶ According to scientific studies nonhuman animals like human animals are sentient and have consciousness. This consciousness means that they are able to suffer and according to principles of natural justice the ability to suffer means that they should be protected from suffering. Legal standing is the connection between the suffering of the subject, a harm that is caused by an action and the possibility of preventing that harm in the subject or for future vulnerable subjects. The developments for legal rights for apes have been the driving force of rights recognition beyond the human animal species. These specific nonhuman animals are politically strategic qualifiers for rights due to their high level of capacity, sentience and closeness to human animals. According to international human rights law and natural law theories talent should be “no measure of their rights”.²⁶⁷ However, because of their closeness to human animals, nonhuman apes provide an opportunity for the judiciary to question the relevance of the attributes that place the limits around legal rights.

The denial of legal standing for nonhuman animals is on the notion that nonhuman animals are incapable of bringing their claim in court. The protection of human animals that lack this

²⁶² David Favre, (2010), *Living Property: A New Status for Animals Within the Legal System*, 93 Marquette Law Review p1023

²⁶³ Nussbaum, M.C, (2000), *Animal Rights: The Need for a Theoretical Basis*, reviewing Wise. S, (2000), *Rattling the Cage: Towards Legal Rights for Animals*, Cambridge, MA: Perseus Books, p1514

²⁶⁴ Sunstein, C. and Nussbaum, M. *Animal Rights: Current Debates, New Directions*, Oxford University Press, p354

²⁶⁵ Sunstein, C. and Nussbaum, M. *Animal Rights: Current Debates, New Directions*, Oxford University Press, p358

²⁶⁶ Sunstein, C. and Nussbaum, M. *Animal Rights: Current Debates, New Directions*, Oxford University Press, p361

²⁶⁷ Thomas Jefferson to Henri Gregoire, *Letters of Thomas Jefferson*, February 25 1809

capacity refutes this proposition. Those that lack the ability may have a guardian act on their behalf to ensure that their legal rights are protected. Only a person has standing to bring a claim in court and not property. The legal status of nonhuman animals is a barrier to legal personality, protection and legal standing. A legal fiction exists in the categorisation of nonhuman animals as living property as although they are not the same as human animals and they cannot function the same the concept of legal personhood is flexible enough to bend according to the nature of the entity. Therefore, protections in correspondence to the entity should be recognised. The inability to perceive nonhuman animals as anything more than a thing for the use of nonhumans facilitates the barrier to legal standing and propagates the refusal of rights.²⁶⁸

1.2 Nonhuman Animal Legal Standing

Legal personhood for nonhuman animals especially for great apes, is pushing the artificial limits of the law, with an increasing amount of cases being considered by the highest courts. In Europe, an international court, the European Court of Human Rights, heard a case involving a chimpanzee that was had detained for 25 years. The petitioners advocated for personhood for the nonhuman animal and that a legal guardian would be appointed to ensure the rights to life, limited freedom of movement, personal safety and property.²⁶⁹ The case of *Matthew Hiasl Pan*²⁷⁰ in 2007 sought legal rights for the nonhuman animal on the basis that chimpanzees and human animals are genetically similar. The petitioners appealed the Supreme Court in Austria decision that declared that a nonhuman animal cannot be a legal person. The appeal was on the basis that the nonhuman animal had been rejected a fair trial as his case was dismissed on the basis he had no legal standing. The Austrian Civil Law Code stipulates that if something is not classified as a person then it is a thing however section 285a states that nonhuman animals are not things. On this basis, the petitions advocated that the nonhuman animal has value in themselves and therefore should be considered a person.²⁷¹ The ambiguous nature of the definition of a legal person under Austrian legislation posed the possibility of including apes as they possessed many of the essential attributes. The consideration of this case by the court signified that nonhuman animal interests are of legal importance.

The idea that nonhuman animals have their own interests and that these interests should be considered has been recognised in varying degrees in various global jurisdictions. Higher courts have accepted the legal merit of many cases involving nonhuman animals and even though a case is yet to be successful in terms of acknowledging that legal rights exist outside the human animal species, developments are consistently being made in that direction. In 2005 a court in Brazil heard the case of a nonhuman chimpanzee held captive in a zoo in relation to a writ of habeas corpus. The Judge Lucio da Cruz entertained the case as the court found that this was a

²⁶⁸ Mill, J. (1859), *On Liberty*, Harvard University p.126

²⁶⁹ Balluch, M. and Theur E, (2007), *Trial on personhood for Chimp Hiasl*, Altex Vol.24, No.4, p335-342

²⁷⁰ Balluch, M. (2008), *Personhood trial for chimpanzee Matthew Pan*

<http://www.vgt.at/publikationen/texte/artikel/20080118Hiasl.htm> Accessed May 20 2017

²⁷¹ Balluch, M. and Theur E, (2007), *Trial on personhood for Chimp Hiasl*, Altex Vol.24, No.4, p335-342

complex issue that warranted legal examination in the pursuit of justice. The case of *Suica*²⁷² was eventually dismissed upon the death of the nonhuman animal but the court's reasoning is important as they observed that legal personhood principles are not bound upon biological parameters and that the case was worthy of consideration, therefore the inherent interests of the animal were worthy of legal consideration. Another important case for nonhuman legal personality was tried in Brazil before the Superior Court of Justice in 2007. The constitutional right to fundamental rights and guarantees is codified in the Brazilian legal system in which a petition for habeas corpus can be filed by a citizen on behalf of the subject giving prima facie legal standing.²⁷³ On this basis, the legal system is flexible to social changes permitting the evolution of law. The constitution has from this principle elevated the status of nonhuman to legal subjects able to seek the protection of basic rights. The case was regarding two nonhuman apes that were under the guardianship of a businessman. In the case of *Megh and Lili*²⁷⁴ the court ruled that the apes should be "reintroduced into nature" to live a life that was more than "mere adornments to please human beings".²⁷⁵ A petition was subsequently filed on behalf of the two nonhuman animals to prevent the release of them into the wild which would result in their deaths. The habeas corpus petition on behalf of a nonhuman animal was claimed on the fact that the nonhuman animals whilst not human animals they did have complete reliance on human animals therefore their rights should reflect this. The concept of the rights in this case were in the best interests of the subject, similar to the principles established for the protection of children upon which a guardian would ensure the protection of their rights. The protection was sought on the basis that whilst they are not human animals, the nonhuman animals are biologically so close that they warrant a similar protection. This case offers a different legal status for nonhuman animals, those which their life is indissociable to the human animal world which they have been forced to be a part of. Rights for these subjects must be aligned with justice principles that recognise the interest of the nonhuman animal to not be deprived of liberty, but to ensure the protection of their life a duty from nonhuman animals is required. The consideration of the subject matter by the court illustrated the inclusive nature of the Brazilian legal system to consider the legal interests of all morally relevant subjects, irrespective of species membership.

The propensity for courts to consider nonhuman animals as holding legally relevant interests shows the superficiality of legal rights to their inclusionary moral foundations. Courts are increasingly acknowledging the legal relevance of nonhuman animals in the rights discourse and blurring the distinction between human animals and nonhuman animals. In 2014 a court in Argentina recognised that a nonhuman orangutan can have legal personality and can be granted legal rights. The ruling found that the legal status for nonhuman animals is not that of property as they are a living being, but it is different from human animals. The case of *Sandra*²⁷⁶ the orangutan alleged that she was illegally detained in the zoo for twenty years. The petitioners

²⁷² Correio da Bahia, 9th Criminal Court, Habeas Corpus 833085-3/2005

<https://www.animallaw.info/case/suica-habeas-corporis> Accessed 17 May 2017

²⁷³ Brazilian Federal Constitution 1988

²⁷⁴ Proceeding no.2005.61.00.008183-7 Sao Paulo Federal Court of Justice

²⁷⁵ Otomo, Y. and Mussawir, E. (2013), *Law and the Question of the Animal: A Critical Jurisprudence*, Oxford: Routledge, P73

²⁷⁶ Argentinean Criminal Chamber, Camara Federal de Casacion Penal, Decision of 18 Dec 2014

filed a writ of habeas corpus arguing that even though the ape is a nonhuman she should be conferred the right to freedom due to her cognitive capacity. The landmark ruling accepted the writ as a great ape has rights, including freedom and avoiding suffering from captivity. The outcome provides a great deal of uncertainty for nonhuman animals as the court ruled that nonhuman animals may have rights but the judicial statement lacked any legal justification. The court ruled that Sandra was a “subject of rights”, a nonhuman person, the ape is not legally an “animal” but a sentient being. Further appeals left the legal status of a nonhuman uncertain as to what protections in law this could attract. The judge ruled that the outcome for the nonhuman animal would be a sanctuary that would preserve the cognitive abilities of the nonhuman animal. This case appealed to the natural law principles as the petitioners claimed the nonhuman animal’s personhood in a philosophical sense rather than a biological one. The court used the moral foundation of rights in determining legal rights. Using this reasoning the definition of a legal person is not confined to human animals. This case evidences the court removing the exclusionist barrier to rights which is usually prevalent in the legal discourse for nonhuman animals. The court’s approach to rights assesses the subject as morally relevant for rights attribution. For this reason, the case is a landmark decision for nonhuman animal rights as nonhuman animals are regarded as morally considerable in the legal discourse. Even though the court did not attribute rights in the equal, universal sense aligned with international law principles, the court recognised “lesser rights”²⁷⁷. Although the case breaks the species barrier for rights, the contentious issue is that the moral value is based upon mental complexity, rather than on sentience alone.²⁷⁸ The human animal imposed parameters on rights dictate the attribution of rights through a humanist perspective. This exclusion of those outside the dominant group is at odds with international rights ideology that basis rights acknowledgement on principles of natural justice.

A 2014 case from the United States of America petitioned for the inclusion of nonhumans in the legal rights framework. The case of *Tommy*²⁷⁹ concerned the right to freedom for four nonhuman animals, namely apes, that had been held captive in unlawful detention. The case asserted that the nonhuman animals should be granted basic rights and declared nonhuman on account of their closeness to the human animal. The writ of habeas corpus²⁸⁰ was filed on behalf of the nonhuman animals declaring that the animals should not be imprisoned in captivity on the basis that the nonhuman animal has attributes sufficient to consider them “persons”. The ruling if found in favour of the petitioner would recognise the nonhuman animals right to bodily liberty thus removing the human animal parameter around rights law. The petitioners did interpret this ruling as an advancement for rights as the court's interpretation of a person was not restricted to a human animal. Instead the court stated that when deliberating what constitutes as a person it “is

²⁷⁷Singer. P, (1985), *In Defense of Animals*, The Second Wave, Oxford: Basil Blackwell, p3

²⁷⁸ de Lavigne, G (2015), *Free Ranging Dogs Stray, Feral or Wild?* First edition, Lulu Press Incorporated

²⁷⁹ *The People of The State of New York ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 2014 NY Slip Op 08531, 2014 N.Y. App. Div. LEXIS 8451, *2 (3rd Dept. Dec. 4, 2014) (“Nonhuman Rights Project v. Lavery”) “*Tommy’s case*”

²⁸⁰ Filed under s70 New York Civil Practice Law and Rules under Chapter 8 Consolidated Laws of New York

not a question of biology, but of public policy and principle”.²⁸¹ This interpretation illustrates that the judge has gone beyond the manmade legalistic boundaries of rights that permeate exclusivity.

The petitioners appealed to the court to consider the possibility of the subject having a right of body liberty, despite the legal status of the subject. The petitioners relied upon the precedent established in the landmark case of *Somerset v Stewart*²⁸² in which the captors would have to provide a legally sufficient reason for the detention of the subject. The case involved a writ of habeas corpus that was petitioned on behalf of a slave on account of the legality of his imprisonment. The Court found for the first time that a slave is a person and therefore capable of possessing rights. The shift of the burden of proof focuses on the justiciability of the actions as opposed to the perceived worth of the individual. The court when accepting to consider this case *prima facie* recognised that the subject was a natural person, that is presumed free and capable of holding rights, as it is on this basis that the onus shifted to the accused to prove the detention was justified. The Court relied upon natural law principles of justice pertaining to the contrary nature of slavery to law.²⁸³ Lord Mansfield, the presiding judge over this case recognised the possible disruption that the ruling of rights recognition could have upon society as he declared *fiat Justitia, ruat coelum* (translated as let justice be done whatever the consequences). This notion of justice appealed to the recognition of inherent rights upon which the refusal of such recognition would be “so odious, that nothing can be suffered to support it, but the common law”.²⁸⁴ The ruling in this case appeals to the case of nonhuman animals as not only can the writ of habeas corpus challenge arbitrary deprivation of freedom, it can challenge the lack of legal status and the legality of current practices.²⁸⁵

The case for *Tommy* was unsuccessful and the nonhuman animal was found to be ineligible for the status of a legal person and thus failed to attract the protection afforded by the writ of habeas corpus that would grant his release. The judges denied the writs on the ground that chimpanzees are incapable of performing social duties and responsibilities.²⁸⁶ This case supported the notion that legal rights are inseparable from the social duties to which they correspond within the societal social contract. The court's refusal to recognise rights in those that lack the ability to engage in society precluded that the prerequisite to rights is reciprocal duties.²⁸⁷ Legal precedent relied upon by the Court evidenced that nonhuman animals have never before been considered

²⁸¹ Reasoning by Justice Jaffe, issued in the court opinion, <https://web.archive.org/web/20160512074736/http://www.nonhumanrightsproject.org/2015/08/04/thats-one-small-step-for-a-judge-one-giant-leap-for-the-nonhuman-rights-project/> Accessed 20 May 2017

²⁸² *Somerset v. Stewart* 98 England Rep. 499 Kings Bench (1772)

²⁸³ Hinks, P. and McKivigan, J. (2016) *Abolition and Anti-slavery: A Historical Encyclopedia of the American Mosaic*, Reference Reviews, Vol. 30, No.1, p12

²⁸⁴ Lord Mansfield, at para 20, p510, *Somerset v. Stewart* 98 ER 499 Kings Bench (1772)

²⁸⁵ *Somerset v. Stewart* 98 ER 499 Kings Bench (1772)

²⁸⁶ The court relied upon the Blacks Legal Dictionary definition of a person being consistent with the holder of both rights and duties. <http://decisions.courts.state.ny.us/ad3/Decisions/2014/518336.pdf>

²⁸⁷ For example, if you wish to sue you have to have the capacity to be sued: *Citizens to End Animal Suffering & Exploitation, Inc. v. New England Aquarium*, 836 F Supp 45, 49–50 [D Mass 1993]

legal persons that are capable of asserting their rights.²⁸⁸ The petitioner relied upon the capability being evident as the subjects had *marginal* differences, therefore proposing that the existence of shared characteristics calls for shared levels of morality to be applied for rights considerations. Human animals that lack the ability to participate in society in a reciprocal nature are included in the rights framework. This illustrates that whilst they may be legally incapacitated they maintain the ability to have legal rights. Mechanisms such as guardianship or appointing a ward to act on their behalf ensures that the natural rights of the subject are not compromised. The decision to deny rights recognition on the basis of inability to enter a social contract applies only to nonhuman animals and not to human animals.²⁸⁹ This analysis suggests that exclusion from the legal rights discourse can only be quantified in light of the species difference. The statement from the Court confirms a speciesist tone in their legal analysis as can be evidenced when the Court concluded that it was “inappropriate to confer upon chimpanzees the legal rights...that have been afforded to human beings.” Parallels can be drawn with the discriminatory dismissal of subjective traits in the case of *Dred Scott v. Sandford* upon which the Court remarked “a black man had no rights that a white man need respect”.²⁹⁰ The legal reasoning in these two cases fixates on the sameness principle of rights, excluding to recognise the rights where there is a difference.

The case of *Tommy* confronted the same issue as in *Somerset*, in that the subject was excluded from the privilege of legal rights on account of difference in group membership. A major flaw in the case was that the sameness approach taken by the petitioner. The petitioner submitted that the subjects were the “appropriate nonhuman animal” and a “higher” nonhuman animal on account of the similar intelligence to that of human animals. This sameness principle of equality frames rights upon the premise that if human animals have rights protections and nonhuman animals have similar attributes, this would justify a similar protection. Rights are set upon the humanist parameters of exclusion.²⁹¹ Legal rights are framed as a privilege upon which humans are the standard, inclusion into this privilege is only qualified by submitting to those attributes. Using this interpretation, the inherent rights of nonhuman animals become dependent on qualities such as “highly complex cognitive functions”,²⁹² facets upon which rights for human animals are not measured against. A perhaps contentious issue with the case is the approach taken by the petitioner calling for the inclusion of nonhuman animals in the rights discourse with the expansion of the definition of person. This approach suggests that legal rights are human, creating a disparate relationship between nonhuman animals and rights. According to natural rights and justice, rights are not a static concept. The legal conceptualisation of rights are fixed, as this case illustrates, to human animals. Movements motivating the shift in law to appeal to its

²⁸⁸ *Cetacean Community v. Bush*, 386 F3d 1169, 1178 (9th Cir20049)

²⁸⁹ *Rasul v. Bush*, 542 U.S. 466, 481, 482 & n.11 (2004): foreign citizen that has only been detained in the host country cannot or has not ever been part of the social contract for that society, asserted in *iHercules and Leo* case

http://online.wsj.com/public/resources/documents/2015_0420_chimpanzee_petition.pdf Accessed 20 May 217

²⁹⁰ *Dred Scott v Sandford* 60 U.S 393

²⁹¹ Deckha, M. (2013), *Animal Advocacy, Feminism and Intersectionality*, *Deportate, Esuli, Profughe* 23, p52

²⁹² Presiding Judge Peters, No 518366 (NY App 4 December 2014), at 2.

natural justice foundations would see the removal of arbitrary limits which does not denote an expansion but a deconstruction. Whilst this case is still under consideration it illustrates the tension between legal and natural rights illustrating that whilst law is fixed it is done so for human interests, which could be the antithesis of justice.

Two further habeas corpus cases were filed by the Nonhuman Rights Project for the right to body liberty in the cases of *Kiko*²⁹³ and *Hercules and Leo*²⁹⁴. *Kiko* was a privately-owned chimpanzee while *Hercules* and *Leo* were owned by a research centre for use in scientific research. The issue in these cases appeal to the idea of partial rights, in that the nonhuman animals would receive protection of their rights in extent to their needs as nonhuman animals living in a human animal environment. In this sense, full rights of liberty and free cannot be granted on an equal basis to that of human animals. Instead the nonhuman animals would live out the rest of their days in a sanctuary, in which they can have enjoyment of their rights to an extent that would not be an unlawful detention. A comparative scenario could be with the placement of children into care facilities which would be in their interests, as they should not be incarcerated but they should also not be completely released as they do not have the competency required for this in the environment they are in and would suffer. The petitioners for *Kiko* sought the transfer of the nonhuman animal to a sanctuary thereby intending the continued detention of the subject. On this basis, the court dismissed the writ of habeas corpus for *Kiko* on the grounds that the granting of the writ would not entitled immediate release. The court refused to grant relief under the writ for a change of detention conditions. Whilst this case was not successful, as it may not be the correct vehicle to provide nonhuman animal rights through the writ, it did effectively grant standing to a nonhuman animal, thus providing the possibility for legal personhood in nonhuman persons.

Similarly, the case of *Hercules and Leo* was dismissed for the same reasons as the *Tommy* case, due to the court's interpretation of rights as being conflated with duties. Whilst the outcome of the case was not successful, the legal reasoning formed persuasive *obita dicta* for further cases involving the standing of nonhuman animals. The judge in deliberating the expansion of rights beyond the human animals, quoted a recent equal marriage case in the reasoning stating that “if rights were defined by who exercised them in the past, then new groups could not invoke rights once denied”.²⁹⁵ She drew upon the necessity to afford greater consideration to those excluded from the law in order to remove the existence of oppressive legislation, referencing the striking down of sodomy laws.²⁹⁶ The judges’ comments questioned the parameters of legal personhood and asserted the possibility that law can allocate rights to nonhuman animals. Although the writ was denied Justice Jaffe concluded that efforts to extend legal rights to nonhuman animals are

²⁹³ *Matter of The Nonhuman Rights Project, Inc. v Presti*, 2015 N.Y. App. Div. LEXIS 148, No. CA 14-00357, 2015 WL 25923, *2 (4th Dept. Jan. 2, 2015) (“Nonhuman Rights Project v. Presti”) “*Kikos case*”

²⁹⁴ *The Nonhuman Rights Project, Incorporated, on behalf of Hercules and Leo the petitioner, v Samuel L Stanley Jr, M.D as President State University of New York at Stony Brook*, 2015 New York Slip Op 25257

²⁹⁵ *Obergefell v. Hodges* 576 U.S (2015)

²⁹⁶ *Lawrence v. Texas* 539 U.S. 558 (2003)

understandable and may in the future, succeed. The consideration of the case illustrates that the judicial system perceives nonhuman animals as potential rightsholders, as the courts are willing to presume nonhuman animals hold moral interests that are worthy of moral consideration. The standing afforded to nonhuman animals by the courts treats the subjects as ends themselves, therefore challenging the current legal system and how nonhuman animals have the as mere property that whose interests only extend to human animal interest. This decision illustrates the dynamic state of the law in the overturning of unsound precedent and that court can continue to be the forum for social progress for nonhuman animals as it has for human animals.²⁹⁷

1.3 Legal Personality and Slavery

The international prohibition of slavery is codified in several universal instruments signifies the global consensus condemning the practice. Article 8 International Covenant on Civil and Political Rights (ICCPR)²⁹⁸ stipulates that the abolition of slavery is a prerequisite to justice. Despite the abhorrence to the practice of forced servitude legal protections extend only to human animals. The history of slavery involved the capture of free beings, the selling of them as products and the exploitation of their labour. Billions of nonhuman animals are subjected to this practice every day in every country around the world. The difference between human animals and nonhuman animals is that the enslavement for nonhuman animals is widely normalised to the point in which the subjects are without due process of the law. The legal status of nonhuman animals as property or things disables them from being considered slaves and having the protection from slavery. Several cases have been brought before courts in different jurisdiction to oppose the legal exclusion of animals from rights protection and to oppose the practice of slavery that human animals engage in. The enslavement of nonhuman animals was petitioned in the case of *Tilikum v Sea World*.²⁹⁹ A petition was filed on behalf of an orca held in captivity, claiming that the treatment was in violation of the constitution. The petitioners based their argument on the fact that the orcas were born free and are currently being held captive.³⁰⁰ The orcas were “[d]eprived of liberty, forced to live in grotesquely unnatural conditions and perform tricks”³⁰¹. The petitioners claimed that enslavement was a violation of Thirteenth Amendment of the United States of America. The constitutional provision on slavery and involuntary servitude prohibits the acts “within the United States, or any place subject to their jurisdiction”.³⁰² The plaintiffs put forward the argument that Sea World “reaped millions of dollars in profits from

²⁹⁷ The court cited that case of *Bing v. Thunig*, 2 N.Y.2d 656, 668 (1957) (a rule of law “out of tune with the life about us, at variance with modern day needs and with concepts of justice and fair dealing . . . [i]t should be discarded”

²⁹⁸ *International Covenant on Civil and Political Rights*, 1976

²⁹⁹ *Tilikum, Katina, Corky, Kasatka, and Ulises, five orcas, by their Next Friends, People for the Ethical Treatment of Animals (PETA), Incorporated., Richard “Ric” O’Barry, Ingrid N. Visser, Ph.D., Howard Garrett, Samantha Berg, and Carol Ray, Plaintiffs, v. Sea World Parks and Entertainment Incorporated and Sea World, LLC, Defendants*, 842 F. Supp. 2d1259, 1264 (S.D. Cal. 2012). Feb. 9, 2012 (*Tilikum v Sea World*)

³⁰⁰ para 1 and 5, *Tilikum v. Sea World (2012)*

³⁰¹ Para 55, *Tilikum v. Sea World (2012)*

³⁰² Thirteenth Amendment, Constitution of the United States of America

their slavery and involuntary servitude.”³⁰³ The case opposed the legal status of the orca as property, by claiming that these practices are unconstitutional. The case was dismissed on the grounds that the plaintiffs did not have standing as the constitutional protection only applies to human animals. The Court stated that the right to freedom from slavery and involuntary servitude "applies to persons, and not to non-persons such as orcas." The nonhuman animals failed to attract the personhood status in this ruling, yet despite the failure of the suit SeaWorld discontinued its “slave trade” of orcas removing plans to capture orcas from the wild for a lifetime of work.

The case of *Tilikum* illustrated that legal personhood can be refused on the basis of group membership. The exclusion of nonhuman animals from legal personality denies the protection from forced servitude. The legal status of nonhuman animals as property means that they can be owned and controlled legally. Emancipation from the acts of slavery was dependent on whether the subject was viewed as being a person. The status of legal personhood was denied in the case of *Dred Scott*. In this case the subject was excluded from the constitutional protections of Article five of the US Constitution which guaranteed the right to life and liberty. It was held that the subject did not have standing in Court on account of his refusal of recognition as a person due to his race. The subject's race fell outside of the attributes for a legal person as he was a “negro”, “imported” and “sold”. The commodification of a being was permitted on account of the non-membership into a society that was based on white domination and racial superiority. The case of *Tilikum* concerns a nonhuman that has been imported and sold, yet the species has not been declared as a morally irrelevant characteristic for the courts as race, has in the recognition of legal rights. The exclusion of nonhuman animals from the person classification and their classification as property is legal and normalised in society all around the world. Slavery in terms of the enslavement of the human animal is an economic system maintained by oppression. The hierarchy of oppression is created through the devaluation and exclusion of the subject. *Tilikum*, is a nonhuman animal is valued as a commodity that can be purchased and used. The Court announced the basis for the exclusion from the protection from slavery is due to the fact that the subject is a nonhuman, rendering them ineligible for standing in the court. The exclusion from the legal framework could be argued to be speciesist, as it removes nonhumans from the rights afforded to human animals, on the basis of species alone.

The cases of *Dred Scott* and *Tilikum* illustrate that slavery as an act is permitted, only if it is against those that are not classified as persons. The ruling in *Tilikum* occurred after the creation of the UDHR, the UN Charter and the Thirteenth Amendment, instruments which explicitly prohibit the practice of slavery itself. The intention to remove this barbarous act from the world speaks to the ideals of humanity enshrined in the UDHR as “all oppression and violence is intimately and ultimately linked”.³⁰⁴ The legitimisation of onerous practices such as slavery, highlight the dual pattern of exclusion and privileged status.³⁰⁵ The privileged status of

³⁰³ At para 46, 55, 62, 66, *Tilikum v. Sea World* (2012)

³⁰⁴ Spiegel, M. (1989), *The Dreaded Comparison* New York: Mirror Books, p27

³⁰⁵ van Boven, T. (2000), *Human Rights from Exclusion to Inclusion; Principles and Practice, An Anthology from the Work of Theo van Boven*, Kluwer Law International, The Hague, p283

those that are assumed legal persons are human animals. Human animals dictate the rights discourse, stating the parameters for inclusion and exclusion and do so with a bias to their interests. This superiority of the human animal enables the degradation of the excluded group to the status of non-persons. The philosopher Bentham stated that “the day may come, when the rest of the animal creation may acquire those rights which never could have been withheld from them but by the hand of tyranny.”³⁰⁶ This quote highlights the ability of a powerful group to exert dominance over an oppressed group by the means of law. Legal exclusion from rights recognition maintains the property status, continuing the subordination of nonhuman animals. The ruling preserved the injustice of the status quo in the refusal to grant standing. If all of the legal elements for standing are present in that there is an injury, causation between the injury and conduct and the ability to redress is then denied, it can only be presumed to be on the basis of speciesism, which the court also stipulated as the basis of their finding.³⁰⁷ The existence of discrimination as a ground to refuse the recognition of legal rights is the antithesis to the universality of international rights law.

Slavery is an act in which *persons* are treated as property. Whilst only human animals are legal persons, nonhuman animals are property therefore both the legal status and practice of control over nonhuman animals is legally permitted. The ownership and control of nonhuman animals species is generally permitted both nationally and internationally (providing that the practice is not cruel and the animal is not endangered). However, the plaintiffs claimed that this specific specie of nonhuman animal deserved constitutional protection and the recognition of constitutional rights due to their “many complex social, communicative, and cognitive behaviors”.³⁰⁸ The forced captivity had particularly damaging effects upon the subject depriving them of “the ability to make conscious choices”³⁰⁹. The approach made by the plaintiffs placed an emphasis on the capacity of the nonhuman animal, denoting that that only nonhuman animals with a certain capacity can be legally relevant. The movement for the recognition of legal personhood in nonhuman animals has been framed around the inclusion of “higher” nonhuman animals in the legal discourse. Nonhuman animals such as great apes, cetaceans have been the subject of many cases that have reached the upper courts. The cases focus on the nonhuman animals having a higher cognitive capacity that brings them closer to human animals “where animals and humans have similar interests...those interests are to be counted equally”.³¹⁰ The recognition of rights in a selective group is advocated by The Great Ape Project³¹¹ and Nonhuman Rights Project³¹². These appeals advocate for basic legal rights for nonhuman animals codified in a UN declaration.³¹³ Criticism has garnered around these appeals in the fear

³⁰⁶ Bentham, J. (1781), *An Introduction to the Principles of Morals and Legislation*, edited by J.H. Burns and H.L.A. Hart, London: Methuen, 1982.

³⁰⁷ Sunstein, C. R. (1999). Standing for Animals (with notes on animal rights). *UCLA Law Review*, 47, p1343

³⁰⁸ para 10-18, *Tilikum v. Sea World (2012)*

³⁰⁹ para 19, *Tilikum v. Sea World (2012)*

³¹⁰ Singer, P. (1985), *In Defense of Animals*, The Second Wave, Oxford: Basil Blackwell, Prologue

³¹¹ The Great Ape Project founded in 1993

³¹² Nonhuman Rights Project founded in 2007

³¹³ Robert W.M, (1994), *Humans, Nonhumans and Personhood*, in Cavalieri, P. and Singer, P. (1993), *The Great Ape Project: Equality beyond Humanity*, New York: St. Martin's Press, p237

that such movement would reinforce the elitist attitudes in which universal rights law aims to prohibit.³¹⁴ Moreso, the hierarchisation of nonhuman animals places them below human animals, setting the norm for rightsholders as human animals and rights as being essentially human. The inclusion of specific nonhumans sets up a new hierarchy within nonhuman animals to coexist with the one between human and nonhuman animals.³¹⁵ This movement illustrates the overt arbitrariness of human rights law as it focuses on the restriction of personhood to those with a special capacity.³¹⁶ Despite the movement away from universal ideology of rights this movement has garnered progress for the recognition of legal rights for nonhuman animals. The Balearic Islands passed the world's first legislation granting legal personhood rights to all great apes in 2007. This removal of legal exclusion marks the beginning of the changing face of what constitutes as a legal person even if it is only specific animals on the basis that they share an undeniable closeness to human animals.³¹⁷

1.4 Legal Consideration of Nonhuman Persons

The High Court in Kerala, India ruled that nonhuman animals are “beings entitled to dignified existences” in the case of *N.R. Nair And Ors., Etc. vs Union of India*.³¹⁸ The court invoked the constitutional rights to life and liberty under s21 of the Indian Constitution when assessing the captivity and use of animals in the circus. The court dismissed the claim under the constitutional provisions but did however engage in an inclusive rights analysis for nonhuman animals. This ruling went beyond the human animal parameters of law encoded in the national constitution finding that all living beings have rights. This case illustrates that human animals establish the parameters for exclusion from rights through law. The court ruled that it is our “fundamental duty...to recognise and protect their rights”, therefore not only stating that an exclusion is arbitrary but it is against the principles of humanity. The court enters into an assessment of the rights status of nonhuman animals that questions why even though nonhuman animals are “not homosapiens” their existence is of less value and consideration.³¹⁹ The court states that “animals are denied rights” in the legal system and that “legal rights shall not be the exclusive preserve of humans” advancing their position that the law had to change to be just. The court stated that nonhuman animals are in many respects, better than humans, all with intelligent behaviour and some with complex reasoning abilities. The court summed up by considering that if human beings are entitled to rights, then animals should be too. This court deemed it necessary to include nonhuman animals in the rights framework, even if the court did not attribute legal rights

³¹⁴ Davis, K. (2014), *The Provocative Elitism of “Personhood” for Nonhuman Creatures in Animal Advocacy Parlance and Polemics*, Journal of Evolution and Technology, Vol.24, No.3, p35-43

³¹⁵ Koskenniemi, M. (1997), *Hierarchy in International Law: A Sketch*, 8 EUR. Journal International Law, p571

³¹⁶ Bilchitz, D. (2009) *Moving Beyond Arbitrariness: The Legal Personhood and Dignity of Non-human Animals*, South African Journal on Human Rights, Vol.25, No.1, p38-72.

³¹⁷ Singer, P. (1985), *In Defense of Animals*, The Second Wave, Oxford: Basil Blackwell,

³¹⁸ *N.R. Nair And Ors., Etc. vs Union of India (Uoi) And Ors.* 6 June, 2000, AIR 2000 Ker 340

³¹⁹ paragraph 13, citing the case *Balakrishnan v. Union of India* (2000.06.06)

it did recognise nonhuman animals have rights and therefore human animals have corresponding duties that should be quantified in law to limit the encroachment on the nonhuman rights.

The court engaged in an interesting debate of the contractual nature of rights, but only in terms of rights for human animals. When human animals have rights and those actions concerned with the right include other beings (both human and nonhuman animals), a duty is imposed alongside that right. The court stated “It is a fallacy to think that, under our Constitution there are only rights and no duties”.³²⁰ This assessment of rights interpreted duties which would regulate the behaviour of human animals. The court’s ruling in this case draws parallels with the case of *Megh and Lili* in where the legal rights of the animals are recognised, but due to the lack of capacity of the subject, a legal duty is bestowed upon those in control in order to protect that right. These cases illustrate the unequal nature of rights in the way that different beings require different protections for their different right realisations. Children human animals and legally incapacitated human animals would still be considered rights holders protected by the UDHR even though they attract a different set of protections for their rights.

The above cases illustrate the growing movement to break down the legal barriers of exclusion for nonhuman animals in the rights discourse. The court’s consideration of these cases evidence a recognition of legitimate legal basis to the claims. The development of law in this area runs parallel to the human animal struggle for inclusion. Rights have always been exclusionary, both for human animals and nonhuman animals. Legal personality claims that appeal to the principles of natural justice foundations of the law coupled with rational scientific reasoning debunk the traditional, theological assumptions upon which legislation arbitrarily excludes. The judiciary’s consideration of this evidence illustrates the legal systems departure from the unilateral human animal interest that is normalised within the law. The cases, irrespective of ruling, are an advancement for the breaking down the barriers of exclusion and a dismantling of the internalised speciesism that is being confronted as a barrier to justice. Rather than being a revolutionary change, this development is an evolutionary change of traditional human rights concepts.³²¹ The cases show the growing recognition of assignment of moral value and the reciprocating fundamental protections are not defined by species membership. However, the jurisprudence before the courts have maintained the exclusionary regime of rights as the grounds for moral consideration are humanist. The nonhuman animal subjects of the personhood cases are those which are viewed as closer to human animals due to their DNA or cognitive sophistication. On one hand the breaking of the species barrier recognises legal rights can be attributed to all subjects, recognising that all subjects are rightsholders with inherent worth. On the other hand, the criteria for personhood rights is set to the human animal standard attributing legal rights only to only the nonhuman animals that qualify are the closest in sameness and therefore the “most deserving of basic *human rights*”.³²² Rights are attributed through a human

³²⁰ Paragraph 9, citing the case *Balakrishnan v. Union of India* (2000.06.06)

³²¹ Cavalieri, P. and Singer, P. (1993), *The Great Ape Project: Equality beyond Humanity*, New York: St. Martin's Press, p312

³²² Robert W.M, (1994), *Humans, Nonhumans and Personhood*, in Cavalieri, P. and Singer, P. (1993), *The Great Ape Project: Equality beyond Humanity*, New York: St. Martin's Press, p237

animal perspective propagating an “unequal value thesis”³²³ of rights. The value of lives of nonhuman animals is determined using sameness as an exclusionary tool. Whilst this signals that the species barrier is artificial the species hierarchy is central to the exclusion of legal rights protection. The legal protection of rights remains inherently exclusionary with the lines of exclusion drawn along the lines of human-ess. Rights, in this interpretation of legal personality; whilst not exclusively human, are necessarily human.

2. Interconnectedness of Rights

2.1 Extrapolating Oppressions

Critics of rights beyond the human animal fear the inclusion of nonhuman animals will create regression in the law.³²⁴ On the contrary, the entanglements of oppression denigrate the very humanity in the law³²⁵ The connections between the oppression and exploitation of human and nonhuman animals are driven by economic based motives causing both a tremendous suffering for nonhuman animals, but also for human animals alike. This entanglement of oppression creates obstacles towards a greater social justice, causing on the denigration of the law with the distinguishment from its natural law foundations as well as the promulgation of insidious acts which due to their character are the antithesis to humanity. The exploitation inherent in these acts are prohibited by international law but only explicitly for those in the human animal group, therefore the potential for these acts to continue remains.

The interconnectedness of oppression that stems from the use of nonhuman animals should not be overlooked when considering the growth of the human rights discourse. The exploitation and justification for this mistreatment of nonhuman animals is not only a resemblance of human animal oppression, but is inextricably tied to it.³²⁶ The structural exploitation inherent in practices such as factory farming for example, extends into the human rights discourse. Aside from the practices against the nonhuman animals the workers face life-threatening working conditions which violate human rights,³²⁷ including the right to form or be part of a union.³²⁸ Not

³²³ Frey, R.G, (1997), *Moral Standing, the Value of Lives and Speciesism*, Ethics in Practice. Edited by Lafollette, H. Blackwell Publishers

³²⁴ Rand, A. (1964), *Man's Rights*, in *The Virtue of Selfishness*, New York: Penguin Putnam

³²⁵ Nibert, D. (2002), *Animal Rights/Human Rights: Entanglements of Oppression and Liberation*, Rowman & Littlefield Publishers, Introduction

³²⁶ Nibert, D. (2002), *Animal Rights/Human Rights: Entanglements of Oppression and Liberation*, Rowman & Littlefield Publishers, p3

³²⁷ Human Rights Watch Report, (2005), *Blood, Sweat, and Fear: Workers' Rights in U.S. Meat and Poultry Plants* <https://www.hrw.org/reports/2005/usa0105/> Accessed 20 May 2017

³²⁸ Article 20, *Universal Declaration Human Rights*, 1948

to mention that the workers in these sectors are predominantly undocumented immigrants that are often unable to seek protection from the State placing them in a vulnerable situation facing exploitative working conditions.³²⁹ The presence of oppression intercepts with other oppressed groups as the exploitative system relies upon the vulnerability and powerlessness, the human animals become passive victims in this oppression.³³⁰ The vulnerability of the nonhuman animal, rather than being safeguarded by the law is devalued for human animal use and the vulnerability of the workers is exploited, with the most devalued members of society holding the most dangerous and lowest paying jobs. A selfish disregard for others and their suffering is evident in the oppressions against nonhuman animals and those which carry out the oppressive acts.

2.2 Environmental Impacts

The profit motive and the affinity for wanton destruction in the human animal has brought dire consequences for all living creatures on the planet; including human animals, nonhuman animals and the environment. Human animals are an invasive species that have elevated their status as being disconnected from other animals and nature. Human development is characterised by exploitation. The exploitation of nature for resources and the use of living beings as resources namely human and nonhuman animals. The recent development of environmental law acknowledges the interconnectedness human rights and the environment.³³¹ The direct and indirect impacts that environmental damage has on human rights enjoyments in relation to health and habitat.³³² Similarly to the spillover of oppression, the unrestricted human animal actions on the environment have a spillover effect for human rights enjoyment.³³³ Article 25 UDHR states that “everyone has the right to a standard of living adequate for health and wellbeing”. The link between environmental impacts and human rights is recognised in several international legal instruments. The right to a satisfactory environment is recognised in the African Charter³³⁴ as a necessary precondition to development. The exploitation of natural resources adversely affect the segments of society that are most vulnerable, preventing their enjoyment of rights such as life, health and wellbeing.³³⁵ Beginning with the Stockholm Declaration in 1972³³⁶ Environmental law was created as a distinct body of law to correspond with human rights law, placing limitations upon human animal activities for the preservation of the environment and human animal rights.

³²⁹ Lo, J. and A. Jacobson. (2011), *Human rights from field to fork: improving labor conditions for food-sector workers by organizing across boundaries*, Race/Ethnicity: Multidisciplinary Global Contexts Vol.5, No.1, p62

³³⁰ Young, I.M, (1990), *Justice and the Politics of Difference*, Princeton University Press

³³¹ Resolution 16/11 adopted by the Human Rights Council, 12th of April 2011, *Human Rights and the environment*, requested the United Nations Office of the High Commissioner

³³² article 24, paragraph 2 (c), Convention on the Rights of the Child: attainment of the highest standard of health

³³³ Intergovernmental Panel on Climate Change (IPCC) Working Group (2014), *Climate Change 2014: Impacts, Adaptation, and Vulnerability*, II AR5 Summary for Policymakers

³³⁴ African Charter 1981, Article 24: Right to satisfactory environment

³³⁵ Resolution 16/11 adopted by the Human Rights Council, 12th of April 2011, *Human Rights and the environment*, requested the United Nations Office of the High Commissioner

³³⁶ Created at the United Nations Conference on the Human Environment 1972

The protection of the environment and the devastating effects upon human animals is also inextricably linked to nonhuman animals. The human animal use of nonhuman animals for food consumption, is the leading cause of climate change.³³⁷ The UN Food and Agriculture Organisation (FAO) attribute at least 18% of total greenhouse gases to livestock.³³⁸ The issue of animal agriculture has not been addressed in the international sphere in reference to preventing environmental devastation and the interference with the enjoyment of human rights. Developing nations are the regions predominantly used for meat production, with the environmental impacts being placed predominantly in these already vulnerable regions.³³⁹ Furthermore, an ethical consideration is raised concerning the fact that developing States are the main producers of meat yet developed States are the main consumer. The extrapolation of exploitation continues beyond the nonhuman animal in this scenario, in which human animals lives and living environments are devalued. The oppressive social arrangement of the animal agriculture system maximises profits through a system of exploitation; exploitation of the nonhuman animals used as products and exploitation of those involved in the exploitative process.

2.3 Health Impacts

The interrelatedness of the exploitation of nonhuman animals and the consequences for human animals also extends to the enjoyment of the right to health and the right to food. The continued exploitation of nonhuman animals for food and the health consequences that are related to this consumption are devastating for human animals and their enjoyment of the right to health.³⁴⁰ The World Health Organisation (WHO), an agency of the United Nations, announced in 2015 that the consumption of processed and red meat cause cancer.³⁴¹ The continued exploitation of nonhuman animals is to the detriment of human animal's right to food as it provides an “unbalanced nutrition”.³⁴² Additionally, the use of nonhuman animals for food extrapolates the injustice towards human animals as over half of the world’s crops are fed to livestock whilst almost one billion people are malnourished.³⁴³ The fundamental right to be free from hunger is stipulated in Article 11(2) ICESCR which is unsustainable under the current system of using nonhuman animals. The number of malnourished people has gradually increased³⁴⁴ and in order to provide enough food (using a meat based diet) for the estimated population growth food production

³³⁷ Goodland, R. and Anhang, J (2009), *Livestock and Climate Change*, World Watch Magazine, at 11. Study shows that livestock and their byproducts account for 51% of worldwide greenhouse gas emissions.

³³⁸ Food and Agriculture Organization of the United Nations, (2006). *Livestock's Long Shadow: Environmental Issues and Options*, Rome.

³³⁹ Food and Agriculture Organization of the United Nations. (2006), *Meat and meat products. Food Outlook*, No. 1, June. www.fao.org/docrep/009/j7927e/j7927e08.htm. Accessed 20 May 2017

³⁴⁰ Article 12(i) ICESCR

³⁴¹ International Agency for Research on Cancer, *Consumption of red meat and processed meat. IARC Working Group*, Vol.114, (6–13 September, 2015).

³⁴² Elver, H. (2016), United Nations General Assembly, *Right to food*, Note by the Secretary-General

³⁴³ A Humane Society of the United States Report, (2009), *The Impact of Industrialized Animal Agriculture on Food Security*, EHH. 6

³⁴⁴ Food and Agriculture Organization of the United Nations. (2008), *The State of Food Insecurity in the World 2008*, Rome: FAO, p. 6

would have to increase globally by 70%.³⁴⁵ The current system of nonhuman animal exploitation cannot be maintained to meet the daily nutritional needs of a rapidly expanding human animal population.³⁴⁶ The international discourse has put a movement towards sustainability on the global agenda in an attempt to prevent the destruction of the environment and curb human animal made greenhouse gas emissions. The integration between both economic development and sustainable development is promoted,³⁴⁷ in order to prevent the prevention of rights enjoyment that is a consequence of environmental degradation.³⁴⁸ The denigration of rights is an implication from the use of nonhuman animals for food. The oppression of nonhuman animals is linked to the oppression of human animals as the system is unsustainable to provide adequate access to rights for all human animals. On that note, the UN stated that it is necessary that the global diet shifts towards a plant based diet which can feed everyone and protect the environment.³⁴⁹ The rights discourse should be linked with sustainability in order to actually bring into realisation the equal treatment of all human animals.

3. Other Developments

3.1 Partial Rights and the Expansion of Legal Personality to Nature

The legal recognition of rights does not mean the attribution of equal rights. The codification of legal rights in international instruments only need to go as far as necessary in order to bring a just result. Equality does not mean justice. Rather there should be the equal consideration of interests for rights attribution,³⁵⁰ in response to the equal inherent worth³⁵¹ and the equal capacity to suffer.³⁵² Partial protection in the sense that protection is attributed based on the needs of the subject rather than reflecting the desires of the human animal.³⁵³ A legal ethical observation in the pursuit of justice could see that the removal of legal barriers for nonhuman animals to gain rights recognition does not signify that they are entitled to equal rights but instead subjective, differentiating rights. Different rights for different persons as a form of distributive justice, allocating protections according to the subjective sufferings. The creation of legal rights would

³⁴⁵ Food and Agriculture Organization of the United Nations. (2009), *How to Feed the World in 2050*, 10.1111/j.1728-4457.2009.00312.x

³⁴⁶ A Humane Society of the United States Report, (2009), *The Impact of Industrialized Animal Agriculture on Food Security*, EHH. 6, p5

³⁴⁷ United Nations (2015), *Transforming our world: the 2030 Agenda for Sustainable Development*, Sustainable Development Goals (SDG) A/RES/70/1

³⁴⁸ *Kyoto Protocol* (1992), United Nations Framework Convention on Climate Change (UNFCCC)

³⁴⁹ Carus, F. (2010), *UN urges global move to meat and dairy-free diet*, The Guardian

³⁵⁰ Singer, P. (2003), *Practical Ethics* in S. Armstrong and R. Botzler, (eds) *The Animal Ethics Reader*, London and New York: Routledge.

³⁵¹ Regan, T (1985), *The Case for Animal Rights*, Berkeley, CA: University of California Press

³⁵² Bentham, J. (1781), *An Introduction to the Principles of Morals and Legislation*, edited by J.H. Burns and H.L.A. Hart, London: Methuen, 1982

³⁵³ Radford, M. (1996), *Partial protection: Animal Welfare and the Law*, in *Animal rights*, Palgrave Macmillan UK, p67-91

extend to reflect the needs of the subject for adequate protection. Many rights will be inapplicable to nonhuman animals on account of their fundamental differences, yet from a human rights perspective, those with potential vulnerability should be protected. Partial juristic persons would have certain, specifically created rights to tender to the needs of the subject.³⁵⁴

In 2014 the New Zealand legislature granted legal personhood rights to a river, establishing legal mechanisms to protect the the river.³⁵⁵ The river has been recognised as a living entity which attracts the same legal status as a human animal with the corresponding rights, duties and liabilities.³⁵⁶ This legal development span over 140 years illustrating that legal personality for living entities can go beyond the human animal and the parameters around personhood rights are not fixed. The legislature in India used the New Zealand ruling as a precedent in their legal granting of legal person status to two rivers.³⁵⁷ These cases illustrate the legal transformation of property status to personhood. The creation of a new category outside the human animal or corporate entity enables the law to provide the necessary protective measures required to safeguard the life of the rivers. The nature of these rights extends to rights necessary for their preservation and protection of their inherent value, to the same extent as human animal legal rights. The rulings recognise the necessity for protection of nature rights due to the interconnectedness of human animal rights which are detrimentally affected as a consequence of the damaging of the living entity. The rights allocated refute the notion that rights confer responsibilities, the river is incapable of performing duties but is still recognised as a legal person on account of its inherent worth. The granting of standing in these cases prompts a critical analysis of the current restrictions surrounding the restriction of personhood rights to nonhuman animals.

A legislative effort to protect the rights of nonhuman living entities was codified into the the constitution of Ecuador in 2008. It is the first State to legally recognise the right to nature, shifting the definition of nature from that of a property status to that which has constitutional rights to “exist, persist, maintain and regenerate”.³⁵⁸ The constitution recognises the interrelatedness of human rights and environmental rights, limiting human animal activities³⁵⁹ and placing responsibilities to respect nature.³⁶⁰ The provisions curb human animal activities in order to prevent the willful destruction of the natural world. The constitution recognises that damage to the environment causes human animal damage, preventing the enjoyment of human

³⁵⁴ Favre, D. (2011), *Animal Law: Welfare Interests & Rights*, Aspen Elective, Second Edition, p422

³⁵⁵ The Office of Treaty Settlements, Ruruku Whakatupua Te Mana O Te Awa Tupua (2002) Office of Treaty Settlements

³⁵⁶ Roy, E.E (2014), *New Zealand river granted same legal rights as human being*, The Guardian <https://www.theguardian.com/world/2017/mar/16/new-zealand-river-granted-same-legal-rights-as-human-being> Accessed 20 May 2017

³⁵⁷ Safi, M. (2017), *Ganges and Yamuna rivers granted same legal rights as human beings*, The Guardian <https://www.theguardian.com/world/2017/mar/21/ganges-and-yamuna-rivers-granted-same-legal-rights-a-s-human-beings> Accessed 20 May 2017

³⁵⁸ Constitution of Ecuador (2008), Article 71, Chapter 7

³⁵⁹ Constitution of Ecuador (2008), Article 18, Chapter 1

³⁶⁰ Constitution of Ecuador (2008), Article 83(6), Chapter 9

rights to health and life.³⁶¹ The additional category of living property ascribes protections beyond the human animal yet it does not require an expansive new legal rights paradigm.³⁶² For nonhuman animals this new legal status could mean that they receive protection, albeit in a welfare form. The development would mean that nonhuman animals would have a new legal status in which they are no longer considered property or “mere things” for usage, they become living entities in themselves under the law.

3.2 International Legislative Development

The legal recognition for the rights of specific nonhuman animals have been both judicial and legislative. The proposals for legislation ensuring the recognition of entitlements for certain “higher” species of nonhuman animals; namely apes, orcas, whales and dolphins, have been put forward on the basis of their level of sentience. The cognitive abilities of these nonhuman animals are complex, arguably just as sophisticated as human animals. Therefore, the drafters of the proposed declarations deem that international legal obligations to protect these specific nonhuman animals from suffering is necessary. The 1994 *World Declaration on the Great Apes* and the 2010 *Declaration of the Rights of Cetaceans: Whales and Dolphins* provide for the recognition of the basic fundamental rights of life, liberty and freedom from torture. Whilst these declarations have not been codified internationally certain States have implemented the covenants of these declarations into their national legislation. Many States have ceased experimentation on chimpanzees and the Great Ape Project declaration was used as a guideline when the Balearic Parliament introduced legislation for the protection of nonhuman ape rights in 2007. The judicial and legislative progressions illustrate the exclusionary basis of rights can be overcome by appealing to the principles of natural justice upon which the posited law is supposed to be founded. The removal of the species barrier brings with it a different exclusion paralleling the removal of exclusion for human animals, for when one discrimination it is replaced with another discrimination. Upon this basis, rights can be seen to be non-exclusionary however the application of rights in the legal form are inherently exclusionary. Rights are inherent and are on the basis of sentience which is trans-species. Rights attribution is legal and human, therefore innately exclusionary.

A proposal for a *Universal Declaration of Human Responsibilities*³⁶³ adopted by *United Nations Educational, Scientific and Cultural Organization* (UNESCO) in 1998 as a way to ensure rights protection by complementing the UDHR. The declaration aims to restrict absolute rights with the bestowing of legal obligations. This proposal categorises rights as being indistinguishable from responsibilities, that in order to recognise rights you have to recognise the duties owed to others. The declaration denotes the idea that equal importance should be given to responsibilities in order to create a “global ethic” towards rights. This recommendation provides an interconnected

³⁶¹ Constitution of Ecuador (2008), Article 66(27), Chapter 6

³⁶² Cupp, R.L (2016), *Animals as More Than 'Mere Things,' but Still Property: A Call for Continuing Evolution of the Animal Welfare Paradigm*, 82 *Cincinnati Law Review*, p25

³⁶³ *Valencia Declaration*, Proposed by the InterAction Council, 1 September 1997

approach to rights, recognising that the acts of some are done at the expense of others and this can cause the suffering. Obligations to prevent suffering are necessary, dismantling the “exclusive insistence on rights” and instead engaging a duty to respect others. The declaration challenges the self-interest rhetoric in human animal rights discourse. The recognition of rights is “a goal which cannot be achieved by laws...alone” and therefore the imposition of duties is fundamental to ensure that human animals “to act justly”. Whilst the declaration was for the purpose of preserving rights for human animals the responsibility rhetoric for human animals is present in several recent initiatives mandating the interdependence of rights and duties. The *UN Millennium Declaration*³⁶⁴ states that an ethic of stewardship should be used for environmental actions.³⁶⁵

In 1987 the *Earth Charter* was drafted and later launched at the UNESCO headquarters in 2000. The Earth Charter went further declaring the requirement for a “peaceful global society” are universal responsibilities. This charter moves away from a human-centric notion of rights, instead focusing on an ethical preservation of life in which responsibilities play an integral role. Statements such as “Earth community” and “kinship with all life” stood to acknowledge the life beyond human animals and in doing so deconstructs the hierarchy by acknowledging all life as important.³⁶⁶ The charter, like the UDHR, forms part of international soft law, promoting morally binding norms that ought to be implemented into legally binding laws by State governments. If the charter was to be used as a foundation for international law and State law, as the UDHR is, then this would mean that the “respect for nature” rhetoric would become embedded in legal systems around the world. The notion of rights could become less synonymous with human animals when legal instruments such as the Earth Charter recognise the value in “all beings” which states that “every form of life has value regardless of its worth to human beings”³⁶⁷. Human animal interest would be restrained permitting the consideration of other interests, as the charter prioritises the ethic of care and compassion ensuring that the responsibility to consider of the suffering of others is paramount. The charter recognises the presence of power in the international arena and seeks to limit that power with responsibility.³⁶⁸

The charter is an international document supported by UNESCO³⁶⁹ and is monumental for the international rights discourse as it specifically addresses reducing harm to nonhuman animals without reducing them to commodities. Other international instruments that concern nonhuman animals prevent cruelty for the purposes of human animal interest and preserve welfare for nonhuman animals for human animal interest in their consumption of nonhuman animals. The charter instead treats nonhuman animals as ends in themselves asking for human animals to “treat all living beings with respect and consideration”.³⁷⁰ The charter signifies a legal

³⁶⁴ UN (8 September 2000). *United Nations Millennium Declaration*. 55/2. United Nations General Assembly.

³⁶⁵ Article 23, *UN Millennium Declaration*, 2000

³⁶⁶ Principle 1 Respect and Care for the Community of Life, *The Earth Charter*, 2000

³⁶⁷ Principle 1 Respect and Care for the Community of Life 1a, *The Earth Charter*, 2000

³⁶⁸ Principle 2b, *The Earth Charter*, 2000

³⁶⁹ General Conference Plenary Session, 32nd session 16 October 2003

³⁷⁰ Principle 15, *The Earth Charter*, 2000

progression bringing moral law into the legal agenda. It signifies that in order to bring moral justice the inclusion of nonhuman animals and the consideration of their interests to “protect them from suffering”³⁷¹ is necessary in international law. It denotes that after almost 60 years of since the UDHR, the restriction of absolute rights and the recognition of worth beyond the human animal is pertinent for development.

3.3 Recommendations

Historically, rights law has a trajectory of illogical exclusion. The legal challenges brought before the courts have opposed the arbitrary limits of the law and have called for inclusion. Legal evolution of the rights framework has meant the expansion of legal rights to those that are discriminatorily prevented from consideration. For nonhuman animals, the current legal exclusion from human rights thinking and practice remains arbitrary and unjustified. There are significant challenges in ascertaining what constitutes as a legitimate possessor of rights, yet the primary concern for matters of justice is whether potential rightsholders have adequate consideration to determine whether they require protection. International legal instruments dictate that the rights framework is to prevent abhorrent acts such as slavery, torture and killing in the world. The legal instruments support the peremptory norms that condemn these practices. International law acts as a mechanism for the moral laws upon which they are based. Human animals are protected by law in terms of their rights, whilst nonhuman animals are not protected with no international legal instruments protecting them from suffering beyond the means of their usage towards human animals. The fact that there have not been codified legal protections beyond the human animal does not suggest that rights are therefore human. Rather rights are a possibility, especially when those rights curb the use of immoral acts that are contrary to customary international law. The treatment of nonhuman animals in intensive factory farming, vivisection and for entertainment purposes is in contravention of anti-torture legislation, anti-cruelty legislation and anti-slavery legislation. Whilst these practices are both morally and legally condemned on an international level, the prohibition only specifies human animals. The legal loophole of permitting these practices is maintained through speciesism, which is legitimised through a strict adherence to the idea of legal rights and not their moral foundations.

Rights should be a correspondence of moral and legal rights; moral rights can exist independently of legal rights but legal rights should always appeal to their moral interest foundations.³⁷² The balancing of moral consideration for legal attribution would recognise the need for the legal system to extend rights judgment beyond the human animal. In order for law to adhere to the principles of moral justice firstly there is a need for the removal of the property status of nonhuman animals. This status permits the commodification of dignified life that is not only contrary to customary law, but it perpetuates an environment contrary to the ideals of humanity. Secondly, adequate legislative protections should be enacted to provide minimum standard rights for nonhuman animals. As a minimum international legislation, should codify the

³⁷¹ Principle 15a, *The Earth Charter*, 2000

³⁷² Childress, D.E. (2011), *The Role of Ethics in International Law*, Cambridge University Press, p237

protection of nonhuman animals on a universal level. Almost every State across the world has anti-cruelty and welfare legislation. The European Union has international minimum legal standards for welfare and the prevention of cruelty, additionally these standards are imported during international trade. The regulation of absolute human animal rights is necessary to curtail unethical human animal behaviour that is contrary to humanity. Legislative rights will also stabilise the law which privileges some nonhuman animals over others for rights protection, a species discrimination created by human animals reflecting human animal preferences, despite scientific proof that sentience exists in those which are not favoured. The movement for legislative rights will remove the hypocritical nature of legal rights, therefore strengthening the law. Rights will no longer be denied from the most vulnerable that cannot contractually submit, especially when these prerequisites are not applied to those of the human animal specie. International law will move further towards eliminating all forms discrimination through creating a universal acknowledgment that rights attribution is considered subjectively and not deprived with ulterior motives. Legislation for nonhuman animals would follow the gradual progression of international law which recognises the necessity of protecting all forms of life in an interconnected world. For example, many international instruments have been established to protect the environment, recognising the importance of biodiversity and the necessity to constrain exploitation for the greater good. Finally, the change in legal status of living beings will ensure that they receive adequate legal consideration by the judiciary, in cases of redress from potential violation of rights. Nonhuman animal cases will not be arbitrarily dismissed for lacking standing as it will no longer be a prima facie fact that property cannot be considered for rights. The ever-increasing volume of cases challenging the judiciary illustrate the integral injustice as the law has become destabilized. Whilst these legal proposals are not indicative of rights attribution for nonhuman animals they do provide a greater legitimacy to the law closing the distinction between morality and legality.

4. Conclusion

The recognition of nonhuman animal rights is critical for the progression of human rights law as the recent developments of national case law involving nonhuman animals across the world, draws a parallel with the development of human rights law throughout history, with its arbitrary exclusion of groups. Rights law has a paradoxical nature existing as both as a mechanism to protect from harm as well as being a tool used perpetuate violence through exclusion. The manifestations of this paradox are proliferated by the tension between natural rights as an entitlement and legal rights as being a privilege. The man-made codification of rights remains a contentious issue complicated by the conflation of these notions. The presupposing of legitimacy of rights allocation in the legal realm proliferates the degradation of legal rights from their natural law foundations. The codification of rights in universal legal instruments for the purpose of reinforcing protections create parameters of exclusion around rights. Whilst the UDHR and subsequent treaties protect one specific group, namely human animals, this results in the amalgamation of rights as being human, placing nonhuman animals outside the scope of the law, and therefore outside of the rights discourse. The well-documented exploitation of nonhuman

animals is both created and maintained from this exclusion, which its existence runs contrary to the ideals of natural justice. The deconstruction of the legal boundary of rights is critical for the development of rights law, that has a history of continual expansion of rights from exclusion even amongst human animals. The current volume of cases challenging the humanist legal boundaries of rights continue this trend, illustrating the trajectory of illogical exclusion in the legal rights discourse.

Discrimination is central to the exclusion of nonhuman animals on the basis that species as a relevant difference, despite the contradictory movement in welfare legislation acknowledging sentience as a basis for consideration. Without the acknowledgment of the oppressive underpinnings of the legal parameters, which serve human animal interest, the perpetuation of exploitation against the excluded nonhuman animals results. Lack of adequate subjective analysis and ignorance of rational, scientific, objectionable analysis evidences that species exclusion is arbitrary. The propertization of nonhuman animals draws parallels to enslavement and torture, acts that are absolutely prohibited in international relations. The human rights ethos fails to live out its true meaning of justice when the human/nonhuman animal dichotomy reproduces an exclusionary, discriminatory nature of rights in which the international legal instruments were sought to eliminate. Legal ethical considerations of the ever-increasing violence permitted against nonhuman animals are necessary to further develop the quality of rights law in the name of humanity both as a restriction on immoral behavior by human animals as well as a protection of the most vulnerable beings on the planet. A reconsideration of humanity in the law is therefore necessary as to close the gap between legal and natural rights.

The recent legislative and judicial movement for the expansion of nonhuman animal and nature rights recognize inherent dignity beyond the human animals and there is an increase in legal systems prescribing rights in accordance with that value. The international recognition of environmental rights, under the premise of interconnectedness of human animal rights and environmental rights, needs to further expand to fully protect all life, as all life is interconnected, as all harms are interconnected. Judgments from recent personhood case law has evidenced a movement towards a greater humanity as the reasoning draws upon the requirement for a constant questioning of the constructed definitions of rights and how artificial rights align with natural principles of justice.

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United Nations Millennium Declaration 2000

Convention on the Rights of Persons with Disabilities 2006

Optional Protocol to International Covenant on Economic, Social and Cultural Rights 2008

Proposed Universal Declaration on Animal Welfare 2011(not in force)

- **Regional International Instruments**

Constitution of India 1949

European Convention for the Protection of Animals Kept for Farming Purposes No. 87 of 10 March 1976

European Convention for the Protection of Animals for Slaughter No. 102 of 10 May 1979

African Charter on Human and Peoples Rights 1981

European Convention on the Protection of Pet Animals No. 125 of 13 November 1987

European Convention for the Protection of Vertebrate Animals Used for Experimentation and other Scientific Purposes No. 123 of 18 March 1986

European Convention for the Protection of Animals kept for Farming Purposes, Treaty No.145, 1992

European Union Directive 98/58/EC 1998 concerning the protection of animals kept for farming purposes

Treaty on the Functioning of the European Union *Treaty of Lisbon* (2009)

Other

Resolution 16/11 adopted by the Human Rights Council, 12th of April 2011, *Human Rights and the environment*, requested the United Nations Office of the High Commissioner

Resolution A/HRC/RES/32/2, adopted by the Human Rights Council, 30 June 2016, *Protection against violence and discrimination based on sexual orientation and gender identity*

Annex II

Abbreviations

CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CBD	Convention on Biological Diversity
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
CITES Flora	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CRPD	Convention on the Rights of Persons with Disabilities
CRC	Convention on the Rights of the Child
DNA	Deoxyribonucleic acid
EU	European Union

FAO	Food and Agriculture Organisation
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IFAW	International Fund for Animal Welfare
IPCC	Intergovernmental Panel on Climate Change
LGBTQ	Lesbian, Gay, Bisexual, Transgender, and Questioning (or queer)
UDHR	Universal Declaration of Human Rights
UDWA	Universal Declaration of Welfare for Animals
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNFCCC	United Nations Framework Convention on Climate Change
USA	United States of America
WHO	World Health Organisation