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IT'S A JUNGLE OUT THERE
THE STATE OF THE LAW ON ANIMAL WELFARE

by **KASHMITA GAYADIN,** KwaZulu-Natal Bar

"It's surely our responsibility to do everything within our power to create a planet that provides a home not just for us, but for all life on Earth." – Sir David Attenborough

While a member of no Bar, Sir David Attenborough is best known for advocating for the rights of animals, in opposition to climate change and for the preservation of natural habitats. In May this year, Sir David celebrated his centenary, so it's apt to use that occasion to honour him for his lifelong commitment to this planet by casting a critical eye on the law of animal welfare and conservation.

As Sir David opined, we have a shared responsibility not only to look after the planet we call home for ourselves, but to care for it in a way that is sustainable for future generations. This means that conservation efforts must go beyond our projected individual life spans to ensure that future generations get to see animals like the Big Five. Regard must, of course, also be given to domesticated animals.

The main South African statute that protects animals is the Animals Protection Act, 1962. Yet, it is outdated legislation. In s2(1), it creates offences including cruelty to animals and it defines what is cruelty. It makes provision for various forms of cruelty, but it is silent on, for example, animals confined to zoos or forced to perform in a circus. Those animals often endure brutal conditions to perform for the benefit of humans. The statute is also silent on whether offences under it might be prosecuted privately.

The national council of the Society for the Prevention for Cruelty to Animals is mandated to deal with complaints of cruelty to wildlife and domestic animals. Its role was confirmed in *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development and Another*,[1] where it sought a declaration confirming that it is mandated to prosecute

privately where the National Prosecuting Authority declined to do so. The matter was triggered by the suffering animals endured in a religious sacrifice, and inspectors intervened. The NSPCA sought to prosecute. The NPA denied it the right. The High Court and the Supreme Court of Appeal adopted the same view, but the Constitutional Court thought differently.

The opening paragraph of the judgment of the Constitutional Court (*per* Khampepe J) reads:

> "From the ancient Khoisan reverence of the eland to the contemporary conception of the dog as 'man's best friend', humans and animals have a storied relationship, one that is a part of the fabric of our society, homes and lives. Animals have shifted from being 'mere brutes or beasts' to 'fellow beasts, fellow mortals or fellow creatures' and finally to 'companions, friends and brothers.' To protect these voiceless companions, individuals have time and again stepped in when animals are mistreated. Around the world, societies similar to the National Society for the Prevention of Cruelty to Animals (NSPCA) zealously defend their welfare. These organisations champion the norm that we do not accept acts of cruelty against those who cannot defend themselves, a norm finding its origins in 1635. The question before us is whether the NSPCA is entitled to privately prosecute crimes of animal cruelty connected with its mandate."

The reference to 1635 is, as the third footnote in the judgment says, to "[t]he earliest recorded law against animal cruelty", which was Ireland's Act against Plowing by the Tayle, and Pulling the Wooll off Living Sheep, which prohibited controlling horses by using their tails and pulling wool from sheep that were still alive.

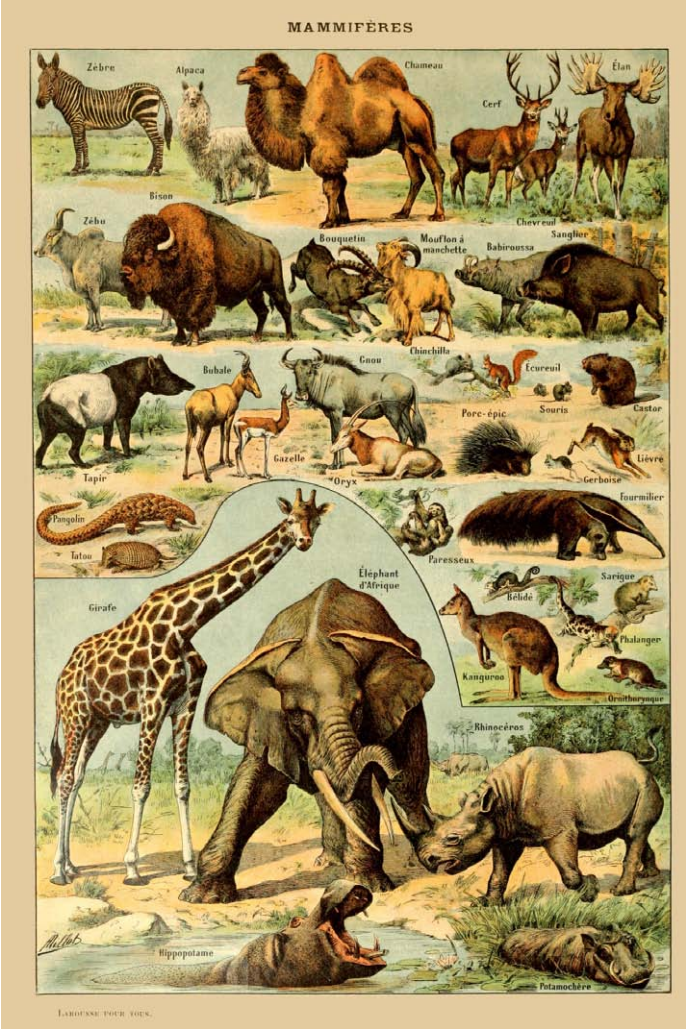
In that decision, the Constitutional Court held that the NSPCA has inherent powers conferred by the Constitution and by the NSPCA Act to prosecute privately. This is a landmark judgment. Our courts are now in a position to afford increasingly robust protection to animals.[2]

The roots of enlightenment might be traced further back. In 1929, in *R v Smit*,[3] where an offender was convicted of an animal-cruelty offence for having beaten a dog for half an hour with a pole and spade, before pelting it with stones and finally shooting it in its kennel, the erstwhile TPD found that the dog had the legal status of property that the accused had been entitled to destroy, but he had to do so "humanely", while causing as little suffering as possible. In *Ex Parte: The Minister of Justice: in re Rex v Masow*,[4] the Appellate Division explained that the legislature's introduction, in 1928, of an amendment to the 1914 SPCA Act, which introduced compulsory whipping as punishment for any wilful and aggravated act of cruelty to animals, was an ethical move to entrench the need to protect animals against cruel treatment.

And animals are often the providers of comfort to humans. Recently, in the Western Cape High Court, Toffee Beanz, a golden retriever trained to assist children to provide testimony in court and recount traumatic events in an unfamiliar setting, comforted a 14-year-old boy as he testified against his own father in a rape trial. The irony is plain. Animals are often trained up to guard, protect and save lives, yet they are themselves given very little protection or care. To us humans, animals are useful only when they provide something essential. We fail to look at the question from a societal perspective, which acknowledges that the progress or development of a society often comes with the recognition that animals, too, are sentient.

The notion of sentience bears much meaning in this broader perspective. According to the website of World Animal Protection, sentience is the ability "to feel a range of complex emotions, such as grief and empathy". It adds: "Animals are sentient beings, and this means that their feelings matter."[5] In the minority judgment in *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw*,[6] Cameron JA recognised that animals are worthy of protection, not only because of the reflection that this has on human values, but because animals are "sentient beings that are capable of suffering and experiencing pain".[7]

> "CAMERON JA RECOGNISED THAT ANIMALS ARE WORTHY OF PROTECTION, NOT ONLY BECAUSE OF THE REFLECTION THAT THIS HAS ON HUMAN VALUES, BUT BECAUSE ANIMALS ARE 'SENTIENT BEINGS THAT ARE CAPABLE OF SUFFERING AND EXPERIENCING PAIN'."



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"CONSERVATION EFFORTS AND WILDLIFE ARE PROTECTED UNDER THE ANIMAS PROTECTION ACT AND THE CONVENTION ON INTERNATIONAL TRADE IN ENDANGERED SPECIES OF WILD FAUNA AND FLORA (CITES), TO WHICH SOUTH AFRICA IS A PARTY."

I would add that animals can solve complex problems, execute instructions as part of search-and-rescue teams in times of disaster. Animals feel positive emotions. They feel the very same feelings that humans tend to experience like love, comfort, safety and reassurance, animals want to feel the same too.

In a case relating to canned-hunting of lions, a unanimous Full Bench of the Free State High Court described the practice as "abhorrent and repulsive" because of the suffering the animals endured.[8] The SCA did not discountenance that finding. In *S v Lemthongthai*,[9] the SCA was confronted with rhinoceros poaching and held that constitutional values dictate a more a caring attitude toward fellow humans, animals and the environment in general. The court concluded that the rationale for protecting animals is rooted in our history. Protecting animal welfare has shifted from merely safeguarding the moral status of humans to acknowledging the intrinsic value of animals as individuals.[10] This judgment is important as it raised questions of biodiversity. Animal welfare and conservation are interconnected. Animal welfare is, moreover, connected with the constitutional right to have the environment protected and links the suffering of an individual animal to conservation. Showing respect and concern for individual animals reinforces broader environmental protection efforts. Animal welfare and animal conservation reflect intertwined values.[11]

Conservation efforts and wildlife are protected under the Animals Protection Act and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), to which South Africa is a party. The aim of CITES is to ensure that international trade in specimens of wild animals and plants does not threaten their survival. CITES has two categories, Appendix I and Appendix II. The former includes all species threatened with extinction. Trade in them is the subject of particularly strict regulation and authorised only in exceptional circumstances. Appendix II includes all species which, although not threatened with extinction, may become so unless trade in them is subject to strict regulation to prevent utilisation incompatible with their survival. CITES became a topic of discussion in relation to the captive lion industry with the lion-bone trade being governed at an international level by CITES.

South Africa then enacted the National Environmental Management: Biodiversity Act, 2004 (NEMBA) to give effect to its obligations as a party to CITES. NEMBA provides a framework on how quotas are determined and regulates and restricts trade in threatened or protected species. Section 2 of NEMBA describes the object of the Act as the protection of the ecosystem as a whole, including species not targeted for exploitation as well as to give effect to international agreements relating to biodiversity, which South Africa has ratified. Section 3 of NEMBA links that statute and the constitutional commitment to the protection of the environment for this and future generations and it places an onus on the State to manage, conserve and sustain South Africa's biodiversity. Sections 101 and 102 impose higher sentences than the Animals Protection Act.

Another instrument aimed at managing wildlife and conservation are the Threatened or Protected Species Regulations,[12] which govern permits and provide for harsher sentences for the possession of rhinoceros horns or elephant ivory and make provision for species according to endangered categories and whether it is in a critical state or not. Sentencing under regulations 107 and 108 might include a fine of R5-million, imprisonment for five years and up to a maximum not exceeding 10 years, or for both a fine and imprisonment.

It is clear that different instruments differentiate among classes of animals. This causes a disconnect. Rather, I would suggest, the protections of animals should be housed in one statute. There are many gaps in the legislation protecting both wildlife and domestic animals. What is more, welfare organisation serving animals' interests, do not qualify for pro bono legal services, while they are already under serious financial strain.

The disjointed and fragmented legislation that is in place should be consolidated. It should confer on an NSPCA officer the same powers as a SAPS officer to enter a property in the event of danger. As it stands, the NSPCA has to apply to the court for a warrant or enlist the assistance of the SAPS to rescue an animal from private property. Legal practitioners and judicial officers may not be aware of the various statutes or what constitutes cruelty. A guideline should be created to assist courts with various issues and why it constitutes cruelty. Our courts have wide powers to develop our laws in line with the *boni mores* of the community. Public opinion should play a pivotal role in animal cruelty cases and a more developed understanding of the relationship between animals and humans will contribute to developed laws, programmes and teaching practices which will, in turn, help society understand and prevent the necessity to prevent animal cruelty, which will ultimately benefit society.[13]

Tomas Malik

Notes

1 2017 (4) BCLR 517 (CC).
2 *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development and Another 2017 (4) BCLR 517 (CC)* at para 55.
3 1929 TPD 397.
4 1940 AD 75, at 81.
5 Animal Sentience https://www.worldanimalprotection.org/our-campaigns/sentience/ [Accessed 12 June 2026].
6 [2008] ZASCA 78; 2008 (5) SA 339 (SCA) at para 38.
7 See para 33.
8 *South African Predator Breeders Association v Minister of Environmental Affairs and Tourism* [2009] ZAFSHC 68.
9 *S v Lemongthai*.
10 *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development and Another 2017 (4) BCLR 517 (CC)* at para 57.
11 Ibid at para 68.
12 National Environmental Management: Biodiversity Act, 2004 (Act No. 10 of 2004) Threatened or protected species regulations.
13 M J Bernuz Beneitez; G A Maria Levrino "Punishment for Animal Abuse in Spain: Animal Attributes as Predictors of Attitudes Toward Penalties" 2022 *Anthrozoos A Multidisciplinary Journal of The Interactions of People & Animals* at 15 https://www.researchgate.net/publication/357600672_Public_Opinion_About_Punishment_for_Animal_Abuse_in_Spain_Animal_Attributes_as_Predictors_of_Attitudes_Toward_Penalties [Accessed 03 August 2022].