

GRANTING ANIMALS RIGHTS UNDER THE CONSTITUTION: A MISPLACED APPROACH? AN ANALYSIS IN LIGHT OF ANIMAL WELFARE BOARD OF INDIA V. A. NAGARAJA

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In May 2014, the Supreme Court of India delivered a sensational judgment banning certain bull-fighting practices. The Court, in its analysis, sought to bring animals under the protection of the rights discourse by stating that Article 21 of the Constitution of India could be applied to animal life. The Court stated that the term 'life' must be expansively interpreted. As animals form a crucial part of human beings' environment, their rights must also be protected under Article 21. This paper seeks to address the deeper implications of this judgment by examining the viability of such an approach. It argues that bringing animals within the ambit of rights is not only incompatible with the traditional jurisprudence of rights, but may also be an ineffective method of addressing the larger issue of protecting animals. It recommends a shift to a duty-based approach towards animal welfare which is more likely to succeed in ensuring the safe and humane treatment of animals by humans.

I. INTRODUCTION

India first embarked on its endeavours to promote animal welfare and ensure animal safety with the enactment of the Prevention of Cruelty to Animals Act in 1960 ('the PCA Act'). Since then, there has been a sustained movement towards animal welfare in the country. This is evidenced by the setting up of the Animal Welfare Board in 1962 and the rising prominence of animal welfare organisations. There has been significant progress as a result of these events, which is seen in the development of various laws and policies like those on the treatment of performing animals¹ and the ban on animal testing of cosmetics². The judiciary's intervention with regard to the issue of animal

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¹ The Performing Animals Rules, 2005.

² Govt. of India, Ministry of Health and Family Welfare, F. No. - X.11014/11/2013-DFQC (October 13, 2014).

welfare and protection has also increased with the expansion and evolution of debate. In general, Indian courts have adopted liberal and welfare-oriented stances towards these issues. In 2000, the Kerala High Court, in *N.R. Nair v. Union of India*³ ('N.R. Nair'), considered the question of extending fundamental rights to animals and emphasised that legal rights should not be "the exclusive preserve of humans which has to be extended beyond people thereby dismantling the thick legal wall with humans all on one side and all non-human animals on the other side".⁴ This view was further developed by the Supreme Court in *Animal Welfare Board of India v. A. Nagaraja*⁵ ('A. Nagaraja').

In what has been described as a landmark judgment,⁶ the Supreme Court of India created history by banning *jallikattu* (a bull-fighting festival celebrated in Tamil Nadu) and bullock-cart races in Maharashtra and Punjab. Delivered by Radhakrishnan J. and Ghose J., the judgment held that animal life could be included within the ambit of the right to life under Article 21 of the Indian Constitution (albeit to the extent that human rights were not harmed).⁷ It further held that the provisions of the PCA Act were indicative of animals' rights to "live in a healthy and clean atmosphere" or "not to be beaten, kicked".⁸ The judgment also briefly pondered upon the notion of the legislature granting animals constitutional rights so as to protect their "dignity and honour" and suggested that an amendment to that effect be made by the Parliament.⁹ This approach towards animal protection has been adopted outside of Indian jurisprudence as well, with a Court in Argentina, in the context of an orangutan's habeas corpus petition, stating that it is "necessary to recognise the animal as a subject of rights".¹⁰ Despite further stating that it has adopted a "dynamic rather than a static interpretation of the law",¹¹ the Court did not substantiate its basis for its view on the rights of animals.

We believe that a rights-based interpretation of animal welfare legislation is misplaced. This is fundamentally because it has been consistently upheld by Indian courts that Article 21 of the Constitution of India is a source

³ *N.R. Nair v. Union of India*, AIR 2000 Ker 340.

⁴ *Id.*, ¶13.

⁵ *Animal Welfare Board of India v. A. Nagaraja*, (2014) 7 SCC 547.

⁶ People for the Ethical Treatment of Animals, *Supreme Court Bans Jallikattu, Bull Races and Bullfights*, May 7, 2014, available at <http://www.petaindia.com/blog/sc-bans-jallikattu-bull-races-fights/> (Last visited on February 21, 2015).

⁷ *Animal Welfare Board of India v. A. Nagaraja*, (2014) 7 SCC 547, ¶62.

⁸ *Id.*, ¶62.

⁹ *Id.*, ¶77.

¹⁰ *Orangutan Sandra s/ appeal s/ HABEAS CORPUS*, Federal Criminal Court of Appeals, Cause No. 68331/2014/CFCI, December 18, 2014 (Argentina) (a translated version of judgment can be accessed at http://a.fastcompany.net/asset_files/-/2014/12/24/Argentina-Habeas-Corpus.pdf (Last visited on March 7, 2015)); see also Reuters, Richard Lough, *Captive orangutan has human right to freedom: Argentine court rules*, December 21, 2014, available at <http://www.reuters.com/article/2014/12/21/us-argentina-orangutan-idUSKBN0JZ0Q620141221> (Last visited on February 26, 2015).

¹¹ *Orangutan Sandra, id.*, ¶2.

of protection for *human* rights and *human* dignity.¹² By protecting non-human animal life through Article 21, the Supreme Court has defied earlier notions of who the possessors of this right are. Beyond the concept of possessors of rights, the larger question revolves around the effectiveness of a rights-based approach towards animal protection. Through this paper, we will argue that adopting a rights-based approach towards securing animal welfare, as endorsed by the Supreme Court, is not tenable. As an alternative, we suggest that a duty-based approach would prove to be more effective in protecting animals.

Part II will briefly summarise the A. Nagaraja case, upon which the paper is based. In Part III, it will be argued that animals cannot possess rights in the way that humans do within the realm of human society and will identify the possible problems that would arise should rights be created in favour of non-human animals. Against this, it will be argued that even in the realm of animal welfare and protection, a rights-based approach will be inadequate and that there should be another method of securing such welfare. Following this analysis, in Part IV, we will present an alternate approach wherein the focus will be on the duty of humans individually and the State as the collective voice of its citizens towards non-humans. We will first assess the source of such a duty and then examine the benefits. Finally, Part V will offer concluding remarks.

II. ANIMAL WELFARE BOARD OF INDIA V. A. NAGARAJA: A BRIEF SUMMARY

Delivered on May 7, 2014, A. Nagaraja deals with the “rights of animals under the Constitution of India as well as Indian laws, culture, tradition, religion and ethology”.¹³ The judgment was specifically in the context of the bull-taming sport ‘*jallikattu*’, which is “played” in Tamil Nadu as well as the practice of bullock-cart racing in Maharashtra. The case was primarily analysed with reference to the PCA Act, 1960, along with the Tamil Nadu Regulation of Jallikattu Act, 2009 (‘the TNRJ Act’).

The AWBI, statutorily set up under the PCA Act for the promotion of animal welfare, argued for the abolition of the foregoing practices on grounds that it violated various provisions of the PCA Act, namely §3,¹⁴ §11(1)

¹² Maneka Gandhi v. Union of India, (1978) 1 SCC 248 : AIR 1978 SC 597; State of A.P. v. Challa Ramakrishna Reddy, (2000) 5 SCC 712 : AIR 2000 SC 2083; Kartar Singh v. State of Punjab, (1994) 3 SCC 569, ¶448 (in which it has been stated, “... each expression used in this Article enhances human dignity and values...”).

¹³ Animal Welfare Board of India v. A. Nagaraja, (2014) 7 SCC 547, ¶1.

¹⁴ The Prevention of Cruelty to Animals Act, 1960, §3 reads, “It shall be the duty of every person having the care or charge of any animal to take all reasonable measures to ensure the well-being of such animal and to prevent the infliction upon such animal of unnecessary pain or suffering.”

(a) and (m)¹⁵ and §22¹⁶. It further asserted that neither of the two practices had any historical, cultural or religious significance in the two states where it was carried out. Due to its lack of significance, welfare legislation like the PCA Act would override the same as it is a Parliamentary legislation.¹⁷ Further, it argued that the TNRJ Act was repugnant to the provisions of the PCA Act and hence, cannot be given effect by the State without Presidential assent under Article 254 of the Constitution of India. As the bulls are forced to undergo great pain and suffering, this practice clearly violated §3, §11 (a) and (m), read with Article 51A(g) and Article 21 of the Constitution.

In response to these arguments, a collective of bull race organisers, argued that these sports had been “played” for the last three centuries and were, therefore, an integral part of the custom and tradition of the culture. In the course of their pleadings, they asserted that extreme care and protection was often taken to ensure that there was no pain or injury caused to the animals that participated in the event. An economic angle to their submissions was also presented in the contention that this practice was a great source of revenue for the State as it attracted a large number of spectators, who were inclined to pay to watch.¹⁸ They finally put forth the argument that sporting events can only be regulated by the State and not banned. This purpose was clearly covered by the TNRJ Act serves this purpose and clarifies the apprehensions that arise out of this case. The State of Tamil Nadu also presented arguments in this case and stated that every effort would be made to ensure that the bulls chosen for *jallikattu* were not subjected to cruelty. It also argued that §22 of the PCA Act would not apply as there is no sale of tickets for the events. The State of Maharashtra made no representations and the Court interpreted this to mean that it was in favour of a ban on such practices.

Thus, the main issues that arose for consideration were: *first*, whether *jallikattu* and bullock-cart racing are harmful to the bulls and violate

¹⁵ The Prevention of Cruelty to Animals Act, 1960, §11 (1) (a) and (m) read,

“If any person (a) beats, kicks, over-rides, over-drives, over-loads, tortures or otherwise treats any animal so as to subject it to unnecessary pain or suffering or causes, or being the owner permits, any animal to be so treated; (m) solely with a view to providing entertainment confines or causes to be confined any animal (including tying of an animal as a bait in a tiger or other sanctuary) so as to make it an object or prey for any other animal [...] he shall be punishable, in the case of a first offence, with fine which shall not be less than ten rupees but which may extend to fifty rupees and in the case of a second or subsequent offence committed within three years of the previous offence, with fine which shall not be less than twenty-five rupees but which may extend, to one hundred rupees or with imprisonment for a term which may extend, to three months, or with both”.

¹⁶ The Prevention of Cruelty to Animals Act, 1960, §22 reads,

“No person shall exhibit or train (i) any performing animal unless he is registered in accordance with the provisions of this Chapter; (ii) as a performing animal, any animal which the Central Government may, by notification in the official gazette, specify as an animal which shall not be exhibited or trained as a performing animal.”

¹⁷ Animal Welfare Board of India v. A. Nagaraja, (2014) 7 SCC 547, ¶4.

¹⁸ Animal Welfare Board of India v. A. Nagaraja, (2014) 7 SCC 547, ¶5.

provisions of the PCA Act; *second*, whether the practice could be justified, culturally or historically; *third*, whether bulls had a right to life under Article 21. The Court held that *jallikattu*, and other sports involving bulls, was indeed harmful to their being. It carefully analysed the nature of a bull's response to external stimuli or danger and found that bulls' natural response is that of 'flight' as opposed to 'fight'. However, as these sports take place in closed or restricted environments, bulls are not able to exercise their natural responses, resulting in considerable harm.

With respect to the question of the cultural significance of these practices, the Court endorsed the argument of AWBI and held that the PCA Act overrides this culture or tradition. The Court reasoned that even if it had been a cultural practice, it must now give way to the provisions of the PCA Act. Finally, the Court extensively examined the "rights" of animals under Article 21. The definition of "life" under the said Article was extended to include animal life, which would further expand to mean a life of dignity, worth and honour. Reading provisions of the PCA Act along with Articles 21 and 51A(g) of the Constitution, it was held that animals also have a right against human beings not to be tortured and against the infliction of unnecessary pain or suffering. Therefore, the Court reasoned that animal dignity must be protected, and to that effect, the TNRJ Act is invalid and such sports are illegal. It further emphasised on the absence of an international framework for the protection of animal rights, and held that practices harming animals must be banned.

III. THE LEGAL CAPACITY TO POSSESS RIGHTS – WHERE DOES IT COME FROM?

In *A. Nagaraja*, the Court placed non-human animals within the paradigm of rights. This section of the paper will scrutinise this aspect of the judgment. While applying rights to entities under the State, it is seen that they are not universally applied to every object or entity that exists but are restricted to those which possess certain characteristics. The existence of these characteristics form the basis for what has been defined as "capacity for rights"¹⁹ by Joseph Raz. In his analysis of the same, he specifically refers to the idea of granting animals rights. According to him, rights can only be accorded to beings which have an "ultimate, non-derivative value" rather than an "instrumental value". The value of non-human animals to humans is merely instrumental as they are largely only brought into human society for their use and not for their intrinsic value. He goes on to propose that as animals have no individual "interests" in the manner that humans do, *i.e.*, interests which have an ultimate, non-derivative value in themselves. By virtue of their lack of mental development as compared to humans, they are incapable of forming interests which would then constitute the basis for rights. Any interest that an animal has would

¹⁹ Joseph Raz, *On the Nature of Rights*, 93 (370) MIND 194, 204 (1984).

be only “instrumental” (meaning that it exists only for the benefit of humans) and not “ultimate”.²⁰ However, it may be incorrect to infer that animals have absolutely no interests simply because they do not possess a level of mental development that humans are thought to have. Most animals, especially mammals, do demonstrate a certain amount of interest in maintaining their basic welfare by making sure of their food and sleep. Therefore, this value-oriented assessment of the capacity for rights is inadequate as it does not truly address *why* non-human animals are incapacitated to possess rights.

In order to analyse the same, it is necessary to look at other indicators which point towards the inability or incapacity of animals to possess rights. These indicators should not rely on the ‘intrinsic value’ of animals but, rather, concentrate on certain qualifying criteria for the possession of rights and consequently, on the abilities of non-human animals to satisfy them. The oft-sung anthem of the animal ‘rights’ movement is a quote by Jeremy Bentham wherein he argues for the rights of non-human animals by emphatically stating, “[t]he question is not can they reason? Nor, can they talk? But, can they suffer?”²¹ Most animal welfare organisations and movements have chosen the central theme of this emphatic statement, i.e., the capacity for suffering, as a reason to grant animals protection through rights.²²

However, the idea that the ability to feel pain and suffering automatically warrants inclusion within the ambit of the rights discourse is flawed as it fails to acknowledge the very nature of a right. While it is undoubtedly true that the ability to suffer is a commonality between human and certain non-human animals, rights are hardly based on this sole notion of suffering and its alleviation.²³ When trying to extend rights to animals, it is relevant to note whether the common characteristics between animals and humans are also in conformity with the ascription of rights that are granted to or possessed by humans in a society. If such commonalities are not apparent, the analogy that is sought to be made between the two ceases to have any meaning.²⁴

A. *THE RELATION BETWEEN LEGAL PERSONHOOD AND RIGHTS*

The central question that arises while attributing constitutional or legal rights to non-human animals is whether they can be said to be legal

²⁰ *Id.*

²¹ JEREMY BENTHAM, INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 144 (1789).

²² People for the Ethical Treatment of Animals, *About PETA*, available at <http://www.peta.org/about-peta/why-peta/why-animal-rights/> (Last visited on February 20, 2015).

²³ TOM REGAN, *The Radical Case for Animal Rights* in ENVIRONMENTAL ETHICS (L. Pojman eds., 1994).

²⁴ Jens David Ohlin, *Is the Concept of a Person Necessary for Human Rights?*, 105 (1) COLUMBIA LAW REV. 209, 222 (2005).

persons. This notion of connecting animals to personhood has been a relatively untouched one, with some even writing off the need to equate animals with the idea of a person for their security of welfare.²⁵ However, this view is dangerous as it neglects to consider an essential part of the animal rights and welfare debate: whether or not animals are entitled to rights on a conceptual and principled level. With specific reference to the Indian scenario, it is vital to discuss this notion of personhood, which also finds specific reference under Article 21. The conjoint reference to personhood and Article 21 was also made in A. Nagaraj to grant animal rights.

Similar to the idea of a 'right', the concept of a 'person' itself is one that has been engulfed in serious philosophical debate. There has never been a consensus on who or what exactly constitutes a person or what this entity's defining characteristics would be.²⁶ Philosophical considerations on the topic present a person to be a free and rational agent "whose existence is an end in itself",²⁷ to a more abstract "bundle or collection of different perceptions" with the feeling of self-identity that may exist being only a "persistent illusion".²⁸ While it is ordinarily and in common parlance used to represent any human being,²⁹ there have been different identities and capabilities granted and ascribed to a person in the context of legal order. In Western jurisprudence (primarily in Roman law), a person has been defined as a rights-holder,³⁰ whereas in Indian philosophy and jurisprudence, the focus has been on the individual's ability to be bound by obligations.³¹ It is in this context of rights and obligations that the concept of personhood will be assessed here.

The most obvious qualifiers for legal personhood in a rights-based context can be found within the analysis of the nature of rights itself, particularly within a Hohfeldian analysis of jural relations.³² In his matrix, the correlative of a right would be a duty and a person's right would be satisfied only by another person's duty to not infringe upon that right. As a right requires a correlated duty, the natural inference that follows is that every person who

²⁵ Nathan Nobis, *On David Degrazia's "On the Question of Personhood beyond Homo Sapiens"*, available at http://www.morehouse.edu/facstaff/nnobis/papers/DeGrazia_comments.htm (Last visited on 22 February, 2015) (The author notes that "the question about whether any animals are persons is a harmful distraction for animal advocacy...I think very little, if any animal advocacy, should be done in terms of whether animals are persons or not").

²⁶ See generally THE IDENTITIES OF PERSONS (A.O. Rorty ed., 1976) (which presents many conflicting views on the issue).

²⁷ IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 28-29 (1785), available at <http://www.earlymoderntexts.com/pdfs/kant1785.pdf> (Last visited on February 26, 2015).

²⁸ DAVID HUME, *Of Personal Identity* in A TREATISE OF HUMAN NATURE 132-133 (1888) available at <http://www.earlymoderntexts.com/pdfs/hume1739book1.pdf> (Last visited on February 26, 2015).

²⁹ ENCARTA WORLD ENGLISH DICTIONARY 1407 (Special Indian ed., 1999).

³⁰ Max Radin, *Fundamental Concepts of the Roman Law*, 13 CAL. L. REV. 207, 222 (1925).

³¹ A.C. PARANJPE, *SELF AND IDENTITY IN MODERN PSYCHOLOGY AND INDIAN THOUGHT* 60 (1998).

³² Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 (1) YALE L.J. 16 (1917).

seeks to claim a right must also be able to perform the corresponding duty that a right entails. This, in part, relates to the capacity of the entity in question to perform this duty. Thus, in a Hohfeldian sense, a ‘person’ is an entity who is able to perform the correlated duty to a right and ensure the protection of another person’s right. For example, a person who is granted the right to life has a duty not to endanger the lives of others. In a practical sense, it would be impossible to expect non-human animals that possess a lower level of human-defined intellect and rationality to perform these duties. While as humans we may try to protect the lives of different species, it is not expected of a snake not to bite or for a tiger not to hunt. Further, the claimant of a right must also be able to have rights claimed against them, i.e., rights must be able to be enforced against a person for them to truly be entitled to them.³³

This means that the non-performance of a duty by a person may be punishable if it violates the right of another person. It is obvious that no non-human animal will ever satisfy or be expected to satisfy this requirement. Although, there were once courts which allowed cases against beetles for causing crop failure or which exiled a ram to Siberia for goring a man to death,³⁴ it is highly unlikely that modern day judicial systems would allow such claims or enforcing such punishments. This thought was echoed in a New York Appellate Court decision to dismiss a petition demanding the human right of bodily liberty for a captive chimpanzee. The Court held that rights could belong only to persons because only they could “be held legally accountable for their actions”.³⁵ Therefore, an analysis purely based on the nature of rights and the concept of personhood related to rights, renders animals incapable of possessing them.

In response to such a line of thought, the response has been to compare animals to persons with disabilities and human infants or children, who cannot participate in society or perform duties in the same way that less disabled humans and adults can.³⁶ Proponents of this school of thought argue that if the ability to perform duties or the level of rationality is what qualifies an entity to be a person, persons with disabilities and infants or children would also be excluded from the purview of personhood.³⁷ Aside from the dangers of

³³ *Id.*

³⁴ See Cristina Pelayo, *Uncommon Law: The Trial of Otiorhynchus Sulcatus*, 26 (2) LITIGATION 59 (1999).

³⁵ The People of the State of New York ex rel. The Nonhuman Rights Project, Inc., on Behalf of Tommy v. Patrick C. Lavery, No. 518336, 2014 WL 6802767 (N.Y. App. Div. Dec. 4, 2014); See also David Grimm, *Chimpanzee ‘personhood’ fails on appeal*, SCIENCE MAG, December 4, 2015, available at <http://news.sciencemag.org/plants-animals/2014/12/chimpanzee-personhood-fails-appeal> (Last visited on February 26, 2015).

³⁶ Edd Doerr, *Ape and Essence*, 54 (4) THE HUMANIST 44.

³⁷ See generally BENTHAM, *supra* note 21; PETER SINGER, ANIMAL LIBERATION: A NEW ETHIC FOR OUR TREATMENT OF ANIMALS (1995); PAOLO CAVALIERI AND PETER SINGER, THE GREAT APE PROJECT: EQUITY BEYOND HUMANITY (1993).

comparing non-human animals to disabled humans or infants,³⁸ such a view disregards the basis for rights within a human society: the capacity to reason and to act upon such reason to make decisions to interact and exist within that society. With respect to infants and children, the reason why they must be brought within the ambit of rights is that they will prospectively become rational and reasonable members of society following a developmental process, *i.e.*, there is great potential for all children to develop and perform the duties that society demands of them in order to entitle them to rights.³⁹

On the other hand, while assessing the abilities of more disabled humans *vis-à-vis* that of less disabled humans⁴⁰ who are able to display greater signs of rationality or reasoning, it must be established as to whether there exists a non-arbitrary manner of differentiating between non-human animals and more disabled humans. This non-arbitrary distinction lies in the fact that under normal developmental circumstances, individuals who are disabled would be ‘normally’ functioning humans who would be able to contribute effectively to society. However, under normal developmental circumstances, no animal would be considered rational (as judged by human standards of rationality).⁴¹ The essence of this argument lies in the fact that there may be different points in a person’s life where they may not be able to perform duties as mandated by the State or by society, but with changes in technology and society itself, this inability may be neutralised and transform into an ability. The fact that such an inability or disability exists at different points does not diminish the inherent capacity for performance of such duties.

The referred argument is best illustrated against the backdrop of the evolution of medical science. The vast array of cures and therapies to remedy illnesses extends not only to physical illnesses or disabilities but also to mental illnesses. Even though a person may be born with severe disability (like mental retardation or blindness), there are ways in which their condition may be improved (through intensive therapy or surgery), even to the extent that their disabilities are removed completely and they are capable of being compared to less disabled persons who possess the mental and cognitive capacity to perform their mandated duties. The potential of there being a change or reduction in their disability is what brings them within the ambit of a rights-based

³⁸ See Nora Ellen Groce & Jonathan Marks, *The Great Ape Project and Disability Rights: Ominous Undercurrents of Eugenics in Action*, 102 (4) AMERICAN ANTHROPOLOGIST 818 (2000) (The authors have argued that comparing animals and highly disabled humans could result in a dehumanisation of the disabled. This altered perception could lead to a reduction in the already precarious rights of the disabled, exacerbating the incidence of rights violations against individuals who are in most need of such protection).

³⁹ Alan Gewirth, *The Basis and Content of Human Rights*, 13 GA. L. REV. 1143, 1157 (1978).

⁴⁰ See generally Malavika Prasad, *Towards A No-Force Paradigm in Mental Health Law*, 5 NUJS L. REV. 7 (2012) (for an analysis on disability and the concept of “normal”).

⁴¹ Shawn Klein, *The Problem of Animal Rights*, Navigator Magazine, September 9, 2004, available at http://news.heartland.org/sites/all/modules/custom/heartland_migration/files/pdfs/15656.pdf (Last visited on February 20, 2015).

discourse. However, animals will never possess this inherent capacity for reason and rationality, which is what renders them ineligible for rights within a human-created rights framework.

Another way in which non-human entities have achieved legal personhood is through the recognition of the State.⁴² This is a form of legal fiction which is ordinarily and most commonly followed through the creation of juristic persons. For instance, this has been done wherein companies⁴³ and religious idols⁴⁴ have been recognised as juristic persons. However, this itself is an idea that is not entirely compatible with the theory of rights as belonging to individual persons which, however, requires separate analysis and is beyond this scope of this paper.⁴⁵

Aside from an analysis originating from the nature of rights, a three-pronged test has been laid down to determine the capacity of an entity to possess legal rights under the State.⁴⁶ The *first* prong is that the entity must be able to institute legal action on its behalf. *Second*, the court must take the entity's injury into account while deciding upon relief. *Third*, any relief granted by the court must prove to be beneficial to the entity. Under our current legal system, it cannot be said that any of these three criteria is satisfied towards granting personhood to animals.

With respect to the first criterion, an animal cannot institute a suit on its own behalf. In all animal welfare cases, it is an organisation, group or human individual that institutes a suit against an offender. Although it is possible for other bodies or organisations to institute suits on behalf of groups of human individuals as well,⁴⁷ this does not negate the ability, capacity or potential of individuals to be cognisant of a violation of their own rights and to file suits against offenders.

⁴² See THOMAS ERSKINE HOLLAND, *ELEMENTS OF JURISPRUDENCE* 82 (N.R. Madhava Menon ed., 2004).

⁴³ *Saloman v. A. Saloman & Co Ltd.*, 1897 AC 22.

⁴⁴ *Pramatha Nath Mullick v. Pradyumna Kumar Mullick*, AIR 1925 PC 139; *Bishwanath & Another v. Radha Ballabhji*, AIR 1967 SC 1044 : (1967) 2 SCR 618; *Ram Jankijee Deities v. State of Bihar*, (1999) 5 SCC 50 : AIR 1999 SCW 1878.

⁴⁵ See Daniel N. Hoffman, *Personhood and Rights*, 19 (1) *POLITY* 74 (1986); See also Dale Rubin, *Corporate Personhood: How the Courts Have Employed Bogus Jurisprudence to Grant Corporations Constitutional Rights Intended for Individuals*, 28 *QUINNIPIAC LAW REV.* 523 (2009) (for a criticism of the extension of personhood to corporations).

⁴⁶ Christopher D. Stone, *Should Trees Have Standing? – Toward Legal Rights for Natural Objects*, 45 *S. CAL. L. REV.* 450, 458 (1968).

⁴⁷ See *Akhil Bharatiya Soshit Karamchari Sangh (Railway) v. Union of India*, (1981) 1 SCC 246 : AIR 1981 SC 298; *People's Union for Democratic Right v. Union of India*, (1982) 3 SCC 235 (where the idea of a group filing Public Interest Litigation suits on behalf of individuals was analysed).

With respect to the other two criteria, while it is not impossible for courts to take animal injury into account, the remedying of such an injury is often not done in continuance of the best interest of the animal but in consonance with accepted human interests.⁴⁸ These cases are decided not with specific focus on the plight of the animals *per se* but on how much the creation of this plight and the plight itself deviates from acceptable *human* standards. This is because it is impossible to ever truly determine what the best interests of the animal are and whether any remedy granted has, in actuality, been beneficial. For example, while animal testing for the purposes of cosmetics has been outlawed in India, medical testing is still an accepted practise.⁴⁹ When assessing such a situation from the perspective of identifying the impact caused to the animal, both scenarios may have an equally disastrous consequence, resulting in death or permanent damage to the animal in question. However, since human standards of ethics and instincts of survival deem medical testing to be a far more worthy cause than cosmetic testing, it is deemed an appropriate practise. This demonstrates how the laws and regulations that are to protect animals are in effect passed against the backdrop of human interests and standards.

B. THE PROBLEM WITH A RIGHTS-BASED APPROACH TO ANIMAL WELFARE AND PROTECTION

Recognising non-human animals as legal persons and according them rights would result in several problems and conflicts within the existing rights regime. The primary problem with such an approach is that a conflict between human rights and animal rights would automatically arise. Granting animals rights, especially under the Constitution, would entitle them to a range of benefits. These benefits could possibly damage the way in which human life is benefitted through the ascription of rights to humans (for example, there may arise a conflict between human religious rights and animal rights). However, the language of rights has evolved such that the word itself can evoke feelings of “moral and metaphysical meaning” and have been used in a largely rhetorical sense.⁵⁰ Rights are important only in the context of the benefits that may be claimed through their existence. Once they are granted, rights are rarely irrevocable and unchangeable and often expand to include elements that were never initially intended.⁵¹ Any creation of rights for animals would automatically

⁴⁸ David R. Schmammann & Lori J. Polacheck, *The Case Against Animal Rights*, 22 B. C. ENVTL. AFF. L. REV. 747, 755 (1995).

⁴⁹ The Prevention of Cruelty to Animals Act, 1960, §14.

⁵⁰ Iredell Jenkins, *The Concept of Rights and the Competence of Courts*, 18 AM. J. JURIS. 1, 7 (1973).

⁵¹ An example of this would be how Art. 21 of the Indian Constitution has been expanded far beyond the mere right to life. *See, e.g.*, Sunil Batra (2) v. Delhi Admn., (1980) 3 SCC 488 (where it was used for prisoners’ rights); Olga Tellis v. Bombay Municipal Corpn., (1985) 3 SCC 545 (where it was extended to the right to livelihood); Neeraja Chaudhary v. State of H.P., (1984) 3 SCC 243 (where it was used to release bonded labourers); Mohd. Ahmed v. Union of India, 2014 SCC OnLine Del 1508 (where it was used to define the right to health in India).

create a duty on the part of humans to protect the rights of animals in an absolute sense, even to the extent that human welfare itself may be neglected, and not just to improve the treatment or welfare of animals. It has been said that a conflict of rights can only result in the prevailing of human rights,⁵² but the possibility of the effects of the evolution of such jurisprudence could prove worrisome to human welfare and social order.

Although under the benefit theory of rights⁵³ it may be argued that “rights in a weak sense” could be created for animals wherein the right exists only to the extent of the benefit that humans choose to extend unto animals.⁵⁴ However, it is practically impossible to precisely distinguish between what a ‘strong’ and a ‘weak’ right intends to protect, especially in the event of a conflict between human rights and animal rights.⁵⁵ Even if this could be done, it would possibly defeat the concept of a right as universally applicable and enforceable entitlements.

Along with the possibility of conflict, the primary drawback of adopting a rights-based approach towards animal welfare lies in the possibility of it never taking effect in the manner intended. It must not be forgotten that rights are, in essence, only instruments to realise the actualisation of human want or for the attainment of a further human goal. Rights are, therefore, more of a functional characteristic than an inherent characteristic of existence and governance. Any right that is created or sanctioned by the State is done so as to allow people to develop to their full potential and to enhance their lives. The inference that may be drawn from this is that every right, whether a claim, a privilege, an immunity or a power is only granted to a person for the purpose of furthering their own good. Rights are valued only when they effectively accomplish the reason for which they were created. In this light, a test was proposed by eminent jurist Iredell Jenkins to identify whether a proposed right will achieve the desired balance of good over possible harmful effects.⁵⁶ Jenkins proposes three questions to test the effectiveness of granting a particular right. The *first* is whether the end that is envisaged by this right is a “real and legitimate human value”.⁵⁷ *Second*, he asks whether the right will be an effective means to this end. *Finally*, will the implementation of the claimed right further good rather than harm?

⁵² P.J. FITZGERALD, SALMOND ON JURISPRUDENCE 63 (2004).

⁵³ JEREMY BENTHAM, *Of Laws in General* in THE WORKS OF JEREMY BENTHAM (1970) (Bentham developed a benefit theory of rights wherein he argued that if the performance of a duty that bestows upon another a benefit, then the other party possessed a right to have that duty performed).

⁵⁴ Michael Wilkinson, *Animal Rights: A Test Case for Theories of Rights*, 1998 UCL JURISPRUDENCE REV. 144, 145 (1998).

⁵⁵ Andrew Johnson, *A Blind Eye to Animal Rights?*, 64 (248) PHILOSOPHY 255, 258 (1989).

⁵⁶ Jenkins, *supra* note 50, 3.

⁵⁷ *Id.*

When the subjects on which the rights are conferred are animals, these questions form a substantial part of whether rights should be granted to animals or not. The *first* question itself refers to a legitimate human value, as the only end to conferring any right. There has been much discourse on whether the protection of animals is a matter of human concern and we believe that it is and it will continue to be so, either for as long as humans and non-humans share an ecosystem and environment or until humans cease to use animals for their collective or individual benefit. This point is elaborated further in the following sections of the paper. However, just because it is a legitimate human value, it does not mean that the value can only be placed on a rights pedestal or that a rights-based view will enable humans to better realise that value. This is where the second question becomes important.

The *second* question refers to the most suitable means to arrive at a particular end. If the desired end is unanimously agreed to be the protection of animals, there is more than one method of achieving this end. Granting rights to animals, rather than legislating towards their welfare would be an impractical means of achieving the final goal as it is impossible for animals to ever identify a rights violation and seek their own protection. Therefore, creating rights for them will not be the most effective means of securing and enforcing their protection. A rights-based approach would not lay down the exact manner in which animals are to be protected and, for the reasons listed above, it would create a system of entitlements that would be almost impossible to adequately address.

Finally, if the harms and benefits of granting animals rights were to be analysed, it would be difficult to conclude that adopting such an approach would further animal welfare. This is partly due to the possibility of conflict between human and animal rights, the result of which will almost always be the victory of human rights and a subjugation of the 'rights' of animals. As will be explained in the subsequent section, there are more effective ways of protecting animals rather than forcibly bringing them within the domain of rights.

At its core, all laws relating to animal welfare and protection seek only to better their status and reduce the capacity of humans to harm them. With such an objective underlying the legislative framework relating to non-human animals and taking the nature of animals as less rational beings (as judged by humans) into consideration, a rights-based approach would not aid in the same. The focus must not be shifted by creating an unstable system of forced entitlements backed by the force of law. To sustainably protect animals, there is a need to shift the approach to animal welfare from a rights-based to approach to a duty-based approach.

IV. LOCATING ANIMAL WELFARE IN A DUTY-BASED APPROACH WITHIN THE THEORY OF JUSTICE

An analysis of animal-based legislation across temporal and spatial scales reveals several approaches towards animal welfare.⁵⁸ For the purpose of theoretical clarity, these approaches can be broadly classified into the rights-based approach and the duty-based approach. The previously addressed argument, that animals cannot possess ‘rights’ in a legal sense, negates the viability of the ‘rights-based approach’. This part of the paper finds an alternative to the right-based approach in the duty-based approach.

Non-human animals have been the subject of extensive philosophical debate.⁵⁹ The debate largely rests on the Aristotelian characterisation of nature as an ‘infinity of beings’.⁶⁰ A hierarchy of species with indistinct and doubtful boundary lines had been constructed as the basis for further analysis. Aristotelians believe that there is a ‘natural good’ in all non-human animals in terms of their productivity in the ecosystem and argue that this good should be used solely for human benefit.⁶¹ It was later, with the strong influence of Darwin’s treatise,⁶² which highlighted the evolutionary similarities between human beings and animals, that the question of granting animals ‘moral rights’ became prominent. Bentham furthered this understanding, by asserting that animals’ capacity for suffering formed the basis for their rights.⁶³ Although earlier argued in this paper that this suffering alone is not a sufficient or appropriate basis for granting rights, it still becomes relevant as the focus of animal welfare legislation and animal protection, because it is this suffering that the mechanisms of law must prevent. This notion of sentience and suffering became the basis for protecting the interests of non-human animals as it invoked compassion in the human species towards their non-human counter-parts.⁶⁴ Sentience can be approached on one hand as the basis for allocating rights to animals, and on the other, as the reason to legislate towards their welfare through a duty.

⁵⁸ Elisa Aaltola, *Animal Ethics and Interest Conflicts*, 10 (1) ETHICS AND THE ENVIRONMENT 19 (2005).

⁵⁹ See generally IMMANUEL KANT, LECTURES ON ANTHROPOLOGY (translated by Robert B. Louden, Allen W. Wood ed., 2012); CHARLES DARWIN, THE DESCENT OF MAN (1902); JEREMY BENTHAM, INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1879); PETER SINGER, ANIMAL LIBERATION (1995).

⁶⁰ ARISTOTLE, ARISTOTLE: ‘HISTORIA ANIMALIUM’: VOLUME 1, BOOKS I-X: TEXT (D.M. Balme ed., 2002).

⁶¹ *Id.*

⁶² CHARLES DARWIN, THE DESCENT OF MAN (1902).

⁶³ BENTHAM, *supra* note 21.

⁶⁴ See PETER SINGER, PRACTICAL ETHICS (1979).

The following parts of the paper begin by examining the root of the duty that human beings owe to non-human animals. Various types of duties advocated by several jurisprudential canons are demarcated. The paper argues that human beings owe the highest of such duties to non-human animals. Finally, it is contended that it is not the abstract concept of ‘animal rights’, but this urgent duty that should be the focus of legislation and courts of law in India.

A. THE SOURCE OF THE DUTY – BENEVOLENCE OR JUSTICE?

A duty-based approach rests on the premise that human beings owe a duty towards non-human animals. Within the Indian context itself, The PCA Act, the primary legislation for animal protection, codifies certain acts that are obligations that humans owe to non-human animals.⁶⁵ Therefore, it seems to propose a duty-based approach towards the issue of animal welfare. The fundamental question that arises subsequently is: where does this duty emanate from? In this regard, Martha Nussbaum’s work, ‘Beyond Compassion and Humanity’ is crucial as a contemporary compilation of various ethical approaches towards the welfare of non-human animals. This sub-part examines Nussbaum’s approach in the context of several theoretical schools, and tests the viability of locating non-human animals within a complex ‘theory of justice’.⁶⁶

Nussbaum begins her theoretical analysis by narrating an incident wherein Pompey, the Roman leader of 55 B.C.E., stages a combat between humans and elephants, woven into a spectacle, for the entire Roman town to watch.⁶⁷ The elephants, attempting to invoke pity in the hearts of the guests, mourn through gestures at their plight. The “agonised trumpeting” of the elephants, often quoted as part of Cicero’s famous letter to M. Marius, became a symbol for extensive ethical discussion. It was believed that it was the commonality of the feeling of suffering that the elephants had with the human race that inspired sympathy and moral concern. It is this sympathy and evolved compassion that were considered the source of any legal or moral duty that human beings owed to non-human animals.⁶⁸

Aristotelians argued that all of nature is a continuum, and that all living things were worthy of respect, even wonder.⁶⁹ Conversely, Western

⁶⁵ The Prevention of Cruelty to Animals Act, 1960, §3.

⁶⁶ MARTHA C. NUSSBAUM, *FRONTIERS OF JUSTICE* 327 (2009).

⁶⁷ See PLINY (THE ELDER), *THE NATURAL HISTORY OF PLINY* (translated by H.G. Bohn, 1857); MARCUS TULLIUS CICERO, *CICERO: EPISTULAE AD FAMILIARES: VOLUME 1, 62-47 B.C.* (D.R. Shackleton ed., 2004).

⁶⁸ Anders Schinkel, *Martha Nussbaum on Animal Rights*, 13 (1) *ETHICS AND THE ENVIRONMENT* 42, 42 (2008).

⁶⁹ NUSSBAUM, *supra* note 66, 328.

religious traditions asserted that the human beings were given dominion over plants and animals.⁷⁰ Religious canons have also deeply influenced philosophical thought, particularly with respect to non-human animals. These religious canons further assert, that we owe our duty to non-human animals due to the sympathy we feel for them. Nussbaum argues that this version of Aristotelianism compatible with Christianity demarcated a sharp divide between human beings and other species, re-enforcing the idea of dominion and duties towards animals emanating solely through benevolence.⁷¹ Traditional schools of thought, hence, viewed our obligations towards non-human animals as duties stemming from charity and benevolence. Nussbaum suggests the most significant alternative to this approach: the source of human duty towards non-human animals is not a misplaced idea of charity, but a concrete theory of justice that forms the content of the subsequent portion of the paper.

1. Evaluating the Viability of Nussbaum's Entitlement-Based Approach

Locating human duty towards non-human animals within a theory of justice is a complex task. According to Nussbaum, this theory is based on the premise that animals have an entitlement (as distinguishable from a right) to a 'dignified existence'. This approach was specifically borrowed from the influential N.R. Nair judgement in 2000.⁷² In Nussbaum's approach, this dignified existence comes with several 'entitlements'. This paper, in the subsequent analysis, argues that an inclusive theory of justice does not stem from these entitlements, but from positive and direct duties towards non-human animals.

Nussbaum outlines ten capabilities that animals have, and considers granting them 'entitlements' on the basis of these capabilities.⁷³ This exercise reveals several inconsistencies. Nussbaum's entitlements are based on the capabilities of animals to realise their full potential, a controversial extension of the capability approach⁷⁴ which extends across the species barrier. This approach reveals that these 'entitlements', are not inherent or enforceable like 'rights' and are subject to conditions like human beings ability to grant these

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² N.R. Nair v. Union of India, AIR 2000 Ker 340.

⁷³ NUSSBAUM, *supra* note 66, 392-400 (She highlights the following on which animal capabilities are based: Life, Bodily Health, Bodily Integrity, Senses, Imagination and Thought, Emotions, Practical Reason, Affiliation, Association with other Species, Play and Control Over One's Environment).

⁷⁴ AMARTYA SEN, THE IDEA OF JUSTICE 231-238 (2009) (The capabilities approach focuses on the existence individuals' ability to perform activities they have reason to value. The central components of this approach are the actual functionings that constitute a person's life and the alternate combinations of functionings or capabilities that person has the potential to achieve. The theory places importance on the agency of the individual and stresses that an individual's achievements must, therefore, be evaluated in terms of the goals they desire to accomplish).

entitlements, human need and demand. This excessive conditionality associated with the entitlements renders them problematic. The life of a non-human animal, which is considered to be its primary capability, is inherently subject to human need. The killing of an animal, under Nussbaum's rendition of the capabilities approach is permitted when there is a 'plausible reason' for the killing, like obtaining necessary food, harm caused to crops, other people or animals, the killing of an animal.⁷⁵ It is hard to see how an entitlement of animals to continue their lives is compatible with a justification of killing them for food.⁷⁶ As has been argued by Anders Schinkel, in his critique of Nussbaum's work, this situation gives rise to the phenomenon of 'doubling', a term used to describe Nazi doctors who carried out cruel experiments on Jews while living ethically decent family lives at home.⁷⁷ A society in which human beings are to treat animals with respect, admiration, wonder and dignity on one hand, and are entitled to kill them for advancement of their needs on the other, arguably results in a 'moral schizophrenia', which results not in progress, but in dangerous inconsistency.

Additionally, there is an evident theoretical contradiction in Nussbaum's analysis regarding killing of animals for human benefit, as she justifies⁷⁸ these exceptions within the utilitarian tradition, which she has criticised extensively.⁷⁹ She reasons that the capabilities approach is superior to utilitarianism because it respects each individual creature, refusing to rely solely on the aggregate.⁸⁰ While her central argument seems to be that every individual animal is worthy of respect because of their capabilities, she does not adequately address the use of non-human animals by humans for achieving their own ends. Nussbaum's justification under utilitarianism, therefore, results in a major (and possibly dangerous, as it allows for a way in which the indiscriminate limiting of an animal's capability may be justified) discrepancy, reducing the value of her alternative approach.

This entitlement-based approach is borne out of a deep criticism of the Kantian contract that states that only human beings can possess entitlements and rights because of their ability to participate in a social contract with the state. Nussbaum criticises the Kantian contract for its rigid distinction between species and its insistence that only members of a single species can participate in a given social contract. However, in an attempt to reconcile 'difficult situations' of using animals for food or experimentation, Nussbaum's approach endorses the premise of the Kantian contract. She states that human beings can, and must, use animals as a source of food, thereby assenting to the

⁷⁵ Schinkel, *supra* note 68, 58.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ NUSSBAUM, *supra* note 66, 402-403.

⁷⁹ *Id.*, 344.

⁸⁰ *Id.*, 345.

superiority of the human species, which also forms the basis of the Kantian contract. The arrival at an eventual ‘universal consensus’⁸¹ towards the use of animals is an unsubstantiated and ambiguous solution to the issue. The theory of entitlements is hence, unsuccessful in rationalising the fundamental question that has plagued thinkers and jurists: how can the concept of human benefit be reconciled with a theory that grants non-human animals rights?

2. Locating Nussbaum’s Theory of Justice in a Duty-Based Approach

Despite its discrepancies, Nussbaum’s analysis regarding a theory of justice remains persuasive, especially in the context of certain duties that human beings owe to non-human animals. The source of such a duty, particularly in the Indian context, could also arise from ancient teachings and beliefs that were based on a different perception of the relation between man and the universe. Unlike the West (deeply influenced by Christian texts), where man was essentially understood to be the centre of the universe,⁸² Eastern religions and cultures reflected a view which endorsed that humans were only a part of a larger universe.⁸³ Ancient Indian concepts of how to treat animals were far more complex and compassionate than the human-centric approach of the West. There were even times where the killing of animals was completely prohibited.⁸⁴ This model of law and order largely rested on the duty-based approach of humans, towards both other humans and non-human animals which was further based on principles of *dharma*.⁸⁵ This line of philosophical thought is also seen in Jainism where Jains recognised the intrinsic value of life, specifically non-human life, and sought to protect it, not through a system of entitlements but through a system of positive duties.⁸⁶ Furthermore and possibly in a bid to reconstruct these ideals, the Indian Constitution uniquely recreates the idea of a duty with no corresponding right through the insertion of the Directive

⁸¹ *Id.*, 389.

⁸² The Bible, Genesis 1:27-28 (New King James Version, 1982) (This demonstrates how God created man and woman to have dominion over every other creature on earth:

“Then God said, ‘Let Us make man in Our image, according to Our likeness; let them have dominion over the fish of the sea, over the birds of the air, and over the cattle, over all the earth and over every creeping thing that creeps on the earth.’ [...] Then God blessed them, and God said to them, ‘Be fruitful and multiply; fill the earth and subdue it; have dominion over the fish of the sea, over the birds of the air, and over every living thing that moves on the earth.’”

⁸³ DERYCK O. LODRICK, SACRED COWS, SACRED PLACES: ORIGINS AND SURVIVAL OF ANIMAL HOMES IN INDIA 55-56 (1981).

⁸⁴ Susan L. Goodkin, *The Evolution of Animal Rights*, 18 COLUM. HUM. RTS. L. REV. 259, 283 (1986).

⁸⁵ S.K. PUROHIT, ANCIENT INDIAN LEGAL PHILOSOPHY 235 (2001).

⁸⁶ See ARTHUR L. BASHAM, *Jainism and Buddhism* in SOURCES OF INDIAN TRADITIONS 45 (1958).

Principle of State Policy⁸⁷ and the Fundamental Duties.⁸⁸ These provisions are not enforceable in the way that a right ordinarily is in India. Nonetheless, they provide guiding principles for governance, jurisprudence and legislation.

Evidently, there is theoretical, historical and even constitutional consensus that human beings owe a *duty* to non-human animals, due to their co-existence within a common ecosystem and mutual benefit derived from our surroundings.⁸⁹ Further, as an intellectually evolved species, human beings also owe a duty to act towards the holistic welfare of non-human animals.⁹⁰ However, the source of this duty is disputed, amongst traditional thinkers like Bentham and contemporary thinkers like Nussbaum, which leads to uncertainty regarding approaches to animal welfare.

In this regard, the concept of ‘dignified existence’, as a source of human duty that has been suggested by the N.R. Nair judgment, forms an interesting and persuasive suggestion. On analysis of the Aristotelian and utilitarian traditions and Nussbaum’s capability approach, it revealed that it is indeed this dignified existence that is the essence of human duty towards non-human animals. This dignified existence premises itself on the fact that non-human animals have traits within themselves that deem them entities with dignities of their own that deserve to be respected. The ‘dignified existence’ of non-animals, although a seemingly obscure intervention of legal and philosophical notions, complies with the Aristotelian naturalism, with Ancient Indian notions of life and with theories of painless killing. Like these philosophical doctrines, the concept of ‘dignified existence’ also supports the idea of continuity within nature, and an inherent duty towards non-human animals to prevent the infliction of pain on them. Further, Nussbaum regards the dignity of animals, as used similarly in the context of N.R. Nair, as the basis of animal welfare and the conscious source from which human beings should derive their duty.⁹¹ Nussbaum’s approach relies on this judgement as an ideal, regarding it as the basis for granting animals ‘entitlements’ based on their capabilities. This vital decision harmonises these theoretical canons and arrives at a distinct and simple source of our duty: the recognition and commitment to the ‘dignified existence’ of the animal.⁹²

Therefore, the source of the duty that human beings owe to non-human animals must be viewed as arising not from what we *give* non-human animals through charity, but as what we *owe* to these species because of their

⁸⁷ The Constitution of India, 1950, Arts. 36-51 (Art. 48A specifically deals with protection of animal life under the Constitution).

⁸⁸ The Constitution of India, 1950, Art. 51A (Cl. (g) is specific to caring for the natural environment and animals).

⁸⁹ NUSSBAUM, *supra* note 66, 372.

⁹⁰ *Id.*, 373.

⁹¹ *Id.*, 335-336.

⁹² *Id.*

inherent faculty. However, to state that animals have several rights on the basis of their capabilities located within a theory of justice, leads to theoretical inconsistencies regarding the use of non-human animals for survival and benefit. It is consequently concluded that the source of human duty towards non-human animals is the commitment to ensure the ‘dignified existence’ of animals. The emphasis should not be on the inconsistent concept of the entitlement of the animal but on the concrete duty of human beings.

B. THE NEED FOR A DIRECT AND POSITIVE DUTY

By subscribing to an approach that negates the viability of granting animals ‘rights’ based on their capabilities, it does not imply that the current laws relating to animal welfare are effective, or even sufficient. The idea of an absolute duty was first suggested by Austin, through his positivist analysis of rights and duties, as a duty that exists within the human species, without the creation of a correlative right.⁹³ The creation of a correlative right considered the determination of a legal person as a pre-requisite.⁹⁴ There are several situations in which human beings owe ‘absolute duties’ to indeterminable legal entities, or entities that are not capable of possessing rights. Duties can be positive or negative, direct or indirect.⁹⁵ The majority of legislation in relation to animal welfare across jurisdictions is the codification of negative and often indirect duties that we owe to non-human animals.⁹⁶ However, the need of the hour is the codification of direct and positive duties into legal provisions, and the enforcement of the same.

The distinction between positive and negative duties bases itself on the distinction between what an individual is supposed to refrain from doing, and what an individual is obliged to do.⁹⁷ Nussbaum herself posits that “traditional morality” holds that it is wrong to harm another by aggression or fraud, but that letting people perish of hunger or disease is not morally problematic.⁹⁸ It follows from this that we have a strict duty not to commit bad acts, but no corresponding duty to act towards their cessation.⁹⁹ This distinction brings with it a hierarchy between positive and negative duties.

Positive duties are considered to be of higher ethical and legal value, as evidenced by the fact that the majority of early legislation in the world,

⁹³ JOHN AUSTIN, JURISPRUDENCE, OR THE PHILOSOPHY OF POSITIVE LAW 113 (R. Campbell ed., 2002); Roscoe Pound, *Legal Rights*, 26 (1) INTERNATIONAL JOURNAL OF ETHICS 92, 94 (1915).

⁹⁴ Pound, *id.*, 162.

⁹⁵ Marcus G. Singer, *Negative and Positive Duties*, 15 (59) THE PHILOSOPHICAL QUARTERLY 97 (1972).

⁹⁶ See, e.g., Act on Welfare and Management of Animals, 1972 (Japan); Animal Welfare Act, 1966 (USA); Animal Welfare Act, 2006 (UK).

⁹⁷ Pound, *supra* note 93, 98.

⁹⁸ NUSSBAUM, *supra* note 66, 336.

⁹⁹ *Id.*

whether criminal or civil, was the codification of negative duties as opposed to positive ones.¹⁰⁰ With the evolution of legal systems, positive duties were codified with varied implications and reactions from society. However, the process of codifying positive duties or making individuals act in a particular manner leads to the endorsement of certain normative behaviour, and causes disputes within a society that is differently morally charged. The codification of positive duties leads to the codification of certain responsibilities that citizens have towards the State, sometimes at the cost of the individual's agency.¹⁰¹ With the advent of the liberal tradition, the supporters of positive legal duties began being labelled as 'moralists' for restricting human freedom by imposing a normative ideal, rather than enhancing it.¹⁰² These disputes, however, are irrelevant when the same standard is imposed with respect to non-human animals, and the need for positive duties towards non-human animals is urgent.

A positive duty towards the welfare of non-human animals does not restrict the moral freedom of an individual directly. It merely ensures that the duty that humans owe to non-human species is optimally served. These positive duties are essential with regards non-human animals because a large number of them live directly under human control, imposing a direct responsibility of nutrition and care of the animals on human beings.¹⁰³ Such animals may live in farms and zoos, or may be domesticated. With technological advancement, human intervention within the world of non-human animals is massive, and the aspect of intervention brings with it a corresponding duty to protect animal habitats. Further, the human race can maintain the 'balance of nature' by preserving several species and saving them from extinction, creating a real duty of material aid and medical assistance towards these species.¹⁰⁴

It is regretful that the large part of animal-based legislation globally merely codifies negative duties that human beings owe to animals. In India, the PCA and the proposed Animal Welfare Act, 2011, codify our duties towards animals to refrain from causing harm, but none to facilitate their 'dignified existence' within the ecosystem. The European Union is a pioneer regarding legislation for the welfare of non-human animals. The German Animal Welfare Act, 1998, was enacted to protect the lives and well-being of animals, based on the responsibility of human beings for their fellow creatures.¹⁰⁵ Article 20A, German Basic Law, after an amendment of 2002 states that animals, like humans, have the right to be respected by the state and to have their dignity protected. This provision, however, reflects

¹⁰⁰ Singer, *supra* note 95, 93.

¹⁰¹ Common examples would be of taxation, conscription, and specific to India, the Flag Code of India, 2002, which prescribes imprisonment for burning an India flag.

¹⁰² Singer, *supra* note 95, 93.

¹⁰³ NUSSBAUM, *supra* note 66, 365.

¹⁰⁴ *Id.*, 368; Daniel B. Botkin, *Adjusting Law to Nature's Discordant Harmonies*, 7(1) DUKE ENVIRONMENTAL LAW & POLICY FORUM 25, 26 (1996).

¹⁰⁵ Animal Welfare Act, 1998 (Germany).

a general duty or responsibility of the state towards animals, and no specific, enforceable right is created.¹⁰⁶ Article 80 of the Swiss Constitution, holds that the State will positively regulate the keeping and care of animals; experiments and intervention on live animals; the use of animals; the importation of animals; animal trade and transportation of animals and the killing of animals.¹⁰⁷ We contend that similar laws enforcing positive duties of human beings towards non-human animals are required within the Indian legal context.

The second pertinent distinction is between direct and indirect duties that the human race owes towards non-human animals. The school of thought advocating indirect duties locates non-human animals within a larger ecological spectrum.¹⁰⁸ The environment, in all its diversity, must be properly maintained to maximise human benefit, and cater optimally to human development. Hence, the ultimate end of any duty which human beings owe to non-human animals is a duty towards the human race itself.¹⁰⁹ Direct duties are those duties that we owe to animals because *they* are beings worthy of a 'dignified existence'.¹¹⁰ An emphasis on this commitment towards a duty to non-human animals because of their inherent nature as productive beings is crucial to highlight the seriousness of any duty owed by the human race. As shown above, there is a gradual change in the manner in which laws have denoted not indirect but to direct duties, based on the inherent nature of the animal.

C. *THE BENEFITS OF A DUTY-BASED APPROACH OVER A RIGHTS-BASED APPROACH*

While acknowledging that a duty and a right are co-related concepts, there are a range of duties that are not associated with corresponding rights. Further, there are different mechanisms for enforcing a right and a duty, and legislation always emphasises one over the other.

Rights in general perform the task of regulating the autonomous management of one's life. Since they can play this role only for beings capable of being self-managers, rights constitute a form of moral protection that is simply out of place for creatures other than human beings, as has been argued under Part II of this paper.¹¹¹ This, however, does not mean that the law will deny animals protection, or will not legislate towards their welfare. In fact, a stronger duty obligation may arguably, be imposed upon the human race, in this scenario.

¹⁰⁶ GRUNDGESETZ, The Constitution of the Federal Republic of Germany, 1949, Art. 20A.

¹⁰⁷ BUNDESVERFASSUNG DER SCHWEIZERISCHEN EIDGENOSSENSCHAFT, The Federal Constitution of the Swiss Confederation, 1874, Art. 80.

¹⁰⁸ NUSSBAUM, *supra* note 66, 373.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ Wilkinson, *supra* note 54, 148.

The fundamental premise of the rights-based approach is to create, in people or the State, a sense of entitlement which they may effect against the State or other bodies who violate their rights.¹¹² However, as has been argued, this view cannot be sustained in the context of animal entitlements or welfare as it is inefficient and unlikely to yield desired results, especially due to the difficulty in truly enforcing the approach against aggressors. At the same time, a duty-based approach will create a positive and direct obligation upon humans and the State to protect non-human animals and as such, will be a more sustainable model upon which animals may be granted protection. As opposed to the rights-based approach, which relies on the possessors' ability to ask for their rights and make various State and non-state actors accountable, a duty-based approach has no such requirement. Additionally, the absence of a rights-based entitlement model could allow for greater dilution of the doctrine of standing and permit humans to ask for the performance of duties on behalf of non-humans in a less controversial sense of procedure. In India, as has been seen in animal welfare case law, this could take the form of Public Interest Litigation suits.¹¹³

In employing jurisprudential theory while legislating, the terms 'rights' and 'duties' are often used interchangeably, which often leads to ambiguity. In actuality, reference is made specifically to one of the two concepts. Having established that animals cannot possess 'rights' within the legal meaning of the term, it is evident that the duty towards non-human animals must be the focus of legislations. This reduces problems of enforceability, and increases conceptual clarity regarding any dispute that is presented before a court of law.

In *A. Nagaraja*, the Supreme Court essentially seeks the codification of a direct and positive duty towards non-human animals to combat the inherent speciesism that pervades our legal thought. However, the Court is inconsistent in its approach by its usage of Article 21 to further its arguments. The Court argues that animals have a right that goes beyond mere survival or existence or instrumental value for human-beings, but to lead a life with some intrinsic worth, honour and dignity. It furthers this claim by saying that animals possess rights to the extent of human rights' protection. This approach is abstruse and problematic. By invoking Article 21 in such a manner, the Court has relied on the age-old rationale, disregarded even by traditional moralists, that non-human animals should be protected solely for the eventual benefit of

¹¹² See Jakob Kirkemann Boesen & Tomas Martin, *Applying a Rights-Based Approach: An Inspirational Guide for Civil Society*, available at <http://www.acfid.asn.au/aid-issues/files/applying-a-rights-based-approach-2013-an-inspirational-guide-for-civil-society> (Last visited on February 23, 2015).

¹¹³ *Ramesh Sharma v. State of H.P.*, 2014 SCC OnLine HP 4679, ¶12 (on animal sacrifice); *Suo Motu v. The State of Karnataka*, (2012) 5 Kar LJ 313 (on the mysterious death of wild elephants); See DNA News Network, *PIL in Bombay High Court Seeks Ban On Cock Fighting*, December 29, 2014, available at <http://www.dnaindia.com/india/report-pil-in-bombay-high-court-seeks-ban-on-cock-fights-2047718> (Last visited on February 26, 2015).

the human race. This contradicts the Court's own stance that animals should be treated with 'dignity' because of a certain intrinsic value they possess. This inconsistency within the judgement leads to a lack of clarity that could have been easily avoided by recognising the necessity of direct and positive duties with regard to the welfare of non-human animals.

V. CONCLUSION

In interpreting provisions of legislative acts and laws, it is important for courts to maintain ideals that correspond to the foundations of what constitutes jurisprudential theory. To this end, the judgment in *A. Nagaraj* has erred in its findings. Not only will adopting a rights-based approach towards securing animal welfare be inconsistent with basic notions of who the possessors of rights are but it is also an impractical way of addressing the problem at hand, *i.e.*, the protection of animals under the law. Granting rights to animals is unlikely to have the desired effect as questions of standing as well as conflicts with existing human rights are likely to arise. Thus, the correct approach is one which already exists in Indian jurisprudence and constitutional law, that which creates a direct and positive duty upon humans. This approach ensures that courts are able to interpret animal welfare and protection laws in the language of compassion and dignity as well as avoid addressing clashes between animal and human rights.