ARTICLES

ANIMAL RIGHTS IN THE SHADOW OF THE CONSTITUTION

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In this Article, we consider whether granting constitutional protections can improve animal welfare. To that end, we carry out a comparative analysis of legal systems that protect animal rights by constitutional tools, identify and analyze the ideas underlying those protections, and explore their adaptability. Focusing mainly on the Israeli case, we argue that constitutional law cannot provide adequate protections for animals and, contrary to the conventional wisdom, might even impair their protection.

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I. INTRODUCTION

Constitutional protections of animals give rise to unique theoretical, normative, and practical complexities, unparalleled in law. The issue is increasingly expanding in a series of liberal democracies around the world. Constitutional protections of animals were developed under the influence of various normative theories, which were developed by philosophers and legal scholars who advocate fundamental change of human attitude towards animals. These theories share, to some extent, the recognition that animals are not only a means to satisfy human needs and pleasures but have their own moral standing. It seems natural, therefore, that the recognition of an independent moral status of animals will be reflected in constitutional rules, parallel to those regulating human rights.

This Article seeks to illuminate, in a comparative analysis, why and how constitutional discourse cannot actually provide appropriate protections for animals, and, contrary to conventional wisdom, might even impair their protection.[1] However, we suggest a normative theoretical approach, which supports making analogies to certain rules that derive from constitutional law in a way that could promote the welfare of animals without purporting to grant them constitutional rights. In this way, significant legal protections of animals could be achieved in a world where full recognition of animal rights is still unrealistic. The proposed approach, therefore, would enable to enjoy the benefits of using the rationales of some constitutional rules while avoiding the disadvantages of artificial and even harmful application of constitutional discourse.

This Article explores several legal systems, including those of Switzerland and Germany—whose constitutions include provisions on animal protection—while focusing primarily on Israeli law. Israel can serve as a unique case study of the implications of constitutionalization of animal protection in light of a series of Supreme Court decisions. The Court ruled inter alia that the practice of force-feeding

[1] A distinction shall be made between general questions regarding the legitimacy of using animals for human needs, and questions relating to the legitimacy of limiting the freedom of religion and the equality of humans regarding the use of animals. Questions of the second category arise, for example, in the context of imposing bans on killing cows and calves on religious grounds. *See* Deepa Das Acevedo, *Secularism in the Indian Context*, 38 L. & SOC. INQUIRY 138, 152 (2013) (discussing Indian law, and a Muslim case prohibiting cow slaughter); Seval Yildirim, *Expanding Secularism's Scope: An Indian Case Study*, 52 AM. J. COMP. L. 901, 912 (2004) (discussing a case involving a legal challenge by Muslim butchers to state legislation prohibiting the slaughter of cows). *See generally* Claudia E. Haupt, *Free Exercise of Religion and Animal Protection: A Comparative Perspective on Ritual Slaughter*, 39 GEO. WASH. INT'L L. REV. 839, 839–86 (2007) (discussing ritual slaughter); Jeremy A. Rovinsky, *The Cutting Edge: The Debate over Regulation of Ritual Slaughter in the Western World*, 45 CAL. W. INT'L L.J. 79, 79–107 (2014) (discussing ritual slaughter). This Article focuses on questions of the first category, which are characterized by conflicts between animal protection and human interests that do not involve any infringement upon human rights that exceed the benefits derived by people from using animals.

geese in order to manufacture foie gras is illegal,[2] and as a result the agricultural sector based on force-feeding of poultry was shut down.[3] The Israeli Supreme Court also ruled that dealing with street cats in order to protect the interests of humans must be based on measures that are generally less extreme than killing and that do not cause suffering to the cats.[4] The Court also prohibited a show featuring a 'struggle' between a man and an alligator, which would have caused suffering and agony to the animal.[5] Just recently the Israeli Supreme Court noted that the very engagement by the Court in a solution that benefits a monkey is an indication of the legal recognition of the evolving issue of animal rights and welfare in Israeli law."[6] The Court, while interpreting the main law that regulates the animal protection—the Prevention of Cruelty to Animals Act (PCA Act)[7]—has stated that animal protection results from "the need to protect everything that was created on Earth with a breath in its nose."[8]

Notwithstanding the legislation and case law aimed at protecting animals, the constitutional discourse that has developed in Israel regarding animal protection has caused a considerable degree of discomfort.[9] The Supreme Court ruled that the question of whether an action concerning animals is tantamount to forbidden torture of animals depends on its proportionality.[10] The same action may be considered torture, cruelty, or abuse if its purpose is of minor importance, and may

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[2] HCJ 9232/01 "Noah," The Israeli Federation of Animal Protection Organizations v. Attorney General, IsrLR 215 (2003) (Isr.), [hereinafter *Noah*] http://elyon1.court.gov.il/files/01/320/092/S14/01092320.s14.pdf [https://perma.cc/QV2B-HCT6] (accessed Jan. 19, 2018).

[3] *See* Ofra Edelman, *Israel Appeals Goose Farmer's Acquittal on Animal Cruelty Charges*, HAARETZ (Apr. 18, 2013, 2:08 AM), http://www.haaretz.com/israel-news/israel-appeals-goose-farmer-s-acquittal-on-animal-cruelty-charges.premium-1.516100 [https://perma.cc/3PP8-7Z3X] (accessed Jan. 19, 2018).

[4] HCJ 6446/96 Cat Welfare Society v. Arad Municipality, para. 5 (1998) (Isr.) [hereinafter *Cat Welfare Society*], http://elyon1.court.gov.il/files/96/460/064/J18/96064460.j18.pdf [https://perma.cc/54CF-L63H] (accessed Jan. 19, 2018); HCJ 4884/00 Let the Animals Live v. Director of Field Veterinary Services in the Ministry of Agriculture, para. 1 (2004) (Isr.) [hereinafter *Street Cats*], http://elyon1.court.gov.il/files/00/840/048/L19/00048840.l19.pdf [https://perma.cc/GT87-K2ME] (accessed Jan. 19, 2018).

[5] LCA 1684/96 Let the Animals Live v. Hamat Gader IsrLR 1, 41 (1997) (Isr.), [hereinafter *Hamat Gader*] http://elyon1.court.gov.il/files_eng/96/840/016/g01/96016840.g01.pdf [https://perma.cc/6ZA4-ESD6] (accessed Jan. 19, 2018).

[6] CAL 5128/16 State of Israel v. Feigin, para. 4 (2016) (Isr.), http://elyon1.court.gov.il/files/16/280/051/z03/16051280.z03.pdf [https://perma.cc/Q37W-7K2J] (accessed Jan. 19, 2018).

[7] *See* the Prevention of Cruelty to Animals Act 5754—1994 2(a) (Isr.) [hereinafter PCA Act] ("No person shall torture, act cruelly toward or abuse an animal in any way.") (translation provided by author).

[8] *Cat Welfare Society*, HCJ 6446/96, para. 5 (translation provided by author).

[9] *See generally* Yossi Wolfson, *Animal Protection Under Israeli Law*, *in* ANIMAL LAW AND WELFARE - INTERNATIONAL PERSPECTIVES 157, 157–79 (Deborah Cao et al. eds., 2016) (discussing animal protection under Israel laws).

[10] *Noah*, HCJ 9232/01, para. 31; *Cat Welfare Society*, HCJ 6446/96, para. 10; *Street Cats*, HCJ 4884/00, para. 8; *Hamat Gader*, LCA 1684/96, paras. 22–23.

not be considered torture, cruelty, or abuse if intended to meet human needs that are perceived by society as essential, including the provision of "basic foods."[11]

Following an analysis of Israeli legislation and case law regarding animal protection in comparison to corresponding laws in other countries, this Article suggests three main arguments.

First, application of constitutional principles derived from human rights in such a way as to subject animals to the interests of humans is an oxymoron. It is difficult to reconcile the contradiction between purporting to grant protection of a constitutional nature to "everything that was created on Earth with a breath in its nose,"[12] and breeding and killing animals to be eaten and used in other ways. The animal products industry cannot exist without animal torture, cruelty, and abuse.

Second, constitutional protection of human rights is based on balancing rights with other interests. Israel's constitutional Basic Laws require that any restriction of a right be set forth in law or by virtue of an explicit authorization prescribed by law, that the law be enacted for a proper purpose, and that the restriction be proportional.[13] Apparently, the requirement in the PCA Act, that "no person shall torture, act cruelly toward or abuse an animal in any way,"[14] was to obviate a discussion of the proportionality of the abuse. But the Israeli courts interpreted this requirement as allowing "proportional" harm to animals.[15] This interpretation—even if it has led to significant animal protection in certain cases—utilizes, and even abuses, the constitutional methodology in a way that legitimizes the infliction of severe harm on them. Imposing the burden of defining the details of the handling of animals intended for food upon the parliament in primary legislation (as has been done in the context of restricting human rights) will likely alleviate the suffering of animals, even if it will not lead to the liquidation of the animal products industry. In addition, this Article suggests examining the cost of measures intended to improve the conditions under which animals are held and treated relative to the effect of these measures on the price of meat and of other food derived from them.

Third, the prohibition of animal abuse constitutes not only a basis for administrative regulation, but also a criminal offense.[16] But interpreting the offense according to constitutional rules of proportionality—which were formulated for the purpose of restricting the powers of

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[11] *Noah*, HCJ 9232/01, para. 18.

[12] *Cat Welfare Society*, HCJ 6446/96, para. 5 (translation provided by author).

[13] Basic Law: Human Dignity and Liberty, 1992, § 8 (Isr.), http://knesset.gov.il/laws/special/eng/BasicLawLiberty.pdf [https://perma.cc/3ZHV-LCR5] (accessed Jan. 19, 2018).

[14] PCA Act § 2(a) (translation provided by author).

[15] *Noah*, HCJ 9232/01, para. 16; *Cat Welfare Society*, HCJ 6446/96, paras. 10, 24; *Street Cats*, HCJ 4884/00, paras. 8, 11; *Hamat Gader*, LCA 1684/96, paras. 22–27.

[16] *Hamat Gader*, LCA 1684/96, para. 16.

government—raises considerable difficulties. The Judiciary has the discretion to determine whether harm to animals constitutes a criminal offense.[17] As a result, important principles have been undermined—which were not only intended to protect the accused—but also to enable efficient enforcement of criminal prohibitions.

This Article proceeds as follows. Part II analyzes the constitutional aspects of current Israeli law regarding animal protection. Part III discusses various theories seeking to establish a basis for animal protection and emphasizes the oxymoron involved in the attempt to reconcile animal protection alongside the recognition of the legitimacy of the animal products industry. Part IV discusses the characteristics of Israeli case law in the area of animal protection, which draws analogies from the methodology of constitutional protection of human rights. Finally, Part V explores the difficulties of the integration between criminal and administrative regulations in animal protection.

II. PROTECTING ANIMALS UNDER ISRAELI LAW

In a few decisions, the Israeli Supreme Court mentioned animal rights.[18] Nevertheless, it appears that these mentions are largely anecdotal and do not reflect a coherent judicial philosophy.[19] It is, therefore, preferable to examine the significance of the totality of judicial decisions regarding animal protections, rather than giving decisive weight to the rhetoric of the judges in such cases.

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[17] *Id.*

[18] *See, e.g.*, LCA 4217/12 Mamut v. Ministry of Agriculture, para. 8 (2012) (Isr.), http://elyon1.court.gov.il/files/12/170/042/w04/12042170.w04.pdf [https://perma.cc/L2JG-7BEN] (accessed Jan. 19, 2018) (in which the Israeli Supreme Court noted that the freedom of occupation and the living of the appellant are rights and interests deserving protection, but they are not absolute rights and must be balanced against conflicting interests and rights, including the rights of animals to receive professional, appropriate, and dedicated medical treatment.); LCA 537/08 Kagan v. Unicol, para. 5 (2008) (Isr.), http://elyon1.court.gov.il/files/08/370/005/b01/08005370.b01.pdf [https://perma.cc/2EYY-84S7] (accessed Jan. 19, 2018) (explaining that the significant limitations imposed on the destruction of stray cats expresses the emphasis placed on the animals' right to live.); *Cat Welfare Society*, HCJ 6446/96, para. 5 (pointing out that in discussing the prerogatives of the local authorities regarding the destruction of animals the Court must bear in mind the right of animals to live and noting that even if this right is not directly enshrined in legislation, it is part of Israeli culture and of an inner sense, ethical and utilitarian alike, regarding the obligation and the need to protect all creation that has a living spirit.). The common approach is that criminal prohibitions against harm to people also create rights not to be harmed. *See* HELENA SILVERSTEIN, UNLEASHING RIGHTS: LAW, MEANING, AND THE ANIMAL RIGHTS MOVEMENT 221 (1996) (stating how the social and legal animal rights movements have contributed to the understanding of the rights' language). *See generally* Thomas Nagel, *Personal Rights and Public Space* 24 PHIL. & PUB. AFF. 83 (1995) (discussing that the common approach is that criminal prohibitions against harm to people also create rights not to be harmed).

[19] *See Hamat Gader*, LCA 1684/96, para. 27 ("While the school of thought that recognizes animal 'rights' does not find support, either in legislation or in case law, it does teach us that although man rules the earth and its creatures, he must nonetheless respect his environment and take into account the interests of animals.").

Laws regarding animal protection in Israel incorporate criminal and administrative regulations in the same provisions.[20] Alongside detailed provisions for the treatment of animals, which are intended to prevent or minimize their suffering, there are also criminal sanctions.[21]

The key provision in the PCA Act is Section 2(a), under which "no person will torture, act cruelly toward or abuse an animal in any way."[22] The PCA Act also contains a series of specific prohibitions.[23] Simultaneously, the PCA Act stipulates that it does not apply to "killing animals for human consumption,"[24] an exception that was created in order to eliminate concerns that the law could prevent kosher slaughtering. Nevertheless, in many areas relating to animal protection, no regulations have been enacted yet.

Regarding the oversight of compliance with the provisions of the PCA Act and of the regulations enacted by its virtue, and their enforcement, the Act provides several mechanisms. The Act provides that if the prosecutor, the Director of Veterinary Services, or an animal protection organization have reasonable grounds to believe that an offense has been committed under the Act, or that it is about to be committed, they can turn to the Magistrates' Court to issue an injunction.[25]

This key provision is a means of prior restraint against violating the law.[26] The power to apply to the court for an injunction is granted to the criminal prosecution, to the administrative regulator, and to animal protection organizations.[27]

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[20] *See, e.g.*, PCA Act § 15 (stating that animal protection organizations may file criminal complaints for violations of the PCA Act after obtaining approval from the district attorney).

[21] *See, e.g.*, PCA Act §§ 2(C), 17(A)(1)(A) (stating that 1) no person shall organize fights between animals," and 2) a person who contravenes the provisions of Section 2 shall be liable to imprisonment for a term of three years or the fine stated in Section 61(a)(4) of the Penal Law 5737-1977); Margot Michel & Eveline Schneider Kayasseh, *The Legal Situation of Animals in Switzerland: Two Steps Forward, One Step Back – Many Steps to Go*, 7 J. ANIMAL L. 1, 16 (2011) (describing a sanction in Switzerland: "[f]or all violations of the Animal Protection Act there is a two-track system of penalties applied. On the one hand there is the so-called administrative protection of animals, and on the other hand the law contains sanctions such as the elements of the offense of cruelty to animals, which is prosecuted by the penal authorities . . . .").

[22] PCA Act § 2(a) (translation provided by author).

[23] *See, e.g.*, *id.* § 2(A)(1)(A) (stating that owners or custodians of an animal must provide for its subsistence needs, care for its health, and prevent abuse to it); *id.* § 2(b) (stating that no person shall pit an animal against another); *id.* § 2(C) (stating that no person shall organize fights between animals); *id.* § 2(D) (stating that no person shall cut the live tissue of an animal for cosmetic purposes); *id.* § 2B(A) (stating that no person shall cut or amputate a cat's knuckles, tendons, or living parts of its claws).

[24] PCA Act § 22(1) (translation provided by author).

[25] *Id.* § 17A(A).

[26] *Id.*

[27] *Id.* The problem of standing for animal protection organizations to apply to the court on behalf of animals against infringement of their rights does not arise in Israel. Rather, it arises in other countries, such as the United States. *See* Adam Kolber, *Standing Upright: The Moral and Legal Standing of Humans and other Apes*, 54 STAN. L.

A violation of the PCA Act is a criminal offense.[28] As an exception to the principle whereby the power of criminal indictment is granted only to the State, it has been determined that animal welfare organizations are also empowered, with the District Attorney's approval, to file a criminal complaint under the law.[29] The maximum penalty that can be imposed under the PCA Act is three years of imprisonment.[30] The maximum penalty for violating regulations enacted under the PCA Act, which is the maximum punishment that can be imposed in Israel for violations specified in the regulations in general,[31] is six months of imprisonment.

In practice, however, the penalties imposed generally do not include imprisonment, which is imposed only in exceptional cases, and then for considerably shorter periods than the maximum.[32] The vast majority of sentencing has to do with harm to pets, dogs, and cats, which elicit special empathy among people, and which Israelis do not eat.[33]

In three key cases, the Supreme Court interpreted and enforced the key prohibition specified in Section 2(a) of the PCA Act. In all three cases, the Court ruled in an administrative or civil procedure of an early preventive nature, rather than in a criminal proceeding.[34]

In *Hamat Gader*, the first decision in which the Supreme Court interpreted in detail the PCA Act, the Court discussed the legality of a

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REV. 163, 174 (2001) (discussing the problem of standing on behalf of animals in the American law context); Tania Rice, *Note & Comment:* L*etting the Apes Run the Zoo: Using Tort Law to Provide Animals with a Legal Voice*, 40 PEPP. L. REV. 1103, 1141 (2013) (discussing the problem of standing on behalf of animals in the American law context); Steven M. Wise, *The Entitlement of Chimpanzees to the Common Law Writs of Habeas Corpus and De Homine Replegiando*, 37 GOLDEN GATE U. L. REV. 219, 220 (2007) (discussing the problem of standing on behalf of animals in the American law context).

[28] *See* PCA Act § 17(A)(1) (prescribing criminal penalties for violating parts of the PCA Act).

[29] *Id.* § 15.

[30] *Id.* § 17(A)(1).

[31] The Penal Law § 2(a) (5737-1977) (Isr.).

[32] *See generally Hamat Gader*, LCA 1684/96, para. 10 ("The chapter containing this offence was found under the headline of 'minor offences' and the maximum punishment for those found guilty of cruelty to animals was a week's imprisonment, for a first offence, and a month's imprisonment for recurring offences.").

[33] In a directive issued by the Israeli Attorney General, prosecutors were instructed in animal abuse offenses to generally ask the court to impose prison sentences on the defendants and put them behind bars, the lowest penalty that the prosecution can request being not less than imprisonment that can be served as community service. The directive refers only to the punishment requested and does not address other aspects regarding prosecution policy. Directive from Yehuda Weinstein, Israeli Attorney General, Prosecution Policy regarding Animal Abuse Offenses (Jul. 31, 2013) (on file with authors).

[34] *See Hamat Gader*, LCA 1684/96, para. 16 (granting the petitioners' injunction to prevent respondents from organizing alligator fights); *Cat Welfare Society*, HCJ 6446/96, at 37 (discussing the creation of an orderly administrative procedure); *Noah*, HCJ 9232/01, at 25–26 (holding that the force-feeding of geese is illegal under the PCA Act, preventing respondents from force-feeding their geese to increase yield).

show that included a struggle between a man and an alligator.[35] Since injunction proceedings are part of administrative law and not criminal in nature, the Court emphasized that *mens rea* is not required, and the petitioner has to prove the *actus reus* of torture, cruelty, or abuse of animals.[36]

The Court followed a two-stage procedure in interpreting the prohibition.[37] In the first stage, the Court, in an opinion led by Justice Mishael Cheshin, interpreted the categories of torture, cruelty, or abuse as covering any act that causes physical or mental suffering to animals.[38] In the second stage, the Court determined that it was necessary to examine whether causing the suffering was justified.[39] The causing of suffering is considered to be prohibited torture, cruelty or abuse only if it is not justified.[40] Regarding the justification, the Supreme Court ruled that the factors that shall be addressed are "[f]or what purpose was the suffering inflicted? Are the means employed proper means? Is the amount of suffering proportional to the purpose and means for which it was inflicted?"[41]

After the Court concluded that showing the fight between a man and an alligator inflicts suffering on the alligator, it ruled that the causing of suffering was not justified for three reasons.[42] First, causing suffering to an animal for entertainment purposes is not justified.[43] Second, watching it sent an anti-educational message to the spectators:[44] "One who treats helpless animals cruelly shall become hard of heart and is one step away from hurling the same treatment upon his fellow man. . . ."[45] Third, the fight was not fair, the result was known in advance, and the alligator had no chance of winning.[46] It appears that at least the second and third reasons reflect a particularly strict approach regarding the justification of causing suffering to animals. Given the fact that animal torture, cruelty, and abuse are criminal offenses, these reasons are conspicuously obscure and broad in their scope. Justice Theodor Or, although agreeing with the outcome of granting an injunction, remarked that he "see[s] quite a few difficul-

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[35] *See Hamat Gader*, LCA 1684/96, para. 16 (discussing whether alligator wrestling matches were considered animal abuse under the PCA Act).

[36] *Id.*

[37] *See id.* paras. 15–21, 36 (discussing first the three elements—the mental element associated with the crime, the suffering caused to the animal, and whether or not the behavior was justified—that determine if, under the PCA Act, animal abuse would occur in the respondent's proposed alligator wrestling exhibition).

[38] *See id.* paras. 15–18 ("Pain or suffering – though not severe – is sufficient to satisfy the second element establishing torture, cruelty, or abuse.").

[39] *Id.* paras. 17–18.

[40] *Id.*

[41] *Id.* para. 22.

[42] *Id.* paras. 40–41.

[43] *Id.* para. 41.

[44] *Id.*

[45] *Id.*

[46] *Id.*

ties associated with applying that opinion's prescriptions to several kinds of behavior, which involve animals, and which society currently views as acceptable."[47]

In two other important decisions, the Israeli Supreme Court discussed the policy dealing with stray cats. In *Cat Welfare Society*, the Court ruled that the fairly general certification provisions of the laws governing the powers of local authorities were amply sufficient to provide for public health and to prevent sanitary hazards and nuisances, in order to meet legal requirements with respect to "thinning" the population of stray cats.[48] At the same time, the Court noted that the legislation regarding the powers of the local authorities is not satisfactory."[49] and According to the decision it would be proper to enshrine in primary legislation, or at least in secondary legislation, detailed instructions such as criteria for the Law's operation, rules of execution, and a proper mechanism for decision-making processes.[50]

Despite ruling that local authorities have the power to destroy stray cats, the Supreme Court overturned two of the three decisions against which the petition had been filed.[51] The Court stated that when the local authority decides to thin the population of cats by killing them, it must consider the possibility of achieving the same goals using less drastic measures before making the decision. This is the doctrine of proportionality, according to which governmental measures must suit the accomplishment of the purpose, and not exceed what is needed to accomplish the goal.[52]

The Supreme Court overturned decisions without proving that the proliferation of cats was a real danger, without showing that proportional discretion was used in order to deal with danger, and without having examined the possibility of ensuring public health without the annihilation of stray cats.

In *Street Cats*, the ??Supreme Court addressed the legality of directives for treating stray cats issued by the Director of Field Veterinary Services at the Ministry of Agriculture, following *Cat Welfare Society*.[53] The directives were designed to regulate the exercise of the authority to destroy cats.[54] The killing of the cats was entrusted to a private company called "Protection of Cats."[55] The Supreme Court did not discuss the question of whether it is possible to regulate the destruction of animals by administrative directives, which are not parliamentary acts, which are neither parliamentary acts nor regulations.

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[47] *Id.* at 48–49.

[48] *Cat Welfare Society*, HCJ 6446/96, para. 2.

[49] *Id.* para. 20.

[50] *Id.*

[51] *Id.* para. 20.

[52] *Id.* para. 28.

[53] *Street Cats*, HCJ 4884/00, para. 1.

[54] *Id.* para. 3.

[55] *Id.* (translation provided by author).

Nevertheless, the Court accepted the petition for two reasons.[56] First, it was determined, in the spirit of the doctrine of proportionality, that the destruction of stray cats must be done sparingly, circumscribing it within boundaries as clear as possible of time and place, and limiting the circumstances under which it is possible to carry it out. The Court noted that destruction of stray cats must be the last step, undertaken only when it is not possible to effectively protect the welfare of humans by any other means at a reasonable cost.[57]

The directives did not establish almost any means for dealing with stray cats apart from killing them. They did not set criteria for handling cats, and ultimately they left no doubt that they revolve around killing as the main mode of action.[58] Second, the Supreme Court ruled that resorting to a private company to collect and destroy the cats was illegal because the company was in a severe conflict of interest, and the supervision over it by Ministry of Agriculture was weak.[59] The company has an economic interest in demonstrating activity, namely to hunt stray cats and kill them.[60] Its employees hold a large amount of drugs and have a free hand to use them.[61] The' company's employees formulate the factual foundation for killing, which takes place far from any governmental supervision.[62] The company is required to report briefly to the authorities on its operations only once a month.[63] However, the Court did not address the question of whether granting a private company the power to shape the policy of destroying stray cats is consistent with the separation of powers.

The third decision—and the most significant one, both in principle and because of its practical implications—was the ruling of the Supreme Court in *Noah*.[64] In a majority decision, the Supreme Court ruled that the practice of force-feeding geese in order to manufacture foie gras is illegal because it involves torture and abuse of the geese, and therefore canceled the regulations on which this practice was based.[65] As a result, the agricultural sector of force-feeding poultry

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[56] *Id.* paras. 4–5, 16.

[57] *Id.* para. 8.

[58] *Id.* para. 10.

[59] *Id.* para. 15.

[60] *Id.* para. 14.

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *See* HCJ 7713/05 "Noah," The Israeli Federation of Animal Protection Organizations v. Attorney General, (2006) (Isr.), http://elyon1.court.gov.il/files/05/130/077/R06/05077130.r06.pdf [https://perma.cc/4JXS-SYXJ] (accessed Jan. 19, 2018) (discussing the enforcement of *Noah*, HCJ 9232/01, once it became clear that there was no method of raising geese for the production of foie gras without involving torture and abuse).

[65] In California, however, a federal district court overturned California's ban on selling force-fed foie gras in January 2015. *See* Ass'n des Éleveurs de Canards et d'Oies du Québec v. Harris, 79 F. Supp. 3d 1136, 1145–48 (C.D. Cal. 2015) (finding that a California statute banning the sale of products that are "the result of force feeding a bird for the purpose of enlarging the bird's liver beyond normal size" is preempted by the Poultry Products Inspection Act). *But see* Kathryn Bowen, *The Poultry Products Inspection*

was shut down.[66] Three main consequences attest to the uniqueness of this decision and to its importance from the points of view of principle and practice.

First, the practice that was declared illegal was part of the meat industry. Without minimizing the importance of prohibiting animal abuse for entertainment,[67] or limiting the authority to kill stray animals in order to prevent nuisance and risks to public health,[68] the ruling that a practice used directly in the industrial production of meat is illegal is of particular importance. Indeed, the social and economic implications of limiting the food industry are dramatically different than the implications of limiting the killing of cats that cause discomfort or of abusing crocodiles in entertainment performances.

Second, the result of the decision was the liquidation of an entire agricultural sector, involving compensation on the part of the State to farmers who made their living by raising geese and other waterfowl for the production of foie gras.[69]

Third, the Supreme Court declared regulations approved by a parliamentary committee were illegal.[70] Although Israeli law allows the Supreme Court to invalidate regulations that received parliamentary approval if they are *ultra vires* or suffer from some other substantial legal flaw, the Court shows great restraint when it comes to judicial review of such regulations.[71] The Supreme Court's willingness to cancel the regulations reflects the particular weight that the Court ascribes to the value of animal protection.

Act and California's Foie Gras Ban: An Analysis of the Canards Decision and Its Implications for California's Animal Agriculture Industry, 104 CAL. L. REV. 1009, 1035–41 (2016) (arguing that the *Canards* decision could "severely undercut" state authority to regulate animal cruelty).

66 *Noah*, HCJ 9232/01, paras. 26–27; *see* Lazar Berman, *Knesset Gives Initial Okay to Ban on Foie Gras Sales,* TIMES ISRAEL (July 10, 2013, 6:21 PM), https://www.timesofisrael.com/knesset-gives-initial-okay-to-ban-on-foie-gras-sale/ [https://perma.cc/9KG5-RP59] (accessed May. 11, 2018).

67 *Hamat Gader*, LCA 1684/96, paras. 40–41.

68 *Cat Welfare Society*, HCJ 6446/96, para. 3; *Street Cats*, HCJ 4884/00, para 4.

69 *See* Government Secretariat, *Resolution No. 4278*, PRIME MINISTER'S OFF. (Oct. 2, 2005), http://www.pmo.gov.il/Secretary/GovDecisions/2005/Pages/des4278.aspx [https://perma.cc/6NZ3-44W5] (accessed Jan. 19, 2018) (creating a committee to determine how to proceed after *Noah*); Government Secretariat, *Resolution No. 250*, PRIME MINISTER'S OFF. (July 9, 2006), http://www.pmo.gov.il/Secretary/GovDecisions/2006/Pages/des250.aspx [https://perma.cc/HMT7-PZM7] (accessed Jan. 19, 2018) (deciding to provide financial compensation to farmers affected by *Noah*). This compensation was given despite the fact that the Supreme Court held that the farmers had no legal right to compensation for the elimination of their business. CA 2118/12 Grass Meat Products Export Ltd. v. State of Israel, 2 (2015) (Isr.), http://elyon1.court.gov.il/files/12/180/021/w10/12021180.w10.pdf [https://perma.cc/H8HF-WF9G] (accessed Jan. 19, 2018).

70 *Noah*, HCJ 9232/01, paras. 25–27.

71 *See, e.g.*, HCJ 7456/09 Midberg v. Rishon Lezion Magistrate's Court, para. 8 (2010) (Isr.), http://elyon1.court.gov.il/files/09/560/074/c06/09074560.c06.pdf [https://perma.cc/BGH7-97UU] (accessed Jan. 19, 2018) (stating that the approval of one of the Knesset committees is not sufficient to immunize secondary legislation that is unreasonably unreasonable against cancellation by the court).

In *Noah* as well, the Supreme Court based its decision on the doctrine of proportionality. Justice Tova Strasberg-Cohen, who led the majority opinion, noted that just as constitutional human rights are not absolute but relative, and can be balanced against other interests, the interest of protecting animals is balanced against the interest of persons using them for their subsistence.[72] Justice Strasberg-Cohen noted that the methodology used for this balancing:

> [B]ears a similarity to the principles that guide this Court when it balances fundamental rights against other rights, values, principles or interests of a public nature. This balance is achieved by weighing the purpose of the violation and the proportionality of the means used to achieve the said purpose . . . . These tests are also used by the courts in determining a balance in cases other than those concerning human rights . . . . In this framework, the tests of purpose and proportionality serve not only to decide whether the harm to the interest of animal protection is justified and is therefore legal, but also for defining the limits of the interest itself.[73]

The Court ruled that breeding animals for human consumption is also subject to the PCA Act, and that "the fact that the law excludes putting animals to death for human consumption from its application . . . does not, in and of itself, justify that the animal's life should be filled with suffering."[74] The Court recognized the fact that the power to enact regulations implementing the Act "constitutes a tool for concretizing the balance between the need to protect animals and the opposing interest of 'agricultural needs.'"[75] In other words, whether this or some other agricultural practice constitutes torture, cruelty, or abuse is determined by the balance between the "needs of agriculture" and the protection of animals. The Court noted that "[t]he circumstances under which other interests will override the interest of protecting animals cannot be precisely demarcated. They will depend on the culture, values, and worldview of society and its members, and these are contingent on time, place, and circumstance."[76]

In this case, the determination that force-feeding constitutes torture, cruelty or abuse was based on two considerations.[77] First, force-feeding caused particularly intense suffering to the geese.[78] Second, the benefit of causing the suffering—which is the production of "luxury food"[79] and not of "basic foods"[80]—required demonstrating the "needs of human existence,"[81] is small in relation to the suffering caused to the geese.

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[72] *Noah*, HCJ 9232/01, paras. 5–7.
[73] *Id.* para. 11.
[74] *Id.* para. 12.
[75] *Id.* para. 16.
[76] *Id.* para. 7.
[77] *Id.* para. 26.
[78] *Id.* para. 17.
[79] *Id.* para. 23.
[80] *Id.*
[81] *Id.* para. 9.

Nevertheless, the Supreme Court stated that:

> [O]ne must give attention to the complexity of the issue, and to the consequences of annulling the Regulations and prohibiting the practice of force-feeding geese on the foie gras industry and those employed in it. All these demand giving respondents time to reevaluate the subject before the annulment takes effect.[82]

Therefore, the Supreme Court postponed the date on which the annulment of the regulations was to take effect by a year and a half, giving the authorities time to evaluate whether there are methods of force-feeding geese that significantly reduce the suffering caused to them.[83]

In his dissenting opinion in *Noah*, Justice Asher Grunis held that the geese's suffering does not justify the abolishment of regulations that would make those "employed in force-feeding geese for decades into felons in a day."[84] Justice Grunis based his reasoning largely on the inconsistency of the majority opinion.[85]

Applying the law on raising animals for the production of meat led the majority justices in *Noah* to what was called "one of the first instances of a court applying an anti-cruelty law to a common farming practice."[86] The Court ruled despite "the strategic, and even psychological, difficulties created by the fact that cruelty is embedded in nearly every aspect and stage of animal food production,"[87] which "can provoke derisive commentary on the inconsistency of such policies."[88]

Indeed, the legal protection of animals in Israel is expanding, and it has some implications also for the raising of animals for food.[89] In

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[82] *Id.* para. 25.

[83] *Id.* para. 27.

[84] *See id.* para. 25 (Grunis, J., dissenting); ("Had we agreed with petitioner's argument, we would be forced to say that the Animal Protection Law makes those employed in Force-feeding geese criminals. These same people have been employed in the profession for many years, with the encouragement and aid of the government."); *id.* para. 29 (Grunis, J., dissenting).

[85] *See id.* para. 18 (Grunis, J., dissenting) ("The purpose of the force-feeding process is to produce food for human consumption. . . . Traditional agriculture, based on family farms, has disappeared. It has been replaced by enormous farms, where animals are raised in harsh conditions. Thousands of chickens are crowded together in cages; calves are kept in extremely narrow stalls; their movement is greatly restricted, and they are fed special food. In the case of calves, the purpose of this is to produce meat of higher quality. We mention these examples to demonstrate that imposing a complete ban on a certain agricultural industry may have far-reaching economic and social consequences. . . . It is true that foie gras is considered a culinary delicacy . . . and thus should not be equated with regular basic foods. . . . We may, however, find ourselves entangled in hairsplitting distinctions; what would we say of veal? Clearly substitutes can be found for both foie gras and veal.").

[86] Mariann Sullivan & David J. Wolfson, *What's Good for the Goose . . . The Israeli Supreme Court, Foie Gras, and the Future of Farmed Animals in the United States*, 70 L. & CONTEM. PROBS. 139, 169 (2007).

[87] *Id.* at 140.

[88] *Id.* at 141.

[89] *Id.* at 154.

this, the Israeli approach differs from that advocated by the US Animal Welfare Act, which in § 2132 states, "[t]he term 'animal' . . . excludes . . . farm animals . . . used or intended for use as food or fiber."[90] Nevertheless, the existing protection is inadequate, to say the least, because of its inconsistency, if not arbitrariness. Is this severe inconsistency, however, in a world that is still a "tyranny of human over nonhuman,"[91] a price worth paying to reduce, if only slightly, the suffering of animals, as long as the realistic consistent alternative is to increase the suffering and not to relieve it? To what degree is the extent of current inconsistency essential and cannot be further reduced by further reducing the suffering? We discuss this in the following sections.

III. THE CONSTITUTIONAL OXYMORON

Different approaches have been proposed in the literature regarding the proper attitude toward animals.[92] These approaches have replaced the Cartesian one,[93] which even conservative scholars do not uphold today,[94] according to whom animals are objects that simply do

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[90] Animal Welfare Act of 1966, 7 U.S.C. § 2132(g) (2008).

[91] PETER SINGER, ANIMAL LIBERATION ix (1975).

[92] *See* Darian M. Ibrahim, *Reduce, Refine, Replace: The Failure of the Three R's and the Future of Animal Experimentation*, 2006 U. CHI. LEGAL F. 195, 195–96 (2006) (describing the debate in animal ethics between the animal welfare and the animal rights approaches); Dorothy Sluszka, *Animal Farm: The E.U.'s Move towards Progress and the U.S.'s Slide towards Dystopia in Farm Animal Welfare*, 24 CARDOZO J. INT'L & COMP. L. 423, 426–29 (2016) (giving a brief history of animal law and its reasoning). *See generally* BRUCE A. WAGMAN & MATTHEW LIEBMAN, A WORLDVIEW OF ANIMAL LAW (2011) (identifying the conflicting perspectives of Animal Law internationally and the potential for unifying philosophical undertones between the opposing groups).

[93] According to this approach, which is attributed to the philosopher Rene Descartes, animals are automata that might act as if they are conscious, but really are not so. *See* John Cottingham, *A Brute to the Brutes? Descartes' Treatment of Animals*, 53 PHILOSOPHY 551, 551 (1978) ("[Descartes] held . . . the 'monstrous' thesis that 'animals are without feeling or awareness of any kind.'"); René Descartes, *Animals Are Machines*, *in* ANIMAL RIGHTS AND HUMAN OBLIGATIONS 60, 60–68 (Tom Regan & Peter Singer eds., 1976) (stating relevant selections of Descartes' writings); Peter Harrison, *Descartes on Animals*, 42 PHILOSOPHICAL QUARTERLY 219, 219–20 (1992) (discussing other interpretations of Descartes's position in regard to animals).

[94] *See Animal Rights: debate between Peter Singer & Richard Posner,* SLATE (June 2001), https://www.utilitarian.net/singer/interviews-debates/200106—.htm [https://perma.cc/UH3B-YGSY] (accessed Jan. 19, 2018) ("[Posner agrees] that gratuitous cruelty to and neglect of animals is wrong and that some costs should be incurred to reduce the suffering of animals raised for food or other human purposes or subjected to medical or other testing and experimentation."). However, Posner is strongly averse to, from both the philosophical and legal points of view, the animal rights movement. *See also* GARY L. FRANCIONE, *Introduction*, *in* ANIMALS AS PERSONS: ESSAYS ON THE ABOLITION OF ANIMAL EXPLOITATION 1, 2–5 (2008) (discussing the "animals as things" approach). *See generally* Richard A. Posner, *Animal Rights: Legal, Philosophical, and Pragmatic Perspectives*, *in* ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 51, 51 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004) (arguing for a "humancentric" approach to animal rights). *But see* David R. Schmahmann & Lori J. Polacheck, *The Case Against Animal Rights*, 22 B.C. ENVTL. AFF. L. REV. 747, 781 (1995) ("No society . . . has ever

not matter, and nothing we might do to them raises a moral question or should become a legal issue. Indeed, as Richard Epstein puts it, "it would be simply insane to insist that animals should be treated like inanimate objects. The level of human concern for animals, in the abstract, makes this position morally abhorrent to most people, even those who have no truck whatsoever with the animal rights movement."[95] This is true although we can only imagine, using our imperfect human experience, the lives of animals and their suffering.[96]

The traditional approach to animal welfare assumes that animals are at least partial members of the moral community, and humans are allowed to use them in serving the needs of humanity.[97] According to this approach, it is morally wrong to inflict unnecessary harm on animals.[98] This approach is reflected, for example, in legislation against animal cruelty and in regulations that impose a legal obligation to treat animals in a manner that is perceived as "humane."[99]

Criticisms of the traditional animal welfare view gave rise to the protectionist approach,[100] which critics have termed the "new welfarism."[101] This approach seeks to reformulate the traditional approach and make it more effective at the practical level.[102] According to the protectionist approach, the moral value of animal life is lower than that of human life.[103] Certain animal usage may be justified.[104] However, humans should regulate their treatment of animals in a manner

politically empowered living animals, with the possible exception of Caligula's Rome. Nor should ours do so now. . . . Instead, our laws properly seek to ensure that people treat animals in a way that is consistent with human interests—including interests in the preservation of our environment—and esthetic sensibilities.").

95 Richard A. Epstein, *Animals as Objects, or Subjects, of Rights*, *in* ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 143, 156 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004).

96 *See* MARTHA A. NUSSBAUM, FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP 354 (2006) ("All human descriptions of animal behavior are in human language, mediated by human experience. . . . Only in our own imagination can we experience the inner life of anyone else.").

97 There are different versions of the traditional welfarist approach, but proponents generally believe that using animals for human needs can be justified because the moral value of human life is higher than that of animals. *See* GARY L. FRANCIONE & ROBERT GARNER, THE ANIMAL RIGHTS DEBATE: ABOLITION OR REGULATION? 6–14 (2010) ("Although the welfarists . . . maintain that what is right or wrong is dependent on consequences and that in assessing consequences we should equally favor the equivalent interests of nonhuman animals, they believe it is permissible to use animals as resources for humans either because animals do not have an interest in their lives or because their interests generally are of lesser weight relative to those of cognitively superior humans.").

98 *See* FRANCIONE, *supra* note 94, at 5–9 (describing the animal welfare approach).

99 FRANCIONE & GARNER, *supra* note 97, at 5–6.

100 *See* FRANCIONE & GARNER, *supra* note 97, at 103–74 (discussing the protectionist approach).

101 *See* FRANCIONE, *supra* note 94, at 14–23 (describing the new welfarism approach).

102 FRANCIONE & GARNER, *supra* note 97, at 121.

103 *Id.* at xi.

104 *Id.*

consistent with the recognition that, although animals do not necessarily have a right not to be used by humans, humans have a substantial moral interest to avoid causing suffering associated with using animal.[105] The conception that animals may be the property of humans does not raise obstacles in the way of adopting more appropriate and better patterns of treatment of animals.[106] This approach is inconsistent with the objective to advance an abolitionist ideology, which rejects all use of animals by humans, by adopting reforms that ensure, in the meantime, more humane treatment of animals.[107] Advancing welfare regulation is a means to achieve the desired long-term goal.

Another, more radical, normative theory is the animal rights approach. According to this view, humans have no moral justification for using animals in general, irrespective of purpose or end, and regardless of how the use is made; in other words, even when it is considered to be "humane."[108] According to this approach, "the ancient Great Wall that has for so long divided humans from every other animal is biased, irrational, unfair, and unjust,"[109] and "any living thing with interests is an end in itself."[110]

Since animals are economic commodities and considered human property, laws that create obligations to treat animals humanely fail to provide any meaningful level of protection of the animals' interests. Regulation may help increase the efficiency of production resulting from the exploitation of animals, but it does not advance the recognition of their inherent value, which transcends their economic value as commodities. This approach criticizes the welfare view and holds that anti-cruelty legislation makes people think that the exploitation of animals is more humane as a result, increasing people's level of comfort with the phenomenon, which can further exacerbate such exploita-

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105 As a utilitarian, Singer does not reject out of hand all animal use, except when the suffering caused to the animals by such use exceeds the benefit it brings to humans. In practice, however, his position rejects most forms of animal use, and therefore Singer advocates stopping animal experimentation and abolishing the industry that uses animal products for food and clothing. *See* SINGER, *supra* note 91, at xiii (arguing that one cannot justify harming others in order to promote human interest, when the harm is more severe than the interest that humans seek to promote.).

106 *See, e.g.*, Robert Garner, *Political Ideology and the Legal Status of Animals*, 8 ANIMAL L. 77, 81–86 (2002) (arguing that whilst the abolition of animals' property status is a necessary step towards the fulfilment of an animal rights agenda, it is incorrect to suggest that significant improvements to their well-being cannot be achieved from within the existing property paradigm).

107 Gary Francione & Anna Charlton, *The Six Principles of the Abolitionist Approach to Animal Rights*, ANIMAL RTS.: ABOLITIONIST APPROACH, http://www.abolitionistapproach.com/about/the-six-principles-of-the-abolitionist-approach-to-animal-rights/ [https://perma.cc/8VS8-5BPY] (accessed Jan. 19, 2018).

108 *See generally* FRANCIONE & GARNER, *supra* note 97, at 1–102 (discussing the competing and congruent interests between abolitionist and protectionist ideologies).

109 STEVEN M. WISE, RATTLING THE CAGE: TOWARD LEGAL RIGHTS FOR ANIMALS 270 (2000).

110 BERNARD E. ROLLIN, ANIMAL RIGHTS & HUMAN MORALITY 116 (3d ed. 2006).

tion.[111] The solution advocated by this approach focuses on strict veganism as part of strengthening the political movement that supports the adoption of measures that would lead to the abolition of animal exploitation.

As described in the second part of this Article, Israeli case law that addressed animal protection drew inferences from the discourse on constitutional human rights.[112] But that rhetoric, borrowed from the rights discourse, is most problematic. Applying constitutional principles derived from human rights in such a way that subjects animals to the interests of humans is an oxymoron.[113]

In the preface to Peter Singer's seminal book *Animal Liberation*, Singer compares the tyranny of humans over nonhuman animals to the tyranny, which prevailed for centuries, by white humans over black humans.[114] Truly, although black slaves were not entitled to constitutional protection and slavery supporters argued that "slaves were property, not persons,"[115] slavery laws granted slaves "sub-constitutional" rights.[116] Even a slave had a right to be fed and clothed.[117] It was argued that a master's authority was not so complete that he could take a slave's life at will;[118] however a master's authority to "lawfully punish his slave" was a right that "must, in general, be left to his own judgment and humanity, and cannot be judicially questioned."[119] Ten U.S. Southern codes made it a crime to mistreat a slave.[120] Under the Louisiana Civil Code of 1825, if a master was "convicted of cruel treatment," the judge could order the sale of the mis-

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111 FRANCIONE & GARNER, *supra* note 97.

112 *See supra* text accompanying notes 1–11 (referring to the constitutional discussion in this Article's Introduction).

113 *See* FRANCIONE & GARNER, *supra* note 97 ("[W]e humans suffer from a form of moral schizophrenia; we say one thing, that animals matter and are not just things, and we do another, treating animals as though they were things that did not matter at all.").

114 SINGER, *supra* note 91, at ix; *see* PAOLA CAVALIERI, THE ANIMAL QUESTION: WHY NONHUMAN ANIMALS DESERVE HUMAN RIGHTS 142–43 (Catherine Woollard trans., 2001) (discussing the parallels between the current situation of animals and slavery); *see also* Epstein, *supra* note 95, at 151 ("[W]e should resist any effort to extrapolate legal rights for animals from the change in legal rights of women and slaves . . . [since there] is no next logical step to restore parity between animals on the one hand and women and slaves on the other.").

115 Paul Finkelman, *Slavery in the United States: Persons or Property*, *in* THE LEGAL UNDERSTANDING OF SLAVERY: FROM THE HISTORICAL TO THE CONTEMPORARY 105, 115 (Jean Allain ed., 2012).

116 Sub-constitutional law refers to the principles and rules embedded in statutes, common law, and criminal regulation—all subordinated to the Constitution. *See* AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS 22–24, 42 (Doron Kalir trans., 2012) (distinguishing between constitutional and sub-constitutional rights); Ariel L. Bendor & Hadar Dancig-Rosenberg, *Unconstitutional Criminalization*, 19 NEW CRIM. L. REV. 171, 184 (2016) (distinguishing between constitutional and sub-constitutional rights).

117 Haskins v. Royster, 70 N.C. 601, 618 (1874).

118 State v. Hoover, 20 N.C. 500, 503 (1839).

119 *Id.*

120 LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 163 (3d ed., 2005).

treated slave, presumably to a better master.[121] Still, an argument that slaves—property of their owners—enjoyed constitutional human rights, even limited constitutional rights, would be absurd. The issuance of some legal protection is not the same as recognition that a person enjoys constitutional human rights.[122]

This view is reflected in the philosophy of Immanuel Kant, which advocates that only rational beings, i.e. humans, are ends in themselves,[123] and "animals are . . . merely . . . means to an end. That end is man."[124]

However, the common approach, which reflects the existing law in almost all of the world, limits constitutional protections to humans.[125] "If humans and animals meet in the modern agora it is neither because animals are now perceived as more human-like . . . nor because humans are perceived as more animal-like."[126] Although some human beings lack specifically human capacities such as rationality, self-consciousness and free will, the law regards these capacities as traits of a species rather than of individuals. Members of the human species are entitled to constitutional rights even if, due to a defect, they lack species-specific capacities in a developed form. According to this argument, what distinguishes such human beings from all other animals is that the disposition is there, but not developed in an appropriate way.[127] This argument is merely an assertion that belonging to a

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121 LA. CIV. CODE, art. 192 (1825).

122 *See* Catharine A. MacKinnon, *Of Mice and Men: A Feminist Fragment on Animal Rights*, *in* ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 263, 263 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004) (examining parallels between the legal protection on women and nonhuman animals); *see also Preface*, *in* BEYOND ANIMAL RIGHTS: A FEMINIST CARING ETHIC FOR THE TREATMENT OF ANIMALS 10, 11 (Josephine Donovan & Carol J. Adams eds., 1996) (discussing how the "rights-care debate" in feminist philosophy can be extended to the animal rights movement); *Introduction*, *in* ANIMALS AND WOMEN: FEMINIST THEORETICAL EXPLORATIONS 1, 1 (Carol J. Adams & Josephine Donovan eds., 1995) (discussing the historical parallels drawn between women and animals, and the intersection of feminism and animal rights).

123 Immanuel Kant, *Conjectures on the Beginning of Human History*, *in* KANT: POLITICAL WRITINGS 221, 225 (Hans Reiss ed., H.B. Nisbet trans., 2d ed. 1991). *But see* ROLLIN, *supra* note 110, at 57-117 (describing and criticizing Kant's approach).

124 IMMANUEL KANT, LECTURES ON ETHICS 239 (Louis Infield trans., 1963); *see* PAUL F. SNOWDON, PERSONS, ANIMALS, OURSELVES 1–2 (2014) (discussing "animalism," a philosophical approach arguing that humans are animals).

125 If the legislation does not sufficiently protect animals, this should not be regarded as violating human dignity of animals. *See* AHARON BARAK, HUMAN DIGNITY: THE CONSTITUTIONAL VALUE AND THE CONSTITUTIONAL RIGHT 302-03 (Daniel Kayros trans., 2015) (asserting that human dignity is a human right, not an animal right).

126 Shai Lavi, *Animal Laws and the Politics of Life: Slaughterhouse Regulation in Germany, 1870-1917*, 8 THEORETICAL INQ. L. 221, 224 (2007).

127 GÖRAN COLLSTE, IS HUMAN LIFE SPECIAL? RELIGIOUS AND PHILOSOPHICAL PERSPECTIVES ON THE PRINCIPLE OF HUMAN DIGNITY 169 (2002). *But see* Vasil Gluchman, *Book Review: Is Human Life Special? Religious and Philosophical Perspectives on the Principle of Human Dignity by Göran Collste,* 7 ETHICAL THEORY & MORAL PRAC. 555, 557 (2005) (criticizing Collste's argument regarding human and animal dignity). A key problem that is addressed is whether South African society is ready to embrace the full implications of this recognition. The legal concept of 'progressive realization' of animal

group, where the vast majority of its members have some capacity that is itself relevant for rights, makes one entitled to rights even if the particular member of the group lacks—and will never develop—the relevant capacity. That is not an appeal to reason, but simply an appeal to species, which is the position that is supposedly being justified, rather than assumed.

In other contexts, however, domesticated animals are treated similarly to human beings that lack specifically human capacities.[128] As Sue Donaldson and Will Kymlicka point out, "theorists of citizenship exclude animals, often in the very same sentence that excludes children and people with cognitive disabilities."[129] Such an approach creates a distinction between these categories and other human beings perceived as members of society.[130]

The Federal Constitution of the Swiss Confederation grants, according to its common interpretation, a right to dignity to animals.[131] Although animal dignity is perceived as "an acknowledgement of [an animal's] intrinsic value and a respect of animals in their being and otherness, . . . an existence that is not linked to being a means to an end,"[132] "[t]here is not much to see of this fundamental commitment in

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rights is proposed as offering the possibility of ensuring greater protections for animals through recognizing their dignity and personhood whilst embracing a gradualist approach towards the full realization of their rights, thus preventing a wholesale disjunction between the law and the attitudes of wider South African society. *See generally* David Bilchitz, *Moving Beyond Arbitrariness: The Legal Personhood and Dignity of Non-Human Animals*, 25 S. AFR. J. HUM. RTS. 38, 62-72 (2009) (considering the possibilities for interpreting both the common law and constitutional provisions so as to recognize the dignity and personhood of animals).

128 Sue Donaldson & Will Kymlicka, *Inclusive Citizenship Beyond the Capacity Contract*, *in* OXFORD HANDBOOK OF CITIZENSHIP 838, 839 (Ayelet Shachar et al. eds., 2017).

129 *Id*. at 840.

130 *See generally* SUE DONALDSON & WILL KYMLICKA, ZOOPOLIS: A POLITICAL THEORY OF ANIMAL RIGHTS (2011) (arguing that domesticated animals should qualify for citizenship under a membership model that ties citizenship to being a member of society, a stakeholder, or a subject of the law).

131 BUNDESVERFASSUNG [BV] [CONSTITUTION] Apr. 18, 1999, Section 8, art. 120 (Switz.), https://www.constituteproject.org/constitution/Switzerland_2002.pdf [https://perma.cc/Y3ZU-FKSS] (accessed Dec. 22, 2017); *see* Gieri Bolliger, *Legal Protection of Animal Dignity in Switzerland: Status Quo and Future Perspectives*, 22 ANIMAL L. 311 (2016) (equating animal rights to human rights); Michel & Kayasseh, *supra* note 21, at 3-4 (discussing dignity as a constitutional principle); Vanessa Gerritsen, *Animal Welfare in Switzerland – Constitutional Aim, Social Commitment, and a Major Challenge*, 1 GLOBAL J. ANIMAL L. 1, 2 n.5 (2013), http://www.gjal.abo.fi/gjal-content/2013-01/article3/Gerritsen%20FINAL.pdf. [https://perma.cc/T3JY-V8LB] (accessed Jan. 19, 2018) ("Although art. 120 Const. refers to reproductivity and gene technology, the fundamental denotation of the . . . dignity of creatures is generally acknowledged and accepted as a constitutional principle.").

132 Gerritsen, *supra* note 131, at 6. A hint to an animal dignity approach, in the sense of addressing the individual needs of every single animal, can be found also in the remark of Justice Hendel of the Israeli Supreme court, that pointed out that when the Court is dealing with a living creature's best interest, it is not possible to predetermine an absolute and unequivocal answer, even if in the first place, it can be said that the best interest of the animal is to be in its natural environment and with his own kind.

view of ownership, experimentation, and other forms of animal utilization in which animals are treated as mere marketable goods."[133] Indeed, even if "the animal dignity concept unquestionably represents a milestone for animal welfare law,"[134] it seems extremely difficult to reconcile a constitutional recognition of the dignity of animals and practices which are common in Switzerland, such as "the mass elimination of male day-old chicks, or the downright exploit of animals bred and kept for experimental or nutritional purposes,"[135] which are integral parts of the animal products industry.[136] It is also difficult to reconcile with animal dignity the fact that "in the Swiss Animal Protection Act there is . . . no protection for the life of the animal . . . [and the] killing of an animal is still fundamentally allowed so long as it remains within the parameters of the Animal Protection Act, and it requires no further justification."[137]

In Germany as well, animals have constitutional protection due to Section 20a of the German Basic Law. This section, entitled "Protection of the natural foundations of life and animals," provides that "Mindful also of its responsibility toward future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order."[138]

Animal protection is also enshrined in the Federal Constitutional Law of Austria, as amended in 2013. Article 11.8 of the amended Austrian Constitution states that "[i]n the following matters legislation is the business of the Federation, execution that of provinces: . . . Animal protection, to the extent not being in the competence of federal legislation according to other regulations, with the exception of the exercise of hunting or fishing."[139] Israeli law generally recognizes the horrible pain and suffering inflicted on animals by industry as not amounting to "abuse, cruelty or torture" only because the production of "basic food" from animals is perceived as an end that justifies the action.[140] The industry that produces animal meat and other animal products,

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Justice Hendel asserted that when it comes to deciding *ex post* when the animal has grown around people, and surely for many years, the Court has to decide on a case-by-case basis, depending on the circumstances and the opinion of experts. Feigin, CAL 5128/16, para. 4.

133 Gerritsen, *supra* note 131, at 6.

134 Bolliger, *supra* note 131.

135 Gerritsen, *supra* note 131, at 7.

136 Bolliger, *supra* note 131.

137 Michel & Kayasseh, *supra* note 21, at 15.

138 GRUNDGESETZ [GG] [BASIC LAW], Art. 20a, *translation at* http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0123 [https://perma.cc/NM49-UDTB] (accessed Jan. 19, 2018) (Ger.).

139 BUNDES-VERFASSUNGSGESETZ [B-VG] [CONSTITUTION] BGBL No. 1/1930, as last amended by Bundesverfassungsgesetz [BVG] BGBL I No. 51/2012, art. 11, ¶ 8, http://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10000138 [https://perma.cc/R5ZX-DHTF] (accessed Jan. 19, 2018) (Austria).

140 *Compare Hamat Gader*, LCA 1684/96, at 20–21, 24–26, 30–33 *with Noah*, HCJ 9232/01, para. 18 (providing that Israeli law recognizes the killing of animals for food,

operating production lines that enable the transformation of meat and other animal products into popular, easily affordable commodities, cannot exist without the cruel torture and abuse of animals. It is difficult to reconcile the contradiction between purporting to grant protection of a constitutional nature to everything that was created on Earth with a breath in its nose[141] and the breeding and killing of animals, to be eaten and used in other ways. This constitutes an oxymoron. Indeed, constitutional rights and constitutional protections may be relative and not absolute.[142] However, the absolute subordination of animals and humans, and the industrial production of animal meat and other products for human consumption, does not allow considering animals as subjects with any constitutional protections. Even in Switzerland, where "from an international perspective, the revised Animal Protection Act is still relatively progressive,"[143] it has been argued that the "range of protections afforded animals remains very unambitious[–]thus, the provision against the infliction of suffering is restricted owing to its subordination to human interests."[144]

Recognition of the fundamental legality of the animal products industry is, therefore, inconsistent even with the welfare view.[145] Although the welfare view recognizes that certain uses of animals may be justified, it also recognizes the moral interest not to cause suffering to animals as a result of these uses.[146] Practically, the way in which suffering is legally justified in Israel is even farther removed from the rights approach, which does not recognize the moral justification of using animals at all.

Israeli law rests on the implicit assumption that recognizes not only the inferiority of the moral value of animal life compared to that

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but that it should be in the easiest manner (Hamat 31) and excessive practices that are known to cause suffering will not be tolerated for foods considered a luxury).

141 *Cat Welfare Society*, HCJ 6446/96, para. 5.

142 For example, while *Roe v. Wade* took into account the mother's right to privacy, which is part of the Due Process Clause of the Fourteenth Amendment and includes a woman's qualified right to terminate her pregnancy, the decision permitted regulating abortions during the second trimester of pregnancy because of the State's interest to preserve the woman's health. The decision also permitted prohibiting abortions during the third trimester because of the State's interest to preserve the fetus' life. Roe v. Wade, 410 U.S. 113, 151–65 (1973). *See also, e.g.*, David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 956 (2002) ("[W]ith few exceptions, constitutional rights are not absolute; a balance must be struck."); Carissa Byrne Hessick & F. Andrew Hessick, *Recognizing Constitutional Rights at Sentencing*, 99 CALIF. L. REV. 47, 92 (2011) (discussing the conflict between constitutional rights and government interest); Daniel J. Solove, *Data Mining and the Security-Liberty Debate*, 75 U. CHI. L. REV. 343, 345 (2008) ("We live in an 'age of balancing,' and the prevailing view is that most rights and civil liberties are not absolute."). *See generally* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987) (discussing the development of balancing approaches in the American constitutional law).

143 Michel & Kayasseh, *supra* note 21, at 17.

144 *Id.*

145 For the welfare view *see supra* text accompanying notes 97–102.

146 *Cat Welfare Society*, HCJ 6446/96, para. 5.

of human life, but also the inferiority of the moral value of their suffering compared to human suffering.[147] Truly, "[t]he human-animal distinction that drives the factory-farm apparatus requires that humans define themselves through contrast, thereby establishing humanity as a species apart from all others."[148] Such an assumption is irreconcilable with constitutional protection of rights in general and with the proportionality doctrine in particular.

Constitutional protections of human rights, which are based on the premise that humans are always objectives and are never only means, cannot therefore serve as a proper legal framework for animal protection, which are manufactured in order to be eaten or to be used in other ways for human benefits.[149] Just as slavery cannot be considered as a limitation of constitutional rights, but its inherent meaning is that the Constitution does not apply to slaves, the pretense to apply constitutional protections to animals, as long as animals are subjected to human needs, is an oxymoron. As demonstrated in the following parts of this Article, the problems arising from this oxymoron are not limited to the philosophical and theoretical levels, but they have also some significant positive legal implications.

IV. THE METHODOLOGY OF ANIMAL PROTECTION

In protecting animals, Israeli case law applies a methodology derived from the constitutional protection of human rights.[150] As discussed in Part II above, Israeli courts examine whether the purpose of regulations enacted under the PCA Act or of an action harmful to animals has a proper purpose, and whether the harm is proportional to the degree of importance of that purpose.[151]

The differences between the protection of animals and the constitutional protection of human rights appear to be merely technical. One difference is that case law does not clearly distinguish between the scope of the protected interest and the balance between it and conflicting interests.[152] Both the definition of the protected interests (e.g., the life of the animals, their physical integrity, and their non-subjection to suffering) and the balance between them and human interests are carried out as part of the interpretation of "torture, cruelty or abuse" of animals. This differs from the conventional distinction which is com-

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147 *See* SINGER, *supra* note 91, at 1–26 (discussing the arguments that justify the use of animals based on speciesism and its critique).

148 David N. Cassuto, *Bred Meat: The Cultural Foundation of the Factory Farm*, 70 L. & CONTEMP. PROBS. 59, 71 (2007).

149 *Id.* at 67 (describing how animals are commodities and have an assigned value opposed to an inherent one).

150 *See Hamat Gader*, LCA 1684/96, para. 25 (discussing the similarity to human rights law).

151 *Supra* Part II.

152 *Noah*, HCJ 9232/01, at 16.

mon in Israel and other countries[153]—but not unequivocally accepted in the U.S.[154]—between the scope of the right and the policy that harms it. A second difference is that many procedures having to do with the handling of animals, which permit causing harm to them, are based on regulations and administrative directives and are not set forth parliamentary laws.[155] At first glance, these differences appear purely semantic. As long as the harm to animals is proportional and for a proper purpose, the methodological difference between the protection of people and that of animals has no substantive meaning. But the assumption that these are merely technical-methodological differences, irrelevant to principle or practice, is incorrect.

The need for a clear distinction between the scope of the protected right or interest, and the justification for harming it, is largely due to the recognition of the importance of protected rights,[156] as well as to the understanding that while "the extent of the right's protection only reflects the views of a given legal community at a given point in time . . . [t]he scope of the right itself . . . reflects the fundamental principles upon which the community is built."[157] In our case, the issue is not human rights embedded in a supra-legal constitution, but the importance of protecting animals, recognized both by the Knesset (the Israeli parliament) and by the courts.[158] This importance of animal protection justifies a clear definition of the protected interests, as separate from the permitted harm to them. Such a definition is of particular importance for our suggestion, described below, that procedures relating to the handling of animals that could harm them, be embedded in parliamentary legislation.

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153 *See* ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 193 (Julian Rivers trans., 2002) (showing the distinction being made by the Federal Constitutional Court); BARAK, *supra* note 116, at 24 (noting the distinction between the scope of the protected interest and the balance between it is "central to the understanding of all modern constitutional rights law"); Stuart Woolman & Henk Botha, *Limitations*, *in* CONSTITUTIONAL LAW OF SOUTH AFRICA 36-2, 36-3 (Stuart Woolman et al. eds., 2d ed. 2005) (presenting the distinction as a common part of constitutional analysis in South Africa).

154 BARAK, *supra* note 116, at 509–13; ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 539 (3d ed. 2006); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 769 (2d ed. 1988).

155 *See, e.g.*, *The Animal Welfare (Protection of Animals) Regulations (Breeding and Holding of Pigs for Agricultural Purposes), 5701-2015*, Ministry of Agric. and Rural Dev. (2015), https://www.nevo.co.il/law_word/law01/501_191.doc (Isr.) [https://perma.cc/K5C7-RQ34] (accessed Jan. 19, 2018) (regulating pig farms); *General Rules for Cruelty to Animals (Experiments on Animals), 2001*, MINISTRY OF AGRIC. & RURAL DEV. (2001), https://www.nevo.co.il/law_word/law01/p200m2_006.doc (Isr.) [https://perma.cc/A3RK-99LW] (accessed Jan. 19, 2018) (regulating experimentation on animals); *Regulations for Cruelty to Animals (Protection of Animals) (Possession not for Agricultural Purposes), 5769-2009*, MINISTRY OF AGRIC. AND RURAL DEV. (2009), https://www.nevo.co.il/law_word/law01/500_202.doc (Isr.) [https://perma.cc/N8ZJ-87YC] (accessed Jan. 19, 2018) (regulating how animals are kept and cared for in commercial settings).

156 BARAK, *supra* note 116, at 22.

157 *Id.* at 23.

158 PCA Act § 2; *Noah*, HCJ 9232/01, at 22.

The approach whereby legal directives that establish primary rules in general, and rules that restrict rights in particular, should be determined by parliamentary legislation, is based on the principles ??of the separation of powers and the rule of law.[159] This is also the positive law that generally applies to Germany[160] and Israel.[161] The rules limiting human rights are currently enshrined in the Basic Laws of human rights.[162] According to Israeli constitutional law, all legal norms that establish rules of primary importance should be determined by parliamentary legislation, even in contexts other than human rights.[163] Practical explanations provided by the Supreme Court in this regard concern the profound character of the parliamentary legislative process, which includes many complex steps, and the fact that only a small portion of the bills are made into law; this ensures that only laws that appear to be essential to the legislature are enacted.[164]

Recognizing the fundamental interests of animal life, bodily integrity and non-subjection to suffering as important values ??should be reflected, above all, in the demand from the legislature to establish through a profound procedure the rules that allow harm to animals, especially in the food industry. It is Parliament, not the Court alone, that should provide legal sanction to the rules that allow causing suffering to animals.[165] Approval by a parliamentary committee, a pro-

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159 *See* Rapp v. Carey, 44 N.Y.2d 157, 169 (1978) (finding that the Governor may only regulate "employees wholly within the executive department"); HCJ 3267/97 Rubinstein v. Minister of Defense, para. 21 (1998) (Isr.), http://elyon1.court.gov.il/files/97/670/032/A11/97032670.a11.pdf [https://perma.cc/E6PT-U242] (accessed Jan. 19, 2018) ("Legislation must establish primary arrangements . . . .").

160 *See* DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 125-34 (1994) (discussing how the enactment of laws is to be entrusted to congress only); Uwe Kischel, *Delegation of Legislative Power to Agencies: A Comparative Analysis of United States and German Law*, 46 ADMIN. L. REV. 213, 231 (1994) ("Parliament is obliged to make all *essential* decisions itself.").

161 *See* BARAK, *supra* note 116, at 118–21 (showing the common law "cannot limit an individual's constitutional right"); Baruch Bracha, *Constitutional Upgrading of Human Rights in Israel: The Impact on Administrative Law*, 3 U. PA. J. CONST. L. 581, 613-23 (2001) ("[P]rimary arrangements are determined by the primary legislator . . . .").

162 Basic Law: Freedom of Occupation, 1994, § 4 (Isr.) http://knesset.gov.il/laws/special/eng/BasicLawOccupation.pdf [https://perma.cc/33HP-M3WE] (accessed Jan. 19, 2018); Basic Law: Human Dignity and Liberty, 1992, § 8 (Isr.).

163 HCJ 5936/97 Lam v. Director of Ministry of Education, Culture and Sport, para. 9 (1999) (Isr.), http://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Lam%20v.%20Dal.pdf [https://perma.cc/S592-N2L7] (accessed Jan. 19, 2018).

164 *Id.*

165 *See* JESSICA VAPNEK & MEGAN CHAPMAN, LEGISLATIVE AND REGULATORY OPTIONS FOR ANIMAL WELFARE 37 (2010), http://www.fao.org/docrep/013/i1907e/i1907e00.pdf [https://perma.cc/9G6G-TSZB] (accessed Jan. 19, 2018) ("Despite national variations, there are certain essential elements that are best included in primary legislation. These include the framing of general animal welfare principles and fundamental legislative goals; the delegation of authority and establishment of enforcement mechanisms; a bare bones framework for the substantive areas of animal welfare (slaughter, transport, housing and management) to be regulated by subsidiary legislation; and guidelines for how such subsidiary legislation will be developed. The more detailed substantive regu-

cess that is substantially different from the primary legislation process, is not enough.[166]

The determination in the PCA Act that the regulations thereunder shall be enacted taking into account "the needs of agriculture"[167] cannot provide a sufficient statutory basis for issuing regulations—even if in the opinion of the Court their content is proportional—if these regulations allow the causing of substantial suffering, as is routinely the case in the food industry.[168] All the more so, administrative guidelines that are not approved by any parliamentary entity are insufficient for imposing the arbitrary will of farmers and meat factories. The lack of parliamentary legislation is particularly evident in light of the discrepancy between the PCA Act provisions, a literal reading of which (except for the exclusion from the law of "slaughter of animals for food") might lead to the conclusion that Israel is a paradise for animals, and the regulatory reality.[169]

But would the mere requirement of enshrining in parliamentary legislation the practices that cause animal suffering, if adopted, help reduce this suffering? Would it not cause further harm to the animals by eliminating the possibility of judicial review of regulations permitting serious harm to animals? These questions have no definitive answer. However, based on consistent trends of increasing support for animal protection in the Israeli society[170] and the large animal lobby in the Knesset,[171] it is reasonable to estimate that charging the Knes-

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lations, including species-specific provisions, may be better left to subsidiary legislation, which can be updated more easily and frequently than primary legislation to reflect improved methods and advances in animal welfare science.").

166 *See* Richard Hall & Frank Wayman, *Buying Time: Moneyed Interests and the Mobilization of Bias in Congressional Committees*, 84 AM. POL. SCI. REV. 797, 801 (1990) (discussing the impact of lobbying efforts aimed at committee members).

167 PCA Act § 19.

168 *See* Bruce Friedrich. *Still in the Jungle: Poultry Slaughter and the USDA*, 23 N.Y.U. ENVTL. L.J. 247, 249–52 (2015) (discussing the exclusion of poultry from the Humane Slaughter Act).

169 PCA Act § 19(3) (translation provided by author).

170 Daniella Cheslow, *As More Israelis Go Vegan, Their Military Adjusts Its Menu,* NPR (Dec. 10, 2015, 12:39 PM), http://www.npr.org/sections/thesalt/2015/12/10/459212839/ why-so-many-israeli-soldiers-are-going-vegan [https://perma.cc/5QKN-9AAD] (accessed Jan. 19, 2018).

171 The Animal Lobby in the Knesset contains dozens of Knesset Members (MKs). Two ministers—the Minister of Agriculture (a function formerly associated with resistance to any relief to farm animals) and the Minister of Environmental Protection—and 17 MKs out of 120 attended the meeting of the Animal Lobby in the 20th Knesset, held on July 27, 2015. *Animal-Rights Lobbying Meeting in Knesset Attended by Large Number of MKs,* ISRAEL CAT LOVERS' SOC'Y *(*July 27, 2015), http://www.isracat.org.il/news [https://perma.cc/M83M-YSN8] (accessed Jan. 19, 2018); Sharon Udasin, *Knesset Approves Strict Amendments to Animal Welfare Law in First Reading,* JERUSALEM POST (July 28, 2015), http://www.jpost.com/Israel-News/Knesset-approves-strict-amendments-to-Animal-Welfare-Law-in-first-reading-410426 [https://perma.cc/K3R9-QZGS] (accessed Jan. 19, 2018); *see Israel's Knesset Joins Meat Free Monday,* MEAT FREE MONDAY (Nov. 18, 2014), http://www.meatfreemondays.com/israels-knesset-joins-meat-free-monday/ [https://perma.cc/HF5G-WAPY] (accessed Jan. 19, 2018) (stating that the

set with determining—in a transparent, public, and in-depth process—the rules that allow causing harm to animals would not increase harm to them.[172] Intense parliamentary oversight can only contribute to the reduction of suffering. As it is, as long as animal protection is not embedded in a constitutional basic law, the Knesset has the authority to enact a "validation law" granting validity to new regulations that permit the causing of suffering to animals, which the Court prohibited.[173] This is true whether Parliament enacts a law that contains provisions identical in substance with the provisions of the regulations that the court annulled, or whether it legislates a law authorizing the enactment of such regulations or the ratification of existing ones.[174]

For reasons of transparency, similar to part of the arguments for prescribing in parliamentary legislation the practices that cause animal suffering, Jeff Leslie and Cass Sunstein suggest establishing a "disclosure regime [that] could improve animal welfare without making it necessary to resolve the most deeply contested questions in this domain."[175] This suggestion is designed "to promote disclosure so as to fortify market processes and to promote democratic discussion regarding the treatment of animals."[176]

Knesset is the world's first parliament to participate in the Meatless Monday event); *Knesset Holds Special Session to Mark Animal Rights Day; Vegan Meal Served in MKs' Cafeteria,* KNESSET (Feb. 8, 2017), http://www.knesset.gov.il/spokesman/eng/PR_eng.asp?PRID=13343 [https://perma.cc/M56D-JWCZ] (accessed Jan. 19, 2018) (announcing that the Knesset held a special session to mark Animal Rights Day). Even Israeli Prime Minister Benjamin Netanyahu has expressed on several occasions his sympathy for protecting animals, including offering his support to dismiss the practice of automatically putting biting dogs into quarantines. His support came on the background of personal experience: his dog, Kia, which was adopted by his family when it was ten years old, was put into quarantine and was about to be euthanized, after biting guests at the Prime Minister's residence. Herb Keinon, *Netanyahu Family Dog Put in Quarantine After Biting Guests at Hanukka Party,* JERUSALEM POST (Dec. 12, 2015, 5:52 PM), http://www.jpost.com/Israel-News/Netanyahu-family-dog-put-in-quarantine-after-biting-guests-at-Hannuka-party-437107 [https://perma.cc/W34F-4MHG] (accessed Jan. 19, 2018).

172 *See* SHERRY F. COLB & MICHAEL C. DORF, BEATING HEARTS: ABORTION AND ANIMAL RIGHTS 120–48 (2016) (casting doubt on the law's ability to do much for animals, except insofar as campaigns for various legal changes raise consciousness).

173 RUTH GAVISON, THE RELATIONSHIP IN CONTEMPORARY LEGAL SYSTEMS BETWEEN WRITTEN AND UNWRITTEN SOURCES OF LAW § 5 (1970), https://ruthgavison.files.wordpress.com/2015/10/the-relationship-in-contemporary-legal-systems-between-written-and-unwritten-sources-of-law.pdf [https://perma.cc/SV75-FKHF] (accessed Jan. 19, 2018).

174 *See* Benjamin Akzin, *Judicial Review of Statute*, 4 ISR. L. REV. 559, 577–78 (1969) (criticizing the practice of enacting a "validation law").

175 Jeff Leslie & Cass R. Sunstein, *Animal Rights without Controversy*, 70 L. & CONTEMP. PROBS. 117, 117 (2007).

176 *Id.* However, it is doubtful whether the suggestion will not arouse any controversy. Hence, several states in the US have adopted ag-gag laws, according to which no person shall, without the effective consent of the owner and with the intent to damage the enterprise conducted at the animal facility, enter an animal facility to take pictures by photograph, video camera, or by any other means. *See* Sluszka, *supra* note 92, at

Another difficulty in the inferences of the Israeli Supreme Court, with regard to the protection of animals from the methodology of the constitutional protection of human rights, concerns the application of the doctrine of proportionality. According to this doctrine, a law—or any other governmental rule or decision—limiting a right is permissible only if it is designed for a proper purpose and is proportional.[177] The proportionality requirement consists of three subtests: (i) the measures undertaken to effectuate the limitation are rationally connected to the fulfillment of the purpose of the law; (ii) the measures undertaken are necessary in that there are no alternative measures that may similarly achieve that same purpose with a lesser degree of limitation; and (iii) there needs to be a proper relation (proportionality *strictu sensu*) between the importance of achieving the proper purpose and the social importance of preventing the limitation on the right.[178]

In other legal systems as well, such as Switzerland[179] and to some extent also Germany,[180] the doctrine of proportionality is applied in respect to animal protection. The proportionality doctrine appears to provide a useful methodology for discussing the typical situations that arise in the context of causing suffering to animals by examining whether the purpose of the harm is appropriate. Sadistic pleasure derived from the sufferings of animals is not recognized as a proper purpose, whereas the provision of food for humans and the advancement of their health (in the case of experiments on animals) are recognized as such goals.[181] Intermediate objectives, such as education or entertainment, are decided on their merits, similarly to questions of properness of purpose, which are also decided based on a critique of actions that violate human rights.[182] In the second stage, the Court determines whether the purpose of the act that inflicts suffering on animals is achieved, or at least advanced.[183] In the third stage, the Court examines whether alternative means are available for promoting that purpose, which are less harmful to animals but the effectiveness of which is not lower and whose costs are not higher than those of the measure whose proportionality is being tested.[184] Finally, propor-

442–53 (proposing and examining a causal explanation for the disparity between the U.S. and EU farm animal welfare regulations).

177 Margit Cohn, *Legal Transplant Chronicles: The Evolution of Unreasonableness and Proportionality Review of the Administration in the United Kingdom*, 58 AM. J. COMP. L. 583, 609 (2010).

178 BARAK, *supra* note 116, at 3; Cohn, *supra* note 177, at 609; Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1295–96 (2007).

179 *See* Bolliger, *supra* note 131, at 344-53 (2016) (discussing how the doctrine of proportionality is applied in Switzerland).

180 *See* Claudia E. Haupt, *The Nature and Effects of Constitutional State Objectives: Assessing the German Basic Law's Animal Protection Clause*, 16 ANIMAL L. 213, 230 (2010) (discussing the use of proportionality application in Germany).

181 Bolliger, *supra* note 131, at 349–50.

182 *Id.* at 352.

183 *Id.* at 346–47.

184 *Id.* at 347.

tionality in its narrow meaning is examined: is the suffering caused to animals by the means chosen greater than the benefits to humans derived from advancing the purpose?[185] The exchange between the human and the animal interests does not necessarily refer to absolute values; but, normally to the comparison between the marginal harm to the animal interests and the marginal benefit to humans.

Indeed, in the Supreme Court's decisions discussed in Part II, the Court based its determination that the practices in question amounted to torture, cruelty or abuse of animals on these tests.[186] In *Hamat Gader*, the Court ruled that entertainment was not a proper purpose for causing suffering to animals, especially given that the fight between man and alligator was anti-educational—it had a negative value for the human public as well.[187] In the Supreme Court decisions rejecting practices for the destruction of stray cats, it did so primarily on the basis of the second subtest of proportionality, which examines whether there are less harmful measures for promoting the goals of preserving public health and preventing nuisances.[188] And in *Noah*, in which the Court banned the force-feeding of geese, the ruling was based on the third subtest of proportionality—proportionality *strictu sensu*—determining that the benefits of luxury food production were not commensurate with the intense suffering caused to the geese.[189]

At first glance, the proportionality doctrine appears to be suitable not only for the protection of human rights but also for animals. However, there is a serious difficulty in the reduction of proportionality to a methodology.[190] Constitutional proportionality is based on the recognition of the high, albeit not absolute, value of human rights.[191] The Israeli Supreme Court has ruled many times that "human rights cost

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[185] *Id.* at 348.

[186] *Noah*, HCJ 9232/01, para. 16–17; *Cat Welfare Society*, HCJ 6446/96, para. 28; *Street Cats*, HCJ 4884/00, para. 8; *Hamat Gader*, LCA 1684/96, para. 22.

[187] *Hamat Gader*, LCA 1684/96, para. 41.

[188] *Cat Welfare Society*, HCJ 6446/96, para. 24; *Street Cats*, HCJ 4884/00, para. 8.

[189] *Noah*, HCJ 9232/01, para. 23 (explaining that basic foods are different than luxuries because the proportionality of "the production of food" has greater weight the more the food item is necessary for human existence).

[190] *See* Ariel L. Bendor & Tal Sela, *How Proportional is Proportionality?*, 13 INT'L J. CONST. L. 530, 534–38 (2015) (discussing the methodology of proportionality).

[191] *Id.* at 530.

money."[192] Cass Sunstein agrees.[193] In many legal systems, including international law, the human right not to be subjected to torture is considered absolute; not subject to the proportionality doctrine.[194] Even if under certain legal systems its violation is not entirely prohibited, it is limited to the most rare circumstances, such as cases of "ticking bombs."[195]

Furthermore, the meat and other animal products industry is inconsistent with the requirement of proper purpose, and certainly not with any of the three subtests of proportionality.

Under the proper purpose requirement, not every purpose is likely to justify the limitation of constitutional rights.[196] Even assuming that the survival of the human race can be a proper purpose for animal abuse, it is difficult to say that the dominant purpose of the current industry, also for the production of basic foods, is survival only.

As to the first requirement of proportionality—the rational connection subtest—it can, indeed, be assumed that the animal products industry efficiently fulfills the purpose of supply at the cheapest price of meat and other animal products to humans. However, a different definition of a goal, in a higher level of abstraction, could lead to serious doubts on the industry's compliance with the subtest.[197] There is evidence that not only does the animal industry not promote human well-being, it causes hunger and worldwide environmental damage.[198]

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[192] *Id.; see, e.g.*, HCJ 4541/94 Alice Miller v. Minister of Defense, IsrLR 1, para. 19 (1995) (Isr.), http://elyon1.court.gov.il/files_eng/94/410/045/Z01/94045410.z01.pdf [https://perma.cc/W8KG-TBTN] (accessed Jan. 19, 2018) ("The protection of human rights costs money, and a society that respects human rights must be prepared to bear the financial burden"); *see also* Moshe Cohen-Eliya, *Discrimination against Arabs in Israel in Public Accommodations*, 36 N.Y.U. J. INT'L L. & POL. 717, 744 (2004) ("Human rights cost money. The guarantee of equality costs money. Usually, the requirement to pay the 'price' is directed at the government. But when human rights, and equality among them, apply in the relationship between individuals, these individuals should pay this price. This is a price that is worth paying in order to guarantee a society that protects human rights and respects equality.").

[193] CASS R. SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO 348 (2001) ("[A]ll rights, even the most conventional, have costs."); Cass R. Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees?*, *in* AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 90, 95 (Michael Ignatieff ed., 2005).

[194] *See* Steven Greer, *Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really 'Absolute' in International Human Rights Law?*, 15 HUM. RTS. L. REV. 101, 102 (2015) (discussing judge rulings that the right to be treated humanely is an absolute right).

[195] *See* HCJ 5100/94 The Public Committee against Torture in Israel v. State of Israel, para. 34 (1999) (Isr.), http://www.hamoked.org/files/2012/260_eng.pdf [https://perma.cc/BS28-7P7V] (accessed Jan. 19, 2018) (discussing when the use of physical force—otherwise prohibited during an interrogation—is acceptable as a necessity defense in instances of "ticking bombs").

[196] BARAK, *supra* note 116, at 251.

[197] *See, e.g.*, Grant Huscroft, *Book Review: Proportionality and Pretense*, 29 CONST. COMMENT. 229, 241 (2014) (discussing the significance of the level of abstraction in the determination of a law that infringes upon a constitutional right).

[198] *See, e.g.*, Bruce Friedrich & Stefanie Wilson, *Coming Home to Roost: How the Chicken Industry Hurts Chickens, Humans, and the Environment*, 22 ANIMAL L. 103

The meat and other animal products industries do not meet the second proportionality requirement—the necessary (or least harmful measure). Animal foods, whether foie gras or yogurt, are unnecessary in the sense that there are plentiful, and generally healthier and cheaper, plant-based alternatives for everyone living in a developed country and nearly everyone in the developing world.[199] One can certainly argue that meat and other food produced from animals are tastier than vegan food. Tastes differ, and to each her or his own. However, eating meat and dairy products is not a necessity in the constitutional sense.[200]

Finally, the animal products industry certainly does not meet the proportionality *strictu sensu* subtest. This is not only because the proportionality subtests are structured like a legal version of the Russian *matryoshka* doll, with each stage of the analysis containing all the preceding ones.[201] An argument that the benefit to the enjoyment of humans from the animal products outweighs the harm caused to the animals produced for that purpose cannot be consistent with any meaningful constitutional protection of rights.

Against this background, legitimizing the grisly animal products industry under the doctrine of proportionality empties this key constitutional doctrine from all significant moral content, rendering it grotesque. The use of the term "proportionality" with respect to the treatment of animals is Orwellian "Newspeak."

Nevertheless, the proportionality doctrine can contribute an important element to making significant, although far from satisfactory, progress in animal protection: a rational comparison between various alternatives. With regard to industrial agriculture, the significance of such a rational comparison of alternatives consists, first and foremost, of examining the implications of changes that would improve the holding and handling conditions of animals for the price of meat and other foods derived from them. It is not difficult to reach the legal conclusion that sadistic behavior toward animals, which has no real economic benefit, is prohibited. By contrast, examination based on the effect of "humane" alternatives on the prices of meat, milk, and eggs is more complex. It also requires a decision regarding the readiness, financially speaking, to cause an increase in the price of animal products proportional to the degree of relief of animal suffering. Truly, "[t]aking

(2015) (discussing how chicken farming perpetuates human rights and hunger issues); Cheryl L. Leahi, *Large-Scale Farmed Animal Abuse and Neglect: Law and Its Enforcement*, 4 J. ANIMAL L. & ETHICS 63, 71–74 (2011) (describing the negative effects of factory farming on the environment and human health).

199 Bolliger, *supra* note 131, at 350.

200 Friedrich & Wilson, *supra* note 198, at 142–43.

201 *See* Bendor & Sela, *supra* note 190, at 538 ("The necessity test encompasses the rationality test. In any factual situation in which there is no rational connection between the purpose that the legislative authority is seeking to achieve and the infringement on the constitutional right, it is possible to accomplish the same purpose by means that infringe on the right to a lesser extent. Similarly, the proportionality *sensu stricto* sub-test includes both the necessity and rational connection requirements.").

[animal] . . . rights seriously could be costly in terms of our comfort, convenience, and lifestyle, but this is always the price to be paid for acknowledging rights."[202] In Israel, despite the rhetoric of proportionality, the existing regulation is not based on such a rational assessment. In this respect, not only is the policy not applied in the spirit of its accepted, significant moral meaning in constitutional law, but neither is proportionality applied as a methodology for policy making.

Rollin pointed out that "[p]eople are not prepared to give up meat or the benefits that come from biomedical research. . . . But what one can expect is that as the consciousness does awaken, . . . people will be more and more willing to make sacrifices for moral reasons."[203] Although some sacrifices of human interests were made in Israel for the benefit of animals, we are still only at the beginning, and can expect more sacrifices, even if they will not involve the elimination of animal industry.

V. THE LACK OF SYNERGY BETWEEN ADMINISTRATIVE AND CRIMINAL REGULATION

As described in Part II, the prohibition against animal abuse both in Israel and other countries, such as Switzerland, is not only the basis of administrative regulation, but is also a criminal offense.[204] However, a single legal framework that forms the basis both for administrative regulation and criminal liability creates considerable difficulties.

First, the definition of "criminal prohibition" in the PCA Act is broad and vague.[205] This vagueness infringes upon the principle of legality, which requires a clear and concrete definition of criminal prohibitions.[206] Furthermore, the interpretation of the offense according to the proportionality doctrine, designed to constitutionally limit governmental authorities, is problematic. The ruling of the Israeli Supreme Court that "abuse" is only a disproportionately abusive behavior[207] leaves the dividing line between the permitted and the prohibited unclear. The judge is granted discretion to determine in each and every case whether or not the injury to animals constitutes a criminal offense. The criminal prohibition defies its purpose of guiding behavior, and it violates the right to know in advance what conduct amounts to a criminal offense. Truly, this problem is not unique to the offense of animal abuse, and arises also in other offences that include

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202 ROLLIN, *supra* note 110, at 119.

203 ROLLIN, *supra* note 110, at 166.

204 PCA Act § 17(A)(1); *Hamat Gader*, LCA 1684/96, at 10–12.

205 *See* PCA Act § 1 ("[A] registered body corporate, the purpose and activity of which is the protection of animals . . . .") (translation provided by author).

206 *See, e.g.*, KENNETH S. GALLANT, THE PRINCIPLE OF LEGALITY IN INTERNATIONAL AND COMPARATIVE CRIMINAL LAW 11–45 (2008) (discussing the principle of legality in criminal law); GABRIEL HALLEVY, A MODERN TREATISE ON THE PRINCIPLE OF LEGALITY IN CRIMINAL LAW ix (2010) (discussing the principle of legality in criminal law).

207 *Noah*, HCJ 9232/01, at 25–26.

the term "abuse," such as the prohibition against abusing a minor or a helpless person.[208] But whereas cruel behavior that is determined to be "abuse" is strictly prohibited in connection with humans, when it comes to animals it may be interpreted as proportional and justified. In other words, violating the legality principle in the case of animal abuse is twofold: the built-in ambiguity of the term "abuse" is compounded by yet another ambiguity, having to do with the justification of the cruel behavior. The result of the absence of a clear definition of the criminal prohibition is the fear of over- and under-enforcement. The purpose of the principle of legality is, on one hand, to protect defendants and instruct people how to act in order to avoid committing a criminal offense; on the other, to simultaneously enable effective enforcement of the criminal law, which is essential for the protection of animals.

Second, the borderline separating conducts that the amounts of a breach of regulations but does not amount to animal "abuse" from behavior that violates the regulations and amounts to "abuse" is ambiguous. Because the determination of which disproportionate behaviors amount to animal abuse is at the discretion of the court, the prosecution must decide in advance, under conditions of uncertainty, which channel to prosecute the defendant: based on the regulations or also on the PCA Act.[209]

Third, the present legal structure may lead to difficulties in the case of regulations governing conduct that contradict the provisions of the PCA Act. For example, provisions determining the conditions of holding animals may appear to be permitted by the regulations, but the court may rule retrospectively that they amount to disproportionate, and hence are forbidden. What is the appropriate policy in such a case with respect to those who hold animals under such conditions? On one hand, regulations cannot permit what the PCA Act has prohibited; on the other, there is a fundamental difficulty in indicting a person for breaking the Act who acted in accordance with official governmental regulations. In such a situation, prospective defendants may argue that the enforcement authorities are estopped from indicting them. Legally, such a claim may manifest in one of three possible defenses: a mistake of law, a mistake of fact, and abuse of process.[210]

MISTAKE OF LAW: Ignorance of the law is normally not an excuse.[211] The principle of legality requires that the boundary between prohibition and permission be objective, set by law, and interpreted by an authorized body, without it being affected by individuals' miscon-

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[208] *See* the Penal Code, 5737–1977, § 368C (Isr.) ("If a person commits an act of physical, mental or sexual abuse on a minor or on a helpless person, then he is liable to seven years of imprisonment.") (translation provided by author).

[209] *Noah*, HCJ 9232/01, at 16.

[210] The Penal Code, 5737–1977, § 34R (Isr.); the Penal Code, 5737–1977, § 34S (Isr.); the Penal Code, 5737–1977, § 138 (Isr.).

[211] OLIVER W. HOLMES, THE COMMON LAW 47 (1923).

ceptions regarding the extent of the prohibition.[212] A second rationale stems from the interest in encouraging knowledge of the criminal law.[213] In order for individuals to internalize criminal prohibitions, the legislator is required to articulate them clearly. However, similarly to many other legal systems in Israel, the presumption that a person knows the law is not absolute.[214] Ignorance of the law may be an excuse in cases where there was no reasonable way of preventing the error.[215] In our case, whoever acted in accordance with official regulations most certainly acted "reasonably," because the regulations were enacted precisely to guide behavior and to define the authorities' expectations regarding the permitted conduct regulating the holding of animals, their transport, slaughter, and the like.[216] Recognition of the mistake does not affect the objectivity of the boundaries of what is and is not allowed, because the prohibition's erroneous boundaries were not affected by the individual's subjective views, but determined by qualified authorities. Not only does the legality principle not preclude exempting those who relied on legislation that has been declared void, but the exemption follows necessarily from the idea of ??fair warning.[217] Those behaving as prescribed by official regulations were not adequately warned that the permission granted by these regulations was misleading and does not accurately reflect the restrictions imposed by the prohibition. Andrew Von Hirsch and Douglas Husak highlighted the similarities between relying on legislation that was annulled and the prohibition against the retroactive application of a criminal prohibition.[218] In both cases, the "correct" boundaries of the criminal prohibition were defined only after the defendant had acted.[219] When the defendant committed the behavior, it was not prohibited.[220] Only later came the Court determination that it was illegal, so that during the commission of the act the defendant did not violate any prohibition.[221] Indeed, many U.S. states exempt from criminal liability

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212 *See* JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 361–408 (2d ed. 1960) (discussing the rationale behind the requirements of the principle of legality).

213 *See* HOLMES, *supra* note 210, at 47–48 (discussing the rationale behind encouraging knowledge of the common law).

214 *See* ANDREW ASHWORTH & JEREMY HORDER, PRINCIPLES OF CRIMINAL LAW 218–22 (7th ed. 2013) (discussing the demands of the recognition of ignorance or mistake of law); DAVID ORMEROD, SMITH AND HOGAN'S CRIMINAL LAW 336–39 (13th ed. 2011) (discussing the general principles and elements of criminal law).

215 *See* the Penal Code, 5737–1977, § 34S (Isr.) ("For the purposes of criminal responsibility it is immaterial whether the person thought that his actions are not prohibited, owing to a mistake regarding the existence of a criminal prohibition or regarding his understanding the prohibition, except if the error was reasonably inevitable.") (translation provided by author).

216 The Penal Code, 5737–1977, § 34S (Isr.).

217 Douglas Husak & Andrew Von Hirsch, *Culpability and Mistake of Law*, *in* ACTION AND VALUE IN CRIMINAL LAW 158, 166 (Stephen Shute et al. eds., 1993).

218 *Id.* at 166–67.

219 *Id.* at 157.

220 *Id.*

221 *Id.*

those who made a mistake of criminal law by relying on legislation that was declared later to be void.[222] Some states, based on the concept of estoppel, were even willing to extend the exemption to cases in which the mistake relied on an official entity authorized to interpret or enforce the law.[223]

MISTAKE OF FACT: The error may negate the *mens rea* required for the formation of offense, which is tantamount to a mistake of fact.[224] In our case, the regulations primarily concern behaviors permitted in the agricultural sector engaged in the raising, holding, and handling of animals, and their aim is to subject those working in this sector to regulatory supervision.[225] Although the provision is a criminal one and states that those violating the regulations are subject to punitive sanctions, the regulations are mainly part of administrative law.[226] To convict a defendant of an abuse, torture, or cruel treatment offense, the prosecution must prove that the defendant was aware of the nature of his conduct, i.e., of the fact that the behavior amounted to abuse, torture, or cruel treatment.[227] But when people act in accordance with the regulations, they do so by relying on the fact that they are acting legally.[228] Defendants are unaware that their behavior represents abuse, torture, or cruelty, because from their point of view, official regulations are legal. In the absence of *mens rea*, there is no criminal liability.[229]

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[222] *See, e.g.*, ALA. CODE § 13A-2-6(b) (1975) (stating that a person is relieved of criminal liability if he or she engaged in conduct under a mistaken belief that the conduct was legal, provided that their belief was based on a previously enacted statute or the most recent court case on the matter); ARK. CODE ANN. § 5-2-206(c) (1975) (stating that an affirmative defense can be asserted when the defendant engaged in criminal conduct, if the defendant reasonably relied on an invalid or erroneous statute, a judicial decision on the matter, or an agency's interpretation); KAN. STAT. ANN. § 21-3203 (1970) (repealed 2010) (allowing a defense when defendant reasonably believes his or her conduct was legal, and this belief was based on an agency interpretation, then-valid statute, or a judicial decision); LA. STAT. ANN. § 14:17 (1950) (allowing a defense when defendant reasonably relied on then-valid legislation or judicial decisions). Most of these states adopted the proposed doctrine of the Model Penal Code, which states: "(3) A belief that conduct does not legally constitute an offense is a defense to a prosecution for that offense based upon such conduct when: . . . (b) he acts in reasonable reliance upon an official statement of the law, afterward determined to be invalid or erroneous, contained in (i) a statute or other enactment; (ii) a judicial decision, opinion or judgment; (iii) an administrative order or grant of permission; or (iv) an official interpretation of the public officer or body charged by law with responsibility for the interpretation, administration or enforcement of the law defining the offense." MODEL PENAL CODE § 2.04(3)(b) (AM LAW INST. 2007).

[223] ASHWORTH & HORDER, *supra* note 214, at 222–24; PAUL H. ROBINSON, CRIMINAL LAW DEFENSES 389–90 (1984).

[224] *See* ORMEROD, *supra* note 214, at 338 (discussing the general principles and elements of criminal law).

[225] PCA Act §§ 15, 21.

[226] The Penal Code, 5737–1977 § 34J1(a) (1977) (Isr.).

[227] Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 223 (1982).

[228] *Id.*

[229] *Id.* at 223, n.2.

ABUSE OF PROCESS: Israeli law extends protection to a defendant if the indictment or criminal proceeding substantively conflicts with the principles of justice and legal fairness.[230] This defense authorizes the court to grant relief, including dismissing the indictment, if it finds that the demands of justice and legal fairness have been violated.[231] This abuse of process defense may apply also to defendants accused of committing a criminal offense, as long as the criminal proceedings substantially violate the sense of justice and fairness.[232] The Israeli Supreme Court stressed that the aim of the defense is to do justice to the defendant, not to settle accounts with law enforcement agencies for their misconduct.[233] The conduct of the criminal proceedings may be contrary to the sense of justice even if the decision to indict is not tainted by any administrative misconduct. In our case, although the defendant may find himself retrospectively having committed actions that amount to a criminal offense, under circumstances in which he relied on official regulations, his prosecution violates the sense of justice. This is even apparent in terms of such framework offenses as abuse, which does not provide clear guidance that would amount to fair warning.[234]

These three defense arguments gain added strength in light of the circumstances surrounding *Noah*.[235] In this case, although the Israeli Supreme Court struck down the regulations allowing force-feeding geese, the government awarded significant damages to the farmers in compensation for eliminating their source of income.[236] The Court also postponed invalidating the regulations for a year and a half in order to minimize the immediate economic damage to the farmers.[237] These decisions reinforce the recognition of the farmers' reliance on the regulations.

The result is that on one hand, criminal prosecution under the general offenses of torture, cruelty, or abuse of animals—which are interpreted not literally, but subject to the proportionality doctrine—is subject to the principles of legality and of fair warning. On the other hand, when the general offense is expressed in concrete terms through

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230 *See* Criminal Procedure Law (consolidated version) 5742–1982 § 149(10) (1982) (Isr.) (authorizing a provision for a defendant to make preliminary pleadings after the commencement of trial).

231 *Id.* § 150.

232 CA 2144/08 Abraham Mondrowitz v. State of Israel, para. 118 (2010) (Isr.), http://elyon1.court.gov.il/files/08/440/021/r10/08021440.r10.pdf [https://perma.cc/B475-RN7D] (accessed Jan. 19, 2018).

233 *See* CA 4855/02 State of Israel v. Borowitz, para. 21 (2005) (Isr.), http://elyon1.court.gov.il/files/02/550/048/F22/02048550.f22.pdf [https://perma.cc/NFU2-78LV] (accessed Jan. 19, 2018) (discussing the right way to apply an interpretation of the provisions).

234 *Id.*

235 *See generally Noah*, HCJ 9232/01, (holding that the force-feeding of geese constituted abuse of animals).

236 *See id.* at 47 (providing the Court's consideration of awarding damages).

237 *Id.* para. 27.

regulations, the possibility of prosecuting on the basis of the general offense is blocked to the extent that the conduct is consistent with the regulations.

VI. CONCLUSION

Some believe that existing common law allows and even requires recognition of some species of animals as persons who deserve full constitutional rights.[238] Others believe that "eradicating the suffering of animals is the goal to which animal advocates ought to direct their attention."[239]

We fear, however, that achieving such goals is unrealistic in a world where industrial agriculture inherently includes animal suffering as long as it is considered vital for manufacturing "basic foods."[240]

In this Article, we sought to offer realistic critique and recommendations we believe to be applicable, even in the non-ideal world in which we live. The constitutional discourse that governs the protection of human rights in Israel, as well as in most other democratic countries around the world, and especially the doctrine of proportionality, cannot provide adequate protection for animals in current society.[241]

Current law and jurisprudence, in Israel and in some other countries, are formulated in terms of animal rights, and even pretend to provide animals with a kind of constitutional protection.[242] However, when the existing laws of most democratic countries around the world, and especially those considering the proportionality doctrine reigning in Israel, are applied in practice, the protection of animal rights are far

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238 Emily A. Fitzgerald, *Apersonhood*, 34 REV. LITIG. 337, 351 (2015); Alexandra B. Rhodes, *Saving Apes with the Laws of Men: Great Ape Protection in a Property-Based Animal Law System*, 20 ANIMAL L. 191, 199–201 (2013); *see, e.g.*, WISE, *supra* note 109, at 270 ("But it should now be obvious that the ancient Great Wall that has for so long divided hums from every other animal is biased, irrational, unfair, and unjust. It is time to knock it down. The decision to extend common law personhood to chimpanzees and bonobos will arise from a great common law case.").

239 ROBERT GARNER, A THEORY OF JUSTICE FOR ANIMALS: ANIMAL RIGHTS IN A NONIDEAL WORLD 168 (2013).

240 Compare to the comment by Justice A. Grunis, which was particularly evident in his opinions that contributed to animal protection in Israel, that the same action may be considered to be torture, cruelty, or abuse of animals if its purpose is of minor importance, and not torture, cruelty, or abuse if it is intended to meet human needs that are perceived by society as existential, including the provision of "basic foods." *Noah*, HCJ 9232/01, at 18.

241 *See generally* CA 8823/07 A v. State of Israel, IsrLR 1 (2009) (Isr.), http://elyon1.court.gov.il/files/07/230/088/p25/07088230.p25.pdf [https://perma.cc/TB7F-Q354] (accessed Jan. 19, 2018) (analyzing the requirements of Israel's Basic Law: Human Dignity and Liberty and its multilevel proportionality test); EMILY CRAWFORD, PROPORTIONALITY (2011) (discussing the principle of proportionality and its relevance in numerous democratic nations and its impact throughout international and domestic law).

242 *See* PCA Act § 2(a) ("No person shall torture, act cruelly toward or abuse an animal in any way.") (translation provided by author).

from realization of the welfarist approach.[243] Outside Utopia, constitutional law is not an appropriate framework for animal protection; sometimes, as exemplified above, it even impairs their protection.[244]

However, without purporting to grant constitutional rights to animals or to provide them with constitutional protections, we do believe that it is feasible to make analogies to certain constitutional law principles in a way that could promote the animal welfare in the world we live.

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[243] *See generally* MARTTI KOSKENNIEMI, HISTORY OF INTERNATIONAL LAW, SINCE WORLD WAR II (2011) (discussing developments of the welfarist approach).

[244] Even the citizens of Thomas More's *Utopia* are not vegans. However, "There are also, without [the Utopians'] towns, places appointed near some running water for killing their beasts and for washing away their filth, which is done by their slaves; for they suffer none of their citizens to kill their cattle, because they think that pity and goodnature, which are among the best of those affections that are born with us, are much impaired by the butchering of animals; nor do they suffer anything that is foul or unclean to be brought within their towns, lest the air should be infected by ill-smells, which might prejudice their health." THOMAS MORE, UTOPIA 51–52 (n.p. 1515), https://www.goodreads.com/ebooks/download/18414?doc=720 [https://perma.cc/YM34-U36E] (accessed Jan. 19, 2018).