

# Non-human animals and the law: The fable of power

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Your conscience is the measure of the  
honesty of your selfishness.  
Listen to it carefully.\*\*

## 1 The question of protection and law

Should we protect non-human animals from cruelty? Almost every legal system in the world, including international<sup>1</sup> and regional systems,<sup>2</sup> answers this question in the affirmative. Therefore, while there is no consensus regarding whether or not the human animal should *use* the non-human animal, it is clear that, at a minimum, there is broad (not universal) consensus to mitigate the harm non-human animals experience as a result of the human animal's use and exploitation of other species. This is not to say that every jurisdiction, culture or discrete community either protects or harms its animals. The nature of the relationship between human and non-human animals is as diverse as the range of animal species itself. One can conclude, however, that a modicum of constraint is used by almost all systems in their engagement with non-human animals.

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<sup>1</sup> See, eg, the work of the International Whaling Commission under the auspices of the International Convention for the Regulation of Whaling, Washington, 1946-12-02 available at <http://iwcoffice.org/commission/convention.htm>.

<sup>2</sup> The most developed regional animal protection framework is that of the European Community. EU legislation regulates animal testing (Directive 2010/63/EU of the European Parliament and of the Council of 2010-09-22 on the protection of animals used for scientific purposes, available at [http://ec.europa.eu/environment/chemicals/lab\\_animals/home\\_en.htm](http://ec.europa.eu/environment/chemicals/lab_animals/home_en.htm); animals in agriculture (over ten directives exist in this regard: [http://ec.europa.eu/food/animal/welfare/references\\_en.htm](http://ec.europa.eu/food/animal/welfare/references_en.htm)); and the trade in animals ([http://ec.europa.eu/food/animal/welfare/references\\_en.htm](http://ec.europa.eu/food/animal/welfare/references_en.htm)). The EU policies, including the policy to replace, reduce and refine the use of animals (the three 'R's), are discussed below.

The question, of course, is how. If we proceed from the conclusion that society (writ large) agrees that the use of animals should be regulated (or at least modulated), we have to determine the manner in which such regulation should be implemented. There are three classic modes of regulation. The first is the regulation of animals' rights; the second is the regulation of animals' welfare; and the third is a hybrid of these two methods. The approach to the regulation of the use of animals is based in two philosophies. The first is the rights-based approach, which recognises that animals have intrinsic rights, much like human beings, and we, as human animals, should respect and protect those rights. This philosophical basis is infused by further sub-debates, such as: what rights do animals have? Can animals, for example, have the right to speak or to vote or to consciousness? If they cannot have such rights, can one say they are rights-holders at all? The answer, of course, is yes. Children, for example, do not have the right to vote but the limited range of rights to which they are entitled does not denude them of their status as rights-holders.<sup>3</sup> I do not engage this debate further at the moment but its underlying premise is that all animals have the inalienable right not to feel pain, not to be abused or not to lose their life in a manner devoid of dignity.

The second philosophical premise for regulation is welfarism. Welfarism focuses on the obligation not to cause unnecessary suffering; use, but do not abuse. The jurisprudential justification for this is not that animals should not be used but rather that, in our utilisation of animals, we should ensure that they experience as little harm as possible; that their welfare remains intact.<sup>4</sup> This legal approach is also linked to utilitarianism.

A hybrid approach engages the two theories and argues that animals have *certain* rights linked to their essential attributes, including the right not to feel pain (linked to the ability to feel) and the right not to be tortured (linked to sentience).<sup>5</sup>

The regulatory approach one adopts engages Nussbaum's powerful distinction: it is not only about who *receives* justice but it is also about who *conceives* of justice.<sup>6</sup>

In this article I discuss the theories of regulation and demonstrate how some systems, such as the European Union, increasingly are importing animal-centric

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<sup>3</sup>Singer *Animal liberation* (2002) 82 (noting that mentally disabled children have the right not to be experimented upon, notwithstanding their limited capabilities).

<sup>4</sup>For an extensive discussion of these respective approaches see in general: Payne 'Animal welfare, animal rights, and the path to social reform: One movement's struggle for coherency and the quest for change' (2002) 9 *Virginia Journal of Social Policy and the Law* 587; Wise 'Animal rights: One step at a time' in Sunstein and Nussbaum (eds) *Animal rights: Current debates and new directions* (2004) 19; Singer *Animal liberation* (2002); Wise *Rattling the cage towards legal rights for animals* (2000); and Anderson 'Animal rights and the values of nonhuman life' in Sunstein and Nussbaum (eds) *Animal rights: Current debates and new directions* (2004) 277.

<sup>5</sup>See in general Spiegel *The dreaded comparison: Human and animal slavery* (1996).

<sup>6</sup>Nussbaum 'Beyond "compassion and humanity": Justice for nonhuman animals' in Sunstein and Nussbaum (eds) *Animal rights: Current debates and new directions* (2004) 299, 301.

considerations into regulatory standards. In the second part of the article I identify the principles that should underlie an animal-centric regulatory system. These principles are: the absence of pain; glass slaughterhouses; and the imperative of survival.

## 2 Human-centric versus animal-centric regulation

The regulatory framework one chooses is linked inextricably to the reason behind regulation: what is the ultimate purpose of regulating the treatment of animals? The rationale for the regulation of the treatment of animals can be divided largely into two categories: human-centric justifications and the animal-centric justifications.<sup>7</sup> The human-centric approach regulates the treatment of animals for our own purposes. This is not to say that the approach is not altruistic; it simply identifies the drivers behind the regulation. One such human-centric justification is the protection of the environment. We protect certain species from extinction as part of our efforts to protect our environment as a whole. Another human-centric motivation is health. We regulate the treatment of farm animals to ensure that the human animal is able to eat healthy, uncontaminated meat.<sup>8</sup> Religion or ethics is another human-centric justification for the protection of animals (although it should be noted that religion has also been used as a justification for the inhumane treatment of animals based on the biblical injunction that God granted humans dominion 'over the fish of the sea, and over the fowl of the air, and over the cattle, and over all the earth, and over every creeping thing that creepeth upon the earth').<sup>9</sup> Religions may demand a certain standard of behaviour from believers in the manner in which they maintain and consume animals.<sup>10</sup>

The common theme in these examples of human-centric regulation is that human interests are served in the pursuit of protecting animal interests. Posner sums up this approach as the need to 'learn to feel animals' pains as our pains and to learn that ... we can alleviate those pains without substantially reducing our standard of living and that of the rest of the world and without sacrificing medical and other scientific progress'.<sup>11</sup>

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<sup>7</sup>For a discussion of the human-centric approach to the question of animal rights see Posner 'Animal rights: Legal, philosophical, and pragmatic perspectives' in Sunstein and Nussbaum (eds) *Animal rights: Current debates and new directions* (2004) 51 at 66.

<sup>8</sup>Council Directive 98/58/EC of 1998-07-20 concerning the protection of animals kept for farming purposes, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31998L0058:EN:NOT>.

<sup>9</sup>Genesis 1:24-26, as cited in Scully *Dominion: The power of man, the suffering of animals and the call to mercy* (2002) vii.

<sup>10</sup>While there are concerns around the Kashrut and Hallal slaughtering, many manifestations of religious slaughter and dietary laws are based on the notion of regulating the human animal's engagement with and use of the non-human animal. See in general Scully *Dominion: The power of man, the suffering of animals and the call to mercy* (2002) and Waldau *The spectre of speciesism* (2002).

<sup>11</sup>Posner 'Animal rights: Legal, philosophical, and pragmatic perspectives' in Sunstein and Nussbaum (eds) *Animal rights current debates and new directions* (2004) 51 at 66.

Animal-centric regulation is a different genre. It has as its central objective the interests and well-being of animals. Humans may or may not benefit from this regulation. Examples of this type of regulation would be the prohibition of factory farming; the elimination of vivisection; and, the prohibition against all forms of cruelty against animals, including in the farming industry. For the majority of legal systems, regulation is founded on human-centric regulation.

### **3 Contradictions in the human-centric approach to regulation**

The human-centric motivation to the regulation of the treatment of non-human animals, however, reveals two contradictions. The first contradiction lies in our own relationship with animals. The second contradiction lies in our use of our own dominance as a species. I examine each contradiction below.

In many societies and countries throughout the world (and I include in this both the Global South and the Global North) demonstrate a fractured approach to non-human animals, what Francione calls our moral schizophrenia.<sup>12</sup> On the one hand, the human animal consumes enormous amounts of meat; amounts that require the industrialisation of farming with its attendant cruelties. The cruelty in factory farming is well-documented and includes levels of meat production and consumption that are beyond comprehension. It should be emphasised that this consumption of meat is not a manifestation of our 'natural' dietary habits. If we go back to our 'natural' selves (ie pre-civilisation), it is true, that as omnivores, the human animal was (and probably is) designed to consume some meat. However, in the context of this same state of nature, the human animal would hunt and kill its own meat. This would be dangerous, intermittent and performed when necessary. The human animal's meat consumption, therefore, would only occur when it was absolutely necessary. The original position no longer pertains and the human animal is, arguably, consuming more meat than was ever naturally intended.<sup>13</sup> Our meat-eating, therefore, is neither natural nor cruelty free. It is both unnatural and extremely cruel. This brings us to the contradiction: at the same time as we consume animals, it is quite prevalent for non-human animals to keep companion animals, integrate these animals into their families, homes and, on occasion, our last wills and testaments. So at the same time as we facilitate untold cruelty on non-human animals, we simultaneously – schizophrenically – love non-human animals. The difference? It all depends on the species. Dolphins, cats and dogs are either aesthetically pleasing or sufficiently domesticated to elicit from some humans (by no means all) high standards of

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<sup>12</sup>Francione 'Animals – property or persons' in Sunstein and Nussbaum (eds) *Animal rights: Current debates and new directions* (2004) 108.

<sup>13</sup>LEAD and FAO 2006 report 'Livestock's long shadow, environmental issues and options' available at [http://www.virtualcentre.org/en/library/key\\_pub/longshad/A0701E00.pdf](http://www.virtualcentre.org/en/library/key_pub/longshad/A0701E00.pdf) (hereafter FOA report).

kindness and care.<sup>14</sup> Other animals, including farm animals, chimpanzees and donkeys, suffer extreme cruelty either because they are invisible or because it is culturally endorsed. These species of animals' ability to feel pain, intuit danger and dread death, however, is the same.

For Joy and Robbins, this contradiction reveals that humans, arbitrarily and willingly, engage in an ideology of violence.<sup>15</sup> Humans, who refuse to eat a golden retriever, for example, but willingly eat a lamb, reveal an inconsistency in their approach to animals. Such humans have been acculturated to accept cruelty in respect of one species and reject it in another. The same inconsistency exists *within* meat-eating: humans eat *some* body parts and not others. As Foer notes, 'we eat wings, but not eyes ...'.<sup>16</sup>

The golden retriever/lamb contradiction exists because of the invisibility of the harm in meat-eating.<sup>17</sup> By refusing to eat something we love (the golden retriever) we recognise that the consumption of an animal may be cruel. The near-universal acceptability of eating a sheep, however, hides the cruelty-component behind a veneer of popularism. Singer evokes the power of normalised meat-eating to hide its cruelty. He describes how most children are told to eat animals at a very young age; carnism is adopted without ever making 'a conscious, informed decision, free from the bias that accompanies any long-established habit, reinforced by all the pressures of social conformity, to eat animal flesh.'<sup>18</sup> Carnism – the ideology of acceptable, habituated violence – is the portal through which the cruelty of meat-eating is rendered invisible.

This is the first contradiction evidenced in the human-centric approach to regulation. We see this contradiction in regulation. In the United States for example, the relevant federal animal protection legislation protects all animals *except* farm animals, which are by far the majority of animals in the United States and subject to brutal standards of 'industry practice'. And this contradiction, for many societies, is acceptable because the regulation is human-centric and designed to serve our own needs and not the interests of animals. Many societies have happily reconciled themselves to this contradiction, while others are starting to reform, such as the European Union, which I discuss below. Either way, it is important to recognise the pitfalls of the human-centric approach to animal regulation and be clear about the contradiction it allows.

The second contradiction in the human-centric approach to regulation is the manner in which we use our power as a 'dominant' species. Scholars have argued

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<sup>14</sup>Sunstein notes that there are nearly 60 million domestic dogs in the United States owned by more than 36 million households. In at least half of these households, the family dog receives a Christmas present. Sunstein 'Introduction: What are animal rights?' Sunstein and Nussbaum (eds) *Animal rights: Current debates and new directions* (2004) 3.

<sup>15</sup>Joy and Robbins *Why we love dogs, eat pigs, and wear cows: An introduction to carnism* (2009).

<sup>16</sup>Foer *Eating a Animals* (2009) 12.

<sup>17</sup>*Ibid* and Joy and Robbins (n 16).

<sup>18</sup>Singer (n 4) 214.

that there is a common theme between the historic discrimination against women and black people, on the one hand, and, on the other, discrimination against non-human animals, so-called speciesism.<sup>19</sup> The analogy is simple: there was no justification for the law to reflect dominance of men over women or whites over blacks and, similarly, there is no justification for the legal differentiation between human and non-human animals. This is not to say that women, black people and animals share the same characteristics or that their experiences of cruelty and oppression are equal or equivalent. The point of connection, rather, is the way the dominant group (men, white people, humans) exploit their dominance because it suits their interests and *because they can*. As Singer notes, '... pain is pain, and the importance of preventing unnecessary pain and suffering does not diminish because the being that suffers is not a member of our species'.<sup>20</sup>

Speciesism shares, with other forms of discrimination, the imputation of certain assumed characteristics to the 'inferior' group. For example, young girls historically were discouraged from higher education in science on the basis that all girls by virtue of their sex lacked the necessary intellectual capability to engage scientific theories. Girls as a group, therefore, were endowed *artificially* with the common characteristic of emotional intelligence rather than scientific intelligence. The same is true in respect of non-human animals. Human animals tend to ignore the complex social structures and sophisticated needs of non-human animals. As Singer argues, when humans marry, we attribute the lifelong union to love and other sophisticated 'human' emotions. However, when animals 'mate' for life, we attribute this to instinct.<sup>21</sup> By focusing on a selected (often inaccurate) set of criteria (such as the ability to communicate in a human language) we prioritise humans over other species. Through this prioritisation, we allocate to humans the right not to feel pain and deny the same right to animals. Communicating in a particular manner or being able to reason in a particular fashion are fundamentally irrelevant to the ability to feel pain, and yet these factors are employed to justify testing animals without anaesthetic or housing chickens in battery cages. At a point in history, unequal protection of rights was justified by virtue of race (the trade in black slaves was justified on the basis that black people were inferior to white people), religion (Jews were killed en masse in Germany and Eastern Europe on the basis that they were inferior to non-Jews) and sex (women were not allowed to vote on the basis that they were inferior to men). If we have rejected the legalised discrimination based on power disparities inherent in race, religion and sex, why do we not reject the legalised discrimination based on one's species?

This is a question that confronts and disturbs our accepted status quo; and the interests challenged are significant. Could it really be true that the current differentiation between human and non-human animals is akin to racism and

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<sup>19</sup>For a discussion of Speciesism, see Singer (n 4) 6.

<sup>20</sup>Singer (n 4) 220.

<sup>21</sup>*Id* 223.

sexism? Each person has to answer this question for themselves;<sup>22</sup> what is clear, however, is that the regulation of the treatment of non-human animals allows for a degree of abuse of power and attendant cruelty which is not tolerated in respect of other historically oppressed groups.

Having identified the deficiencies in the human-centric approach to regulation, it is useful to consider some of the laws that protect non-human animals from cruelty, the principled basis for that law and the extent to which it may demonstrate a shift from human-centric regulation to animal-centric regulation.

## 4 The human-centric and animal-centric approach in practice

### 4.1 The USA

Let us take, as a point of departure, the country which consumes some of the highest numbers of animals in the world: the United States.<sup>23</sup> Animals are designated as property within United States law. However, a distinction is drawn between animate and inanimate property, with specific legislation relating to the handling and treatment of non-human animals. In general, animals are regulated by the United States Animal Welfare Act, enacted in 1966.<sup>24</sup> This Act defines an animal as:

Any live or dead dog, cat, monkey (nonhuman primate mammal), guinea pig, hamster, rabbit, or such other warm blooded animal, as the Secretary may determine is being used, or is intended for use, for research, testing, experimentation, or exhibition purposes, or as a pet; but such term excludes horses not used for research purposes and other farm animals, such as, but not limited to livestock or poultry, used or intended for use as food or fiber, or livestock or poultry used or intended for use for improving animal nutrition, breeding, management, or production efficiency, or for improving the quality of food or fiber. With respect to a dog, the term means all dogs including those used for hunting, security, or breeding purposes.<sup>25</sup>

The exclusion of 'farm animals, such as 'livestock or poultry, used or intended for use as food ...'<sup>26</sup> creates a sizeable regulatory gap: farmed animals constitute 98% of all animals in the United States who come into contact with humans.<sup>27</sup>

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<sup>22</sup>Posner proposes that this distinction is justified 'in some rational sense – only that it is a fact deeply rooted in our current thinking and feeling ...'. Posner 'Animal rights: Legal, philosophical, and pragmatic perspectives' in Sunstein and Nussbaum (eds) *Animal rights: Current debates and new directions* (2004) 51 at 67.

<sup>23</sup>See Pollan's discussion of the abuse of farm animals in his discussion of Peter Singer's book, *Animal liberation* in the *New York Time Magazine* of 2002-11-10. Pollan states that 'The industrialization – and dehumanization – of American animal farming is a relatively new, evitable and local phenomenon: no other country raises and slaughters its food animals quite as intensively or as brutally as we do'. *New York Time Magazine* (2002-11-10).

<sup>24</sup>USCA § 2131.

<sup>25</sup>USCA § 2132.

<sup>26</sup>*Ibid.*

<sup>27</sup>Wolfson and Sullivan 'Foxes in the hen house: Animals, agribusiness, and the law: A modern American fable' in Sunstein and Nussbaum (eds) *Animal rights: Current debates and new directions*

There is little, if any regulation of farmed animals in other legislation. The Humane Methods of Slaughter Act,<sup>28</sup> in an attempt to prevent, *inter alia*, the 'needless suffering' of livestock, declares that it is 'the policy of the United States that the slaughtering of livestock and the handling of livestock in connection with slaughter shall be carried out only by humane methods.'<sup>29</sup> Humane methods include the rendering of the animal 'insensible to pain by a single blow or gunshot or an electrical, chemical, or other means that is rapid and effective, before being shackled, hoisted, thrown, cast, or cut ...'.<sup>30</sup> This certainly provides some standard for the killing of farmed animals (to the extent that it is enforced) but still absent is any regulation of the way in which farmed animals are treated *while still alive*.

In 2004, the Humane Methods of Slaughtering Act was amended to include practices involving non-ambulatory livestock, or so-called downed animals – animals that are simply too sick or injured to walk.<sup>31</sup> This amendment authorises the Secretary of Agriculture, *inter alia*, to investigate and report to Congress on the scope of non-ambulatory livestock, the way in which they are treated and the causes of the problem. This is relevant in that the immobility of livestock occurs as a result of maltreatment during the life of the animal in question and the amendment is a small step in regulating the welfare of farmed animals.

However, the regulations to the Humane Methods of Slaughtering Act exclude poultry, the result of which is that over 95% of all farmed animals (approximately 8.5 billion slaughtered per year) have no federal legal protection from inhumane slaughter.<sup>32</sup> Moreover, the violation of this federal statute imposes no fines and few, if any, deterrent penalties.<sup>33</sup>

Finally, most states in the USA have anticruelty legislation, which criminalises the cruel treatment of animals, including farmed animals. There are three phenomena, however, that render these statutes nugatory. First, prosecutors are unlikely to use their time and resources to prosecute violations of animal-related legislation.<sup>34</sup> Second, where prosecutors do bring charges for animal cruelty, they must prove, *beyond a reasonable doubt*, that the cruelty was administered with the necessary *intent*. Both the standard of proof and the degree of intention required for criminality preclude all but the most egregious, unjustifiable and obvious acts of cruelty.<sup>35</sup>

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(2004) 205 at 206 ('Approximately 9.5 billion animals die annually in food production in the United States. This compares with some 218 million killed by hunters and trappers and in animal shelters, biomedical research, product testing, dissection, and fur farms, *combined*').

<sup>28</sup>7 USCA § 1901.

<sup>29</sup>*Ibid.*

<sup>30</sup>7 USCA § 1902.

<sup>31</sup>7 USCA § 1907.

<sup>32</sup>Wolfson and Sullivan (n 28) 208.

<sup>33</sup>*Ibid.*

<sup>34</sup>*Id* 210.

<sup>35</sup>Moreover, it is hardly acceptable to have preventative anticruelty statutes without legislation and/or regulations that impose positive requirements on farmers.



Thirdly, a growing number of states have excluded so-called 'customary farming practices' from their anticruelty statutes, with the result that as long as a particular farming methodology is 'common,' it will be lawful. No matter how cruel the practice, the anticruelty statutes will not apply as long as there are sufficient people engaging in the same conduct.<sup>36</sup>

While legislation exists at both federal and state levels, it is deficient in regulating the welfare of farmed animals. To satisfy some of the applicable interests, slaughterhouses and factory farms should be transparent, accessible and accountable.

The United States, therefore, represents a wholly human-centric approach to the regulation of animal treatment.

#### 4.2 *The European system*

A more nuanced approach to regulation is evident in the European system. Article 13 of Title II of the newly established Treaty of Lisbon (which entered into force on 2009-12-01)<sup>37</sup> provides as follows:<sup>38</sup>

In formulating and implementing the Union's agriculture, fisheries, transport, internal market, research and technological development and space policies, the Union and the Member States shall, since animals are sentient beings, pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage.

The reference to the sentience of animals and the attendant obligation to respect their welfare is based on decades of European regulatory reform in respect of non-human animals. In 1998, for example, the Council of the European Union adopted Council Directive 98/58/EC concerning the protection of animals kept for farming purposes.<sup>39</sup> This was based on the 1976 European Convention for the protection of animals kept for farming purposes.<sup>40</sup> This Convention is aspirational but retains a commitment to the human-centric approach to regulation. Article 3 provides that:

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<sup>36</sup>Wolfson and Sullivan (n 28) 212-219.

<sup>37</sup>[http://europa.eu/lisbon\\_treaty/index\\_en.htm](http://europa.eu/lisbon_treaty/index_en.htm).

<sup>38</sup>Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union – Consolidated version of the Treaty on European Union – Consolidated version of the Treaty on the Functioning of the European Union – Protocols – Annexes – Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon – Tables of equivalences, *Official Journal* C 115, 09/05/2008 P. 0001-0388, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0001:01:EN:HTML> (hereafter Treaty of Lisbon).

<sup>39</sup>Council Directive 98/58/EC of 20 July 1998 concerning the protection of animals kept for farming purposes, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31998L0058:EN:NOT> (hereafter the EC Directive on farmed animals).

<sup>40</sup>European Convention for the protection of animals kept for farming purposes *Official Journal* L 323, 17/11/1978 p. 0014–0022, available at [http://ec.europa.eu/food/animal/welfare/references\\_en.htm](http://ec.europa.eu/food/animal/welfare/references_en.htm).

Animals shall be housed and provided with food, water and care in a manner which – having regard to their species and to their degree of development, adaptation and domestication – is appropriate to their physiological and ethological needs in accordance with established experience and scientific knowledge.

The key theme throughout the Convention is the rejection of ‘unnecessary suffering’ in the utilisation of animals for farming (including for food, skins, wool and fur).<sup>41</sup>

The Council Directive on farmed animals (98/58/EC) has a similar infusion of human-centric and animal-centric motivations. The Preamble has several distinct underpinnings. There is reference to ‘the welfare requirements of animals’; the ‘need to establish common minimum standards for the protection of animals kept for farming purposes in order to ensure rational development of production and to facilitate the organisation of the market in animals’; and, to the elimination of ‘distortions of competition’. The standard for protection is the prevention of ‘unnecessary pain, suffering or injury’.<sup>42</sup>

The Directive does include some specific standards for the treatment of farm animals. For example, the Directive requires: frequent inspection of animals kept in husbandry systems;<sup>43</sup> proper care and record keeping in respect of animals that are ill;<sup>44</sup> freedom of movement for animals, ‘having regard to its species and in accordance with established experience and scientific knowledge must not be restricted in such a way as to cause it unnecessary suffering or injury’;<sup>45</sup> proper ventilation and lighting ‘to meet the physiological and ethological needs of the animals’;<sup>46</sup> that animals be ‘fed a wholesome diet which is appropriate to their age and species and which is fed to them in sufficient quantity to maintain them in good health and satisfy their nutritional needs’;<sup>47</sup> that ‘no other substance, with the exception of those given for therapeutic, or prophylactic purposes or for the purposes of zootechnical treatment ... , must be administered to an animal unless it has been demonstrated by scientific studies of animal welfare or established experience that the effect of that substance is not detrimental to the health or welfare of the animal’;<sup>48</sup> that ‘natural or artificial breeding or breeding procedures which cause or are likely to cause suffering or injury to any of the animals concerned must not be practised’.<sup>49</sup>

The Directive excludes procedures likely to cause ‘minimal or momentary suffering or injury, or which might necessitate interventions which would not cause

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<sup>41</sup>*Id* art 1.

<sup>42</sup>EC Directive on farmed animals (n 40) art 3.

<sup>43</sup>*Id* annex 2.

<sup>44</sup>*Id* annex 4, 5 and 6.

<sup>45</sup>*Id* annex 7.

<sup>46</sup>*Id* annex 10 and 11.

<sup>47</sup>*Id* annex 14.

<sup>48</sup>*Id* annex 18.

<sup>49</sup>*Id* annex 20.

lasting injury, where these are allowed by national provisions'.<sup>50</sup> The regulation of mutilation of farm animals is still in process. The transportation of farm animals (most farm animals are transported from their breeding location to slaughterhouses) is governed by Council Regulation (EC) No 1/2005 of 22 December 2004 on the protection of animals during transport and related operations.<sup>51</sup>

These limitations certainly *reduce* the suffering of farm animals and introduce standards previously unknown. However, if one were to apply these standards, say, to human beings in a prison, the legislation would undoubtedly be challenged on the ground of cruelty. The conclusion inevitably is that the European System remains human-centric in its regulation of farm animals, with the attendant contradictions discussed above.

However, the human-centric approach is infused with an animal-centric *benefit* (if not approach). For example, Council Directive 2008/119/EC laying down minimum standards for the protection of calves<sup>52</sup> recognises that scientifically 'calves should benefit from an environment corresponding to their needs as a herd-living species. For that reason, they should be reared in groups. Calves, both group-housed and individually penned, should have sufficient space for exercise, for contact with other cattle and for normal movements when standing up or lying down'.<sup>53</sup> The regulations in this Directive clearly prohibit the production of veal. Similarly, Council Directive 2008/120/EC laying down minimum standards for the protection of pigs,<sup>54</sup> regulates the housing, rearing, mutilation and feeding of pigs, with no evident human interest being served. The treatment of hens and chickens is regulated by a combination of Directives, including Council Directive 1999/74/EC which sets out minimum standards for the protection of laying hens,<sup>55</sup> Commission Directive 2002/4/EC on the registration of establishments keeping laying hens,<sup>56</sup> Council Regulation (EC) no 1234/2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products;<sup>57</sup>

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<sup>50</sup> *Id* annex 20.

<sup>51</sup> Council Regulation (EC) No 1/2005 of 2004-12-22 on the protection of animals during transport and related operations. *Official Journal* L 3, 5.1.2005, p 001 0044.

<sup>52</sup> Council Directive 2008/119/EC of 2008-12-18, *Official Journal* L 010, 15/01/2009 p 0007-0013 laying down minimum standards for the protection of calves, available at [http://ec.europa.eu/food/animal/welfare/references\\_en.htm](http://ec.europa.eu/food/animal/welfare/references_en.htm).

<sup>53</sup> *Id* preamble item 7.

<sup>54</sup> Council Directive 2008/120/EC of 2008-12-18 laying down minimum standards for the protection of pigs *Official Journal* L 47, 18/02/2009 p 5 available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32008L0120:EN:NOT>.

<sup>55</sup> Council Directive 1999/74/EC of 1999-07-19 sets out minimum standards for the protection of laying hens *Official Journal* L 203, 03/08/1999 p 0053-0057 (hereafter Council Directive for the protection of laying hens), available at [http://ec.europa.eu/food/animal/welfare/references\\_en.htm](http://ec.europa.eu/food/animal/welfare/references_en.htm).

<sup>56</sup> Commission Directive 2002/4/EC of 2002-01-30 on the registration of establishments keeping laying hens, covered by Council Directive 1999/74/EC *Official Journal* L 30, 31/01/2002 p 0044-0046 available at [http://ec.europa.eu/food/animal/welfare/references\\_en.htm](http://ec.europa.eu/food/animal/welfare/references_en.htm).

<sup>57</sup> Council Regulation (EC) no 1234/2007 of 2007-10-22 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation) (*Official Journal* L 299, 16.11.2007 p 1) available at <http://ec.europa.eu/food/animal>

Commission Regulation (EC) no 589/2008 as regards marketing standards for eggs;<sup>58</sup> and Council Directive 2007/43 laying down minimum rules for the protection of chickens kept for meat production.<sup>59</sup>

These instruments reveal the tension between the interests of humanity and the interests of animals. The Council Directive for the protection of laying hens, for example, notes the scientific view that ‘the welfare conditions of hens kept in current battery cages and in other systems of rearing are inadequate and that certain of their needs cannot be met in such cages ...’<sup>60</sup> but maintains that a ‘balance must be kept between the various aspects to be taken into consideration, as regards both welfare and health, economic and social considerations, and also environmental impact’.<sup>61</sup>

The analysis could continue beyond farm animals. The European system regulates the treatment of animals during transportation;<sup>62</sup> the utilisation of cat and dog fur;<sup>63</sup> the keeping of zoo animals;<sup>64</sup> the protection of animals used for experimental and scientific purposes (which protects vertebrate animals);<sup>65</sup> and the trade in seals products.<sup>66</sup>

Collectively, these instruments confirm the trend towards the inclusion of an animal-centric approach to the regulation of animal treatment. This trend embraces ‘new scientific knowledge ... in respect of factors influencing animal

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/welfare/references\_en.htm.

<sup>58</sup> Commission Regulation (EC) no 589/2008 laying down detailed rules for implementing Council Regulation (EC) no 1234/2007 as regards marketing standards for eggs (*Official Journal* L 163 24.06.2008 p 6) available at [http://ec.europa.eu/food/animal/welfare/references\\_en.htm](http://ec.europa.eu/food/animal/welfare/references_en.htm).

<sup>59</sup> Council Directive 2007/43 of 2007-06-28 laying down minimum rules for the protection of chickens kept for meat production (*Official Journal* L 182, 12.7.2007 p 0019-0028) available at [http://ec.europa.eu/food/animal/welfare/references\\_en.htm](http://ec.europa.eu/food/animal/welfare/references_en.htm).

<sup>60</sup> Council Directive for the protection of laying hens (n 56) preamble, para 7.

<sup>61</sup> *Ibid.*

<sup>62</sup> Council Regulation (EC) No 1/2005 of 2004-12-22, on the protection of animals during transport and related operations and amending Directives 64/432/EEC and 93/119/EC and Regulation (EC) No 1255/97 ; Council Decision (2004/544/EC) of 2004-06-21 on the signing of the European Convention for the protection of animals during international transport; European Convention for the Protection of Animals during International Transport (revised); Commission Regulation (EC) 639/2003 of 2003-04-09 laying down detailed rules pursuant to Council Regulation (EC) 1254/1999 as regards requirements for the granting of export refunds related to the welfare of live bovine animals during transport *Official Journal* L 093, 10/04/2003 p 0010-0017; and Council Regulation (EC) No 1255/97 of 1997-06-25 concerning Community criteria for staging points and amending the route plan referred to in the Annex to Directive 91/628/EEC (*Official Journal* L 174, 2.7.1997, p 1).

<sup>63</sup> Regulation (EC) no 1523/2007 of the European Parliament and of the Council of 2007-12-11 banning the placing on the market and the import to, or export from, the Community of cat and dog fur, and products containing such fur Text with EEA relevance (*Official Journal* L 343, 27.12.2007 p 0001-0004).

<sup>64</sup> Council Directive 1999/22/EC of 1999-03-29 relating to the keeping of wild animals in zoos, *Official Journal* L 094, 09/04/1999 p 0024-0026.

<sup>65</sup> Directive 2010/63/EU of the European Parliament and of the Council of 2010-09-22 on the protection of animals used for scientific purposes *Official Journal* L 276, 20.10.2010 p 33-79 (revising Directive 86/609/EEC) (hereafter Directive on the protection of animals used for scientific purposes).

<sup>66</sup> Regulation (EC) No 1007/2009 of the European Parliament and of the Council on trade in seal products.

welfare as well as the capacity of animals to sense and express pain, suffering, distress and lasting harm'.<sup>67</sup>

The most telling development is probably in respect of vivisection, where the interests of humans in using live animals in testing procedures must be balanced against the interests of animals. The Directive on the protection of animals used for experimental and scientific purposes notes that this balance 'represents an important step towards achieving the final goal of full replacement of procedures on live animals for scientific and educational purposes as soon as it is scientifically possible to do so. To that end, it seeks to facilitate and promote the advancement of alternative approaches. It also seeks to ensure a high level of protection for animals that still need to be used in procedures. This Directive should be reviewed regularly in light of evolving science and animal-protection measures'.<sup>68</sup> The Directive, which also adopts the principle of replacement, reduction and refinement, confirms the trend towards regulation that speaks both to the needs of humans and the interests of animals.<sup>69</sup>

## 5 Implications of an animal-centric approach to regulation: three principles of protection

If we pursued an animal-centric approach to the regulation of treatment of animals, would it be possible to retain the interests of human animals while recognising the interests of non-human animals? And this is presuming that this is the balance we want to achieve (Posner's position may be unpalatable but it does recognise a deep-seated human characteristic to pursue its own interests).

The point of departure is that in the near future it is unlikely that the human animal will stop its utilisation of the non-human animal. However, it is likely that the *manner* of such utilisation could be changed to meet the interests of animals, as far as utilisation allows that. It remains, however, an approach that accepts the inferiority of non-human animals, the discriminatory approach that distinguishes between the same sentience of human and non-human animals and the commitment to cruelty for the purposes of the human animal. Based on this status quo (which I do not endorse), the question is: what is the next step in regulation that would better protect non-human animals from their capricious utilisation by humans.

Any regulatory system that has an animal-centric component should, in my view, be based on three co-existing principles. These principles are: the absence of pain; glass slaughterhouses; and the imperative of survival. I discuss each of

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<sup>67</sup>Directive 2010/63/EU of the European Parliament and of the Council of 2010-09-22 on the protection of animals used for scientific purposes *Official Journal* L 276, 20.10.2010 p 33-79 (revising Directive 86/609/EEC), Preamble para 6 (hereafter Directive on the protection of animals used for scientific purposes).

<sup>68</sup>*Id* preamble para 10.

<sup>69</sup>*Id* art 4.

these principles but it is important to note two preliminary points. This regulatory matrix is a compromise. It seeks to take the human-animal a step towards the needs and interests of the non-human animal. At the same time, it accepts that the non-human animal will continue to be used, exploited and hurt in a manner that is inconsistent with many principles of animal protection (and inconsistent with the author's own personal views on the rights of animals). The second point is that each principle is essential to the regulatory matrix I propose. Each principle speaks to the other and reinforces the web of protection that should, as a minimum, be imposed on the animal industry.

The first principle is the 'absence of pain' principle. Based on this principle, any form of regulation must require the farming and utilisation of animals to be devoid of all avoidable pain and must meet the animal's natural needs. This means at a minimum the abolition of factory farming and the utilisation of anaesthetics. This will be much more costly but that is a balance required by the harmonised approach of human-centric and animal-centric regulation.

The economics of this approach are neither simple nor palatable. This is expensive; but so too was the abolition of slavery and child labour. It is also important to note that the expense of animal protection is not destined to be a burden for the developing world. This paper will not go into the food crisis and disproportionate distribution of food and nutrition around the globe. However, the protection of animals and the concomitant increase in cost will not cause greater world hunger; on the contrary. Meat production and the excessive consumption of meat (facilitated by the cheap production of meat) is cited as one of the reasons for world hunger.<sup>70</sup> The regulatory approach to animal protection is in harmony with the increased availability of food in destitute regions (and yes, this is admittedly a human-centric consideration).

The second principle is the 'glass slaughterhouse' principle. The impenetrability of the meat and animal industry is a significant hurdle in providing consumers with the truth regarding the source of their food, clothes and products. This principle emanates from Pollan's call for transparency in the production of meat and, literally, the openness of slaughterhouses.<sup>71</sup> It also applies to the utilisation of animals in laboratories, most of which do not reveal the day-to-day experimentation on animals.<sup>72</sup>

Given the lack of information regarding the farming of non-human animals, consumers are deceived by the largely inaccurate advertising campaigns of the meat markets. Advertisements for beef describe animals as having free range, healthy foods and stress-free lifestyles. This is not the case. Consumers simply do not know about the tail docking of pigs without anaesthetic (to prevent the biting of tails in adulthood – a phenomenon induced by the stress of immobilising quarters);

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<sup>70</sup>FAO report (n 14). See also Singer (n 4) 221.

<sup>71</sup>Pollan (n 24).

<sup>72</sup>Singer (n 4) 217.

the sow crates which almost completely restrict sows for a period of six weeks allowing their offspring to feed at any time; the beak clipping of chickens to prevent stress-induced self-mutilation, a common phenomenon in the immobilising battery cages; electro-ejaculation of laboratory non-human primates,<sup>73</sup> and the killing of 400 head of cattle per hour.<sup>74</sup> As Singer points out:

For most humans, especially those in modern urban and suburban communities, the most direct form of contact with nonhuman animals is at meal time: we eat them ... The use and abuse of animals raised for food far exceeds, in sheer numbers of animals affected, any other kind of mistreatment. Hundreds of millions of cattle, pigs, and sheep are raised and slaughtered in the United States alone each year; and for poultry the figure is a staggering three billion. (That means that about 5,000 birds – mostly chickens – will have been slaughtered in the time it takes you to read this page.) It is here, on our dinner table and in our neighborhood supermarket or butcher's shop, that we are brought into direct touch with the most extensive exploitation of other species that has ever existed.<sup>75</sup>

This information vacuum results in consumers effectively being tricked into a belief that their meat-eating and use of animal products is not invidious but sanctioned by some higher order of government authority.

To offset this lack of consciousness, all slaughterhouses, animal testing facilities and animal-related facilities should be open to the public on demand. Why should the utilisation of animals be hidden from us? Unlike prisons, the 'inmates' of slaughterhouses and animal factories have committed no crime and their conduct is not dangerous. And yet these facilities are closed to the public. This enclosure both hides and facilitates cruelty. Only if there is transparency, can there be accountability. Exposure ensures higher standards of behaviour, accountable conduct and a reduction of cruelty. The 'glass slaughterhouse principle' is in essence the requirement of transparency and accountability.

The third principle of the proposed regulatory matrix is contentious. The 'imperative of survival' principle requires the prohibition of all animal-utilisation that does not serve some fundamental human need to survive. This principle, therefore, would require the prohibition of a number of animal-related activities, which are seminal in many people's lives. These activities include the use of animals in entertainment, including circuses, film industries and gambling; the testing of animals in the production of cosmetics and household cleaning products; the general utilisation of animals in the beauty industry; and the utilisation of animals for fur.

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<sup>73</sup>See <http://www.ohsukillsprimates.com/caatvanpic.htm>: 'Crowds of onlookers literally swarmed around the CAAT van to catch a glimpse and hear the cries of non-human primates being electro-ejaculated, exposing their self-injurious wounds, lingering in their own filth, and living in absolute terror of their surroundings as well as those who are supposed to care for them'.

<sup>74</sup>See <http://www.aahr.asn.au/info/>.

<sup>75</sup>Singer (n 4).

This principle opens up the subjective notion of what is necessary for the 'survival' of the human species. In particular, is meat-eating essential for the survival of the human species? The answer to this question, as Joy argues, is deeply ideological. Joy proposes that meat-eating or 'carnism' is a belief system that rests on the acceptability of eating certain animals, and not others. This system is acceptable because it is so widely endorsed and not because it is either cruelty-free or necessary for survival. Thousands of vegetarians and vegans live extremely healthy lives. Clearly the consumption of meat is not essential for the survival of humans. If meat-eating is not essential for the survival of human beings, does this mean that carnism should be prohibited? And, if carnism should be prohibited, does this render the first two principles nugatory?

As noted above, these principles are a proposal for regulation in a compromised society, where meat-eating continues at a rate that will not easily be abated. If and when human society abstains from the consumption of animals, clearly, the requirement of pain-free and transparent utilisation of animals in factory farming will not apply. However, the 'absence of pain' and 'glass slaughterhouse' principles will continue to apply for as long as the human animal utilises, in some form or another, the non-human animal.

## 6 Conclusion

Each principle represents a cost to the human-animal, a sacrifice and a deviation from the status quo. As such, this proposal obviously rests on the human animal's philosophical and political commitment to including the interests of animals in relevant regulatory frameworks. As Pollan concludes, in the future we will look back at our meat eating and animal experimentation 'as relics of an equally backward age. Eating animals, wearing animals, experimenting on animals, killing animals for sport: all these practices, so resolutely normal to us, will be seen as the barbarities they are, and we will come to view as "speciesism"'.<sup>76</sup>

This commitment exists in many societies and, in my view, is not an unrealistic aspiration. It will, however, take courage and an appreciation that the system we have is based on inequality; and that this inequality is unjustifiable, unreasonable and, ultimately, unsustainable.

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<sup>76</sup>Pollan (n 24).