

The Place of Animal Rights in Kenyan Law: Prospects and Challenges

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Abstract

Over the last several years, animal rights and welfare movement has gained momentum the world over, with many countries coming up with laws to protect the welfare of animals. While some advocates for the same call for absolute protection of the rights of animals, effectively banning the use and exploitation of animal resources by human beings, others call for the enhanced welfare of the animals where they should be treated in a humane manner even as they get used and exploited. This paper examines the position that Kenya has taken as far as the subject is concerned.

1. Introduction

The rights and legal status of animals have been the subject of various and diverse discussions globally, with some arguing for absolute protection of animals while others advocate for fair treatment of animals while allowing human beings to benefit from these animals.¹

This paper critically discusses the place of animal rights within the Kenyan legal framework on whether the country has adopted the animal ‘rights’ approach or the ‘welfare’ one. The paper first looks at the international discussions surrounding animal rights and the various commentaries that offer pros and cons of recognising and upholding animal rights. The author also looks at the proposed legislation on animal welfare and protection and its merits and demerits as far as protection of animal rights in Kenya is concerned.

2. Ethical and Moral Arguments for and Against Protection of Animal Rights

Some authors have used the utilitarianism moral theory to discuss the protection of animal rights or welfare. According to its proponents, ‘a morally good action is one which promotes or produces the greatest amount of pleasure, happiness, or satisfaction of desires, and such promotion, requires abandoning such practices as animal husbandry, and experimentation upon animals for scientific or

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¹ Jean-Marc Neumann, ‘The Universal Declaration of Animal Rights or the Creation of a New Equilibrium between Species’ (2012) 19 Animal L. 91; See also Henry Stephens Salt, *Animals’ Rights Considered in Relation to Social Progress: With a Bibliographical Appendix* (Macmillan 1894); ‘BBC - Ethics - Animal Ethics: Animal Rights’ <http://www.bbc.co.uk/ethics/animals/rights/rights_1.shtml> accessed 20 July 2020.

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commercial purposes'.² According to the utilitarian view, one needs to consider the interests of all affected sentient beings, and seek to produce the greatest total fulfilment of interests, thus including the welfare of the affected animals. On this view it is acceptable, for example, to raise animals for slaughter as long as their welfare is protected, which will typically mean an end to the most intensive production methods.³

Others, however, have rejected the utilitarianism approach and argued for the inherent value of animals which is enough to guarantee their protection. To them, many sorts of non-human animals possess moral rights because they possess 'inherent value'.⁴ Accordingly, we are morally obligated to treat them in ways that respect this value, and this requires us to abandon such practices as animal husbandry, vivisection, and so on. Inherent value for these proponents is an objective property, and whether or not an individual possesses it does not in any way depend on whether he, she, or it is valued by others. Whether or not a person possesses inherent value depends only on their nature as the type of thing they are.⁵

The moral theory of contractarianism, which claims that moral norms derive their normative force from the idea of contract or mutual agreement,⁶ is also used as a basis for determining the place of animal rights. The contractarian view considers only human self-interest: what is in it for oneself (and for those fellow humans on whose collaboration one depends). This view has no objections against the use of animals for anything, in principle.⁷

According to this group of scholars, animals lack a moral standing to claim any rights and how we treat them matters, not because of their own intrinsic rights to being treated well, but because treating animals cruelly reveals the character of the person doing it and which might be projected to other human beings who of course have rights not to be treated as such.⁸

2.1 Animal Rights versus Animal Welfare

Notably, those who fight for animal rights are divided between those who advocate for animal rights while others fight for welfare of the animals. Some of the advocates for animal rights aim to achieve a number of goals, including: the total abolition of the use of animals in science; the total dissolution of

² Mark Rowlands, 'Animal Rights and Moral Theories' in Mark Rowlands (ed), *Animal Rights: Moral Theory and Practice* (Palgrave Macmillan UK 2009) <https://doi.org/10.1057/9780230245112_1> accessed 20 July 2020.

³ Thomas B Lund and others, 'Animal Ethics Profiling of Vegetarians, Vegans and Meat-Eaters' (2016) 29 *Anthrozoös* 89.

⁴ *Ibid.*

⁵ Mark Rowlands, 'Animal Rights and Moral Theories' in Mark Rowlands (ed), *Animal Rights: Moral Theory and Practice* (Palgrave Macmillan UK 2009) <https://doi.org/10.1057/9780230245112_1> accessed 20 July 2020.

⁶ Ann Cudd and Seena Eftekhari, 'Contractarianism' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Summer 2018, Metaphysics Research Lab, Stanford University 2018) <<https://plato.stanford.edu/archives/sum2018/entries/contractarianism/>> accessed 20 July 2020.

⁷ Thomas B Lund and others, 'Animal Ethics Profiling of Vegetarians, Vegans and Meat-Eaters' (2016) 29 *Anthrozoös* 89.

⁸ Peter Carruthers, *The Animals Issue: Moral Theory in Practice* (Cambridge University Press 1992); See also Raymond Gillespie Frey, 'Interests and Rights: The Case against Animals'; RG Frey, 'Rights, Interests, Desires and Beliefs' (1979) 16 *American Philosophical Quarterly* 233.

commercial animal agriculture; the total elimination of commercial and sport hunting and trapping.⁹ Those who take this approach argue that the fundamental wrong with how animals are treated by human beings is the system that allows us to view animals as our resources, here for us — to be eaten, or surgically manipulated, or exploited for sport or money.¹⁰ To them, once we accept this view of animals - as our resources - the rest is as predictable as it is regrettable.¹¹

Considering that in recent times most countries have chosen to extend some kind of protection to animals, the debates are therefore usually about the two approaches.

3. The Place of Animal Rights in International Law

Jeremy Bentham was among the very first scholars to argue for the recognition of animal rights as ‘sensitive beings’ where he argued that “other animals, which on account of their interests having been neglected by the insensibility of the ancient jurists, stand degraded into the class of things The day may come, when the rest of the animal creation may acquire those rights”¹² It is safe to say that the day is here and this section looks at the existing international legal instruments meant to guarantee animal welfare and protection.

3.1 Universal Declaration on Animal Welfare

The *Universal Declaration on Animal Welfare*¹³ calls on countries to acknowledge the importance of animal welfare and, at the same time, recognises the World Organisation for Animal Health (OIE) as the established international animal welfare standard-setting body.

3.2 International Convention for the Protection of Animals

The *International Convention for the Protection of Animals*¹⁴ was formulated against a background of Contracting Parties’: realisation of the need to establish effective and comprehensive international standards for the treatment of animals; recognition that humans derive many diverse benefits from their associations with animals and their utilization of them; recognition that the misuse and wastage of animals impairs the conservation of the environment as well as cultural and economic development;

⁹ Tom Regan, ‘The Case for Animal Rights’, *Advances in animal welfare science 1986/87* (Springer 1987).

¹⁰ Ibid.

¹¹ Ibid.

¹² Jeremy Bentham, ‘Theory of Legislation, Vol. II: Principles of the Penal Code’ [1841] Trans. R. Hildreth. Boston: Weeks, Jordan, and Company (As quoted in Jean-Marc Neumann, ‘The Universal Declaration of Animal Rights or the Creation of a New Equilibrium between Species’ (2012) 19 *Animal L.* 91).

¹³ *Universal Declaration on Animal Welfare*, Adopted by the International Committee of the OIE on 24 May 2007, 75 GS/FR – PARIS, May 2007.

¹⁴ *International Convention for the Protection of Animals, Proposed by the Committee for the Convention for the Protection of Animals, April 4, 1988.*

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recognition of the widespread international concern over the many and varied abuses of animals which constitute cruelty; recognition that heretofore there existed no comprehensive international agreement which effectively confronted these abuses so as to eliminate or to mitigate their severity; seeking to institute a practical mechanism which resolves the differences arising from the character and implementation of animal protective legislation of the various States; and the conviction that meaningful and effective improvements in the treatment of animals and fulfillment of mankind's obligations toward animals and natural systems can be assured through cooperative action by all States.¹⁵

The implementation of the Convention is to be guided by the following fundamental principles: humans and animals co-exist within an interdependent ecosystem. Humans and animals share an evolutionary heritage. Humans, as moral beings, have an obligation to act responsibly toward animals; life has intrinsic value. No animal should be killed unnecessarily or be subjected to cruel acts or to unnecessary suffering; and when humans have control over specific animals they have a positive obligation to provide these animals with an environment and care appropriate for the species.¹⁶ The convention covers, all types of animals including both domestic and wildlife animals and offers guidelines on how they should be dealt with in order to prevent the subjection of animals to cruelty and unnecessary suffering and to conserve the natural habitat of wildlife.¹⁷

3.3 Washington Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)

Washington Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)¹⁸ was formulated to protect the endangered species of animals and plants based on the recognition that wild fauna and flora in their many beautiful and varied forms are an irreplaceable part of the natural systems of the earth which must be protected for this and the generations to come; the ever-growing value of wild fauna and flora from aesthetic, scientific, cultural, recreational and economic points of view; that peoples and States are and should be the best protectors of their own wild fauna and flora; that international co-operation is essential for the protection of certain species of wild fauna and flora against over-exploitation through international trade.¹⁹

¹⁵ Preamble, *International Convention for the Protection of Animals*.

¹⁶ Article 1.

¹⁷ Article 10.

¹⁸ Washington Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), *Signed at Washington, D.C., on 3 March 1973; Amended at Bonn, on 22 June 1979; Amended at Gaborone, on 30 April 1983.*

¹⁹ *Ibid*, Preamble.

4. National Law on Safeguarding the Rights of Animals in Kenya: Prospects and Challenges

4.1 The Constitution of Kenya 2010

The Constitution of Kenya 2010 has some general provisions which cover animal rights, both domestic and wild animals. Under Chapter five, part 2, on environment and natural resources, the Constitution obligates the state to protect genetic resources and biological diversity.²⁰ The Fourth Schedule also outlines the roles of the two levels of government in promoting animal welfare; the national government is responsible for protection of wild animals in conservation areas while the county governments are mandated to seeing the control and welfare of domestic animals.²¹ The Constitution thus lays a basis for other statutory legislation on the welfare of animals in Kenya.

4.2 Prevention of Cruelty to Animals Act

The *Prevention of Cruelty to Animals Act*²² was enacted in 1962 to make better provision for the prevention of cruelty to animals; to control experiments on animals; and for matters incidental thereto and connected therewith. The Act defines acts and omissions which amount to cruelty and penalties therefor as follows: a person shall be guilty of an offence of cruelty if he—cruelly beats, kicks, ill-treats, over-rides, over-drives, over-loads, tortures, infuriates or terrifies any animal; or uses an animal which is so diseased, injured or in such physical condition that it is unfit to be so used; or conveys, carries, confines or impounds an animal in a manner or position as to cause that animal unnecessary suffering; or without sufficient cause, starves, underfeeds or denies water to an animal; or being the owner of an animal, without reasonable cause or excuse, abandons it, whether permanently or not, in circumstances likely to cause the animal unnecessary suffering; or being the owner of an animal, keeps it in a grossly dirty or verminous condition or, without reasonable cause or excuse, fails to procure or administer veterinary treatment or attention for the animal in case of disease, injury or delivery of young; or wilfully, without reasonable cause or excuse, administers any poisonous or injurious drug or substance to an animal or causes any such substance to be taken by an animal; subjects an animal to veterinary surgery in contravention of the Veterinary Surgeons Act (Cap. 366); or subjects an animal to any operation, surgical interference or other treatment which is performed without due care and humanity; or being the owner of any animal, fails to have it destroyed where the animal is so seriously injured or diseased that to prolong its life would cause it unnecessary suffering; or hunts, kills or destroys any animal in such a manner as to

²⁰ Constitution of Kenya 2010, Article 69 (1)(e).

²¹ Constitution of Kenya, 2010, Fourth Schedule [Articles 185(2), 186(1) and 187(2).]; see also KSPCA, 'Kenya's Constitution on Animal Rights and Prevention of Cruelty to Animals – KSPCA Kenya' <<https://kspca-kenya.org/kenyas-constitution-on-animal-rights-and-prevention-of-cruelty-to-animals/>> accessed 20 July 2020.

²² Prevention of Cruelty to Animals Act, Cap 360, Laws of Kenya, Revised Edition 2012 [1983].

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cause that animal more suffering than is necessary; or being the owner of any animal, without reasonable cause or excuse, does or omits to do an act which causes unnecessary suffering to the animal.²³ However, the Act provides for exception to the foregoing by providing for: the hunting and killing or destruction of any animal under the provisions of the Wild Life (Conservation and Management) Act (Cap.376)²⁴, the Rabies Act (Cap.365) or any other written law for the time being in force; or subject to the provisions of section 7²⁵ of this Act, the coursing and hunting of captive animals; subject to the provisions of section 8²⁶ of this Act, the slaughtering of any animal; or subject to the provisions of section 9²⁷ of this Act, the

²³ Ibid, sec. 3(1).

²⁴ Repealed by the Wildlife Conservation and Management Act, No 47 of 2013, Laws of Kenya.

²⁵ **7. Hunting of injured captive animal an offence**

(1) Any person who, for the purpose of coursing or hunting, liberates any captive animal—

(a) in an exhausted, injured or mutilated condition; or

(b) in such manner or place as to expose it to immediate attack, or danger of attack, by other animals; or

(c) in an enclosed space from which it has no reasonable chance of escape,

shall be guilty of an offence and liable to a fine not exceeding two thousand shillings or to a term of imprisonment not exceeding three months, or to both.

(2) For the purposes of this section, a captive animal shall not be deemed to be coursed or hunted before it is liberated for the purpose of being coursed or hunted, or after it has been recaptured, or if it is under control.

²⁶ **8. Cruel slaughtering of animals an offence**

(1) Any person who, whether in any slaughterhouse or abattoir or in any place than a slaughterhouse or abattoir, and whether for human consumption or not, slaughters an animal—

(a) in such a manner as to cause it more suffering than is necessary; or

(b) in the sight of any another animal awaiting slaughter,

shall be guilty of an offence and liable to a fine not exceeding two thousand shillings or to a term of imprisonment not exceeding three months or to both.

(2) It shall be a defence to proceedings under paragraph (a) of subsection (1) of this section, for the defendant to prove—

(a) that at the time of the alleged offence he was of a religious persuasion that prescribed the slaughter of an animal in the manner in which it was slaughtered; and

(b) that the animal was slaughtered in a place other than a slaughterhouse or abattoir; and

(c) that the animal was slaughtered for private consumption and that the meat of such animal was not the subject of sale, barter or exchange.

²⁷ **9. Training of animals in cruel manner an offence**

(1) A person who, whether for the purposes of the exhibition or not, trains any animal by the cruel infliction of pain or terror, or by the excessive use of a whip, goad or other instrument, or by the application of heat, electrical shock, or other similar appliance or agency, shall be guilty of an offence and liable to a fine not exceeding two thousand shillings or to a term of imprisonment not exceeding three months, or to both such fine and imprisonment.

(2) Where any person is convicted of an offence under this section, the court may, in addition to any penalty that may be imposed, order any whip, goad or other instrument, or appliance used by such person for the training of any animal to be forfeited.

(3) Where it is proved to the satisfaction of a subordinate court on a complaint made by an authorized officer or police officer that the training or exhibition of any animal has been accompanied by cruelty and should be prohibited or allowed subject only to conditions, the court may make an order against the person in respect of whom the complaint is made prohibiting the training or exhibition or imposing such conditions thereon as may be specified by the order.

(4) If any person is aggrieved by the making of an order, or by the refusal to make such an order, he may appeal to the Supreme Court whose decision shall be final.

An order made under this subsection shall not come into force until seven days after it is made, or, if an appeal has been entered within that period, until the determination of the appeal.

(6) For the purpose of this section, “exhibition” means an exhibition and any entertainment to which the public are admitted whether on payment of money or otherwise.

(7) This section shall not apply to the training of any animal for bona fide military or police purposes nor to the exhibition of an animal so trained.

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training of any animal; or the performance of an operation on an animal under the provisions of the Veterinary Surgeons Act (Cap.366); or subject to the provisions of Part III of this Act, the performance of any experiment on an animal,

where the compliance with any provisions of that subsection would necessarily frustrate the object or purpose of the hunting and killing or destruction, coursing and hunting, slaughtering, training, or the performance of the operation or experiment.²⁸

In addition to the foregoing, the Act provides that a person who—causes, promotes or assists at the fighting or baiting of an animal; or keeps, uses, manages, or acts or assists in the management of, premises for the purpose, or partly for the purpose of fighting or baiting any animal, or permits any premises or place to be so kept, managed or used; or receives, or causes or procures any person to receive any money for the admission of any person to any premises kept or used for the purpose, or partly for the purpose of fighting or baiting any animal, shall be guilty of an offence and liable to a fine not exceeding three thousand shillings or to a term of imprisonment not exceeding six months, or to both.²⁹

In relation to poisoned grain and flesh, the Act provides that a person who—sells, or offers or exposes for sale, or gives away, or causes or procures any person to sell or offer or expose for sale or give away, or knowingly is a party to the sale or offering or exposing for sale or giving away of any grain or seed which has been rendered poisonous except for bona fide use in agriculture; or knowingly puts or places, or causes or procures any person to put or place, or knowingly is a party to the putting or placing in or upon any land or building any poison, or any fluid or edible matter (not being sown seed or grain) which has been rendered poisonous, shall be guilty of an offence and shall be liable to a fine not exceeding two hundred shillings.³⁰

However, it shall be a defence to proceedings under paragraph (b) of subsection (1) that the poison was placed for the purpose of destroying insects and other invertebrates, rats, mice and small ground vermin or any other animals where such is found to be necessary in the interests of public health, agriculture, or the preservation of other animals, or for the purpose of manuring the land, and that all reasonable precautions to prevent injury to other animals were taken.³¹

The Act also prohibits the use of traps and other devices for the purpose of capturing or killing an animal.³²

Hunting of an injured captive animal is also an offence under the Act.³³

²⁸ Prevention of Cruelty to Animals Act, sec. 3 (4).

²⁹ Ibid, sec. 4.

³⁰ Ibid, sec. 5(1).

³¹ Ibid, sec. 5(2).

³² Ibid, sec. 6(1).

³³ Ibid, sec. 7.

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Experiments with animals are only to be performed by licensed persons.³⁴

A person who, being the owner of an animal, permits the commission of an offence under this Act or against any regulation made thereunder in relation to that animal shall be guilty of that offence and liable to the penalties prescribed therefor.³⁵ Notably, an owner shall be deemed to have permitted the commission of an offence if he fails to exercise reasonable care and supervision in respect of the protection of the animal therefrom provided that, where an owner is convicted of permitting the commission of an offence by reason only of his having failed to exercise reasonable care and supervision, he shall not be liable to imprisonment without the option of a fine.³⁶

The Act grants the court power to deprive a person convicted of offence ownership of animal. If any person is convicted of an offence under this Act or any regulation made thereunder in relation to any animal, the court may, if it thinks fit, in addition to any other punishment, make an order—depriving such person of the ownership of the animal; disqualifying such person from owning, possessing or controlling any similar kind, type or class of animal for such period as it thinks fit under the circumstances.³⁷

4.3 Prevention of Cruelty to Animals (Transport of Animals) Regulations

The *Prevention of Cruelty to Animals (Transport of Animals) Regulations*, 1984³⁸ provide guidelines on how animals should be transported whether by sea, air, road or rail. The Regulations require that during loading, any person who loads an animal into or unloads an animal out of a vessel, aircraft or vehicle, or who causes or permits an animal to be so loaded or unloaded, must do so in a way not likely to cause injury or unnecessary suffering to the animal.³⁹ In addition, any person who transports an animal by sea, air, road or rail, or who causes or permits an animal to be so transported, must ensure that the same is done in a way not likely to cause injury or unnecessary suffering to that animal.⁴⁰ A person would be guilty of an offence where an animal is likely to be caused injury or unnecessary suffering—by reason of inadequately constructed or insecure fittings in that part of the vessel, aircraft or vehicle, or in the receptacle in which the animal is transported; by coming into contact with a fitting or other part of the vessel, aircraft or vehicle which has not been adequately padded or fenced-off, or with another obstruction; from unnecessary exposure to the action of the weather or the sea; from an inadequate supply of fresh air, whether the vessel, aircraft or vehicle is stationary or in motion; or from exposure to

³⁴ Prevention of Cruelty to Animals Act, sec. 13.

³⁵ Ibid, sec. 24(1).

³⁶ Ibid, sec. 24(2).

³⁷ Ibid, sec. 28(1).

³⁸ *Prevention of Cruelty to Animals (Transport of Animals) Regulations*, 1984, Legal Notice No. 119 of 1984.

³⁹ Ibid, Regulation 3 (1).

⁴⁰ Ibid, Regulation 4(1).

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unnecessary fluctuations in or sustained high or low levels of temperature, humidity or air pressure, from unnecessary exposure to noise or vibration.⁴¹

In addition, an animal under transport must be taken care of by the owner or charterer of a vessel or the operator of an aircraft in which an animal is transported by sea or air, and the transported or other person in charge of an animal transported by road or rail, ensuring ensure that—the animal is adequately fed and watered at suitable intervals during transport, including during a period in which the animal is waiting to be loaded or unloaded; where necessary, an adequate supply of food and water appropriate to the species of that animal is available in the vessel, aircraft or vehicle; an attendant who is responsible for feeding and watering of the animal as provided under subparagraph (a) and for the general care of the animal is available during transport; and where necessary, suitable access is available to the animal for the purpose of feeding and watering and for otherwise attending to the needs of the animal.⁴² As for the transportation of unfit animals, a person who loads or transports an animal that is unfit or likely to give birth during transport, or who causes or permits the loading or transportation of such animal shall be guilty of an offence unless a veterinary surgeon or an authorized officer has given prior written authority for the loading or transport of that animal.⁴³

4.4 Wildlife Conservation and Management Act, 2013

The Wildlife Conservation and Management Act, 2013⁴⁴ is to apply to all wildlife resources on public, community and private land, and Kenya territorial waters.⁴⁵ The Act makes it an offence for anyone to pollute areas designated as wildlife habitats and states that any person who—discharges any hazardous substances or waste or oil into a designated wildlife area contrary to the provisions of this Act and any other written law; pollutes wildlife habitats and ecosystems; discharges any pollutant detrimental to wildlife into a designated wildlife conservation area contrary to the provisions of this Act or any other written law, commits an offence and shall be liable upon conviction to a fine of not less than two million shillings or to imprisonment of not less than five years or to both such fine and imprisonment.⁴⁶ In addition to such a sentence, the court may direct that person to—pay the full cost of cleaning up the polluted wildlife habitat and ecosystem and of removing the pollution; and clean up the polluted habitats and ecosystems and remove the effects of pollution to the satisfaction of the Service.⁴⁷

⁴¹ Regulation 4(2), *Prevention of Cruelty to Animals (Transport of Animals) Regulations*, 1984.

⁴² *Ibid*, Regulation 5(1).

⁴³ *Ibid*, Regulation 6.

⁴⁴ Wildlife Conservation and Management Act, No. 47 of 2013, Laws of Kenya.

⁴⁵ *Ibid*, sec. 2.

⁴⁶ *Ibid*, sec. 89(1).

⁴⁷ *Ibid*, sec. 89(2).

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The Act also outlines offences relating to endangered and threatened species. It prohibits any person from: killing or injuring, torturing or molesting, or attempting to kill or injure, a critically endangered, or endangered species as specified in the Sixth Schedule or listed under CITES Appendix I; dealing in a wildlife trophy, of any critically endangered or endangered species as specified in the Sixth Schedule or listed under CITES Appendix I, without a permit or exemption issued under this Act; dealing in a live wildlife species of any of critically endangered or endangered species as specified in the Sixth Schedule or listed under CITES Appendix I, without permit or exemption issued under this Act; possession of any live wildlife species or trophy of any critically endangered or endangered species as specified in the Sixth Schedule or listed under CITES Appendix I, without permit or exemption issued under this Act; or manufacturing an item from a trophy of a critically endangered or endangered species specified under the Sixth Schedule or listed under CITES Appendix I without a permit or exemption issued under this Act.⁴⁸

It also prohibits any person from—knowingly introducing an invasive species into a wildlife conservation area ; or failing to comply with the measures prescribed by the Cabinet Secretary set out under this Act.⁴⁹

The Act also prohibits any person from knowingly or recklessly using any substance whose effect is to poison any wildlife species.⁵⁰

The Act also prohibits any person from engaging in sport hunting or any other recreational hunting.⁵¹

Notably, the Act also prohibits any person from engaging in hunting of a species other than a critically endangered or endangered species listed under Schedule 6 or CITES Appendix I for the purposes of subsistence commits.⁵²

The Act also prohibits any person, without permit or exemption issued under this Act, to deal in the carcass or meat of any wildlife species. In addition, it also prohibits any person from purchasing from another person any meat or eggs of any wildlife species.⁵³

Trade in, import, export, re-export or introduce any specimen or product of a wildlife species into or from Kenya without a permit issued by the Service under this Act is also prohibited.⁵⁴

Regarding international instruments, conventions and agreements ratified by Kenya, for which the Cabinet Secretary has been given implementing authority, the Act empowers the Cabinet Secretary to make regulations and give directions to ensure compliance with the obligations thereunder.⁵⁵

⁴⁸ Wildlife Conservation and Management Act, 2013, sec. 92; See also sec. 95.

⁴⁹ Ibid, sec. 93.

⁵⁰ Ibid, sec. 95A.

⁵¹ Ibid, sec. 96.

⁵² Ibid, sec. 97.

⁵³ Ibid, sec. 98.

⁵⁴ Ibid, sec. 99.

⁵⁵ Ibid, sec. 109.

4.5 Fisheries Management and Development Act, 2016

The Fisheries Management and Development Act, 2016⁵⁶ was enacted to provide for the conservation, management and development of fisheries and other aquatic resources to enhance the livelihood of communities dependent on fishing and to establish the Kenya Fisheries Services; and for connected purposes.⁵⁷ The objective of this Act is to protect, manage, use and develop the aquatic resources in a manner which is consistent with ecologically sustainable development, to uplift the living standards of the fishing communities and to introduce fishing to traditionally non-fishing communities and to enhance food security.⁵⁸

The implementation of the Act is to be guided by the following principles: long-term sustainable use, conservation and management of fisheries resources and habitat, and adoption and implementation of management measures in such a manner as to ensure that the fisheries resources and habitat are not overexploited, threatened or endangered; allocation and access to the fisheries resources in a manner that achieves optimum utilization, equitable distribution and long-term sustainable development of fisheries resources to achieve economic growth, human resource development, employment creation, a sound ecological balance and generational equity; conservation and protection of fisheries habitats; ensuring the effective application of the ecosystem approach to fisheries management; ensuring that biodiversity and genetic diversity in the marine environment is maintained and enhanced; fostering recreational and ornamental fishing, aquaculture and commercial fishing activities for the benefit of the country; encouraging the participation of users of the fisheries resources, and the general community, in the management of fisheries; ensuring that management measures are based on the best scientific evidence available and are designed to maintain or restore stocks capable of producing sustainable yield, as qualified by relevant environmental and economic factors including fishing patterns, the interdependence of stocks and generally recommended international standards; application of the precautionary approach to the management and development of the fisheries at no less standard than is set out in any international agreement; managing fisheries resources in an efficient and cost effective manner, including setting targets for the recovery of management costs; collection and, as appropriate sharing, in a timely manner complete and accurate data and information concerning fishing activities and fisheries; implementation and enforcement of conservation and management measures through effective monitoring, control and surveillance; promotion of sustainable aquaculture in appropriate zones as a viable option to contribute to food security; replenishing natural habitats through diversification from capture fisheries and wealth generation; minimization of wastage, bycatch, discards, catch by lost or abandoned gear, pollution and the

⁵⁶ Fisheries Management and Development Act, No. 35 of 2016, Laws of Kenya.

⁵⁷ Ibid, Preamble.

⁵⁸ Ibid, sec. 5(1).

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promotion of development and use of selective, environmentally safe and cost-effective fishing gear and techniques; prevention or elimination of over-fishing and excess capacity and managing levels of fishing efforts so they do not exceed levels commensurate with sustainable use of fishery resources; effective implementation of international agreements and relevant international laws in conformity with the Treaty Making and Ratification Act, 2013⁵⁹; ensuring effective cooperation with coastal States, fishing States and entities and competent organisations; and ensuring that the livelihood of fishers is enhanced.⁶⁰

The Act thus expressly acknowledges that it is not just concerned with the protection and conservation of fisheries resources but also with how these resources may be used to benefit the communities that rely on them as their source of livelihood.

4.6 Penal Code, Cap 63

The Penal Code⁶¹ establishes the country's code of criminal law.⁶² The Code has several provisions that seek to safeguard the welfare of animals. The Code makes it a felony for any person to have carnal knowledge of an animal.⁶³ Notably, the Code classifies animals under property capable of being stolen as follows: every tame animal, whether tame by nature or wild by nature and subsequently tamed, which is the property of any person is capable of being stolen; animals wild by nature, of a kind which is not ordinarily found in a condition of natural liberty in Kenya, which are the property of any person, and which are usually kept in a state of confinement, are capable of being stolen, whether they are actually in confinement or have escaped from confinement; animals wild by nature, of a kind which is ordinarily found in a condition of natural liberty in Kenya, which are the property of any person, are capable of being stolen while they are in confinement, and while they are being actually pursued after escaping from confinement, but not at any other time; an animal wild by nature is deemed to be in a state of confinement so long as it is in a den, cage, sty, tank or other small enclosure, or is otherwise so placed that it cannot escape and that its owner can take possession of it at pleasure; wild animals in the enjoyment of their natural liberty are not capable of being stolen, but their dead bodies are capable of being stolen; and everything produced by or forming part of the body of an animal capable of being stolen is capable of being stolen.⁶⁴

In addition to the provisions of section 267, the Code provides that if the thing stolen is any of the following things, that is to say, a horse, mare, gelding, ass, mule, camel, ostrich, bull, cow, ox, ram, ewe,

⁵⁹ Treaty Making and Ratification Act, No 45 of 2012, Laws of Kenya.

⁶⁰ Ibid, sec. 5(2).

⁶¹ Penal Code, Cap 63, Laws of Kenya.

⁶² Ibid, Preamble.

⁶³ Ibid, sec. 162 (b).

⁶⁴ Ibid, sec. 267 (3) (4) (5) (6) (7) (8).

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wether, goat or pig, or the young thereof the offender is liable to imprisonment for a period not exceeding fourteen years.⁶⁵

The Code prohibits killing animals with intent to kill by providing that: any person, who kills any animal capable of being stolen with intent to steal the skin or carcass, or any part of the skin or carcass, is guilty of an offence and is liable to the same punishment as if he had stolen the animal.⁶⁶

The Code also provides that any person, who, being the mortgagor of mortgaged goods, removes or disposes of the goods without the consent of the mortgagee, and with intent to defraud, is guilty of a misdemeanour.⁶⁷ Notably, for purposes of this section, the Code defines “mortgaged goods” to include any goods and chattels of any kind, and *any animals*, and *any progeny of any animals*, and any crops or produce of the soil, whether growing or severed, which are subject for the time being, by virtue of any instrument or any written law, to a valid charge or lien by way of security for any debt or obligation (emphasis added).⁶⁸

Regarding injuring animals, the Code provides that any person who wilfully and unlawfully kills, maims or wounds any animal capable of being stolen is guilty of a felony and is liable, if the animal is an animal such as is referred to in section 278, to imprisonment for fourteen years, and, in any other case, to imprisonment for three years.⁶⁹

The Code also prohibits any person from communicating infectious diseases to animals. It provides that any person who wilfully and unlawfully causes, or is concerned in causing or attempts to cause, any infectious disease to be communicated to or among any animal or animals capable of being stolen, is guilty of a felony and is liable to imprisonment for seven years.⁷⁰

4.7 Environmental Management and Co-ordination Act, 1999

The *Environmental Management and Co-ordination Act, 1999*⁷¹ (EMCA) provides for the establishment of an appropriate legal and institutional framework for the management of the environment and for matters connected therewith and incidental thereto.⁷² It is the framework law on environmental matters in Kenya. EMCA defines “environment” to include; the physical factors of the surroundings of human beings including land, water, atmosphere, climate, sound, odour, taste, *the biological factors of animals*

⁶⁵ Penal Code, sec. 278.

⁶⁶ Ibid, sec. 289.

⁶⁷ Ibid, sec. 291(1).

⁶⁸ Ibid, sec. 291(2).

⁶⁹ Ibid, sec. 338.

⁷⁰ Ibid, sec. 341.

⁷¹ Environmental Management and Co-ordination Act, No. 8 of 1999, Laws of Kenya.

⁷² Ibid, Preamble.

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and plants and the social factor of aesthetics and includes both the natural and the built environment (emphasis added).⁷³

EMCA seeks to, inter alia, protect and conserve the ‘ecosystem’ which is defined under the Act to mean a dynamic complex of plant, *animal*, micro-organism communities and their non-living environment interacting as a functional unit (emphasis added).⁷⁴ It also seeks tackle “pollution” which is defined to mean any direct or indirect alteration of the physical, thermal, chemical, biological, or radio-active properties of any part of the environment by discharging, emitting, or depositing wastes so as to affect any beneficial use adversely, to cause a condition which is hazardous or potentially hazardous to public health, safety or welfare, or to *animals, birds, wildlife, fish or aquatic life*, or to plants or to cause contravention of any condition, limitation, or restriction which is subject to a licence under this Act.⁷⁵

For purposes of protection of rivers, lakes, seas and wet lands, EMCA prohibits any person, without the prior written approval of the Authority given after an environmental impact assessment, in relation to a river, lake, sea or wetland in Kenya, form, inter alia— introducing any *animal*, whether alien or indigenous, dead or alive, in any river, lake, sea or wetland.⁷⁶

For purposes of conservation of biological resources ex-situ, EMCA obligates the Cabinet Secretary to, on the recommendation of the Authority—prescribe measures for the conservation of biological resources ex-situ especially for those species threatened with extinction; issue guidelines for the management of—zoos or aquaria; animal orphanages; and, ensure that species threatened with extinction which are conserved ex-situ are re-introduced into their native habitats and ecosystems where—the threat to the species has been terminated; or a viable population of the threatened species has been achieved.⁷⁷

EMCA also requires that widespread introduction of new crops and animals in agriculture, is one of the projects requiring submission of an environmental impact assessment study report under the Second Schedule to the Act.⁷⁸

EMCA thus treats animals as part of the environment which must be protected from adverse effects such as pollution and other environmental degrading elements and activities.

4.8 Veterinary Surgeons and Veterinary Para-professionals Act, 2011

The *Veterinary Surgeons and Veterinary Para-professionals Act, 2011*⁷⁹ was enacted to make provision for the training, registration and licensing of veterinary surgeons and veterinary para-professionals; to provide for matters relating to animal health services and welfare, and for connected purposes.⁸⁰

⁷³ Environmental Management and Co-ordination Act, sec.2.

⁷⁴ Ibid, sec. 2.

⁷⁵ Ibid, sec. 2.

⁷⁶ Ibid, sec. 42 (1) (c).

⁷⁷ Ibid, sec. 52.

⁷⁸ Ibid, Second Schedule [Section 58, Act No. 5 of 2015, s. 80.]

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The Act is applicable to a wide range of animals as it defines “animal” to include cattle, camel, buffalo, sheep, goats, pigs, fish, horse, mule, ass, dog and any other wild or domestic animal kept in captivity or otherwise.⁸¹ Notably, while the Act deals with animal health services and welfare, it also applies to “animal resource industry” which means a sector responsible for animal production, quality assurance, marketing, animal food security and sanitary factors in livestock, companion and other non-human animal resources development.⁸²

The veterinary medicine envisaged under the Act is meant to: diagnose, treat, mitigate or prevent disease or abnormal physical or mental state or the symptoms thereof in an animal; restore, correct or modify any physical, mental or organic function in an animal; or control internal or external pests and parasites and includes insecticides, vaccines, hormones, alternative medicines, antiseptics, disinfectants, surgical, nutrients and biological products.⁸³

Considering that the Act also envisages the use of animal products for human consumption and other needs, the Act notably omits the use of animal rights but instead addresses itself to safeguarding animal welfare.⁸⁴

4.9 Branding of Stock Act

The *Branding of Stock Act*⁸⁵ makes provision for the registration of brands of stock.⁸⁶ The Act applies to “stock” which is defined to mean horses, cattle, camels, sheep and goats.⁸⁷ In addition, it provides that all brands shall be imprinted on stock as follows—the first brand shall be imprinted on the near hind leg below the stifle joint of the animal, and every second or subsequent brand shall, when there is space sufficient for the purpose, be imprinted on the same part of such animal and at a distance of not less than one and a half inches from and directly below the last brand imprinted.⁸⁸ Where there is not sufficient space for the purpose, the second or subsequent brand shall be imprinted on one of the following parts of such animal— off hind leg below the stifle joint; near side of neck; off side of neck; near cheek; off cheek.⁸⁹

⁷⁹ Veterinary Surgeons and Veterinary Para-professionals Act, No. 29 of 2011, Laws of Kenya.

⁸⁰ Ibid, Preamble.

⁸¹ Ibid, sec. 2(1).

⁸² Ibid, sec. 2(1).

⁸³ Ibid, sec. 2(1).

⁸⁴ Ibid, sec. 45 (2)(1).

⁸⁵ Branding of Stock Act, Cap 357, Laws of Kenya.

⁸⁶ Ibid, Preamble.

⁸⁷ Ibid, sec. 2.

⁸⁸ Ibid, sec. 9(a).

⁸⁹ Ibid, sec. 9(b).

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The Branding of Stock Rules, made under section 28 of the Branding of Stock Act provides that Branding-irons and branding instruments shall only be procurable through the Registrar of Brands, care of the Veterinary Department, to whom all applications shall be addressed.⁹⁰ The Rules also specifies that the persons named in the Schedule to the Rules are authorised to manufacture branding-irons and branding instruments for sale at the respective prices specified in the said Schedule.⁹¹

Notably, both the Act and the Rules thereof are quiet on any principles that must be observed in carrying out such branding. It is quiet on such issues as ensuring that the process is carried out in a manner that respects the rights or welfare of the animals, as envisaged in the international debate. Some authors within the international debate on animal rights and welfare may take issue with the Kenyan legislation as it only specifies where such marks may be put without offering any guiding principles. Indeed, some advocates for animal rights may take issue with the whole branding process as they believe that animals should not be branded as the process may inflict pain on the animals especially the piercings and hot iron branding.⁹² Some commentators have argued that branding is used as a property stamp identifying the stockbreeder as the owner of the animal. According to them, by branding the animals, ranch owners are expressing the animals' legal condition as mere things, or as slaves.⁹³ Hot-iron branding has even been banned in some countries.⁹⁴

4.10 Animal Welfare and Protection Bill, 2019

There is a pending National Assembly legislation, *Animal Welfare and Protection Bill, 2019*, which seeks to provide for the welfare and protection of animals and prevention of ill treatment of animals; to provide for the monitoring of and mitigation of animal abuse and for connected purposes.⁹⁵ The proposed law defines “animal” to mean any member of the animal kingdom except human, whether alive or dead, including mammals, birds, reptiles and aquatic animals.⁹⁶ “Farm animal” is defined to mean any animal including fish, reptiles, rabbits, cattle, sheep, goats, camels, donkeys or amphibians bred or kept for the production of food, wool, skin or fur or for other farming purposes or any other animal kept for these purposes.⁹⁷ “Working animal” is defined to mean any animal that is used to provide any service with the

⁹⁰ Branding of Stock Rules, Rule 2.

⁹¹ Ibid, Rule 3.

⁹² Greg Rushford and TR Goldman, ‘Urging an End To Face Branding Of Cattle’;

⁹³ Animal Ethics, ‘Animal Branding’ (*Animal Ethics*, 29 March 2016) <<https://www.animal-ethics.org/animal-branding/>> accessed 21 July 2020.

⁹⁴ Sarah JJ Adcock and others, ‘Branding Practices on Four Dairies in Kantale, Sri Lanka’ (2018) 8 *Animals* 137.

⁹⁵ Animal Welfare and Protection Bill, 2019, Preamble.

⁹⁶ Ibid, 2019, Clause 2.

⁹⁷ Ibid, 2019, Clause 2.

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exception of purposes for food or companionship and includes but is not limited to oxen, equids, camels and guard dogs.⁹⁸

It defines “animal protection” to include behaviours and actions aimed at keeping an animal healthy, comfortable, well nourished, safe, able to express innate behaviour and avoidance of any form of suffering.⁹⁹ “Animal welfare” is defined to mean the state of the animal and how it is coping with the conditions in which it lives including good health, comfort, good nourishment, safety, ability to express innate behavior and freedom from suffering from unpleasant states such as pain, fear or distress.¹⁰⁰

The object and purpose of the proposed law shall be to promote the responsible care and use of animals leading to the achievement of a reasonable balance between the welfare of animals and the interests of persons whose livelihoods depend on animals.¹⁰¹ The purposes of the proposed legislation are to: - ensure that owners of animals and persons in charge of animals take responsibility for and attend to the protection and welfare of the animals; ensure animal disease prevention and provision of veterinary care; specify and regulate conduct that may be permissible in regard to any animal or class of animals; ensure appropriate shelter, management, nutrition, humane handling and humane slaughter or killing of animals; provide for guidance on animal care and animal husbandry; and provide for the process of approving the use of animals in research, investigations and teaching.¹⁰²

The proposed legislation is to apply: - to all persons in the animal resource industry including those who own, handle, transport or in any way deal with animals and include persons under whose custody an animal may be on a temporary basis or for an extended period of time; and alongside other written laws pertaining to wildlife species or aquatic animals in Kenya.¹⁰³

The proposed law outlines the basic values and principles which shall guide the provision of animal protection including but not limited to: - an acknowledgement and the cognizance that animals are sentient and are capable of experiencing negative and positive complex emotions including grief, empathy, pain and suffering; humane use of animals for companionship, food, fibre, recreation, work, education, exhibition, and research conducted for the benefit of both humans and animals; application of a multi-dimensional approach when considering and making decisions regarding animal care, use and welfare; continuous evaluation of procedures related to animal housing, management, care and use and where necessary, refine or replace them with methods that enhance the welfare of animals; conservation and management of animal populations conducted in a humane, compassionate, socially responsible and scientifically prudent manner; a veterinary profession continuously striving to improve animal health and

⁹⁸ Animal Welfare and Protection Bill, 2019, Clause 2.

⁹⁹ Ibid, Clause 2.

¹⁰⁰ Ibid, 2019, Clause 2.

¹⁰¹ Ibid, 2019, Clause 3(1).

¹⁰² Ibid, Clause 3(2).

¹⁰³ Ibid, Clause 4.

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welfare through scientific research, education, collaboration, advocacy and legislation; and provision of a humane death to an animal where an animal is to be slaughtered for food or killed for any other lawful reason.¹⁰⁴

If enacted, the law will empower the Cabinet Secretary responsible to, in the regulations, prescribe: - mechanisms to ensure facilitation of the well-being of all animals in Kenya; and means by which all animals gazetted as wild species have their welfare guaranteed in accordance with the Act.¹⁰⁵

The proposed law seeks to establish an Advisory Committee to be known as the National Animal Welfare Advisory Committee,¹⁰⁶ whose functions shall be to carry out such mandates as may be necessary to give effect to the objects of this Act and to advise the national and county governments in relation to all aspects thereof.¹⁰⁷ In carrying out its functions, the Committee shall: monitor and report on animal welfare matters; promote co-operation among public departments, County Animal Welfare Committees, the private sector, Non-Governmental Organisations and such other organizations engaged in safeguarding of animal welfare; develop humane education programmes for animals; incorporate animal welfare in school curricula; promote awareness on animal welfare matters; ensure capacity building of County Animal Welfare Committees and other relevant government departments; and prepare annual reports on the state of animal welfare in the country.¹⁰⁸

Each county government shall establish a County Animal Welfare Committee,¹⁰⁹ whose functions shall include:- be responsible for monitoring implementation of the proposed Act; be the advisory body on matters related to the protection and welfare of animals in the county; promote the safeguarding of animal welfare by all actors in the animal resource industry in the county; be involved in the development of animal welfare information and education programmes for the public; recommend incorporation of animal welfare in school curricula; and perform such other functions as may be necessary under the Act.¹¹⁰

The proposed law also provides that a person who owns, is responsible for or is a custodian of any animal shall: - treat or cause the animal to be treated with respect and dignity; provide the animal with adequate water, feed, health-care and space; not subject the animal to, and ensure that the animal is not subjected to fear, pain, stress or any form of suffering; provide the animal with an environment appropriate to its care and use, with thoughtful consideration for the species-typical biological behaviour; while transporting or transiting the animal, maintain the animal in a manner that minimizes the possibility of injury, pain and

¹⁰⁴ Animal Welfare and Protection Bill, 2019, Clause 5(1).

¹⁰⁵ Ibid, Clause 5(2).

¹⁰⁶ Ibid, 2019, Clause 6.

¹⁰⁷ Ibid, Clause 7(1).

¹⁰⁸ Ibid, Clause 7(2).

¹⁰⁹ Ibid, Clause 10(1).

¹¹⁰ Ibid, Clause 11.

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anxiety; be accountable for anything done to, or by the animal; and where the person is a veterinary surgeon or veterinary para-professional, provide the necessary veterinary care for the animal.¹¹¹

Transportation of animals must only be done in accordance with the provisions of the proposed law.¹¹² A working animal shall not be used for work, sport, transport or any cultural event except as provided for under this Act or any other written law.¹¹³ In addition, any person who uses a working animal for sports, transport, security or any other purpose shall handle and care for the animal in a manner that does not compromise the welfare of the animal or cause the animal to suffer pain, injury, distress, anxiety, discomfort or exhaustion.¹¹⁴ Any person who uses any animal for purposes of entertainment in public or in an exhibition or show shall handle and care for the animal in a manner that does not cause pain, injury, anxiety or distress to the animal.¹¹⁵

Any person who keeps an animal under custody or confinement is required to: - provide the animal with adequate feed, water, space, area to access sunshine, fresh air and shelter; and ensure that the welfare of the animal is maintained or where necessary, improved and the animal is able to express natural behaviour.¹¹⁶

Any person keeping or in custody of a companion animal is required to ensure that its specific welfare and species needs are met.¹¹⁷

Any person who owns or operates a farm in which animals are kept is required to take all reasonable steps to ensure: - the welfare of animals under his care; and that those animals are not caused any suffering, injury or pain.¹¹⁸

All animals kept for purposes of food for human consumption must also be cared for in a manner that guarantees their welfare as stipulated under the proposed law.¹¹⁹

Regarding slaughtering of an animal for human consumption, the proposed law provides that a person should, when slaughtering an animal for human consumption, slaughter the animal in a manner that does not cause the animal pain, distress or suffering before and during slaughter.¹²⁰

A person trading in animals should handle the animal: in a responsible and humane manner; and in a manner that does not compromise the welfare of the animal or cause the animal to suffer pain, injury, distress or exhaustion.¹²¹

¹¹¹ Animal Welfare and Protection Bill, 2019, Clause 23 (1).

¹¹² *Ibid*, Clause 24 (1).

¹¹³ *Ibid*, Clause 25 (1).

¹¹⁴ *Ibid*, Clause 25 (2).

¹¹⁵ *Ibid*, Clause 25 (3).

¹¹⁶ *Ibid*, Clause 26 (2).

¹¹⁷ *Ibid*, Clause 27 (2).

¹¹⁸ *Ibid*, Clause 28(1).

¹¹⁹ *Ibid*, Clause 31.

¹²⁰ *Ibid*, Clause 32(1).

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Any person who is responsible for or is in charge of an animal that lives in water should ensure that: - the animal is kept or handled in a manner that does not cause it any form of anxiety or distress; sufficiently oxygenated water and adequate feed supply is provided to the animal; and adequate space is provided for free movement of the animal.¹²²

The Proposed law provides that No person should: - cruelly beat, kick, ill-treat, over-ride, over-drive, over-load, torture, infuriate or terrify an animal; use an animal that is diseased, injured or in such physical condition that it is unfit to be used; convey, carry, confine or impound an animal in a manner or position as to cause that animal suffering; without sufficient cause, underfeed or deny water to an animal; or being the owner of an animal, or tasked to care for an animal, without reasonable cause or excuse, abandon the animal, whether permanently or not, in circumstances likely to cause the animal suffering; being the owner of an animal, or tasked to care for an animal, keep the animal in a grossly dirty or verminous condition or, without reasonable cause or excuse, fail to procure or administer required veterinary care or attention for the animal in case of disease, injury or parturition; or wilfully, without reasonable cause or excuse, administer any poisonous, stimulant or injurious drug or substance to an animal or cause such substance to be taken by an animal; subject an animal to veterinary surgery in contravention of the Veterinary Surgeons and Veterinary Paraprofessional Act; or subject an animal to any operation, surgical interference or other treatment which is performed without due care and humanity; or being the owner of any animal, fail to have the animal humanely euthanized where the animal is so seriously injured or diseased that to prolong the animal's life would cause the animal unnecessary suffering; or hunt, kill or destroy any animal in such a manner as to cause that animal suffering; or being the owner of any animal, without reasonable cause or excuse, do or omit to do an act which causes suffering to the animal; or de-beak a bird, cut ears of a donkey or cut any other animal without direct authorization and supervision of a qualified and registered veterinarian.¹²³

The proposed law notably outlaws fighting and baiting of animals by providing that no person shall: - cause, promote or assist the fighting or baiting of an animal; keep, use, manage, act or assist in the management of, premises for the purpose, or partly for the purpose of fighting or baiting any animal, or permit any premises or place to be so kept, managed or used; receive, or cause or procure any person to receive any money for the admission of any person to any premises kept or used for the purpose, or partly used for the purpose of fighting or baiting any animal.¹²⁴

¹²¹ Animal Welfare and Protection Bill, 2019, Clause 33.

¹²² Ibid, Clause 34.

¹²³ Ibid, Clause 35(1).

¹²⁴ Ibid, Clause 36(1).

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It also prohibits use of traps to capture animals or the purpose of capturing or killing any animal except a vermin or fish.¹²⁵

Notably, the proposed law also borrows from the Penal Code to prohibit an unnatural act or bestiality with an animal of any kind.¹²⁶

The proposed law, if enacted will repeal the Prevention of Cruelty to Animals Act, Cap. 360.¹²⁷

In summary, the proposed law seeks to retain most of the offences against animals as contained in Capp 360. However, there are a few additions. The proposed law acknowledges “sentience”, that is, the capacity of an animal to experience suffering and pleasure including pain and positive emotions with a level of conscious awareness, an acknowledgement that is missing in the current Cap 360. Some countries around the world such as France, New Zealand and the Canadian province of Quebec all explicitly recognized animal sentience in their laws in 2015. Sweden and the Belgian capital of Brussels both joined the club in 2018.¹²⁸ If the 2019 proposed law on the welfare and protection of animals is enacted, Kenya would theoretically join these countries.

In addition, while Cap 360 allowed persons to abuse animals in the name of culture, the proposed law provides that cultural beliefs and cultural set-ups shall not be a defence for contravening the provisions on acts and omissions amounting to cruelty to animals.¹²⁹ The proposed law also is more detailed on animal protection and welfare and spells out more punitive measures for violation of any of the provisions therein.

However, it is worth mentioning that while the proposed law acknowledges the need to protect and take care of the welfare of the animals, it still makes room for animal resource industry and merely seeks to promote the responsible care and use of animals leading to the achievement of a reasonable balance between the welfare of animals and the interests of persons whose livelihoods depend on animals.¹³⁰ It does not therefore seek to impose a total ban on hurting animals; it merely seeks to reduce pain and suffering of animals. Notably, it also seems to retain the notion, though covertly, that, animals can be treated as property capable of ownership and owners can inflict some pain and suffering so long as they do so in accordance with the proposed law. Again, this may not sit very well with the fiercest critics of violation of animal rights in any way. It is also notable that it avoids the use of the term ‘animal rights’ and opts for the broader term ‘animal welfare’. It therefore seeks to adopt a middle ground for those who call for a total ban of any adverse dealings with animals and those who do not consider it offensive to use

¹²⁵ Animal Welfare and Protection Bill, 2019, Clause 38(1).

¹²⁶ Ibid, Clause 44.

¹²⁷ Ibid, Clause 63.

¹²⁸ Jennifer Fiala, ‘News’ [2008] VIN.com <<https://www.vin.com/doc/?id=4235063>>.

¹²⁹ Animal Welfare and Protection Bill, 2019, Clause 35 (3).

¹³⁰ Ibid, Clause 3.

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of animals to fulfil some of the human needs and rights. It is therefore understandable why the drafters settled on the more politically tolerable term ‘animal welfare’.

The proposed law also seeks to rope in county governments in recognition of the post 2010 constitutional dispensation. It also seeks to ensure that, as way of creating a culture of respect for animal rights and welfare in Kenya, the National Animal Welfare Advisory Committee develop humane education programmes for animals; incorporate animal welfare in school curricula; promote awareness on animal welfare matters.¹³¹ While some of the provisions envisaged in the proposed law may take time to enforce and implement, especially against the background of many communities’ cultural practices (for instance, fighting and baiting of animals among the Luhya community (bullfighting)), the proposed law has made great efforts at protecting the welfare of animals in Kenya.

The piece of legislation, if passed into law, would not sit well with some of the animal rights movement. This is because a number of them seek to ensure that there is: total abolition of the use of animals in science; total dissolution of commercial animal agriculture; and total elimination of commercial and sport hunting and trapping.¹³² It is thus arguable that the extent to which animal rights and welfare succeeds is highly dependent on the society in question. It is also unlikely that the African Continent and especially in Kenya will be willing to pass laws that completely outlaw the use of animals especially for food and commercial animal agriculture.

5. Animal Rights and Welfare in Kenya: The Practice

This section looks at how animal rights have been treated under the Kenyan laws. To elaborate on this, we focus on some case law as decided by the Kenyan courts.

In *Hussein Khalid and 16 others v Attorney General & 2 others [2014] eKLR*¹³³, the petitioners were charged with, inter alia, cruelty to animals contrary to Section 3(1)(c) as read with Section 3(3) of the Prevention of Cruelty to Animals Act Cap 360 Laws of Kenya. The petitioners were accused of cruel treatment of pigs in their demonstration against the Members of Parliament. In this particular constitutional petition, the petitioners sought orders to quash the decision to charge them under criminal law for the alleged cruelty against animals under *Criminal Case No.685 of 2013 (R V William Omondi and 16 Others*. The Court however declined to do so.¹³⁴

¹³¹ Animal Welfare and Protection Bill, 2019, Clause 7.

¹³² Tom Regan, ‘The Case for Animal Rights’ < <https://www.tier-im-fokus.ch/wp-content/uploads/2009/09/regan85.pdf>> 23 July 2020.

¹³³ Hussein Khalid and 16 others v Attorney General & 2 others [2014] eKLR, Petition 324 of 2013.

¹³⁴ Notably, the matter was appealed all the way to the *Supreme Court of Kenya vide Hussein Khalid And 16 others v Attorney General & 2 others [2019] eKLR*, Petition 21 of 2017, but the same was disallowed.

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In *May v Republic [1979] eKLR*¹³⁵, the Appellant was convicted in a Resident Magistrate's court at Nairobi on four counts charging offences under the Prevention of Cruelty to Animals Act (Cap 360). She appealed unsuccessfully to the High Court and then brought a second appeal to the Court of Appeal for East Africa. The appellant ran a business known as "Amber May Safaris", and in connection with that business she owned some fifty horses, twelve mules and six zebroids which she kept on land owned or occupied by her at Nanyuki. She also kept four dogs there. Apparently the appellant left Kenya early in July, 1978, for a holiday in Europe, and returned later in the year. During her absence, these animals were neglected and suffered greatly and the matter was reported to the Kenya Society for the Protection and Care of Animals, who caused the animals to be inspected by their Nanyuki representative and by the District Veterinary Officer for Laikipia. As a result of what they reported, the Society obtained a custody order under Section 26 of the Act and in pursuance of the custody order, all the equine animals were removed to the Nanyuki Sports Centre, where there was some grazing, except for five horses and one mule which were in such an under-nourished and generally poor condition that they had to be destroyed on the spot. Two of these animals appeared to have been slashed with pangas. Of the remaining horses, twenty were in a very poor condition due to underfeeding. The dogs were also in a deplorable condition. Two were taken to Nairobi for veterinary treatment.

The offences with which the appellant was charged were as follows: doing an act which amounts to cruelty contrary to Section 3(1) of the Act, in that being the owner of twenty horses, without sufficient cause she underfed the said horses; abandoning animals contrary to Section 3(1) (e) of the Act, in that being the owner of the animals already referred to, without reasonable cause or excuse, she abandoned the said animals in circumstances likely to cause them unnecessary suffering; failing to procure veterinary treatment, contrary to Section 3(1) (f) of the Act, without reasonable cause or excuse; and, keeping animals in a verminous condition, contrary to Section 3(1) (f) of the Act, without reasonable cause or excuse. Her appeal was however dismissed.

In *Joseph Wanjogu Kungu v Republic [2005] eKLR*¹³⁶, the appellant, Joseph Wanjogu Kungu, was charged with the offence of being cruel to an animal contrary to Section 3(1)(K) of the Prevention of Cruelty to Animals Act (Cap 360 of the Laws of Kenya). The particulars of the offence were that on 18th of January 2000 at Nyandarua Farm, Nakuru the appellant was found being cruel to an animal, namely a dog by killing it, the property of Christopher Njoroge Kimani. At the lower court trial, the appellant had been found guilty as charged and was sentenced to pay a fine of Kshs 300/= or in default he was to serve one month's imprisonment. The Court of Appeal found that the appeal filed by the appellant had merit

¹³⁵ *May v Republic [1979] eKLR*, Criminal Appeal 24 of 1979.

¹³⁶ *Joseph Wanjogu Kungu v Republic [2005] eKLR*, Criminal Appeal 160 of 2000.

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and the same was allowed. The conviction of the appellant was quashed, the sentence imposed set aside and the fine paid by the appellant was ordered to be refunded.

Despite the laws outlined in the previous section, Kenyans continue with the outlawed dealings in animals unperturbed. For instance, the Luhya community takes great pride in bull fighting, a practice that is expressly outlawed in not only Cap 360, but also in the proposed bill. This therefore poses the risk of a direct confrontation between authorities' efforts on welfare and animal protection and culture.

There are hardly tangible reported cases of successful prosecution of cases involving violation of animal rights in Kenya for one to draw a conclusion on the country's jurisprudence on the rights and welfare of animals. It is however clear based on the laws in force and even the proposed legislation that Kenya opts for animal welfare rather than rights, which approach allows one to use animals to meet their needs while minimising the suffering and pain caused to these animals while fulfilling such needs.

6. Animal Rights versus Animal Welfare: Which way to go

Animal rights supporters believe that it is morally wrong to use or exploit animals in any way and that human beings should not do so.¹³⁷ On the other hand, animal welfare supporters believe that it can be morally acceptable for human beings to use or exploit animals, as long as: the suffering of the animals is either eliminated or reduced to the minimum and there is no practicable way of achieving the same end without using animals.¹³⁸ The debate, therefore, is whether animals should be used or exploited at all on the one hand, or how the animals should be used and exploited while reducing pain and suffering, on the other hand. It thus follows that any country's laws fall under either of the two approaches.

Kenya's laws on the protection of animals seem to lean more towards animal welfare, that is, the state of the animal and how it is coping with the conditions in which it lives including good health, comfort, good nourishment, safety, ability to express innate behavior and freedom from suffering from unpleasant states such as pain, fear or distress.

The various laws highlighted above almost all seem to leave some room for subjecting animals to the unpleasant states such as pain, fear and distress. The proposed law seems to qualify every allowable scenario in hurting animals to carrying out everything according to the law.

It is arguable that while the international community and some of the hardliners in animal rights debate seem to advocate for total ban of animal resource industry and all other forms of cruelty to animals, Kenya may not yet get there. This is because Kenyan communities are still highly dependent on animal resources for their livelihoods. Banning the use of animal products may therefore not work. It is also

¹³⁷ 'BBC - Ethics - Animal Ethics: Introduction to Animal Rights'
<<http://www.bbc.co.uk/ethics/animals/rights/introduction.shtml>> accessed 25 July 2020.

¹³⁸ Ibid.

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worth mentioning that the animal resource industry is also a huge source of income for the Government of Kenya and this may therefore create a disincentive to criminalize the use of animal resources, with certain exceptions such as the wildlife, which, again, is a source of income for the Government.

The biodiversity and the ecosystem which include the relationship between the animals and their environment, as envisaged under EMCA, are also important for the survival of humankind. It is therefore in the best interests of the humankind that these resources are protected and their welfare guaranteed. The debate at which animals should have rights or even have their welfare taken care of is also relevant.¹³⁹

However, all animals regardless of their size should have their welfare protected. It should not only be the domesticated animals or the bigger wild animals. Even the smaller animals form part of the biodiversity and are relevant to the health of the ecosystem.¹⁴⁰ The Smaller animals especially those that act as pollinators have an important role to play in crop and food production as well as realisation of the sustainable development agenda.¹⁴¹ It is therefore imperative that whichever approach is adopted, whether towards absolute protection of animal rights or the more flexible animal welfare approach, all animals should be included, whether large or small since they all indirectly contribute to the wellbeing of the ecosystem or the wellbeing of human beings. This approach would entail incorporating both ecocentric and anthropocentric approaches. The anthropocentric approach would entail enlightened self-interest where the main goal is to preserve a healthy natural world for the purpose of commerce, aesthetics, and human health, while the ecocentric one places moral value at the level of whole systems and ecosystems.¹⁴²

7. Conclusion

The debate on animal rights is not about to come to an end. There are two contradictory movements, those for absolute protection of animals and their rights and the consequent banning of all uses and exploitation of animals for human self-interests, and those who advocate for the welfare of animals which would allow the use and exploitation of animals as long as the animals are treated in a humane way while doing so. This paper has analysed the Kenyan law on animal welfare and rights and concluded that the same adopts a welfare approach as opposed to the strict animal rights protection one.

¹³⁹ 'BBC - Ethics - Animal Ethics: Introduction to Animal Rights'
<<http://www.bbc.co.uk/ethics/animals/rights/introduction.shtml>> accessed 25 July 2020.

¹⁴⁰ Muigua K. "The Neglected Link: Safeguarding Pollinators for Sustainable Development in Kenya." *Journal of cmsd*. 2017;1(2):72-96.

¹⁴¹ *Ibid*, p. 92.

¹⁴² David A Fennell and Valerie Sheppard, 'Tourism, Animals and the Scales of Justice' [2020] *Journal of Sustainable Tourism* 1.

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