

# **WHAT WAS LEFT UNSAID: THE UNCONSTITUTIONALITY OF THE PERFORMING ANIMALS PROTECTION ACT IN *NSPCA V MINISTER OF AGRICULTURE, FORESTRY AND FISHERIES* [2013] ZACC 26**

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## **1. INTRODUCTION**

It is rare for cases concerning animal welfare legislation to reach the Constitutional Court. The case of *NSPCA v Minister of Agriculture, Forestry and Fisheries* (*'NSPCA case'*)<sup>2</sup> is therefore notable in that the constitutionality of sections of the Performing Animals Protection Act 24 of 1935 (*'PAPA'*) was placed under scrutiny. Even more importantly, two sections of the Act, which could be regarded as its heart and soul were declared unconstitutional. The Constitutional Court has effectively placed the government now on terms to require a revision of, at least, this piece of legislation.

In this note, I wish to consider the judgment of the Constitutional Court from a perspective that is concerned with the welfare of animals.<sup>3</sup> This may seem

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<sup>2</sup> [2013] ZACC 26

<sup>3</sup> I choose to use the term 'welfare' for a variety of reasons. First, it is a broad term and can encompass a concern for animals from a variety of perspectives. Secondly, in my view, animal welfare and rights views rest on a continuum and my usage of 'welfare' in this context is meant to be indifferent between these perspectives (though there can be a tension between them). Thirdly, the references in South African law thus far are to the prevention of cruelty to animals which fits better with a notion of animal 'welfare'. I have argued though in the past that such laws do in fact grant certain rights to animals: see D. Bilchitz 'Moving Beyond Arbitrariness: the Legal Personhood and Dignity of Non-Human Animals' (2009) 25 *SAJHR* 48-49.

surprising as the judgment itself says nothing about animal welfare and is focused mainly on the separation of powers; it is this very omission, however, that will be the focus of my analysis. In the first section, I consider the scheme of the PAPA as well as the reasoning of the Constitutional Court. The second section involves a critical evaluation of the reasoning of the Court. I seek to show how its conclusions relating to separation of powers required some engagement with the particular subject matter of this legislation – the protection of animals. The omission to engage with the issue of animal welfare highlights a significant gap in the reasoning of the court. The gap, implicitly, indicates troubling ideological assumptions concerning animals that appear to have been made by the court. In section three, I seek to consider how the court’s judgment could have been reconstructed in a manner that would have been more justifiable and embraced a more progressive approach towards animals. Whilst the court’s ultimate conclusion was justifiable, a different process of reasoning would have been preferable. The fourth and final part of this paper brings a case from India which also concerned performing animals in circuses as a contrast. I attempt to demonstrate the substantive, compassionate reasoning embodied in that case which provides an important counterpoint to the rather disconnected, formalist reasoning of our own court. The conclusion indicates that the court’s judgment has indeed finally required a revision of animal welfare legislation by the government. The discussion in this note is used to provide a guide to how some of the core issues facing legislators should be addressed.

## 2. THE PAPA AND THE JUDGMENT

The case concerned an application by the National Society for the Prevention of Cruelty to Animals ('NSPCA') to have sections of the PAPA declared unconstitutional. The PAPA seeks to regulate and govern a particular sub-set of the human engagement with animals, namely, the 'exhibition or training of performing animals and the use of dogs for safeguarding'.<sup>4</sup> To 'exhibit' an animal is defined as exposing it for show 'at any entertainment to which the public are admitted, whether for payment of money or otherwise'.<sup>5</sup> The basic condition placed upon anyone seeking to use animals for performance is that they apply for and receive a license.<sup>6</sup> Importantly, for this case, it is magistrates who are empowered in terms of the Act to grant or refuse such licenses.

Section 2 provides that a person who wishes to exhibit or train for exhibition any animal (or use dogs for safeguarding) must apply for a license to the magistrate in the district in question. The magistrate must grant the license provided s/he is satisfied that the person in question is a fit and proper person. The license lasts for one calendar year and a magistrate is empowered to refuse to renew a license if there is 'good and sufficient reason' (which is not further specified). The Act authorizes the Minister to develop a prescribed form for the application and allows the Minister to add further conditions for the granting of such a license.

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<sup>4</sup> PAPA, long title.

<sup>5</sup> *Ibid* s 11.

<sup>6</sup> *Ibid* s 1.

The regulations that were passed in terms of the PAPA add a requirement that an application for a license be accompanied by a report by the district police commissioner regarding the applicant's fitness to be a licensee<sup>7</sup> and the payment of a small fee. They also allow a magistrate to request all available information concerning the licensee from local animal organizations as well as information concerning the type of animal in respect of which the license is applied for in order to decide whether to grant the application.<sup>8</sup> The regulations also require that if wild or vicious animals are trained, the licensee must take the steps necessary to keep the animals under control.<sup>9</sup> They also prohibit the use of an animal for exhibition, training or safeguarding where that animal is suffering from a disease or injury.<sup>10</sup>

Section 3 of the PAPA provides that a license-holder may only conduct the activities regulated in the Act upon being granted a certificate by the magistrate in the district. The certificate must specify the form of training, exhibition or use of the animals in question that is permitted and various provisions allow for the amendment of the certificate.<sup>11</sup>

The main issue under consideration in this case was whether or not the assignment to magistrates of the power to decide on applications for licenses and certificates concerning animal training and exhibition was consistent with the

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<sup>7</sup> Regulations GNR 1672 (1 September 1993) s 2(2)(b).

<sup>8</sup> *Ibid* s 2(3).

<sup>9</sup> *Ibid* s 3 (2).

<sup>10</sup> *Ibid* s 3(3).

<sup>11</sup> PAPA s 3(3) and 3(4).

doctrine of the separation of powers. The High Court found that the ‘functions of issuing of licenses and certificates as envisaged in sections 2 and 3 are executive or administrative functions which have nothing to do with the core judicial functions of magistrates’.<sup>12</sup> These provisions therefore violated the separation of powers enshrined in the Constitution and were, therefore, unconstitutional. Legodi J ordered that they be revised by parliament within six months. He also made an interim order in which he created a committee to exercise the licensing function temporarily (pending confirmation of his judgment and the defect being cured) that would include an expert team comprising animal welfare experts from the NSPCA and Veterinary Council as well as members of the Ministry of Agriculture.<sup>13</sup>

The judgment then went to the Constitutional Court for confirmation. The Court used the opportunity to engage in some detail with the separation of powers doctrine and to summarize some of the key elements of the doctrine that have emerged in the jurisprudence of the court thus far. It went rather extensively through the key cases that have been decided up until this point and summarized the circumstances under which a magistrate may be permitted to perform an administrative function.<sup>14</sup> The court concluded that an appropriate approach would need to take into account various considerations:

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<sup>12</sup> *National Society for the Prevention of Cruelty to Animals v Minister of Agriculture, Forestry and Fisheries* [2012] ZAGPPHC 329 (‘NSPCA High Court’) para 27.

<sup>13</sup> *Ibid* para 46.

<sup>14</sup> NSPCA case (note 1 above) para 36.

‘Although it must be based upon an acceptance of the reality that our model of separation of powers is not one that requires a complete or total separation and that it permits the performance of some non-judicial functions by the Judiciary, it must be an approach that promotes rather than dilutes the principle of the separation of powers and the independence of the judiciary’.<sup>15</sup>

The court then went on to develop a series of questions (which can be understood to be a test) to determine whether the performance by a member of the judiciary offends the separation of powers as follows:

- (a) Whether the function is a non-judicial function. If it is a judicial function, then there is no separation of powers problem;
- (b) Whether the performance of the non-judicial function by the judiciary is expressly provided for in the Constitution. If so, there can be no separation of powers problem;
- (c) Whether the performance of the non-judicial function is closely connected to a core function of the judiciary. If it is, then there is no separation of powers problem;
- (d) Whether there is any compelling reason why a non-judicial function of this kind should be performed by a member of the judiciary and not a member of the executive. If there is no good reason, then the separation of powers is offended.<sup>16</sup>

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<sup>15</sup> Ibid para 37.

<sup>16</sup> Ibid. para 38. This is a summary of the requirements outlined by the court.

The main enquiry in this particular case was whether or not question (d) could be answered adequately as the power in the PAPA did not fall into any of the other categories. Zondo J (writing on behalf of a unanimous court) could not find any good reason why a magistrate should perform the licensing functions granted to them in the PAPA. The central reasoning that led to this conclusion is included in the following paragraph which will be further analysed below:

‘I do not see why, if, for example a non-judicial body or officer can be given the power to issue casino or liquor licenses, a judicial officer such as a Magistrate should be assigned the function of issuing animal training and exhibition licenses. If we were to hold that it accords with this country’s model of separation of powers for a statutory provision to require a member of the Judiciary to issue animal training and exhibition licenses and that does not offend the separation of powers, where will the requirement for the performance of administrative functions by Magistrate’s stop?’<sup>17</sup>

This reasoning leads the court to find that the separation of powers doctrine was violated by the PAPA and the provisions in question were declared unconstitutional. The court gave parliament 18 months to cure the defect but suspended the declaration of validity to allow the existing provisions to continue to operate pending the required revisions.

### *3. WHAT WAS LEFT UNSAID: A CRITICAL EVALUATION OF THE JUDGMENT*

This case is the first in which animal welfare legislation has been reviewed by the Constitutional Court in the new democratic era. Yet, the judgment completely ignores this fact or the real subject matter of the dispute. Indeed, underlying the

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<sup>17</sup> Ibid para 39.

arguments relating to the separation of powers, was clearly a substantive dispute between the parties concerning the protections to be afforded to animals. The NSPCA is itself a body specifically set up by statute to protect animals and, it can thus reasonably be inferred, that its decision to bring this case to court related to the fact that the provisions of the Act were offering little protection for performing animals. Magistrates anywhere in the country were empowered to grant such licenses and very little guidance is provided in the law as to the factors that must be taken into account in doing so. Support for this inference can be gleaned from the request in the papers that the NSPCA be granted the power to decide about license applications in relation to performing animals.<sup>18</sup> Presumably, this was because of a concern that had arisen in practice concerning the issuing of licenses by magistrates in this regard. The Minister of Agriculture's submission also recognized the need for 'expertise' in deciding on matters relating to license permits regarding performing animals.<sup>19</sup>

Interestingly, those opposing the order were the Licensed Animal Trainers Association which is the industry association of those who train or exhibit animals or use dogs for safeguarding. The order was also opposed by the Commercial Producers Association which is an association of commercial film producers which produce marketing or advertising campaigns for television or cinema and the South African Association of Stills Producers who produce adverts for use in the print media. Clearly, performing animals are used by all these bodies: it is not entirely clear why they opposed the order, but, a reasonable inference would be

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<sup>18</sup> NSPCA High Court para 28.

<sup>19</sup> Ibid para 39.



that the current regime worked reasonably well for them in acquiring licenses and they were concerned about a stricter regime replacing it.

Despite the fact that there clearly was an underlying dispute concerning the protection of animals, it could be objected that courts must only address the arguments presented to them. The case was argued on the basis of the separation of powers and, therefore, there was no need for the constitutional court to address any issues relating to animal welfare. I agree with the contention that the court was entitled to avoid animal welfare arguments if this were not relevant to the main basis of the constitutional challenge. However, as I shall show, the judgment of court could not coherently avoid questions of animal welfare in reaching its conclusions concerning the separation of powers.

The Court ultimately ruled that there was no good reason why magistrates (as part of the judiciary) should exercise the licensing functions granted to them in the PAPA. In order to make out that case, it is necessary to engage in some detail with the reasons provided by the court in reaching this conclusion. The first line of reasoning provided by the court was to make an argument by analogy. The court's argument can be captured in the following syllogism:

- (a) Non-judicial bodies are tasked with deciding upon whether to issue casino or liquor licenses;
- (b) There is no relevant difference between such licenses and licenses relating to animal training and exhibition;

(c) Therefore, there is no good reason for the judiciary (and every reason for non-judicial bodies) to be tasked with deciding upon the issuing of licenses relating to the exhibition and training of performing animals.

The problem with this argument lies in the second premise: the court provides no reason to support this proposition and simply assumes it to be the case. Yet, the question arises whether licenses relating to casinos and liquor are really analogous to those concerning the exhibition and training of performing animals? When the question is raised in this manner, there are some obvious points of dissimilarity: licenses under the PAPA relate to an extremely vulnerable group of creatures (non-human animals) who are often the subject of terrible abuse when required to perform in these industries.<sup>20</sup> The license system is a mechanism for ‘protecting’ performing animals as is indicated by the title of the Act itself. Licenses under the PAPA relate to protecting vulnerable sentient creatures from harm by very powerful owners. Moreover, the needs and capacities of these animals require detailed understanding and knowledge.

These elements are distinguishable from licenses relating to casinos and liquor. These licenses regulate industries that do often lead to social problems: however, regulation in this area importantly governs practices that are engaged in by human beings who have the choice whether to do so or not. Regulation in this

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<sup>20</sup> See, for example, the recent reports and mobile footage of the abuse of elephants by the Brian Boswell Circus in April 2013 at <http://www.news24.com/SouthAfrica/News/Circus-charged-after-elephant-abuse-video-20130416> and <http://www.iol.co.za/news/crime-courts/charges-laid-against-circus-for-cruelty-1.1501806>.

area rather involves protecting human beings from harming themselves (having a paternalistic justification). Gambling and alcohol abuse can, of course, also create harms to others but the licensing system in and of itself is not designed to address these harms. The licensing of liquor outlets places certain restrictions on who may sell alcohol and the times and places where it is available; it does not restrict how much alcohol an individual consumer can buy or require any checks as to whether alcohol leads to reckless or violent behavior on the part of a particular person. Given these dissimilarities, it could well be argued that a different regime would be justifiable for licenses granted in relation to performing animals and those relating to casinos and liquor.

The second argument provided by the court is a type of *reductio ad absurdum*. The court argues that if a power as basic as granting licenses to train and exhibit animals can be granted to the judiciary and is consistent with the separation of powers regime in South Africa, then it is unclear whether there will be any administrative function that can justifiably be excluded from the ambit of activities to be performed by the judiciary. The court here seems to assume that this power is a very basic administrative power and that, in fact, it cannot be distinguished in any meaningful way from the wide range of administrative functions that can be conceived.

Yet, again, however, it may be argued in response that in fact the licensing power in this case concerns a very important and grave matter: it relates to the protection of creatures that have deep needs and capacities and may be the subject to strong abuse in the entertainment world. As such, there could be a justifiable distinction drawn between other administrative powers and the

granting of licenses in these cases. Cameron J, in a minority judgment in 2008, recognized that animal welfare statutes recognise that animals,

‘are sentient beings that are capable of suffering and of experiencing pain.

And they recognise that, regrettably, humans are capable of inflicting

suffering on animals and causing them pain. The statutes thus acknowledge the need for

animals to be protected from human ill-treatment.’<sup>21</sup>

It thus could be argued that it would be wholly appropriate for courts to exercise the licensing power in the PAPA which should be focused on protecting the vulnerable.

The fact that the Constitutional Court reasoned so thinly and failed to address these (rather obvious) arguments does appear in itself to speak volumes. The Court in fact saw the matter as purely one of licensing: the protection of performing animals was no different from the regulation of casinos and liquor. Underlying this view, I would contend, is an assumption deeply rooted in our common law tradition that animals are ‘things’ or ‘legal objects’ and not ‘persons’ or ‘legal subjects’ and so can be treated in a similar way to other ‘things’ or ‘legal objects’.<sup>22</sup> Yet, it is deeply disappointing to see the Constitutional Court uncritically accepting this common law tradition. Indeed, the Constitutional order requires us to reflect on common law categories which may no longer be

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<sup>21</sup> *NCSPCA v Openshaw* (462/07) [2008] ZASCA 78 (RSA)

<sup>22</sup> J Sinclair ‘Introduction’ in B Van Heerden et al *Boberg’s Law of Person and the Family* 2 ed (1999) 3. I have criticized the way this distinction has been drawn in the common law in Bilchitz (note 3 above) 41-50.

justifiable.<sup>23</sup> Its ethos pushes us in the direction of a more caring society that takes account of the needs of the most vulnerable.<sup>24</sup> In relation to animals, this requires our recognition of their particularities and vulnerabilities which require particular institutional and substantive responses in the law. By failing to engage with the sensitive and difficult subject matter with which this case was concerned, the Constitutional Court not only reasoned poorly but did a disservice to the new constitutional order it is developing.

#### 4. *WHAT THE COURT SHOULD HAVE SAID: RECONSTRUCTING THE COURT'S REASONING*

We have seen that the conclusion the court wished to draw is not adequately supported by its reasoning. If this is so, was the conclusion the court reached nevertheless wrong, namely, that magistrates should not be granted the powers to issue licenses and certificates concerning performing animals?

In my view, the PAPA as an Act is problematic as a whole. The welfare of performing animals appears to be the purpose of the Act and its very title suggests its goal is protecting performing animals. However, there is very little detail as to what is required in order to be involved in exhibiting or training performing animals as well as the harms that animals are to be protected against

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<sup>23</sup> The Constitution itself requires the development of the common law in light of the new Constitutional order (section 39(2)). It also prohibits the arbitrary exercise of state power (see *Merafong Demarcation Forum v President of the Republic of South Africa* 2008 (5) SA 171 (CC) para 62): treating animals simply as 'things' could be regarded as arbitrary – see Bilchitz *ibid*.

<sup>24</sup> Famously, in *S v Makwanyane* 1995 (3) SA 391 (CC) para 88, Justice Chaskalson said that 'it is only if there is a willingness to protect the worst and the weakest amongst us, that all of us can be secure that our own rights will be protected'. Mahomed CJ also stated in that judgment para 262 that the Constitution commits us to a 'democratic, universalistic, caring and aspirationally egalitarian ethos'.

in these industries. The Act is also meant to govern two rather disparate areas: the exhibition and training of animals and the keeping of dogs for safeguarding. The Act vaguely requires proof that a person is fit and proper to receive a license without clarity as to what forms of evidence would allow for a negative finding by a magistrate. It also focuses, particularly, on the trainer's credentials rather than on what the performance or exhibition inherently involves. Thus, it could be argued that, for many types of animals, their exhibition and training is inherently cruel and should not be allowed. Elephants, for instance, are highly intelligent and social creatures; they would never naturally perform in a circus, for instance, and training methods usually involve a large degree of cruelty. The same is true with tigers and lions.<sup>25</sup> Arguably, any attempt to acquire a license under the Act to exhibit such creatures should be refused on welfare grounds – yet, the Act is unclear whether performances and exhibitions by these animals is permissible. Discretion is therefore provided to the magistrates with very little guidance as to how it is to be exercised.

The Constitutional Court has previously held in the *Dawood* case that '[i]t is an important principle of the rule of law that rules be stated in a clear and accessible manner...if broad discretionary powers contain no express constraints, those who are affected by the exercise of the broad discretionary powers will not know what is relevant to the exercise of those powers or in what circumstances they are entitled to seek relief from an adverse decision'.<sup>26</sup> An unguided discretion such as

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<sup>25</sup> See the Indian government's report referred to in *NR Nair v Union of India* AIR 2000 KERALA 340 (Kerala High Court) ('*Nair Kerala case*') and the cruel treatment referred to below in the discussion of that case.

<sup>26</sup> *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) para.47.

that contained in the PAPA fails to meet basic rule of law requirements that any law must pass. The current provisions of the Act could thus, I would argue, have been impugned on the grounds that they fail adequately to provide guidance as to the factors that must be taken into account in deciding on any application for a license or its renewal.

If the welfare of animals is to be a central concern in determining whether licenses are granted, a number of important factors would need to be considered. First, there would need to be clarity as to the nature of the exhibition or training activity that an animal is being subjected to. The methods of training that are to be employed must also be considered and whether they are consistent with animal welfare. Secondly, it would be important to have an understanding of the animal in question, its biology, psychology and needs. Thirdly, both the previous factors would lead to an evaluation as to whether the training or exhibition activity would cause harm to the welfare of the animal inherently. If so, it should be prohibited. If not, then the fourth and final element must be considered: namely, what conditions are necessary in order to ensure that the welfare of animals is protected in these activities. Parties applying for the license would need to provide detailed evidence as to how the welfare of the animals would be provided for in these activities. Other factors not directly relating to the welfare of animals such as the protection of the public from dangerous animals would also be relevant.

Placing the welfare of animals at the forefront of a determination as to whether to grant a license in relation to performing animals then leads, importantly, to the question as to which branch of government would be best placed to conduct

these enquiries and, to provide, significant protection to these animals. This enquiry cannot simply be dismissed in the manner that the Constitutional Court approaches the matter. The courts have special inherent powers to protect children as their upper guardian – should a similar inherent power be developed in relation to non-human animals? Whilst courts are often entrusted with protecting the vulnerable, in this case, I would argue that the power of granting licenses in relation to performing animals would be better housed in a body set up by the executive specifically to address this issue.

The reason for this is that the factors outlined above for determining whether to grant a license are not simple and require detailed attention by experts. The protection of animal welfare is really in its infancy in the courts as this case demonstrates. The legislature has also recognized the need to set up a special statutory body, the NSPCA, to protect animals.<sup>27</sup> As such, it would make sense for the executive to set up a committee of experts – many of whom should be experts in animal welfare and behavior - who would be tasked with considering the compatibility of the performance activity with animal welfare. Some training activities for dogs, for instance, are often not cruel and can in fact enhance the welfare of these animals, providing them with stimulation and interest in their environment. Other forms of performance activity may never be compatible with animal welfare and, some may only be permissible under very particular circumstances. In order to attain clarity in this regard, and improve protections for animals, a special committee housed in the executive would be best placed to

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<sup>27</sup> The National Council of the SPCA is set up in terms of the Society for the Prevention of Cruelty to Animals Act 169 of 1993 ('SPCA Act').



make these decisions. Legislation or regulations should also (as indicated above) provide further guidance as to the factors that must be considered by this committee.

The Constitutional Court thus reached the right conclusion, in my view, though, its reasoning leaves much to be desired. Its pithy argumentation and lack of concern for animal welfare in the case also resulted in a poor interim order. Instead of seeking evidence as to the working of the current system for protecting animals, the Court simply allows the current provisions to continue in operation for 18 months pending changes to the legislation being made by parliament. This order was consistent with the court not really considering the interests of the animals - or whether the current system had major deficiencies in realizing the objectives of the Act - but simply conceiving of the matter as a simple 'licensing' issue. Allowing a situation to continue where any magistrate in the country – no matter their expertise - has an unguided discretion to grant licenses affecting the very lives and well-being of sentient creatures is a dereliction of the Court's duty to uphold the purpose behind this legislation and the important ethos underlying the new constitutional order that the vulnerable must be protected.

The High Court indeed appeared to take the matter more seriously by worrying about how the interim arrangements should be governed: the interim order that was granted was consistent with the argument I have made, namely, that an expert committee needs to be constituted to make these decisions.<sup>28</sup> The High Court also recognized the urgency of a change in this regard, ordering the

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<sup>28</sup> NSPCA High Court para 46.4.

legislation to be amended within 6 months.<sup>29</sup> It is thus a great pity that the Constitutional Court's order demonstrates such a disregard for the possible concrete implications of the current system for animals.

##### 5. *THE COURTS, INDIA AND PERFORMING ANIMALS: A COMPARISON*

It is instructive to consider as a contrast a case brought in India - under similar legislation to our own PAPA - relating to the treatment of animals in circuses.<sup>30</sup> The case concerned a challenge to the constitutionality of a regulation by the Indian government banning the training and exhibition of five animals: bears, monkeys, tigers, panthers and lions after this was recommended by an expert committee.<sup>31</sup>

The court's reasoning is instructive in this case. It looked at detailed evidence provided by animal welfare groups to the government as to the suffering involved in training animals (particularly for circuses) of this kind. Some of this evidence is indeed entirely shocking. The court quotes a well-known trainer Van Amburgn, saying that '[t]he subduing of wild beasts is merely the result of merciless thrashing while they are young'<sup>32</sup>. Alfred Court, also a reputed trainer speaks of the most shocking treatment meted out against animals: 'it was my turn to be brutal, terribly brutal and I was ...All the clubs I had left in the cage were broken one by one on the tiger's head; lashes came down like an avalanche, each cutting

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<sup>29</sup> Ibid para 46.3.

<sup>30</sup> *Nair Kerala* case (note 23 above).

<sup>31</sup> Initially, dogs were included in the ban but this was later withdrawn.

<sup>32</sup> *Nair Kerala* case (note 23 above) para 4.

deep into the tiger's shining coat'.<sup>33</sup> The court thus found that the government had made a justifiable decision based on relevant materials.

The court also considered an argument that the impugned provision is unnecessarily discriminatory between animals kept in circuses and zoos. This argument was dismissed by the Court in a very interesting way, which contended that circuses and zoos are wholly distinguishable. First, the function of circuses is as a business purely for profit; whereas zoos seek to perform educational and conservation work.<sup>34</sup> Secondly, the impact on the animals is different: whilst zoos involve seizure of animals from the wild and translocation, circuses involve these elements plus continued training, performance and transportation which is very invasive for the animals. Circuses have no regard to animals' natural needs to settle down, to have a place to roam and to avoid being stared at. Instead, animals are subjected frequently to very frightening loud audiences and music. The court states that 'circuses using wild animals have become an anachronism'.<sup>35</sup> Importantly, the argument was also made that stopping the use of these animals in circuses would infringe the right of the circus owners to carry on their trade or business in terms of the Indian Constitution (article 19(1)(g)).<sup>36</sup> The court's response again is instructive: '[n]o person has any right, much less a fundamental right to carry on a trade or business which results in infliction of unnecessary pain

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<sup>33</sup> Ibid.

<sup>34</sup> Ibid para 6.

<sup>35</sup> Ibid.

<sup>36</sup> South African has an analogous right in section 22 of the Constitution.

or suffering nor a right to carry on a trade or business in an activity which has been declared by law as an offence'.<sup>37</sup> Thus, the fundamental right to trade could not be held to be violated in this instance, or if it was, the limitation would have been regarded as justifiable.

The court in a concluding passage makes far-reaching comments about the treatment of animals which are important to reproduce:

In conclusion, we hold that circus animals are being forced to perform unnatural tricks, are housed in cramped cages, subjected to fear, hunger, pain, not to mention the undignified way of life they have to live with no respite and the impugned notification has been issued in conformity with the changing scenario, values of human life, philosophy of the Constitution, prevailing conditions and the surrounding circumstances to prevent the infliction of unnecessary pain or suffering on animals. Though not homosapiens, they are also beings entitled to dignified existences and humane treatment sans cruelty and torture... Therefore, it is not only our fundamental duty to show compassion to our animal friends, but also to recognise and protect their rights. In this context, we may ask why not our educational institutions offer a course on "Animal Rights Law" with an emphasis on fundamental rights as has been done by the Harvard Law School recently. If humans are entitled to fundamental rights, why not animals'? In our considered opinion; legal rights shall not be the exclusive preserve of the humans which has to be extended beyond people thereby dismantling the thick legal wall with humans all on one side and all non-human animals on the other side. While the law

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<sup>37</sup> *Nair Kerala* case (note 23 above) para 8.

currently protects wild life and endangered species from extinction, animals are denied rights, an anachronism which must necessarily change.<sup>38</sup>

The court thus dismissed the petition in question which was taken on appeal to the Supreme Court of India.<sup>39</sup> The judgment in the Supreme Court is short but it renders the protection of animals central to its reasoning. The Supreme Court recognizes that the very purpose of the Act was to prevent unnecessary suffering or cruelty being caused to animals and the central government was entitled to intervene to prevent this from happening. The Court was also satisfied that the government had not acted irresponsibly and had taken into account all relevant evidence and taken guidance from an expert committee.

This Indian case was clearly different to the challenge in the NSPCA case. The Indian case related to a particular regulation banning the training of particular animals in terms of their equivalent of our PAPA. The reasoning of the two court decisions is instructive though: first, they tackle squarely the questions relating to animal protection raised by the cases in question and take their role in this regard seriously. Secondly, there is a recognition of the need for expertise to address the question of how to address the welfare of performing animals and deference is given to the executive in this regard which had constituted an expert committee to advise on these issues. Such reasoning would support my argument that the granting of licenses in relation to performing animals should be done by an expert

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<sup>38</sup> Ibid para 13.

<sup>39</sup> See *NR Nair v Union of India* AIR 2001 SUPREME COURT 2337 (Supreme Court of India) (*'Nair Supreme Court case*).

committee constituted by the executive. Thirdly, the court importantly recognizes that animal welfare may be a good reason to restrict commercial trade or interests. This is a vital issue in providing protection to performing animals, and animals more generally.

#### *6. Conclusion: Towards Future Legislation for Performing Animals*

Though the cases are different in nature, the Indian decision represents a shining example of courts taking their responsibility to animals seriously. In South Africa, sadly, the Constitutional Court did not make any lasting pronouncements that could aid animals in future litigation. They did, however, for separation of powers reasons, force parliament and the executive to amend the PAPA within the next 18 months. That is in itself a significant development given that, for several years now, the Ministry of Agriculture has been suggesting that animal welfare legislation will be reviewed. Yet nothing has happened. For the first time, the executive and parliament now have a time period within which they have to amend at least the PAPA legislation. It is not clear whether the government will respond by solely amending the PAPA or seek also to re-draft the Animal Protection Act. Either way, there will in the near future be a significant revision to the legal framework governing animal welfare in South Africa. In conclusion, I shall consider some of issues discussed in this note which should be addressed in a revised PAPA.

First, any new legislation needs to place animal welfare for performing animals at its core. In doing so, the scientific understanding of animal welfare needs to be incorporated into the Act, recognising that welfare is a vector that includes

multiple dimensions.<sup>40</sup> These include the physical, emotional and psychological well-being of the animal and the realization of its natural capabilities.<sup>41</sup> All these elements need to be assessed in arriving at a proper understanding of animal welfare.

Secondly, the new legislation should provide detailed criteria that guide the evaluation of any application for an animal to be allowed to perform. These criteria should include the nature of the performance or activity; the nature and type of animal concerned and its needs; whether the performance is inherently likely to harm the animal in any way; and, if the measure inherently would not harm the animal, what measures are necessary to protect its welfare.

Finally, a proper institutional forum for making determinations concerning applications regarding performing animals must be developed. The idea of an expert committee is a good one involving experts in animal welfare (veterinarians), animal organizations and members of the government. That institutional forum should be empowered to prohibit activities which can be shown to involve the systematic abuse of animals. As was evident in the *Kerala* case, the training of animals in circuses often involves a high level of cruelty: such 'uses' of animals should be prohibited. Recently, the government of India has banned the keeping of dolphins in captivity: the reason has been that these are

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<sup>40</sup> MS Dawkins 'The Scientific Basis for Assessing Suffering in Animals' in P Singer (ed) *In Defense of Animals* (2006) 26ff.

<sup>41</sup> For the application of the capabilities approach to animals, see M Nussbaum *Frontiers of Justice* (2006).

highly complex, sentient creatures who suffer from being kept in captivity and being forced to perform unnatural tricks.<sup>42</sup>

In South Africa, anachronistically, there are still circuses that use live animals in performance, there are still dolphins who are required to perform in aquariums and there are still elephants who are forcibly removed from the wild and cruelly trained to allow tourists onto their backs. Despite its disappointments, the Constitutional Court ruling this year has forced the South African government to take a hard look at its current statutory regime relating to performing animals and to amend it. This is an important step in the reform of this country's legislation: let us hope that it will lead us in the direction of a more caring, humane society sensitive to the suffering and plight of the wonderful varied creatures with whom we share this planet.

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<sup>42</sup> Lex Berko 'India Banned Dolphin Captivity on Moral Grounds' *Motherboard* (24 June 2013) available at <<http://motherboard.vice.com/blog/india-banned-dolphin-captivity-on-moral-grounds>>.